IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2012

CORAM: ANSAH J.S.C. (PRESIDING)
ADINYIRA (MRS), J.S.C.
DOTSE, J.S.C.
ANIN YEBOAH, J.S.C.
AKOTO-BAMFO (MRS)J.S.C.

CIVIL APPEAL
No. J4/6/ 2012

12TH DECEMBER, 2012

1. JOSEPH AKONU-BAFFOE ... PLAINTIFFS/APPELLANTS/
2. KWESI BRUCE APPELLANTS
3. ALFRED BREMANSU

VRS.

1. LAWRENCE BUAKU ... DEFENDANTS/RESPONDENTS/
2. REBECCA VANDYKE RESPONDENTS.
(SUBSTITUTED BY VIDA BREMANSU)

J U D G M E N T

ANSAH, J.S.C.

The facts of this case are hardly contentious. In 1992, Thomas Kobina Bremansu executed a will and named the defendants/respondents/respondents (hereinafter "the respondents") as executors. Upon Bremansu's demise, they applied for and obtained probate to deal with his estate. When the respondents attempted to take charge of one of Bremansu's properties in Takoradi, it became known that the late Bremansu had executed another will in 1995. The plaintiffs/ appellants/ appellants (hereinafter "appellants") were named the executors of the latter will. The appellants consequently brought an action for "an order that probate of the estate of Thomas Kobina Barimansu granted to the defendants be called in and revoked for want of interest and for dissipating the estate." The respondents counterclaimed and sought "an order setting aside the alleged will of the deceased dated 22nd day of February, 1997 on the grounds that it is not the deed of the deceased." The trial judge entered judgment in favour of the respondents based on their counterclaim. The Court of Appeal affirmed the decision of the High Court on appeal. The appellants have brought the instant appeal on the following grounds:

i) That the Court of Appeal failed to give adequate consideration to the Appellant's grounds of appeal.
ii) That the Court of Appeal erred in failing to appreciate the fact the trial court's findings were not borne out by the evidence –
    a. that the Court of Appeal failed to appreciate the fact that the deceased who was advanced in age could have thumb-printed the 1995 Will.
    b. that the Court failed to appreciate that, aside the absence of a jurat, there were circumstances, facts and evidence on record that suggested that the 1995 Will was duly executed by the testator.

c. that the trial court having found as a fact that the testator was literate, the undue emphasis on the need for a jurat was not necessary.
d. that the Court failed to appreciate the fact that the trial judge erred in placing undue weight on the fact that a beneficiary of the 1995 Will, Ama Amissah, died before the execution of the Will, then in fact the actual date of death of Ama Amissah was not conclusively established; and that the devise does not necessarily invalidate the 1995 Will.
e. that the Court failed to appreciate that the Defendants' whole defence hinged on the allegation of fraud, and that the allegation of fraud having not been proven the Plaintiffs were entitled to their claim.

It must be noted from the outset, as the appellant rightly points out in his statement of case dated 8th February, 2012, that this appeal comes on the back on two concurrent findings of the courts below. There are numerous Supreme Court decisions to the effect that an appellate court should be slow to disturb the concurrent findings of fact by two courts unless the findings are so perverse and unsupported by the evidence on record. See *Obrasiwah II v. Otu* (1996-97) SCGLR 618, *Achoro v. Akanfela* (1996-97) SCGLR 209, *Koglex (No 2) v. Field*, (2000) SCGLR 175, *Adu v. Ahamah* (2007-2008) SCGLR 143 and *Fosua & Adu-Poku v. Dufie (Deceased) & Adu-Poku Mensah* (2009) SCGLR 311. Therefore the duty of the court in this instance is to examine the evidence on the record vis-à-vis the concurrent findings of fact by the High Court and the Court of Appeal and then determine whether the evidence supported the findings that were made.

Burden of Proof

The appellants' contention is that since the respondents maintained a counterclaim against the appellants, an equal burden was placed on them to prove their case. Having failed to discharge that burden of proof, they argue that the Court of Appeal erred when it held at 296 of the record of appeal thus:

> "We are of the opinion that having regard to the issue and additional issues set down for trial, and on the totality of evidence put forth by the Appellants as proponents of the 1995 will, they failed to discharge the onus placed on them by law."

The appellants contend in their statement of case at 4 that

> "… the Defendants assumed a burden to prove their claim, or an equal burden is placed on both parties by law to prove their respective claims. …"

The position of the law is settled as far as the burden of proof in counterclaims is concerned. Order 12 rule 1 of the High Court (Civil Procedure) Rules, 2004, C.I. 47 provides thus:

> "**Rule 1—Counterclaim Against Plaintiff**
>
> (1) A defendant who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in an action in respect of any matter, whenever and however arising, may, instead of bringing a separate action, make a counterclaim in respect of that matter."

Further in *Amon v. Bobbett* (1889) 22 QBD 543 Bowne LJ held at 548 thus:

> " a counterclaim is to be treated for all purposes for which justice requires it to be so treated as an independent action."

In essence, a defendant's counterclaim is treated in the same way as the plaintiff's case. The roles are reversed and the defendant (as plaintiff in the counterclaim) assumes the burden to prove his case. In effect because a counterclaim has the nature of an independent action, the counterclaim may still

be continued even after judgement has been given in favour of the plaintiff or if the plaintiff's case is stayed or dismissed.

In this case, the burden of proof rested on the appellants to prove their case but on the counterclaim, it was the respondents' responsibility to prove their case. It would be useful to note at this point that at the trial court, the judge dismissed the respondents' claim of fraud and forgery because the respondents failed to plead the particulars of the alleged fraud, as the High Court (Civil Procedure) Rules, C.I. 47 requires, and left the court make inferences from the evidence. The appellants have relied on *Agbosu & Others v. Kotey & Others* (2003-2005) 1 GLR 685 where Brobbey JSC said at 732 as follows:

> "A litigant who is a defendant in a civil case does not need to prove anything; the plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time, if the court has to make a determination of a fact or of an issue, and that determination depends on evaluation of facts and evidence, the defendant must realize that the determination cannot be made on nothing. If the defendant desires the determination to be made in his favour, then he has the duty to help his cause or case by adducing before the court such facts or evidence that will induce the determination to be made in his favour. The logical sequel to this is that if he leads no such facts or evidence, the court will be left with no choice but to evaluate the entire case on the basis of the evidence of the plaintiff. …"

The appellants, while stating the correct position of the law, appear to have lost sight of the fact this position of the law as expressed succinctly by Brobbey JSC in *Agbosu & Others v. Kotey & Others*, supra, also applied in equal measure to their duty to discharge the burden of proof. That being the case, the question to ask is this: which of the parties effectively established their

case and discharged the burden of proof, on the balance of probabilities? Assuming, *arguendo*, that the respondents failed to discharge the burden of proof (as plaintiffs in the counterclaim), the result of that failure was only that their counterclaim would fail. However, the failure of that counterclaim would not in any way lessen the burden which rested firmly on the appellants who originated the action in the High Court. The trial judge still had to determine whether, on the balance of probabilities, the appellants had discharged the burden of proving their case. The burden would then shift to the respondents to adduce evidence to enable the trial judge make a favourable determination based on the facts and the evidence.

Validity of the 1995 Will

The central issue in this case is the validity of the latter of the two wills which the deceased testator executed in 1992 and 1995. The appellants herein do not dispute the validity of the will executed in 1992. They simply contend that the 1995 Will effectively revoked the 1992 Will. On the other hand the respondents have claimed from the onset that the 1995 was not the deed of the testator and adduced evidence which "excited the trial court's suspicion" as to the validity of the will. The biggest wrinkle in the case, in our view, is the fact that the deceased testator signed his signature for the 1992 Will but chose to thumbprint on the 1995 Will. The evidence on record showed that the deceased normally signed his signature on his official documents. The respondents tendered Exhibit 1, the testator's driver's license, Exhibit 4, a letter which the deceased wrote to his employers for end of service benefits and Exhibit 5, the 1992 Will itself to support this fact. Also DW3 testified that the late testator "was educated formally up to primary 5" and could sign his name. The respondents' argued that since the testator was accustomed to signing his signature, the thumbprint on the 1995 Will attracted suspicion as to the validity of the will. In their statement of defence at paragraph 9 at page 7 of the record,

the respondents called on the appellants to "prove the alleged Will in a solemn form."

The appellants did not prove the 1995 Will in solemn form but proceeded to adduce evidence to convince the court that 1995 Will was valid. The appellants claimed that the testator was illiterate and on certain occasions thumb printed his official documents. They sought to rely on the testator's bank documents with Barclays Bank, Tarkwa Branch, which documents were thumb printed by the testator. The first plaintiff testified in court that he used to read the testator's letters to him because he was illiterate. After considering the evidence the trial judge held that the circumstances surrounding the 1995 Will excited suspicion, especially because the testator had been known to sign most of his documents. At 219 of the record of appeal he said:

> "Let me also quickly mention one other circumstance that equally excites my suspicion in no small measure. That circumstance is the fact that T.K. Bremansu (deceased) who could sign his name rather thumb printed the 1995 Will. And what makes it more suspicious is the fact that there is complete absence of any jurat to inform the world as to who read and explained the contents of the Will to him or whether he even understood the contents of the Will especially if one comes to consider the fact that the Will was made by a professional hand, a lawyer who presumably appreciated the essence and legal requirement of a jurat whenever documents are thumb printed by people who cannot read and understand. …There is copious evidence both oral and documentary on record that portrays that the late Kobina Bremansu could sign his name. … Above all, it is crucial to observe that the plaintiffs seemingly admitted this fact by their failure to cross-examine on the evidence."

Based on the trial judge's reasoning above, the appellants appear to have concluded that the trial judge found as a matter of fact that the late Kobina Bremansu was literate because he was educated formally to primary 5 and was able to sign his name of official documents for at page 7 of their statement of case they contend as follows:

> "… However, the same trial court, adopting the evidence of DW3, had held that the testator was literate who "was educated formally up to primary 5". If the testator was literate, then he understood the contents of the 1995 Will."

It is the view of the court that that conclusion is faulty to say the very least. At 220 of the record of the appeal, the trial judge stated rather clearly that one's ability to sign his or her name did not confer literacy on that person. He said:

> "I must remark that it is not unusual for a person who is illiterate to be able to sign his name. In other words, the ability of one signing his name has nothing to do with his formal educational standing. I say this against the backdrop of the evidence of 1st plaintiff who claimed that the late Bremansu was illiterate. That evidence does not, in my view, in any way negate the fact that the late T.K. Bremansu could sign his own name on documents especially in the face of the evidence as a whole on record."

The facts and evidence showed that the late Bremansu was literate enough to sign his name on official documents. But the evidence also showed that Bremansu sometimes thumb printed on some other official documents, suggesting that he was, at least, not fully literate. How does the law deal with such persons? The case of *Zabrama v. Segbedzi* (1991) 2 GLR 221, C.A. provides the answer. I find it extremely useful to reproduce a long passage in

that case where Kpegah J.A (as he then was) put the issue of literacy vis-à-vis the provisions in the Illiterates Protection Ordinance, Cap 262, in the correct perspective at 230 to 231:

> "In the case of Kwamin v. Kufour (1914) 2 Ren. 808 at 814, Lord Kinnear reading the advice of the Privy Council said:
>
> " . . . when a person of full age signs a contract in his own language his own signature raises a presumption of liability so strong that it requires very distinct and explicit averments indeed in order to subvert it."
>
> While agreeing with the general concept of Lord Kinnear's proposition, my only reservation is that it fails to take into account the fact that a person signing a contract in "his own language" may be unable to read or write the said language. … If the purport is to be sure that the signatory really understood the document before making his mark, then the issue should not be whether it is written in "his own language" or not. Before the signature can raise the level of presumption against a person, the question, to my mind, should be whether he can read and write the said language and not whether the document is in a language he can only speak. Despite any claims to development, I am sure there are people in the British society who can speak English very well but can neither read nor write it, just as in this country there are citizens who can speak either Ewe, Twi, Ga or Dagbani perfectly without being able to read and write same. In my view, they are illiterates so far as these languages are concerned.
>
> Who then is an illiterate as Cap 262 does not offer a definition? In the case of *Brown v. Ansah*, High Court, Cape Coast, 10 April 1989, unreported, I had to decide whether a testator, who could read Fanti and spoke some English but could neither read nor write

English, was an illiterate within the context of section 2 (6) of the Wills Act, 1971 (Act 360). This is what I said in that case:

"It is necessary here to repeat that there is no dispute that the will in question has no declaration of the interpreter to the effect that the will has been read and explained to the testator who perfectly understood the contents before executing same. To meet this factual deficiency of the will, learned counsel for the defendants, Mr. E. F. Short, submitted that there is evidence that the deceased could read some Fanti and understand some English so he is not an illiterate but semi-illiterate and therefore section 2 (6) of Act 360 does not apply in this case since it is relevant only to cases where the testator can be said to be a complete illiterate. It is true the Act does not define who an illiterate is. But I think whether a person is to be considered as literate or illiterate in this context, it must be related to the language in which the document is prepared, that is the ability to read and write the said language. In this case it is English. A person who can perfectly read and write the Ewe or Fanti language may be an illiterate within this context if the will is written in English which he can neither read nor write. It is the ability to read and write the language in which the document is written which to me is relevant and not whether the fellow can be classified as semiliterate or demi-semi-literate. The evidence is that the testator cannot read and write English. He is to me an illiterate within the context of the law."

I will offer the same definition under Cap. 262. This definition should make it possible for even a professor emeritus in the English language from Oxford to seek protection under the law if he should come to this country and sign a contract written in Dagbani. …"

We would hold that this position of the law as stated in *Zabrama v. Segbedzi, supra* is correct and adopt it as our own. It is clear then, that by the appellants' own evidence the late Bremansu was illiterate. In the absence of clear evidence to show that he could read or write the English language (the language which was used to prepare both Wills) the ability to sign his name on official documents did not detract from this fact. It is also clear from the trial judge's decision that he considered the appellants' claim to the effect that Bremansu was illiterate. At 220 of the record of appeal the trial judge held:

> "Going by the case of plaintiffs who sought to establish that the late T.K. Bremansu was illiterate, one would be quick to point out the purported execution of Exhibit 'A', the 1995 Will grossly sinned against the Wills Act, 1971 (Act 360) section 2(6) thereof which provides that "where the testator is blind or illiterate, a competent person shall declare in writing upon the Will that he had so read over and explained the contents to the testator and that the testator appeared perfectly to understand it before it was executed."

The appellants challenged the trial judge's "undue" insistence on a jurat at page 7 of their Statement of Case as follows:

> "One other reason that excited the suspicion of the trial court and affirmed by the Court of Appeal was the fact that although the 1995 Will was thumb printed there was no jurat clause to authenticate the fact that the contents were read and explained to the testator who understood and approved of same before making his mark. However, the same trial court, adopting the evidence of DW3, had held that the testator was literate who 'was educated formally up primary 5". If the testator was literate, then he understood the contents of the 1995 Will. There was no need to for

> the plaintiffs to "affirmatively prove that the contents of the 1995 Will was read over and explained to the testator before he thumb printed same. Similarly, there was no need to "prove by cogent evidence that the thumb print on the will was that of the testator who normally signed all his documents." It is submitted that under such circumstances there was therefore no need for a jurat…."

We find this reasoning also faulty. While it is correct to state that the absence of a jurat does not in itself negate the validity of an otherwise valid Will, it must be pointed out that the law requires the proponents of such a will to lead evidence to show that even in the absence of a jurat, the testator fully understood the content of the Will. Again, the case of *Zabrama v. Segbedzi, supra* is instructive. At page 234-235 Kpegah J.A. (as he then was) held:

> "What then is the standard of proof on a party relying on a document to which an illiterate is a party? Does the presence of a declaration on the document that it had been read and interpreted to him and that he appeared to have understood before signing same satisfy this requirement of proof or there is need for some corroborative evidence outside the document? … As had been pointed out, in *Kwamin v. Kufuor* (supra), the issue whether an illiterate fully understood the contents of a document before making his mark or not "raises a question of fact, to be decided like other such questions upon evidence." Being a question of fact, I think the presence or otherwise of an interpretation clause on a document is one of the factors a court should take into account in determining whether the document in question was fully understood by the illiterate. In my view, an interpretation clause is only an aid to the court in satisfying itself that the illiterate against whom the document is being used appreciated the contents before

its execution. *The presence of an interpretation clause in a document is not, in my humble view, conclusive of that fact, neither is it a sine qua non. It should still be possible for an illiterate to lead evidence outside the document to show that despite the said interpretation clause he was not made fully aware of the contents of the document to which he made his mark. While its presence may lighten the burden of proof on its proponent, its absence on the other hand should not be fatal to his case either. It is still open to him to lead other credible evidence in proof that, actually, the document was clearly read and correctly interpreted to the illiterate who appreciated the contents before executing same.*

I hold this view because the standard of proof required in law to affect an illiterate person with the knowledge of complete appreciation of the contents and import of a document, written in a language he can neither read nor write, and to which he is a signatory, cannot be achieved by merely saying:

"Look at the document. There is an interpretation clause on it to the effect that it had been clearly read and interpreted to him and he understood it fully before executing it so he is bound by it."

I will recommend that type of proof which settles for preponderance of evidence in a civil case. If a court after assessing all the available evidence is satisfied, upon the preponderance of evidence, that the document was read and interpreted to the illiterate person, and that he fully understood the contents before making his mark, then the burden of proof would have been discharged by the person relying on the document. This is because just as it is bad to hold an illiterate to a bargain he would otherwise not have entered into if fully appreciated, so also is it equally bad to permit a person to avoid a bargain properly and voluntarily

entered into by him under the guise of illiteracy. In the case of *State v. Boahene* [1963] 2 G.L.R. 554 at 568, Sowah J. (as he then was) put it nicely:

"I agree that there is no presumption that an illiterate person appreciates the meaning and effect of a legal instrument or for that matter of any instrument or letter just because he has signed it; this is sound principle for the protection of an illiterate person against an unprincipled opponent, *but this principle is not to be stretched to make illiteracy a cloak for fraud or criminal activities."*

I adopt these words as my own and will only add that illiteracy is not a privilege but rather a misfortune. Cap. 262 is therefore a shield and not a sword.

Although there is no interpretation clause on exhibit A in this case, *there is sufficient evidence on record to justify a finding of fact that the document was read over and dutifully interpreted to the plaintiff before he made his mark. …*" (e.s.)

It would appear to us that the appellants would want to this court to believe on one hand that if the late Bremansu was literate, then the absence of a jurat was not fatal to the validity of the 1995 Will, while on the other hand, the appellants have sought from the onset sought to establish the fact that Bremansu was illiterate. In our view this double-edged approach to establishing the validity of a will should be avoided as it only highlights the mischief the law sought to amend by enacted both the Illiterates Protection Ordinance and the Wills Act. In simple terms, the appellants are not allowed to eat their cake and have it. On the strength of *Zabrama v. Segbedzi, supra* even if the trial judge had "unduly" relied on the absence of the jurat, the question whether or not the testator understood the contents of the will was a question of fact and the appellants had ample opportunity to adduce evidence to establish that the

contents of the 1995 Will were explained to the testator and he fully understood same. The respondents, on the other hand, by their evidence satisfied the trial court that there was suspicion surrounding the validity of the latter Will. In those circumstances, the burden effectively shifted back the appellants (as defendants in the counterclaim) to prove the Will in solemn as demanded or show by evidence that the 1995 Will was valid. They did not and in doing so, allowed the respondents' counterclaim to stand. In such circumstances we are unable to disagree with the trial judge's conclusion at 220 of the record of appeal as follows:

> "In the evidence, though plaintiffs the proponents of this 1995 Will were put on the enquiry to prove same in solemn form, not even a scintilla of evidence was adduced to the effect that the late Bremansu had the benefit of understanding the contents of Exhibit 'A' same having been read over to him by any competent person…"

We would therefore agree with the trial judge's decision as affirmed by the Court of Appeal. This court has also taken note of the other circumstances which excited the trial court's suspicion as to the validity of the 1995 Will, such as the bequest to a person whom the testator knew to be dead in 1992 and the different dates on the will – one on the will itself and one on the envelope. While these circumstances may very well have been suspicious, the burden of proof lay on the appellants to dispel these suspicions through the adduction of cogent evidence. However, the appellants allowed these suspicions to linger on and in the absence of such supporting evidence the trial judge was entitled to make a determination based on the respondents' evidence.

In sum, the appellants herein have not advanced any arguments in this appeal to support a conclusion that the High Court decision as affirmed by the Court of Appeal was so perverse in law or was unsupported by the evidence on

record. We are also well minded of the Supreme Court's decision in *Barkers-Woode v. Nana Fitz* (2007-2008) 2 SCGLR 897 where it was held that where a trial judge makes findings of fact, which are supported by the evidence on record, it is not permissible for the Supreme Court or any other appellate court to interfere with the determination by the trial judge even if the Supreme Court is inclined to interpret the evidence differently. Accordingly we would also hold that the 1995 Will is invalid. It must be noted once more that the appellants did not challenged the validity of the 1992 Will; their only claim being that it was revoked by the 1995 Will. As the Court of Appeal speaking through Abban J.A. held, "[s]ince the 1992 will can only be revoked when the 1995 Will is proved to be valid, and the Appellants were unable to discharge this burden, the 1992 will therefore remains the valid will of the deceased. … " .

The appeal is hereby dismissed.

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

(SGD) J. V. M. DOTSE
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