

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, SESSION HELD AT SEFWI WIAWSO IN THE WESTERN NORTH REGION ON TUESDAY THE 7TH DAY OF FEBRUARY 2023 BEFORE HIS LORDSHIP JUSTICE KWAME AMOAKO

SUIT NO. E6/03/2023

IN THE MATTER OF THE ESTATE OF
JOSEPH KWESI BADU A.K.A AGYAPA J. K.)
OF MORCHERKROM, WESTERN NORTH) DECEASED
OF GHANA)

AND

IN THE MATTER OF AN APPLICATION FOR GRANT OF PROBATE BY:

1. MR. STEPHEN ADDO)
OF MORCHERKROM ANGLICAN CHURCH) EXECUTORS
2. MR. YEBOAH APPIAH) / APPLICANTS
MMRANTEHENE OF MORCHERKROM

Applicants absent

Jacob Soung for Applicant present

JUDGMENT

This is the Judgment of the Court on an **Originating Motion Ex Parte for Grant of Probate** filed by the Applicants to administer the estate of Joseph Kwesi Baidu A. K. A. Agyapa (deceased).

THE LAW ON GRANT OF PROBATE (COMMON FORM)

The law pertaining to grant of Probate will be discussed under the following two headings:

- A) Ascertaining the Statutory prerequisites for the grant of Probate, and
- B) Affording facility to remedy non-compliance with Statutory prerequisites for the grant of Probate or L. A.

A) ASCERTAINING THE STATUTORY PREREQUISITES FOR GRANT OF PROBATE

In determining an application for the grant of Probate (Common Form), the Court is required by statute to ascertain the following:

- (1) The jurisdiction of the Court and every Court with concurrent jurisdiction;
- (2) The time, place and fact of death of the deceased;
- (3) The value of the estate of the deceased;
- (4) Affidavit by the executor(s), as applicant(s), deposing to facts upon which the application for Probate is grounded;
- (5) Assurance of faithful administration of the estate of the deceased; and
- (6) The existence and regularity of the Will.

See *A Practical Guide to Civil Procedure in Ghana* by Justice Samuel Marful-Sau 2017 at page 181.

Where trial Courts fail to carry out these statutorily mandated ascertainment exercises when determining applications for Probate and Letters of Administration (L. A.), not only does the failure rip the Judicial Service of huge sums of money annually in Estate Duties, but also it plunges the Court into indirectly and unknowingly condoning the incidence of “error and fraud” associated with applications for Probate and L. A., the very incidence the Courts are enjoined to prevent under *Order 66 rule 10 (4) of C. I. 47*.

With regard to applicants for grant of Probate or L. A., it must be noted that, a party who seeks a favour from the Court must be candid: see *Mumuni v Nyamekye* [2013] 58 GMJ 35 at 58-59, CA. With particular reference to ex parte applications, such as the instant one, the proposition of the law is that utmost good faith is required of an ex parte applicant and such applicant is under a duty not to suppress any material facts or misrepresent facts to the Court: see *Republic v High Court, Accra; Ex Parte Salloum & Others (Senyo Coker Interested Party)* [2011] 1 SCGLR 574 at 582; *R v Kensington Income Tax Commissioners; Ex parte Princess Edmond de polignac* [1917] 1 KB 486, CA; and *R v Accra District Court Magistrate; Ex Parte Kuma* [1968] GLR 954 per Charles Crabbe J (as he then was).

Order 66 rule 10 (4) of C. I. 47 provides as follows:

“(4) The Court shall afford as great a facility, as possible for obtaining probate or letters of administration as is consistent with due regard to the prevention of error and fraud.” [emphasis added]

S. Kwami Tetteh provides in his book, *Civil Procedure – A Practical Approach* 2011 at page 729 as follows:

“In principle, the Court would afford as great facility as possible for obtaining probate or letters of administration as is consistent with prevention of error fraud. **Accordingly, the Court would not make a grant until all enquiries are answered.**” [emphasis added]

The above-mentioned statutorily mandated ascertainment exercises will now be taken in turn.

1) Ascertainment of the jurisdiction of the Court and every Court with concurrent jurisdiction

The ascertainment regarding the Court’s jurisdiction in this regard is two-fold: (i) ascertainment of the Court’s jurisdiction to hear the application for Probate or L. A. and (ii) ascertainment of every other Court with concurrent jurisdiction to hear the Probate or L. A. application.

i) Ascertainment of the Court’s Jurisdiction

Order 66 rule 1 (1) of C. I. 47 stipulates that an application for Probate or L. A. in respect of the estate of a deceased person “may be made only to the Court with jurisdiction where the deceased had at the time of death a fixed place of abode”. Generally speaking, in Probate and L. A. matters, the geographical jurisdiction of the High and the Circuit Courts is the Region, and in the case of the District Court the Metroplis/Municipality/District, where the deceased had at the time of death a fixed place of abode: see *Order 3 rule 1 & Order 66 rule 1 (1) of the High Court (Civil Procedure) Rules, 2004 (C. I. 47); Order 5 rule 1 & Order 31 rule 1 (1) of the District Court (Civil Procedure) Rules, 2009, (C. I. 59); Lower Courts and Tribunals Instrument,*

1993 (L. I. 1574) and the First Schedule thereto and section 42 (1) (a)(vii) & section 47 (1) (g) of the Courts Act, 1993 (Act 459).

Quite apart from the last “fixed place of abode” of the deceased under Order 66 rule 1 (1) of C. I. 47, every Court in the Region or Metroplis/Municipality/District (as the case may be) where any property of the deceased may be found has jurisdiction to hear an application for Probate or L. A. in respect of the estate of that deceased person, but such application shall be made to only one of the Courts in respect of all the properties.

Order 66 rules 2 and 3 of C. I. 47 provide as follows:

“(2) Notwithstanding subrule (1) where any person dies within or outside the country without a fixed place of abode in the country, **the court in the area where any property of the deceased may be found, shall**, subject to the Courts Act, 1993 (Act 459) or any other enactment for the time being in force, **have jurisdiction** for the purposes of granting probate or letters of administration in respect of the estate. [emphasis added]

(3) Where the deceased has property within the jurisdiction of more than one Court, **the application shall be made to only one of the Courts in respect of all the properties.** [emphasis added]

ii) Ascertainment of every Court with concurrent Jurisdiction

The following Courts have concurrent jurisdiction with the High Court before which an application for Probate or L. A. is validly pending (i.e. *sub judice* High Court) to hear the Probate or L. A. application:

- a. Every other High Court within the Region where the *sub judice* High Court is located, irrespective of the value of the estate of the deceased: see *article 140 (1)*

of the Constitution; section 15 (1) (a) of the Courts Act, 1993 (Act 459); Order 3 rule 1 (1) & (5) and Order 66 rule 1 (1) of the High Court (Civil Procedure) Rules, 2004 (C. I. 47).

- b. Every Circuit Court within the Region where the *sub judice* High Court is located, where the value of the estate of the deceased does not exceed two million Ghana cedis (i.e. value GHC2m or less): see *section 42 (1) (a) (vii) of the Courts Act, 1993 (Act 459) as amended by regulation 2 (b) of the Courts Regulations, 2020 (L. I. 2429); Order 3 rule 1 (1) & (5) and Order 66 rule 1 (1) of C. I. 47 and section 1 (2) of the Lower Courts and Tribunals Instrument, 1993 (L. I. 1574) and the First Schedule thereto.* See also *Practice & Procedure in the Trial Courts & Tribunals of Ghana* (2nd Edition) by S. A. Brobbey at pages 34 and 35 paragraphs 67 and 68.
- c. Every District Court within the Metroplis/Municipality/District where the *sub judice* High Court is located, where the value of the estate of the deceased does not exceed five hundred thousand Ghana cedis (i.e. value GHC500,000.00 or less): see *section 47 (1) (g) of the Courts Act, 1993 (Act 459) as amended by regulation 3 (c) of the Courts Regulations, 2020 (L. I. 2429); Order 5 rule 1 (1) & (5) and Order 31 rule 1 (1) of C. I. 59 and section 1 (2) of the Lower Courts and Tribunals Instrument, 1993 (L. I. 1574) and the First Schedule thereto.* See also *Practice & Procedure in the Trial Courts & Tribunals of Ghana* (2nd Edition) by S. A. Brobbey at pages 34 and 35 paragraphs 67 and 68.

What this also means is that where an application for Probate or L. A. with the value of the estate of the deceased being more than five hundred thousand Ghana cedis but not exceeding two million Ghana cedis (i.e. value within GHC500,000.00 plus - GHC2m) is validly pending in a Circuit Court (*sub judice* Circuit Court), every High Court and

every other Circuit Court within the Region where the *sub judice* Circuit Court is located has concurrent jurisdiction with the *sub judice* Circuit Court to hear the application.

Furthermore, where an application for Probate or L. A. with the value of the estate of the deceased not exceeding five hundred thousand Ghana cedis (i.e. value GHc500,000.00 or less) is validly pending in a District Court (*sub judice* District Court), every High Court, every Circuit Court and every other District Court within the Metroplis/Municipality/District where the *sub judice* District Court is located has concurrent jurisdiction with the *sub judice* District Court to hear the application.

The Court where an application for Probate or L. A. is validly pending (i.e. the *sub judice* Court) is under a statutory duty to ascertain every other Court which has concurrent jurisdiction to hear the application: see *Order 66 rules 1 (4) and 10 (3) & (4) of C. I. 47* and *Order 31 rules 1 (4) and 10 (3) & (4) of C. I. 59*.

Order 66 rule 1 (4) of C. I. 47 provides as follows:

“(4) **Notice of an application** made under subrule (3) shall be given to the registrar of every court with jurisdiction in the areas where the property may be found **and any caveat filed** in the Courts shall be brought to the notice of the Court before which the application is pending, which may stay the hearing of the application until it is satisfied that no caveat has been filed in another Court.”
[emphasis added]

Accordingly, the Court before which an application for Probate or L. A. is validly pending (i.e. the *sub judice* Court) is enjoined by *Order 66 rules 1 (3) & (4) and 10 (3) & (4) of C. I. 47* and *Order 31 rules 1 (3) & (4) and 10 (3) & (4) of C. I. 59* (as the case may be) to ascertain whether there is any other Court *in the areas where the property of the deceased may be found* which has concurrent jurisdiction to entertain an application for

Probate or L. A. in respect of the property of the deceased, and where the *sub judice* Court has so ascertained that any other Court has concurrent jurisdiction to entertain the application, the *sub judice* Court is enjoined by the aforesaid rules to order its Registrar to inquire from the registrars of all such Courts with concurrent jurisdiction whether **any caveat** or **any application** has been filed in those Courts in respect of the property of the deceased, and adjourn the hearing of the application pending the results of the inquiries.

Where the results of the inquiries show that **any caveat** has been filed in any other Court in respect of the property of the deceased, the *sub judice* Court is enjoined by **Order 66 rule 1 (4) of C. I. 47** and **Order 31 rules 1 (4) of C. I. 59** (as the case may be) to order any such caveat to be brought before it for such caveat(s) to be determined in accordance with Order 66 rule 11 of C. I. 47 and Order 31 rule 11 of C. I. 59 (as the case may be).

Where the results of the enquiries show that **any application** has been filed in any other Court in respect of the property of the deceased, the *sub judice* Court is enjoined by Order 66 rules 1 (3) and 10 (4) of C. I. 47 and **Order 31 rules 1 (3) and 10 (4) of C. I. 59** (as the case may be) to order any such application to be brought before it for the applicant(s) to be put to an election as to which of the pending applications they intend to pursue.

2) Ascertainment of the time, place and fact of death of the deceased

Order 66 rule 9 (2) of C. I. 47 enjoins the Court to “ascertain the time and place of death of the deceased and require proof of death by production of a death or burial certificate or such other evidence to the satisfaction of the Court”. Proof of death of the deceased is crucial to every application for Probate or L. A., for if, in fact, the deceased person is not actually dead and the applicants have fraudulently represented to the Court a state of

facts that the person is dead, not only will the Court entertaining such application be acting without jurisdiction, but the Court will also be condoning “fraud”, the very mischief the Courts are enjoined to prevent under *Order 66 rule 10 (4) of C. I. 47*: see *sections 16 and 133 (1) of the Criminal Offences Act, 1960, Act 29* and the cases of *Welham v DPP* [1960] 2 WLR 669 and *Yirenkyi v The Republic* [1979] GLR 551. The standard required for proof of death of the deceased in an application for Probate or L. A. is therefore high, as the statute itself, in *Order 66 rule 9 (2) of C. I. 47*, specifically requires a high standard proof of death by production of a *death or burial certificate*. Accordingly, the expression “*such other evidence to the satisfaction of the Court*” in *Order 66 rule 9 (2) of C. I. 47* regarding additional sources of proof of death, is to be construed *ejusdem generis* with *death certificate* and *burial certificate* mentioned in the said *Order 66 rule 9 (2) of C. I. 47*.

Explaining the *ejusdem generis* rule, S. Y. Bimpong-Buta provides in his book, *The Law of Interpretation in Ghana (exposition and critique)* 1995 at page 107 as follows:

“The rule, simply put is: where in a statute or a document there are general words following particular and specific words, the general word or words must have their meaning restricted or confined to the meaning as conveyed by the specific words. Let us consider an expression like ‘hats, under-wear, overcoat, gown, shoes, shirts, tie or any other thing’. The general words, ‘any other thing’ following the specific words ‘hats, under-wear, overcoat, gown, shoes, shirts and tie’ cannot be given their natural meaning as any material or thing but must be construed as restricted to the things such as *clothing* which is the *class* or *genus* suggested by the specific words.”

In *Republic v Saffour II* [1980] GLR 193, the *ejusdem generis* rule was applied in determining the true meaning of the word “revenue” as used in the erstwhile

Administration of Lands Act, 1962 (Act 123), section 17 (2) thereof which provided as follows:

“(2) Revenue for the purposes of this Act includes all rents, dues, fees, royalties, revenues, levies, tributes and other payments, whether in the nature of income or capital, from or in connection with lands subject to this Act.”

In that case, the respondent, a Chief, had collected sums of money from persons to whom he had granted portions of his Stool land. He was arraigned before a Circuit Court for the offence of “Unlawful receipt of Stool revenue” in contravention of sections 17 (1) and 27 of Act 123 which vested the sole right to collect Stool lands revenue in the Minister of Lands. In his defence, the appellant argued that the moneys collected by him were “customary drinks” – not falling within the definition of “revenue” in section 17 (2) of the Act. The trial Judge accepted the defence of the respondent and dismissed the charge, holding that the respondent had committed no offence under section 17 (1) of the Act. On appeal to the High Court by the State, Counsel for the State argued that the trial Judge had put a wrong interpretation on the meaning of the word “revenue”; that the general words “or other payments” in section 17 (2) were so wide to cover the moneys or customary drinks received by the respondent and therefore such moneys were caught by the definition of revenue in section 17 (2). Counsel’s argument was rejected by the High Court per Okunor J on the application of the *ejusdem generis* rule when he said at page 201 of the report:

“When such general and rather sweeping expressions [such as ‘other payments’] as have been used in the definition... stand by themselves they carry their full complement of meaning and effect; but when, as in the present case, they follow a series of specific and particular words, such general words shed a good measure of their popular meaning, and only bear that portion of it which would

make them **consistent with the specific words** to which they are appended. This is the rule of construction popularly referred to as *ejusdem generis* rule...

Thus there is this **limiting rule of construction** applicable when there is a particular description of objects, sufficient to identify what was intended, followed by some general or omnibus description. The latter description **will be confined to objects of the same class or kind** as the former." [emphasis added]

Both *death certificate* and *burial certificate* [mentioned in the said Order 66 rule 9 (2) of C. I. 47] are statute-based sources of proof of death. *Death certificate*, as evidence of proof of death, draws its source from the Births and Deaths Registry Act, 1965 (Act 301), section 20 (2) (b) thereof; and *burial certificate*, as evidence of proof of death, draws its source from the Coroner's Act, 1960 (Act 18), section 6 thereof. Therefore, *death certificate* and *burial certificate* belong to the class of '*statute-based sources of proof of death*'. Accordingly, the expression "*or such other evidence to the satisfaction of the Court*" in Order 66 rule 9 (2) of C.I. 47 must be limited in construction and confined to 'other statute-based sources of proof of death': see *Republic v Saffour II* [1980] GLR 193 (supra).

In law therefore, the fact of death of the deceased may be validly proved by any of the following (the list is not exhaustive):

- i. **Death Certificate** – see *section 20 (2)(b) of Act 301* and *Order 66 rule 9 (2) of C.I. 47*;
- ii. **Burial Certificate** - see *section 6 of Act 18* and *Order 66 rule 9 (2) of C.I. 47*;

When the expression "*such other evidence to the satisfaction of the Court*" in Order 66 rule 9 (2) of C.I. 47 is construed *ejusdem generis* with *death certificate* and *burial certificate*, any of the following additional statute-based sources of proof of death can also satisfy the Court of the fact of death of the deceased:

- iii. **Post-mortem Report** - see *section 7 of Act 18*;

- iv. **Coroner's Certificate of Cause of Death** - see *section 19 (1) of Act 301* and *section 19 of Act 18*;
- v. **Medical Practitioner's Certificate of Death** – see *section 18 of Act 301*;
- vi. **Burial Permit** – see *section 20 (2) (a) of Act 301*. In law, there can be no burial without Burial Permit and 'Burial' includes cremation: see *sections 22 and 41 of Act 301*;
- vii. **Certified true copy of the entry in the Register of Deaths**, by the Registrar for Births and Deaths - see *section 33 of Act 301*;
- viii. **Certified true copy of the entry in the Coroner's Register of Deaths for the District where the death of the deceased occurred**, by the Coroner - see *section 20 of Act 18*;
- ix. **Search Report from the Registrar for Births and Deaths confirming death of the deceased** - see *section 31 of Act 301*;
- x. **Presumed death of the deceased after seven years' absence** in the absence of any evidence in rebuttal – see *section 33 of the Evidence Act, 1975 (NRCD 323)*
- xi. **Judgment of a Court of competent jurisdiction establishing the death of the deceased as in a murder or manslaughter case** in the absence of any evidence in rebuttal (e.g. Judgment overturned on appeal) – see *section 39 of NRCD 323*. See also *Anyimah III v Kodia IV* [1962] 2 GLR 1 and *Seraphim v Amua Sekyi* [1971] 2 GLR 328;
- xii. **Official document attesting to the death of the deceased** in the absence of any evidence in rebuttal – see *section 37 of NRCD 323* on the presumption of regularity of official duties. See also the case of *GPHA v Nova Complex Ltd* [2007-

2008] 2 SCGLR 806 which applied the common law rule rendered in Latin as *omnia praesumuntur rite esse acta* (there is a presumption that officials perform their duties regularly). A few instances of official documents attesting to the death of the deceased will be discussed.

- Sealed official document from a public office or department (such as the Public Health Directorate of an Assembly) attesting to the death of the deceased – see *Order 38 rule 9 of C. I. 47*
- Authenticated administrative circular attesting to the death of the deceased – see *Essentials of the Ghana Law of Evidence 2014* by S. A. Brobbey at pages 110-111
- Gazette notice attesting to the death of the deceased – see *Essentials of the Ghana Law of Evidence 2014* by S. A. Brobbey at pages 110-111
- Obituary publication in a national newspaper attesting to the death of the deceased

The Court must not rely on an obituary publication in a private newspaper as proof of death of the deceased, irrespective of the extent of circulation of such private newspaper in the country. It must be noted that there is no presumption of regularity in the performance of private duties: see *GPHA v Nova Complex Ltd* [2007-2008] 2 SCGLR 806 (supra).

The Court must also not rely on mere obituary posters, original ('coloured') or otherwise, as such documents have absolutely no statutory basis to prove the death of the deceased. Obituary posters are mere artistic impressions and, especially with the advancement in technology, the reliance on them by the

Court in Probate or L. A. proceedings is not only unwarranted but also extremely dangerous.

Even though photocopies of the above-listed statute-based sources (and other statute-based sources, as the list is not exhaustive) of proof of the death of the deceased may be used, it is important that the Court sights their originals at the hearing of the application for Probate or L. A. and that fact recorded accordingly.

3) Ascertainment of the value of the estate of the deceased

Order 66 rule 1 (5) of C. I. 47 defines 'property' as follows:

“(5) In this Order "property" means movable and immovable property.”

In the first place, it must be stated that, for the purpose of grant of Probate or L. A., 'property of the deceased' under Order 66 rule 1 (5) of C. I. 47, be it movable or immovable, does not include Social Security contributions of the deceased and/or other employment benefits in respect of which the deceased while alive specified the beneficiaries, gifts the deceased validly made *inter vivos* or are the subject matter of a *donatio mortis causa*, etc.: see the relevant statutes on Pension, Will and Intestate Succession.

Movable properties of the deceased include vehicles/machines (*motorized machines, i.e. machines capable of self-propulsion*), cash at bank, company share holdings, sole proprietorship businesses, patent rights, copyrights, precious minerals such as gold, and personal effects. Personal effects of the deceased include chattels such as bed & other furniture, mattresses & spread sheets, fridges, deep freezers, air conditioners, jewelries, television sets, clothing, travelling bags, bicycles, computers, mobile phones, watches, and such other personal properties of the deceased construed *ejusdem generis*

with these chattels. Personal effects of the deceased should not be lumped together to include other specified movable properties like vehicles/machines, cash at bank, company share holdings, sole proprietorship businesses, patent rights, copyrights or precious minerals such as gold - each of which must be itemized separately on the Declaration Form under movable properties.

Immovable properties of the deceased include land and/or, buildings, farms/plantations and mining/quarrying/timber concession.

Order 66 rule 9 (3) & (4) of C. I. 47 provide as follows:

“(3) The applicant shall make a declaration of the value of the property of the deceased and **the Court shall as correctly as the circumstances allow ascertain the value.**”

(4) Form 22 in the Schedule shall be used for the declaration under this rule.”
[emphasis added]

The *Side Notes* on Form 22 significantly state as follows:

“The **details** of the deceased’s movable and immovable property **must be inserted** here (in as many sheets of paper as may be necessary) and **value inserted opposite each of them.**” [emphasis added]

From the above statutory provisions, it is important that the personal properties of the deceased are each identified and their value stated on the property Declaration Form; and the Court is statutorily required to, as correctly as the circumstances of the case allow, ascertain the value of each property of the deceased stated on the property Declaration Form. Short of an order for formal valuation, the value of the property of the deceased that applicants for Probate or L. A. state on the property Declaration Form

must not be arbitrary, even though the value need not be exact: see *Order 66 rule 9 (3) of C. I. 47*. The use of the expression “*as correctly as the circumstances allow*” in *Order 66 rule 9 (3)* places an obligation on applicants for Probate or L. A. to provide on the property Declaration Form some relevant proximate indicators to enable the Court ascertain the value of the property of the deceased stated on the property Declaration Form “*as correctly as the circumstances allow*”.

Thus, where a sole proprietorship business is part of the estate of the deceased, then, to enable the Court to ascertain its value ‘as correctly as the circumstances of the case allow’ under *Order 66 rule 9 (3) of C. I. 47*, the location and type of the sole proprietorship business (e.g. provisions store) as well as the number of branches, if any, must be stated on the property Declaration Form, among others.

Also, where a piece/parcel of land is part of the estate of the deceased, the location and acreage of the land must be stated on the property Declaration Form, among others.

Again, where a building is part of the estate of the deceased, the location and number of rooms or apartments in the building must be stated on the property Declaration Form, among others.

Furthermore, where a farm/plantation is part of the estate of the deceased, the location, the acreage and the type of farm/plantation (e.g. cocoa farm, palm plantation, etc.) must be stated on the property Declaration Form, among others.

Also, where a mining/quarrying/timber concession is part of the estate of the deceased, the location, the acreage and the unexpired term/years of the concession must be stated on the property Declaration Form, among others.

4) Ascertainment of affidavit by the executor(s), as applicant(s), deposing to facts upon which the application for Probate is grounded

The executor(s)/applicant(s) for grant of Probate is/are required by statute to swear to an affidavit. *Order 19 rule 4 of C. I. 47* generally provides in respect of all applications as follows:

“4. Every application shall be supported by affidavit deposed to by the applicant or some person duly authorised by the applicant and **stating the facts on which the applicant relies**, unless any of these Rules provides that an affidavit shall not be used or unless the application is grounded entirely on matters of law or procedure which shall be stated in the motion paper. [emphasis added]

With specific reference to applications for Probate (or L. A.), *Order 66 rule 8 (1) of C. I. 47* provides as follows:

“(1) Every application for grant of probate or letters of administration shall be supported by an affidavit sworn by the applicant and with such other documents as the Court may require.” [emphasis added]

The affidavit must identify the deceased person, as well as the named executor(s); it must state the place and date of death of the deceased, the date of the last Will, the last place of abode of the deceased and the value of the estate of the deceased: see *A Practical Guide to Civil Procedure in Ghana* by Justice Samuel Marful-Sau 2017 at page 181.

5) Ascertainment of assurance of faithful administration of the estate of the deceased

The executor(s)/applicant(s) for grant of Probate is/are required by statute to swear an oath that the movable and immovable property of the testator/deceased will be faithfully administered.

In this regard, the executor(s)/applicant(s) must complete and sign a statutory form [Form 31 - OATH FOR EXECUTOR] and swear same before a Commissioner for Oaths.

Order 66 rule 22 of C. I. 47 provides as follows:

“22. Each will or copy of a will to which an executor or an administrator is sworn, **shall be marked by the executor or administrator and by the person before whom the executor or administrator is sworn as in Forms 31 and 32** respectively in the Schedule”. [emphasis added]

6) Ascertainment of the existence and regularity of the Will

The executor(s)/applicant(s) must annex to the application for Probate a copy of the last Will (and codicils, if any) of the testator/deceased. The Will (and codicils, if any) must be regular on the face of it and it must be established that there is no dispute as to its validity.

Essentially, *subsections 1 and 3 of section 2 of the Wills Act, 1971 (Act 360)* provide as follows:

“(1) A will is not valid unless it is **in writing** and **signed** by the testator or by any other person at the direction of the testator.

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

Order 66 rule 25 of C. I. 47 provides as follows:

“25. Where a **will appears regular on the face of it and there is no dispute as to its validity**, the application for probate may be sufficiently supported by affidavit deposing to the due execution and attestation of the will and by such other documents or papers as the Court may require.” [emphasis added]

See also *Order 66 rule 17 of C. I. 47* on the matter.

In *Barry v Butlin* (1838) 2 Moo PC 480, the Court held, per Parke B, that if a Will is rational on the face of it and duly executed, there is a presumption that the testator had the necessary mental capacity and the Will will be granted probate without difficulty.

See also *Yankah and Others v Administrator-General and Another* [1971] 2 GLR 186 and *A Practical Guide to Civil Procedure in Ghana* by Justice Samuel Marful-Sau 2017 at page 181 on the matter.

Where there is no or insufficient attestation clause, FORM 29 (ATTESTATION CLAUSE AND WITNESSES) as well as FORM 30 (AFFIDAVIT OF HANDWRITING) duly completed, signed and sworn before a Commissioner for Oaths, shall be annexed to the application for grant of Probate.

Order 66 rule 18 of C. I. 47 provides as follows:

“18. (1) **If there is no attestation clause, or if the attestation clause is insufficient**, the Court shall require an affidavit from at least one subscribing witness, if either of them is living, to prove that the will was in fact executed in accordance with the Wills Act, 1971 (Act 360).

(2) The affidavit shall form a part of the probate so that the probate shall be a complete document on the face of it.

(3) If on perusal of the affidavit it appears that the will was not in fact executed in accordance with the Wills Act, 1971 (Act 360), the Court shall refuse probate.

(4) Where both the subscribing witnesses are dead, or if from other circumstances an affidavit cannot be obtained from either of them, the Court may resort to an affidavit as in Form 28 in the Schedule from other persons, if any, present at the execution of the will but if so such affidavit can be obtained, proof shall be required of that fact and of the handwriting of the deceased and of the subscribing witnesses, and also of any circumstances that raise a presumption in favour of the due execution of the will.

(5) **An attestation clause and an affidavit of handwriting shall be as in Forms 29 and 30 respectively in the Schedule**". [emphasis added]

See also *In re Okine (Decd); Dodoo and Anor v Okine and Ors* [2003-2005]1 GLR 630, SC, on the matter.

B) AFFORDING FACILITY TO REMEDY NON-COMPLIANCE WITH STATUTORY PREREQUISITES FOR GRANT OF PROBATE OR L. A.

Rather than declining an application for Probate or L. A. for non-compliance with the statutory prerequisites, the Court is enjoined by statute to grant leave or afford the necessary facility, in appropriate cases, to remedy the non-compliance and salvage the application.

Order 66 rule 10 (4) of C. I. 47 provides as follows:

“(4) The Court shall afford as great a facility, as possible for obtaining probate or letters of administration as is consistent with due regard to the prevention of error and fraud.” [emphasis added]

A few of non-compliance situations requiring the Court’s intervention to remedy, will be discussed.

Where Social Security contributions of the deceased and/or other employment benefits in respect of which the deceased while alive specified the beneficiaries or any gift validly made by the deceased during his/her lifetime (gifts *inter vivos*) or gift(s) the subject matter of a *donatio mortis causa*, etc. have been included on the property Declaration Form, the Court must grant leave (or facility) for same to be removed from the property Declaration Form, rather than invalidating the entire property Declaration Form.

Also, the Court is enjoined by *Order 66 rule 9 (3) of C. I. 47* to inquire from the applicants for Probate or L. A. whether any other movable properties have been lumped up together with the personal effects of the deceased, and where it is shown that any other movable properties have been so lumped up together with the personal effects of the deceased, the Court must grant leave for those other movable properties to be separately itemized and separately valued by the filing of a corrective property Declaration Form.

Furthermore, where the applicants state the value of the cash at bank/financial institution of the deceased on the property Declaration Form as “UNKNOWN”, the Court must grant leave (or facility) for the relevant account details of the deceased (e.g. account name, account number, bank branch, etc.) to be provided to enable the Court to make the necessary disclosure orders directed at such bank/financial institution to

furnish the Court with the net account balance or statement of account of the deceased, etc. as the Court may deem fit.

Similarly, where the applicants state the value of the company share holdings of the deceased on the property Declaration Form as “UNKNOWN”, the Court must grant leave (or facility) for the relevant information regarding the share holdings of the deceased to be provided to enable the Court to make the necessary disclosure orders directed at company in question to furnish the Court with the value of the outstanding share holdings of the deceased.

Also, where the applicants fail to provide the relevant proximate indicators of the movable and immovable property of the deceased (such as the location, acreage, type, number or rooms/apartments, etc. of the property, as the case may be), making it impossible or difficult for the Court to ascertain the value of that property ‘as correctly as the circumstances allow’ under *Order 66 rule 9 (3) of C. I. 47*, the Court must grant leave (or facility) for same to be provided.

Publication of the Grant

Unlike Letters of Administration, grant of Probate does not require any publication: see *section 61 subsections 1 & 2 of the Administration of Estates Act, 1961 (Act 63)*. Explaining the rationale behind the non-requirement of publication of the grant, S. Kwami Tetteh provides in his book, *Civil Procedure – A Practical Approach* 2011 at page 730 as follows:

“A grant of probate is not required to be published because the executor is entitled, before the grant of probate, to perform the functions pertaining to the office without disposition of the property. A grant of probate is however required to administer the properties of the testator.” [emphasis added]

APPLICATION OF THE LAW

In proof of the death of the deceased, the Applicants have exhibited as a photocopy of a mortuary receipt from a private medical facility namely, Frimpong-Boateng Medical Center, which does not even state the place of abode (address) of the deceased. This receipt obviously does not qualify as a valid proof of death under *Order 66 rule 9 (2) of C.I. 47*. This Court will however remedy this non-compliance in accordance with *Order 66 rule 10 (4) of C. I. 47*.

The property Declaration Form annexed to this application listed among other properties of the deceased “GHANA COMMERCIAL BANK, ENCHI BRANCH, ACCOUNT No. 4071010006002” and put its value as “UNKNOWN”. The Applicants nevertheless were able to arrive at a total value of the estate of the deceased as GHC87,000.00, with the “UNKOWN” figure! The said “UNKNOWN” figure made it impossible for the Court to ascertain the total value of the estate of the deceased ‘as correctly as the circumstances allow’ under *Order 66 rule 9 (3) of C. I. 47*. Again, this Court will make the necessary bank account balance disclosure orders under *Order 66 rule 10 (4) of C. I. 47* to remedy the non-compliance.

The Applicants have also supported their application with a sworn affidavit identifying the deceased person, as well as the named executors, being the Applicants herein. The supporting affidavit also states the place and date of death of the deceased, the last place of abode of the deceased and the value of the estate of the deceased.

Furthermore, the Applicants have annexed to the application a sworn oath, assuring this Court of the faithful administration of the estate of the deceased, in accordance with *Order 66 rule 22 of C. I. 47*.

Also, the Applicants have exhibited to the application the last Will of the deceased, Joseph Kwesi Baidu A. K. A. Agyapa.

From the records, no dispute has been established before this Court as to the validity of the said Will.

CONCLUSION

Probate hereby is granted to **MR. STEPHEN ADDO** (OF MORCHERKROM ANGLICAN CHURCH) AND **MR. YEBOAH APPIAH** (MMRANTEHENE OF MORCHERKROM) to administer the estate of Joseph Kwesi Baidu A. K. A. Agyapa (deceased) in accordance with the Will of the Deceased (which has been exhibited to the application) subject to:

1. Valid proof of death of the deceased (the photocopy of the mortuary receipt from a private medical facility does not suffice);
2. The ascertainment of the cash at Ghana Commercial Bank, Enchi Branch (stated on the Property Declaration Form which value the Applicants have put as "UNKNOWN") to enable the total value of the estate of the Deceased to be computed.

In this regard, the Bank Manager of the Ghana Commercial Bank, Enchi Branch is hereby ordered to furnish this Court with the net bank balance and / or bank statement of Joseph Kwesi Baidu a.k.a J. K. Agyapa (who is now deceased) to enable the Court to determine the total value of the estate of the deceased.

The Certificate will be issued in the sum (the value of the estate of the Deceased) as ascertained by this Court as correctly as the circumstances of this case will allow, including the cash at the Ghana Commercial Bank, Enchi Branch, standing to the credit of the Deceased.

H/L KWAME AMOAKO

JUSTICE OF THE HIGH COURT