THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: GBADEGBE, JSC (PRESIDING)

BENIN, JSC

APPAU, JSC

PWAMANG, JSC

KOTEY, JSC

CIVIL APPEAL
NO. J4/78/2018

17TH JULY, 2019

1. SAMPSON OBENG

2. KWAME MENSAH ..... DEFENDANTS/APPELLANTS/APPELLANTS

VRS

KWABENA MENSAH
(SUING FOR HIMSELF & ON BEHALF
OF ALL HIS SIBLINGS) ..... PLAINTIFF/RESPONDENT/RESPONDENT

JUDGMENT

THE UNANIMOUS JUDGMENT OF THE COURT IS READ BY GBADEGBE, JSC AS FOLLOWS:-

GBADEGBE:

We have before us in the exercise of our appellate jurisdiction, an appeal from the judgment of the Court of Appeal (CA) by which the decision of the trial High Court was varied in part. In the judgment on appeal to us, the learned justices agreed with the

lower court's findings of fact but varied the consequential awards. While the variation of relief 2 relating to an order of perpetual injunction was essentially a different formulation of that which was granted by the trial court, relief 1 was varied in substance to include children and descendants of the plaintiff's uncle- Opanyin Kwadwo Gyebi. The variation to the order made regarding relief 2 inserted the words; "the children of Opanyin Kwadwo Gyebi and their descendants" to the persons whose beneficial interest in the disputed property was acknowledged in the judgment of the trial court. Following the said judgment, the defendants/ appellants/ appellants (defendants) launched the instant appeal seeking a variation of the judgment in their favor. For reasons of convenience, in these proceedings the plaintiff/respondent/respondent will bear the description of plaintiff.

In the notice of appeal, the defendants attacked the judgment of the CA on the following grounds:

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

2. The Court of Appeal was wrong in declaring the children of Opanyin Kwasi Sarfo and their descendants, the children of Opanyin Kwadwo Gyebi and their descendants are beneficiary owners of House No 27, Block 6, Old Tafo, Kumasi.

3. The Court of Appeal erred in restraining the Defendants/ Appellants/ Appellants and or Agona Petenyinase family and their respective privies, assigns, workmen and anybody claiming in trust for them from interfering with the beneficiaries' occupation and use of House No 27, Block 6, Old Tafo, Kumasi.

4. The Plaintiff was not entitled to judgment against the Petenyinase family or the family of Opanyin Kwadwo Gyebi.

5. The Defendants were not the proper persons to be sued or to be continued as Defendants in respect of the Suit.

6. The Plaintiff was not entitled to judgment on the reliefs he was granted upon the requisite standard of proof or at all.

A brief statement of the background to the action herein is stated as follows. During his life time, Opanyin Kwabena Asare was married to one Abena Tiwaah with whom he had two children, Opanyin Kwasi Sarfo and Opanyin Kwadwo Gyebi. He also acquired the disputed property in which he lived with his children and their said mother. At his death, Opanyin Kwabena Asare left behind a will, which contained a devise of the disputed property to his wife and children. The wife predeceased the children and was followed in that order by Opanyin Kwasi Sarfo and Opanyin Kwadwo Gyebi. The evidence established that in their life time, the two children of Opanyin Kwabena Asare had rights of occupancy in respect of the disputed property and the plaintiff as a child of Opanyin Kwasi Asare also lived therein with his siblings even after their father's death. Indeed, his uncle and his children also lived in the disputed property. When the last of the two brothers, Opanyin Kwadwo Gyebi died, he purported to devise the property to his wife and children. Accordingly, the plaintiff sued to protect the right and interest of the children of Opanyin Kwasi Asare to the disputed property. As the defendants are the executors of the last will of the said testator, the plaintiffs issued the proceedings herein by which they sought certain reliefs including an order that the devise of the disputed property by his uncle, Opanyin Kwadwo Gyebi to his wife and children be declared a nullity. The defendants contested the action and made a counterclaim in respect of the disputed property.

After giving careful and anxious consideration to these grounds, we are of the view that while grounds 3, 4 and 5 raise procedural matters, the cumulative effect of the other grounds 1, 2 and 6 is directed at the effect of the admitted evidence before us contained in the record of appeal. As this is a rehearing and the procedural matters are

not alleged to have resulted in jurisdictional error, we will consider the question regarding the correctness of the judgment on appeal before us before attending to them. We add that as the defendants on whose behalf the procedural points are urged took part in the proceedings, a different approach to the appeal, would in the event of such points succeeding deprive the court of having before it the necessary parties to proceedings which are in their nature 'inter partes' and was in conformity with. Therefore, the fundamental issue to be determined in these proceedings is whether the decision of the CA can be said to be reasonably derived from the evidence contained in the record of appeal such as not to be said to suffer from perversity and or unreasonableness. In our opinion, such a consideration would take into account grounds 1, 2, and 6 as set out in the notice of appeal. The suggested approach would enable us determine whether on all the evidence placed before the learned justices of the CA, their decision in the matter herein was a proper exercise of their discretion. See: (1) Achoro v Akanfela [1996-97] SCGLR 207; (2) Fosua & Adu- Poku v Dufie (Deceased) & Adu- Poku Mensah [2009] SCGLR 310.

As pointed out earlier in the course of this delivery, the learned justices of the CA varied the decision of the High Court regarding the beneficial enjoyment of the disputed property to include the children of Opanyin Kwadwo Gyebi, and their descendants. In our opinion, the evidence contained in the record of appeal is overwhelmingly supportive of the position reached by the CA. In so concluding, the CA must have considered the uncontroverted evidence tendered by the parties, plaintiff and the defendants alike that the disputed property was built by Opanyin Kwabena Asare, the father of Opanyin Kwasi Sarfo and Opanyin Kwadwo Gyebi who were both born to him by his wife, Akua Tiwaah. As the said Opanyin Kwabena Asare devised the property to his wife and children, the property devolved upon them. Abena Tiwaah predeceased her children and with Opanyin Kwasi Sarfo also predeceasing Opanyin Kwadwo Gyebi. In the circumstances, the learned justices of the CA reached the right conclusion on the evidence when they varied the judgment to reflect the effect of the evidence placed before them in the record of appeal. Again, as the plaintiff and his siblings as well as

the children of his uncle derived their grant from the same source, the declaration made in respect of his uncle's children and descendants was necessary to avoid multiplicity of proceedings and in conformity with the overriding principles contained in Order 1 rule 2 of the High Court (Civil Procedure) Rules, 2004, CI 47. In the circumstances, we agree with the variation order made by the learned justices of the CA; such an order sought to correct an obvious lapse in the judgment and better served the needs of justice in the matter. The variation made by the CA is justified by section 11(8) of the Courts Act, 1993, Act 459 which provides:

> *"For the purpose of hearing and determining an appeal within its jurisdiction ...on any appeal, … the Court of Appeal shall have all the powers, authority and jurisdiction vested in the court from which the appeal is brought."*

Further, on all the evidence, the learned justices could not have declared ownership to the property in the Petenyinase family as demanded by the defendants in their counterclaim. We say so because apart from the apparent inconsistencies in the version of the defendants regarding how the property came to acquire that character, the substance of the said evidence is inherently improbable. That aside, there was no witness to the said agreement, which the defendants sought to impress upon the trial court as though it was a matter within their knowledge. It is incredulous to accept that the initial story on which the family's right to the property, which was said to be based on an agreement reached at the fortieth day celebration of Opanyin Kwadwo Gyebi's funeral can metamorphosize, so to say, into a new and distinct claim allegedly derived from a consensual agreement between Abena Tiwaah and her two children that the property be passed on to the said family. Although this new version was given effect to by an amendment to the statement of defence, the apparent inconsistency in the two versions rendered it improbable. That such a claim could first be made only after the death of the persons who reached such an agreement is difficult to believe particularly bearing in mind that it involves rights to property which before then was dealt with in a

manner inconsistent with the agreement alleged to have been reached. The allegation of such an agreement also tends to be supportive of the position that before then they held the property in common. On this aspect of the matter, the learned justices of the CA accepted the findings of the learned trial judge in his judgment at page 102 of the record of appeal, which conclusion he reached after a careful consideration of the probabilities before rejecting that version of the matter; we share that rejection as well. In reaching this view of the contested facts, we have also been guided by section 52 of the Evidence Act, NRCD 323.

Furthermore, although by the rules, a party to a cause may amend his pleadings, the court is not thereby disabled from reaching the conclusion that it is untrue; that is the true province of a trial judge subject to the said conclusion being rooted in reasonableness. A careful examination of the affidavit of the defendants in support of their application to amend the statement of defence provided inadvertency as the sole reason for not pleading the consensual agreement between Abena Tiwaah and her children; the two contentions being inherently irreconcilable undermines any credit that such evidence might otherwise have attracted. On the whole, we are of the view that placing the uncontroverted version of the facts regarding the acquisition of the property by Opanyin Kwasi Asare and the devise made by him in his will and the associated enjoyment of the property by his children against, the agreement on which the defendants based the claim of the Petenyinase family to the disputed property, the learned justices of the CA were right in agreeing with the learned trial judge on the acceptance of the version of the matter tendered by the plaintiff in support of his claim.

Closely related to the above is the contention regarding the gift that was made by Opanyin Kwabena Asare, the original owner of the disputed property to Kwabena Duku, a junior brother of his. As the declaration made in the judgment of the CA at page 170 of the record of appeal did not utilize either the word "the "or "exclusively" before "are beneficiary owners", the issue raised by the defendants before us related to the interest of Kwabena Duku pales into insignificance. Therefore, the attack on the judgment of

the learned justices of the Court of Appeal derived from grounds 1, 2 and 6 of the notice of appeal fail. It is probable that had the learned justices of the CA not varied relief 1 to include the children and descendants of Opanyin Kwadwo Gyebi as beneficial owners, the defendants would have complained about it as well.

Regarding ground 4 by which the judgment against the Petenyinase family is attacked, we are of the view that having reached the view that the defendants were not members of the said family, the learned justices were without justification when they granted an order of restraint against them. But, to be quite frank, it was the defendants who sought a declaration of title to the property on behalf of the said family and as there was no objection raised to their capacity, the learned justices of the CA for whom we have great respect must have acted on the assumption that the counterclaim was competent. The complaint made by the defendants which finds favor with us reiterates the need for appellate judges to appreciate that their jurisdiction is one of correction, which requires them to interrogate proceedings beyond the grounds of appeal in order to uphold their onerous duty of deciding cases according to law. We observe the emergence of an unhappy trend in appeals before us of the learned justices of the CA shying away from utilizing the extensive power conferred on them under the Rules to interrogate appeals before them beyond the grounds of appeal raised by the parties. Reference is made to Rule 8 (9) of the Court of Appeal Rules, CI 19, which provides as follows:

> *"Despite sub-sections (4) to (8), the Court in deciding the appeal shall not be confined to the grounds set out by the appellant but the Court shall not rest its decision on a ground not set out by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground."*

A similar such power is conferred on this court in rule 6 (8) of CI 16. Ground 4 of the notice of appeal therefore succeeds. Sequentially, the order of restraint is corrected to

read *"The defendants-appellants/appellants and their privies, assigns, workmen, agents and any person claiming through them are restrained from interfering with the beneficial enjoyment of Hose No 27, Block 6, Old Tafo, Kumasi by the children of Opanyin Kwasi Sarfo, Opanyin Kwadwo Gyebi and their descendants".*

There is also the complaint contained in ground 3 of the notice of appeal. It concerns the order of restraint made against the defendants. While we are in agreement with the defendants on the complaint related to the making of the order against the Petenyinase family, we are unable to accept their contention that the order of restraint made against the defendants is not proper. On the contrary, we say that as the defendants conduct provoked the action herein, the order of restraint was justifiably made against them. Although the defendants claimed to be acting on behalf of the Petenyinase family, as discussed in relation to ground 4 of the notice of appeal, their acts lack a family character as none of them is said to be either head of the family or comes within any of the exceptions by which a person other than the head of family might sue on its behalf, they must personally answer for their actions. Accordingly, the order of restraint made against them under relief 2 of the claim herein is intended to prevent them from disturbing the quiet and peaceful enjoyment of the disputed property by the beneficial owners.

Ground 5 raises an objection regarding the competency of the defendants as parties to the action. We think that authority aside, the defendants who were executors of the last will of Opanyin Kwadwo Gyebi are necessary and proper parties to the action; in point of law they became vested with the rights of the deceased testator at the date of his death and any action concerning any bequest or devise in the said last will must, to be good, be directed at them as such. There is therefore, no substance in the submissions to the contrary and the said ground also fails. And for a more compelling reason, there is relief 3 by which the plaintiff claimed "An order of the Court declaring the portion of the Will of Opanyin Kwadwo Gyebi (deceased) purporting to devise House Number 27, Block 6, Old Tafo, null and void." The said relief can properly be directed only at the executors of the last will of the said testator, the defendants herein.

Accordingly, it is baffling that in the face of te said relief the defendants deny that they are competent parties to the action herein.

Before ending this delivery, we would like on our own to correct what we consider to be a slip in the making of the Court of Appeal's order regarding relief 1 by substituting 'beneficial' for 'beneficiary'. Accordingly, the order shall be:

> *"It is hereby declared that the children of Opanyin Kwasi Sarfo and their descendants, the children of Opanyin Kwadwo Gyebi and their descendants are beneficial owners of House No 27, O Block 6, Old Tafo Kumasi to hold same as tenants in common."*

Also, having regard to the undisputed evidence that the disputed property did not belong exclusively to Opanyin Kwadwo Gyebi, we think that the learned justices of the Court of Appeal who had all the powers of the trial court should have granted relief 3 by which an order declaring the devise of the disputed property null and void as was sought by the plaintiffs. We think that such an order naturally follows from the declaration made in respect of relief (1) regarding the right to the beneficial enjoyment of the disputed property being in the children and descendants of Opanyin Kwasi Asare and Opanyin Kwadwo Gyebi. Accordingly, in regard to relief 3 endorsed on the writ of summons, and in the exercise of a power conferred on us under section 2 (4) of the Courts Act, 1993, Act 459, we make an order declaring the devise of the disputed property by Opanyin Kwadwo Gyebi to his wife and children ineffectual. See: A-G v Simpson [1901] 2 Ch 671.

For the above reasons and excepting ground 4 of the notice of appeal, the appeal herein is dismissed. The decision of the CA in the matter herein dated February 16, 2017 is hereby affirmed subject to the variations contained in this judgment.

N. S. GBADEGBE

(JUSTICE OF THE SUPREME COURT)

A. A. BENIN

(JUSTICE OF THE SUPREME COURT)

Y. APPAU

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

PROF N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

COUNSEL

KWAME A. BOAFO FOR THE DEFENDANTS/APPELLANST/APPELLANTS.

BENJAMIN OSEI BOATENG FOR THE PLAINTIFF/RESPONDENT/RESPONDENT.