IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE, PROBATE AND LETTERS OF ADMINISTRATION DIVISION 'COURT 1' HELD IN ACCRA ON 23RD DAY OF OCTOBER 2023 BEFORE HER LADYSHIP JUSTICE EUDORA CHRISTINA DADSON (MRS.), JUSTICE OF THE HIGH COURT.

SUIT NO. BFA 41/2015

NII OSAI WELBECK
HO. 5 ONYASIA CRESCENT - PLAINTIFFS
ROMAN RIDGE, ACCRA

VS

PRINCE EDWARD SOWATEY OPARE
ARMAH ADDO - DEFENDANTS
(Executor of the Estate of
LETICIA ADUKWAI ADDO(Deceased)
HOUSE NO. D 439/3
KNUTSFORD AVENUE, ACCRA

PARTIES: PLAINTIFF PRESENT
2ND DEFENDANT PRESENT

COUNSEL: JACQUELENE BEMPAH WITH KOFI AGYEI FOSU FOR A. A. SOMUAH-ASAMOAH FOR THE PLAINTIFF PRESENT
FRANK YANKEY FOR THE DEFENDANTS PRESENT

JUDGMENT

---

[1] Introduction and brief Background

It is apposite to preface this judgment with the words of my brother Justice Kweku T. Ackaah-Boafo J (as he then was) in the case ***Grace Adu & 1 other vs Martin Anaglate & 2 others, delivered on 5th April 2019, Suit No. BFA 103/2009:***

"It is often said that Justice is like a river. Because all rivers are not the same so is justice. Some rivers run off quickly to their ultimate destinations whilst others take time, a long time to travel, winding to their ultimate destination with many twists and turns. The justice for the parties in this case has seen many twists including a change of venue from the Brong Ahafo Region to the Greater Accra and change of Counsel. This case has taken many years to reach its final destination; but today, finally, the end is here. For the parties it is judgment day."

For such a such a relatively simple case it has spent too many years in the corridors of justice. It has passed through the hands of at least three judges and I, the 4th Judge, inherited it as a part-heard and only concluded the trial.

Cockburn, C.J. said:

"The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of the new ties, or artful contrivance, or sinister influences, may lead to the neglect of claims that ought to be attended to, yet, instincts, affections and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the

requirements of each particular case, that could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law[1].

The Plaintiffs issued a Writ of Summons with an accompanying Statement of Claim on 20th March 2015 for the following reliefs:

1. *"A declaration that the Will is invalid, null and void.*
2. *A declaration that the grant of probate was procured by fraud and same invalid and revoked.*
3. *An account of all the sums of money received by the 1st Defendant in respect of the estate;*
4. *An inventory of all properties, movable and immovable constituting the estate of the deceased.*
5. *Delivery up of such properties as are due the Plaintiffs and the said beneficiaries of the estate of the Deceased.*
6. *An order that the 2nd Defendant be removed and the Plaintiffs be appointed by way of substitution as administrators of the estate of the of the deceased;*
7. *An order of perpetual injunction to restrain the Defendants from holding themselves as administrators of the estate of the deceased or dealing in any manner with any assets comprised in the estate.*
8. *Such other or further relief as the court may seem just; and*
9. *Cost".*

[1.1] Procedural history

The Defendant caused appearance to be entered on his behalf on 17th April 2015 and filed his Statement of Defence on 30th April 2015. No reply was filed.

[1] Banks v. Goodfellow: [1870] L. R. Q. B. 549 at 564

A motion was filed on 20th November 2015 to delete the name of 1st Plaintiff. There is no indication from the proceedings on record that the application was moved and granted.

An amended Writ of Summons and accompanying Statement of Claim was filed however same was not endorsed with residential and occupational address of the parties. It was also not endorsed with the capacity in which the Plaintiffs sued.

From the proceedings available it does not appear that any issues were set down for the determination of this case and from Counsel respective address it does not appear to this Court that any issues were set down for hearing, as it would have been typically referred to if issues had been so set down, however given that a Court is not bound by issues set down by Counsel and the Court can set down for determination issues other than those originally set down in the application for directions, I do not find myself disabled on the mere technicality that no issues were set down. I will subsequently set down issues as I have identified from the pleadings before the Court.

On 18th November 2020 this Court adopted proceedings. From the records I inherited there is also no indication the date the case was set down for trial and pre-trial orders made however the parties filed their witness statements and pre-trial checklist and the Court can only presume that Case Management Conference was conducted prior to commencement of trial.

The Plaintiff's testified and called two witnesses Noelle Amartey – Atayi and Eugenia Koranteng Addo. The Defendants' evidence was proffered by the 1st and 2nd Defendants and they called no witness. The Court also called the Registrar to tender in evidence the original Will in the custody of the Court.

After completion of hearing, the Plaintiff's Counsel filed his address on 8th December 2022. As at the time of delivering this Judgment I have not seen Defendants' Counsel address and if same has been filed it had not been placed on the Court's docket.

The sole issue for determination is whether the Last Will and Testament of the late Leticia Adukai Addo is invalid, null and void. A determination of the validity or otherwise of the Will would enable the court to determine the other issues which would arise from the pleadings and reliefs sought by the parties.

[2] The Plaintiff's case

The Plaintiff has pleaded that he is the son of Late Leticia Adukai Addo hereinafter referred to as the "deceased Testatrix" who died on 27th February 2013 and beneficiary of her estate. The 1st Defendant is a grandson of the deceased Testatrix, and the 2nd Defendant is the sole surviving executor of the deceased Testatrix. It is the Plaintiff's case that his mother Madam Leticia Adukai Addo was a joint owner of property number D 29/3 Amonakwa Road Ayalolo together with the late Nathaniel Ayitey Addo. The said property was rented to tenants and the proceeds equally shared between the late Leticia Adukai Addo and the late Nathaniel Ayitey Addo.

It is the further case of the Plaintiff that because of the advancement in the mother's age they decided that the 1st Defendant moves from Chorkor to stay with the deceased Testatrix who happens to be his grandmother. According to the Plaintiff that is how the 1st Defendant came to stay with the deceased Testatrix. The Plaintiff states that his siblings and himself provided provisions and money for the proper upkeep of the deceased Testatrix. The Plaintiff states that he was taking care of his mother together with the 1st Defendant and that at a point when the Plaintiff relocated to his own house in Accra, he continued to contribute money for the upkeep of his mother and nephew who was now directly taking care of her.

The Plaintiff states that as their mother started advancing in age she lost her sight and started exhibiting strange behaviours associated with old age. The Plaintiff states further that they were informed that High Court Accra on 3rd July 2014 granted probate of an

alleged Will purported to be executed by Leticia Adukai Addo. The Plaintiff contends that the *"alleged Will is a forgery been purported by 1st Defendant with the connivance of the 2nd Defendant"*. The Plaintiff gave particulars of fraud as follows:

a. *"The will was not duly executed by the testator and that this forged document which the 1st and 2nd Defendants are parading was not made by the testator.*
b. *At the time that the testator was alleged to have executed this document, the testator was not of sound mind, had mental relapse and did not understand and or appreciate the contents thereof.*
c. *That after the death of the deceased the 1st and 2nd Defendants forged this document to represent and mislead people that the deceased executed a Will in favour of the 1st Defendant.*
d. *That in their haste they totally forgot the real name of the deceased and executed a document which has cancellations, erasures, obliterations, alterations and interlineations which could only be executed by someone in a haste to perpetuate fraud.*
e. *That if the said document was executed at all by the deceased she was unduly influenced by the 1st Defendant who was taking care of her."*

[3] The Defendants' case

The 1st Defendant testifying per his adopted witness statement stated that the Plaintiffs are his maternal uncles. According to the 1st Defendant his mother and the 1st Plaintiff are siblings while 2nd Plaintiff has a different father but the same mother with his mother and 1st Plaintiff. The deceased Testatrix was his grandmother who died on 27th February 2013 aged 91 years.

It is the case of the 1st Defendant that he was the only grandchild who stayed with the deceased Testatrix and took care of her because his own surviving children abandoned

her. According to the 1st Defendant after the death of the deceased Testatrix he saw a sealed envelope which turned out to be a Will. The 1st Defendant states:

"I traced the address of the lawyer who prepared the Will and got to his office. I was told he was Lawyer Ntim Boateng and that he had died since 15th July 2012. I met one Lawyer Yankey at the Chambers and showed him the Will and he confirmed that it was Lawyer Ntim Boateng who prepared the Will. The Lawyer then directed us as to what to do…"

According to the 1st Defendant it was when he laid claim to the properties vested in him that the Plaintiffs claimed that as the biological children of the deceased Testatrix they were entitled to the estate and further claimed that the Defendants had forged the Will.

The Defendants tendered in evidence the following exhibits, Exhibit **A** - the application for grant of probate, Exhibit **B** - vesting assent and Exhibit **C** - transcription of excerpts of funeral service of Late Leticia Adukwai Addo on the Orders of the Court.

[4] The Court's Evaluation of the Evidence

Accordingly, the sole issue as set down by the Court is:

1. Whether or not the purported Will of the late Leticia Adukai Addo dated 24th December 2009 is invalid?

As an issue, it does not raise any complex matters. But in determining the issue, one must look at the guidance laid down by case-law as to what burdens the parties carry and which particular burden is assumed by either of the parties. In the 1951 decision of the West African Court of Appeal of **Johnson v. Maja (1951) 13 W.A.C.A. 290 at 292** it was stated:

"Where there is a dispute as to a will, those who propound it must clearly show by evidence that, prima facie, all is in order; that is to say, that there has been due execution, and that the testator had the necessary mental capacity, and was a free agent. Once they have satisfied the Court, prima

facie, as to these matters.... the burden is then cast upon those who attack the will, and that they are required to substantiate by evidence the allegations they have made as to lack of capacity, undue influence, and so forth."

The Plaintiff's case was that due to the advancement in age of the deceased Testatrix she lost her sight became frail and exhibited strange behaviour normally associated with old age and the Will had several erasures, cancellations and thumbprints which was not of the alleged deceased Testatrix.

Accordingly, as I see it, the evidential burden assumed by each side in view of the positions taken by the parties, is that the Defendants must show that the purported Last Will and Testament, is the testamentary wish of the Deceased Testatrix; that she was compos mentis at the date of its execution and was a free agent; and, lastly, that it was executed and attested in accordance with the requirement laid down in section 2 of the Wills Act, 1971 (Act 360) and also any alteration in the Will was executed in the same manner as is required for the execution of the Will[2]. Upon showing this, the burden then shifts to the Plaintiff to prove the fraud and undue influence he alleges[3].

The law is trite and same supported by statute that for a Court to decide a case one way or the other, each party to the suit must adduce evidence on the issues to be determined by the Court to the standard prescribed by law. This position is supported by various provisions of the Evidence Act 1975 (NRCD 323). Section 14 of NRCD 323 provides as follows:

"(14). Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting".

[2] Section 5(1) of Act 360
[3] AKENTEN II AND ANOTHER V OSEI [1984-86]2 GLR 437

In the case of **Thomas Tata Atanley Kofigah & 1 Other vs. Kofigah Francis Atanley & 1 other, Civil Appeal, Suit No: J4/05/2019**, the Supreme Court speaking through Pwamang JSC stated as follows:

"In Ghana, issues pertaining to Wills are regulated by statutes and these are the ***Wills Act, 1971 (Act 360)*** *and* ***Order 66 of C.I 47****. Act 360 states the manner a Will shall be made for it to be valid, the custody and interpretation of Wills and related matters. Or 66 of C.I. 47 sets out the procedure to be adopted in applying for the grant probate to Wills and for trial of contentious probate matters.*

Where any person challenges the validity of the Will, she has two alternative ways of proceeding under the Rules. She may file a notice pursuant to Rules 26 of Order 66 calling on the executors to prove the Will in solemn form or to renounce probate. Executors prove a Will in solemn form by issuing a writ of summons against the person calling for it to be proved and praying the court to declare the Will valid. Rule 26(1) & (2) provide;

"26. (1) Where for any reason the executors of a will are in doubt as to its validity or the validity of the wills disputed, the executors may if they consider it necessary to do so, prove the will in solemn form in an action commenced by writ asking the Court to pronounce the will as valid.

(2) Any person who claims to have an interest in the estate of a deceased person may by notice in writing request the executors named in the will of the deceased to prove the will in solemn form."

The alternative method is for the person challenging the validity of the Will to issue a writ of summons pursuant to Rule 28 (1) of Order 66 against the executors praying the court to declare the will invalid. The Rule is as follows;

"28. (1) Any person who claims to have an interest in the estate of a deceased testator may, instead of issuing a notice to the executor to prove the will under rule 26 (2) of this Order, bring an action against the executor for a declaration that the will is invalid."

On the facts of this case, the plaintiffs who challenged the validity of the Will adopted the second method".

The Plaintiff in the present case is proceeding under Order 66 rule 28 of CI 47 seeking a declaration that the Will of the late Leticia Adukai Addo dated 24th December 2009 is invalid, null and void and a further declaration that the grant of probate was procured by fraud and same invalid and revoked.

There a plethora of authorities on the main issue confronting the Court in this very case, that is whether the Will of the late Leticia Adukai Addo dated 24th December 2009 is invalid and fraudulent.

I will therefore proceed to deal with this issue in accordance with the law on the subject and the evidence led in this Court.

Sections 2 of the Wills Act are the relevant sections of the Act that will help us resolve this issue. It provides as follows:

(1) ***No will shall be valid unless it is in writing and signed by the testator or by some other person at his direction.***

(2) *No signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, or which is inserted after the signature has been made.*

(3) ***The signature of the testator shall be made or acknowledged by him in the presence of two or more witnesses present at the same time.***

(4) A signature by some other person at the direction of the testator shall be made by that other person in the presence of the testator and two or more witnesses present at the same time.

(5) The witnesses shall attest and sign the will in the presence of the testator, but no form of attestation shall be necessary.

(6) Where the testator is blind or illiterate, a competent person shall carefully read over and explain to him the contents of the will before it is executed and shall declare in writing upon the will that he had so read over and explained its contents to the testator and that the testator appeared perfectly to understand it before it was executed.

The relevant sub-sections for the purpose of this case are subsections 1 and 3. The main elements for a valid execution of a will per these subsections are that the will must be:

i. Signed by the testatrix; and

ii. The signature of the testatrix must be made or acknowledged by her in the presence of two or more witnesses present at the same time.

These provisions of the Wills Act have been the subject of litigation before the Courts and Courts have time and again emphasized the relevance of these provisions with respect to the validity of a will. Cases such as **In re Okine (Decd); Dodoo v Okine [2003-2004] SCGLR 582, In re Agyekum (Decd); Agyekum v Tackie & Brown [2005-2006] SCGLR 851** and **In re Blay-Miezah (Decd); Ako Adjei v Kells [2001-2002] SCGLR 339** are in point.

In re Blay-Miezah (Decd); Ako Adjei v Kells case, the Supreme Court held inter alia that Sections 2(1), (3) and (5) of the Wills Act are mandatory requirements without which the court cannot hold the will valid.

In the case of **Akua Prempeh & 3 Ors Vs. S.D.A. Oddai; Civil Appeal No. 5/2000, 14th May, 2003** the burden of proof in Wills was discussed. The Court stated as follows:

"The rule enunciated by Parke B is that in every case the onus lies on the propounders of the Will to satisfy the Court that the instrument is the Last Will of a free and capable testator, must, however, be taken, I think, to refer to the first stage so to speak, of the onus for, the onus does not necessarily remain fixed; it shifts. Where there is a dispute as to a Will those who propound it must clearly show by evidence that prima facie, all is in order, that is to say, there has been due execution and that the testator had the necessary mental capacity and was a free agent. Once they have satisfied the Court, prima facie, as to these matters, it seems to me the burden is then cast upon those who attack the Will and they are required to substantiate by evidence the allegations they have made as to lack of capacity, undue influence and so forth."

In the case of **In Re Ayayee (Decd); Kukubor and Another vs Ayayee [1982-83] GLR 866:**

"Since in the instant case, there was evidence casting suspicion around the execution of the will, the court would apply the rule in Barry v Butlin, namely, that a party propounding a will prepared by a person who took a benefit under it, had the burden of showing that the paper propounded expressed the true will of the deceased. That rule was not confined to the single case where a will was prepared by or on the instructions of one taking large benefits under it, but extended to all cases where circumstances excited the suspicion of the court. In such event, those propounding the will (as in the instant case) were obliged to remove the suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document. Once this was done, the onus was thrown on the opponents to prove fraud or undue influence or whatever else they relied on to displace the case made in proving the will".

In his book, **Law of Wills in Ghana**, Justice Azu Crabbe on page 89 writes as follows:

A testator may desire, after the execution of his will, to alter it in some way and subsection 1 of section 5 of Act 360 enacts that:

"No alteration made in a will shall have effect unless it is separately executed in the same manner as is required for the execution of the will or unless it has been made valid by the re-execution of the Will or by the subsequent execution of some codicil thereto".

N. A. Josiah-Aryeh in his book **Ghana Law of Wills** writing on alteration of Wills and Codicils at pages 74 to 77 states as follows:

"A testator may wish to make amendments either before or after the execution of a will. Although such amendment may be made by codicil, testators frequently prefer to alter the original document itself. Alteration of a Will is strictly regulated by Section 5 (1) of the Wills Act, 1971.

Blewitt (1880) SPD 116 is authority for the view that the witnesses need only subscribe their signatures to the alteration.

Obliterations usually arise where words are scratched out, scribbed or pasted over with a strip of paper in a manner which renders them indecipherable. If accompanied by a requisite animus revocandi such obliterations have the effect of revoking parts of a will. As was noted by the court in In the Goods of Horsford (1874) L. R. 3 P & D 211): "If a testator shall take such pains to obliterate certain passages in his will and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and as valid as one mentioned in the Act." The cases lay down the test as to whether words in a will are "not apparent" (see e.g. In b Ibbetson (1839) 2 Curt 337). The vital point is whether such words can be deciphered by an expert through natural means when the will is inspected in the condition in which it was left by the testator. Magnifying glass may be used or the document can be held up to light to aid such inspection. It was observed in In The Goods of Horsford (supra):

"It has not been the practice to adopt any means of ascertaining what the words attempted to be obliterated were, other than mere inspection by the aid of glasses. Chemical agents have not been resorted to in order to remove any portion of the obscuring ink, and I do not think it would be proper to adopt such means.

To be valid, an alteration made before the execution of the will should be final rather than deliberative. It is advisable to attest all alterations.

Section 5 (1) of the Wills Act 1971 appears to require the presence of the testator's signature as well as those of the witnesses for a valid alteration to a will. Some authority exists in Blewitt's case (supra) that all witnesses may simply append their signatures. This was rejected in the case of Shearn (1880) 5 L.J.P 15). The object of insisting on signatures and attestation is to ensure that the genuine intentions of the testator are given proper effect and fraud and undue influence minimized. A codicil only validates an alteration if the codicil in some way makes reference to the alteration.[4]*"*

[2.1] Burden of Proof

For the will in issue to be valid, it must be established first, that will was signed by the testator and second, that the testator signed the said signature in the presence of two or more witnesses present at the same time. Under our Evidence Act, 1975 (NRCD 323), the person who usually asserts the positive has the burden of proving that assertion on a balance of probabilities. With respect to establishing the validity of a will, this duty is placed on the propounder of the will to establish on a balance of probabilities that the will was duly executed by the testator. Usually where there is an attestation clause as in this case, it raises a presumption of due execution, and the burden is shifted onto the one challenging the validity of the will to lead evidence to rebut that presumption failing which the will shall be admitted to probate.

In the case of ***In re Okine (deceased)***, the Supreme Court in dealing with the issue of the burden of proof in probate matters held that it is the duty of the propounder of the will

[4] *This was illustrated in **Re Heath's Goods (1892) P. 253)** where a testator made an unattested alteration giving a beneficiary a further legacy of money, additional to a previous pecuniary gift. A codicil to the will recited that the beneficiary was to receive a stated figure being the sum total of the two monetary gifts to the beneficiary. It was held that the codicil had re-published the will in its altered form".*

to establish the capacity of the testator and the due execution of the Will. This is what the Court held at holding (7) of the headnote:

"The burden lay on the propounder of a will to satisfy the court that the document presented for probate was the freely executed will of a competent testator. If the proof provided by the propounder left the court in doubt, the will might be denied probate. Therefore, in the instant case, the plaintiffs assumed the onus probandi under which they must prove both capacity of the testator and due execution of the will."

The authorities have however held that where the validity of the will has been challenged on the grounds of forgery, the propounder has the duty to establish the validity of the will on a balance of probability and no presumption of due execution is raised in favour of such a will. In the case of ***In re Blay-Miezah (Decd)***, the Supreme Court made the following observation at holding (1) of the headnotes on this issue:

"For where the validity of a Will is challenged, especially on grounds of forgery, the proof of due execution in such an action, demands a proof of all the elements thereof.

This proof comprises:

i) Proof of the genuineness of the disputed Will: McDonald vs. McDonald 142 Ind. 55, 41 NE 336. In this wise evidence must be established to remove all suspicious circumstances negativing the genuineness of the will

ii) Proof of the genuineness of the testator's signature: Weber vs. Storobel. Mo. Sup, 194 SW 272.

iii) Proof of the authorization by the testator of another to sign for him when that method of signing is employed: McCoy vrs Conrad, 64 Neb. 150, 89 NW 665.

iv) Proof of the presence of the entire instrument at the time of execution: In re Maginn's Estate, 278 Pa 89, 30 ALR 418, and

v) Proof of the attestation of the Will in the presence of the testator: Clarkson vrs Kirtright, 291 111 609, 126 NE 541.

Of course, where the opposing party by his pleadings admits any of the above elements, the proponents of the will are relieved from proving that element. But short of any admission, proof of due execution in a contentious probate action requires proof of all the elements of validity of the Will in dispute. For in such a case, there is no presumption that the subscribing witnesses told the truth in testifying that they saw the will executed. Indeed, the Court will not apply the maxim omnia praesumuntur rites es solemniter esse acta (all things are presumed to be correctly and solemnly done) where there are circumstances that excite the suspicion of the Court that there must be something wrong with the Will. The burden of the plaintiffs or those who propound the Will is to lead credible evidence to remove such suspicion and to prove affirmatively that the Will is indeed that of the testator. As Lindley L.J. explained in Tyrell vs. Painton (1894) 151 P 157 CA, in all cases: "in which circumstances exist which excite the suspicion of the Court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the Will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the Will to prove fraud, or undue influence, or whatever else they rely on to displace the case made for proving the Will." In this wise, as held in Baird vs. Shaffer 101 Kan. 585: "The testimony of subscribing witnesses to a Will may be overcome by any probative facts and circumstances admissible under the ordinary rules of evidence." Indeed in the unbiased search for the truth, the law has no favorites by presumption. Silent circumstances, without power to change their attitude, or to make explanations, or to commit perjury, may speak as truthfully in Court as animated witnesses. Accordingly when an issue of forgery in a civil case is raised by pleadings and contested by evidence on both sides, there is no presumption either in favour of witnesses or in favour of circumstances. All of the evidential facts, which throw light on the issue, must be considered in connection with the allegation of proponents that the Will is genuine and with the

charge of contestants that the document offered for probate is a forgery. If the truth is found in oral testimony, it must determine the issue, but it is equally potent if found in circumstances. As Rose J at the Nebraska Supreme Court said in In Re O'Connor's Estate, 179 NW 401 at 406: "In a civil case, when there is substantial proof in support of the plea that the Will offered for probate is a forgery, all presumptions in flavor of genuineness fall. Thereafter the truth must be found in the evidence itself, and every item of proof must stand on its own footing in connection with each evidential fact considered in its proper light. In this test presumption creates no advantage one-way or the other. In such a situation persons who declare themselves to be subscribing witnesses and boldly speak from the witness stand as such, though not directly impeached, are subject to the same impartial and penetrating scrutiny as the mute instrument ascribed by them to the dead."

ascribed by them to the dead."

The doctrine of suspicious circumstance is designed to prevent fraud by a third party drawing up a will. It is usually invoked in cases where the party drawing up the will takes the whole or part of the testator's estate[5].

It was held in the case of **Barry v Butlin (1838)2 Moo PC 480)** that if a party writes or prepares a will under which he takes a benefit *"that is a circumstance that ought generally to excite the suspicion of the court and calls upon it to be vigilant and jealous in examining evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed."*

By the principle in **Tyrrell v. Painton (1894) P 151)** suspicious circumstance is created where a will is prepared by a close relative of a substantial beneficiary.

In the case of **Andrew v Fulton (1875) LR HL 488)** a will was made in the handwriting of one of the executors leaving gifts to that executor and another. Evidence showed

[5] N.A. JOSIAH-ARYEH, GHANA LAW OF WILLS Page 52

discrepancies between the testator's actual instructions and the terms of the will. It was held that the executors had failed to alleviate the court's suspicion.

Prima facie therefore, the Defendants had a duty to establish the validity of the will on a balance of probabilities and more so when the validity of the will has been challenged on the ground of forgery.

In the present case before us, one of the ground which the will of the Deceased **(Exhibit C1)** has been challenged is the fact that the thumbprint on the Will was not the deceased's thumbprint. The Plaintiff is thus alleging that the deceased Testatrix's purported thumbprint was procured by duress and undue influence. The other ground of the challenge mounted to the Will was that the Will had several erasures, cancellations, obliterations, alterations and interlineations which was not that of the deceased Testatrix and or at all and this could only come from someone in a hurry to perpetuate fraud.

In that vein a duty was placed upon the Defendants to lead evidence in respect of the genuineness of the deceased Testatrix's thumbprint. I will now assess the evidence that was led in line with the two elements I have already identified to determine whether the Defendants have been able to discharge the duty placed on them with respect to the genuineness of the deceased Testatrix's thumbprint and the validity of the Will.

[2.1.1] Signed/Thumb-printed by the Testatrix

Prima facie therefore, the Defendants had a duty to establish the validity of the will on a balance of probabilities and more so when the validity of the Will has been challenged on the ground of forgery.

What evidence did the Defendants proffer in respect of the execution of the Will?

The 1st Defendant testifying per his adopted witness statement stated that after the death of the deceased Testatrix he saw a sealed envelope which turned out to be a Will. The 1st Defendant states:

"I traced the address of the lawyer who prepared the Will and got to his office. I was told he was Lawyer Ntim Boateng and that he had died since 15th July 2012. I met one Lawyer Yankey at the Chambers and showed him the Will and he confirmed that it was Lawyer Ntim Boateng who prepared the Will. The Lawyer then directed us as to what to do…" The 1st Defendant then described the process leading to the grant of probate and execution of vesting assent in his favour.

The 2nd Defendant is the named executor in the impugned Will and gives evidence on the mode of execution of the Will. For ease of reference I shall reproduce 2nd Defendant evidence-in-chief. Testifying per his adopted witness statement he stated as follows:

"I know the late Madam Leticia Adukai Addo. She was my Aunt. On the 24th of December 2009 she sent for me to meet her at her residence. On reaching there, I met her seated with a man she introduced to me as Lawyer Boateng and she in turn introduced me to the lawyer as her nephew. The lawyer told me my aunt had instructed him to prepare a Will for her and he had done so and she wanted me to attest to the fact that she was the one thumbprinting. Later a cousin of mine called Grace Okine, who had also been sent for by my aunt arrived and she was also introduced to the lawyer and vice versa. The lawyer repeated what he had told me to Grace Okine with respect to attesting to the thumbprint of my late aunt Leticia Adukai Addo. Lawyer Boateng then brought out some typed documents and asked my aunt to thumbprint which she did. Lawyer Boateng then asked me who had thumb printed the documents and I identified my aunt as the one, so the lawyer asked me to write my name and address an sign which I did. The lawyer never read the contents of the Will to us and when I asked why he said it was prohibited for me to know the contents. The lawyer then asked my cousin Grace Okine the same questions and she mentioned my aunt's full name of Leticia Adukai Addo. It was at this stage that the lawyer told us that he had made a mistake

in the name of my aunt and that he had used CECILIA instead of LETICIA but he only cancelled the Cecilia and wrote the Leticia and initialed the cancellations and asked us to initial same which we did. It was after the correction that Grace Okine also wrote her name, her address and appended her signature to attest to the fact that my late aunt was the one who had thumb printed the Will."

No serious challenge was mounted to the evidence of the 2nd Defendant under cross-examination, 25and it is trite cross-examination constitutes part of the evidence on record.

The relevant part of the cross-examination of 2nd Defendant by Counsel for the Plaintiff on 14th July 2022 is as follows:

"Q. You have seen the document tendered in evidence by the 1st Defendant as the last Will and testament of his grandmother and the vesting assent he has tendered as vesting property to him.

A. Yes.

Q. I want you to take a look at the two documents, do you confirm that these documents are what they say they are.

A. Yes My Lord they are.

Q. In the purported Will, Mr. Armah Addo is mentioned, do you know him.

A. I am Mr. Armah Addo.

Q. The name Ransford Addo is also written in that document, do you know him.

A. Yes he is the same person Nii Armah Addo.

Q. The Testatrix was stark illiterate, is that correct.

A. No, it is not true.

Q. She could read and write.

A. She can read and write to some extent.

Q. You claimed that you were there when this document was executed.

A. Yes My Lord I was there.

Q. Did the old woman who could read and write to some extent according to you write anything on this document?

A. No My Lord.

Q. So what exactly did she do with this document you have identified?

A. When I got to the place she was seated with a man called lawyer Boateng and introduced me to lawyer Boateng as her Nephew and me to the lawyer as Lawyer Boateng. That she has instructed the lawyer to prepare a Will for her and he the lawyer has done it. I was asked to attest to the fact that it is the old lady who has asked him to prepare the Will. After that she sent for a cousin of mine who is also called Grace Okai. When she came the lawyer explained to her what he has told me that my Auntie has instructed him to prepare a Will for her. Then the lawyer brought out a typed document and asked my auntie to thumbprint the document, after she thumb printed the document, the lawyer asked me who has thumb printed the document and said is my auntie Leticia Adukai Addo. Then he said I should write my name, address and sign. When it come to the turn of my cousin, she tried to make fun of my auntie and said Leticia Adukai Addo. At this juncture the lawyer realised that he had made a mistake that instead of Leticia Adukai Addo, he has written Cecilia Adukai Addo. So he cancelled it and wrote Leticia Adukai Addo and put his initial and then asked us to do so. He asked Grace Okai to also sign, and she did sign. Thereafter she also signed attesting to the fact that it is Leticia Adukai Addo.

Q. You have seen the document you are talking about.

A. Yes.

Q. And you have said the old lady thumb printed it.

A. Yes.

Q. Did you see the thumbprint on the document which was shown to you?

A. Yes it was done in my presence.

Q. Can you show the court where that thumbprint is on the document.

A. It is beside the third paragraph of the last Will and Testament of Leticia Addo.

Q. How many thumbprints are on the document.

A. Only one.

Q. And do you confirm that on the day you are talking about only one thumbprint was put on the document.

A. Yes, My Lord.

Q. In any case before that day when you went to Lawyer Boateng's office according to you, you have not been present at any time when the old lady gave instructions as to the preparation of the Will and what should be put on the Will.

A. No, My Lord."

In re Blay-Miezah (Decd); Ako Adjei v Kells [2001-2002] SCGLR 339 Acquah JSC (as he then was) delivered himself thus:

"Indeed, in the unbiased search for the truth, the law has no favourites by presumption. Silent circumstances, without power to change their attitude, or to make explanations, or to commit perjury, may speak as truthfully in Court as animated witnesses. Accordingly, when an issue of forgery in a civil case is raised by pleadings and contested by evidence on both sides, there is no presumption either in favour of witnesses or in favour of circumstances. All of the evidential facts, which throw light on the issue, must be considered in connection with the allegation of proponents that the Will is genuine and with the charge of contestants that the document offered for probate is a forgery. If the truth is found in oral testimony, it must determine the issue, but it is equally potent if found in circumstances.

As Rose J at the Nebraska Supreme Court said in ***In Re O'Connor's Estate, 179 NW 401 at 406****:*

"In a civil case, when there is substantial proof in support of the plea that the Will offered for probate is a forgery, all presumptions in flavor of genuineness fall. Thereafter the truth must be found in the evidence itself, and every item of proof must stand on its own footing in connection

with each evidential fact considered in its proper light. In this test presumption creates no advantage one-way or the other. In such a situation, persons who declare themselves to be subscribing witnesses and boldly speak from the witness stand as such, though not directly impeached, are subject to the same impartial and penetrating scrutiny as the mute instrument ascribed by them to the dead."

I endorse and adopt the above statement of Justice Rose.

In the instant case what evidence did the Defendants (Propounders of the Will) produce to remove the strong suspicion created by the cancellation of the name of the deceased Testatrix by striking out **"Cecilia"** and writing **"Leticia"** above the cancelled name which was allegedly initialed by Lawyer Daniel Ntim Boateng and the attesting witnesses?

In determining the validity of 2009 Will, Exhibit **C1**, there is the need to examine the evidence-in-chief of Defendants, their answers in cross-examination, and the evidence of other witnesses, before drawing conclusions.

The Plaintiff has mounted this challenge to the Will on the basis that the deceased Testatrix was blind and displaying traits of someone who had lost her mental faculties around the year 2008. PW1 and PW2 who have testified that they are the biological sisters of the 1st Defendant testified in support of the Plaintiff's position.

Cross-Examination of the Plaintiff by Counsel for Defendants on 9th January 2018 challenges the Plaintiff's version of events. An extract of the cross-examination is as follows:

"Q: So are you saying that because you are the son of that testatrix that testatrix should make you a beneficiary of the Will

A: *Yes*

Q: *I am putting it (sic) that a testatrix or testator has the liberty to bequeath the property anybody of her wish*

A: *This is case it is not so. I have always being the bread winner of to (sic) my family and supporter of the family and my siblings.*

Q: *Are you also saying that because there were cancellations which had been duly initialed are you saying because of this the Will has been forged?*

A: *Yes*

Q: *I am putting it(sic) you that those who had initialed the cancellation in the Will were 3 persons namely; the lawyer and the two witnesses?*

A: *I was not there when the thing was done.*

Q: *Have you had the chance of looking at the witness statement of one of the witnesses that is the 2nd Defendant?*

A: *Yes, I have.*

Q: *And you will agree with me that in that statement by 2nd Defendant he explained what happened when the Will was being executed?*

A: *He did explain but I do not accept that explanation.*

…

Q: *Do you know one Madam Salome Addo*

A: *Yes, I do.*

Q: *Who is she?*

A: *She is my aunt.*

Q: *Where is she now?*

A: *She is dead and ago(sic) long time*

Q: *When did she die*

A: *She is dies (sic) cannot remember the actual date but if I am permitted I can go and look for the date at the house*

Q: *When her funeral was conducted you were there*

A: *Yes, I was there*

Q: *And this funeral was conducted in October, 2010?*

A: *I cannot remember and all that I know she passed on the funeral was conducted in the house. And it is a duty for all of us to assemble and perform the funeral successfully.*

Q: *I sure you can recollect that your mother attended this funeral?*

A: *I cannot recollect. It has been a year.*

Q: *Then I am putting it to that your mother Leticia Adukwai Addo attended this funeral and celebrated it fully with your family.*

A: *I cannot recollect.*

Q: *This Will you are claiming that your mother might not have appreciated its content was executed in 2009. Do you know that?*

A: *My Lord I do not know that.*

Q: *I am putting it to you that the Will you are claiming was forged by the defendant was executed in 24th December 2009*

A: *I wouldn't know because I was not there when the Will was done*

…

Q: *Then upon what basis are you suggesting that the Will that has been properly admitted by probate was secured by fraud*

A: *Based on the cancellation of the photocopy of the document he has been carrying around.*

Q: *That was the more reason you should have applied for a certified true copy before coming to Court*

A: *…there is one of the property which does not belong to my mum…no way. And that property H/No B340/3 Old cemetery Road, Korley Wokon.*

Q: *This house you are referring to is not in the Will*

A: *It is in the Will and he has been collecting rent till now*

Q: *We have a copy of the will attached to the Witness statement of the 1st Defendant marked as exhibit 'B'. That is the copy of the will there. In that Will there is no property by that address.*

Q: *(sic) Can I have a look at the said Will.*

A: My Lord, when I was a small boy that H/No. D340/ and if the H/NO. has been changed then I don't know."

Based on the Plaintiff's responses under cross-examination he appeared fond of making sweeping statements with no supporting evidence. The Plaintiff contends that his deceased Grandmother the deceased Testatrix was non compos mentis and blind.

The cross-examination of PW1, Noelle Amartey-Atayi by Counsel for Defendants on 13th February 2013 is very revealing. Below are excerpts of the relevant parts of the cross-examination:

"Q: So you do not even know why plaintiff is in court and you are here to testify to it.

A: I know and that at the time he claim my grandmother willed her property she was not in sound mind.

Q: Plaintiff is in court claiming that his mother should have willed her property to him that is why he claims the will has been forged.

A: that is between him and his brother"

From PW1's responses it appears that the Plaintiff reason for challenging the validity of the Will was because no devise/bequest was made in his favour.

PW 2 Eugenia Koranteng-Addow testified per her adopted witness statement as follows:

"I stayed with my grandmother in her old age together with the 1st Defendant from 1989 through to the later part of 2008 when as a result of marriage I left to go and stay in my matrimonial home but I visited her every day to ensure that she is properly taken care of. That as a result of our

grandmother's age and immediately after the death of her elder sister by name Salome or grandmother started exhibiting signs of someone who was gradually losing her memory."

PW2 has testified that deceased Testatrix developed mental health challenges after the death of her sister Salome.

The erudite judgment of Ollenu J (as he then was) in ***Majolagbe vs Larbi [1959] GLR 190*** always gives guidance to the courts on how the burden of proof is discharged:

> *Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness-box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true.*

If the deceased Testatrix was indeed blind and had mental health challenges there should have been a scintilla of extrinsic evidence i.e. medical evidence in support of those assertions. However save the repetition of the Plaintiff's and his two witnesses averments under oath there was no evidence in support of these assertions.

The Plaintiff, PW1 and PW2 evidence was to the effect that because the 1st Defendant took care of the deceased Testatrix he exerted undue influence on the deceased.

The 2nd Defendant has testified about the circumstances leading to the cancellation of the name **Cecilia** and the insertion of the name **Letitia** on Exhibit C1.

The Plaintiff has testified on this issue as follows:

"And also it is curious to notice that this purported single sheet of paper has several erasures, cancellations, obliterations and interlineations and thumb prints which is not that of the alleged testator and or at all and this could only come from someone who was in a haste to perpetuate fraud".

I have examined Exhibit C1 carefully and these are my observations. There are three places where the said erasures took place. At the heading *"The Last Will and testament of …, The introductory part, I ….. and thirdly at the signature part"*. In all three instances the name **Cecilia** has been cancelled and the name **Leticia** written in ink and initialed. The two other names Adukai Addo remains the same. The Will has been thumb-printed and there is a jurat/declaration which has been duly signed by Daniel Ntim Boateng Esq. There is also the names and address of one Ransford Addo and Grace Okine beneath the thumb-print of the deceased Testatrix and they have also signed. There are no erasures, obliterations, interlineations and cancellation in the three clauses of the Will which has the devises. The date on the Will is 24th December 2009.

The envelope containing the alleged Will Exhibit C1, has the following information:

"The Last Will and Testament of Leticia Adukai Addo of Ayalolo, Accra"

Prepared by:
D. NTIM BOATENG, ESQ
SOLICITOR & ADVOCATE
KYIDOM CHAMBERS
D695/ DERBY LINK, off KNUTSFORD AVENUE
ACCRA CENTRAL
There is a stamp and the received date is ***29th December 2009***."

It is clear from the evidence of the 2nd Defendant that the cancellation on the impugned Will, Exhibit **C1** was done by Lawyer Daniel Ntim Boateng and initialed/signed by the attesting witnesses.

Exhibit **C1** is the Will from the custody of the Registry of the Court was tendered in evidence at the instance of the Court by the Registrar of the Court on 20th October 2023. Case of Kofigah vs Kofigah applied.

In the Supreme Court case of ***In re Will of Bremansu; Akonu-Baffoe & Others vrs Buaku & Vandyke (Substituted by) Bremansu [2012] 2 SCGLR 1313 at 1330*** where the Supreme Court in affirming the judgments of the High Court and Court of Appeal while dismissing the case of the plaintiffs noted the peculiar facts of that case where a will executed in 1995 excited suspicion to call for proof to dispel the suspicions. At page 1330 of the Report, the Supreme Court stated as follows:

> *"This court has also taken note of the other circumstances which excited the trial court's suspicion as to the validity of the 1995 will, such as the bequest to a person whom the testator knew to be dead in 1992 and the different dates on the will – one on the will itself and one on the envelope. While these circumstances may very well have been suspicious, the burden of proof lay on the plaintiffs to dispel these suspicions through the adduction of cogent evidence. However, the plaintiffs allowed these suspicions to linger on and in the absence of such supporting evidence, the trial judge was entitled to make a determination based on the defendants' evidence."*

Just like the above-mentioned case, the instant suit also has suspicious circumstances which the Defendants as the propounder of the validity of the purported Will ought to lead cogent evidence to dispel. Have the Defendants succeeded in dispelling the suspicious circumstances surrounding the due execution of the Will? In the considered

view of this Court the Defendants have succeeded in dispelling the suspicions. From the totality of the evidence placed before the Court the Defendants have explained the circumstances under which there were erasures on the face of the Will. The 2nd Defendant was an attesting witness who was present during the execution of the Will. There is evidence of due execution of the Will, i.e., the deceased testatrix duly thumb-printed the Will and there are two attesting witnesses who duly attested the Will. There is an attestation clause and a jurat which the Declarant has duly signed. See Section 2 of the Wills Act.

The Will was executed on 24th December 2009 and deposited in the Registry of the Court on 29th December 2009 that is a five-day interval. The deceased died in the year 2013. Clearly this Will was not made when the deceased testatrix was on her sick bed. There was an interval of 5 years between the time the Will was prepared and when she died. The erasure/cancellation was not done by the deceased Testatrix but rather the lawyer who from the evidence before the Court needed to correct an error in the name of the deceased.

I therefore find that the Last Will and Testament of Leticia Adukai Addo dated 24th December 2009 is valid.

[5] Conclusion

It is not uncommon anywhere to find the case of a testator, who either through forgetfulness or deliberately omitted to make provisions for persons with expectations reasonable or otherwise of partaking in his estate. The testator is of course, not bound to make any devises to his family[6].

For as Knight Bruce said in Bird v. Luckie:

[6] Crabbe S. A., Law of Wills in Ghana, 1998

"No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise or the good. A testator is permitted to be capricious and improvident, and is more at liberty to conceal the circumstances and the motives by which he has been actuated in his dispositions. Many a testamentary provision may seem to the world arbitrary, capricious and eccentric, for which the testator, if he could be heard, might be able to answer most satisfactorily[7]*."*

From the totality of the evidence led, I hold that the Plaintiff's claim fails entirely specifically reliefs **a) to i)** and same is accordingly dismissed.

(SGD.)

H/L EUDORA CHRISTINA DADSON (MRS.)

JUSTICE OF THE HIGH COURT

[7] Bird v. Luckie: [1850] 8 Hare 306