IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2013

CORAM: **ATUGUBA JSC (PRESIDING)**
ADINYIRA (MRS) JSC
OWUSU (MS)JSC
DOTSE JSC
BAFFOE-BONNIE JSC

CIVIL APPEAL
No.J4/25/2012

23RD JANUARY,2013

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF OBAAPANIN AMMA MANSA AND OTHERS	**-**	**PLAINTIFFS**
VRS		
NANA YAA ADUTWUMWAA & OTHERS	**-**	**DEFENDANTS**

AND

IN THE MATTER OF AN APPLICATION FOR CERTIORARI BY OBAAPANIN AMMA MANSA AND OTHERS	**-**	**APPLICANTS/ APPELLANTS**

AND

THE REPUBLIC

VRS

JUDICIAL COMMITTEE OF THE BRONG AHAFO REGIONAL HOUSE OF CHIEFS, SUNYANI	**-**	**RESPONDENT/ RESPONDENT**

1.	**NANA YAA ADUTWUMWAA (QUEEN MOTHER)**		
2.	**NANA APPIAH KUBI**	**-**	**INTERESTED**
3.	**NANA KWAKU OPPONG**		**PARTIES/**
4.	**KWABENA ADJEI**		**RESPONDENTS**
5.	**OSEI KOFI ABIRI**		

EX-PARTE:

1.	**OBAAPANIN AMMA MANSAH**	**-**	**APPLICANTS**
2.	**KWAKU ADARKWA ACHEAMPONG**		**APPELLANTS**
3.	**AKWASI ADDAI**		**APPELLANTS**
4.	**NANA ANTIW BOASIAKO**		

J U D G M E N T

DOTSE JSC:

This is an appeal by the Plaintiffs/Applicants/Appellants/Appellants hereinafter referred to as the Appellants against the judgment of the Court of Appeal dated 24th June 2011 whereby the Court of Appeal affirmed the judgment of the High court which was in favour of the Defendants/Interested Parties/Respondents/Respondents, hereinafter referred to as Respondents.

FACTS OF THE CASE:

Since the genesis of this case emanated from the Judicial Committee of the Brong Ahafo Regional House of Chiefs, it is important to set out the facts in extenso.

The Omanhene of Kenyasi No. I died. After the burial of the Omanhene, the task of finding a suitable candidate to succeed him was entrusted to Nana Yaa Adutwumwaa, the (1st Respondent herein) in her capacity as the Queen mother of Kenyasi No. 1 as demanded by custom and tradition.

There was some competition for the successorship to the vacant Omanhene stool of Kenyasi No.1. To this end, out of three eligible candidates who expressed and or showed interest in the stool including Nana Antwi Bosiako, the Akwasiase Abrantehene (4th Appellant) herein, the Queenmother, 1st Respondent nominated one Osei Kofi Abiri (5th Respondent herein) to succeed the late Omanhene of Kenyasi No. 1 and subsequently handed him over to the Gyasehene to be introduced to the elders of the Royal Family.

At a point when the Gyasehene was about to introduce the 5th Interested Party to the elders of the Royal Family as part of the installation process of the successor to the late Omanhene, the 4th Appellant, Nana Antwi Bosiako, invoked the Great oath of Otumfuo (Ntamkese) against the 1st Respondent, Nana Adutwumwaa, the Queen mother to the effect that the stool in question belongs to his grandfather Mensah Kumta and if she the 1st Respondent, nominated someone who is not a descendant to his grandfather, then she had violated the Great Oath of Otumfuo (Ntamkese). The other reason the 4th Appellant invoked the Great Oath against the 1st Respondent was to the effect that although they are from the same family, the 1st Respondent is not a royal to the stool in question and therefore if she nominates someone to occupy the Kenyasi No. I stool, she violates the Great Oath of Otumfuo.

BEFORE OTUMFUO AT MANHYIA

As is demanded by custom, the matters raised by the swearing of the Great Oath have to be presided over by Otumfuo Osei Tutu II and the Asanteman Council.

As a result, the Asanteman Council presided over by the Otumfuo deliberated on this case on 22nd and 25th August 2005 respectively at the Manhyia Palace.

It must be noted that, at the hearing before Otumfuo, the 4th Appellant herein was allowed to state his case. Thereafter, the 1st Respondent was also made to state her case. The Gyasehene of Kenyasi was also allowed to testify, as well as Kenyasi No. 2 Omanhene.

Thereafter, members of the Asanteman Council who were present during the proceedings either made observations and or comments. For example, the Bantamahene, Yamfohene, Mamponghene, Juabenghene, Oboguhene etc, just to mention a few who all made comments.

As a matter of fact, the appeal record has evidence to the effect that the 4th Appellant admitted invoking the Great Oath of Otumfuo against the 1st Respondent.

Out of abundance of caution, this is how the 4th Appellant was captured on record as having admitted invoking the Great Oath of Otumfuo:

> *"I invoked the Great Oath of Otumfuo against Nana Adutwumwaa to the effect that the stool in question belongs to my grandfather Mensah Kuntia and that if she nominates someone who is not a descendent of my grandfather she violates the Great Oath of Otumfuo. Also invoked the Great Oath against Nana Yaa Adutwumwaa to the effect that although we are from the same family but she is not a royal to the stool in question and that if she nominates someone to occupy the stool, she violates the Great Oath of Otumfuo."*

On the part of the 1st Respondent herein, there is evidence on record that she also responded to the oath and challenged him to strict proof. This is how she was also captured:

> *"Nananom, when the person chosen to occupy the stool was being introduced to the stool elders Opanin Antwi Bosiako invoked the Great Oath of Otumfuo to the effect that if Nananom accept the person chosen they violate the Great Oath of Otumfuo, I responded to the oath and said that the person chosen is a true royal to the stool in question and that if he has something to say about his conduct and behavior of the person he is at liberty to say it. Nananom, he did not say anything and left."*

It is therefore clear that, all the parties in this case, that is to say, the Appellants and the Respondents had opportunity to state their case to the best of their ability. Witnesses who were relevant to the dispute testified before the Asanteman Council.

In view of the profound nature and depth of learning, wisdom and customary knowledge that is inherent in the summing up and decision of Otumfuo on the 22nd day of August 2005 we have decided to set them out in some detail to espouse the Asante custom, culture and tradition.

"Otumfuo: Akyeame, this woman has been introduced to me as a Queenmother of Kenyase No. 1. And when the Chief died she together with the stool elders informed me of the death of the Chief. There were no charges leveled against her that she is not a true royal of the stool, now it is time for her to elect someone to occupy the stool in question, then three people from the family pleaded with her to give the stool to them to occupy. She then chose one to occupy the stool but unfortunately one of them invoked the Great Oath of Otumfuo against her that if she went ahead to introduce the person chosen to the elders she violates the Great Oath of Otumfuo. Moreover, the Queenmother said that he misconstrued what he said previously and said that the man Opanin Antwi Bosiako accused her of not being a true descendant of Nana Kuntia and for that reason she is not a royal to the stool in question besides she has not right to enstool someone to occupy the stool and if she does she violates the Great Oath of Otumfuo. Akyeame, you should let him understand that this woman (Kenyase No. I hemaa) is the Queenmother of Kenyase No.1, it was Nana Acheampong who enstooled her as a Queenmother.

However, this is how our custom should be portrayed, the Queenmother will have to nominate someone and hand him over to Gyasehene, after that Gyasehene will also have to introduce the person chosen to the elders, it is up to the elders to scrutinize the conduct and behavior of the person and also to know whether he is a royal from the family, then he can occupy the stool. Subsequently, even though the brother of the late Opanin Bonsu is very handsome and a man of valour to ascend the stool but it is the sole responsibility of the Queenmother to always elect someone to occupy the stool. So far as she accepted his drinks (Gyatua) meaning he is a royal but she said among all the three people who came to ask for the stool it is this man whom she will like to occupy the stool. It is only the elders who have the onus to oppose her on the grounds that the person chosen is not a royal or he is having a criminal record. But so far as they have all agreed that the man is of a good character and also a royal then he can occupy the stool.

Moreover, Kukuomhene made a certain comment that the candidates chosen to occupy the stool in question are becoming one-sided family. You have to think about the other family in case something happens in future so

that there will be peace and unity among the family besides you should all come together as one family. Also, the incoming Chief should know that they are one family he should try as much as possible to unite both families together in order to enjoy peace and tranquility, he can seek.

Also, the incoming Chief should know that they are one family he should try as much as possible to unite both families together in other to enjoy peace and tranquility, he can seek advice from Mr. Senkyire brother of the late Opanin Bonsu so that he can support him with his experience and knowledge to develop the town. Mr. Senkyire should also bear in mind that not only to become a chief will make you eminent, you may not know what God has in store for you in future. As I have already said the Queenmother is the only person who has that power to nominate someone to occupy the stool that is how I have made the arrangement from time immemorial it has not changed and I am not going to change it today. It is the sole responsibility of the Queenmother to install a Chief if only there is a Queenmother in the town. The Queenmother will have to elect someone and give him to Gyasehene then Gyasehene will in turn introduce him to the elders, it is up to the elders to tell the Queenmother the qualities of a Chief if that person chosen does not have it, the Queenmother can elect another person to occupy the stool. However, so far as the elders and the Abusuapanin have approved of it, then it means there is no reason why the person cannot occupy the stool in question.

Akyeame, what I want Asanteman to know is that a Queenmother should not instigate a dispute neither a royal should also rebel towards the Chief or stool, any Queenmother who will misbehave towards his Overlord will be destooled. Besides no royal should invoke the Great Oath to fight for a stool if there is dispute about a stool you shouldn't invoke the oath but rather report it to the Abusuapanin that this is what the Queenmother is doing if he consults the Queenmother and they decide to give it to you that is good. But if not and you invoke the Great Oath against her unless the person chosen is not a royal but she or he is a royal and you

invoke the Great Oath then it is a reckless Oath. Consequently, I am stating it emphatically clear today, that if such things happen in your domain and you not redress it as quickly as possible you will be in trouble if the matters appears before me. Akyeame, my grand son invoked the Oath to claim ownership of the stool but that is not the proper way of invoking the Great Oath. You accused her of not being eligible to occupy the stool in question, because she did not nominate you to occupy the stool but it has been the other way round you wouldn't have accused her of her ineligibility to occupy the stool. First and foremost you shouldn't have asked for the stool by sending your drinks to her if she is not a royal to the stool in question. She is the only Kenyase No. 1 hemaa that I know, the man should be customarily arrested for invoking a reckless Oath then after the necessary rites has been performed, the man nominated to occupy the stool should swear an Oath of allegiance to me before he can be carried in a Palanquin.

At this stage both parties were pronounced guilty for invoking a reckless oath against the Obaahemaa and the stool elders and were asked to slaughter one live sheep each."

When the Asanteman Council, reconvened sitting on the said dispute on 25th August 2005 the appeal record has a statement to the effect that, the 4th Appellant herein requested Kenyasi No II Omanhene to apologise to Otumfuo and Nananom on his behalf for what he did and also wish the Queenmother and the stool elders *"Dibim".* Nanamon are also on record as having pleaded with Otumfuo to forgive and also accept the apology rendered by Opanin Antwi Bosiako and Opanin Senkyire. It was after this that Otumfuo concluded the proceedings with the following statement which we reproduce verbatim for their full force, and effect.

"Otumfuo: Akyeame, all fingers are not equal, all of us were not expecting to attain such a position but by the grace of our ancestors that is why we are here. Opanin Senkyire have all the qualities as a chief but it is sole responsibility of the Queenmother to always nominate someone when the stool becomes vacant. If you are created to become a chief you will one day become one

before you die but you have to exercise patient maybe you can do something different to help the town without being a Chief. Moreover, all the powers have been invested in the Queenmother to elect someone to occupy the stool, all that you can do is to have something bad against the person nominated but if he is a royal and have not committed any criminal offence he is at liberty to occupy the stool in question I will urged you to contribute your quota to help the Queenmother and the person chosen to promote the development of the town. However, if they have regretted their wrongdoing and have come to apologise to me I have forgiven them. Subsequently, the Queenmother and the stool elders should introduce the person chosen to occupy the stool in question to me after he has sworn to the elders and has performed the necessary rites pertaining to his enstoolment as Chief of Kenyase No.1"

From the above notable and profound decisions of the Asanteman Council presided over by Otumfuo, the following decisions stand out clear as having been made by the Council arising from the arbitral proceedings on the invocation of the Great Oath of Otumfuo.

1. That the 4th Appellant has invoked a reckless oath.

2. The 1st Respondent was confirmed as the Queenmother of Kenyasi No. I

3. That as Queen mother of Kenyasi No I, the 1st Respondent has the prerogative of nominating a successor to the stool of Kenyasi No I according to custom.

4. That in so far as the Abusuapanyin has endorsed the nominee of the 1st Respondent, to wit the 5th Respondent, it meant that the 5th Respondent had been properly nominated and elected for installation as Omanhene of Kenyasi No I.

5. What was needed to complete the process of installation of 5th Respondent, was for the 1st Respondent and elders to introduce the 5th Respondent to

Otumfuo after he has sworn the oath to the elders and performed the necessary rites pertaining to his enstoolment as chief of Kenyasi No I.

6. The 4th Appellant and one Opanin Senkyere were found guilty on invoking a reckless oath against the Queen mother and stool elders and were asked to slaughter one sheep each to signify their acceptance of the decision of the Asanteman Council. The 4th Appellant and Opanin Senkyere accordingly slaughtered the sheep and offered two bottles of schnapps.

7. The 4th Appellant had previously asked the Omanhene of Kenyase No. II to render an apology to the Otumfuo and the Asanteman Council on his behalf for invoking the reckless oath. They also offered "Debim" to the Queen mother and the elders.

PETITION BEFORE BRONG AHAFO REGIONAL HOUSE OF CHIEFS

Matters however did not end at the Asanteman Council. On 26th August 2005, the Appellants herein, filed a petition against the Respondents herein claiming the following reliefs:

In order for the proper import of the petition at the Judicial Committee of the Brong Ahafo Regional House of Chiefs to be understood, we will set out portions of the petition in detail.

"Petition To the Judicial Committee of the Brong-Ahafo
Regional House of Chiefs
Sunyani, Chieftaincy Petition

1. *Full Names of Petitioners*
    1. *Obaapanin Ama Mansah*
    2. *Kwaku Adarkwa Acheampong*
    3. *Akwasi Addai*
    4. *Nana Antwi Boasiako*
2. *Capacity in which the petition is made*
    1. *Obaapanin of Afia Dwomo Family*
    2. *Principal/Royal Member of Afia Dwomo Maternal Family*
    3. *Akwasi Addai-Abusuapanin*

4. *Nana Antwi Bosiako-Principal Member of the Afia Dwomo Family*

3. *Petitioners Address for Service*
   H/NO: A/H 10, Kenyasi No. 1
4. *Names and address of Petitioners' Counsel/Solicitors:*
   Nana Obiri Boahen and Associates, "Enyo Nyame Ye Chambers", Sunyani
5. *Names and address of Defendants/Respondents/Persons who may be affected directly by the Petition:*
   1. *Nana Adutwumwaa, Queenmother, Kenyasi No. 1*
   2. *Nana Appiah Kubi, Kenyasi No. 1*
   3. *Nana Kwaku Oppong, Kenyasi No.1*
   4. *Kwabena Adjei, Kenyasi No.1*
   5. *Osei Kofi Abiri – Kenyasi No.1"*

Where the Petitioners claim as follows:

a. A declaration that, by custom, convention, usages, and practices at Kenyasi No. 1 it is the 2nd Petitioner who is to be nominated, elected and or enstooled as the Omanhene of Kenyasi No. 1 Traditional Area.

b. An order of perpetual injunction restraining the 1st, 2nd , 3rd and 4th Respondents to be enstooled as the Omanhene of Kenyasi No. 1 Traditional Area until the final determination of the case.

c. An order of perpetual injunction restraining the 5th Defendant from posing, acting and/or styling himself as the would be enstolled Omanhene of Kenyasi No. 1 Traditional Area.

d. Perpetual injunction restraining the 4th Respondent from presenting the 5th Respondent as validly nominated, elected, to Otumfuo Osei Tutu II or anybody or any authority until the final determination of the case.

e. A declaration that any acts done by the 1st to 4th Respondents in respect of the 5th Defendant in any way in respect of the position of Omanhene of Kenyasi No. 1 Traditional Area be declared null and void.

f. Perpetual injunction restraining all the Respondents from collecting any royalties from anybody/entity or aliening any Kenyasi No. 1 stool land to any body, company, etc until the final determination of the case.

From the above claims, it is clear that, the substance of what the appellants herein claimed before the Judicial Committee of the Brong Ahafo Regional House of Chiefs was not different from what was adjudicated before the Asanteman Council.

ACTION TO DISMISS PETITION

The Respondents then filed a motion on Notice praying for an order to dismiss the petition on grounds of estoppel per rem judicatam.

The Judicial Committee of the Brong Ahafo Regional House of Chiefs that went into the motion to dismiss the said petition granted the Respondents request and stated as follows:-

> "*The petition is hereby struck out and dismissed as having been brought in bad faith with cost of one thousand Ghana Cedis (GH¢1000.00) to the Respondents/Appellants and against the Petitioners/Respondents."*

We however deem it expedient to state in some detail the reasons given by the Judicial Committee for dismissing the petition because these are relevant in resolving the issues germane in this appeal.

Out of abundance of caution, the Judicial Committee of the Brong Ahafo Regional House of Chiefs stated in part as follows:-

> *"To be able to understand properly what necessitated the parties to appear before the Asantehene and the Asanteman Council Nananom had to take notice of the fact that the Asantehene occupies a special position in chieftaincy matters in Ghana.*
>
> *"Section 58 (a) of the Chieftaincy Act 759 states:*
> *The following are the categories of Chiefs:*
> *The Asantehene and Paramount Chiefs"*

The Asantehene is the overlord in Ashanti and parts of Brong Ahafo. Indeed all paramount chiefs in Ashanti and parts of Brong Ahafo particularly the Ahafo area owe or swear allegiance to the Asantehene.

Section 72 of the Chieftaincy Act supra states

"A provision of this Act does not prejudice a right of allegiance to which a chief in one region is entitled to from a chief in another region or a right of a stool in one region to property movable or immovable in another region.:

It is in the light of this that the people of Kenyase regard themselves as part and parcel of Ashanti and therefore owe and swear allegiance to the Asantehene.
|
From this Nanaom see clearly the importance and significance of the invocation of the Great Oath of Asante by the 1st Petitioner and Opanin Senkyire regarding the nomination of the 5th Respondent as Omanhene of Kenyase No. 1 by 1st Respondent.

It is the considered view of Nananom that being the subjects of the Asantehene the 1st Petitioner and Opanin Senkyire who invoked the Great Oath whether the Oath was responded to or not made themselves and the root cause of the invocation, who ought to become the Omanhene of Kenyase No. 1 an issue that must be resolved in the court of the Asantehene. This in the view of Nananom is the reason why what took place before the Asantehene and Asanteman Council is a serious issue, a combination of a trial and an arbitration.

Ernest E. Obeng in his book "Ancient Ashanti Chieftaincy" says that "The Oath derives its importance from its reference to a national calamity. It consists of more or less obscure reference to some national and tribal disaster page 59.
For this reason any one invoking an oath must do so for a very grave reason. He should be prepared and indeed that is what he wants to appear before the Chief or the Oman whose oath he has invoked to establish his claim or cause for swearing the Oath.
Nananom have had the privilege of watching the proceedings that took place before the Asanteman Council on the video recording and are convinced that the Petitioners/Respondents were given every opportunity to state their case and lay the claim to the

Omanhene's stool of Kenyase No. 1. However, their Overlord, the Asantehene ruled that he saw nothing wrong with the choice of 5th Respondent by the 1st Respondent as the next Omanhene of Kenyase No. 1.

Having invoked the Great Oath of Asante to contest for the stool, 1st Petitioner and the others who supported him chose their own arbitrators and powerful ones too and must be bound by the ruling. It is instructive to state that in the paramountcies that are subject to the Asantehene, installation of the Omanhene is not complete until the Chief has sworn the Oath of allegiance to the Asantehene. For these reasons, Nananom unanimously grant the application by the Respondents/Appellants"

PROCEEDINGS FOR CERTIORARI BEFORE HIGH COURT

Aggrieved and dissatisfied with the decision of the Judicial Committee of the Brong Ahafo Regional House of Chiefs, the Appellants filed a Certiorari application before the High Court, Sunyani seeking to quash the ruling of the Judicial Committee referred to supra.

In a very terse but incisive ruling, the High Court on 16th September 2010 dismissed the Appellants application for Certiorari.

APPEAL COURT

Again aggrieved and dissatisfied with the Ruling of the High Court, the Appellants appealed to the Court of Appeal, which in a considered and unanimous Ruling delivered on 24th June 2011 also dismissed the Appellants appeal.

SUPREME COURT

It is in exercise of their right of appeal that the Appellants who continue to soldier on with this dispute have launched this final onslaught against the Court of Appeal decision with the following as the grounds of appeal.

ORIGINAL GROUNDS OF APPEAL

1. Since the Asanteman Council purported to try a chieftaincy matter per an arbitral process, the Court of Appeal erred in law in confirming the wrong decision of the High Court.

2. Since the Asanteman Council usurped the jurisdiction of the Ashanti Regional Judicial Committee over the said chieftaincy matter, the Court of Appeal should have concluded that there was an error of law on the face of the record and should therefore have quashed the decision of the Judicial Committee of the Brong-Ahafo Regional House of Chiefs.

3. In view of costs previously awarded against the Appellants herein by both the Brong Ahafo Judicial Committee and the High Court, the costs awarded by the Court of Appeal were too excessive.

4. Additional grounds of Appeal will be filed upon the receipt of the Record of Proceedings.

ADDITIONAL GROUNDS

1. That the motion filed by the Respondents on 10/7/2008 praying for the dismissal of the Appellants petition on grounds of estoppels per res (sic) judicata was not sanctioned by any rule of procedure nor was the said motion a valid preliminary objection in point of law. The said motion was therefore irregular and incompetent, the judicial Committee had no jurisdiction to entertain the said motion. There was therefore an error of law on the face of the record.

2. Since the Judicial Committee concluded that what took place at the meeting of the Asanteman Council was neither an arbitration as claimed by the respondents nor a settlement as claimed by the Appellants, the Judicial Committee erred in law in not dismissing the said motion. The Judicial Committee erred in law in overstepping the bounds of the pleadings and the motion by substituting a strange and unknown legal principle for their judgment there was an obvious error on the face of the record, an error going to the core foundation.

ISSUES ARISING FROM THE GROUNDS OF APPEAL AND THE STATEMENTS OF CASE FILED BY THE PARTIES

After perusing the statements of case filed by learned Counsel for the parties we are of the considered view that the determination of the following issues will completely dispose of the grounds of appeal filed and argued in this appeal.

ISSUES

1. Whether the proceedings that took place before the Asanteman Council can be said to be contrary to article 274 (3) (d) of the Constitution 1992 as well as section 28 of the Chieftaincy Act 2008, Act 759.

2. Whether or not the parties herein can be held to be bound by the decisions taken by the Asanteman Council so as to constitute estoppel.

3. Whether or not the process initiated by the Respondents herein at the Judicial Committee of the B.A.R.H.C wherein the issue of estoppel was raised is a legitimate and or appropriate process.

We will take issues 1 and 2 together.

Learned Counsel for the Appellants has argued before this court that under article 274 (3) (d) of the Constitution 1992, and section 28 of the Chieftaincy Act, 2008 (Act 759) the forum for determination of chieftaincy disputes involving paramount Chiefs are the Judicial Committees of the various Regional House of Chiefs. Learned Counsel therefore concluded that the Asanteman Council, not being a Judicial Committee of an appropriate Regional House of Chiefs had no jurisdiction to settle the Kenyasi No I, chieftaincy dispute.

Learned Counsel also argued that, besides the Judicial Committee's no other body or institution such as the Asanteman Council can use customary arbitration to settle chieftaincy disputes. On this issue, learned counsel referred to the Supreme Court decision in the case of **Darko v Amoah [1989-90] 2 GLR 214.**

Learned Counsel for the Appellants also contended that once the Judicial Committee of the B.A.R.H.C held that what took place before the Asanteman Council was neither an arbitration nor a settlement, the Judicial Committee erred by not dismissing the motion that the Respondents filed at the Judicial Committee of the B.A.R.H.C.

Learned Counsel therefore relied on the case of **Obadzen II vrs Onanka II [1982-83] GLRD** paragraphs 5, page 12.

On the basis of the above cited case, learned Counsel submitted that the Judicial Committee of the B.A.R.H.C should have dismissed the Respondents motion since the issue of oath swearing was an unknown principle they had introduced into our laws as the procedure for commencing actions.

Finally, learned counsel for the appellants argued that the acceptance of Exhibit "F" as a certified true copy of the proceedings of the Asanteman Council breached section 126 and 162 of the Evidence Act, 1975 (NRCD 323). Learned Counsel therefore argued that by relying on the said document and the video coverage which constitute hearsay evidence, a great miscarriage of justice has been done to the appellants. Learned Counsel referred to the case of **Ussher v Kpanyinli II [1989-90] 2 GLR 13** to support his contention.

RESPONDENTS SUBMISSIONS ON ISSUES 1 AND 2

Learned Counsel for the Respondents disagreed with the submissions of learned Counsel for the appellants on the unconstitutionality of using an arbitral process to dispose of a chieftaincy dispute whilst conceding the validity of article 274 (3)(d) of the constitution on the exclusivity of jurisdictions in Judicial Committee's of the various Regional Houses of Chiefs, to deal with chieftaincy cases.

Learned counsel was however quick to distinguish the case of **Darko V. Amoah [1989-90] 2GLR 214** already referred to supra.

Secondly, learned counsel for the Respondents contended that the argument that the Asanteman Council is not a competent body to deal with the Kenyasi No. I Chieftaincy dispute does not hold water.

Finally, on these issues, learned counsel for the Respondent argued that once an appeal is by way of rehearing, this court has to study the appeal record and come to its own decision as to whether or not what transpired at the Asanteman Council is a valid arbitration award, a settlement, or none of the two.

On the basis of the appeal record, learned counsel for the respondent invites this court by reference to cases like **Paul Vrs Koko [1962] 2GLR 213, SC** and **Asano Vrs Taka [1973] 2GLR 312** to conclude that the proceedings before the Asanteman Council were indeed a valid and binding arbitral award.

Article 274 3(d) of the Constitution 1992 provides thus:-

> *"A Regional House of Chiefs shall have original jurisdiction in all matters relating to a paramount stool or skin or the occupant of a paramount stool or skin including a queen mother to a paramount stool or skin."*

Section 28(1) and (2) of the Chieftaincy Act 2008, (Act 759) provides as follows:-

1. There shall be a judicial committee of each Regional House which shall exercise the original and appellate jurisdiction conferred on the Regional House under Sections 26 and 27.
2. The original and appellate jurisdiction of each Regional House shall be exercised by the judicial committee of the Regional House composing of three chiefs approved by the Regional House from among its members."

From the above constitutional and statutory provisions, it is clear that the body charged with the resolution of chieftaincy disputes has to be satisfied that the following criteria has been met:

1. Exclusive original and appellate jurisdiction in matters affecting paramount stools or skins has been conferred only on the Regional Houses of Chiefs.

2. The Regional House of Chiefs exercises that jurisdiction through its Judicial committee.

3. The Judicial Committee members are appointed from among members of the Regional House.

This in effect means that the dispute involving the Kenyasi No. I Omanhene Stool is cognisable before the Regional House of Chiefs through its judicial committee.

However, the proceedings before the Asanteman council as had been stated supra were not initiated under the constitutional provision in article 274 (3) (d) or section 28 of Act 759 stated above.

In order to understand the nature of the proceedings before the Asanteman Council, it is important to go back to the very basics, i.e. what are customary arbitrations and their essential requirements.

Lassey J, (as he then was), in the celebrated case of **Pong V. Mante, [1964] GLR 593 at 596**, defined customary arbitration as follows:-

> *"The . . . practice whereby natives of this country constitute themselves into adhoc tribunals popularly known and called arbitrations for the purposes of amicably settling disputes informally between them or their neighbours which has long been recognised as an essential part of our legal system; provided all the essential characteristics of holding valid arbitrations are present, the courts will undoubtedly enforce any valid award published by such adhoc bodies".*

ESSENTIAL REQUIREMENTS OF A VALID CUSTOMARY ARBITRATION

These are:

1. Voluntary submission to the arbitration.
2. Prior agreement to accept the award.
3. Publication of the award.

See cases of

i. **Ankra v Dabra & Another [1956] 1 WALR 89**
ii. **Manu V. Kontre [1965] GLR 375, S.C.**
iii. **Nyasemhwe v. Afibiyesan [1977] 1GLR 27**
iv. **Asare v. Donkor [1962] 2GLR 176**

In the latter case of Asare v. Donkor, voluntary submission was explained as follows:-

> *"It is only when the person against whom the complaint is made and agreed after such an explanation, i.e. if with full knowledge of the implications he also expresses his agreement to the proposal of the complainant that an arbitration should be so held, that there could be a lawful submission to arbitration by both parties, otherwise not".*

In the instant case, it was the 4th Appellant who invoked the Great Oath of Otumfuo on his own volition upon the 1st Respondent and the others to which she also voluntarily submitted or responded.

From the proceedings at Asanteman Council, it is certain that, as Asante's, the Appellants and the Respondents knew the consequences of the invocation of Otumfuo's Oath. They also knew the composition of the panel, as it were presided over by the Otumfuo sitting in Council with his paramount chiefs.

From the proceedings, the parties were voluntarily allowed to state their case after which some of the panel members made statements or enquires. It was after the proceedings in Exhibit F that the award was published.

In our mind, even though the proceedings at the Asanteman Council in the present instance was not initiated by a summons or complaint, it does satisfy some of the key requirements of a valid customary arbitration.

We accordingly endorse the statement of the court of Appeal that,

> *"In Asante customary practice and procedure, the invocation of the great oath of Asantehene automatically trigger a chain of consequences or actions one of which is the appearance before the Asantehene and the Asanteman Council to show cause for the invocation of the great oath. In the instant case it is not in dispute that the 4th Appellant invoked the great oath of Asantehene against the 1st Interested Party in her capacity as the Queen mother of Kenyasi No I from presenting the 5th Interested party to the elders of Kenyasi No. I as the person chosen to be the next Omanhene".*

It is therefore correct, as the Court of Appeal found that by that process, the 4th Appellant automatically initiated proceedings which took place before the Asanteman Council. The unique position of the Asantehene wherein he sits in council with his paramount chiefs and other chiefs has been given statutory recognition in section 58 of the Chieftaincy Act, Act 759 which is actually a repetition from the previous chieftaincy Acts.

From the statute, it is the Asantehene and paramount Chiefs meaning the Asantehene is above paramount Chiefs. Speaking historically, culturally and traditionally, the authority of the Asantehene extends beyond the geographical location of present day Ashanti Region to parts of Brong-Ahafo such as Kenyasi No I where he is the overlord.

As has been pointed out, it is clear from the evidence on record that the reasons why the 4th Appellant invoked the Great Oath is that the concerns touched on

matters and or causes affecting chieftaincy. A case in point is the decision in the case of **Asano V. Taku & Anor. [1973] 2 GLR, 312**, particularly at 319.

The decision in **Asano V. Taku** firmly established the principle that if the Respondent fails to respond to the oath sworn to by the Appellant for example as in this case, the panel, in this instance the Asanteman council would have lacked the legitimacy and the jurisdiction to go into the matter.

But once the Respondent responded, the jurisdiction of the Asanteman Council would be deemed to have been properly invoked customarily.

Generally speaking, it is the prevailing circumstances in each case that would determine whether the party or parties voluntarily submitted themselves to the arbitral process. Each case has to be decided on its own.

In critically analysing the facts of this case, it is clear that the parties did not choose their own panel to adjudicate the dispute. This is so because once the Great oath of Otumfuo had been sworn, it meant that whether you like it or not, he and the Asanteman Council had to adjudicate. However, considering the fact that the parties ought to have known these basics facts, as subjects of the Golden Stool of Asante, the lack of that ingredient does not obviate the fact that the issues which provoked the 4th Appellant to swear the Otumfuo's oath had been finally settled by the Asanteman Council.

The parties also indicated their acceptance by complying with the award i.e. providing a sheep, and 2 bottles of schnapps and the rendering of the apology to Otumfuo, the Asanteman Council and wished the 1st Respondent and her elders "Debim". **According to Rattray, in his book entitled "Ashanti Law and Constitution" "debim" is defined as "your cause is right". By ordinary rules of logic, it can safely be stated that having accepted the position of the 1st Respondent and her elders in the entire Kenyasi No. I chieftaincy**

dispute as the rightful position then the 4th Appellant must be deemed to bound by the decision of the Asantehene and the Asanteman Council.

In our mind, once this position has been made clear, it is apparent that the Judicial Committee of the Brong Ahafo Regional House of Chief was right in dismissing the petition filed by the Appellants who are all members of the 4th Appellants royal family and have a common interest in the chieftaincy dispute.

In dismissing the petition, we are convinced that even though some of the reliefs the appellants claimed were couched in language that would appear that other reliefs unrelated to the issues that had been dealt with by the Asanteman Council were on the Menu, the value is the same, i.e. since the critical issues of who was qualified to nominate a candidate to fill the vacant Kenyasi No. I paramount stool and whether the candidate nominated by the 1st Respondent had passed the litmus test. Since these matters had been conclusively dealt with by the decisions of the Asanteman Council, there was nothing left to relitigate in the dispute.

In this respect, we would refer to the salient points in the decision of the Asanteman Council already referred to supra which gave the Asantehene's approval of the nomination of the 5th Interested party as the next Omanhene of Kenyasi No. I by the 1st Respondent. The crux of the contention of the appellants in this case is that, because chieftaincy disputes have been exclusively reserved for judicial committee's of Regional Houses of Chiefs, the Asanteman Council lacked jurisdiction to have gone into the dispute.

The first point to be noted is that, the dispute was not determined by the Asanteman Council by virtue of an action commenced pursuant to article 274 (3) (d) of the Constitution 1992 and section 28 of the Chieftaincy Act 2008, (Act 759) and the Regulations made under it.

On the contrary, the proceedings at the Asanteman Council were conducted as a necessary customary practice arising from the swearing of the oath of Otumfuo.

It has been contended that, the decision of the Supreme Court in **Darko v Amoah,** already referred to supra does not allow customary arbitration procedures to resolve chieftaincy disputes.

From the facts of the **Darko v Amoah** case, it is clear that the case is distinguishable from the circumstances of the present case. This is because, in the Darko case, the suit was commenced at the Kyebi Executive and Amantoomiensa Council where the defendant moved for its dismissal on grounds of res judicata.

This plea failed, the tribunal ruling as follows:-

> *"We are satisfied that the defendant has failed to establish a case of res judicata motion therefore fails".*

It is important to note that, the Defendant did not appeal from this ruling but successfully applied for a transfer of the suit to the Judicial Committee of the Akim Abuakwa Traditional Council, where he raised the res judicata issue as a preliminary issue and lost. After a trial on the merits which the plaintiff won the defendant unsuccessfully appealed to the Eastern Regional House of Chiefs. It was the third throw of the dice before the Judicial Committee of the National House of Chiefs that saw a reversal of the plaintiff's fortunes.

It is also significant to observe that, the defendant never suggested that the specie of res judicate that he relied on in the previous suits arose from the finality of an arbitration settlement.

Finally, it has to be noted that, in the Darko case, the suit went to a formal statutory institution such as the Judicial Committee of Abuakwa Traditional Council for adjudication where a writ had been issued.

It is therefore difficult to conceive of such a body i.e. Judicial Committee of Akim Abuakwa Traditional Council as an arbitration panel, when it is exercising its normal functions as a Judicial tribunal.

From the above, it is clear that the **Darko v Amoah** Case cannot by any stretch of imagination be likened to the proceedings at the Asanteman Council between the parties. The two are strikingly different, and whilst the instant appeal was commenced by the swearing of the Great Oath of Otumfuo, the former case of Darko was commenced by petition filed before the Judicial Committee of the Abuakwa Traditional Council.

On the totality of the matters stated supra, it is our considered view that the proceedings that took place before the Asanteman Council and presided over by

Otumfuo Osei Tutu II did not contravene either article 274 3 (d) of the Constitution 1992 and section 28 of the Chieftaincy Act (2008) (Act 759).

Secondly, we are also of the considered view that in as much as Otumfuo and the Asanteman Council, made notable pronouncements on the merits of the dispute between the contesting parties in a forum chosen by themselves and regarded traditionally among the Asante as appropriate, the decision on the merits of the case are binding on the parties therein.

This now leaves us with the resolution of the last issue which is formulated thus:-

Whether or not the process initiated by the Respondents herein at the Judicial Committee of the B.A.R.H.C by raising the issue of estoppels is legitimate and appropriate under the circumstances.

From the appeal record, the Respondents herein filed a motion on Notice supported by affidavit seeking an order from the Judicial Committee of the B.A.R.H.C to dismiss the petition filed by the appellants on grounds of estoppel per res (sic) judicata.

The Respondents in a 23 paragraphed affidavit chronicled in great detail the events that led to the invocation of the Great "Ntamkesie" oath of the Asantehene by the 4th Appellant and the subsequent settlement and publishing of the awards by the Asanteman Council presided over by the Otumfuo.

Even though the Appellants herein filed a 36 paragraphed affidavit in opposition, the substance of what happened at the Asanteman Council was not denied. The point of departure was the claim by the Appellants about the inaccurate nature of the record of proceedings procured from the Asanteman Council alleging that there were differences in procedure and content.

This court just like all the other courts before it, (to wit, the Judicial Committee of the Brong Ahafo Regional House of Chiefs, the High Court, and Court of Appeal) is not convinced about the claims of the Appellants doubting the authenticity of exhibit "F", the record of proceedings at the Asanteman Council.

What must be noted is that, even if the video recording could be doctored, are the appellants alleging that it was doctored to include huge personalities like Otumfuo, Osei Tutu II in attendance with his paramount Chiefs? We do not think so.

Besides, there were other pieces of evidence on record from which the Judicial Committee came to its conclusion.

This court is therefore of the view that the process by which the Respondents invoked the jurisdiction of the Judicial Committee of the B.A.R.H.C in filing the motion to dismiss the petition was a legitimate one.

Furthermore, that application raised substantial issues of fact and law in respect of which the appellants were given the opportunity to respond. The Judicial Committee only adjudicated upon the application after an appraisal of the issues raised in a judicial manner.

In our humble opinion, what the appellants should have done was to have appealed against that decision and not applied for certiorari.

This is because, there are plethora of legal authorities that certiorari would only issue to quash the record and decision of a lower court or tribunal if the error of law complained of was apparent on the face of the record or where the lower court acted in excess or without jurisdiction or abused its powers or is in breach of the rules of natural justice.

In the application for certiorari before the High Court, Sunyani, the appellants threw in every conceivable arsenal that they could lay hands on contrary to settled principles of law. It is thus not clear on what legal grounds the certiorari application was brought.

For example, in paragraph 10, 11, 12, 13, and 14, the appellants urged upon the High Court the following grounds:-

i. Error of law

ii. Error of law in the arbitration proceedings at the Asanteman Council

iii. That evidence should have been led at the Judicial Committee

iv. That what happened at the Asanteman Council was an attempted settlement and not an arbitration.

v. That the video recording was not authentic.

The appellants however failed to demonstrate one particular error of law upon which they sought to quash the proceedings before the Asanteman Council.

Apart from the error of law which they failed to demonstrably establish and identify, all the other issues are not grounds to impeach the ruling and or orders of decisions of lower courts or tribunals.

It must be noted that, practitioners who invoke the supervisory jurisdiction of the High Courts must ensure that they act within the guidelines and framework issued by the courts over the years. This is especially crucial because, if in their indecent haste to pursue applications grounded on prerogative writs or judicial reviews as they are now called valuable time is lost, such that, the party cannot legitimately pursue an appeal process because of time lapse, then that party would have lost the chance to litigate completely.

We will like to reiterate the views of this court when it spoke with one voice restating the principles of judicial review through Dr. Date-Bah JSC, in the locus classicus case of **Republic v High Court, Accra, Ex-parte Commission on Human Rights and Administrative Justice (Addo – Interested Party) [2003-2004] 1 SCGLR 312**

> *"The court would re-state the law governing exercise of judicial review as follows: Where the High Court (or for that matter the Court of Appeal) has made a non-jurisdictional error of law, which was not patent on the face of the record (and by the "record" was meant the document initiated the proceedings, the pleadings, if any, and the adjudication but not the evidence nor the reasons unless the tribunal chose to incorporate them), the avenue for redress open to an aggrieved party was an appeal, not judicial review. Therefore, certiorari would not lie to quash errors of law which were not patent on the face of the record and which had been made by a superior court judge who was properly seised of the matter before him or her. In that regard, an error of law made by the High Court or the Court of Appeal, would not to be regarded as taking the judge outside the court's*

jurisdiction, unless the court had acted ultra vires the Constitution or an express statutory restriction validly imposed on it."

It must be noted that even though the above cited case and others listed hereunder refer to superior courts i.e. High Court and the Court of Appeal, the restatement of the law holds good for lower courts and adjudicating tribunals, such as has happened in this case.

See also, the following cases:

1. **Republic v High Court, Sekondi, Ex-parte Ampong aka Akrufa Krukoko I (Kyerefo III and others Interested Parties) 2011 2 SCGLR 717, holding I**

2. **Republic v High Court, Accra, Ex-parte Soku [1996-97] SCGLR 525 at 529**

3. **Republic v Court of Appeal, Accra Ex-parte Ghana Cable Co. Ltd. (Barclays Bank Ghana Ltd. – Interested Party) [2005-2006] SCGLR 107 at 118**

Where Dr. Twum JSC speaking for the court stated thus:

"*Certiorari is not concerned with the merits of the decision. It is a complaint about jurisdciton or some procedural irregularity like the breach of natural justice."*

4. Republic v Accra Circuit Court, Ex-parte Appiah [1982-83] 1 GLR 129

5. Finally see the case of **Republic v High Court Accra, Ex-parte Industrialisation fund for Developing Countries [2003-2004] 1 SCGLR**

From all the above cases, and several others which learned Counsel referred us to, the central theme running through them is that where the High Court makes a non-jurisdictional error of law which is not patent on the face of the record, such as in the instant case, the avenue for redress is an appeal.

We are therefore of the considered view that the process initiated by the Respondents in the Judicial Committee of the Brong Ahafo Regional House of Chiefs was proper and legitimate.

Before we conclude this appeal, there is a small matter that must, be dealt with. Even though we have substantially dealt with all the matters involved in this appeal, there is one small matter left to be disposed off, and that is the question of excessive costs awarded in this case.

We have considered that ground of appeal and we are not convinced that a strong case has been made which will compel us to interfere with the exercise of discretion by the Court of Appeal. That ground of appeal is also therefore dismissed.

The Appeal therefore fails in its entirety and is accordingly dismissed. In the circumstances, the appeal against the Court of Appeal judgment dated 24th June 2011 by the appellants is dismissed in its entirety.

(SGD) J. V. M. DOTSE
JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

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

(SGD) R. C. OWUSU (MS)
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