**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE SUPREME COURT OF GHANA**
**ACCRA- GHANA, A.D.2014**

**CORAM: ADINYIRA (MRS), J.S.C. (PRESIDING)**
**OWUSU (MS), J.S.C.**
**ANIN YEBOAH, J.S.C.**
**BAFFOE-BONNIE, J.S.C.**
**AKAMBA, J.S.C.**

**CIVIL APPEAL**
**NO.J4/1/2014**

**21ST MAY 2014**

**EBUSUA PANYIN KOFI ESSUON ….. PLAINTIFF/APPELLANT**
**/APPELLANT**

**VRS**

**CHARLES KOFI BOHAM ….. DEFENDANT/RESPONDENT**
**(SUBSTITUTED BY EKOW LAMPTEY) RESPONDENT**

# JUDGMENT

## ANIN YEBOAH J.S.C; -

On the 21/05/2014, we allowed the appeal in this case and reserved our reasons. We now proceed to give our reasons.

The facts of this appeal appear not to be in any controversy whatsoever as the case was not determined on the merits at the trial court. The facts of this appeal as by the Court of Appeal are as follows:

"On the 5th of June, 1981 EBUSUAPANYIN KOFI CHARLES BOHAM, the plaintiff therein, hereafter referred to as respondent issued out a Writ of Summons against Opanyin Kofi Kwei and Opanyin Kweku Annan in Suit № CS.122/81 entitled

EBUSUAPANYIN KOFI CHARLES BROWN ….. PLAINTIFF

VRS

1. OPNAYIN KOFI KWEI SUBSTITUTED BY KOFI ESSON
2. OPANYIN KWEKU ANNAN

….. DEFENDANTS

Kofi Esson who was substituted by the order of the High Court, dated 23-7-85 in place of the 1st defendant, who had died, will hereafter be referred to as the appellant.

The original Writ of Summons, later amended on 10-8-1992 had the following reliefs;

1. Declaration that he is the principal Ebusuapanyin of the Buturnan Anona Ebusua of Tetter Kessim near Elmina and that the Ebusua comprises of 8 sections and not the 2 sections represented by the defendant only.
2. Recovery of the Bombe drums, Amankwa drums and all the associated equipment for the male and female drumming and singing groups of the Ebusa.
3. Recovery of the State Whisk.
4. Perpetual injunction restraining the defendants, their representatives, agents, workmen from misrepresenting the 1st defendant as the principal Ebusuapanyin of the Buturnyan Anona Ebusua of Tetter Kessim.
5. Perpetual Injunction restraining the defendants, their agents, representatives, workmen from acts misrepresenting their two sections only as comprising the Buturnyan Anon Ebusua of Tetter Kessim.

The defendants therein, herein appellants resisted these claims and filed a counterclaim also seeing similar declarations.

In the meantime, Suit № CS.57/91 had been instituted and intituled as follows;

EBUSUAPANYIN KOFI ESSON & ANOTHER …..PLAINTIFFS

VRS

KOFI CHARLES BOHAM ….DEFENDANT

In the above Suit, plaintiffs therein, herein Appellants claimed against the defendant therein, herein respondent the following reliefs;

a) " A declaration that the defendant herein is not the Ebusuapayin of Nana Buturnyan Anona Family of Tetter Kessim"

b) " Perpetual Injunction restraining the defendant from in anyway whatsoever describing himself as the Ebusuapanyin of Nana Buturnyan Anona Family of Tetter Kessim

In an amended Statement of Claim filed pursuant to an Order of the High Court, dated 10th September, 1991 the Statement of Claim in support of the Writ of Summons in suit №57/91 was amended as follows; - (Reference page 143 lines 1-20 of the appeal record, the plaintiffs averred as follows;

1) "That 1st plaintiff is the Ebusuapayin of Buturnyan Anona family of Tetter Kessim and on behalf of the said family as well as on his own behalf brings this instant action. He is an accountant by profession and lives at Takoradi and Tetter Kessim near Elmina respectively.

2) The 2nd plaintiff, a member of the said Buturnyan Anona family, is the Chief of Tetter Kessim near Elmina. He is by profession a Surveyor and lives respectively at Tetter Kessim and Sekondi.

3) The defendant is an ordinary member of Kobina Esson's section or chamber of the Anona family at Elmina. He is a driver and lives at Elmina.

The defendant therein resisted the said claims, entered appearance and filed defence to the suit appropriately.

In an amended defence, reference page 146 of the record of appeal, the respondent herein, therein defendant averred in paragraphs 2 and 6 as follows;

2. "Paragraph 1 of the claim is denied, 1st plaintiff is not the Ebusuapanyin of the Buturnyan Anona Family of Tetter Kessim. He is only the head of one of the 8 sections or houses comprising the said Family."

6. “Paragraph 4 of the claim is denied, there is no vagueness or seeming less that the 8 houses or sections make up the Buturnyan Anona Family of Tetter Kessim. This was accepted by all the parties in the Cape Coast Circuit Court case of”

1. Ebusuapanyin Kojo Awotwe substituted by Kweku Bosomtwe
2. Ajoa Seguwa

…..Plaintiffs

Ebusuapanyin Kofi Charles Boham …..Co-Plaintiff

Vrs

1. Edina Traditional Council
2. Kofi Kwei
3. John E. Edu

Both substituted by Kofi Esson

4. Sofo Ama Kwesi

…..Defendants

In Suit № LS. 9/81 the learned trial judge in his judgment stated;-

“Apart from the initial disagreement in the pleadings, the plaintiffs and the defendants from the evidence do not dispute that the Buturnyan Anona Family of Tetter Kessim is made up of eight sections each with its own head. There is also a general agreement that the either sections are linked together by one common ancestor and one family property, Tetter Kessim Lands”

The above quotation from the judgment of the case referred to is the courts evaluation and assessment of the pleadings and the evidence that had been led before it. It is interesting to note that both the Appellant and Respondent herein were key participants in the said case.

This judgment of the Circuit Court, Cape Coast presided over by B.T. Aryeetey, (as he then was) seems therefore to support the contention of the respondents herein. Out of abundance of caution, the said judgment was used in the instance appeal and it is on the appeal record and headed as Exhibit “A”.

On the 31st day of October, 1991, the plaintiff herein, brought an application seeking to consolidate Suit № CS 122/81 and CS 57/91 both pending at the High Court, Cape Coast.

On the 21st day of November, 1991, J.D Sappong J. (as he then was) whilst granting the application for consolidation made the following observations;_ reference pages 74 to 75 line 34-40 and lines 1-8 respectively.

> "CS 122/81 and CS 57/91 are suits pending in this court
>
> In CS 122/81 Kofi Charles Boham is the plaintiff and in CS 57/91 he is the defendant. In CS 122/81 Kofi Esson and Opanyin Kweku Annan are the defendants and in CS 57/91 Kweku Annan and Nana Buturnyan are the plaintiffs".

The main quarrel in both cases centers around whether or not Kofi Charles Boham is Ebusuapanyin of Nana Buturnyan Anona Family of Tetter Kessim.

Having therefore heard both counsel and having read the Affidavits for and against the application for consolidation and by the observation above made, I am of the opinion that a consolidation order is to be made. Thus, I do grant the application for consolidation"

Thereafter, quite a number of interlocutory applications were filed and determined by the High Court after the suits were consolidated.

However, on 12th April 1994, the respondent herein through his counsel filed an application to dismiss suit № 57/91 on the grounds that the plaintiff lacked capacity to institute the said action.

The crux of the defendants' application was their contention that the plaintiffs lacked capacity to institute this action because the question of the Headship of the Buturnyan Anona Family of Tetter Kessim was determined in Cape Coast Circuit Court Suit № LS 9/81 already referred to supra.

The respondent contended that the judgment that was delivered in the said suit was in his favour as the Co-Plaintiff therein. The respondent also averred that the

appellant herein, KOFI ESSON was the 2nd defendant in the Circuit Court suit № LS 9/81.

The defendant supported his application with a number of exhibits reference pages 162 – 163 of the record of appeal.

This application was vehemently opposed by the appellants herein who also attached copious exhibits to authenticate why the application should not be granted.

However, after arguments by both counsels in the matter, the court on 27th day of September, 1995 delivered its Ruling. The Ruling upheld the application made before the court and by its suit № 57/91 was dismissed as plaintiff therein lacked capacity to mount that action.

Aggrieved and dissatisfied with the Ruling of the Cape Coast High Court the appellant on the 6th day of November 1995 lodged an appeal against the said ruling. By a majority decision, the ruling of the High Court, Cape Coast was affirmed. The appellant has further appealed to this court against the majority decision of the Court of Appeal.

The appellants seek to attack the judgment of the majority decision by the following grounds:

I. The majority judgment is against the weight of affidavit evidence adduced.
II. That the majority judgment was wrong to the extent that it relied on the judgment and not the whole proceedings in the Circuit Court in determining any issue of estoppels per rem judicatam.
III. That to the extent that the reliefs on the Writ of Summons culminating in the Circuit Court judgment relied upon to operate as estoppels by the majority decision dealt with title to land and not the leadership of a family any issue of headship of any family was orbiter dictum and not ratio descendendi and therefore cannot operate as estoppels the majority decision was wrong.
IV. That the majority decision erred in not finding that the question of estoppels could not be dealt with by way of a motion and affidavit instead of by viva voce evidence

V. That the majority decision erred in not finding that with the demise of the original defendant the issue as to whether or not [the original defendant] was the overall head of family died with him to the extent that his contention was that the position rotated among the different sections of the family

VI. Other grounds to be filed upon receipt of the record of proceedings.

In my respected opinion, the first issue to consider in this appeal touches on the procedure at the High Court which was endorsed by the majority. Ground (iv) of the grounds of appeal raises serious doubts about the procedure adopted to terminate the proceedings at that stage without a plenary trial.

It must be pointed out that the action was decided when the old rules, that is High Court (Civil Procedure) Rules (LN 140A) of 1954 was in force. Under the said rules, Order 19 rule 16 made it mandatory for the defendant to plead estoppels and other defences to avoid surprise to a plaintiff in any proceedings. See ASARE v BROBBEY [1971] 2 GLR 211 and BASSIL v KABBARA [1966] GLR 102 SC. Estoppel of any kind be it per rem judicatam, laches or acquiescence ought to be pleaded to avoid surprise. See ARYEE v BLANKSON [1972] 2 GLR 247 and G.B. OLLIVANT LTD v KORSAH [1941] 7 WACA 188. In these proceedings in the Amended Statement of Defence to plaintiff's Amended Statement of Claim filed on 22/10/91, the defendant who is the respondent in this appeal pleaded that the Cape Coast Circuit Court had already determined that the appellant herein was not the Ebusuapanin of the Buturnyan Anona Family of Tetter kessim. It must be pointed out that reading the said Amended Statement of Defence as a whole, the respondent did not go further to plead that by virtue of the said judgment the appellant herein is estopped from re-litigating the issue of his status as Ebusuapanin of his said family. However, as pointed out earlier, the respondent herein on 12/4/94 filed a motion to dismiss the suit. In view of the peculiar antecedent of this case the body of the motion is reproduced as follows:

**NOTICE OF MOTION**

"PLEASE TAKE NOTICE that his Honourable Court will be moved by counsel for and on behalf of the defendant herein praying for an order of the court dismissing the suit for lack of capacity on the part of the plaintiffs to bring this action."

It must also be pointed out that the said application to dismiss the action was not brought under any rule of procedure under the then High Court [Civil Procedure] Rules LN 140 A of 1954 or any settled practice of the Court or under the Court's inherent jurisdiction. The only procedure sanctioned by the then existing rules of court to terminate the action after summons for directions was under Order 25 rule 2 (3) of the rules. For a fuller record the said order is as follows:

(2) "Any party shall be entitled to raise by his pleading any point of law, and any points so raised shall be disposed of by the Judge who tries the cause at or after the trial, provided that by consent of the parties or by order of the court or a Judge on the application of either party, the same may be set down for hearing and disposed of at any time before the trial.

(3) If in the opinion of the court or Judge the decision of such point of law substantially disposes of the whole action or any distinct cause of action, ground or defence , set-off, counterclaim or reply therein, the court or Judge may thereupon dismiss the action or make such other order therein as may be just."

The determination of lack of capacity in the appellant was based entirely on the ruling of the Cape Coast, Circuit Court. How the judge entertained the motion referred to above to dismiss the entire action appears to be incomprehensible to us after a careful reading of Order 25 rules 2 and 3 of the rules of court as it then stood. The disposal of the point of law that the action was squarely caught by estoppel per rem judicatam in our respectful opinion could only be determined by resort to evidence from the parties to the suit especially the party relying on it to non-suit his adversary.

It is interesting to note that both on the pleadings and in the motion, the appellant had stoutly denied that he was estopped by the ruling of the Cape Coast Circuit

Court. This denial clearly called for adduction of evidence. In the case of APPENTENG & ORS v BANK OF WEST AFRICA & ORS [1961] GLR 196 Ollenu J [as he then was] in determining how to resolve issues under Order 25 rules (2) and (3) of LN 140A said at page 199 as follows;

> "As bases for the application of these rules there must be facts pleaded which are admitted by the party raising the point of law, or which for the purposes of the objection are assumed to be true"

The learned judge relied on the English case of EVERETT v RIBBANDS [1952] 2QB 198 in which Romer L.J said:

> "where there is a point of law which if decided in one way, is going to be decisive of litigation, advantage ought to be taken of the facilities afforded by the rules of court to have it disposed of at the close of the pleadings or …shortly afterwards"

In our opinion, as the facts in this case show, the contentious nature of the issue called for adduction of evidence by the party who raised the issue. The dispositions in the affidavit which were stoutly denied were not proved when counsel for the respondent moved the motion to non-suit the appellant herein. As the respondent herein bears the burden of proof of the issue he was enjoined by the basic rules of evidence to prove the issue on preponderance of probabilities. This has been the position of the law expounded lucidly by our sister Adinyira JSC in the often-quoted case ACKAH v PERGAH TRANSPORT LTD [2010] SCGLR 731.

As the motion was moved and was stoutly opposed without any supporting evidence to back the depositions in the affidavit it was not proved by the respondent that indeed the appellant was estopped by the ruling of the Circuit Court, Cape Coast. The law requires more evidence than what was placed before the learned judge at the High court. See MAJOLAGBE V LARBI [1959] GLR 190 and ZABRAMAH v SEGBEDZI [1991] 2 GLR 221 CA.

It must also be said that estoppels is a rule of evidence and its denial must be proved. In the reknowed book: Cross and Tapper on Evidence, 12th edition the learned authors stated the law so clearly at page 85 as follows:

> "When estoppel bind a party to litigation, he is prevented from placing reliance on or denying the existence of certain facts. This justifies the treatment of estoppels as an exclusionary rule of evidence"

In our opinion, the issue of estoppels per rem judicatam ought to have been proved on the balance of probabilities. Another vital omission in the majority decision was its failure to appreciate that whether a party has capacity to sue or not is a matter which requires evidence to show that the party is indeed clothed with that requisite capacity. Several reported cases established the principle that when a suitor's capacity is challenged he could only succeed on the merits if he is clothed with that capacity. See QUARTEY v QUARTEY [1963] I GLR 58 SC, SOKPUI II v AGBOZO III [1951] 13 WACA 241, CHAPMAN v OCLOO & KPORHANU [1957] 3 WALR 84, ASARE v DZENZY [1976] I GLR 473 CA [Full Bench]. In the SOKPUI II case Verity, Agp said at page 242 as follows:

> "There can be no doubt that where parties sue in a representative capacity and their authority to do so is questioned, it lies upon them to satisfy the court that they have been duly authorized. It is for the Court to consider the evidence they have tendered in that regard and to argue to its conclusion"

The evidence required to be tendered was to have come from the plaintiff/appellant herein who was duly challenged as regards his capacity. Alternatively the learned High Court judgment could have set the issue of capacity down for determination which necessarily would have called for adduction of evidence in the circumstances.

The determination of the vital issue by motion in this case in our opinion was not based on the settled practice or under any rule of procedure. We are of the opinion that the affirmation of the ruling of the High Court judgment by the majority of the Court of Appeal judges was, with due respect, in error as vital procedural steps canvassed in this judgment were ignored.

Apart from the procedural flaws pointed out above, another crucial point which was with due respect, ignored by the majority decision. The respondent pleaded estoppels per rem judicatam to prevent the appellant from proceeding with the action. It is a cardinal rule of evidence that he who bears the burden of proof must proved his case by producing the required evidence of the facts in issue. See the judgment of this court in ACKAH v PERGAH TRANSPORT LTD & ORS [2010] SCGLR 728.

A party pleading estoppel must prove it to succeed on that issue. It is a requirement of the law that when estoppels per rem judicatam is pleaded, the whole record of proceedings must be tendered in evidence for the court to know exactly the issues raised by the pleadings, if any, and the judgment or findings based on the evidence adduced. See LARBI v KWABENA [14 WACA 299] and ATTA v AMISSAH [1970] CC. 73.

However, the parties through admissions formally made in the pleadings or the judgment relied on which may appear to be unambiguous, the court may not have to look at the pleadings to attribute a different meaning to the judgment. See OKWEI-MENSAH v AHIETEYE [2011] ISCGLR 317. In this case the ruling on which the respondent sought to rely on as creating estoppels per rem judicatam was not free from doubt. The motion which was filed, the pleadings, if any, and the record of the trial court were not part of the evidence placed before the learned High Court judge in coming to a fair conclusion that the issue of estoppel per rem judicatam had been proved as required by law.

We are of the opinion that the majority decision did not adequately consider the legal points raised by the appellants on appeal at the Court of Appeal. We therefore allowed the appeal and remitted the case to the trial court for hearing on its merits as a consolidated suit with suit № 122/81 entitled Ebusuapanyin Kofi Charles Brown v Opanyin Kwesi, substituted by Kofi Esson and Opanyin Kweku Annan.

**(SGD) ANIN YEBOAH**

**JUSTICE OF THE SUPREME COURT**

**(SGD) S. O. A. ADINYIRA (MRS)**

**JUSTICE OF THE SUPREME COURT**

**(SGD) R. C. OWUSU (MS)**

**JUSTICE OF THE SUPREME COURT**

**(SGD) P. BAFFOE BONNIE**

**JUSTICE OF THE SUPREME COURT**

**(SGD) J. B. AKAMBA**

**JUSTICE OF THE SUPREME COURT**

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