IN THE HIGH COURT OF JUSTICE, WESTERN REGION, HELD AT SEKONDI, ON THE 4TH DAY OF JULY, 2023, BEFORE HER LADYSHIP AFIA N. ADU-AMANKWA (MRS.) J.

SUIT NO. E5/1/22

1. NANA AMOESI — **1ST PLAINTIFF**
2. MARGARET OJO — **2ND PLAINTIFF**

VRS.

1. MARY GYASI — **1ST DEFENDANT**
2. HILDA ACKON — **2ND DEFENDANT**

JUDGMENT

The plaintiffs have sued the defendants for:

"a. Declaration of title to subject matter property in favour of the Plaintiffs as administrators/beneficiaries of the estate of one JOSEPH DOUGLAS ACKON (deceased).

b. An order for ejectment directed against the 1st and 2nd Defendant (sic) to move away from the subject matter landed property H/No. PT 42 differently described as H/No. K 42, New Effia Road.

c. An order for recovery of possession of one room currently occupied by the Defendants.

d. An order for perpetual injunction restraining the Defendants, their families, agents, privies, assigns etc. from having anything to do with the subject matter.

e. Any other order the Honourable Court deems fit to make".

The plaintiffs are the surviving child and spouse of the late Joseph Douglas Ackon. In his lifetime, the late Mr. Ackon rented the subject matter property from one Kwesi Kumi, the late husband of the 1st defendant. In 2007, the late Ackon bought the subject matter property from the late Kumi. According to the plaintiffs, the late Mr. Ackon permitted the 1st defendant to move into the house when she was being ejected from her premises. Even though the 1st defendant did not challenge the sale, she had an issue with her share of the proceeds, which ended in court. The plaintiffs claim that the 1st defendant is making adverse claims to the house to the extent that in 2018, she broke down some portions of the house without any lawful order. They contend that the defendants are trespassers and have no interest in the subject matter property.

In their defence, the defendants claim that the 1st defendant and her husband acquired the disputed house during the subsistence of their marriage. The 1st defendant and her children had lived in the disputed house for over twenty years. According to the defendants, the late Douglas Ackon rented the rooms currently occupied by the plaintiffs. When the late Ackon informed the 1st defendant of his purchase of the house, she told him to go for his money as she was not ready to sell her portion of the matrimonial property. When the plaintiffs applied for Letters of Administration and included the disputed property as part of the estate of the late Ackon, the 1st defendant caveated, and they abandoned their claim. The defendants contend that the plaintiffs took action against them in respect of the disputed property at the District court. After a full trial, the court on 11th August 2021 dismissed the plaintiffs' claims against them. By the said judgment, the defendants contend that the plaintiffs are estopped from litigating the instant action.

The issues which the parties settled and which they invite me to decide on are:

i. Whether or not the deceased Joseph Douglas Ackon bought the subject matter property from the late former husband of the 1st defendant.
ii. Whether or not the 1st defendant is estopped from challenging the sale of the subject matter property.
iii. Whether or not the 1st defendant had her interest in the disputed property sold to the plaintiff's father.
iv. Whether or not the plaintiffs are estopped by res judicata.
v. Whether or not the plaintiffs have the capacity to institute this action.
vi. Any other issue(s)

ESTOPPEL PER REM JUDICATEM

The first issue for determination is whether the plaintiffs' cause of action is caught by estoppel per rem judicatem. The common law doctrine of res judicata is a principle of litigation that ensures the finality of disputes to protect parties from being vexed with the same matter twice. The full Latin maxim of this term is *"res judicata pro veritate accipitur"*, which essentially translates to *"a matter adjudged is taken as truth"*. Its purpose is primarily to honour the finality of a decision. It does this by ensuring that when a decision is handed down by a judicial or other tribunal with jurisdiction over the case, the same matter cannot be relitigated by the parties bound by the decision. The exception is if the decision were to be appealed. Thus, in the case of **Agbeshie & Anor vrs. Amorkor & Another [2009] SCGLR 594,** the Supreme Court held that:

> *"It is well settled under the rule of estoppel that if a court of competent jurisdiction has tried and disposed of a case the parties themselves and their privies cannot thereafter bring an action on the same claim or issue".*

This rule is based on two policy grounds: that it is in the public interest that there be an end to litigation and that nobody should be vexed twice on the same matter. Hence, res judicata, among other things, prevents abusive and duplicative litigation, prevents any legal uncertainty that might arise from relitigation, and prevents time and resources from being wasted.

In paragraphs 13 and 14 of their statement of defence, the defendants averred that:

> *"13. Paragraph 13 of the Statement of Claim is denied, and in denial Defendants aver that the Plaintiffs took action in respect of the disputed property at the District Court, Takoradi against the Defendant(s) herein titled;*
>
> *1. NANA AMOESI ACKON,*
> *2. MARGARET OJO*
> *VRS*
> *1. MARY GYASI,*
> *2. HILDA ACKONN,*
> *3. PETER KWESI,*
> *4. MANA TINA.*
> *With Suit N0. A1/13/2020, whereby after a full trial, the Court on 11/8/2021, dismissed the Plaintiff's Claims against the Defendants.*
> *14. Defendants further aver that by the said Judgment, the Plaintiffs are estopped by res-judicata from relitigating on the subject matter".*

Since the doctrine's objective is to prevent abuse of the courts' process, there is no need to go into the exercise of hearing the whole evidence on the matter again, otherwise, its purpose would be defeated. Accordingly, a court before which a plea of res judicata has been raised is duty-bound to determine whether the plea has indeed been made out. And if it is satisfied that the plea has been

established, the court is to decline jurisdiction and dismiss the action as it is a proper determination of a fundamental issue going to the jurisdiction of the court. As Coussey JA stated in **Basil v Honger (1954) 14 WACA 569 at 572**:

> *"The plea of res judicata prohibits the court from enquiring into a matter already adjudicated upon. It ousts the jurisdiction of the Court.' (The emphasis is mine.)*

As with all civil trials, the party who, in his pleadings, raises an issue essential to the success of his case bears the burden of proof. The defendants rely on a judgment to found a plea of estoppel per rem judicatam. The onus lies on them to prove on a preponderance of probabilities that the judgment was given by a court of competent jurisdiction, that the judgment is still subsisting, and the subject matter relied on in the earlier suit is identical to the subject matter of the suit in dispute. Thus, for the proper invocation of the doctrine, these elements must exist:

i. The judgment was given by a court of competent jurisdiction
ii. The judgment is final and still subsists
iii. The parties or privies in both proceedings are the same, and
iv. The subject matter relied on in the earlier suit is identical to the subject matter of the suit in dispute

The nature of estoppel raised in this matter is cause of action estoppel. The defendants discharge this burden by producing the proceedings of the earlier suit to compare with the present suit to determine if the judgment is final and if the parties and the subject matter are the same. In **Frimpong vrs. Poku [1972] 1 GLR 230,** it was held that the judgment and the pleadings of the earlier suit should be tendered. The court stated thus:

> *"In my view, where a party in a suit relies on "cause of action estoppel," the burden of establishing the identity of the subject-matter of the previous litigation with that of the second suit lies on the party who alleges the*

judgment in the previous suit as a bar. He discharges this burden by first producing in evidence (i) the record of the judgment in the previous suit, and (ii) the pleadings in that former suit. And if, by comparison between (i) and (ii) on the one hand and the pleadings in the case before the court he satisfies the court of the possibility of the two causes of action being identical, he will then proceed to give positive evidence of the identity".

However, this has been held not to be an inflexible rule, and each case was to be judged and evaluated on its facts. Thus in **Otu X vrs Owuodzi [1987-88] 1 GLR 196**, the Supreme Court per Adade JSC held that:

"I do not believe that Poku v. Frimpong (supra) sought to lay down any such absolute rule that in every case the judgment relied on must first be tendered in evidence, together with the pleadings in the suit to which it relates. Every court is obliged to take note of a subsisting judgment of a court of competent jurisdiction, if it is brought to its attention. Most of these judgments will be in printed volumes of law reports. If the particular judgment or report is not easily available, then the party relying on it must endeavour to secure a copy for the court (not necessarily tender it in evidence). And as for putting in the pleadings and the proceedings in the earlier case, this is a matter which the party must decide for himself. After all, a party pleading estoppel per rem judicatam assumes the burden of establishing that the matter has already been adjudicated upon, and that the parties and the subject matter are the same in the instant case as in the previous suit. If in his opinion the judgment he relies on for the plea contains sufficient material (facts, parties, and identity of subject matter) to enable him discharge the burden, there is no reason why he should, in addition, tender the pleadings and the proceedings in the previous action. It cannot be stated as an inflexible rule that in every case of a plea of estoppel per rem judicatam the judgment and the pleadings in the earlier

action must be put in evidence, or else the plea fails. Each case must be judged and evaluated on its facts".

The defendants did not tender the proceedings in evidence but tendered the judgment of the District Court dated 31st August 2021 as exhibit "4". The plaintiffs tendered a portion of the proceedings, the 1st defendants' evidence as exhibit "C". The judgment contains sufficient particulars to determine the finality of the judgment, the parties, and the subject matter in dispute.

The 1st defendant testified that the plaintiffs instituted the same suit in respect of the same house against her, the 2nd defendant and her daughter titled: *Nana Amoesi Ackon & 1 Or vrs. Mary Gyasi & 3 Ors* with Suit No. A1/13/2020. The case went through a full trial, after which the court dismissed the plaintiffs' claim against them. Therefore she wondered why the plaintiffs were relitigating the case in this court.

The 1st plaintiff explained that after the sale of the house, the late Mr. Kwesi Kumi decided to give part of the proceeds from the sale to his two wives, including the 1st defendant. There was a disagreement regarding the share of the money, which ended at the District Court, Takoradi, where it was resolved.

It is not in issue that the judgment that the defendants rely on as founding estoppel was given by a court of competent jurisdiction and still subsists as the judgment of the court. It is the judgment of the District Court, Takoradi. None of the parties has appealed against the judgment of the court.

For the judgment to operate as an estoppel, it must be clear, unambiguous and finally determine the issues between the parties. A judgment which did not finally decide issues between the parties could not operate as estoppel per rem judicatem. Thus, a default judgment of the High Court which did not decide any matter in controversy between the parties on its merits, could not operate as

estoppel per rem judicatem. See the case of **Conca Engineering (Gh) Ltd vrs. Moses [1984-86] 2 GLR 319**.

In exhibit "4", the plaintiffs therein are the present plaintiffs. They sued the defendants herein and two others for declaration of title and recovery of possession of H/NO PT 42, differently described as H/NO. K42 New Effia Road. The plaintiffs therein also prayed for an order of ejectment against the 1st defendant herein and two others and an order for perpetual injunction restraining them from having anything to do with the house. It would be noted that the plaintiffs have sued the defendants for the same reliefs they sued them for at the District Court. These reliefs have to do with the disputed house. Thus, the parties and the subject matter in both suits are the same.

The judgment of the District Court did not decide on any matter in controversy between the parties on its merits. In exhibit "4", the trial judge stated as follows:

> *"The plaintiffs herein are inviting this court to make up its mind on the facts and evidences presented and to draw inferences from same to the extent that the High Court could do. And in any case the decisions of the High Court are binding on the District Court. In view of the foregoing, it is the determination of the court that the plaintiffs' case is an abuse of the court's process and I according (sic) dismiss same. The parties are to proceed to the High Court on a determination in respect of the subject matter".*

The trial judge did not determine the parties' rights to the disputed house. She dismissed the matter for the High Court to determine the parties' rights. As such, this judgment, not being final, cannot operate as res judicata. As stated in **Foli and Others vrs. Agya-Atta and Others (Consolidated) [1976] 1 GLR 194** regarding the dismissal of a suit after trial, the Court of Appeal stated thus:

> *"A dismissal of a suit for mere want of prosecution could not found res judicata. Thus in actions which were dismissed by the court instead of being*

voluntarily withdrawn, the point of time at which the dismissal occurred did not itself determine the question of estoppel. With regard to actions dismissed after a hearing or trial, the legal position was whether anything could be said to have been decided, so as to conclude the parties, beyond the actual fact of the dismissal. If the dismissal necessarily involved a determination of any particular issue or question of fact or law, then the dismissal would be an adjudication on that question or issue; if otherwise, the dismissal would decide nothing, except that the party had been refused the relief which he sought. In the circumstances of the instant case, the dismissal of the reliefs claimed was a mere refusal of reliefs and was by no means intended to conclude any matter giving rise to those reliefs. Consequently the plaintiff was not precluded per rem judicatam from bringing the present action".

The judgment of the District Court is not final and cannot operate as res judicata against the plaintiffs. Consequently, the plaintiffs' action is not caught by estoppel per rem judicatam.

CAPACITY

The defendants have challenged the capacity of the plaintiffs to institute the action. The defendants contend that the plaintiffs are not administrators, given that the disputed house does not form part of the estate of the late Ackon for which Letters of Administration was granted to them. That being the case, they do not have the capacity to sue them. The law is trite that capacity is a fundamental and crucial matter that affects the very root of a suit, and for that matter, it can be raised at any time, even after judgment or on appeal. Capacity, whenever it is raised in a legal dispute in court, must be determined first because it is only after the court has declared a party as having the capacity to mount the said suit that the court can proceed to consider the case on its merits. It was no answer for a party whose capacity to initiate proceedings had been challenged

by his adversary to plead that he should be given a hearing on the merits because he had a cast iron case against his opponent. See the case of **Sarkodee I vrs. Boateng II [1982-83] GLR 715**.

The 1st plaintiff testified that he and the 2nd plaintiff were the administrators of the estate of the late Joseph Douglas Ackon. Douglas Ackon was his late father, while the 2nd plaintiff was the deceased's only surviving wife. On the other hand, the 1st defendant testified that the disputed house did not form part of the estate of the late Ackon, for which the plaintiffs acquired Letters of Administration from the High Court. According to her, when the plaintiffs applied for Letters of Administration regarding the estate of the late Douglas Ackon and included the disputed house as part of his estate, she caveated against the house. After filing the various processes, the plaintiffs abandoned the issue of the house and applied for a limited Letters of Administration, which the Court granted to them save the house. The 1st plaintiff has not denied this fact. He explained under cross-examination that at the time of the application, he had gained admission into school and needed money for his expenditures. Thus, upon the advice of his lawyer to abandon the disputed property and concentrate on the others, he heeded his advice and concentrated on the other property. The plaintiffs tendered the Letters of Administration in evidence as exhibit "A". The Letters of Administration was limited because it excluded the Effia property being the disputed property. Thus, even though they are the administrators of the late Joseph D. Ackon's estate, the disputed property does not form part of the deceased's estate. As such, they cannot sue over the property as administrators.

The plaintiffs claim that the disputed property belongs to their late father and husband and seek a declaration of title in the property as beneficiaries of his estate. The deceased died intestate, and by virtue of the rules under intestacy, upon the death of the deceased, the property devolved unto the spouse and children. That being the case, the plaintiffs have an immediate interest in the

deceased's estate and are beneficiaries of the estate for which they can sue and be sued regarding the property. I am fortified in my thinking by the decision of the Supreme Court in the case of **Adisa Boya vrs. Zenabu Mohammed (substituted by Adama Mohammed) and Mujeeb [2018] DLSC4225** wherein Gbadegbe JSC opined thus:

> *"Proceeding further, we are of the view that by virtue of the rules of intestacy contained in section 4(1)(a) of the Intestate Succession Law, PNDCL 112, following the death of the father of the defendants and their mother-the original 1 defendant, the property devolved upon the children and as such, they had an immediate legal interest in the property that they are competent to defend and or sue in respect of and in any such case either the children acting together or any of them acting on behalf of the others may seek and or have an order of declaration of title made in their favor".*

The plaintiffs can institute the present action as beneficiaries of the deceased's estate. They need not be administrators of the deceased's estate to sue. It could also be argued that the plaintiffs, based on the principle of necessity, are clothed with capacity to sue to protect the disputed property from being taken over by the defendants. The case of **Kwan vrs. Nyieni [1959] GLR 67** makes it clear that a person can sue to protect property upon proof of necessity which the plaintiffs, as beneficiaries of their father's estate, have done. See **Thomas Baiden and Frank Wallace vrs. Francis Parker [2023] DLSC15009.**

BURDEN OF PROOF

The Evidence Act, 1975, NRCD 323, prescribes the procedure to be applied in every proceeding. It provides a useful guide on the burden required to be discharged by a party to a dispute at a trial. In civil suits such as this one, it is trite that the plaintiffs bear the burden to lead evidence to prove all they assert in their

writ for declaration of title and recovery of possession of the disputed property. Section 11(1) of Act 323 obliges a party to introduce sufficient evidence to avoid a ruling against him on an issue. The plaintiffs have the initial burden to produce such evidence as would satisfy the court that the defendants have occupied the house without their consent. Kpegah JSC pithily captures the position of the law on proof in **Zabrama vrs. Segbedzi [1991] 2 GLR 221**, wherein he restated the well-known principle in Majolarbi vrs. Larbi as follows:

> *"The correct proposition is that, a person who makes an averment or assertion, which is denied by his opponent, has the burden to establish that his averment or assertion is true. And he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred. The nature of each averment or assertion determines the degree and nature of that burden.*"

This burden is not discharged by merely entering the witness box and repeating the claims or averments in the pleadings. The burden is discharged by leading admissible and credible evidence from which the facts being asserted can be properly and safely inferred or concluded.

MERITS

In proof of their claim to a declaration of title to the disputed house, the plaintiffs testified through the 1st plaintiff, Nana Amoesi, who testified for himself and on behalf of the 2nd plaintiff. He testified that he, the 2nd plaintiff, and his late father occupied the disputed house as tenants of the late Mr. Kwesi Kumi, alias Mr. Felix Koomson who owned the house. At a point in time, the late Kwesi Kumi offered to sell the house, which his late father agreed to buy. On 14th June 2007, an agreement was made to sell the house for GHc10,000.00 (Ten Thousand Ghana Cedis). His late father concluded the transaction and purchased the disputed

house at GHc10,000.00. At the time of the sale of the disputed house, the late Kumi was living with his first wife in Techiman, while the 1st defendant lived in rented premises at Effia, at an area commonly known as Effia Roman in Takoradi. According to the 1st plaintiff, when the 1st defendant was being ejected, her late husband pleaded with his late father to allow her to occupy one room in the disputed house, which needed only roofing to make it habitable. The 1st plaintiff further testified that after the sale, the late Kwesi Kumi decided to give part of the sale proceeds to his two wives, including the 1st defendant. There was a disagreement over the share of the money, for which the 1st defendant sued her late husband, and it was resolved. The late Kwesi Kumi subsequently fell ill and died. After his death, the 1st defendant claimed ownership and possession of the house. In her affidavit of interest pursuant to the caveat filed at the High Court, Sekondi, the 1st defendant, admitted that the disputed house was purchased by the deceased, Joseph Douglas Ackon. The 1st plaintiff denied that the defendants lived in the disputed house during the late Kumi's lifetime. He explained that the defendants lived elsewhere when the disputed house was rented. He, along with his late father and the 2nd plaintiff, had lived in the disputed house since 2001, save the demise of his late father on 15th March, 2018. The 1st plaintiff contended that during the lifetime of the late Joseph Douglas Ackon, no one challenged him as to his title and ownership to the disputed house. The 1st defendant was now making an adverse claim to the house in issue. In 2018, she broke down some portions of the house without a lawful order. She had also dug a manhole and intended to put up a toilet and bath.

Mr. Ebo Afran, the attorney of Ebo Sackey Afran, testified for the plaintiffs. He testified that his brother, Kwesi Kumi informed him of his decision to sell his house at Effia. He asked him to inform his wife, the 1st defendant, about it. Subsequently, with his brother, Kwesi Kumi, they offered the house to the then tenant, Joseph Douglas Ackon (deceased), who lived there for GHc10, 000.00 (Ten Thousand Ghana Cedis). The late Joseph Douglas Ackon promised to take a loan to

purchase the house since that would be much more convenient to him than looking for another accommodation. True to his words, the late Joseph D. Ackon got a loan and paid part of the purchase price. After the payment, the 1st defendant, Mary Gyasi, commenced an action in court to stop the late Kwesi Kumi from selling the house because she and the children of Kwesi Kumi did not have a place of abode. His brother, the late Kwesi Kumi, was served with the court processes and accompanied Douglas Ackon to court. There, the 1st defendant, only requested part of the GHC10,000.00. At a settlement conference with her and her lawyers, the Diaba and Diaba Law Firms, it was agreed that the 1st defendant would take one-fourth of the GHc10,000.00, as her late husband Kwesi Kumi had another wife with children of his who also had to get their share of the GHc10,000.00. When the late Joseph Douglas Ackon completed the payment for the house, he and his brother Kwesi Kumi attempted to give the 1st defendant her GHc2,500.00 share of the proceeds of the sale of the disputed house but she refused to take it because she said it was not enough despite the earlier understanding. The issue went to court and was resolved between the 1st defendant and her late husband. One day, the 1st defendant attacked him, claiming that he was the reason why the ownership of the house had been transferred to Joseph Douglas Ackon.

The 1st defendant, Mary Gyasi, testified that she and her children had lived in the disputed house for over twenty (20) years. The disputed house was acquired by her and her late husband (John Felix Koomson) during the subsistence of their marriage, and she contributed to the purchase of the land and putting up of the house. Being married and uneducated, her late husband took over the transactions such that the receipt in respect of the land was issued in his name. She explained that the late Douglas Ackon became their tenant living in the rooms currently occupied by the plaintiffs whilst she and her children occupied their present premises. Since the completion of the house and the rental of the premises by the late Joseph Ackon, they had never left the house to live

elsewhere. She recalled that her husband had told her that he was going to sell the house and go to his hometown. She had told him that he could not sell it because it did not belong to him alone, more so, she was living in it with the children. Two years after her husband had left Takoradi for his hometown, the late Joseph Ackon informed her that he had purchased the house from her husband. She told him she was not interested in selling her portion of the house to him, and so he should go for his money from her husband. She never heard anything again from Joseph Ackon, and she lived in her part of the house with her children until his demise.

PW1, Ebo Sackey Afran testified through an attorney, i.e., his nephew, Ebow Afran. As a witness, he is required to testify of things he is privy to regarding the case of the party calling him. How could such a witness appoint another to testify in his stead of issues and events which he knows? If the attorney is privy to these facts, he need not be appointed as an attorney but can testify in his own right as one who could speak to the issues at stake. In paragraph 3 of his witness statement, PW1 stated:

> *"I am attorney of EBO SACKEY AFRAN, and he is my uncle and who has given me Power of Attorney to testify in this case on his behalf. Kindly see the copy of power of Attorney attached hereto as Exhibit "PA".*

So for all intents and purposes, he was testifying to what his principal would have testified to if he had testified himself. It would be noted that Ebow Afran, the attorney, testified in the first person singular as if he was Ebo Sackey Afran and not in the 3rd person singular. It is the principle that if a person representing a party to a suit gives evidence in the first person in the name of the party whom he represents as if it were the party himself giving evidence, the whole of that evidence is inadmissible, and should be completely disregarded as if that evidence had not been given. See the case of **Nii Boye vrs. Adu [1964] GLR 410.** Ebo Affran testified as if his principal was testifying, and therefore his evidence is

inadmissible. Thus, by his testimony, he was the brother of the late Kumi when, in fact, it was his uncle, Ebo Sackey Afran, who was the brother. Being inadmissible, PW1's evidence is disregarded and would not be considered part of the plaintiffs' case.

The plaintiffs also tendered a copy of the Sale Agreement executed between the late Ackon and the late Kumi as exhibit "B" without any objection from the defendants. Ordinarily, the court should consider the document as long as it is in evidence. Unfortunately, the exhibit is unstamped and, therefore, inadmissible per se. Evidence is inadmissible per se when a statute or law makes it inadmissible, and its inadmissibility is not founded upon a fact that the matter to be proved by that evidence had not been pleaded. See **In Re Okine (Decd); Dodoo & Another vrs. Okine & Others [2003-2004] SCGLR 582**. Evidence inadmissible per se includes unstamped and unregistered documents. The law makes them inadmissible even if the opposing party does not object. **Section 32(6) of the Stamp Duty Act, 2005 (Act 689)** states:

> *"Except as expressly provided in this section, an instrument*
>
> *(a) executed in Ghana, or*
>
> *(b) executed outside Ghana but relating to property situate or to any matter or thing done or to be done in Ghana, shall except in criminal proceedings, not be given in evidence or be available for any purpose unless it is stamped in accordance with the law in force at the time when it was first executed.*

The sale agreement is an instrument affecting land and must be stamped. As an unstamped document, exhibit "B" is inadmissible per se. As held in **Lizori Ltd vrs. Mrs. Evelyn Boye, School of Domestic Science & Catering [2013-2014] 2 SCGLR 889:**

"Either the document has been stamped and appropriate duty paid in accordance with the law in force at the time it was executed or it should not be admitted in evidence. There is no discretion to admit it in the first place and ask the party to pay the duty and penalty after judgment. Thus the trial court would have been perfectly justified to reject the receipts without stamping".

Being inadmissible per se, the document should not have been admitted in evidence in the first place. Therefore, it would not be considered as part of the evidence led on record. After all, where such evidence is received in the course of the trial (with or without objection), it is the duty of the court to reject such evidence when giving judgment, if not, the appellate court would reject it. This rule is founded on the fundamental principle that a court must arrive at its decision by relying on legal and admissible evidence and nothing less. See **Tormekpe vrs. Ahiable [1975] 2 GLR 432.**

From the evidence led by the parties, the following facts were undisputed.

i. The late Joseph Ackon was the father and husband of the plaintiffs. The late Kwesi Kumi, aka Felix Koomson, was survived by two wives, one of whom was the 1st defendant. How the 2nd defendant is connected to the rest of the parties is unknown. No such evidence was led.

ii. In his lifetime, the late Kwesi Kumi was the owner of the disputed property i.e., H/No. PT 42 situate at Effia. Even though the plaintiffs could not provide any documentary proof of title save for a receipt for the sale of the land (exhibit "F"), the parties are ad idem that the deceased owned the disputed property. The defendants' case is premised on the late Kumi's ownership of the property, that the 1st defendant is a joint owner of the property.

iii. Sometime in 2001, the late Douglas Ackon rented the disputed property and lived there with the plaintiffs until his demise in March 2018.

iv. In 2007, the late Kwesi Kumi sold the disputed property to the late Douglas Ackon for GHc10,000.00.

v. At a point in time, the 1st defendant came to live in the disputed property, and she lives there to date. She occupies one room in the disputed property. Whereas the plaintiffs contend that she came to live in the house at their late father's behest when she was being evicted from her premises, the 1st defendant claims that she has lived in the disputed property since its completion and rental by the late Joseph Ackon.

vi. The plaintiffs applied for Letters of Administration to administer the estate of the late Douglas Ackon, which estate included the disputed property. The 1st defendant caveated. The LA was granted to the plaintiffs to administer the estate of the late Douglas Ackon but excluded the disputed house.

The 1st defendant does not dispute these facts. Her contention lies in the fact that she is a joint owner of the disputed property. According to her, she contributed to the purchase of the land and the construction of the house during the subsistence of her marriage to the late Kumi. Given the undisputed fact that the late Kumi owned the disputed house and, in 2007, sold same to the late Douglas Ackon, the burden lies on her to show that she is a joint owner of the property. The 1st defendant ought to show that at the time of the sale to the late Ackon in 2007, she was a joint owner of the property for which her late husband had no capacity to dispose of the property. During the period under consideration, that is, in 2007, the principle regarding spousal property was that whatever property the husband acquired during the marriage belonged to him. However, if there were a substantial contribution by the wife towards the acquisition of the property, the courts would hold that such a wife had acquired a beneficial interest in the property. See **Abebrese vrs. Kaah [1976] 2 GLR 46**. In this case, the court held that the wife's contribution was far in excess of the assistance contemplated by

customary law as stated in **Quartey vrs. Martey [1959] GLR 377**, and therefore she had substantially contributed to the acquisition of the property.

Quite apart from her bare assertion that she substantially contributed to the purchase of the land and the construction of the building, the defendant provided no further evidence regarding her contribution towards the acquisition of the disputed property. In the first place, it is not known when she married her husband. It is very possible that the property was even acquired prior to her marriage to her late husband. And even if it was acquired during the subsistence of the marriage, what was her contribution towards its acquisition? She claims she contributed part of the purchase money for the land. How much did she contribute? Again, what was her exact contribution towards the construction of the house? She need not tender receipts or be specific as to the exact amount of her contribution towards the construction of the house as her contribution could be in kind, such as the provisions of building materials, supervision of workers, cooking for workers etc. Without such proof, she would have failed in her quest to show that she is a joint owner of the disputed property. In our present dispensation, following the **Mensah vrs. Mensah case [2012] 1 SCGLR 391,** property acquired during the subsistence of a marriage is presumed to have been jointly acquired and, therefore, marital property. Spousal property is no longer dependent on the substantial contribution principle. The 1st defendant need not have contributed a pesewa to be entitled to a share in the disputed property. However, this principle is not applicable to the 1st defendant given that the disputed property was sold in 2007 at a time when a spouse ought to prove her contribution, albeit a substantial one, to the acquisition of the property. Counsel for the defendants harboured under the mistaken impression that **section 47 of the Lands Act, 2020, Act 1036** applied to this case. Under the Act, a spouse shall not deal with property jointly acquired during the marriage for valuable consideration without the written consent of the other spouse, but such consent shall not be unreasonably withheld. However, given that the Constitution frowns

on laws which operate retrospectively to impose limitations or affect the personal rights and liberties of any person, the Land Act, supra, which came into force in 2020, could not apply to a transaction that took place in 2007, prior to the passage of the Act.

As it stands now, the 1st defendant has woefully failed to prove that she jointly acquired the disputed property with her late husband. Again, I am not entirely convinced that her story to the court is the truth. She testified that she had occupied the disputed property since the construction of the house and its rental by the late Ackon. However, under cross-examination, she testified that the plaintiffs moved into occupation in 2002 and five years after building the house, she moved in. This contradicts her case that she was in the house when the plaintiffs moved in and instead lends credence to the plaintiffs' case that she did not live there and only came in at their father's behest. Again, during her testimony, she had initially denied that her late husband had sold the property and given her a share of the proceeds. However, under cross-examination, she admitted the sale and said she had rejected her share of the proceeds as she had not sold her portion of the building.

As of 2007, when the late Kumi sold the disputed property to the late Douglas Ackon, the property belonged to him; the 1st defendant had no share in it. As such, he was free to dispose of it in any way he liked and had the capacity to sell it to whomever, including the late Douglas Ackon. The 2nd plaintiff lived in the house with her late husband as their matrimonial home. Under the intestate succession Act, the surviving spouse and children are the beneficiaries of his estate and are entitled absolutely to the house and household chattels. See **section 4(1)(a) of the Intestate Succession Act, supra.**

The plaintiffs claim for a declaration of title to the disputed land, recovery of possession and perpetual injunction. In the case of **Mondial Veneer (GH) Ltd vrs. Nana Amua Gyebu XV vrs. [2011] SCGLR 466**, the Supreme Court held that:

In land litigation, even where living witnesses who were directly involved in the transaction under reference are produced in court as witnesses, the law requires the person asserting title and on whom the burden of persuasion falls, as in this instant case, to prove the root of title, mode of acquisition and various acts of possession exercised over the subject matter of litigation. It is only where the party has succeeded in establishing these facts on the balance of probabilities, that the party would be entitled to the claim.

The plaintiffs trace their root of title to the late Kumi, who sold the disputed house to the late Ackon, their father and husband, in 2007. There is evidence of the plaintiffs' possession of the disputed property. They have lived in the disputed house since 2001 till date. The plaintiffs have proved their case and are entitled to their reliefs as endorsed on the writ of summons.

I declare title in the disputed house, H/No. PT 42 differently described as H/No. K42, New Effia Road, to the plaintiffs. They are entitled to recover possession of the house from the defendants. The defendants are to vacate the premises within six months from today. The defendants, their families, agents, privies, and assigns are restrained from having to do anything with the disputed property.

(SGD.)
H/L AFIA N. ADU-AMANKWA (MRS.)
JUSTICE OF THE HIGH COURT.

COUNSELS
Ebo Donkor appears for the Plaintiffs.
Sarah C. Otoo (holding Philip F. Buckman's brief) appears for the Defendants.