IN THE HIGH COURT OF JUSTICE, WESTERN REGION, HELD AT SEKONDI ON THE 27TH DAY OF JULY, 2023, BEFORE HER LADYSHIP AFIA N. ADU-AMANKWA (MRS.) J.

SUIT NO. E5/5/21

SUSUANA AMA MENSAH	**PLAINTIFF**
VRS.	
1. FRANCIS EKOW MENSAH	**1ST DEFENDANT**
2. CHARLOTTE MENSAH	**2ND DEFENDANT**
3. MR. TELFA	**3RD DEFENDANT**
4. PAPA KWAW WIREDU	**4TH DEFENDANT**

JUDGMENT

The plaintiff claims against the defendants for the following reliefs:

> "a) A declaration that the purported Will of the deceased dated the 18th March, 2014 is invalid and therefore null and void abinitro(sic)
>
> b) A declaration that the deceased Margaret Poe a. k. a. Efua Abbiw made her valid Will deposited at the High Court on the 14th November, 2013 and read on the 26th March, 2021 by the Registrar of the High Court, Sekondi".

It is the plaintiff's case that her late mother, Margaret Poe, aka Efua Abbiw, executed a Will which she deposited at the registry of the High Court, Sekondi, on 14th November 2013. Her late mother also deposited a copy of the Will with the superintendent Minister of the Methodist Church of the Good Shepherd, Tanokrom, known as Very Rev. (Mrs) Ruth Comfort Quartey Papafio. She further

averred that upon her mother's death, she applied for Letters of Administration of the deceased estate since no application was forthcoming for probate of the Will. The 1st and 2nd defendants, with the customary successor, Lucy Assafuah, caveated the application for the grant of the Letters of Administration. During the proceedings, it was realised that a second Will of the deceased had been deposited at the High Court, Sekondi. This fact was brought to the judge's attention, who ordered the reading of both Wills. The two Wills were read together on 26th March 2021. The plaintiff contends that the second Will, dated 18th March 2014, was not the act of the deceased and was done fraudulently. According to her, the thumbprint attributed to the deceased was not hers. Again, the contents of the Will were not read and interpreted to the deceased, who was an illiterate.

The 1st and 2nd defendants are children of the deceased, whilst the 3rd and 4th defendants are the executors of her Will dated 18th March 2014. They have denied the plaintiff's claims that the Will dated 18th March 2014 was procured fraudulently. They contend that the only valid last Will and Testament of the late Madam Efua Abbiw was the one she executed on 18th March 2014 and deposited at the registry of the High Court on 20th March 2014; hence their counterclaim for:

> "A declaration that the Will dated 18th day of March 2014 deposited at the Registry of the Court on 20th March 2014 and read by the Registrar on 26th March, 2021 is the valid Will and last Testament of the late Madam Efua Abbiw".

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

i. Whether or not the deceased Margaret Poe, aka Efua Abbiw, made a Will and deposited same at the registry of the High Court, Sekondi, on the 14th November, 2013
ii. Whether or not the deceased Margaret Poe, aka Efua Abbiw, deposited a copy of her Will filed on 14th November 2013 with the Priest (Supt.

Minister of the Methodist Church-Good Shepherd, Tanokrom, known as Very Rev. (Mrs) Ruth Comfort Quartey Papafio and whether same was collected by the 1st and 2nd defendants deceitfully.

iii. Whether or not the purported Will dated 18th March 2014 was the act of the deceased Margaret Poe, aka Efua Abbiw.

iv. Whether the purported Will dated the 18th March 2014 was a forgery and procured fraudulently.

v. Whether or not the Will dated the 18th day of March 2014 and deposited at the Registry of the Court on 20th March 2014 is the valid Will and last Testament of the late Madam Efua Abbiw.

vi. Any other issues arising from the pleadings.

In the course of the proceedings, the 3rd defendant was disjoined from the suit following his renunciation of probate. Shortly thereafter, the 1st and 2nd defendants died, leaving the 4th defendant to defend the case. Just when he was about to open his defence, his counsel informed the court of his desire to renounce probate, given the sudden deaths of the other defendants, but he never got around to doing that. He also failed to attend court until the court had to close his case following his failure to open his defence. Therefore, this case is one-sided, consisting only of the plaintiff's evidence.

Despite the uncontested nature of the case, it is the plaintiff's call to prove her case. In civil cases, the general rule is that the party who, in her pleadings, raises issues essential to the success of her case assumes the onus of proof and proves her case on the preponderance of probabilities as per sections 10, 11 and 12 of the Evidence Act, 1975, NRCD 323. On the burden of proof in civil matters, Ansah JSC, in the case of **Takoradi Flour Mills vrs. Samir Faris [2005-2006] SCGLR 882 at 900**, held that:

> *To sum up this point, it is sufficient to state that this being a civil suit, the rules of evidence require that the plaintiff produces sufficient evidence to make*

out his claim on a preponderance of probabilities, as defined in section 12(2) of the Evidence Decree, 1975 (NRCD 323). Our understanding of the rules in Evidence Decree, 1975 on the burden of proof is that in assessing the balance of probabilities, all the evidence, be it that of the plaintiff or the defendant, must be considered, and the party in whose favour the balance tilts is the person whose case is more probable of the rival versions and is deserving of a favourable verdict.

Therefore, the law is settled that the party who bears the burden of proof must produce the required evidence of the facts in issue that has the quality of credibility for his claim to succeed. See the case of **Ackah vrs. Pergah Transport Limited and Others [2010] SCGLR 728.**

There are two Wills in contention here, which the plaintiff tendered in evidence as exhibits "B" and "C", respectively. Per her reliefs, the plaintiff seeks a declaration that exhibit "C", executed on 18th March 2014, is invalid. She contends that exhibit "C" is a forgery given that the thumbprint purported to be that of the deceased was not the deceased's. Again, the deceased was illiterate, and no one interpreted the Will to her. The deceased had land at Assakae, which she sold in her lifetime. It was strange to find in the Will that the deceased had directed that her three surviving daughters share the land. Again, the deceased had fifteen (15) rooms in the building at Tanokrom, and it was strange for her to state twenty-seven (27) rooms in the Will. The plaintiff also seeks a declaration that exhibit "B", executed by the deceased and deposited at the Registry of the High Court, Sekondi, on 14th November 2013, is the valid Will of the deceased.

To the extent that the plaintiff seeks to rely on the due execution of exhibit "B", she bears the burden of persuasion and producing evidence. This is more so when the defendants, per their pleadings, deny its existence and claim that exhibit "C" is the only last and valid Will of the testatrix. As stated in **Johnson vrs. Maja (1951) 13 WACA 290 @ 292:**

"Where there is a dispute as to a will, those who propound it must clearly show by evidence that, 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".

On the burden of proof further, Ampiah JSC in the case of **Akua Prempeh and 3 Ors. vrs. SDA Oddai (2003) JELR 68304 (SC)**held that:

"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".

The defendants counterclaimed and, as propounders of exhibit "C", bore the burden of proving its due execution and the testamentary capacity of the testatrix. Having satisfied the court of these matters, the onus shifts to the plaintiff, who asserts that it was fraudulently obtained to lead sufficient evidence to convince the Court beyond a reasonable doubt that it was fraudulently procured.

Recounting the antecedents leading to the execution of exhibit "C", the plaintiff testified that she was the eldest surviving daughter of the deceased, Margaret Poe, aka Efua Abbiw. Her mother passed away on the 7th November 2016, at the

Effia Nkwanta Hospital, Sekondi, having made her last Will and Testament, which was deposited at the registry of the High Court, Sekondi, on 14th November 2013. The deceased also deposited another copy of the Will with her priest, the Superintendent Minister of the Methodist Church of the Good Shepherd, Tanokrom, near Takoradi, known as Very Rev. (Mrs) Ruth Comfort Quartey Papafio. The plaintiff further testified that sometime before the deceased's demise, the 1st defendant attacked her, saying that he had collected the foolish Will made. She contacted the priest, who confirmed that the 1st and 2nd defendants came to her to collect the Will by saying the deceased had made a new one. The priest also added that the 1st and 2nd defendants, while collecting the Will, remarked that she had a house already and should leave the deceased's house to them. After the deceased's death, she applied for Letters of Administration since there was no application for probate in order to fix the deceased's house, which was in ruins. The 1st and 2nd defendants with the customary successor caveated. It came to light that the second Will was deposited at the registry on 20th March 2014, so the judge directed the reading of the two Wills. The two Wills were read together on the 26th March 2021.

As has already been stated, the defendants, the propounders of exhibit "C", failed to prosecute their claim regarding the validity of the Will. This, without more, is fatal to their case. The plaintiff's main plaint was that the Will was forged as the thumbprint on exhibit "C" was not the testatrix's thumbprint. There was no proof from the plaintiff that the thumbprint on exhibit "C" was forged. Her other allegations that the testatrix had already sold her Assakae land and, therefore, could not have bequeathed it to her three surviving daughters also went unproven. Exhibit "D", a search report from the Lands Commission, which she tendered to prove this fact had no bearing with the Assakae land. There was also no proof from her that the deceased had fifteen (15) rooms instead of twenty-seven (27) rooms in her building at Tanokrom, and for that matter very unusual of her to have stated twenty-seven (27) rooms in exhibit "C".

Her only allegation which was proved was in respect of the fact that the contents of exhibit "C" were not interpreted to the deceased. Her testimony that the deceased was illiterate went unchallenged. For when an opponent in an action fails to challenge the other party on an alleged fact, the court will take that failure to challenge as an admission of the truth of the fact as presented by the one who asserted it. See the case of **Aryeetey vrs. Brown [2006] 5 MLRG 160 CA**. The testator thumbprinted Exhibit "C" without a jurat. It is trite law that the presence or absence of a jurat only raises a rebuttable presumption which can be rebutted by evidence and the circumstances of the case. Therefore the absence of a jurat does not mean a document was not executed by an illiterate and vice versa. See **Duodu & Others vrs. Adomako & Adomako [2012] 1 SCGLR 198**.

The law is settled that in the absence of a jurat, the proponent of a Will must lead evidence to show that in its absence, the testator fully understood the contents of the Will. By making a prima facie case that the Will of the illiterate testator was not jurated and, therefore, the contents were not interpreted to her, the onus was on the propounders, i.e. the defendant to show that the testator fully understood the contents of the Will. This he failed to do as he did not prosecute his claim.

It is provided under **section 2(6) of the Wills Act, 1971, Act 360** that:

> *"Where the testator is blind or illiterate, a competent person shall carefully read over and explain the contents of the will before it is executed, and that competent person shall declare in writing on the will that the will had been read over and its contents explained to the testator and that the testator appeared perfectly to understand the will before the will was executed".*

As this was not complied with, the implication is that the testatrix lacked the testamentary capacity to execute the Will in that she did not understand the contents of the Will she made. For a Will to be valid, the testator should be of a

sound mind, memory and understanding. By **Order 66 r. 19 of the High Court (Civil Procedure) Rules, 2004 (CI 47)**, the Court shall not grant probate of the Will or administration with Will annexed unless the court is satisfied by proof or by what appears on the face of the Will, that the Will was read over to the deceased before its execution or that the deceased had at that time knowledge of its contents. Clearly, in the absence of the contents of the Will not being explained to the deceased, it is presumed that she did not understand the contents of the Will, and therefore it is invalid.

Regarding exhibit "B", the defendants denied that there was such a Will. Per paragraph 5 of their statement of defence, they averred that:

> *"The Defendants vehemently deny paragraph 3 of the Statement of Claim and say that the only valid Last Will and Testament of the late MADAM EFUA ABBIW is the one made on the 18th day of March 2014 and deposited at the Registry of the Court on 20th MARCH 2014".*

By this denial, the issue of whether the deceased executed exhibit "B" was joined between the parties. This placed the burden on the plaintiff as the propounder of the Will to show that not only was the Will duly executed but that the testatrix had the mental capacity to execute the Will. Short of saying that the testatrix executed exhibit "B", nothing else was said of it, much less lead evidence in support of it. No reference was made to when and how the Will was executed. It is not known when the Will was executed except by exhibit "A" which shows that the Will was deposited at the registry of the High Court, Sekondi, on 14th November 2013. It was not enough on the plaintiff's part to simply tender the Will and testify that the deceased executed it without testifying as to how the Will was executed, given the defendants' denial that there was no such Will. The plaintiff has failed to displace the burden on her to show the due execution of exhibit "B". She has

also failed to show that the deceased deposited a copy of the Will with Very Rev. (Mrs) Ruth Comfort Quartey Papafio.

In conclusion, the plaintiff's case succeeds in part. The testator's Will executed on 18th March 2014 is invalid. Relief "b" of the plaintiff's claim is dismissed. The defendant's counterclaim is also dismissed.

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

COUNSEL
J. E. K. Abekah appears for the Plaintiff.