IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: YEBOAH, CJ (PRESIDING)
BAFFOE-BONNIE, JSC
MARFUL-SAU, JSC
AMEGATCHER, JSC
TORKORNOO (MRS.), JSC

CIVIL APPEAL
NO. J4/51/2019

4TH NOVEMBER, 2020

MR. SENTI MICHAEL …….. PLAINTIFF/RESPONDENT/RESPONDENT

VRS

1. REV. FATHER MON KWAME
2. DR. ASOMAH (CHAIRMAN OF POLYTECHNIC COUNCIL) DEFENDANTS/APPELLANTS/APPELLANTS

AMEGATCHER, JSC:-

The appellants Rev. Father Mon Kwame and Dr. Isaac Asomah are the named Executors in the Will of the late Thomas Asante Senti; also known in his lifetime as Nana Senti by reason of a chieftaincy title he held as the then Tufuhene of Techimantia. The appellants are in this court because they have appealed against the judgment of the Court of Appeal sitting at Kumasi dated 22nd May, 2018. What then are the facts leading to this appeal?

FACTS:

Thomas Asante Senti died in Sunyani on 25th February, 2013. After his death, his Will was read at the High Court, Sunyani. His oldest son and plaintiff/respondent/respondent to this action entered a caveat against the Will.

After complying with the necessary processes under Order 66 of the High Court Civil Procedure rules C.I. 47, the respondent, qualified as a person who has or claims to have an interest in the estate of the deceased testator, invoked his rights under Order 66 rule 28 and instituted an action at the High Court, Sunyani against the executors to have the Will declared invalid.

The case of the respondent is that the testator in his lifetime held a Higher National Diploma Certificate in Dispensing Technology. He was very diligent and meticulous in all transactions with a high sense of clarity in all his documents. However, when he perused the purported Will, he noticed that it lacked clarity of expression which was contrary to the values of his father. This according to the respondent was the basis for the failure of the testator to give the exact description of his self-acquired properties such as his building plots, the registration numbers of his vehicles, names of banks he held accounts with and the account numbers. Apart from these, the respondent avers that the testator on the date he was alleged to have executed the purported Will, he was seriously sick and bedridden and could not validly make a Will. The respondent on these facts concluded that the purported Will was not the act and deed of his father and was procured by fraud so should be declared null and void.

After a full trial in which seven witnesses testified, the learned trial judge, John Bosco Nabarese J delivered his judgment on 21st July, 2015 in favour of the respondent. He declared the Will a forgery, null and void and set it aside. The appellants appealed to the Court of Appeal which on 22nd May, 2018 unanimously dismissed the appeal and confirmed the judgment of the trial court. It is from the judgment of the Court of Appeal that the appellants have exercised their right to have a second bite at the cherry by appealing to this court.

GROUNDS OF APPEAL:

The appellants filed four main grounds of appeal. They are:

a) The judgment is against the weight of evidence.
b) The Court of Appeal erred when it held that the late Thomas Senti was unduly influenced by Angelina Bommo in executing his last Will.

c) The Court of Appeal fell in the same error as the trial court when it held that Thomas Senti executed the Will under influence but nevertheless went further to hold that the signature on the Will is not that of the late Thomas Senti.
d) The Court of Appeal erred when it held that the respondent was not under obligation to prove that the late Thomas Senti was of unsound mind.
e) Additional grounds of appeal shall be filed upon receipt of the record of appeal.

EFFECT OF AN APPEAL AGAINST CONCURRENT FINDINGS OF TWO LOWER COURTS:

Being an appeal against concurrent findings of the two lower courts, the appeal raises again the propriety of this court interfering with the findings made by the two courts below. Fortunately, the principle underlying this has been stated, clarified and re-stated by this court in several decisions that where findings of fact by a trial court have been concurred with by the first appellate court, the second appellate court must be slow in interfering unless under very limited circumstances. These circumstances include where the trial court committed a fundamental error in its findings of fact but the first appellate court did not detect the error but affirmed it, and thereby perpetuated the error, or failed properly to evaluate the evidence or has drawn wrong conclusions from the accepted evidence or its findings are shown to be perverse. In such cases, the second appellate court would justifiably interfere with the findings so made and reverse the judgment of a first appellate court. See the cases of **Gregory v Tandoh [2010] SCGLR 971 at 985-986**, **Fosua and Adu - Poku vrs Dufie (deceased) & Adu Poku Mensah [2009] SCGLR 310 at 313.**

It is our duty now to review the evidence on the record and make a determination whether the concurrent findings are supported by the evidence or perverse within the scope of the authorities propounded by the court. Our first analysis will be on grounds (b) and (c). The grounds state that the Court of Appeal erred when it held that the late Thomas Senti was unduly influenced by Angelina Bommo Senti in executing his last Will and yet found that the signature was not that of the late Thomas Senti.

The appellants in their statement of case have submitted that there is no evidence on record that Angelina Bommo Senti and her sister Akosua Senti did exert undue influence on the testator apart from the suspicion arising from their role as the caretakers of the testator during his sickness. Even the Court of Appeal's acceptance of undue influence is based on demeanour of the witnesses which was not a factor considered by the trial judge. Counsel for the appellant also submitted that execution of a Will and being unduly influenced to execute the same document are mutually exclusive and therefore to hold that the testator did not execute the Will and later find that the testator was unduly influenced blurred the judgment of the court below.

Counsel for the respondent in answer to these submissions insisted that because the testator was completely dependent on Angelina Bommo Senti and her sister, the dominance resulted in the influence by which most of the properties of the testator were gifted to Angelina and her associates.

PROPER ROLE OF REPLY IN PLEADINGS:

The name Angelina Bommo Senti which engaged the scrutiny of both the trial court and the Court of Appeal first appeared in the reply filed by the plaintiff on 5th April, 2014 as amended by the Amended Reply filed on 13th November, 2014. We have identified a procedural matter in that ground which we believe must be dealt with first before delving into the merits of the appeal. What is the proper role of a reply and the responsibilities imposed by law on the parties when formulating the contents of their pleadings?

The relevant provisions of the Statement of Claim of the respondent, then plaintiff, which is the gravamen of his case can be found in paragraphs 4 to 15 of the Statement of Claim. The averments comprised the positions of the plaintiff described already regarding his father's diligence and learning which, in his opinion, rendered the Will incapable of being his act. In paragraph 13, he urged fraud in the Will and set out the particulars as follows:

13. The plaintiff says that it is his contention that the purported Will of Thomas Asante Senti was procured by recourse to fraud.

PARTICULARS OF FRAUD

a. **The date on which the execution of the purported Will took place, the testator was seriously sick and bed ridden and could not make a Will.**
b. **The description of the devised property are vague and ambiguous which is uncharacteristic of the testator.**

He urged that the testator did not sign the Will voluntarily and prayed for it to be declared null and void since it does not disclose the identity of the devises/dispositions under the purported Will and that suggest that the purported Will was not the deed of his father.

The above formed the story of the respondent which the appellants confronted in their Statement of Defence as amended. The appellants denied the claims of the respondent, and in particular the allegation of fraud in the preparation of the Will and asserted that even though the testator was ill, two physiotherapists who later attested to his Will had been treating him. According to them the testator was intelligent, clear-minded and able to sign his signature. The appellants further stated that the respondent and his father had a strained relationship arising over a woman called Ataa who worked in the testator's pharmacy and caused financial loss to the business. The dispute arose because the plaintiff had two children with the said Ataa despite opposition from his father; a dispute which eventually led to the father parting ways with Ataa and the plaintiff moving out of his father's house without informing him. The appellants further asserted that there was nothing wrong with the way the properties of the testator were described in the Will. The improper description if any, according to appellants did not affect the validity of the Will. The appellants insisted they were appointed executors of the testator's Will duly prepared by a lawyer of great repute and signed by the testator in the presence of two witnesses who also signed and therefore the Will was valid.

In the Amended Reply in answer to the Amended Statement of Defence filed by the appellants, the respondent pleaded that the instructions for the preparation of the Will was not by the testator but Angelina Bommo Senti, a daughter of the testator; that from March 2012 till the date of his death, the testator was extremely sick, hard of hearing and his memory was greatly impaired; that Angelina Bommo Senti had managed to drive away everyone from the sick old man, gained absolute and complete dominance over him and thereby exerted enough undue sinister influence over the testator in order to give fraudulent instructions for the preparation of the Will. The

respondent asserted that that the testator did not know and approve of the contents of the purported Will and that accounted for Angelina Bommo Senti's name featuring in priority and a large benefit of the Will going to her and her close associates. Further that the signature on the purported Will is incoherent and was forged or fraudulently procured by Angelina Bommo Senti from the terminally ill man. He went on to say that subsequent to the death of the testator, Angelina Bommo Senti and her associates forged his signature and backdated documents in respect of "SENTI CHEMIST LTD" accounts with Ecobank thereby appointing the said Angelina Bommo as the sole signatory to the account therein.

The general rule is that a plaintiff is not permitted to set up in his reply a new claim or cause of action which was not raised either in the writ or the statement of claim except by way of amendment. The rule, however, permits the plaintiff to allege new facts in his reply for the sole purpose of supporting the case already pleaded in his statement of claim. On this basis, the authorities are ad idem that the main purpose of a Reply in pleadings is to raise in answer to the Defence any matters which must be pleaded by way of confession and avoidance, or to make any admissions which the plaintiff may consider proper to make. See the English case of **Hall v Eve [1876] 4 Ch. D. 341 at 345-346** where James L.J opined that:

"[T]he reply is the proper place for meeting the defence by confession and avoidance"

The rule on reply stated above is well entrenched in the High Court Civil Procedure Rules, 2004 (C.I. 47). Order 11 Rule 10 headed "Departure" provides as follows:

10. (1) A party shall not in any pleading make any allegation of fact or raise any new ground or claim, inconsistent with a previous pleading made by the party.

(2) Subrule (1) shall not be taken as limiting the right of a party to amend or apply for leave to amend previous pleading of the party in order to plead allegations or claims in the alternative.

Any new pleading which is filed by a party and which is inconsistent with an original or earlier pleading will be a departure from a party's previous pleadings. The law on departure from pleadings has been well captured by the previous decisions of this court.

The locus classicus is **Hammond v. Odoi & Anor [1982-83] GLR 1215.** The facts are that in 1965, the plaintiff noticed that the defendants had started building operations on a plot of land at Kotobabi in Accra which the he alleged belonged to him. Thereafter he instituted an action in the High Court, claiming a declaration of title to the land. In his Statement of Claim, he averred that the land was conveyed to him under a customary grant by the Nii We family, the owners of the land, in 1949. The defendants in their Statement of Defence denied that the land in dispute belonged to the Nii We family. They stated that under the mistaken belief that the land belonged to the Nii We family, they had in 1956 obtained a grant from that family. However, when the Supreme Court held in Akwei v. Awuletey [1960] G.L.R. 231, that Osu rural lands, including the land in dispute, belonged to the Osu stool, they had in compliance with a notice published published in the local papers by the then Osu Manche, Nii Dowuona IV inviting all persons in possession of Osu rural lands to obtain valid grants from that stool, had the deed of gift obtained from Nii We stool confirmed by Nii Dowuona IV in 1962. They then registered that deed in 1965. The plaintiff in his reply deposed that in response to a similar publication in 1964 by Nii Dowuona V, the successor in office of Nii Dowuona IV, he had had his original grant in 1949 confirmed in 1964. The plaintiff further contended that the ancestors of the Nii We family had occupied the Kotobabi lands as subjects of the Osu stool and therefore the stool could not alienate lands in their possession without their consent.

The Supreme Court per Archer JSC (as he then was) stated the legal proposition under Order 19 r. 17 of the repealed High Court Civil Procedure Rules which is in pari materia with Order 11 r. 10 of the current rules. The court held in holding 1 that:

Nowhere in the statement of claim did the plaintiff aver that his ancestors, being Osu subjects, settled on the disputed land as of customary right. The plaintiff's pleading in the statement of claim only conveyed the impression that he and his brother were owners of the land in dispute because they took their grant from the Nii We family of the Osu Blohum quarter. Consequently, when he subsequently pleaded in his reply that he and his ancestors occupied the land in dispute as Osu subjects he committed a decessus by changing his radical title and making new allegations of fact. He thus raised a new matter which was not intended to be a set-off nor did it controvert anything pleaded in the statement of defence. On the contrary, the reply raised a new matter and abandoned the earlier stand and that

amounted to a departure from his pleadings contrary to Order 19, r. 17 of the High Court (Civil Procedure) Rules, 1954 (LN 140A).

See also **Bissah v Gyampoh III [1964] GLR 381 at 387.**

In this case, the learned trial judge did not question the volte-face made by the plaintiff in his Reply. He accepted the new averments and the evidence led in support of it. He held as follows:

"**As to the contents or provisions of the Will, I am of the view that it was Angelina Bommo Senti who did not know the details/particulars of her father's properties, who gave the instructions to Mr Gyamfi, of Akyede Chambers for the preparation of the Will. No wonder Angelina Bommo Senti stated in her evidence that she did not know her father's properties……It must be noted that what Angelina Bommo Senti (DW1) had succeeded in doing was to have caused the execution of the Will pretending to express Nana Senti's mind but which really does not, having regard to his values. I am satisfied that, on the evidence, the Will was procured through recourse to fraud……On the totality of the evidence, I am convinced that Exhibit 'A' or Exhibit '1' was procured under fraudulent instructions of Angelina Bommo Senti**."

At the intermediate appellate court, the learned justices were also swayed by the findings of the trial judge on the averments contained in the Reply and supported his conclusion as follows:

"**In the instant case, the suspicious circumstances surrounding the execution of the will of the late Nana Senti in relation to palpable inconsistencies in the signatures as adduced in evidence on the exhibits; Exhibit 'A' (the Will) and Exhibit 'D' (the letter to ECOBANK) on one hand and Exhibit 'B' (the lease agreement) and Exhibit 'C' (the letter for leave commencement) on the other hand and also the allocation of almost all the properties in the Estate of the Deceased to Angelina Bommo Senti and her associates, as critically analysed by the trial court and this court, has given a compelling reason to this court to affirm the decision of the trial court judge to the effect that the Will of the late Thomas Nana Asante is invalid."**

Order 66 rule 40(5) & (6) of the High Court Civil Procedure Rules C.I. 47 deals with the requirements a person who alleges that a Will executed by a testator is not his act must plead. The rule states as follows:

"(5) Any party who pleads that at the time when a will, the subject of the action is alleged to have been executed, the testator did not know and approve of its contents shall specify the nature of the case on which the party intends to rely.
(6) Any party referred to in subrule (5) shall specifically plead the following matters if the party intends to rely on any of them
***(a)* that the will was not duly executed;**
***(b)* that at the time of the execution of the will, the testator was not of sound mind, memory and understanding;**
(c) that the will was a forgery; or
(d) that the execution of it was obtained by undue influence or fraud."

It seems to us that the respondent's case, particularised in his Writ and Statement of Claim, raises the central issues in this litigation which are; firstly, whether the testator was so sick that he did not have the mental capacity to make a Will, and secondly, whether failure to give exact description of his self-acquired properties, diligent though a person may be in his lifetime rendered the Will not the act or deed of the testator?

In his Amended Reply to the appellant's Statement of Defence, the respondent, however, alleged that the Will was prepared under the fraudulent instructions of Angelina Bommo Senti, a daughter of the testator who during the last year that the testator lived on this earth managed to drive away everyone from the sick old man and gained absolute and complete dominance over him and therefore managed to exert undue sinister influence over the testator, forged or fraudulently procured his signature and that accounted for her name featuring in priority as well as large benefits of the Will going to her close associates and her. The respondent in his Amended Reply gave an instance of forgery as forging the deceased's signature and backdating documents in respect of Senti Chemist Ltd accounts with Ecobank appointing Angelina Bommo Senti as the sole signatory to that account.

In our view, the respondent was by his reply setting up a case completely inconsistent with his former pleadings. The new facts are a clear departure from the story the respondent had initially put across in his claim which had been confronted by the appellants. His case no longer was, as disclosed in the particulars of fraud in his statement of claim, that firstly on the date on which the execution took place, the testator was seriously sick and bedridden and could not make a will, and secondly that the description of the devised properties were vague and ambiguous which was uncharacteristic of the testator.

The respondent somersaulted to allege that Angelina Bommo Senti, a daughter of the testator drove away all the family members from the deceased, gained absolute and complete dominance over him and exerted undue sinister influence over the testator which gave her the advantage to forge or fraudulently procure his signature resulting in the testator devising large portions of his estate to her close associates and herself.

Contrary to law, the respondent in this case did not seek leave of the court to amend his Writ of Summons and Statement of Claim to plead the averments in the Reply. In our opinion, counsel for the appellant should have applied to have paragraphs (3), (4), (5), (6), (8), (9), (10), (11) and (13) of the Reply struck out as being grossly defective. See the English case of **Williamson v. London and North Western Ry. Co. (1879) 12 Ch.D. 787.**

The duty of the trial judge in situations like this was to have struck out that part of the Reply and the evidence adduced in support of those facts which were at variance with the case put forward by the plaintiff in the Statement of Claim. The legal effect, therefore, was that those paragraphs could not be part of any proper Reply before the court, they being a departure from the pleadings. The only pleadings which the learned trial judge was, therefore, entitled to look at were the Statement of Claim in its present form, the Amended Statement of Defence, and paragraphs 1, 2, 4, 7 and 12 of the Amended Reply and any evidence adduced in support of them. The trial judge failed to apply the time-tested principles on Reply and accepted that pleading. This constitutes a fundamental error on the part of the trial judge. The Court of Appeal also did not detect this error but proceeded to affirm it and hold that the late Thomas Senti was unduly influenced by Angelina Bommo in executing his last Will thus perpetuating the trial judge's error.

In our view, this error has occasioned a miscarriage of justice. We say so because the error did not afford an opportunity to the appellants to answer to it in their defence, an opportunity which should have availed them had the respondent amended his Statement of Claim and pleaded those new facts. We have no hesitation in reversing that finding of the trial court and concurred to by the Court of Appeal. We strike out paragraphs 3, 4, 5, 6, 8, 9, 10, 11 and13 of the Amended Reply. In any case no evidence was led by the respondent in support of those paragraphs pleaded in the Reply, and we are at a loss as to how the two lower courts came by the findings and conclusions reached.

CONTRADICTIONS IN PLEADING FORGERY OF SIGNATURE AND UNDUE INFLUENCE IN ONE CLAIM:

If undue influence was exerted on the testator by Angelina Bommo Senti, then it was the testator who executed the Will except that he was pressurised to do so. If the testator's signature was forged or he was so sick that he could not make a Will, then the testator did not sign the Will. Someone else must have signed the Will purporting to be the testator. Undue influence on a testator and forgery of the signature of the testator are mutually exclusive. It is either one or the other. You cannot have the two as the basis for challenging the validity of a testator's signature on a Will.

The implication of these pleadings is that in one breath, the signature of the testator was alleged to have been forged on the Will by Angelina Bommo Senti and in another breath the same Will was signed by the testator under undue influence. This smacks of a contradiction that no tribunal of fact will give weight to.

The testator had been touted by the respondent to be a scholar, very sound and intelligent in all his dealings. We are at a loss how a daughter with lower educational background and intelligence could exert such an influence on the testator. In any case, the trial judge in one of his contradictory findings described the mental status of the testator as follows: **"I do not accept the evidence that Nana Senti decided those who should visit him, for this was a person who was feeble in body, <u>even though not unsound in mind which I doubt had no free and</u>**

independent mind." If the testator, though, feeble in body, according to the trial judge was sound in mind and had free and independent mind, what was the basis for the findings that the testator did not have testamentary capacity and was subject to influence by a daughter performing her filial responsibilities to her father.

PROOF OF FORGERY:

The learned trial judge based his findings of forgery of the testator's signature on exhibit 'D'. This is a letter written to Ecobank Ghana Limited together with a resolution by Senti Chemist Ltd appointing Angelina Bommo Senti as the sole signatory to the company's accounts. The trial judge stated that because the date on the letter to Ecobank, exhibit 'D' is 5th October, 2012 and that of the resolution passed by the board of directors was later, i.e., 2nd November, 2012, that implies that the signature of Nana Senti was forged by Angelina Bommo Senti appointing herself as the sole signatory to Senti Chemist. The Court of Appeal concurred in this finding by the trial judge in the following words:

"**It therefore seems rather questionable that Angelina Bommo who is the Administrator of Senti Chemists, as well as one of the board members of same, would not know of the number of accounts which the company holds especially the one that she has been made a sole signatory to….It is therefore suspicious that she was made the sole signatory of the Senti Chemists Account with ECOBANK; given majority of the disposition in the father's estate; and finally, that she prevented other family members from having access to the Testator when he was ill and bedridden**."

Forgery of signature is a criminal act which must be established by clear evidence. The mere fact that there were differences in the date the letter to the bank was written and the date the board resolution was passed is not sufficient to conclude that forgery had taken place. A decision may have been taken to write to the bank before the company's attention was drawn to the requirement of a board resolution which it passed subsequently. For a private limited company, we do not find this practice unusual. Besides, the only child of the testator on record appointed director and involved in the running of the chemist business is the very Angelina Bommo Senti. We find nothing unusual with the majority shareholder and Managing Director in his ailing

health passing a resolution for his daughter to be the sole signatory to the company accounts. In any case, apart from the respondent's suspicion and speculation which was swallowed hook, line and sinker by the trial judge and the Court of Appeal, the evidence presented was that Angelina Bommo Senti had nothing to do with the preparation, execution and lodgment of the Will of the testator in contention.

Her role in managing the business of Senti Chemist Ltd, a limited liability company had nothing to do with and must be kept separate and distinct from the personal affairs of her father, the testator. The trial judge and Court of Appeal found that she was not candid in some of the answers she gave in her evidence in court. We have read her evidence and found some of her answers about the limited liability company not credible. However, it is our opinion that those inconsistencies are of negligible legal consequences to the merits of the controversy affecting the validity of the testator's Will. We also did not find any substantiated evidence of forgery on the part of Angelina Bommo Senti on Exhibit 'D' to warrant the finding made by the trial judge and concurred to by the Court of Appeal. Those findings and conclusions are perverse and are hereby set aside.

LEGAL EFFECT OF MERE SUSPICION OF FORGERY:

It appears to us that the challenge to the Will was prompted by negative emotions ripening to suspicion that the Will was forged. The respondent stated in paragraph 12 of his reply:

12. "The plaintiff says that there is great suspicion concerning the preparation of the Will under reference and therefore same is tainted with fraud and ought to be declared null and void."

The interpretation we place on this averment is that the allegation of fraud is not based on any solid facts that it was actually perpetuated. It is premised on suspicion that the testator could not have prepared the Will and so long as that suspicion was in mind, fraud must be associated with the preparation of the Will.

We restate here that courts of law do not rule on cases placed before them by parties appearing based on mere rumours or suspicion, however strong. Where suspicion is alleged, it must be

established by solid and compelling evidence and not conjecture. That is why the rule of the litigation game is evidence. We are, therefore, in agreement with the observations of Devlin J. (as he then was) in the English case of **R. v. Atter [1956] Crim.L.R. 289 at p. 290**, that "**You cannot put a multitude of suspicions together and make proof out of it."** See also the South African case of **Irvin & Johnson Ltd v Gelcer & Co. Ltd [1958] 2 S.A.L.R. 59 at 62-63** where Herbstein J warned on reliance on suspicion in the following words:

"If the court is entitled to act on 'a suspicion of some grave impropriety', it should be satisfied that the suspicion is well founded and that it has a solid and substantial basis. A mere feeling that something might be wrong should not be, and in my opinion is not enough."

From the totality of the evidence adduced at the trial and the applicable law, grounds (b) and (c) of the grounds of appeal are, therefore, allowed. We hold that the Court of Appeal erred when it concurred in the holding of the trial court that the late Thomas Senti was unduly influenced by Angelina Bommo Senti in executing his last Will. That finding is misplaced and hereby set aside.

BURDEN OF PROOF ON EXECUTORS IN PROBATE ACTIONS:

We now move to tackle grounds (a) and (d). Ground (a) states that the judgment is against the weight of evidence and ground (d) that the Court of Appeal erred when it held that the respondent was not under obligation to prove that the late Thomas Senti was of unsound mind.

The Court of Appeal concluded that the appellants who are the executors named in the Will bore the **"onus of showing that the Testator was of [unsound] mind at the time of the execution of the Will"** but could not discharge this burden. The conclusion of the Court of Appeal concurred with the findings by the trial judge that the evidence led showed that the testator had no animus testandi because the Will was prepared and executed "**under circumstances which gave rise to some sort of suspicion which the defendants and their witnesses failed to lead credible evidence to reverse.**"

Once again, this appeal brings to the fore the burden placed on executors named in a Will be they plaintiffs or defendants in an action challenging the validity of the Will or to have the Will

proved in solemn form. Thus, under section 2 of the Wills Act, 1971 (Act 360) for a Will to be prima facie valid, it must have the following essential ingredients:

1. It must be in writing.
2. It must be signed by the testator or by some other person at his direction.
3. The signature of the testator shall be made or acknowledged by him in the presence of two or more witnesses
4. The two or more witnesses must be present at the same time.
5. The witnesses shall attest and sign the will in the presence of the testator.

The role of the court in determining the validity of a Will is spelt out in Order 66 r 17 of the High Court Civil Procedure Rules, C.I. 47 as follows:

Examination of will

17. (1) On receiving an application for probate or for letters of administration with a will annexed the Court shall inspect the will and see whether it appears to have been signed by the testator, or by some other person in his or her presence and by his direction and to have been subscribed by two witnesses in accordance with the Wills Act, 1971 (Act 360) and shall not proceed further if the will does not appear to be so signed and subscribed.

(2) If the will appears to be so signed and subscribed, the Court shall then refer to the attestation clause, if any, and consider whether it shows the will to have been in fact executed in accordance with the Wills Act, 1971 (Act 360).

In effect, the legal burden placed on executors named in a Will whenever the validity of the Will is called in question is to lead evidence to demonstrate that the Will is in writing, signed by the testator or some other person at his direction in the presence of two or more witnesses present at the same time and the witnesses have attested and signed the Will in the presence of each other and of the testator. Such evidence will normally be provided by the lawyer who prepared the Will and supervised its execution and the attesting witnesses who were present when the testator executed the Will. If the testator had a medical condition, the evidence of the health professional with the history of the health condition of the testator, confirming that the ailment did or did not

affect the mental capacity of the testator to make and execute a testamentary disposition is also important. This is because a testator must have sound disposing mind at the time when the instructions for the will are given and when the will is executed.

A Will, therefore, which is prepared in accordance with the instructions given while the testator was of a sound disposing mind and executed at a time the testator appreciated what he was executing will prima facie comply with the law. It is a fact that sometimes the named executors had nothing to do with the preparation and execution of the Will. They may not even have been notified about their appointment to act as such. However, the law requires that they lead evidence to propound the Will. Thus, once executors produce evidence conclusively that the provisions of the Wills Act have been satisfied, they would have discharged the burden of proof required of them and the onus then shifts to the person challenging the validity of the Will to lead concrete evidence to disprove the evidence led in proof of the due execution of the Will.

English Courts have long given recognition to Wills executed and attested to properly by a testator and witnesses according to the law in force. Thus, in the old English case of **Lloyd v. Roberts (1858) 14 E.R. 871**, the will was in the handwriting of the testator with an attestation clause in its proper place and was attested by two witnesses. The Court of Appeal affirmed the decision of the Arches Court of Canterbury which pronounced for the Will. In the words of the court:

"If a will appears on the face of it to have been properly executed according to the requirements of the Will Act, 1 Vict., c. 26, the presumption of law is, that the Testator duly acknowledged it."

Again, in the English Court of Appeal case of **Wright v. Sanderson (1884) 9 P.D. 149, C.A**. the testator who was a man of business wrote a holograph codicil upon the same paper as a Will which he made ten years previously. The Court of Appeal affirming the Court of Probate, held that as the codicil ex facie appeared to be properly executed, the presumption omnia rite esse acta was strengthened by the conduct of the testator which showed an anxious and intelligent desire to do everything regularly, that the presumption was not rebutted by the evidence of the

witnesses whose recollection of what took place was evidently imperfect. In the words of Fry LJ at p. 163:

"judges who have presided over the Court of Probate have long been accustomed to give great weight to the presumption of due execution arising from the regularity ex facie of the testamentary paper produced, where no suspicion of fraud has occurred. In so doing they have, in my opinion, acted rightly and wisely."

See also **Perera v. Perera [1901] A.C. 354 at pp. 361-362,** P.C.

West African and Ghanaian courts have followed the English position in leaning towards due execution of the Will. Thus, in the case of **Johnson v Kaja [1951] 13 WACA 290,** Lewey J.A., reading the judgment of the West African Court of Appeal held at page 292 as follows:

"Where there is a dispute as to a Will, those who propound it must clearly show by evidence that, prima facie, all is in order, that is to say, that there has been due execution, and that the testator had the necessary mental capacity, and was a free agent. Once they have satisfied the court, prima facie, as to these matters, it seems to me that the burden is then cast upon those who attack the Will, and that they are required to substantiate by the evidence the allegations they have made as to lack of capacity, undue influence and so forth."

In the Ghanaian case of **Yankah v. Administrator-General [1971] 2 GLR 186** a testator who had executed a Will gave instructions to his solicitor to prepare a codicil altering certain dispositions in the original Will while confined in hospital. Some of the children of the testator whose interests were affected by the codicil issued a Writ seeking to invalidate the codicil on the main ground that at the date of its execution the testator was delirious and was not in a fit physical state to execute it. The Court of Appeal held in holding 3 as follows:

"If it appears on the face of a will that it has been properly executed in accordance with the requirements of the law, the presumption by law is that the testator duly acknowledged it."

Another Ghanaian case which is on all fours with the instant case is **In re Cole (Decd.); Cudjoe v. Cole [1977] 2 GLR 305.** The testator became ill with stroke and instructed a letter-writer who was his friend to draft his Will for him. The letter-writer read the contents to the testator who approved of the Will and appended his signature after which he invited the letter-writer and a Roman Catholic priest to his house and acknowledged his signature in the presence of the two men and which the two men signed as witnesses in the presence of each other. After the death of the testator, his nephew entered a caveat and averred firstly that the said Will was not properly attested, and secondly that the testator was so completely paralysed and incapable of speech that he could not have dictated instructions for his Will and could not have held a pen to sign his name, and thirdly that undue influence was exerted on the testator by a son-in-law, through his friend, the letter-writer who drafted the Will.

The Court of Appeal held that the will was valid because the formalities required by law applicable at the date of the execution of the Will, were complied with. Section 9 of the Wills Act, 1837, did not require any more legal rituals than these. The Court of Appeal further held that in determining whether a testator had the mental capacity to make a Will, the law required that there should be a sound disposing mind both at the time when the instructions for the Will were given and when the Will was executed.

In this appeal, the appellants submitted that the trial judge erred in examining the signature of the testator on other documents as his basis for finding that the signature on the Will was not that of the testator. Counsel submitted that that was not a legal requirement and that all that was required was that the testator intended what is on the Will to be his signature. According to counsel, DW 2, the lawyer who prepared and supervised the execution of the Will as well as DW3, a physiotherapist engaged to treat the ailing testator and one of the attesting witnesses were all disinterested persons in the probate action. They testified about the due execution of the Will and their testimonies were not discredited in anyway. Counsel for the appellants also submitted that inadequate description, non-description or mis-description of properties devised in a Will had never been a ground for challenging the validity of a Will and, therefore, both the trial court and the Court of Appeal erred in finding that imprecise description of the devises in the Will gave credence to the assertion by the respondent that it was not the testator who gave instructions for the Will to be prepared.

Counsel for the respondent, however, argued forcefully that the evidence on record supports the findings and conclusion the trial court came to which was concurred to by the Court of Appeal. Counsel submitted that the holding by the trial court and concurred to by the Court of Appeal that the signatures on exhibits 'A' and 'D' were different from the signatures on exhibits 'B' and 'C', and therefore, was not the act and deed of the testator was confirmed by the evidence of the respondent which was believed by the trial court, hence an appellate court cannot disturb those findings. Counsel invited the court to state that where signatures are in dispute, recourse could be made to other documents from proper custody containing the signature of the person in dispute for the purposes of comparison and determination of validity. He again invited the court to doubt the evidence of DW2 and DW3 on due execution of the Will since their evidence was discredited. This was because DW2's evidence of how he met the testator and prepared the Will and executed it the same day is so incredible that no trier of fact will believe him.

What evidence did the appellants, the named executors in the testator's Will put before the court? The appellants called the 2nd appellant who testified on behalf of himself and the 1st appellant. The appellants also called Kofi Iddrissah, the lawyer who took instructions from the testator, prepared the Will and supervised its execution. One of the attesting witnesses by name Humphrey Osei-Boateng was also called to confirm the execution and attestation in the presence of Kofi Iddrissah, the testator and Cornelius Adjei, the other attesting witness. Then the Registrar of the High Court, Sunyani was called to tender the original Will executed by the testator and lodged at the court.

The original Will exhibit 1 at page 212 of the record on its face is in writing. It is signed at the attestation clause and witnessed by one Osei-Boateng Humphrey, a Physiotherapist and another Adjei Cornelius an Exercise Scientist. There is a lawyer's certificate by Kofi Iddrissah, Barrister & Solicitor of Kofi Iddrissah & Associates Law Offices, Sunyani certifying reading over and interpreting the contents of the Will to the testator in the Twi language and he seeming perfectly to have understood and appreciated the meaning and significance of the contents before appending his signature in the presence of the two attesting witnesses. The Will is then signed at the back by Kofi Iddrissah as the solicitor who prepared it. On its face, there is no doubt that the Will has been duly signed and witnessed, qualifying it within the presumption of law that the execution was duly carried out according to the requirements of law.

Based on these pieces of evidence, the courts, as a general rule, have a duty to sustain bequeaths and devises made in a Will which prima facie complies with the requirements of due execution under the prevailing law. Thus, in another Ghanaian High Court case of **In re Kotei (Decd); Kotei v. Ollennu [1975] 2 GLR 107,** recently cited by this court with approval in the case of **Thomas Tata Atanley Kofigah v Kofigah Francis Atanley, civil appeal no. J4/05/2019 Supreme Court dated 22ND JANUARY, 2020 (unreported)**, a testator died leaving a Will dated 13th March 1969, in which the respondents were named as executors. An application for probate was made by the executors and supported by the affidavit of one of the attesting witnesses confirming due execution of the Will. Shortly after probate was granted, the daughters of the testator and beneficiaries under the Will, applied for an order revoking the grant of probate and to declare the Will null and void on the ground that it was not in fact executed by their late father in the presence of two attesting witnesses as required by law. The attesting witness who swore the affidavit for probate then changed his story and denied that he had ever seen the Will in question until it was shown to him in court. The other attesting witness was not called to testify. Abban J (as he then was) at page 111 stated the principle as follows:

"**The will in dispute herein was typewritten and it is evident that the testator, Clement Kotei, signed it as his final will. There is an attestation clause at the foot of the Will which clearly states that the testator signed it in the presence of two persons, Nunoo and Tawiah, and that the said two persons in the presence of the testator also subscribed their names as attesting witnesses and in the presence of each other. There is, therefore, no doubt whatever that the will itself, on its face, is perfectly regular as regards all formalities of signature and attestation. In the circumstances, the maxim *Omnia praesumuntur rite esse acta* must apply. Where a will appears to be duly signed and witnessed, as in the instant case, it is a presumption of law that the execution was duly carried out according to the requirements of the Wills Act, 1837, and strong evidence will be required from those who alleged the contrary to show that it may not have been properly executed and thus shift the burden of proof on the persons propounding it."**

What strong evidence did the respondent lead to counter the evidence of the appellants and to establish that the Will was not executed by the testator? The respondent gave evidence and called one witness, one Akwasi Kwakye who described the testator as a uterine older brother. The

respondent's testimony was that when he received a copy of the Will, he realised that it was not the act or deed of his father because he could not describe his acquired properties in the alleged Will though he was very intelligent and very meticulous and exhibited a high sense of clarity on all his documents. The respondent also said that the **"signature on the Will doesn't represent my father's signature at all. It appears to have been traced to look like that of my father's signature**." He then tendered a photocopy of the Will, exhibit "A", lease agreement dated 1st November 2005 as exhibit "B", a letter dated 20th April 2009, exhibit "C" and another letter dated 5th October 2012, exhibit "D". These exhibits were to confirm respondent's knowledge of the genuine and forged signatures of his father.

The respondent also testified that at the time the Will was made on 27th August, 2012, his father was extremely sick, bedridden and had no sound mind at that time since he could not even communicate with the outside world. He then said he had a strong conviction that it was Angelina Bommo Senti who gave instructions for the alleged Will to be prepared because "**when you look at the alleged Will most of the properties went to her, her brother and one sister.**"

In the case of PW1 what he told the court was that he got to know the testator had made a Will but he did not accept the Will. According to him, he was prevented by Angelina Bommo Senti from seeing his brother and had to scale the wall to get to see him and observed that he was unkempt, paralysed from the waist downwards and unable to talk because when he talked to him, he did not answer. Though he did not know the one who prepared the Will, in his view because of the condition he saw his brother in, he would not have been able to go anywhere and to prepare any Will.

The respondent's evidence before the trial court only reproduced his pleadings. When confronted and put to strict proof under cross-examination, these were the answers the respondent gave:

Q. Do you repeat that the Will was procured by fraud by Angelina Bommo Senti?
A. Yes.
Q. Do you say that the signature was forged by Angelina Bommo Senti?
A. Yes.

Q. You have no evidence to that effect that it was procured fraudulently or forged.

A. I do, I showed a letter written to Ecobank-exhibit 'D'.

Q. Angelina Bommo Senti has not forged the signature of your father on any document.

A. That is not correct, exhibit 'D' showed that.

Q. The Will prepared by your late father is different from the letter written to Ecobank (Exhibit 'D').

A. That is why I am contesting the Will. The two documents are different. ……..

Q. You said your father could not give the exact description of his properties in the Will.

A. That is true.

Q. It is because of that you say it is not the deed of your father.

A. It is so.

Interestingly, the trial judge reproduced the same evidence in his judgment but gave a different interpretation to the meaning of the answers provided by the respondent. The averments and evidence were strongly denied by the appellants who led evidence from the lawyer who prepared and supervised the execution of the Will, from one of the attesting witnesses who witnessed the Will and the original Will itself which had a signature and an attestation clause signed by the testator and the two attesting witnesses.

In our opinion, apart from reproducing his pleadings by way of evidence, the respondent admitted under cross-examination that his suspicion of forgery of signature and fraud on the part of Angelina Bommo Senti were based on the letter to the Bank, exhibit 'D' and the imprecise description of the properties in the Will. We have found that exhibit 'D' was not procured by fraud and further that mis-description or non-description are no grounds for setting aside a Will. Clearly, when these two grounds held on by the respondent are removed, no evidence whatsoever was adduced to justify setting aside the Will.

In the Ghanaian case of **Akenten v Osei [1984-86] 2 GLR 437, Apaloo CJ** on the burden of proving testamentary capacity held at holding 1 as follows:

"the evidential burden assumed by each side in view of the position taken by the parties, was that the plaintiffs must show that the document in respect of which they sought

probate was the testamentary wish of G; that he was compos mentis at the date of its execution and was a free agent and lastly, that it was executed and attested in accordance with the requirement laid down in section 2 of the Wills Act, 1971 (Act 360). Upon showing that, the burden then shifted to the defendant to prove the alleged forgery. On the evidence, the plaintiffs who propounded the 1981 will (exhibit B) had shown, prima facie, that that will was freely executed by G and attested by the two partners of the firm and that at the time he executed it he was in sound mind. Unlike the firm, M had proved himself untruthful in part and his testimony could not be relied on in proof of the defendant's case that the signature appearing on the will was not that of G. Moreover, when the firm's direct evidence of execution and attestation of the 1981 will was placed in juxtaposition to the opinion evidence of D, the latter was hardly of any weight. The defendant had therefore failed to satisfy the court that the 1981 will (exhibit B), was fraudulent and that the signature thereon was not that of the deceased. Exhibit B would therefore be pronounced in solemn form and the plaintiffs as executors were entitled to have it admitted to probate."

The evidence of the respondent failed to excite our suspicion that the testator had no animus probandi in the execution of the Will. The respondent, therefore, failed to discharge the high burden of proof placed on him by law. His evidence on the mental state of the deceased could have been enriched if he had called a disinterested person like the medical doctor, one Dr. Abebrese of the Regional Hospital, Sunyani who was mentioned in the evidence as the doctor who took care of the testator during his ailment. No such evidence to confirm the mental state of the testator was proffered by the respondent. In the absence of that evidence, the appellants were under no legal obligation to fill in the gaps for the respondent by calling on the evidence of Nana Senti's driver, Gyamfi, the court clerk from Akyede Chambers and Cornelius Adjei, the second attesting witness to prove that the testator was of sound mind as held by the trial judge and concurred to by the Court of Appeal.

Closely related to the findings on the evidence adduced by the respondent are the findings by the two lower courts on the credibility of the appellants and their witnesses which also featured in this appeal. We are referring to the credibility of Dr. Isaac Asomah, the 2nd appellant, Kofi Iddrissah, the lawyer, Humphrey Osei-Boateng the physiotherapist and attesting witness and the

Registrar of the High Court, Sunyani. The trial judge and the Court of Appeal found that their evidence on the due execution of the Will were not credible.

We have reviewed the pieces of evidence by these witnesses on the record. We have found their evidence plausible and very persuasive. When tested, they were not discredited in any way under cross-examination. We found them all to be truthful witnesses. The appellants did discharge the burden placed on them by law to propound the due execution of the Will of the testator. Our opinion is further enhanced by the fact that the appellants and witnesses were all neutral and disinterested persons in the estate of the deceased. No evidence had connected them to any interest they stood to gain by their evidence to propound the Will. Juxtaposing the evidence of the four disinterested witnesses for the appellants evidencing due execution of the Will with the evidence of the respondent and his uncle who were interested persons in the estate of the deceased, the respondent stood to gain if the Will was set aside and the estate falls into intestacy. Therefore, the evidence of the appellants and their witnesses is to be preferred.

We have, thus, come to the conclusion that on 27th August, 2012, Kofi Iddrissah, the lawyer, went to the residence of the testator in Sunyani and supervised the execution of the Will in contention. The Will was executed by the testator, Thomas Asante Senti, a.k.a. Nana Senti in the presence of Humphrey Osei-Boateng and Cornelius Adjei who signed in the presence of the testator and in the presence of each other as attesting witnesses as described in the evidence. It is our opinion as well that the testator's signature on the Will is genuine.

The learned justices of the Court of Appeal, therefore, fell into grave error when they shifted the burden on the appellants to prove that the testator was of sound mind; the appellants having already denied the averment by the respondent that the testator was not of sound mind. The finding by the trial judge shifting the onus on the appellant and concurred to by the Court of Appeal is perverse. It sins against the provisions of the Evidence Act, 1975, (NRCD 323). Section 15(3) of the Act provides as follows:

"**15(3) Unless and until it is shifted, the party claiming that any person, including himself, is or was insane or of unsound mind has the burden of persuasion on that issue**."

We hereby set aside that conclusion reached by the two lower courts.

COMPARISON OF SIGNATURES ON DOCUMENTS FROM IMPROPER CUSTODY IN PROOF OF VALIDITY OF CONTESTED SIGNATURE:

The trial judge also made a finding on the forged signature of the testator appearing on the Will. The judge compared two signatures of the testator on exhibits 'B' and 'C' dated 1st November, 2005 and 20th April, 2009 respectively with exhibits 'A' and 'D', all signed in 2012. He concluded as follows:

"With one's naked eye and without any expert knowledge, one will notice that there were differences in the signatures in Exhibit 'B' and 'C' and that of the Will and Exhibit 'D' so it was Nana Senti who signed the lease document, Exhibit 'B', the letter for leave commencement Exhibit 'C' but not the letter to ECOBANK Exhibit 'D' and the Will of 27/08/2012."

It appears from the record that the Court of Appeal did not agree with the findings of the trial judge that the testator did not sign the Will. The Court of Appeal concluded that in the absence of any forensic evidence, it cannot say conclusively for a fact that the signature appended to the Will is that of the testator or another person. We believe the Court of Appeal took inspiration from section 112 of the Evidence Act which provides as follows:

"If the subject of the testimony is sufficiently beyond common experience that the opinion or inference of an expert will assist the court or tribunal of fact in understanding evidence in the action or in determining any issue, a witness may give testimony in the form of an opinion or inference concerning any subject on which the witness is qualified to give expert testimony."

This is the holding of the Court of Appeal:

"This Appellate Court does not seek to conclusively say for a fact that the signature appended on the Will is that of the Testator or any other person. This is because there was no forensic evidence adduced to the effect that the signature on the will is not of the Late Nana Senti I."

Rather surprisingly, after coming to this conclusion on the appeal before it, the Court of Appeal then made a volte-face and concurred with the trial court that since it is the respondent's case that it was not Nana Senti who signed or executed the Will, the ground of appeal regarding the testator's signature **"is unapproving and must, therefore, fail."**

We find it difficult to reconcile the inconsistent position taken by the Court of Appeal on the authenticity of the testator's signature on the Will. As a general rule, the final decision on the authenticity of a document or a signature rests with the court. But the court cannot just conjure that decision-making from the wilderness without strong and cogent reasons and in many cases without the assistance of an aid especially in a highly technical matter such as comparing signatures and establishing its authenticity. So, in the absence of clear evidence, expert forensic evidence is relevant to assist the court make a determination one way or the other. That is not to say the expert opinion is binding on the court. The expert opinion is to guide the court in making a just determination and where the expert evidence is accepted or rejected, it is the duty of the court to give reasons for its preference.

Thus, in the case of **In Re Agyekum (Decd) Agyekum & Ors v Tackie & Ors [2005-2006] SCGLR 851** Twum JSC in explaining the legal position that the reliance on a handwriting expert is not a requirement under the Wills Act, 1971 (Act 360) and the Evidence Act (NRCD 323), nevertheless at 856-857 of the report stated as follows:

"This type of witness is ordinarily employed to furnish aids to the trier of facts by which he is enabled, without any personal expertise, to reach conclusions as to the genuineness or lack thereof of a disputed writing. But in the last analysis the fact-finder has both the privilege and function of reaching his own conclusions as to the genuineness of disputed signatures or other writing with or without the opinion evidence of a handwriting expert."

We may also refer to the dictum of Ansah JSC in the case of In **The Matter of An Application for Grant of Letters of Administration with Will and Codicil Annexed by Mary Quarcoo and Nii Kojo Armah II-Supreme Court-J4/41/2012 dated 25th November, 2015 (unreported)** where he explained the role of the expert witness in the following words:

"It is a point of law that a handwriting expert is not required to state definitely that a particular writing was by a particular person. His functions were to point out similarities or differences in two or more specimens of handwriting submitted to him and leave the court to draw its own conclusions. In other words, a handwriting expert having examined, deciphered and compared the disputed writing with any other writing, the genuineness of which was not in dispute, was only obliged to point out the similarities or otherwise in the handwriting; and it was for the court to determine whether or not, the writing was to be assigned to the testator.

See also **Wakeford v Lincoln (Bishop) (1921) 90 LJ 174 at 179, PC,**

In this case, the trial judge did not find the need to seek guidance from a forensic expert to assist him resolve the conflicting claims regarding the signature of the testator on the Will. The trial judge opted to determine this contest using his ocular vision to do a comparison of four signatures of the testator tendered in court by the respondent. Apart from the original Will, the rest of the documents were not produced from proper custody but nevertheless accepted by the trial judge. After doing the comparison, he came to the conclusion that the testator signed the 2005 lease agreement exhibit 'B', the 2009 letter to Agnes Pokua, exhibit 'C' but not the 2012 Will, Exhibit '1' and the 2012 letter to Ecobank, exhibit 'D'. How the trial judge came to that conclusion is difficult to fathom because apart from not being a forensic expert in handwritings, he was not conversant with the testator's signature and could not say for sure which signature should be the primary one for the purposes of comparison with others.

Aside forensic examination, another method of establishing the authenticity or otherwise of a signature is by producing from proper custody other documents admitted to be genuine or proved to have been signed by the testator. In this case, the original Will, exhibit '1' was tendered in court, upon a subpoena, by the Registrar of the High Court. The rest of the documents containing the signature of the testator were tendered by the plaintiff, the main challenger to the disputed signature on the Will. These did not come from proper custody. An invitation to the bankers of the testator and other key public institutions where the testator transacted business requesting them to furnish the court with signatures on cheques and letters authored by the testator in 2005, 2009 and 2012 would have assisted the court greatly. To pick two of the signatures from the

exhibits tendered by the plaintiff as the authentic signatures of the testator and the other two as forged signatures because the plaintiff said so is an abdication of his role as a trial judge to properly review the conflicting evidence by the parties and make an impartial determination.

It is a settled fact that no two signatures look alike even if signed within a space of five minutes. How much more comparing four signatures, one signed in 2005, the other in 2009 with two others authored in 2012. There are bound to be differences in the signatures especially in 2012 when the evidence adduced in court was that the testator had spinal problems which had caused weakness or a stroke and had affected his lower limbs. Not surprisingly, it is the two 2012 documents authored by the testator when he was unwell which the trial judge rejected as forgeries. In the peculiar facts of this case, we agree with the earlier conclusion of the Court of Appeal that in the absence of an expert examination to assist the court make its findings on which signatures of the testator were different from others and why, the trial court could not determine conclusively that the testator did not author the signature on the Will.

In any case the law currently in force in this jurisdiction is that it is not the differences in signature compared to the usual signature of a person which matters. The determinant factor is whether the testator acknowledges the mark that was made to be his. Thus, in the Ghanaian case of **In re Sackitey (Decd.); Dzamioja alias Ashong v. Sackitey [1982-83] GLR 1196, Asare-Kwapong J.** resolving a signature dispute in a Will observed in holding 1 that:

"the law allowed a testator who was weak to be assisted to hold a pen to sign his will; there was nothing legally wrong with a person being assisted in signing his name if his fingers were neither strong nor mobile enough to hold and manipulate a pen provided he accepted it as his signature. Any evidence to the contrary has to be proved by the defendants on whom the onus probandi shifted. Even the law allowed that if a person was so weak as to be unable to sign his usual signature, a mark or initials were sufficient. Also, whether a testator could write or not, an incomplete signature was sufficient where there was evidence, as in the instant case, that the testator intended it to be the best he could do by way of writing his name."

In our opinion, the finding by the trial judge and concurred to by the Court of Appeal that the signature on the Will was not that of the testator is perverse and manifestly unsupported by the evidence adduced.

In such cases of disputed handwriting or signature, an appellate court can itself examine documents and form its own conclusion: see the case of **Appea v R (1951) 13 WACA 143.** The first appellate court failed to exercise this power and concurred with the trial court. We are not precluded from doing justice to this case by doing our own examination.

After critically examining the disputed signature on the Will with the other three documents, the common writing that runs through all the exhibits eligible to us is "**asanSenti**". This was how the testator chose to sign his documents. There were visible similarities in the curves and indentations on all the four documents with slight differences on those signed in 2012 when the testator suffered from "paraparesis". It is evident that in 2012, the testator's fingers were not steady, hence those differences which in any event were not material. In our opinion any insignificant variation in the signature on the Will and the letter to the Bank in 2012 was attributed to the testator's condition of health, age and posture.

After our examinations, we have formed the opinion that all the four exhibits were authored by one and the same person. The Will, exhibit '1', could not in the circumstances be a forgery. In our opinion, both the trial court and the Court of Appeal failed to properly weigh the evidence and apply the appropriate law on genuineness of documents authored by a testator. The finding is against the weight of the evidence adduced at the trial. We allow this ground of appeal and set aside the finding by the trial court and the Court of Appeal that the signature on the Will, exhibit '1', was not that of the testator.

DUTY TO NOTIFY THIRD PARTIES OF DECISION TO WRITE A WILL:

Another finding of fact made by the learned trial judge which engaged the attention of the Court of Appeal is the statement that it was strange that the 2nd appellant was not told by the testator of his intentions to go to Kofi Iddrissah, the lawyer, to make a Will. This is because the 2nd appellant visited the testator regularly with his wife where they discussed politics, sports, confidential matters, shared the word of God, ate meals and watched TV programmes. This was

one of the reasons given by the trial judge for rejecting the Will. This is how the Court of Appeal assessed this finding:

"In my view, that statement by the Trial Judge is of no moment as a person is not bound by any legal obligations to disclose the making of a will. But in the circumstances of the rather restricted nature of the Testator's movements, Dr Asomah would have known about his going to see the lawyer. It so appears that it is this observation that the Trial Judge describes as 'strange'. Substantially, the Trial Judge was not wrong in making this observation and even if so no miscarriage of justice can be said to have been occasioned by it."

With all due respect to the Court of Appeal, after observing that the statement by the trial judge was of no moment, that should have ended the analysis on that issue. To proceed and hold that because the 2nd appellant was a close friend of the testator, he should have known the movements of the testator including going to see a lawyer to prepare his Will is calling for the moon. This is not common practice in this jurisdiction and not provided for in any law. The preparation of a Will is usually kept secret in the Ghanaian society. There is a general belief, though erroneous, that the preparation of a Will implies the imminent demise of the person. People, therefore do not talk about it, much more share it with friends and family members. Even spouses hide this all-important decision affecting their lives from each other.

The culture of Ghanaian society alone should have alerted the trial judge and the Court of Appeal that failure or refusal by the testator to disclose the preparation of his Will to his close friend cannot and should not be a ground to justify the suspicion that the testator never prepared the Will. The finding by the trial judge on this issue is perverse and did occasion a grave miscarriage of justice in as much as it set aside the wishes of a testator, his right to dispose of his self-acquired property as he wished and a denial of the beneficiaries the right to inherit the properties devised to them. The Court of Appeal erred in concurring with the trial court on this issue. We have no hesitation in reversing the opinion of the Court of Appeal on this issue.

DESCRIPTION OF BENEFICIARIES & PROPERTIES IN A WILL:

The extent to which a testator is obliged to name the beneficiaries and describe his or her properties in the Will is another key finding which emerged in this appeal. The respondent had pleaded and testified that one of the reasons for his suspicion that the Will was not authored by the testator was that it lacked clarity of expression which was contrary to the values of his father. According to him, his father could not give the exact description of his self-acquired properties such as the building plots, registration numbers of his vehicles, names of banks he held accounts with and the account numbers.

After reviewing the evidence, the learned trial judge made a finding that the Will was the work of a non-lawyer and not the calibre of a lawyer like Kofi Iddrissah because there were no particulars, details or descriptions to any of the properties devised to the beneficiaries. The judge also found that building plots devised in the Will had no plot numbers, banks where the testator saved his money were not named, no account numbers to the Banks were stated and the types of vehicles as well as their registration numbers were also not stated. The trial judge then concluded:

"I support the view expressed by counsel for the Plaintiff that as a scholar, Nana Senti will not give instructions to a lawyer to prepare his Will, without the necessary details, particulars and proper descriptions of his properties."

The trial judge then took on Kofi Iddrissah. He made findings that firstly, the lawyer never went to the testator's house on 27th August, 2012 for the purpose of execution of any Will, and secondly, the testator never gave his telephone number to him as he stated in his evidence. Thirdly, that assuming the lawyer went to the testator's house he only went there to give the Will he had signed in his office to Angelina Bommo Senti for the witnesses, DW3, and Cornelius Adjei to sign their portion, and fourthly the involvement of Kofi Iddrissah so far as the Will was concerned was to sign it, endorse it with his official stamp in his office and deposit it on 4th October, 2012 at the Registry of the High Court. The trial judge then blurted

"**And if I may ask, does Lawyer Iddrissah take instructions from clients in their cars parked in public places, especially in this case, when Nana Senti was coming to him for the preparation of a Will which is an important document of his life? Having realized that**

Nana Senti was sick, I do think that the most reasonable thing, if Nana Senti came to Lawyer Iddrissah's office premises at all, which I doubt, and with all due respect, was for Mr Iddrissah to have followed Nana Senti to his house and taken instructions from the sick man, before returning to his office to prepare the Will for him."

The Court of Appeal again disagreed with these findings by the trial judge. The appeal court reviewed the evidence and held as follows:

"Indeed, as could be gleaned from the evidence on record, the Testator at the time of the execution of the Will was paralysed from the waist. Certainly, his ability to recall or remember the particulars of his property may not be as sharp as a healthy person. In any event, the Testator was able to mention the property that he had and the places they were. Except that they were not described by their numbers. This practice is not uncommon especially among many sick and aged persons even if they are first class scholars. The only danger is that if beneficiaries are not able to trace those properties, then the properties may be lost. Fortunately, however in this case, the Respondent during cross examination was able to identify all the properties."

Rather surprisingly, the Court of Appeal seemed not to be persuaded by its own opinion and proceeded to confirm the findings of the trial judge. There is no law which specifies the form or manner in which a testator's properties should be described in a Will to make it valid. A testator may be the most intelligent and organised person in the prime of his life. The fact is aging and sickness could affect the ability of the most diligent and meticulous human being to slack and become a pale shadow of his former self.

In a similar situation which arose nearly 40 years ago in **Yankah v. Administrator-General (supra)**, a testator was unable to describe his own house and also mixed up the names of some of his children in his Will. Apaloo JSC (as he then was) **at** page **194** resolved the law on the issue as follows:

"Mr. Adjetey next says the testator cannot have been in full possession of his senses when he executed the codicil because not only did he misdescribe his own house, but mixed up the names of his own children. For instance, it is said he described his "Nyamitiase Lodge"

as "Yamitiase House" and misnamed his son Ernest Hayford Topp Yankah alias Ebo as Eboe Holdbrook Topp Yankah. The only difference between the words "Nyamitiase" and "Yamitiase" is that in the latter, the "N" is omitted. This may well be due to Mr. Caseley-Hayford's difficulty in deciphering the testator's handwriting. But the house in question is sufficiently designated and there can be no doubt as to what house was intended to be devised. No point of substance can be made of the fact that the premises was called "House" instead of "Lodge." As to the mixing up of the names, this may well be due to the testator's defective memory when his end was near. But there seems to be no doubt whom the testator meant. Whatever the errors, the rule of law on which a Court of Probate acts in these matters is that mere misdescription does not invalidate a gift or put in the language of the classical Roman lawyer: falsa demonstratio non nocet."

The evidence on the record is that in the last year of the life of the testator on this earth, he was sick and suffered lower limb weakness or stroke which affected his movements. This prompted the 2nd appellant to hire the services of an expert in physiotherapy and an exercise scientist to treat him at home. The finding by the trial court and concurred to by the Court of Appeal that because of the absence of details or descriptions to the properties devised in the Will to the beneficiaries, the Will was the work of a non-lawyer is speculative and pure conjecture. Further, the finding that Kofi Iddrissah never went to the testator's house on 27th August, 2012 to execute any Will and even if he did, it was to give the Will he had signed in his office to Angelina Bommo Senti for the attesting witnesses to sign their portion is also pure conjecture, has no basis in law and not borne out by the evidence adduced at the trial.

ROLE OF A JUDGE WHEN FINDINGS OF MISCONDUCT IN THE PROFESSIONAL WORK OF A LAWYER IS DETECTED AT A TRIAL:

The serious part of these findings was those dealing with Kofi Iddrissah. The trial judge found that he never took instructions from the testator and never prepared the Will in contention and yet he mounted the witness stand and on oath testified about his role in taking instructions and supervising the execution of the Will. A conduct as described above, (if it did happen) would be a serious breach of the ethics of the legal profession, especially rules 2(2) and 9(4) of the Legal Profession (Professional Conduct and Etiquette Rules, 1969 (LI 613) which enjoins every lawyer

at all times to uphold the dignity and high standing of the profession and his own dignity and high standing as a member and to refrain from deliberately deceiving the court.

In all cases, where a lawyer's conduct, be it as a party, witness or acting in a professional capacity falls short of his high calling, a lawyer would have betrayed the trust and respect reposed in him by society and would have no moral right to continue on the roll of the honourable profession. A judge before whom evidence is conclusive that a lawyer has so misconducted himself is enjoined to refer the conduct of that lawyer to the disciplinary committee of the General Legal Council for the necessary disciplinary proceedings to take place.

Applying the ethical rules, if the findings made against Kofi Iddrissah by the trial judge were true and did happen in this probate action, the Court of Appeal and the trial judge would have failed in their duty to the profession and the public by not referring his conduct to the General Legal Council. However, we have concluded in this appeal that we have not found any such misconduct on the part of Kofi Iddrissah after reviewing the evidence. All the findings made by the trial judge against him were pure conjecture and not borne out by the evidence on the record.

We rather observed that the testator, aware of his failing health and eager to put his worldly affairs in order made contact with Kofi Iddrissah through one of the law firm's clerks known to him and subsequently drove to his law firm and instructed him to prepare the Will for him. The lawyer came down from his office to the car park and sat in the testator's car, took instructions and prepared the Will which he took to the house of the testator the same afternoon for execution.

In our opinion, there is absolutely nothing strange about lawyers moving to the car parks of their offices to take instructions from sick clients who on account of their ill health cannot walk to the offices of the lawyer. It is rather a common practice among the Bar for lawyers to be invited to homes, hospital beds and hotel rooms of their clients and persons who wished to engage their services to take testamentary instructions, prepare the Wills and supervise the execution of those Wills outside their law offices and in some cases for gratis. If anything, it is part of the moral duty lawyers owe the public. It is also part of the service they render to the poor and disadvantaged within the community they serve and must be commended and encouraged at the

Bar. In our opinion, Kofi Iddrissah saw the condition of the testator and acted with commendable dispatch to ensure that the testator's dream to put his earthly possessions in order before the inevitable happened were not frustrated.

IS THERE A FIDUCIARY RELATIONSHIP BETWEEN PARENTS & CHILDREN?

The Court of Appeal and the trial court both came to the conclusion that there existed a fiduciary relationship between the testator and Angelina Bommo Senti because the testator was dependent on the daughter for his sustenance. In our earlier position on the pleadings contained in the reply, we struck out the evidence connecting Angelina Bommo Senti to this probate action. Thus, any comment on this aspect of the case would have been unnecessary. However, in view of the importance to the development of law in this jurisdiction we deem it proper to expound on the law of fiduciary relationship in general and circumstances in which it would apply between parents and children.

Black's Law Dictionary, 10th edition defines fiduciary relationship as:

"**a relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship. Fiduciary relationships such as trustee-beneficiary, guardian-ward, principal-agent, and attorney-client - require an unusually high degree of care. Fiduciary relationships usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer."**

Thus, the scope of a fiduciary relationship will extend to every possible situation in which complete trust has been placed by one party in the hands of another who possesses the relevant knowledge, resources, power, or moral authority to control the matter in issue. Common examples of this kind of relationship include a Will by a patient in favour of his physician, a client in favour of his lawyer, or a sick person in favour of a priest or spiritual adviser. However,

blood relation alone does not automatically bring about a fiduciary relationship unless the fiduciary is acting in a professional capacity in addition to his family relationship. One can, therefore, say that a fiduciary relationship does not necessarily arise between parents and children or brothers and sisters. Reference can be made to the United States Michigan Court of Appeal's case of **Salvner v Salvner, 349 Mich 375, 383-385; 84 NW2d 871 (1957)** which held that a parent-child relationship did not constitute a fiduciary relationship that gave rise to a presumption of undue influence. See also **In re Evans' Estate, 283 Mich 275, 282; 277 NW 893 (1938)** which decided as follows:

"We have repeatedly held that the fact that a beneficiary under a will has for a considerable time been intimate with and attended to business transactions for a testator, notwithstanding the latter was mentally afflicted to the extent of being intermittently insane, does not raise a presumption of undue influence.".

The testator whose estate is contested in this appeal had four children at the time of his demise. The plaintiff is on record as the oldest. Then, there is Angelina Bommo Senti and Mary Serwa Akosua Senti. Lastly, William Yaw Senti who was studying piloting in the United States of America but visited their father and communicated by Skype regularly in his lifetime. During the period the testator was indisposed, it was two of his children, Angelina and Mary who lived with and looked after him. The testator in the Will in question gave his building plot situate at Penkwase, Sunyani to the respondent who was referred to in the Will by his local name, Kofi Sabi Senti. The testator then devised his building plots at Sunyani, near the SDA Hospital, Abesim Dominase, Asaasetre on Duayaw Nkwanta Stool Land and Techimantia and rooms in his Techimantia house to his three children namely Angelina Bommo Senti, William Yaw Senti and Mary Serwa Senti. The testator also bequeathed his Pharmacy Shop at Sunyani, his tractor, his vehicles, monies standing to his credit in banks and creditors as well as the residuary of his estate to the three children. In the case of his siblings including PW 1, the testator devised the boys' quarters attached to his Techimantia house to the four and a room to his niece Philomena Nyarko. It is this distribution which the respondent, disappointed after the reading at the High Court took umbrage at and commenced this probate action on suspicion that the signature on the Will was forged by Angelina Bommo Senti.

In re: Kotei (Dced): Kotei v. Ollennu, (supra) Abban J (as he then was) again, confronted with a similar challenge of a testator devising more of his properties to some of his children and less to others resolved it as follows:

"I have read through the will carefully, and I find that the estate consists of houses, cash, and other personal properties and the applicants were given cash gifts and interests in some of the houses. The will, which is an elaborate one, provided also for the other children as well as grandchildren, stepchildren, wives, nieces, nephews and other relations of the testator. The testator seemed to have made a fair distribution of his estate among all those he felt should benefit from his earthly possessions. Yet the applicants, not being content with what their father gave them, put forward Tawiah, a dishonest witness, to champion their cause. The late Clement Kotei did not intend to die intestate when he went through the form of will making, and if this court had not been vigilant Tawiah would have completely frustrated the wishes of the late Clement Kotei on earth."

It is our opinion that the relationship which existed between Angelina Bommo Senti, Mary Akosua Serwa Senti and William Yaw Senti and their father was not a fiduciary one as between attorney and client, broker and principal, principal and agent, trustee and beneficiary, and executors or administrators and the beneficiaries of a deceased estate. In our view, a parent-child relationship, in and of itself, does not establish a fiduciary relationship. A fiduciary relationship extends far beyond a child's friendly or filial assistance to a parent in times of sickness. Again, mere respect by a father for a child's judgment or general trust by a father in the character of a child is ordinarily insufficient for the creation of a fiduciary relationship to raise the suspicion of undue influence.

In, **In re Sackitey (Decd.); Dzamioja alias Ashong v. Sackitey [1982-83] GLR 1196, Asare-Kwapong J held that.**

"Again, it was not sufficient to establish that a person has the power unduly to overbear the will of the testator. It has to be shown that in the particular case, the power was exercised, and that it was by means of the exercise of that power that the will was obtained. As the

defendants failed to substantiate the charges of improper execution, mental or physical incapacity and undue influence, they had failed to discharge that onus."

See also In **re Cole (Decd.); Cudjoe v. Cole [1977] 2 GLR 305, CA.**

The Court of appeal and trial court both erred in holding that the relationship existing between a caregiver like Angelina Bommo Senti and her father was a fiduciary one which resulted in her influencing him unduly. This finding is perverse and accordingly set aside.

CONCLUSION:

In Re Attah (dec'd); Kwaku v Tawiah [2001-2002] 1 GLR 339 at 346, Adzoe JSC delivering the judgment of this court echoed the court's disposition towards giving effect to the last wishes of a deceased in the following dictum:

"My understanding is that a will is a very special and solemn legal document in which a person declares his wishes as to how his property should be distributed, disposed of or managed after his death; and the greatest respect due to a deceased person is, in my opinion, to give effect to his 'last will and testament' unless there are compelling reasons militating against doing so."

We believe this dictum sums up the policy rationale which has influenced our decision to uphold that last Will and testament of Thomas Asante Senti.

Parents' love and affection for their children is manifested in the foundation they give them in their education and, depending on how the relationship is sustained, in their farewell testamentary disposition. It is usual for parents to totally disinherit a child above eighteen years in their Will. Other parents show their revulsion to children of bad character by donating a token sum to them for the purposes of purchasing Bibles to read and reform their lives. Such children, in the lifetime of their parents are believed to have acted contrary to the biblical advice in **Exodus 20:12** to **"honour their father and mother,** so that you may live long in the land the Lord your God is giving you."

In the case of the testator, Thomas Asante Senti, the evidence against the respondent was that he had a frosty relationship with his father arising from his befriending a female pharmacy assistant

called Ataa who had caused financial loss to the business of his father. Respondent, then vacated the father's house without notice to him. The other three children stayed in close touch with the testator and developed a cordial relationship with him. Angelina Bommo Senti and Mary Akosua Serwa Senti stayed with the testator in the same house providing care for him in his ailment. William Yaw Senti was in the United States of America but visited the father when he could and also got in touch on Skype and telephone. It is not surprising that the testator gave almost all his earthly possessions to the three children. The devise by the testator to the three children is in consonance with what most fathers would do.

In the recent decision of this court in **Thomas Tata Atanley Kofigah v Kofigah Francis Atanley (supra)**, we decried the frequent challenge mounted by children against Wills made by their parents and the expectations among such children to have a divine right to be left an inheritance. We did so because we observed that one of our roles as a policy court is to identify some of the ills in our society and offer solutions towards curbing them. We observed that:

"**It has been the habit of recalcitrant children disinherited in the Will of their deceased parents or guardians to mount challenges against the Will. Children ought to know that after the age of 18 years, a parent or guardian is under no obligation to make provision in his or her Will for them. Any such provision is based on the whims of the testator arising from natural love and affection, respect for, care for and cordial relationship a child shows or strikes with the parents or guardians when they were alive……. The practice whereby recalcitrant children challenge the Wills of their parents or guardians is becoming so rampant that it is time to call upon professional advisors to confront such children with the realities of life. That is not to say that Wills suspected to have been forged should not be challenged. There are guidelines laid down in the rules and case law by which Wills can be challenged and proved in solemn form. We recommend these guidelines to all who intend to pursue true justice in the Probate division of the courts."**

This probate action ending in this appeal is one of such cases. The respondent, the oldest child of the testator had anguished his father so that he felt completely let down by him as a son. He broke all relationships with his father only to surface after his demise to demand an equitable share of the earthly possessions left by his father.

As we decried in the Atanley's case, such children also erroneously, hold the view that the ability to make it in life and acquire earthly possessions is the preserve of parents whose acquisitions must be fought over and each child begotten given an equal share. The world has reached a stage where it must be hammered home that the education imparted into the lives of children by their parents should be sufficient to equip and propel them to conquer the world and turn their homes, communities, countries and the world at large into successful places. It is expected that such children would dream, be innovative and improve upon what their parents acquired in their lifetime. The possessions, then left for them in the Wills of their parents should be an exception rather than the norm, a bonus rather than gold mines to fight for and live on.

We cannot end this opinion without congratulating counsel for the parties for their industry and invaluable assistance in the conduct of this case from the trial court all the way to this court.

Concluding, based on the totality of the evidence and applicable law presented before this court, it is our considered view that the trial court and the Court of Appeal both erred in their findings and came to the wrong conclusions on both procedural and substantive grounds. We would allow the appeal herein and proceed to set aside the judgment of the Court of Appeal and by necessary implications that of the High Court and substitute our decision dismissing the plaintiff's claim as formulated in his writ of summons. We order that the last Will of Thomas Asante Senti dated 27th August 2012 be admitted to probate.

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU

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