

IN THE SUPERIOR COURT OF JUDICATURE AND IN THE HIGH COURT OF
JUSTICE AMASAMAN ACCRA REGION HELD BEFORE HER LADYSHIP
JUSTICE PRISCILLA DAPAAH MIREKU (MRS.) SITTING ON THURSDAY
THE 29TH DAY OF JUNE, 2023

SUIT NO. E1/AHC/140/2022

NII ANKRAH AGYABENG & 2 ORS .. PLAINTIFFS/RESPONDENTS

VRS:

NII OKAI TAGOE & ANOTHER ... DEFENDANTS/APPLICANTS

RULING ON APPLICATION FOR DETERMINATION OF PRELIMINARY
ISSUES AS SET DOWN FOR AN ORDER TO DISMISS PLAINTIFFS' ACTION
AS AN ABUSE OF THE COURT'S PROCESS PURSUANT TO ORDERS 11 RULE
18 & 33 RULES 3 & 5

The plaintiff instituted this action against the defendants for the reliefs endorsed on the Writ of Summons. Both defendants entered conditional appearance through their lawyers. They subsequently filed their defence and counterclaim. During directions, the court adopted the issues set out in the plaintiff's application for direction and additional issues filed by the defendant. It is on these bases the 1st Defendant/Applicant has brought this instant application before this Court praying for leave to file for determination of issues 1(i) and 1(j) as set down by way of preliminary legal argument and consequent upon the determination for an order to dismiss the Plaintiff's action as an abuse of the Court's process pursuant to Orders 11 Rule 18 and Order 33 Rules 3 and 5.

According to the applicant, their counsel filed additional issues for direction which includes;

- i. Whether or not the face of the judgment in Suit No. BL 175/2006 over the disputed land, the instant action amounts to relitigating the same matter involving the same parties as in Suit No. BL 175/2006.
- ii. Whether or not the instant action constitutes an abuse of the court process and should therefore be struck out as such.

The applicant believes that it has become necessary to set down the aforementioned issues for preliminary legal argument as its determination may substantially dispose off this action and render the trial of this case unnecessary. Also, the applicant submits that the instant action has been instituted by the plaintiffs in utmost bad faith and is clearly an attempt by them not only to circumvent the rules but also to use the back door to avoid the binding judgment given against them in their previous Suit No. BL 175/2006. Thus, this suit is an abuse of the court process.

The applicant attached the following exhibits to their application; Writ of Summons filed by the 1st Defendant as plaintiff in Suit No. BL 175/2006 (Exhibit 'A'), Joinder application filed by the 2nd Defendant on the 23rd day of June 2011 (Exhibit 'B'), Statement of Defence of the 2nd defendant herein in Suit No. BL 175/2006 (Exhibit 'C'), Judgment dated 23rd day of June 2014 in Suit No. BL 175/2006 (Exhibit 'D') and Notice of Appeal filed on 2nd September, 2014 by the 2nd Defendant herein (Exhibit 'E').

The plaintiffs/respondents are vehemently opposed to the instant application. According to the respondents, their suit herein is intrinsically different from the suit alleged to have been adjudged in the 1st Defendant's favour in the aforementioned suit. That the parties in the first suit are not the same as the parties to this suit.

According to the plaintiffs/respondents in the reply of the 1st defendant, he challenges the capacity of the plaintiffs and issue of capacity cannot be dealt with summarily.

Also the issues raised herein are different from the issues raised in the first suit. The applicant further alleges it lies ill in the mouth of the 1st defendant to purport that this action is an abuse of process.

That the 2nd defendant denies being a party to the said suit and that there is no exhibit 'B' attached to the instant suit as claimed. That the alleged statement of defence and counterclaim alleged to have been filled on behalf of the 2nd Defendant in the first suit does not bear a solicitor's license number and that same is null and void and of no legal effect whatsoever. The judgment purportedly rendered in relation thereto is also void and nullity at law. That there is neither a course of action estoppel or issue estoppel that prevents them from bringing this instant suit. That the action herein relates to the principal asset of the estate of one Christiana Korkor Armah who died intestate in 1940. The principal asset (land) was acquired in terms of an indenture dated 16th September 1897 copy of which attached to their response and marked as Exhibit 'NAA4'. That this application herein is brought in bad faith and is intended to hide and perpetuate a manifest injustice.

The 2nd defendant/respondent is also opposed to this instant application. The 2nd defendant denies being party to Suit No. BL175/2006 and that he applied to the court to be joined as party to the said suit as the 2nd defendant. That he conducted two successive searches in the registry of the said court which substantiate his claim that he was not a party to the said suit and attached a copy of the said search report as Exhibit 'EKQ1' AND Exhibit 'EKQ2'. That aside the fact that he testified therein in his capacity as a witness, he had nothing to do with the suit in question. That the issues in this instant suit are also significantly different from the issues that were determined by the High Court, Accra in the suit the applicants seek to rely on.

The issues for determination in this instant application are:

1. Whether or not this court ought to grant the 1st defendant/applicant leave to file for determination of issues 1(i) and 1(j) as set down by way of preliminary legal argument.
2. Whether or not this court after determination of the first issue ought to grant an order to dismiss the Plaintiff's action as an abuse of the Court's process pursuant to Order 11 Rule 18 and Order 33 Rules 3 and 5.

The first issue for determination is whether or not this court ought to grant the 1st defendant/applicant leave to file for determination of issues 1(i) and 1(j) as set down by way of preliminary legal argument.

Order 11 rule 18 states,

- (1) The Court may at any stage of proceedings order any pleading or anything in any pleading to be struck out on the grounds that**
 - (a) It discloses no reasonable cause of action or defence; or**
 - (b) It is scandalous, frivolous or vexatious; or**
 - (c) It may prejudice, embarrass or delay the fair trial of the action; or**
 - (d) It is otherwise an abuse of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly.**
- (2) No evidence whatsoever shall be admissible on an application under subrule (1) (a).**

And Order 33 Rules 3 and 5 also provides that,

RULE 3: 'The Court may order any question or issue arising in any cause or matter whether of fact or law, or partly fact and partly law, and raised by the pleadings to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue shall be stated.'

RULE 5: 'Where it appears to the Court that the decision of any question or issue arising in any cause of matter and tried separately from the main cause or matter

substantially disposes of the cause or matter or renders trial of the main cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment as may be just.'

In determining the first issue, the Court ought to take into consideration whether or not this present suit is the same in substance as in fact and law with Suit No. BL175/2006. The Plaintiffs/Respondents reliefs endorsed on the Writ of Summons include;

- a. A declaration that the 2nd Defendant together with the Plaintiffs and all members of the Noi and Quartey family of Osu are lawful heirs and successors of Christiana Korkor Armah and are joint owners with the heirs and successors of Emmanuel David Tagoe represented by the 1st Defendant of all that piece or parcel of land lying, being and situate at Kuntunse near Accra bounded on the east by Omang and Quao Botwe's land, on the West by Obo,s land, on the North the unoccupied land belonging to Akwete Gwamang and the Valley of Manchi and on the South by the Badu's land and the valley of Odame and measuring by the then measurements as follows on the East 43 chains nil yard and 1foot, on the West 23 chains 14 yards 1 foot, on the North 25 chains 8 yards and 2 feet and on the South 42 chains nil yard and 2 feet containing in the whole 134 chains 2 yards and nil foot as more particularly described in the site plan attached to the indenture dated 16/9/1987 totaling 125 acres.
- b. An Order of perpetual injunction restraining the 1st defendant and the Tagoe Family of Osu, their agents, privies, servants, workmen and all other persons claiming through them from holding themselves out as the sole owners of the land the subject matter of this suit.
- c. An order directing that the Plaintiffs are entitled to a 50% interest in the said land and to recovery of possession of same.

- d. An order for account from the 1st Defendant of all earnings relating to all transactions by the 1st Defendant from the aforesaid land since the death of Christiana Korkor Armah (Deceased) in 1940.
- e. Costs.

The Amended Writ of Summons of Suit No. BL 175/2006 marked as Exhibit 'A' attached to the application by the applicants is endorsed with the Parties as Madam Agnes Okaikor Tagoe (Deceased) substituted by Nii Okai Tagoe vrs. Tracoaf Estate Limited & 2 Ors. The name of the 2nd Defendant is not seen on the said amended Writ. However Exhibit 'C' which is the alleged statement of defence of co-defendant has the 2nd Defendant's name endorse on same. Per the said exhibit, the 2nd defendant alleged counterclaim for the following;

- A) A declaration of title to the land in dispute in favour of the Quartey family of Osu.
- B) A perpetual injunction restraining the plaintiff and the Tagoe family or their assigns, agents and privies from entering the land in dispute.

The applicant submits that the 2nd applicant was a party to the first suit aforementioned and that this suit is an abuse of the court process. The 2nd defendant denies being a party to the suit or applying to join the suit and attach search results at the registry of that court that proves that he was not a party to the suit. Those search results are photocopies and have not been endorsed as certified true copies from the court. The endorsement on same are also not eligible but the printing is. The applicant subsequently filed supplementary affidavit in support to their application and attached notice of entry of appearance filed by the 2nd Defendant through his lawyers; T. Forson & Co. in the former suit. The applicant further attaches evidence of the 2nd Defendant giving evidence during trial in the suit aforementioned to show that indeed he was party to the said suit.

In the case of **Sasu vrs. Amua-Sekyi and Anor [2003-2004] SCGLR 742**, Prof. Date-Bah JSC, in his concurring opinion stated of the principle of abuse of process as follows;

"In addition to the cause of action and issue estoppels ... there is the related doctrine of abuse of process, commonly referred to as the rule in Henderson c. Henderson (1843) 3 Hare 100 ... whose essence was set out by the English Court of Appeal in Barrow v. Bankside Agency LTD. [1996] 1 WLR 257 at 260 follows:

"The rule in Henderson v. Henderson requires the parties, when a matter becomes the subject of litigation between them in a Court of competent jurisdiction, to bring their whole case before the Court so that all aspects of it may be finally decided, (subject of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the Court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do."

This rule in Henderson v. Henderson (supra) was also re-echoed in the case of **Easter Alloys Company Ltd v. Silverstar Auto Ltd [2017-2020] 1SCGLR 611**.

There is no doubt in the mind of this court that the second defendant was party to the Suit No. EL/175/2006. There is also no doubt that the subject matter is one and the same.

The names of the parties endorsed on the both Writ is slightly different because, in this instant suit, the plaintiffs/respondents who are members of the 2nd defendant's family are suing the 1st defendant who is the head of family of the Tagoe Family of Osu.

The Plaintiff does not deny the fact that the 2nd Defendant is the head of the Noi and Quartey family of Osu and that they are from the said family. They claim the 2nd defendant has not taken steps to secure the interest of the descendants of Christiana Korkor Armah including the subject matter in dispute.

However, the evidence before this court shows that the 2nd defendant took steps by contesting the 1st defendant in this suit when he instituted an action against grantees of portion of the subject matter by joining the suit and giving evidence as the 2nd defendant and also counterclaiming for certain reliefs. When judgment was entered against the 2nd Defendant and his family, he further took steps to appeal the said judgment.

Litigation must come to an end and the court will not allow re-litigating of same issues and facts.

The principle of abuse of process that is discernible has been postulated on the fact that the matters on controversy have been determined by a court of competent jurisdiction between the same parties and basically on the same subject matter and that it would therefore be an abuse of the process of the court to allow a suitor to have an open ended opportunity to be litigating over and over again in respect of the same issue which has over the period and in previous decisions been decided against him. **(NAOS Holding INC V. Ghana Commercial Bank Ltd, Civil Appeal No. J4/28/2009 (Dated 24th November, 2010).**

The respondents have submitted that the 1st applicant raising an issue about the capacity of the plaintiffs and issues being joined by them prevent the court to determine this matter summarily. In the case of **ASANTE-APPIAH V. AMPOSAH ALIAS MANSAH [2009] SCGLR 90**, it was held that,

"... where the capacity of a person is challenged, he has to establish it before his case can be considered on its merits".

Also, in the case of **SAMUEL OBLIE & 2 OTHERS VRS. TETTEH LANCASTER, CIVIL APPEAL, NO: J4/29/2015, 15TH MARCH 2016**, the Supreme Court stated,

'Under customary law, which is part of the common law of Ghana, it is axiomatic that it is the Head of Family who has capacity to sue and be sued in matters concerning family property. The only exceptions to this rule have been well-established in the cases of KWAN v NYIENI [1959] GLR 67 @ 68; AMPONSAH v KWATIA [1976] 2 GLR 189; YORMENU v AWUTE [1987] 1 GLR 9; IN RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU & Others v KOTEY & Others [2003-2004] 1 SCGLR 420 @ 423; MANU v NSIAH [2005-2006] SCGLR 25 and IN RE NEEQUAYE (DECD); ADEE KOTEY v KOOTSO NEEQUAYE [2010] SCGLR 348.'

The Supreme Court in **IN RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU & Others v KOTEY & Others [2003-2004] 1 SCGLR 420 @ 423** case cited (supra) explained the principle as follows:

'The general rule recognized in Kwan v Nyieni, namely, that the head of family was the proper person to sue and be sued in respect of family property was not inflexible. There are situations or special circumstances or exceptions in which ordinary members of the family could in their own right sue to protect the family property, without having to prove that there was a head of family who was refusing to take action to preserve the family property. The special or exceptional circumstances include situations where: (a) a member of the family had been authorized by members of the family to sue; or (b) upon proof of necessity to sue.

The issue of capacity was indeed raised but the court disagrees that it stops it from determining this suit summarily if there are other issues that can dispose of the matter

in that manner. If indeed this suit is an abuse of the court's process, the issue of capacity will not be relevant. The authorities on capacity even suggests that, if the issue of capacity is raised, the onus is on the plaintiff to prove same before the substantive matter is dealt with.

In consideration of the above authorities and submission by counsels, this Honourable Court grants the applicant leave to file for determination of issues 1(i) and 1(j) as set down by way of preliminary legal argument.

The second issue for determination is whether or not this court after determination of the first issue ought to grant an order to dismiss the Plaintiff's action as an abuse of the Court's process pursuant to Orders 11 Rule 18 and Order 33 Rules 3 and 5.

In the case of **KUSI & KUSI V. BONSU [2010] SCGLR 60**, the majority of the Supreme Court held that, facts recited in document conclusively presumed to be true between the parties and all persons claiming through them under section 25 of the Evidence Act, 1975 – facts in written document creating estoppel binding parties and their successors.

The Respondents are bound by the actions of their head of family the 2nd Defendant as members of his family. The court has already stated that, the 2nd defendant knew of the first case Suit No. BL 175/2006, was joined to the suit as a 2nd Defendant, gave evidence as a party and even took steps to appeal the decision of the court. If not so what it implies is that, members of the 1st Defendant's family can also institute an action against the 2nd Defendant if they are also not satisfied with the outcome of this case and the case will go on and on. As stated supra, litigation cannot go on forever. It must definitely come to an end.

Both parties have made their preliminary legal arguments through their affidavits and supplementary affidavits. The court gave counsels the opportunity also to file written addresses but both counsels relied on their processes filed.

This court having come to the conclusion that the instant suit is an abuse of the court process, the instant suit is hereby dismissed. Cost of Ten Thousand Cedis (GH¢10,000) is awarded against the respondents.

(SGD)

H/L PRISCILLA DAPAAH MIREKU (MRS)

JUSTICE OF THE HIGH COURT

AMASAMAN