IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, SESSION HELD AT SEFWI WIAWSO IN THE WESTERN NORTH REGION ON THURSDAY DAY THE 13TH DAY OF JULY 2023 BEFORE HIS LORDSHIP JUSTICE KWAME AMOAKO

SUIT NO. E11/07/2019

ABENA AFO (WIDOW TO THE LATE KOFI) ----- PLAINTIFF/
GYAMA OF SEFWI, ASUONTAA) RESPONDENT

VRS.

1. KWASI BADU (CUSTOMARY SUCCESSOR)
TO THE LATE KOFI GYAMA)
2. ABUSUAPANIN ATTA KWAO) --- DEFENDANTS/
BOTH OF SEFWI ADJOAFUA) APPELLANTS

Appellants absent

Respondent present

Paul Nkuah-Gyapong for Appellant present

Counsel for Respondent (Simon Abledu) absent, indisposed.

JUDGMENT

This is the Judgment of the Court on an appeal from the District Court, Sefwi Debiso.

The background to this Judgment is as follows: On 29th May 2018, the Plaintiff/Respondent (hereinafter referred to as "the Plaintiff") caused to be issued a

writ of summons against the Defendants/Appellants (hereinafter referred to as "the Defendants") in the District Court, Sefwi Debiso claiming the following reliefs:-

(a) Declaration to title, recovery of possession ownership of half (1/2) of all that piece or parcel of cocoa farm cultivated on abunu basis by the Plaintiff's late husband being and situate at Yaw Owusukrom on Ntotroso stool land bounded by the properties of Op. Yaw Adomako, Maame Fat, Willie, Kwasi Dagarti respectively.

(b) An order of this Honourable Court to compel the Defendant to share and give half share of all that piece or parcel of cocoa farm being and situate at Amoayano on Sefwi Adjoafua stool land bounded by the properties of Madam Badu, Afua Bronya and Madam Yaa Ase which said cocoa farm was cultivated by the Plaintiff's late husband to the Plaintiff herein.

(c) An order or this Honourable Court to compel one Abena Badu a family member through Defendant to return one ecolag bag which was forcibly seized from the Plaintiff.

(d) Any orders (sic) relief the Honourable Court may deem fit".

The suit was originally instituted by Plaintiff against the 1st Defendant. The 2nd Defendant, upon application, was joined to the suit by the District Court as 2nd Defendant. The suit went through full trial, and on 26th July, 2018, the trial Magistrate delivered judgment in favour of the Plaintiff on all reliefs sought by her in her writ of summons. Being aggrieved by the said judgment, the Defendants have appealed against the said judgment to this Court.

The Case of Plaintiff

It is the case of plaintiff that she married Kofi Gyama for 13 years and that the said Kofi Gyama died about five years ago as at the time she gave evidence on 21st June, 2018. By simple calculation therefore the late Kofi Gyama died in or about 2013. It is the case of plaintiff that during his lifetime, the late Kofi Gyama with her assistance cultivated a cocoa farm on a piece of land situate at a place commonly known as Amoayano. The said land according to plaintiff belonged to the late father of plaintiff called Kwaku Tawiah. It is also the case of plaintiff that she and her late husband Kofi Gyama cultivated a piece of land situate at Ntrontroso into a cocoa farm on abunu tenancy basis and that the said land was acquired by her and her late husband on abunu tenancy basis.

It is the case of plaintiff that after the death of her late husband Kofi Gyama, his head of family told her not to step on the two farms situate at Ntrontroso and Amoayano hence the institution of the suit at the District Court, Sefwi Debiso against Defendants claiming reliefs as endorsed on her writ of summons.

The Case of Defendants

It is the case of the Defendants as presented by the 2nd Defendant that, when his late brother Kofi Gyama started life, he cultivated cocoa farm at Amoayano for 3 years and realized that the cocoa farm was not bearing fruit so he decided to move elsewhere. He then went to Ntotroso Kokofu near Hwidiem. He first got a land from one Safo Johnson and cultivated the land with his children and nephews. That the brother of Safo Johnson one Oware started litigating over the land with Johnson and a new document was

prepared by Oware for his late brother. Later on, Safo Johnson won the matter and became the land owner.

According to the 2nd Defendant, in the year 2008, his brother Kofi Gyama went for another land from one Ama Serwaa where she married the Plaintiff and cultivated the cocoa farm with the Plaintiff. He later fell sick and died. Continuing, the 2nd Defendant says that, he sent the Plaintiff. 1st Defendant, Yaw Sama and Kwame Brenya to Ntotroso and when they came back, they enquired from the plaintiff which of the farms she prefers and the plaintiff chose the 2nd farm which the family agreed and ordered the plaintiff to pay a sealing fee of GH¢600.00, one castle bridge drink and a crate of minerals. When the plaintiff went to the farm with the family members, a misunderstanding ensued.

Grounds of Appeal

The notice of appeal can be found at page 32 of the record of appeal and the grounds of appeal stated therein are:

a) The judgment is against the weight of evidence advanced at the trial.

b) The trial Magistrate erred when he failed to dismiss plaintiff's claim for lack of capacity on the part of Plaintiff.

c) Additional grounds to be filed upon receipt of the record of appeal.

From the records, no additional grounds of appeal were filed. This effectively reduces the grounds of appeal to two, upon which grounds the instant appeal has been argued.

The law is that an appeal from a decision of a District Court to the High Court shall be by way of rehearing: see ***Order 51 Rule 1 (1) of the High Court (Civil Procedure) Rules, 2004 [C. I. 47]*** and the cases of ***Tuakwa v Bosom*** [2001-2002] SCGLR 61 per Sophia Akuffo JSC (as she then was) at page 65; ***Cudjoe v Kwatchey*** (1930-33) 2 WACA 37; ***Nkrumah v Atta*** [1972] 2GLR 13; ***Djin v Musa Baako*** [2007-2008] 1 SCGLR 687 (Holding 1); ***Nyamebekyere Sawmills Ltd & 2 Others v Ghana Red Cross Society & Another*** [2014] 68 G.M.J 22 at 30 and ***Oppong Kofi & Others v Attibrukusu III*** [2011] 1 SCGLR 176 variously cited by Counsel in this case.

I will start with Ground (b) of the appeal, namely:

"The trial Magistrate erred when he failed to dismiss plaintiff's claim for lack of capacity on the part of Plaintiff"

From the records before this Court, the Plaintiff claimed her title to both *half of the cocoa farm in relief (a)* of the writ of summons and ownership to *half of the cocoa farm in relief (b)* of the writ of summons from her late husband called Kofi Gyama, who died intestate.
On types of alienation of land in Ghana, Justice Sir Dominic Adjei provides in his book ***Land Law, Practice and Conveyancing in Ghana*** 2017 at page 53 as follows:

> "There are different modes by which land is disposed of or alienated… The most common ones are by gift, by sale, by pledge, by testacy (wills) and through intestacy."

See also ***Ghana Land Law and Conveyancing*** (2nd edition) 1999 by B J da Rocha and C H K Lodoh pages 8 and 9.

Writing on the topic "Title", B J da Rocha and C H K Lodoh provide in their book ***Ghana Land Law and Conveyancing*** (2nd edition) 1999 at pages 99 as follows:

> "Title is the means by which a person establishes his right to land. A person's title indicates by which means he claims to be the owner of land."

The law is that failure of a plaintiff to establish his root of title is fatal to his case.

In ***Ogbarmey Tetteh v Ogbarmey Tetteh*** **(1993-94) 1 GLR 353,** the Supreme Court held (in holding 4) that:

> "In an action for a declaration of title, **a plaintiff who fails to establish the root of title must fail because such default was fatal to his case**." [emphasis added]

Thus, in the case of ***Cephas Okuonu Addo (Substituted by) J. B. Bortey v Koiwah Investment Co. Ltd & 3 Others*** Civil Appeal No. H1/56/2016 Court of Appeal, Accra dated 14th July 2016, the plaintiff therein relied on a deed of gift and a site plan in proof of his title. Setting aside the judgment of the High Court, the Court of Appeal stated, per Kusi-Appiah JA, at page 13 of the judgment as follows:

> "I must say that in the face of a strong challenge by the defendants on the existence or otherwise of the Deed of Gift, the plaintiff who relied on this document as his family root of title to the land, should have substantiated his claim by tendering a copy or extract from the Lands Department to prove the existence of the Deed of Gift. He could have also called any of the supposed signatories to the Deed to confirm that the Deed of Gift was indeed made or granted to the E.A. Addo and Brothers by the Nungua Stool in 1960. But plaintiff

woefully failed to do so. One wonders how the plaintiff could come out with the date and the registered number of the said Deed of Gift and yet could not produce a copy or extract from the Lands Department."

His Lordship continued at pages 16, 17 and 18 of the judgment thus:

"… the plaintiff who bears the evidential burden to establish his claim or root of title that by a Deed of Gift dated 1960, the Nungua Stool granted the land in dispute to his family, woefully failed to discharge that burden.

It is a matter of regret that in the face of the overwhelming evidence on the record of appeal on a preponderance of probabilities against the plaintiff for failing to prove his case, the learned trial judge fell into an unpardonable error when he relied solely on Exhibit A, the site plan which has been found to be of no probative value and thus invalid to enter judgment for the plaintiff…

In the light of these principles, I hold that the plaintiff **having failed to establish his root of title on the land in dispute must fail in his claim because such default is fatal to his case**.

On the whole, it is clear that the trial judge improperly evaluated certain pieces of evidence, failed to appreciate the correct legal burden on the parties having regard to the evidence and the state of the pleadings, failed to examine critically the evidence as a whole, and finally failed to realize that the real nature of the plaintiff's claim was an alleged Deed of Gift over a parcel of land which he failed to produce the said vital document to prove his case.

Having come to this conclusion, it is unnecessary to discuss any of the other interesting matters in this appeal.

In the result, I will allow the appeal and the judgment of the High Court, Accra dated 19th June, 2009 together with the consequential orders are hereby set aside." [emphasis added]

With specific reference to the capacity to institute or defend an action in respect of the estate of an intestate, the law is that for a person to institute or defend an action as title holder in respect of the estate of an intestate, that person must have been granted Letters of Administration, or if he is a beneficiary of the estate to whom Letters of Administration has not been granted, a vesting assent must have been given to him by the person to whom Letters of Administration has been granted, as envisaged under the ***Intestate Succession Law, 1985 (PNDCL 111)***. Simply put, the law, as crystallized by a string of legal binding authorities is that, for a person to institute or defend an action in respect of the estate of an intestate, Letters of Administration must first have been granted by the Court in respect of that estate.

The law is that, administrators or executors (who have not renounced probate) of the estate of a deceased person are the persons upon whom the deceased's estate devolves as personal representatives and are the proper persons to sue or be sued in an action involving ownership of the estate of that deceased person. In the same vain, the law is that trustees are the proper persons to sue or be sued in respect of properties they hold in trust.

Sections 1 and 2 of the Administration of Estates Act, 1961 (Act 63) provide as follows:

"**Section 1 - Devolution on Personal Representatives.**

(1) The movable and immovable property of a deceased person shall **devolve on his personal representatives** with effect from his death.

(2) In the absence of an executor the estate shall, until a personal representative is appointed, vest as follows: -

(a) if the entire estate devolves under customary law - in the successor;

(b) in any other case - in the Chief Justice.

Section 2 - Status of Personal Representatives.

(1) The **personal representatives shall be the representative of the deceased in regard to his movable and immovable property**.

(2) The personal representatives for the time being of a deceased person **are deemed in law his heirs and assigns within the meaning of all trusts and powers**." [emphasis added]

Section 108 of the Administration of Estates Act, 1961 (Act 63), the Interpretation part, defines "personal representative" as follows:

"personal representative" means the executor, original or by representation, or administrator for the time being of a deceased person;

With specific reference to the estate of an intestate, and as stated supra, it is the person who has been granted Letters of Administration (i. e. the administrator) as the

intestate's personal representative who can sue and be sued in respect of the estate of the intestate.

Section 108 of the Administration of Estates Act, 1961 (Act 63) defines "administrator" as follows:

> "administrator" means a person to whom administration is granted;

To help clarify the matter further, the section goes on to define "administration" as follows:

> "administration" means, with reference to the movable and immovable property of a deceased person, letters of administration, whether general or limited, or with the will annexed or otherwise;

A litany of Supreme Court decisions confirms this statutory position, namely that it is the person who has been granted Letters of Administration (i. e. the administrator) as the intestate's personal representative who can sue and be sued in respect of the estate of the intestate, until vesting assent has been granted to the beneficiaries.

In the case of ***Akrong v Bulley*** [1965] GLR 469, the Supreme Court held that the plaintiff therein ought to have first applied for Letters of Administration before he could sue. His Lordship Apaloo JSC at page 470 rendered the long held position of the law as follows:

> "I need hardly say that I reached this conclusion with no relish, especially as the Plaintiff made out an unimpeachable case of negligence against the Defendants

on the merits. But the question of capacity, like the plea of limitation, is not concerned with merits."

Also, in the case of ***Prah v Ampah*** [1992] 1 GLR 34, death intestate occurred in May 1967, and a revised grant of Letters of Administration was finally made in December 1972. It was held that the beneficiary's right accrued from December 1972, when grant of Letters of Administration was made, and not in 1967, when the death intestate occurred.

Again, the Supreme Court held in ***Djin v Musa Baako*** [2007-2008] 1 SCGLR 686 that the right to recover land of an intestate's estate accrues form the date of grant of Letters of Administration.

Speaking through Aninakwah JSC the Court had this stated:

"Under our local Laws, the Court of Appeal referring to Section 104 of the Administration of Estates Act 1961, Act 63, stated thus:

'Time does not begin until the end of the year after the death of the intestate as the Customary Successor is not bound to distribute the estate of the deceased before the expiration of one year from death. If the property requires to be vested in the future then time does not run until that even has occurred. **This in effect postpones the rights of a beneficiary under intestacy. His rights do not begin to run**…" [emphasis added]

See also the cases of ***Re Ennin Alias Bodom (Decd.);*** and ***Nti v Serwaah*** [1980] GLR 809 at 814 on the matter.

Derick Adu-Gyamfi describes 'personal representatives' in his book, ***Handbook on Probate & Administration Practice in Ghana (with Precedents)*** 2018 at page 57 as follows:

> "The expression 'personal representatives' is used to describe either an executor (whether he has proved the Will or not) or an administrator."

A very important duty of a personal representative is to apply for letters of administration (in case of intestacy) or probate (in case of testacy) to administer the estate: see ***Handbook on Probate & Administration Practice in Ghana (with Precedents)*** 2018 by Derick Adu-Gyamfi at page 57 on *"Duties and liabilities of personal representatives or executors"*.

Once Letters of Administration have been granted by the Court, the administrator must proceed forthwith to administer the estate of the deceased in accordance with law.

Justice Dennis Dominic Adjei warns administrators of this important duty in his invaluable book titled ***Land Law, Practice and Conveyancing in Ghana*** (2nd Edition) 2017 at page 80 in the following terms:

> "... The administrators of an intestate estate, however, cannot hold on to the properties they are to administrator to distribute to the beneficiaries *ad infinitum*."

The law is that, the properties of a deceased person which devolve unto the beneficiaries of the estate of an intestate do not automatically become part of the properties of those beneficiaries upon the death of the intestate: for same to become part of their properties, the said properties must have been vested in them by a valid vesting assent, except in the case of the customary successor, who holds such properties in trust for his immediate family.

Sub-sections 1 and 2 of section 96 of the Administration of Estates Act, 1961 (Act 63) provide as follows:

> "(1) A personal representative may assent to the vesting, in the form set out in the Third Schedule to this Act, in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto, either beneficially or as a trustee or personal representative, of any estate or interest in immovable property to which the testator or intestate was entitled or over which he exercised a general power of appointment by his will, and which devolved upon the personal representative.
>
> (2) The assent shall operate to vest in that person the estate or interest to which the assent relates, and, unless a contrary intention appears, the assent shall relate back to the death of the deceased."

Justice Dennis Dominic Adjei provides in his invaluable book titled ***Land Law, Practice and Conveyancing in Ghana*** (2nd Edition) 2017 at page 79 as follows:

> "Properties devolved unto beneficiaries of an intestate estate become part of the properties of the person after they have been vested in them by a valid registered vesting assent except those of a customary successor… The customary successor rather holds such properties in trust for his immediate family."

The law is now settled that administrators or executors (who have not renounced probate) of the estate of a deceased person are the proper persons to sue or be sued in an action involving ownership of any property (estate) of that deceased person: see the cases of ***Re Ennin Alias Bodom (Decd.); Nti v Serwaah*** [1980] GLR 809 at 814; ***Sheffield Corporation v Luxford*** [1929] and ***Re Estate of Benedict Kwabena Dick alias Kwabena Badu; Susana Aboagye & Anor (Applicants) v Diana Korsah (Caveatrix)*** (2022) High Court, Sefwi Wiawso, Suit No. E6/20/2021 Ruling given on 16th June 2022.

The law therefore is that, a beneficiary of an estate of a testate or an intestate has no capacity to sue or be sued as title holder in respect of the estate of a deceased person before grant of vesting assent.

In the case of ***Okyere (Decd) (substituted by) Peprah v Appenteng & Adomaa*** [2012] 1 SCGLR 65, the Supreme Court stated, per Brobbey JSC, at page 76 as follows:

> "The import of the judgment in this case is this: when a person dies testate or intestate, his estate devolves on the executor or personal representative [administrator] respectively until a vesting assent has been executed to the beneficiaries or devisees; and until the grant to them of the vesting assent, the beneficiaries and devisees have no title or *locus standi* over any portion of the estate."

Justice Dennis Dominic Adjei provides in his invaluable book titled ***Land Law, Practice and Conveyancing in Ghana*** (2nd Edition) 2017 at page 80 as follows:

> "A beneficiary under an intestate estate cannot sue or be sued in a property to be vested in him until the property is properly vested in him."

Thus for one to have capacity to sue or be sued when the deceased died testate or intestate, probate or letters of administration, as the case may be, has to be granted first. It is the *Executor* in the case where the deceased died testate and probate is granted, or the *Administrator* of the estate where the deceased died intestate, who under the ***Administration of Estate Act 1961 (Act 63)***, can sue or be sued. In the case of a beneficiary of the estate of a deceased, it is only when the executor (in the case of the deceased dying testate), or the administrator of the estate (in the case of the deceased dying intestate) has given the beneficiary a vesting assent that he or she can sue or be sued.

However, Counsel for the Plaintiff provides at pages 4 and 5 of his Written Submission as follows:

> "From the submission of the learned Counsel [for the Defendant], does it mean that, the plaintiff who did not either obtain Letters of Administration or vesting assent before mounting the suit at the Court below has no capacity to use?
>
> Frist of all, in the case of Okyere (deceased) vrs. Appenteng & Anor (supra), the properties being claimed were under a will and therefore, the views on intestacy were obiter. In this case, the plaintiff's husband died intestate. The evidence before the Court shows that, the plaintiff is the personal representative of her late husband.
>
> The case of Okyere (deceased) vrs. Appenteng & Anor. (Supra) was decided on 23rd November, 2011, however, on 14th February, 2018, the Supreme Court in the case of

Adiza Boya vrs. Zenabu Mohammed (substituted by) Adama Mohammed, Mujeed (unreported) Civil Appeal No. J4/44\2017 reviewed the decision in Okyere vrs. Appenteng & Anor (supra) and held as follows:-

> 'We are of the view that by virtue of the rules on intestacy contained in section 4(1) (a) of the intestate succession Law (PNDC Law III), following the death of the father of the defendant and their mother, the original first 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 others may sue and have an order of declaration of title made in their favour'.

The above decision by the Supreme Court was in respect of one of the issues in the Adiza Boya case (supra). That is whether a beneficiary under PNDC Law III can counterclaim or sue without vesting assent.

In our respectful view, the above decision in the Adiza Boya case (supra) falls on all four with the facts in this case…

From the foregoing and applying the ratio in Adiza Boya case (supra), it is our considered view that the plaintiff has capacity to sue in this case as the surviving spouse of the late Kofi Gyama therefore ground (b) should fail."

It must be noted that the decision in the *Adiza Boya* case is a solitary Supreme Court decision that stands against the litany of binding Supreme Court decisions that existed before it. That being the case, the decision in the *Adiza Boya* case, for it to be a binding

judicial precedent, ought to have departed from the litany of existing Supreme Court decisions in accordance with ***Article 129 (3) of the Constitution*** by clearly stating the points of departure, without any equivocation. Unfortunately, this was not done in the *Adiza Boya* case.

The Supreme Court in the case of the ***Republic v High Court (General Jurisdiction '5') Accra, Ex parte: The Minister for the Interior and the Comproller-General of Immigration Service; Ashok Kumar Sivaram - Interested Party)*** Civil Motion No. JS/10/2018, SC, explained and highlighted the position of the law succinctly, per Benin JSC, as follows:

> "It is to be stated where the Court casts doubt on existing case law or principle, it does not amount to laying down any new law or principle, let alone departing from the existing law. Article 129 (3) of the Constitution 1992 enables this Court to depart from its previous decision. And it means **the existing law must be clearly stated and the point(s) of departure must equally be clearly stated, without equivocation.** Merely casting doubt or even criticizing an existing decision is not tantamount to departing therefrom." [emphasis added]

Indeed, the law has crystallized that, where the Supreme Court wants to depart from its own previous decisions, it does so expressly and unequivocally. For instance, in the case of ***Republic v High Court (General Jurisdiction) Ex parte Magna (Ghana Telecom – Interested Party*** [unreported, Civil Motion No. JS/66A/2017, SC],

The Supreme Court eloquently held, per Benin JSC, as follows:

> "Consequently, any legislation that seeks to upset this principle of law and settled practice which gives the Court a very useful and purposely jurisdiction **must be express in its language**."

The Supreme Court continued thus:

> "That only part of a Court's decision that creates binding precedent is the 'ratio decidendi'. Other principles stated in a Court's decision which do not flow from the issues to be determined, whether they are the main issues or ancillary ones, are classified as 'Obiter dicta' and do not have the force of law. **That is why the issues must be known as the reasons for the Court's determination, especially so, as it seeks to depart from existing legislation, principles of law as well as practice**. For these reasons we decide that the decision in ex parte Abodakpi was given *per incuriam* and we depart from it accordingly in line with Article 129 (3) of the Constitution, 1992." [emphasis mine].

In the invaluable book, ***Contemporary Trends in the Law of Immovable Property in Ghana*** **(**2019) by Yaw D. Oppong, and writing on the sub-topic '*Capacitating Beneficiaries Without Letters of Administration'* the learned Author states at page 856 as follows:

> "In what has been deemed by many as a revolutionary or radical proposition of alternative perspectives to some established relevant principles of law, the Honourable Supreme Court, in ***Adisa Boya v. Zenabu Mohammed (Substituted by Adama Mohammed) & Mujeeb*** speaking through His Lordship Gbadegbe JSC, held that the Defendants who were children of the estate had immediate interest in the property and for that reason, they were competent to defend or

even sue for declaration of title, notwithstanding the fact that they had not obtained any letters of administration…

The principle espoused in the Adisa Boya case is indeed quite novel in view of the known practice and law where Letters of Administration are required before one can sue or defend his proprietary interest in a property subject to an intestate's estate."

Then at page 859, the learned Author continued:

"In the Adisa Boya case, the reason given for recognizing the Defendants' capacity was because as children they were entitled to their parent's estate under PNDC 111. It is my humble opinion however that, that reason may not, with all due respect, be enough grounds to ignore **the existing binding law contained in a legion of binding decisions of the Supreme Court**, some of which have been cited above and **without specifically departing from same in accordance with law.** These principles have over many years been followed as binding precedence by all other Courts. Indeed, it cuts both ways, in that it clearly stipulates that not only does a person without Letters of Administration lack capacity to sue in respect of the estate of an intestate, but also that no such person can be sued either." [emphasis added]

Justice S. A. Brobbey provides in his invaluable book, ***Practice and Procedure in the Trial Courts & Tribunals of Ghana*** (2011) at pages 383-385 as follows:

"The Ghana legal system is largely grounded on the Anglo-American jurisprudence and consequently places much emphasis on the doctrine of judicial

precedent, whereby a Court is bound by previous decisions on the points of law given by Courts higher to it. The concepts of ***'stare decisis***' and ***'ratio decedendi'*** are central to the operation of the doctrine of judicial precedent… 'Stare decisis' literally means, to stand by matters already decided. Under this system, the Court abides by former precedents on the same points of law decided in the previous suits…

Another expression worthy of note is 'per incuriam', which literally means 'through want of care'… See ***Adjei v The Republic*** [1977] 1 GLR 156 for an instance of a decision ruled per incuriam for failing to apply a statute. A judgment held to have been given per incuriam is of doubtful value as a judicial authority or precedent."

The expression 'per incuriam' [literally meaning 'Through want of care'] has been defined in the ***Osborn's Concise Law Dictionary*** (8th ed.) at p 246 as follows:

"A decision of the Court which is mistaken. A decision of the Court is not a binding precedent if given *per incuriam*; i.e. without the Court's attention having been drawn to the relevant authority or statute."

The oft-quoted definition given by Evershed MR in ***Morelle Ltd v Wakeling*** **[1955] 2 QB 379 at 406**, CA is as follows:

"As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned: so that in such cases some part of the decision or some step in the

reasoning on which it is based is found, on that account, to be demonstrably wrong".

In his dissenting judgment in ***Loga v Davordzi*** [1966] GLR 530 at 549, SC which approved Lord Evershed's definition, Azu Crabbe JSC (as he then was) noted that:

> "A previous decision is regarded to have been given per incuriam if the decision must have been different had the Court been referred to a particular statute or statutory rule or some authority decisive of the issue."

This definition was approved by Akufo-Addo JSC (as he then was) in his judgment in ***Nye v Nye*** [1967] GLR 76 at 82, CA.

The learned author and former Justice of the Apex Court, Justice S. A. Brobbey, further provides in his invaluable book, ***Practice and Procedure in the Trial Courts & Tribunals of Ghana*** (2011) (supra) at page 389 as follows:

> "The only exceptions to the above rules where the … Court may not follow previous decisions are:
>
> (i) **where the trial Court can distinguish the Superior Court decision.**; or
>
> (ii) Where the previous judgment has been compromised.

If the decision can be distinguished, it does not have to be followed. The decision may be distinguished on, inter alia, any of the following grounds:

(a) **because the decision conflicts with a statute**; see Edusei v Diners Club Suisse SA [1982-83] GLR 809, CA and Darko v Dei XI [1991] 2 GLR 112, CA;

(b) **that the decision was given per incuriam for failure to advert to a contrary provision in a statute or contrary decision of a higher Court or Court of co-ordinate jurisdiction or its own previous decision**: see Botwey v Edwey IX [1991] 2 GLR 179, CA; or

(c) that facts of the earlier case so differ materially from those of the case before the Court as to make reliance on the previous decision inappropriate. The material difference should be clearly spelt out in the judgment."

Thus the decision in the *Adiza Boya* case can be distinguished for failure to advert to previous binding decisions of the Supreme Court, and will accordingly not be followed: see ***Akrong v Bulley*** [1965] GLR 469; ***Prah v Ampah*** [1992] 1 GLR 34 and ***Djin v Musa Baako*** [2007-2008] 1 SCGLR 686.

Another case that can be distinguished is ***Appau v Occansey and Anor*** [1992-93] 2 GLR 839 which held that a beneficiary could act to protect the estate even where vesting assent had not been granted to him or her.

From the records before this Court, this Court holds that the Plaintiff lacked capacity to institute the action at the District Court for want of Letters of Administration in respect of the estate of the intestate, and the issue of the Plaintiff's capacity thus arising before the District Court ought to have been investigated and determined before the merits of the case could be gone into: see ***Sections 1, 2 and 108 of the Administration of Estates Act, 1961 (Act 63) -*** Supreme Court decisions in ***Akrong v Bulley*** [1965] GLR 469; ***Prah v Ampah*** [1992] 1 GLR 34 and ***Djin v Musa Baako*** followed; Supreme Court decision in

Adiza Boya v Zenabu Mohammed (substituted by) Adama Mohammed & Mujeed [2017-2020] 1 SCGLR 997, per Gbadegbe JSC, not followed.

The law is that, capacity issue, when it exists on record, must be determined before the merits of the case can be gone into; and the Court is duty bound to raise it where it is not raised by the parties.

In ***Yorkwa v Duah*** [1992-93] 1 GBR 278, even though the capacity of the plaintiff/respondent was in issue, it was not raised by the parties/Counsel and same also escaped the attention of the trial judge.

The Court of Appeal, per Brobbey JA (as he then was), stated at page 293 of the report thus:

> "The point of respondent's capacity was not raised at the trial. But it involves a serious point of law which the trial judge should have considered…Indeed the issue of capacity of the respondent when she took over the litigation as the sole plaintiff seriously undermined her entire case and the reliefs which the trial judge granted to her. The judge obviously erred in glossing over the issue of capacity and then proceeding to consider the respondent's case on its merits. Where a person's capacity to initiate proceedings is in issue, it is no answer to give that person a hearing on the merits even if he has a cast iron case."

In law, Capacity to institute an action is a precondition to the institution of the action in Court. Accordingly, the trial Magistrate ought to have raised the issue of the capacity of the Plaintiff *suo motu* (when same was not raised by the Defendant), to allow the

Plaintiff to establish same by the adduction of evidence, before proceeding to determine the Plaintiff's claim on the merits. In ***Sarkodee I v Boateng II*** [1982-83] GLR 715, the Supreme Court pronounced on the matter at 724 as follows:

> "It is elementary that a plaintiff or petitioner whose capacity is put in issue, must establish it by cogent evidence… it is no answer for a party against whom a serious issue of *locus standi* is raised, to plead that he should be given a hearing on the merits because he has a cast-iron case against his opponent."

Land Law, Practice and Conveyancing in Ghana 2017, [2nd Edition] by Justice Sir Dominic Adjei provides on *'Capacity to Maintain Suit'* at page 39 as follows:

> "Capacity goes to the root of every action and a person who has an iron cast case would not be heard on the merits of her case where she is unable to satisfy the Court that she has capacity to maintain the suit. Where the issue of lack of capacity is raised, the Court is prohibited from determining the case on its merits without first considering the issue of capacity."

In ***Civil Procedure – A Practical Approach*** 2011 by S. Kwame Tetteh, the learned author states at page 185 as follows:

> "The issue of capacity so arising may be determined before or at the trial, and in any case before the merits."

From the records, the Plaintiff did not have Letters of Administration when she instituted the action before the District Court to claim properties which were part of the estate of her late husband who died intestate.

Having come to the conclusion that the Plaintiff lacked capacity to institute the action at the District Court for want of Letters of Administration in respect of the estate of the intestate, it will not be necessary to consider the other ground of Appeal.

Conclusion

The trial Magistrate erred in law when he proceeded to determine the case on its merits without first determining the issue of capacity of the Plaintiff which patently existed on the records before him.

The judgment of the District Court, Sefwi Debiso dated 26th July 2018 and the orders made therein are hereby set aside.

The Appeal thus succeeds.

Cost of GHc4,000.00 is awarded against the Plaintiff in favour of the Defendants.

H/L KWAME AMOAKO
JUSTICE OF THE HIGH COURT