IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: WOOD (MRS.) CJ, PRESIDING
ANSAH, J.S.C
YEBOAH, J.S.C
BONNIE, J.S.C
AKAMBA, J.S.C

CIVIL APPEAL
NO. J4/42/2013
26TH FEBRUARY, 2014

ADOMAKO ANANE — **PLAINTIFF / APPELLANT / RESPONDENT**

VRS

1. NANA OWUSU AGYEMANG
(SUBSTITUTED BY NANA BANAHENE)

2. NANA YAW GUAKRO
(SUBSTITUTED BY NANA ASAMOAH OKYERE)

3. JERRY DEE AMOAH

4. AKWASI DONKOR
(SUBSTITUTED BY NANA KWAKU DWOMOH) — **DEFENDANTS / RESPONDENTS**

5. ADDO ALIAJA — **APPELLANTS**

6. AMMA KWAAH
(SUBSTITUTED BY NANA KWAKU DWOMOH)

7. KWABENA ANTOH
(SUBSTITUTED BY AKUA ODE)

8. AMMA NHYIRAA

JUDGMENT

WOOD (MRS.), CJ;

The oft quoted legal maxim "Justice delayed is justice denied", coined by the British politician, William Gladstone (1809-1898), is no mere cliché. The right to fair trial in a timely manner is neither a courtesy nor a favour, but a fundamental right. Protracted delays in the administration of justice, impact negatively not only on those who access the courts, such as the victims of crime, accused persons who are acquitted at the end of their trial, parties in civil proceedings and their privies, lawyers who practice before the courts but indeed the entire justice system. The judicial history of this relatively simple family related land matter, which was commenced in the High Court Kumasi, as far back as the 4th of April 1974, provides an insight into the harmful effects of systemic delays in the administration of justice. Regrettably, it has taken forty long years, a whole generation, for this case to finally find its way into this court; the court of last appeal. We hope court business shall always be managed in ways that will not occasion a repeat of this parody of justice.

BACKGROUND FACTS

The Plaintiff/ Appellant/ Respondent, (Respondent), a senior member of the immediate Asona family of Asamankama-Offinso, acting on behalf of himself and the family, took out a writ of summons against the Defendants /Respondents/ Appellants (Appellants) jointly and severally for declaration of title to certain properties listed in a schedule attached to the statement of claim, recovery of possession of those properties and an order of perpetual injunction. This appeal relates to one of these properties, the house numbered 0.1. 92, Ashanti-New Town, Kumasi. The original claim which was in relation to all those properties was directed against only two named executors of one Osei Hwirie, deceased, the person around whom this entire controversy revolves. But, by an order of Anterkyi J, both writ and statement of claim were amended to include the 3rd to 8th Appellants, who are beneficiaries of the will of Hwirie. Again, in the course of time, the Respondent limited the claim to only the house numbered 01.92.

The case presented by the parties in this legal battle is in reality so uncomplicated that it is most unfortunate that it has taken so long for it to be brought to closure. The Respondent's case is that in 1921, Kwabena Amankwaa, deceased, the maternal uncle of Hwirie, acquired plot No 0.192, from the Chief Commissioner of Kumasi for a period of twenty –one years certain, and constructed a swish building thereon. On his death intestate some six months to the expiry of the said lease in 1942, Hwirie in his capacity as customary successor inherited the property, as family property. However, some four years later, in 1946, Hwirie acquired the self same property, from the Asantehene, this time round, in his personal name, for a period of ninety –nine years. He pulled down the swish building and constructed a sandcrete building which he however later devised under his will, to the 3rd-8th Appellants as beneficiaries. The Respondents, contending that the lease which Hwirie as customary successor subsequently acquired in 1946, together with the building thereon, constituted family property and not his self acquired property, sued on behalf of the family in protection of its property.

Not surprisingly, the Appellants countered the claim. They maintained that the family's interest in the property was completely extinguished when the late Amankwaa's lease expired in 1942. They further contended that with the property having lost its family character altogether, Hwirie, was legally entitled to and did in fact take out the subsequent lease in his individual capacity, and was indeed entitled to dispose of it in the manner that he did, namely, as his self acquired property.

As is to be expected, the pleadings on both sides raised a number of pertinent triable issues, as is borne out by both the summons for directions and additional issues. It took a whole decade, after the commencement of the action, for judgment to be pronounced by the High Court differently constituted. While the evidence was received by Korsah J, who reserved judgment on 15th August 1980, the decision, with the full reasons reserved, to be given at a later date, was delivered by Okunnor J on the 21st of August 1986, nearly six years thereafter. But the Respondent, who lost the action, would not wait for the promised reasons. Some five days thereafter, aggrieved by the decision, he appealed to the Court of Appeal; understandably, on the oft used omnibus ground that:

"The judgment is against the weight of the evidence."

For reasons not apparent on the face of the record, this judicial promise by Okunnor J, that he would provide the reasons for dismissing the claim, never came to be honoured.

Again, regrettably, it took another two decades for the Court of Appeal to set aside Okunnor J's decision, on the ground that when he took over the case from a previous judge; he failed to formally adopt the proceedings before pronouncing the decision complained of. The appellate court consequently ordered a de novo hearing.

When the parties appeared before the new trial judge Debrah J for a fresh hearing as ordered, the learned judge, relying on an agreement of the parties, decided to dispose of the entire action by way of legal arguments only. He neither adopted the proceedings nor took fresh evidence from the parties and their witnesses. He ruled:

"As things stand now, the court will take formal evidence in this matter. The Plaintiff says he wants to go by relying on documentary evidence. The Court has no option but to go by the way the parties have directed. On the defendants, they must react to what counsel for the plaintiff is going to file and come back for a date.

The filing must be within a week from 2 weeks. Counsel on the other side must comply within 2 weeks."

Thus, on the 16th of March 2010, the court gave judgment dismissing the Respondent's claim, in the words of the trial judge:

"as basically unexisting."

The Respondent, who was aggrieved by the results, successfully appealed the decision. It is the appeal against that decision of the Court of Appeal, which we now proceed to hear and pronounce on.

We take issue with the trial judge on this stand, particularly, in relation to the hapless statement that it had no option but to bow to the dictates of the parties to dispose of the case by legal arguments only. Clearly, given the state of the pleadings, the judge's primary responsibility was to ensure that all the factual issues were resolved on the basis of the evidence. As the trier of facts, he should

not have shirked that responsibility or sacrificed it on the altar of expediency or convenience. Given this and the appellate court's express orders, his duty was to ensure that either the proceedings were adopted to provide the basis of the fresh hearing; or failing which under the existing law; he ought to have taken evidence afresh from the parties and their witnesses. To do neither was not the right step in the circumstances. In this process, we doubt if he would have run into any difficulties with the parties, particularly the Respondent. Was he not the one who complained about this lacuna in the proceedings before Okunnor J? Was the failure to formally adopt the proceedings not the ground on which he successfully got the decision of Okunnor J completely nullified and a de novo hearing ordered?

Courts of law must follow the law. As a rule, courts are not expected to endorse concessions, compromises or agreements by parties which are contrary to, inconsistent with or not warranted by any rule of law or procedure. Thus, in any proceedings, where the step taken by a party or parties violates any constitutional or statutory provision or is not sanctioned by any substantive rule of law or procedure, the court has a duty to reject it, notwithstanding the fact it was based on the mutual agreement of the parties. A court should not, in the face of substantive disputed facts, yield to parties' invitation to resolve a case through legal arguments only.

We find that the court failed in its primary duty entrusted to it by the appellate court and the learned justices of the Court of Appeal must be commended for finding a way to resolve the legal quagmire arising from the breach of duty by the Debrah J court.

At the hearing of the appeal, the court decided nonetheless to take into account the evidence on the record although they had no formal consent of the parties to do so. It was through this process that court was enabled to determine the issues of fact central to the claim. As we shall demonstrate shortly, the factual findings are supported by the record and we affirm these findings, albeit via a different reasoning process, which as we would demonstrate, would make a major inroad into our jurisprudence on the nagging question of the adoption of proceedings. In this regard, and for the purposes of clarity, we produce in extenso the appellate court's reasons for utilising the evidence on the record.

The court observed:

“There is a preliminary issue that we deem important to consider in this appeal.

In the written submission of Counsel for the Defendant, he raised casually the issue that since lawyers for the parties agreed not to go through the drudgery of retrial but to determine the issue on legal arguments, what the trial judge in law could do was to rely on the pleadings which span pages 1-74 of the record and not on the proceedings which are from pages 75-174 of the record which were not adopted.

We have considered carefully the issue raised by counsel for the plaintiff. It is trite law that litigation cannot go on in perpetuity. It must come to an end at some point. And since an appeal is by way of rehearing we are enjoined to consider the entire record of appeal which the parties obviously agreed to its content at the settlement of record stage at the Court below. We cannot therefore shut our eyes to what is before us.

Under Rule 32 (1) of the Court of Appeal Rules, 1997, C.I. 19 the Court is empowered as follows:

> “(1) The Court may, in respect of an appeal before it, give a judgment and make an order that ought to have been made and to make a further or any other order as the case may require including an order as to cost.”

The Supreme Court in recent years leans more towards judgments that go to the merits or roots of a case instead of technicalities. Thus in HALLE AND SONS A. S. VRS BANK OF GHANA & ANOR (2011) 34 G. M. J., the Supreme Court, commented on the need to reject technicism as a judicial approach to case resolution. On the principle of non-compliance with procedural technicality, the Supreme Court in Holding (2) held thus:

“The words of Lord Denning MR. in HARKNESS VRS BELLS ASBESTOS & ENGINEERING LIMITED (1967) 2 QB 729 at 736 CA”

> “It can be asserted that it is not possible for an honest litigant in her majesty’s High Court to be defeated by any mere technicality, any slip, and any mistaken step in his litigation.” The same can also be said of our Courts

in Ghana in view of our rule 79 of C.I. 16 rule 63 of C.I. 19 and Order 81 of C.I. 47."

We commend the learned justices of appeal for finding a way to define the legal rights of the parties, deploying Rule 32 (1) of the Court of Appeal Rules, 1977, CI 19, for the purpose. They cannot altogether be blamed for employing this procedure to address the issue facing them. At the date of the hearing of the appeal, the decisional law, which on the principle of stare decisis they were bound to follow was the legal principle enunciated in the case of Awudome (Tsito) Stool v Peki Stool [2009] SCGLR 681; wherein we affirmed the proper legal procedure for the adoption of proceedings in these terms:

"(1) The established rule was that when a case has been transferred from one High Court to another, the parties had the option to adopt the proceedings or to have the trial started *de novo*. That was the common law rule which had been adopted and practiced for many years in the courts of Ghana. *Boama v Okyere* [1967] GLR 548 and *Coleshill v Manchester Corporation* [1928] 1 K 776 cited."

We fully recognise that the learned justices had no option but to follow this principle, hence their resort to Rule 31 (1) of C I 19 to resolve the difficulty which confronted them. While we agree with the result reached via the invocation of that rule, we nonetheless respectfully think the rule was wrongly applied in this instant case, given that as it's sub- title clearly states, the rule merely confers on the court the power to deliver judgments and make appropriate orders thereto in relation to appeals before the court, having regard, implicitly, to the evidence before the court. By evidence is meant evidence which properly speaking, forms part of the relevant record. And yet we know that the evidence received by Korsah J had not yet been adopted as part of the record, while at the same time the Rule 31 (1) of C1 19 does not make provision for adopting evidence received by a previous judge. But even if the court's approach can be justified, the state of the law as decided hereunder will provide or serve as an additional legal buffer to the appellate court's reasoning.

In this case then, we hereby proceed to employ a more radical and constitutionally based approach to determine the rather nagging question of what the proper legal procedure is for adopting proceedings before a previous judge. The resolution of this question will then pave the way for the adoption of the evidence received by

Korsah J, qualifying it to form part of the record (which Debrah J never adopted) and which would then be used to resolve the critical issues of fact arising from the pleadings. Since an appeal is by way of re-hearing, we will use this evidence, when finally adopted at this re-hearing, for the purposes stated. The pronouncement on this crucial issue will alter the course of our jurisprudence, in that it would provide a more just and far lasting legal solution to the challenge which has faced our courts in the past and created enormous difficulties for the smooth and speedy administration of justice in our jurisdiction. We concede that the time is long overdue for a volte-face from the age–old legal position of no agreement by all the parties no adoption of evidence that the courts have unremittingly followed for decades. At this re-hearing, we will not tie ourselves to the existing legal principle, but liberate ourselves from its shackles.

The foundation of this principle which we have fastidiously held on to was laid in the case of Boama v Okyere [1967] GLR 548, in which it was held that:

"Although the usual practice was to hear evidence afresh the court did have power on the peculiar facts of the case so permitted, on grounds of convenience and expense to order that the evidence in the first trial be adopted in the second trial by consent of all parties."

In this court, we were persuaded by this authority and the English case of Coleshill *v* Manchester Corporation [1928] 1 K 776 to form our decision in the case of Awudome (Tsito) Stool v Peki Stool (supra).

Our decision triggered the thought provoking editorial comments of the learned author, Dr S.Y. Bimpong – Buta, who strongly advocated a departure from our firmly held legal position.

This case provides us with the opportunity to utilise the jurisdiction conferred on us by article 129 (3) of the 1992 Constitution to depart from our previous decision which we find rather archaic, retrogressive and producing unjust results.

The article 129 (3) states:

"(3) The Supreme Court may, while treating its previous own previous decision as normally binding, depart from a previous decision when it appears to it right to do

so and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law."

We now give the reasons for our departure from the previous decision of this court. In the administration of justice, transfers, ill health, death, resignations, retirements, and other vicissitudes of life from which the judiciary is not spared have, unavoidably necessitated the transfer of part heard cases from one court to another differently constituted; that is from one judge to another. The first question which arises in such cases is whether the new judge must adopt the evidence taken by the previous judge and continue from where he or she left off or the case be retried or heard de novo, namely that fresh evidence be received. Hitherto this ground breaking decision; our courts have adopted proceedings, namely the evidence, only where all the parties have given their unequivocal consent. But more often than not, this consent has, without valid reasons, unreasonably been withheld. Under such circumstances, judges have, in desperation thrown their hands in the air and yielded to a de novo hearing, leading to needless delays.

The main policy reasoning behind this approach is the thinking that the new judge can only serve justice if he or she saw and heard the witnesses to enable a close monitoring or observation of their demeanour. And yet, speaking for this bench as presently constituted, our judicial experience, cumulatively spanning a period of over a century has taught us that hardly does the demeanour qua demeanour of witnesses play a significant role when evaluating the credibility of witnesses. Courts tend to rely on some more reliable criteria such as documentary evidence, the testimony of disinterested witnesses, the implausibility or otherwise of narrations given in court, to arrive at their findings and conclusions. As noted by the learned author inter alia, (see the editorial comments in Awudome (Tsito) Stool v Peki Stool (supra)) :

"The argument based on observation of the demeanour of parties and witnesses is not always tenable, especially where that trial lasts for many weeks; months or years as is common in the courts. The effluxion of time may cause memories to fade, wane or totally forgotten and, in that event, there can be no legitimate reliance on demeanour which cannot be recollected.

…If the specific observation is not apparent on the face of the record, it may be attacked as being speculative. If the observation is properly recorded and is apparent in the proceedings, the second trial judge can make use of them as the basis for commenting on or evaluating the credibility of parties and witnesses. In that event, the reason for insisting on trial de novo will not be applicable."

And as he further urged:

"On the other hand, arguments for trial de novo may be countered on the following grounds: (i) the protracted trials and delay in the delivery of judgments; (ii) they afford parties undue advantage to reconstruct their case and thus waste more time; (iii) they encourage parties to seek to embellish or improve their case if they believe that their performance or the performance of their witnesses did not go the way they wanted; (iv) they can sometimes lead to denial of justice where the witness or party is dead or otherwise unavailable and there is no other means of haring the truth except to rely on what has already been reproduced by the court under cross-examination in the previous proceedings; (v) there will be denial of justice where vital exhibit is lost or otherwise unavailable but details of it are on the record and could have been used to write the judgment if the previous proceedings had been adopted; and (vi) in fact in the event of the last two reasons, trials may have to be discontinued or cases abandoned or justice denied when, indeed, adoption of the record would have saved the continuation of the trial and the entire case."

The argument against de novo hearing is so cogent and compelling that sound case management policy reasoning alone constitute a sufficient basis for charting a new legal path in our jurisprudence. We would, therefore state the law as follows. In civil proceedings, the ultimate question of whether or not evidence already adduced before a previous judge be adopted should not rest on the parties' consent. It should exclusively be at the discretion of the new judge who takes over the partly heard case. Since this involves the exercise of a discretionary jurisdiction, we will identify some of the factors that must be taken into account to arrive at this decision. The judge's broad and primary concern must be to ensure that the adoption of the proceedings would not result in any miscarriage of justice. Specific factors that would influence the decision would include the length of time that the case has been on the court's calendar, the stage at which a trial has reached, the

number of witnesses already called, the disputed issues, the nature of the evidence-mostly narrative or documentary, weighty objections by either party, if any, to its reliability, the availability of the witnesses who has already testified, the quality and reliability of the record or transcript.

In this appeal, we have before us a reliable transcript of the proceedings, signed by the judge who received the evidence. We have not the least evidence of the slightest objection from any of the parties' relative its reliability. To the contrary, the Respondent's lament at one time had been that the evidence was not adopted in accordance with the law. Again, the availability and or memory of the only parties and witnesses who may happen to be alive and who had earlier testified has not been guaranteed, in respect of this forty year old case. On these bases, we will adopt the proceedings and, at this re-hearing, use the evidence to resolve the disputed facts which are central to this case.

GROUNDS OF APPEAL

Having settled this important question, our next duty is to examine the Appellants' in the light of the impugned judgment. The Appellants appealed the decision on the following grounds:

1"That the judgment is against the weight of evidence adduced.

2 That the learned Justices of Appeal either ignored or failed to consider clear evidence on record especially the contents of Exhibit "A" which clearly stated that Kwabena Amankwaa's lease which commencing from 1st July, 1921 expired on 30th June, 1942 and thereafter Osei Hwidie (sic) was given a lease in the form of a yearly tenancy by the Asantehene dated 26th June, 1946 and commencing from 1st February, 1946 until same was terminated on 2nd September, 1953. Thereafter Osei Hwidie (sic) was given a lease dated 22nd January, 1954 commencing 1st October, 1953 and expiring 31st March, 2052.

3 The learned Justices of Appeal misdirected themselves when they held that Osei Hwidie (sic) invoked the renewal clause in Kwabena Amankwaa's 1921 lease to renew the expired lease in his name instead of applying for his own lease thus stamping his resultant lease with family character when there is clear and ample evidence on record that upon the expiring of Kwabena Amankwaa's in 1942, Osei Hwedie was given a yearly lease by the Asantehene in 1946, which run from year to year until same was terminated on 2nd September, 1953 and a fresh long lease was granted him on 22nd January, 1954 for 98 years, 4 months commencing 1st October, 1953 and expiring 31st March, 2052.

4 The learned justices of Appeal erred in law when they refused to hold that Kwabena Amankwaa (sic) is choosing to govern his transaction by English law was bound by the dictates and terms of the English law of leases."

What triggered these grounds of appeal and the long arguments in support thereof? After reviewing the evidence on the record, their Lordships in the appellate court ruled, inter alia:

"It is clear from letter number 645/1794 that there was an option to renew clause in the Lease of Kwabena Amankwah (sic) which expired on 30th June 1942. The Lands Department then gave him notice for the renewal of the lease. This is confirmed by the fact that Osei Hwirie in his Affidavit of 31st December, 1942 "prayed that the lease be renewed in my name instead of Kwabena Amankwah (sic) deceased." [Emphasis ours].

Subsequently Osei Hwirie's name was entered in the record, the lease having been renewed for a further ninety-nine years. We are unable to go along with the submission of Counsel for the Defendant in the instant case in view of the above documentary evidence. This is because it is not in dispute that Osei Hwirie succeeded Kwabena Amankwah as the customary successor and it is clear that Osei Hwirie did not take a fresh lease. He rather exercised the option to renew inherent in the lessee Kwabena Amankwa in the original lease and had the lease renewed in his name. There is no evidence of a yearly tenancy as argued by Counsel for the Defendant between the Asantehene and Osei Hwirie. The renewal in the name of Osei Hwirie occurred as per letter dated 8th January 1943 barely six

months and eight days after the expiration of the initial term of the lease. So the question is when could such yearly tenancies have been entered into and for which years? It is also not in dispute that Kwabena Amankwah constructed a swish building on the plot. The fact that Osei Hwirie after the renewal of lease pulled down the swish building and constructed a sandcrete storey building does not detract from the duty he was expected to perform as customary successor. Thus in Kusi & Kusi vrs Bonsu [2010] SC GLR 60, in the majority decision of the Supreme Court it was held in holding (7) that;

"The sound and well settled principle of customary law, intended to protect family property from being converted into private property, would imply that even if Asante had used his own personal resources, ingenuity and the best of his negotiating skills in acquiring the property he did so on behalf of the family and not for himself. The principle, which had been accepted and applied in a number of cases was that if any member of a family used his or her own funds to recover property lost to the family property would revert to its family character it would not become the individual's private property. On the principle, the disputed property in the instant case could not be described as a self acquired property of Asante the deceased head of family".

It is these central findings and conclusions in this case that has led the Appellant under grounds 1, 2, and 3, to criticize the judgment as being erroneous. Our understanding of the Appellants' long arguments built around English authorities is that, since Amankwaa obtained his original lease under English common law, English law governed his transaction, as a result of which Amankwaa's interest was effectively extinguished when the lease expired. The further argument is that Hwirie was subsequently at liberty to legally obtain the subsequent lease in his personal name. The argument ran thus:

"In the present case, Kwabena Amankwaa, the original family member who acquired the land died in 1941and his lease expired in 1942. The interest of Kwabena Amankwaa inherited by Osei Hwedie expired on 30th June, 1942and if anything at all, the family's interest and character in the land terminated with the lease.

Until 1st February, 1946 when the Asantehene gave Osei Hwidie (sic) a yearly tenancy, the property did not belong to Kwabena Amankwaa or his family or even to Osei Hwedie (sic). The interest Osei Hwedie (sic) acquired as a yearly tenant was by a written conveyance conferring the status of a yearly tenant on him and the Asantehene gave his lease in the capacity as a lessor who had re-entered and repossessed the land upon the expiry of a lease."

Respondent Counsel's simple answer to the argument is that:

"The issue which is of paramount interest is whether or not OSEI HWIRIE, whose name was initially only inserted into the records of the Lands Department because he was the 'INHERITOR' of the estate of KWABENA AMANKWA, can now claim that the property which he inherited as Customary Successor, has now become his own BONA FIDE property because instead of the yearly tenancy which he took upon the expiration of the initial lease, he has now taken a long Lease.

To answer this question, the position of the Lessee at the time that he was being granted the long Lease is most important.

OSEI HWIRIE, at the time of the long lease was Customary Successor of KWABENA AMANKWA.

As Customary Successor, he was a fiduciary for the Family, for the law then was that upon the death INTESTATE, of an AKAN MAN, his personal property became family property. The period of Succession by OSEI HWIRIE, commenced from the early 1940's and the then firm legal position was that "In Customary Law, as soon as a Successor is appointed to succeed a deceased member of a family, the self-acquired property left by the deceased person vests in the said Customary Successor who holds same for and on behalf of the family." PLEASE see the case of **DOTWAAH VRS AFRIYIE:** [1965] **GLR** at PAGE 257.

My Lords, if it is admitted that OSEI HWIRIE until his death, remained the Customary Successor of the late KWABENA AMANKWA, then it is submitted that it was his duty to take ALL legitimate steps to guard or protect for the family the properties he was holding in trust for the family as a result of his being the Customary Successor.

It was his duty as Customary Successor to ENHANCE if need be, the said properties.

And I submit that taking a long Lease in order to redevelop the property into a more permanent Sandcrete Structure is an enhancement within the scope of his duties as Customary Successor."

As Defendant counsel rightly urged and was correctly answered by the appellate court, the question is whether the lease subsequently acquired by Osei Hwirie validly devolved on him in his personal capacity such that he can dispose of it in the manner he did or did he acquire it in trust on behalf of the family?

We find the Appellants argument unsustainable. The fiduciary responsibilities which devolve on a customary successor who holds property in trust for and on behalf of the family at customary law, is not dependent on the mode by which that property was originally acquired. The legal authorities which define the duties and responsibilities of customary successors, as typified by such cases as In Re Kwao v. Nortey [1884-86] GLR 144, do not draw a distinction between properties acquired under the English common law and those acquired at customary law. At customary law, property acquired by an individual which upon death devolves on the individual's family as family property does not lose its family character on the sole basis that the mode of acquisition was not under customary law, but common law. A customary successor is not entitled to handle with less care and trust inherited family property, which property was originally acquired under customary law. The rules on accountability, transparency, ameliorating the family property, ensuring that it does not suffer waste apply with equal strictness to property acquired by the original owner at customary law. Customary law, detests, frowns upon and abhors dishonest or unjust gain, unjust enrichment, inequity, fraud, theft, roguery, collusion and the like.

The findings and conclusions drawn and reasons assigned by their Lordships of the court of appeal that Hwirie entered into the ninety- nine years on behalf of the family and held same albeit, in his name in trust for the family is not only borne out by the evidence, but so weighty that we are bereft of any legal basis for reversing them. This case is clearly distinguishable from the old case of Santeng v Darkwa 6 W.A.CA. 52. On Counsel's own showing, the decision in that case

turned on its own peculiar facts, in which as he himself brought out, the family property had been totally abandoned. Not so in this case, where as per the Appellant's own affidavit he used to apply for the renewal, he was taking the step solely on account of his position as successor and inheritor, albeit in his own name. When all the paragraphs of that affidavit are purposively read as a whole, which in any event is the proper approach for the construction of documents, we come to no other conclusion than that he acquired the lease for and on behalf of the family. The paragraph (iii) of the said affidavit reveals clearly that the invitation for renewal of the lease, on its expiry, was extended to Amankwaa, the original lessee who unfortunately had passed. Obviously, Appellant's duty then was to utilise that information which he had obtained in the best interest of the family, not to advance his personal interest. To hold otherwise is to undermine the law on fiduciary relationships, while endorsing such negative acts as fraudulent breach of trust, bad faith and the like. We find their Lordships thinking on this pertinent issue so apt that we deem it expedient to reproduce same.

" In our view, a customary successor so appointed by the family stands in a fiduciary relationship with the family. It is his duty not only to take over the Estate of the deceased but hold it in trust not only for himself as a beneficiary but the family members entitled to a share of the Estate. His duty further entails the protection of the family property and to enhance it if possible for the family. Thus as the custodian of the family property in his hands it is incumbent on him at all material times to act in good faith vis a vis the family and the family property."

Under no circumstances should the customary successor set up an adverse interest to that of the family."

In the same vein, we find the appellate court's findings and conclusions on the issue of whether the Respondent had the capacity to sue, supportable on both the facts and the law. As rightly found by the court, the Respondent's case fell within the exceptions created under Kwan and Nyieni & Anor [1959] 1GLR 67 CA which principles have been dutifully followed in a number of decisions of this court including the more recent case of Ashalley Botwe Lands, In re; Adjetey Agbosu v Kotey;[2003-2004] SCGLR 420. The Respondent was faced with the case where the head of family who ought to institute the action to preserve the subject family properties was himself a beneficiary under the will of Hwirie with regard to the

same properties. Definitely, at law Appellant has the legal right and capacity to sue in protection of those family properties.

We are satisfied with the final result reached by the court of Appeal in this matter and we fully endorse same. In the result, this appeal fails and the same is hereby dismissed.

Finally, the Respondent is not entitled by way of cross appeal to a variation of the costs awarded in the court below or additionally an order of accounts. The costs awarded involved the exercise of discretionary power. It has not been proven that this jurisdiction was wrongly exercised. Again, the Respondent's prayer for the order of accounts which was not included in the notice of Cross- Appeal, and was put in only casually at the tail end of Counsel's address and therefore appeared more as a footnote than a well deserved order on the strength of the evidence, must be declined. Incidentally, the order for accounts was not one of the reliefs endorsed on the writ. It is therefore not surprising in the least that the case was not additionally fought along this line. This explains why no evidence was led in support of the same.

(SGD) G. T. WOOD (MRS)

CHIEF JUSTICE

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA

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