IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: BAFFOE- BONNIE JSC (PRESIDING)

PROF. KOTEY JSC

OWUSU (MS.) JSC

LOVELACE-JOHNSON (MS.) JSC

AMADU JSC

CIVIL APPEAL

NO. J4/28/2022

27TH JULY, 2023

1. ANDREWS NARH - BI
(SUBSTITUTED BY JOHN NYONGMO OBODAI BEDAI)
2. TORGBOR OBERKO
3. NETAS PROPERTIES LIMITED
4. GHANA NATIONAL ASSOCIATION OF TEACHERS (GNAT)

DEFENDANTS/ RESPONDENTS/ APPELLANTS

VS.

ASAFOATSE KWETEY AKORSORKU III
(SUBSTITUTED BY ASAFOATSE KWETEY

PLAINTIFF/APPELLANT/ RESPONDENT

NARTEY - WAYO AKAMISA II)

JUDGMENT

AMADU JSC:-

INTRODUCTION:

(1) This appeal emanates from the judgment of the Court of Appeal dated 20th May, 2021 wherein the Court of Appeal reversed the decision of the High Court, Land Division-Accra, dated 27th February, 2019 in favour of the Plaintiff/Appellant/ Respondent/Cross/Appellant. For purposes of consistency, the parties shall bear the designations assigned them at the Trial Court, simply as ***"Defendants and Plaintiff".***

(2) The appeal, though straight-forward in terms of the substantive issues for determination is however shrouded in various technicalities from the Trial High Court to this court. As a court of last resort, this court has always been circumspect in determining cases without sacrificing substance on the alter of technicalities unless the technical issue raised is of a kind which is indisputably fatal to proceedings and manifestly unanswerable on the peculiar facts of each case and relevant law.

(3) The issues arising for determination in this appeal rest on three key areas: capacity/locus *standi;* ownership of the land, the subject matter in dispute as well as allegations of bias against one of the justices of the Court of Appeal, the latter which in our view ought not to be relevant to the instant appeal but which could

have been raised by the invocation of the appropriate jurisdiction of this court for the consequential remedy. We shall however address that ground shortly.

(4) Intriguingly, while these crucial issues for determination are not difficult to identify, the Defendants have anchored their appeal on a myriad of as many as twelve (12) grounds most of which contravene the mandatory rules of this court on the proper formulation of grounds of appeal. The grounds of appeal as set out in the Defendants' notice of appeal are as follows:

a. ***The judgment of the Court of Appeal is against the weight of evidence placed before it.***

b. ***His Lordship Justice P. Bright Mensah J.A wrongly exercised his judicial discretion by not only accepting to sit as an appellate judge over the same case he partly handled at the trial Court, and with the Trial Court's influence or bias, went ahead to write the lead judgment of the Court of Appeal which the other two judges only agreed or concurred to.***

c. ***The Learned Lordships of the Court of Appeal unfortunately failed to consider the totality of the evidence of Defendants/ Respondents/Appellants which occasioned substantial miscarriage of justice.***

d. ***The court erred in law when it admitted Asafoatse Kwetey Akorsorku III as a Head of Family of Djanmaku Trominya but failed to indicate how and when he ceased to hold the said position to (purportedly) cloth or qualify Asafoatse Nartey Wayo Akamisa II of "Wenguam" to substitute him.***

e. ***The Court of Appeal having admitted that: ". . .among the Ningos . . . the Asafoatse is the land owner of family land but he holds same in trust for the***

family" (page 17 of the Court of Appeal judgment) it erred in law when it overlooked the incidence of fraud perpetuated by Plaintiff/Appellant/ Respondent to hoodwink the Trial Court that he replaced/substituted Asafoatse Kwetey Akorsorku III as Asafoatse in addition to adulterating exhibits to support his case.

f. *The Honourable Court erred in law in the face of Plaintiff/Appellant/Respondent's own witness's admission that there is no family or town known/called Wenguam, contrary to the position taken by the court that there is one and same used to influence the court's judgment in favour of Plaintiff/Appellant/Respondent in determining the issue of capacity in favour of Respondent herein-a clear miscarriage of justice to the disadvantage of Defendants/Respondents/ Appellants.*

g. *The Court of Appeal contradicted itself and came to wrong conclusions in law when it said that 1st and 2nd Defendants /Respondents/Appellants are licencees yet acquired usufructuary interest in Lardowayo, the land in controversy.*

h. *The Learned Judges of the Court of Appeal inadvertently or wrongly applied the legal principles in the cases of TORGBUI DZOKUI VS. ATISE AZAMLI (Civil Appeal No. J4/36/2015) delivered on December 09, 2015 & AWULAE ATTIBRUKUSU VS. OPOPNG KOFI [2011] SCGLR 176 to the instant case which in no way was similar to the Lardowayo case where no evidence of vassalage or attorning tenancy to Plaintiff/Appellant/ Respondent by the Bedai, who are chiefs of Lardowayo land from time immemorial, ever existed.*

i. The Court erred in law when it accepted Asafoatse Nartey Wayo Akamisa II as an Asafoatse who substituted Asafoatse Kwetey Akorsorku, in the face of contrary judicial pronouncements.

j. The appellate court below misconstrued the facts relied on by the High Court in determining the issue of capacity and thus perpetuating the miscarriage of justice to the disadvantage of Defendants/ Respondents/Appellants.

k. The Honourable appellate Court below misled itself to encourage falsehood and miscarriage of justice when it relied on the evidence of a palpable discredited witness to corroborate Plaintiff/Appellant/Applicant's status as Asafoatse and granted him capacity.

l. Further grounds of appeal to be filled upon the receipt of the Record of Appeal.

(5) The caution this court has given in numerous decisions on the proper formulation of grounds of appeal cannot be over emphasized. Counsel practicing before this court have been directed to first, appreciate that an appeal is a creature of statute. Therefore, the statutory rules governing appeals must, at all times, be strictly adhered to. It has become common practice lately for counsel appearing before this court to expect the court to undo their errors in the court's effort to achieve substantial justice. We have in appropriate cases overlooked such errors, albeit, ordinarily unpardonable and afforded special dispensation in pursuit of the justice of the issues before us for adjudication.

(6) Rules 6(4) and (5) of the Supreme Court Rules, 1996 (C.I.16) prescribe particular ways of formulating grounds of appeal. The rule requires the grounds to be set out concisely and under distinct heads. The rule frowns upon grounds which are

argumentative or narrative in formulation. Indeed, the caution to abiding by Rule 6(4) is manifested in the consequence in it's disobedience under Rule 6(5) of C.I. 19. The rules provide as follows:

"4. The grounds of appeal shall set out concisely and under distinct heads the grounds upon which the Appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered seriatim and where a ground of appeal is one of law the Appellant shall indicate the stage of the proceedings at which it was first raised.

5. No ground of appeal which is vague or general in terms or 'discloses no reasonable ground of appeal shall be permitted, except the general ground that the judgment is against the weight of evidence; and any ground of appeal or any part of it which is not permitted under this rule may be struck out by the Court on its own motion or on application by the Respondent."

(7) In the case of **F.K.A COMPANY LTD. VS. NII TEIKO OKINE (Substituted By: NII TACKIE AMOAH VI) Civil Appeal No.J4/1/2016 dated 13th April 2016** this court restated its position per Akamba JSC in the following words: ***"It is important to state that the adjudication process thrives upon law which defines its scope of operation. It is trite to state for instance that, nobody has an inherent right of appeal. The appeal process is the creature of law. Any initiative within the context of the adjudication process must be guided by the appropriate, relevant provision be it substantive law or procedural law. As courts, if we fail to enforce compliance with the rules of court, we would by that lapse be enforcing the failure of the adjudication process which we have sworn by our judicial oaths to uphold".***

(8) When therefore a situation of similar non-compliance resurfaced in the case of **INTERNATIONAL ROM LIMITED VS. VODAFONE GHANA LIMITED. Civil Appeal No. J4/2/2016 dated 6th June 2016,** this court cracked the whip and expressed itself in the following words of Akamba JSC while saving the appeal from perdition.

"Thus the 1st Defendant's so called grounds of appeal when juxtaposed with the above requirement (rules 6(4) and (5) reveals an obvious non-compliance with the rules of court. Undoubtedly it is only in an atmosphere of compliance with procedural rules of court would there be certainty and integrity in litigation. All the so called grounds filed by the Appellant (above) are general argumentative and narrative and to that extent non-complaint with Rule 6 Sub-rules 4 and 5 of C.I.16. They are struck out. In order not to yield overly to legal technicalities to defeat the cries of an otherwise sincere litigant we would and hereby substitute them with what actually emerges as the core complaint and general ground which is that "the judgment is against the weight of evidence". It does appear that the magnanimity exhibited by this court over these obvious lapses and disrespect for the rules of engagement is being taken as a sign either of condoning or weakness hence the persistence of the impunity. It is time to apply the rules strictly".

(9) Reference is also made to the cases of **OFOSU ADDO VS. GRAPHIC COMMUNICATIONS GROUP LTD. [2011] 1 SCGLR 355; DAHABIEH VS. S. A. TARQUI & BROTEHRS [2001-2002] 1 GLR 176 & FAUSTINA TETTEH VS. T CHANDIRAM & 3 OTHERS Civil Appeal No./J4/52/2018** dated 24th July 2019 the letter in which Marful-Sau JSC *(of blessed memory)* in delivering the unanimous decision of this court and citing **DAHABIEH BROTHERS VS. S.A. TURQUI & BROTHERS** (supra) with approval held *inter alia* that: ***"The Appellant failed to particularize the errors alleged by the said grounds, to enable this court effectively***

address same as required by law. The errors alleged cannot also be inferred sufficiently from the wording of the grounds to enable us address same. Accordingly, the offending grounds (1) to (10) of the appeal will be struck out as they are non-compliance with rules of this court".

(10) In the instant case, most of the grounds of appeal set out in the Notice of Appeal have unpardonably contravened Rule 6(4) such that, they cannot be saved through reformulation. Grounds "e"; "f"; "h" and "k" are all argumentative and non-compliant with Rule 6(3) of the rules of this court. They are therefore, struck out. As we held in the case of **OKONTI BORLEY & ANOTHER VS. HAUSBAUER LTD. [2021] DLSC 10078.** *". . .rules of court are not mere rules but subsidiary legislations by virtue of Article 11(7) of the Constitution 1992 and therefore have the force of law. That is why rules of court must be respected and obeyed. When there is non-compliance with rule of court especially those in mandatory terms, the court cannot remain silent and condone same. There must be sanctions otherwise the purpose of enacting those rules will be defeated".*

(11) In formulating Ground '1' the Defendants allege that: ***"The Court erred in law when it accepted Asafoatse Nartey Wayo Akamisa II as an Asafoatse who substituted ASafoatse Kwetey Akorsorku, in the face of contrary judicial pronouncements"*** Having alleged an error of law, the Defendants failed to provide the necessary particulars of the said error as required by Rule 6(1)(f) of C.I. 16. This ground is also accordingly struck out.

(12) In the result, the remaining competent grounds for consideration in this appeal on the merits are the following:-

"(a) The judgment of the Court of Appeal is against the weight of evidence placed before it.

(b) His Lordship Justice P. Bright Mensah J.A. wrongly exercised his judicial discretion by not only accepting to sit as an appellate judge over the same case he partly handled at the trial Court, and with the Trial Court's influence or bias, went ahead to writ the lead judgment of the Court of Appeal which the other two judges only agreed or concurred to.

(c) The Learned Lordships of the Court of Appeal unfortunately failed to consider the totality of the evidence of Defendants/Respondents/Appellants which occasioned substantial miscarriage of justice.

(d) The court erred in law when it admitted Asafoatse Kwetey Akorsorku III as a Head of Family of Djanmaku Trominya but failed to indicate how and when he ceased to hold the said position to (purportedly) cloth or qualify Asafoatse Nartey Wayo Akamise II of "Wenguam" to substitute him.

(e) The Court of Appeal contradicted itself and came to wrong conclusions in law when it said that 1st and 2nd Defendants/Respondents/Appellants are licencees yet acquired usufructuary interest in Lardowayo, the land in controversy.

(f) The appellate court below misconstrued the facts relied on by the High Court in determining the issue of capacity and thus perpetuating the miscarriage of justice to the disadvantage of Defendants/Respondents/Appellants".

(13) From their formulation, grounds "c" and "e" which allege improper evaluation of the evidence on record can all be conveniently dealt with under the omnibus ground of appeal. It is incomprehensible and unnecessarily repetitive for the Defendants to urge on us the omnibus ground of appeal and still isolate issues which are properly speaking complaints about the proper or improper evaluation of the evidence which falls under the omnibus ground. Such approach to formulating grounds of appeal result in repetitive submissions.

(14) Further, we are of the view that ground "d" can also be dealt with under ground "f" as both grounds relate to the challenge of Plaintiff's capacity and are also unnecessarily repetitive. This appeal will therefore, be determined on three grounds, which invariably provoke the same issues for determination, as the said impugned grounds have been struck out for non-compliance with the rules. The competent grounds are as follows:

i. ***The judgment of the Court of Appeal is against the weight of evidence placed before it.***

ii. ***His Lordship Justice P. Bright Mensah J.A. wrongly exercised his judicial discretion by not only accepting to sit as an appellate judge over the same case he partly handled at the trial court, and with the trial court's influence or bias, went ahead to write the lead judgment of the Court of Appeal which the other two judges only agreed or concurred to.***

iii. ***The appellate court below misconstrued the facts relied on by the High Court in determining the issue of capacity and thus perpetuating the (sic)***

miscarriage of justice to the disadvantage of Defendants/Respondents/Appellants.

(15) The Plaintiff also filed a notice of cross-appeal on one ground to wit:

"a. The court erred when it failed to grant an order for perpetual injunction and recovery of possession to Plaintiff in respect of lands outside the 1st Defendant's family settlement area which have been alienated to 3rd and 4th Defendants and other third parties."

We wish to place on record that while the parties indicated in their notices of appeal/cross-appeal that they intended filing additional grounds of appeal, none was filed.

(16) **BACKGROUND**

On the 4th of April 2011, the original Plaintiff caused to be issued, a writ of summons and a statement of claim against the Defendants for the following reliefs:

"a. A declaration of title to all that piece of land situate, lying and being at Ladorwayo and bounded on the North -West by land at Odumase, the property of Akugbey Family of Lowe, Ningo; on the South East by land at Nihetsokunya, the property of Okubeng family of Lowerkponor, Ningo; on the South-West by land along the Mangotsonya boundary, the property of Djangmaku family; North-East by land at Vakpo, the property of Blemano family of Bantama-Kabiawe, Ningo; on the South at Mangotsonya, on the West by land at Otsebreku and covering an approximate area of 1500 acres.

b. Recovery of possession of the land described in relief (a) above;

c. An order of perpetual injunction to restrain the Defendants whether by themselves, their assigns, workmen, agents, privies, personal

representatives successors, servants or howsoever described from entering, interfering and /or alienating portions of all of the land described in relief (a) above;

d. Damages for trespass

e. Costs inclusive of legal fees."

(17) Pursuant to an order of the trial court, the original Plaintiff amended the statement of claim but maintained the reliefs sought in the suit. This was followed by a second amendment of the writ and statement of claim. The Defendants filed an amended statement of defence and counterclaimed as follows :

1. A declaration that:

"(i) Plaintiff has no capacity and or locus to initiate this action.

(ii) Plaintiff is estopped to initiate this action since this Honourable Court had once conclusively dealt with the case including Plaintiff's purported predecessor herein.

(iii) All that piece or parcel of land covering an approximate area of 136.3 acres located, situate and being at Lardowayo in the Greater Accra Region of the Republic of Ghana and registered at the Land Title Registry as No.TD. 0991 in the Land Registry Vol. 021 FOLIO is the property of GHANA NATIONAL ASSOCIATION OF TEACHERS, TEMA MUNICIPALITY only.

(iv) The large stretch of land located situate and being at Lardowayo and measuring approximately in area 479.832 hectres and more particularly delineated on a site plan and bounded by families hailing from Prampram, Vakpa, Odumase and Amanfro (less those conveyed out) is the property of Bedai family Lardowayo.

2. ***Recovery of possession of the said land.***

3. ***Perpetual injunction restraining Plaintiff, his assigns, servants, agents and or whosoever claims through him from ever trespassing on the said land.***
4. ***Damages for trespass.***
5. ***Costs of this action".***

THE FACTS

(18) As aforesaid, this suit was commenced on the 4th day of April, 2011 by one Asafoatse Kwetey Akorsoku III. Per the indorsement on the writ of summons, he sued for himself and on behalf of the Djangmaku family of Old Ningo. He commenced the action per his lawful attorneys, -Hassan Enoch, Kwame Narteynorh and Albert Kwei.

(19) In paragraph 1 of the statement of claim, the original Plaintiff pleaded that, he is the Head of Family and the Asafoatse of Djangmaku Trominya of the Djangmaku We of the Ningo Traditional Area. He stated further, that the 1st, 2nd and 3rd Defendants were members of the Aneho family and descendants of one Bedai. He further pleaded, that the 4th and 5th Defendants are body corporates who allegedly acquired parcels of his family's land from the 1st, 2nd and 3rd Defendants. In fact, from the pleadings of the parties and the evidence on record, the principal reason why the action was commenced was the alleged conveyance of Plaintiff's land by 1st, 2nd and 3rd Defendants to the 4th and 5th Defendants. It is important to place on record at this stage that, the original Defendants were five, the 1st and 3rd Defendants passed away. And while the 1st Defendant was substituted, the 3rd was not. He was subsequently non-suited. The 1st and 2nd Defendants on record are however members of the same Bedai family referred to as 1st Defendant's family.

(20) On the 29th day of October, 2013, the Plaintiff *(Respondent)* in the instant appeal, *(Asafoatse Nartey -Wayo Akamisa II)* applied to the trial court to substitute the original Plaintiff and to prosecute the claim. In his affidavit in support, he stated that he had brought the application with the authority and consent of the principal members of the Djangmaku family of Old Ningo, Accra. In paragraph 5 thereof, he deposed that: ***"the Plaintiff is no longer the head of family of the Dganmaku family of Old Ningo."*** He added, that he is presently the head of the Djangmaku family of Old Ningo and hence, the court should substitute Plaintiff with him. This application was granted by the court.

(21) Consequently, an amended writ of summons and statement of claim was filed by the new Plaintiff, *(Respondent herein).* There was a second amendment to the writ of summons and statement of claim on the 22nd of May 2015. *(See page 92-95 of the Record of Appeal).* In the said amended statement of claim, the Plaintiff contended that, he is the head of family and the Asafoatse of Djangmaku Wenguam of the Djangmaku-We of the Ningo Traditional Area. He contended as aforesaid that, the 1st, 2nd and 3rd Defendants are members of the Aneho Family and descendants of one Bedai. According to him, the 4th and 5th Defendants are body corporates who allegedly acquired parcels of his family land from the 1st, 2nd and 3rd Defendants.

(22) In tracing the history of his family ownership to the land, he averred that, one Asafoatse Nartey-Wayo Akamisa I, a member of the Djganmaku-Wenguam of the Djagmaku-We of Old Ningo acquired a large tract of land known as the Ladorwayo lands in the second half of the 19th Century by purchase from one Nana Darko also known as Nana Dankwa of Akwapim. Following the purchase, Asafoatse Nartey Wayo Akamisa I and some members of the Djangmaku family

relocated from Old Ningo to settle on the Ladorwayo land and their descendants have been in undisturbed occupation of the land ever since. He contended that, Asafoatse Nartey -Wayo Akamisa, Kwetey Akorsorku, and Kweinor Agbodo were half-brothers paternally while Narteh Oklutse and Tetteh Agbanawo were son and nephew respectively of Asafoatse Nartey-Wayo Akamisa.

(23) According to the Plaintiff, in the year 1915, Francis Crowther, the then Secretary for Native Affairs confirmed the Djangmaku clan's ownership of the Ladorwayo lands and recorded this fact in his account of the history of the Ningo people and their land ownership in some official documents. He pleaded further that, in 1954-56 Commissioner Jackson the Land Commissioner also affirmed this history in his report and indicated that the Ladorwayo lands were property of the Djangmaku family. According to the Plaintiff, 1st, 2nd and 3rd Defendants' ancestor, one Bedai with the consent and concurrence of the Djangmaku family erected settlement on portion of the Plaintiff's family land. Plaintiff contended that, the 1st, 2nd and 3rd Defendants have unlawfully conveyed portions of the Plaintiff's family land to the 4th and 5th Defendants hence the action in court.

(24) In defence to the Plaintiff's amended statement of claim, the Defendants filed an amended statement of defence dated the 12th of June 2015. They challenged the capacity of the Plaintiff and further denied knowledge of any family in Lordowayo or Old Ningo called Djangmaku Wenguam of Djangmaku-We. The basis of this challenge is captured at paragraphs 19-20 of the Amended Statement of Defence at page 98 of the record as follows:

19. Defendants further say that Plaintiff's suit is defective and therefore incompetent in that though in Plaintiff's Statement of claim he alleged dealing with family property, neither in the title to the suit nor in

its indorsement of claim has Plaintiff disclose the capacity in which he issued the suit.

20. Defendants further say that Plaintiff lacks the capacity to initiate the instant action because he neither hails from Lardowayo nor is he a family head and or has any link with Djangmaku clan and its lands.

(25) The 1st, 2nd and 3rd Defendants averred that the land they were possessed of was acquired by their forebears who acquired same from one Amonor-Mantse from Akuapem. They contended that, the land owned by the Bedais in Lardowayo belonged to the people of Amanfro and Prampram. The 1st, 2nd and 3rd Defendants averred further, that the Bedai of the Aneho family of Djangmaku clan/wenguam settled in Lardawayo. They averred that the Djangmaku as a clan/wenguam never owns nor owned land but various families within Djangmaku clan/wenguam are the owners of land. The 1st, 2nd and 3rd Defendants averred further, that they lawfully conveyed the land to the 4th and 5th Defendants.

THE JUDGMENT OF THE HIGH COURT

(26) The Trial Court in its judgment dismissed the Plaintiff's action and granted the counterclaim of the Defendants. In that judgment, the Trial Court reasoned and held that:

a. ***Both the original Plaintiff and the substituted Plaintiff were all bereft of capacity to have mounted or pursued the action. According to the court, by the showing of the present Plaintiff as well as the evidence before it, neither the original Plaintiff, nor the Respondent herein was Head of Family of the Djangmaku family of Old Ningo. Whiles the original Plaintiff was the head of the Trominye Family of the Djangmaku We family, the substituted Plaintiff was an Asafoatse of the Djangmaku Wenguam Family of Old***

Ningo. The Respondent therefore misled the court in causing to be substituted as a party to the suit.

b. ***Since the evidence revealed, that the Djangmaku Family allowed 1st, 2nd and 3rd Defendants' ancestor Bedai to settle on the land and he and his family have been in possession for ages, the Bedai's acquired a usufructuary interest in the land at customary law with all of its possessory and alienatory incidents".***

(27) Dissatisfied with the decision of the Trial Court, the Plaintiff successfully appealed to the Court of Appeal. The Court of Appeal set aside the judgment of the trial court, and further dismissed the counterclaim of the Defendants. The Court of Appeal found and held that :

i. ***The Respondent had the requisite capacity to mount the action.***

ii. ***The Appellants, being licensees of the Respondent cannot be liable for trespass. They shall continue to be in possession provided they acknowledged the Respondent's family title to the land.***

iii. ***All conveyances by the Appellants must be with the consent of the Respondent family.***

iv. ***GNAT and Netas Properties shall attorn tenant to the Respondent in order not to lose their land.***

v. ***Cost of Ten Thousand Ghana Cedis in favour of the Respondent.***

It is against this judgment of the Court of Appeal that the Defendants have appealed to this court on the ground hereinbefore set out.

THE APPEAL

(28) The law is settled that, an appeal is by way of re-hearing. This is particularly so, when an Appellant sets up the appeal on the omnibus ground that, the judgment appealed from is against the weight of evidence on record. While this court is

obliged in the circumstances to examine the entire record in order to make a determination of the error alleged to have been committed by the lower courts regarding the evaluation of evidence, the Appellant carries the burden of establishing the nature of the evidence on record which was either improperly evaluated, or not evaluated at all, or any legal incident wrongly apprehended or applied by the lower court which if otherwise done by this court, will result in a favourable decision for the Appellant. See the dicta of this court in the cases of **TUAKWA VS. BOSOM [2001-2002] SCGLR 61; BINGA DAUGBARTEY SARPOR VS. EKOW BOSOMPRAH [2020] DLSC 9922 at PAGE 6; NORTEY (NO.2) VS. AFRICAN INSTITUTE OF JOURNALISM AND COMMUNICATION & OTHERS (NO. 2) [2013-2014] 1 SCGLR 703; KORANTENG II AND OTHER VS. KLU [1993-94] 1 GLR 280.**

FINDINGS OF FACT BY THE TWO LOWER COURTS

(29) The law is that unless the circumstances so compel and authorise, an appellate court, must not disturb the findings of fact made by a Trial Court. This is particularly so as the trial court is the forum where the demeanour of the witnesses are presumed to have been properly examined during the trial. In **AGYENIM-BOATENG VS. OFORI & YEBOAH [2010] SCGLR 861,** this court held that: ***"The law governing this is that while findings of specific facts are within the competency of the trial court alone, a finding of fact which is an inference to be drawn from specific facts found is within the competency of an appeal court no less than the trial court; in other words, an appeal court is in as good a position as the trial court to draw inferences from specific facts which the trial court may find."***

(30) In a plethora of cases, this court has held that where there are concurrent findings of facts by both the court of first instance and the 1st Appellate court, this court will be extremely slow in disturbing those findings. The exception is where the findings are manifestly at variance with the evidence on record or sin against certain principles of law. See the cases of **SYLVIA GREGORY VS. NANA KWESI TANDOH IV [2010] SCGLR 971; ACHORO VS. ANKANFELA [1997-98] SCGLR 209; FRABINA VS. SHELL GHANA LTD [2011] 1 SCGLR 429**.

(31) Guided by the aforementioned principles, we shall proceed to evaluate the grounds of appeal, beginning with the issue of capacity. The ground on capacity was formulated thus: ***"The appellate court below misconstrued the facts relied on by the High Court in determining the issue of capacity and thus perpetuating the miscarriage of justice to the disadvantage of Defendants/ Respondents/Appellants".***

(32) The settled practice is that where capacity is put in issue, it must be resolved first, for an issue of capacity goes to the jurisdiction of the court. A court must insulate itself from considering the merits of a case when an attack is launched against the capacity of a party to the suit. It will be a waste of judicial time for the court to engage itself with the merits of a particular matter, only to strike out the action on the basis of want of capacity on the part of the Plaintiff. This position has been restated by Anin -Yeboah JSC *(as he then was)* in the case of **HFC BANK (GHANA) LTD. VS. JACOB ABEKA, CIVIL APPEAL NO. J4/05/2018 DATED 12TH JUNE 2019** where the position of the law was articulated as follows: ***"In actions in which the issue of capacity is raised, the authorities like SARKODIE VS. BOATENG II [1982-83] 1 GLR 715 SC, FOSUA & ADU POKU VS. DUFIE (DEC'D) ADU-MENSAH [2009] SCGLR 310, DUAH VS. YORKWAH [1992-93] 1 GBR 278***

establish the principle that no matter the merits of the case of the suitor, failure to prove his capacity should rock the very foundations of the action. It is therefore the position of the law that if a Plaintiff lacks capacity and it is so found by a trial court, the merits of the case should not be considered as the proper parties to the suit are not before the court. Indeed in the Sarkordie's case (supra) the Court of Appeal and the Supreme Court for that matter never proceeded to consider the merits of the case in any manner whatsoever. In this case the learned trial judge, with due respect, should have rested her judgment on the lack of capacity without more. Discussing the merits of a suit when the proper parties are not before the court is erroneous in law." *(Emphasis is mine).*

(33) Further, a challenge to capacity by another against a party to the action places the burden on that party whose capacity is challenged to dispute and prove otherwise. This, contextually, is one of the exceptions to the basic rule of evidence that, he who alleges must prove. Reference is made to the case **ASANTE-APPIAH VRS. AMPONSAH ALIAS MANSA (2009) SCGLR 90.** At page 95 of the report, Brobbey JSC held that: ***"[W]here the capacity of a person to sue is challenged he has to establish it before his case can be considered on its merits. In the instant case, the Defendant challenged the capacity of the Plaintiff right from the inception of the trial. The challenge was explicit in the first paragraph of the statement of defence and in the cross-examination of Nana Twum Barima. The Plaintiff had to establish his capacity before he could expect the court to have considered his case on its merits. He woefully failed to establish the capacity in which he sued by his reliance on the invalid power of attorney.***

(34) Similarly in **STANDARD BANK OFFSHORE TRUST COMPANY LTD. VS. NATIONAL INVESTMENT BANK & OTHERS (NO.2) [2017-2020]2 SCGLR 52** this Court per Benin JSC held that: ***A person's capacity to sue, whether under a***

statute or rule of practice, must be found to be present and valid before the issuance of the writ of summons, else the writ will be declared a nullity. In the case of a company, it's authority to bring a lawsuit is one of capacity and not standing. Capacity to sue is a very critical component of any civil litigation without which the Plaintiff cannot maintain any claim. See also: **KOWUS MOTORS VS. CHECK POINT GH. LTD. [2009] SCGLR AT 233; MANU VS. NSIAH [2005-2006] SCGLR 25 AT 30 SARKODIE I. VS. BOATENG [1977] 2 GLR 343 AT 346.**

(35) At the trial court, the Plaintiff's action was dismissed for want of capacity, yet, the Defendants/Counterclaimant's reliefs were upheld by the court against the Plaintiff. At page 778 of the record of appeal, the Trial Court pronounced as follows:

"Now, if the case of Akamisa II is anything to go by, then the Court would say that Akorsorku III who initiated the action had no business suing for the disputed land. In other words, he would have no capacity to purport to claim Djangmaku Wenguam land as distinct from Djangmaku land. And if Akrosorku III had no capacity, then Akamisa II's substitution is of no effect. That is to say the replacement of Akrosorku III by Akamisa II could not have clothed Akamsia II with capacity when the one initiated the action whom he purported to replace had none". Further, at page 780 of the record of appeal, the Trial Court held as follows:-

"Akamisa II wanted the Court to believe that the three divisions perform customary rites including celebrations in common and together. What Plaintiff failed to tell the Court is whether the said three sub clans/divisions have joint interest in each other's land. What Plaintiff said is that the three clans "notionally own the land together". If that were so the holding of the land

together would require that a threat to the title to the land should be fought by all the three together. The Court is of the view that the alleged notional ownership of the land by the three clans is very questionable and so the Court has cause to believe that in practice or in terms of what actually pertains on the ground each of them owns exclusively its own land, celebration of festivals and customary rites notwithstanding…….Now considering the fact that Akrosorku II is from the Trominya Division by Plaintiff's showing and Trominya might own its land exclusively, the suit mounted by Akorsorku III could only be in respect of Trominya Djangmaku land yet Akamisa II now says the subject land Akrosorku III sued for rather belongs to the Wenguam Djangmaku. Deeper reflection of Plaintiff's case seems to suggest that there is some confusion surrounding the case of Plaintiff to say the least. Is the land sued for Trominya Division or the Wenguam Division or the composite Djangmaku family? In all of this, the Court is of the view that Akamisa II should have mounted a new action when he decided to go to Court to vindicate the interest or title in the Djangmaku Wenguam land and that it is very wrong for him to have purported to pursue an action the commencement of which was fraught with want of capacity, if we are talking about Wenguam Djangmaku land".

(36) It is obvious that, the Trial Court committed a fundamental error because a party cannot prosecute a counterclaim against a Plaintiff who is bereft of capacity to have commenced the action in the first place. Having found that the Plaintiff lacked capacity to initiate the action, the Trial Court ought to have struck out the suit as improperly constituted for want of jurisdiction. The converse situation exposes the error of the procedure applied. Per the rules of pleadings, setting up a counterclaim against a party manifests an admission that the said party has capacity to initiate an action and litigate. For purposes of argument therefore, if

the trial court's decision that, the Plaintiff lacked capacity to litigate was right, the court could not, with respect, proceed to deal with and grant the counterclaim of the Defendants against the very non juristic person who lacked capacity to initiate the action. A similar situation confronted this court in the case of **ALHAJI MOHAMMED MORU VS. MOHAMMED HUSEINI Civil Appeal No.J4/17/2012 Dated 27th February 2013.** In that case, it was found that, the action had been mounted on a defective power of attorney, yet the two lower courts proceeded to consider the counter-claim. This court corrected this procedural anomaly and held, per Baffoe-Bonnie JSC that: ***"It is true that a counterclaim is a separate action from the claim. But in the peculiar circumstances of this case the bottom of the matter had been knocked off for want of capacity. If there was no capacity to sue because of the defective Power of Attorney, then there was no capacity to defend the action, any pleadings served on the Attorney would be deemed not to have been properly served on the principal. To the extent that the service of the Defendant's counterclaim on the deficient attorney is deemed as no service, evidence given in proof of the counterclaim cannot be allowed to stand.***

(37) Against this background, in the instant case, the Defendants attack of the judgment of the Court of Appeal on the issue of capacity mathematically formulated is that, since the original Plaintiff *(i.e. Akorsorku III)* claimed to be suing for and on behalf of Djangmaku Trominya Family, his substitute, could not hail from the Djangmaku Wenguam family albeit, the same Djangmaku. Thus, according to the Appellant, in so far as the substituted Plaintiff was not from Djangmaku Trominya family as the original Plaintiff, he could not have sustained the action against them. The Defendants further repeated the same arguments in the converse that, if the land were alleged to belong to the family of Wenguam, then, it ought to have been the head of family of Wenguam and not the head of family of Trominya that

could sue in respect of same. This argument aligns with the reasoning of the trial court already referred to. Counsel for the Defendants on this issue submitted as follows:

"In the Trial Court's judgment specially on pages 777 to 778 Vol.3 of the ROA, the Trial Judge made it clear that with the initiation of the suit, Plaintiff Akorsorku III identified the family of Trominyua as the owners of the land in dispute. However, upon the substitution of Plaintiff by Akamisa II, Plaintiff's suit was amended whereupon Akamisa II alleged the land that is being claimed by Plaintiff now belong to Djamaku Wenguam".

"By the rules of amendment, any amendment made has the effect of relating back to the date the original document was filed. Consequently an amended writ becomes the origin of the action and the reliefs claimed therein are substituted for those of the original writ…"

"By implication therefore, since the family of Wenguam is NOT the same as Trominya family, then it stands to reason that the Head of Family of Trominya not being the Head of Family of Wenguam lacks the capacity as the Head of Family of the alleged Wenguam family to initiate a suit on behalf of the alleged Djangmaku Wengua."

Counsel for Defendants submitted further that;

"Trominya family thus does not inherit with Akamisa II's Wenguam family and hence Akorsorku II has no capacity to initiate the said process in the first place; and as said by the trial judge, if the original suit is defective due to lack of capacity, then the suit is not even competent to be continued".

(38) The law is however settled that, the head of family, in accordance with customary law is the appropriate person clothed with capacity to litigate in respect of a family land. The limited exception to this general position of the law arises in situations where the property is in jeopardy or being endangered, yet, the head of family is unwilling to act to protect the family property. In such situations, the law permits a member of the family with the consent of the other members to sue to protect the family property on grounds of necessity because that member has a vested interest.

(39) This position of the law, was settled in the vintage case of **KWAN VS. NYIENI & ANOR. [1959] GLR 67-74;** in holdings (1) and (2) as follows:

(1) As a general rule the head of family, as representative of the family, is the proper person to institute a suit for recovery of family land;

(2) to this general rule there are exceptions in certain special circumstances, such as:

(i) where family property is in danger of being lost to the family, and it is shown that the head , either out of personal interest or otherwise , will not make a move to save or preserve it; or

(ii) where, owing to a division in the family, the head and some of the principal members will not take any steps; or

(iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, or the determinate of the family as a whole.

In any such special circumstances the Courts will entertain an action by any member of the family, either upon proof of that he has been authorised by other members of the family to sue, or upon proof of necessity, provided that the Court

is satisfied that the action is instituted in order to preserve the family character of the property;

(40) In the case of **ADOMAKO ANANE VS. NANA OWUSU AGYEMAN (SUBSTITUED BY NANA BANAHENE) [2013-2014] SCGLR** this court emphasised this position in the following words: -

> ***"In the same vein, we find the appellate court's findings and conclusions on the issue of whether the respondent had capacity to sue, supportable on both the facts and the law. As rightly found by the court, the Respondent's case fell within the exceptions created under KWAN AND NYIENI & ANOR [1959] 1 GLR 67, CA which principles have been dutifully followed in a number of decisions of this court including the more recent case of ASHALLEY BOTWE LANDS, IN RE; ADJETEY AGBOSU VS. KOTEI [2003-2004] SCGLR 420. The Respondent was faced with the case where the head of family who ought to institute the action to preserve the subject family properties was himself a beneficiary under the will of Hwirie with regard to the same properties. Definitely, at law Appellant has the legal right and capacity to sue in protection of those family properties.***

(41) These principles of customary law have statutory support under Order 4 Rule 9(2) & (3) of the High Court Civil Procedure Rules, C.I. 47 which provide that:

> ***(3) The head of a family. In accordance with customary law may sue and be sued on behalf of or as representation the family.***
>
> ***(4) If for any good reason the head of a family is unable to act or***

if the head of a family refuses or fails to take action to protect the interest of the family any member of the family may subject to this rule sue on behalf of the family.

(42) In the instance case therefore, what was lost on both counsel in the instant appeal, as well as the learned justices of the two lower courts is that, both the original Plaintiff as well as his substitute had sufficient standing to mount or sustain the action before the trial court. That is, the two lower courts, with respect confused the issue of capacity with the concept of *locus standi*, thereby completely ignoring an evaluation of the latter. If the trial court had averted its mind to the standing of the Plaintiff, it would have not dismissed the action for want of capacity as the Plaintiff or his substitute per their pleadings had demonstrated sufficient vested interest in the subject matter of the suit.

(43) While appreciating the conceptual dissimilarity between the issue of capacity and *locus standi*, or standing, the two are of different legal effect and import. Capacity references the legal persona of a person to litigate in terms of whether the party is juristic or not. That is, what a person alleges he is, which is recognised by the law to clothe him with an adjudicating right.

(44) Thus, in the case **ADISA BOYA VS. ZAINABU NASKE** this court speaking through Gbadegbe JSC held on this issue as follows:

[W]e are of the view that by virtue of the rules on intestacy contained in section 4(1) (a) of the Intestate Succession Law, PNDC Law 111, following the death of the father of the defendants and their mother-the original 1st Defendant, the property devolved upon the children and as such they had an immediate legal interest in the property that they are competent to defend and/or sue in respect of and in any such case either of the children

acting together or any of them acting on behalf of the others may seek and or have an order of declaration of title made in their favour.

(45) The above statements should however, not be taken ordinarily to imply access to the courts by complete strangers in so far as they can demonstrate per their pleadings sufficient interest in the subject matter. The policy exception is that, where the law recognises only a person with a special status, with the capacity to litigate in respect of a subject status, with the foreclosing the standing of others, those others, cannot proceed under the sufficient interest umbrella to force a hearing before the court.

(46) In his dissenting opinion in the case of **BOARD OF GOVERNORS, ACHIMOTA SCHOOL VS. NII AKO NORTEI II & ORS. (Civil Appeal No. J4/09/2019 Dated 20th May, 2020)** Pwamang JSC clarified the apparent confusion between capacity and locus standing. His Lordship explained as follows:

"Locus standing or simply standing, is one of the core principles on which the common law operates. The jurisdiction of the court at common law is only to be invoked by persons who have interest in the subject matter in respect of which they seek relief. This is so because the courts do not try hypothetical cases but only actual controversies or disputes. . ."

At times locus standing is confused with capacity but they are of different juridical backgrounds though the underlying policy reasons are the same. Capacity relates to the legal personality of a party to proceedings and becomes an issue when a party is proceeding not for her personal benefit but under a stated legal or representative capacity. In such situations the law insists that the person must prove that capacity.

(47) In the instant case, the Plaintiff stated of his capacity in his statement of claim as follows:

"1. The Plaintiff is the Head of Family and the Asafoatse of Djangmaku Trominya of the Djangmaku We of the Ningo Traditional Area".

At paragraphs 12 to 14, it was averred as follows:

"12. The Plaintiff further states that the 1st, 2nd and 3rd Defendants have recently conveyed portions of the Plaintiff's family land to the 4th and 5th Defendants without the authority and consent of the Plaintiff's family.

13. The Plaintiff states that the 1st, 2nd and 3rd Defendants are now claiming that the land at Ladorwayo belongs to the Aneho family and not the Djangmaku family of Old Ningo.

14. Unless restrained by this Honourable Court the Defendants have evinced a clear intention to dispossess the Plaintiff's family of their land at Ladorwayo".

(48) For purposes of emphasis, the entirety of the amended statement of claim *(except the reliefs)* is reproduced herewith:

"1. The Plaintiff is the head of family and the Asafoatse of Djangmaku Wenguam of the Djangmaku-We of the Ningo Traditional Area.

2. The 1st, 2nd and 3rd Defendants are members of the Aneho Family and descendants of one Bedai.

3. The 4th and 5th Defendants are bodies (sic) corporate who allegedly acquired parcels of Plaintiff's family land from the 1st, 2nd and 3rd Defendants.

4. *The Plaintiff states that his ancestor and predecessor in office Asafoatse Nartey-Wayo Akamisa I acquired a large tract [sic] land known as the Ladorwayo lands within the second half of the 19th Century by purchase from one Nana Darko also known as Nana Dankwa of Akwapim.*

5. *The Plaintiff avers that after the acquisition of the land, Asafoatse Nartey-Wayo Akamisa I and some members of the Djangmaku family including Kwetey Akorsorku, Kweinor Agbododo, Narh Oklutse, and Tetteh Agbanawo relocated form Old Ningo to settle on the Ladorwayo land and their descendants have been in undisturbed occupation of the land ever since.*
6. *The Plaintiff further avers that Asafoatse Nartey-Wayo Akamisa, Kwetey Akrosorku, and Kweinor Agbododo were half-brothers paternally while Narh Oklutse and Tetteh Agbanawo were ASafoatse Nartey-Wayo Akamisa I's son and nephew.*

7. *The Plaintiff avers that the late ASafoatse Nartey-Wayo Akamisa I was a member of the Djangmaku-Wenguam of the Djangmaku-We of Old Ningo.*

8. *The Plaintiff further avers that after the death of Asafoatse Nartey -Wayo Akamisa I, he was succeeded by his brother Kwetey Akorsorku.*
9. *The Plaintiff says that the Ladorwayo land is bounded on the North -West by land at Odumase, the propwrty of the Akugbey Family of Lowe, Ningo; on the South East by land at Nihetsokunya, the property of Okubeng family of Lowerkponor, Ningo; on the South -West by land along the Mangotsonya boundary, the property of the Djangmaku family; North – East by land at*

Vakpo, the property of Blemano family of Bantama-Kabiawe, Ningo; and on the South at Mangotsonya, on the West by land at Otsebreku.

10. *The Plaintiff says that in the year 1915 Francis Crowther, the then Secretary for Native Affairs confirmed the Djangmaku clan's ownership of the Ladorwayo lands and recoded this fact in his account of the history of the Ningo people and their land ownership in some official documents.*

11. *The Plaintiff says further that in the year 1954-56 Jackson J., land Commissioner also affirmed this piece of history in his report and indicated that the Ladorwayo lands were property of the Djangmaku family.*

12. *The Plaintiff avers that the 1st, 2nd and 3rd Defendants'' ancestor, bedai later married Kwekie, the daughter of Kweinor Agbododo at Ningo and followed the Djangmaku family on the Ladorwayo land.*
13. *The Plaintiff further avers that 1st, 2nd and 3rd Defendant's ancestor wit the consent and concurrence of the Djangmaku family erected settlement on portion of the Plaintiff family land.*
14. *The Plaintiff further avers that 1st, 23rd and 3rd Defendants' ancestor, Bedai later married Kwekie, the daughter of Kweinor Agbododo at Ningo and followed the Djangmaku family on the Ladorwayo land.*
15. *The Plaintiff further avers that 1st, 2nd and 3rd Defendant's ancestor with the consent and concurrence of the Djangmaku family erected settlement on portion of the Plaintiff family land.*
16. *The Plaintiff further states that the 1st, 2nd 3rd Defendants have recently conveyed portions of the Plaintiff's family land to the 4th and 5th Defendants without the authority and consent of the Plaintiff's family.*

17. The Plaintiff states that the 1st, 2nd and 3rd Defendants are now claiming that the land at Ladorwayo belong to the Aneho family and not the Djangmaku family of Old Ningo.

18. Unless restrained by this honourable court the Defendants have evinced clear intention to disposes the Plaintiff's family of their land at Lardowayo.

(49) Quite clearly therefore, the Plaintiff demonstrated per his pleadings that, he is not litigating in respect of the disputed land in his personal property. He is contesting the land for his family. Per his pleadings he claims that, the Ladorwayo lands belong to the Djangmaku family of which he is the head and Asafoatse. Assuming without conceding that, Plaintiff is only the head or Asafoatse of just a faction of the family among the clan, he has by the pleadings, demonstrated sufficient interest in the disputed land which vests him with the necessary standing to mount the action. Indeed, one of the exceptions as identified in the **KWAN VS. NYIENI** principles is that, necessity can clothe a person with the locus to mount an action to save a family property which is threatened of being lost to strangers.

(50) In any event, as has already been observed, by counterclaiming against the Plaintiff, the Defendants had admitted that the Plaintiff was properly before the court. The logic here is that, should the Plaintiff's name be struck off the suit for want of capacity, the Defendants automatically lose on their counterclaim. The result will be a potential relitigation of a fresh suit. As held aforesaid however, the Plaintiff had demonstrated per his pleadings that, both as an elder and member of the family, he had sufficient interest in the subject matter of the suit which vests him with the requisite standing to pursue the action. To put this issue to rest, we prefer to rely on the statement of Wood JSC *(as she then was)* in **IN RE: ASHALLEY**

BOTWE LANDS; ADJETEY AGBOSU VS. KOTEY & OTHERS [2003-2004] SCGLR 420 AT PAGE 438 which determined a similar issue of capacity to sue in protection of family interest in land as follows: ***". . . The evidence that they (The Plaintiffs) undertook this action purposely to preserve the family character of the property is clearly implicit from this evidence of the first Plaintiff witness. Once again, the court's conclusion that they did not provide evidence that the property was in jeopardy of being lost to the family if they failed to act, is clearly not borne out of the record. Had the Plaintiffs been ordinary members of the family, on the peculiar facts of the case, they would still have been entitled to sue in preservation of the family property. But even more important, on the proven facts, the Plaintiffs are principal elders of the family . . ."*** In consequence, the first ground of appeal anchored on the issue of capacity is dismissed.

(51) The next ground to be discussed is set out as follows:-

> ***"His Lordship Justice P. Bright Mensah J.A. wrongly exercised his judicial discretion by not only accepting to sit as an appellate judge over the same case he partly handled at the trial Court, and with the Trial Court's influence or bias, went ahead to write the lead judgment of the Court of Appeal which the other two judges only agreed or concurred to".***

(52) In their statement of case, Counsel for the Defendants concedes that, the involvement of His Lordship Justice Bright Mensah J.A. at the trial court was rendered nugatory and inconsequential following the setting aside of his earlier orders pertaining to the adduction and reception of the expert evidence. The attack of bias against him clearly pales into insignificance as regards the judgment of the Court below. Counsel's argument therefore, is too simplistic, fanciful and devoid of merit. Further, the ground itself seeks to distastefully suggest that, the other two justices of the Court of Appeal contributed nothing to the judgment and merely

concurred to same. The judgment, with respect, is the judgment of the Court of Appeal and not of a single judge. Furthermore, not having raised the issue of foreknowledge and or potential bias against Justice Bright Mensah during the hearing of the appeal, would the Defendants have raised it if the judgment went in their favour. We do not think so. They certainly would have celebrated it. The ground of appeal giving rise to the above issue is unmeritorious and is accordingly dismissed.

(53) Be that as it may, the test for bias against a judge, as settled in a plethora of cases has been a real likelihood of bias. See cases such as **REPUBLIC VS. HIGH COURT DENU, EX-PARTE AGBESI AWUSU (NO.2) [2003-2004] SCGLR 907; ATTORNEY-GENERAL VS. SALLAH (G&G) SC.17TH APRIL [1970].** This test in our view, the Defendants have woefully failed to meet.

(54) We will now proceed to the final ground of appeal, which touches, on the question of ownership of the disputed land. From the record, both lower courts made a finding of fact that, the Defendants were settlers who had been permitted by the Djangmaku family to settle on the land and have remained in settlement for several ages, such that, they had acquired the usufructuary interest therein. However, the 1st Defendant in defence to the Plaintiff's allegation rebutted that his family are licensees. He proceeded further to claim his family are allodial owners themselves of the disputed land. The 1st Defendant's reasons for this position are that, their ancestors have been Chiefs in Ningo and if they were licensees, they could not have been installed as Chiefs. The 1st Defendant asserts further that none of the Plaintiff's kin has ever been an Asafoatse and or Chief in Lardowayo. By this position the 1st Defendant attacked the judgment of the Court of Appeal that it improperly applied the principle in the case of **TORGBUI DZORKUI VS. ATISE**

AZAMLI Civil Appeal No. J4/36/2015 dated 9th December 2015 to the effect that: ***"the title of a stranger grantee was limited to a well-defined area demarcated and granted to him …"*** The 1st Defendant contended that, since they were not licencees, the said decision is inapplicable to them.

THE TRADITIONAL EVIDENCE RULE

(55) It is observed that the parties led copious conflicting traditional evidence on their respective ownership to the disputed land. The settled position of the law endorsed by a number of judicial decisions is that, the approach to dealing with conflicting traditional evidence is to analyse it in the light of such recent facts in living memory as exposed by the evidence at the trial. In land litigations, the most plausible probable of such recent facts is in reference to acts of possession and ownership. This approach is informed by the evidential presumption that, the things which a person possesses are presumed to be owned by that person. The principles governing the evaluation of conflicting traditional evidence has been summarised by this court in the case of **IN RE: TAAHYEN AND ASAAGO STOOLS; IN RE: KUMANIN II (SUBSTITUTED BY OPPON) VS. ANIN [1998-99] SCGLR 399** taking inspiration from the locus classicus of **ADJEI-KOJO VS. BONSIE [1957]3 WALR 257,** per **Lord Denning** as follows:

" To sum up, the court in assessing rival traditional evidence,

(a) Must not allow itself to be carried away solely by the impressive manner in which one party narrated his version, and how coherent that version is.

(b) But must examine the events and acts within living memory established by the evidence, paying particular attention to undisputed acts of ownership and possession on record.

(c) ***And then to see which version of the traditional evidence, whether coherent or incoherent, I rendered more probable by the established acts and events.***

(d) ***And finally, the party whose traditional evidence such established acts and events support or render more probable, must succeed unless there exists on the record of proceedings, a very cogent reason to the contrary.*** See also **ADJEI VS. ACQUAH [1999] 1 GLR 13; HILODJIE VS. GEORGE [2005-2006] SCGLR 974."** It must be pointed out however that, this approach, will not be pursued, if, the court, in evaluating the evidence is very convinced that a party's case is more preferable than the other.

(56) On the issue of whether the 1st Defendant's family are licensees, or are the true owners of the land, the Court of Appeal was swayed by the inconsistency in the testimony of the 1st Defendant' instead of such recent facts in living memory. The Court of Appeal stated in its judgment as follows: *"Having regard to the inconsistencies in the story of the Respondents/Defendants/ Appellants herein, but the story of the Appellant/Plaintiff/Respondent herein was consistent with his pleadings, as a rule, the latter's is preferable to the formers. (Emphasis is ours).* As was observed by this Court in the **IN RE: TAAYEN STOOL CASE** (supra): ***"In assessing rival traditional evidence, the court must not allow itself to be carried away solely by the impressive manner in which one party narrated his version, and how coherent that version is; it must rather examine the events and acts within living memory established by the evidence, paying particular attention to the undisputed acts of ownership and possession on the record; and then see which version of the traditional evidence, coherent or incoherent, is rendered more probable by the established facts and events. The party whose traditional evidence such***

established acts and events support or render more probable must succeed unless there exists on the record of proceedings a very cogent reason to the contrary. And the presumption of title raised by acts of possession and ownership appears now as Section 48 of the evidence decree, 1975 (NRCD 323). It follows from that provision that a party can succeed in his claim even if his traditional evidence is rejected."

(57) In the instant case, what the evidence on record reveals is that, the 1st Defendant's family have been in possession of the area being sought to be recovered for several years upon the acquiescence of the Plaintiff's family. And the respective families have over these long years lived together without any hostility nor claim of adverse possession against the 1st Defendant's family by the Plaintiff's family. Indeed, in the instant proceedings, the Plaintiff has conveniently chosen to describe the 1st Defendant's family as licencees. We find however that, the rights and interests acquired by the 1st Defendant's family over the disputed land in their possession cannot make them mere licencees but owners in usufruct. See the evidence of 'CW1' of 5th July 2023 where the area of land on which the 1st Defendant's ancestors had settled as usufructs is identified to cover a total area of approximately 3.63 acres only.

(58) It has been held by our courts with certainty, that, the settled position of the law has been that long possession by a stranger with the permission of the allodial owner does not confer any form of ownership on the stranger. So also is the law settled that, laches or acquiescence by the allodial owner will not extinguish title of the true owner, just as it will not confer on the stranger, occupier or settler absolute, title to the land. The incident of the long possession by the stranger/settler is to prevent re-possession by the allodial owner while protecting

the usufruct of the possessory right. See the cases of **OHIMEN VS. AGYEI 2(WALR) 275; MANSU VS. ABBOUE [1982-1983]2 GLR 1313 CA, and AWUAH VS. AZUTUTU & ANOTHER [1987-1988]2 GLR 191 CA.**

(59) In the case of **TORGBE LUGU AWADALI IV VS. TORGBE GBADAWU IV [2017-2018]2 SCGLR 699** at pages **700-701**, this court held per holding 2 as follows: ***"Usufructuary rights are not reserved exclusively to individual members of the group or family or clan which communally owns the land in question, but they can be acquired by any person, including a stranger. A stranger can acquire usufructuary rights over land owned by another ground or family either on terms or through acquiescence. In the eyes of customary law, such naturalized stranger holds and enjoys an interest in the land not as a stranger anymore, but as a subject with no limitations or restrictions attached to his enjoyment of the land".*** From the evidence on record before us, it is not in doubt that, portions of the disputed land has for ages, been in the possession of the 1st Defendant's family and have over the years installed chiefs as traditional overlords of the area in their possession. Indeed, the Plaintiff tacitly admitted this, except to contend that, 1st Defendant's ancestors lived on the land as their licensees. This claim by the Plaintiff is not supported by the evidence.

(60) It is instructive to refer to the statement of the West Africa Court of Appeal on this issue of the allodial/usufruct relationship as stated in the case of **SULEMAN VS. JOHNSON [1951]13 WACA 213**, where Sir John Verity Ag President of the court held as follows: ***"The real infringement of the owner's right would only arise by alienation, and of this, they might have no immediate knowledge. It is far otherwise when land upon which no occupational rights have been granted, but into possession of which strangers enter and exercise rights inconsistent with the possession of the owners. Then at once the owner is put on enquiry, and if for many***

years, he takes no action to assert his rights, not to the reversion but possession, the considerations which apply as to his acquiescence are far different and I think the evidence required to establish such acquiescence as would serve to pass the original rights of the overlord to the occupier if occupational rights had previously been granted and the reversionary rights only come into question". In the instant case, not only have the 1st Defendant's family provoked this litigation by the alienation of the land outside their settlement, they have even worse, denied the allodial rights of the Plaintiff's family contrary to the drift of the evidence on record.

(61) Consequently, guided by the accepted incidents of the usufruct and consistent with the position of this court in the case of **EBENEZER KWAKU & 2 OTHERS VS. MANKRALO TETTEH OTIBU IV Civil Appeal NO.J4/53/2021 dated 7th July 2021** and other authorities aforementioned, we hold that the 1st Defendant's family has acquired the usufructuary interest in the portion of the Lardawoyo lands but limited only to the area of 3.63 acres as particularly delineated in the composite site plan tendered as Exhibit 'CW1B' by 'CW1' Frank Wontumi, where their family settled for several years, and were in occupation before the commencement of this suit.

(62) The incidence of the holder of the usufructuary interest in a parcel of land has been statutorily provided for in Section 5 of the Lands Act,2020 (Act 1036) provides as follows:

5. (1) Usufruct is an interest in land, which is

(a) Acquired in the exercise of an inherent right by a subject or a member of a stool, skin or family or clan which holds the allodial title through the

development of an unappropriated portion of the land of the stool or skin, or family or clan by virtue of an express grant; or

(b) Acquired through settlement for a period of not less than fifty years, with the permission with the holder of an allodial title by a non-indigene or group of non-indigenes or the descendants of the non-indigene or group of non-indigenes, except where the settlement is on agreed terms; and

(c) Inheritable and alienable

(2) Where alienation of the usufruct is to a person who

(a) is not a member of the stool, skin or clan or family which holds the allodial title, or

(b) is not a non-indigene or from the group of non-indigenes who hold the usufructuary interest as provided in paragraph (b) of subsection (1) in the land in respect of which the usufruct is to be alienated, the alienation is subject to the written consent of the stool or skin, or clan or family or group and the performance of establishes customary obligations.

(63) In our determination of this appeal therefore we affirm the holding of the Court of Appeal that, the 1st Appellant's family, are the usufructuary owners of the land but from the evidence adduced in this court on 5th July 2023 only limited to an area of 3.63 acres which has been in their possession for several years and could alienate same subject to the consent of the Plaintiff's family. As their usufructuary interest is founded on prior possession for many years, the 1st Defendant's family is not entitled to recovery of possession of any portion of land which they were not possessed of prior to the commencement of the Plaintiff's action in the High Court.

ISSUE OF IDENTITY OF LAND CLAIMED BY THE PLAINTIFF

(64) Before we deal with the Plaintiff's cross appeal, it is observed that though at the proceedings of 5th July 2023 this court cautioned Counsel for the parties to address the court only issues arising out of the testimony of CW1, Counsel for the Defendants has drawn our attention to the Plaintiff's failure to produce a site plan for the size of land claimed. The Defendants' counsel has thus referred us to the settled law in our land jurisprudence on the effect of the failure to tender a site plan to identify land for which the relief of declaration of title and other consequential reliefs are sought. While we are in agreement with the Defendants' Counsel on the authorities referred to in respect of that position of the law, the failure to produce or tender a site plan per se is not fatal to a claim in circumstances where the disputed land is known to the parties and no boundary dispute has arisen for determination by the court.

(65) We need to place on record that, this issue of the identification of the land in dispute was never raised for determination at the trial high court where the Plaintiff's action was dismissed on the ground of lack of capacity while the Defendants succeeded on their counterclaim. We have examined the issues set down for determination in the application for directions as well as the Defendants amended statement of defence *(see pages 48-49 and 96-99 of Volume 1 of the record of appeal)* and have come to the conclusion that, the Defendants' denial of the Plaintiff's averments in respect of the land in dispute was evasive without further particulars. Therefore, neither the issue of identification of the disputed land nor of a boundary dispute arose between the parties for determination at all. The issue did not also arise from the grounds of appeal set out by the Defendants in their notice of appeal to this court.

(66) However, as aforesaid, in Defendants' counsel's address after the proceedings of the 5th day of July 2023, the issue has been raised and strenuously addressed. Our answer is simply that, the absence of the site plan delineating the Plaintiff's land is not consequential to the reliefs sought by the Plaintiff. From the pleadings settled by the Defendants in their amended statement of defence, no dispute arose on the identity of the land in dispute.

(67) The resolution of the issue is not novel in land adjudication in our jurisdiction. We refer to the attitude of this court in the **IN RE: ASHALLEY BOTWE LANDS, ADJETEY AGBOSU VS. KOTEY** case (supra) where Wood JSC *(as she then was)* resolved the issue in the following words.

". . . I am in agreement with the Learned Trial Judge that the identity of the subject matter was not in dispute. Indeed, the failure by the Defendants to deny the detailed description of the land as pleaded in paragraph 4 of the statement of claim, placed no obligation on the Plaintiff either by themselves or through an array of witnesses to prove boundaries, since they were also not met with a boundary dispute" *… I think the court (Court of Appeal) erred in applying the principle enunciated in* ***ANANE VS. DONKOR KWARTENG VS. DONKOR (Consolidated) [1965] GLR 188, SC*** *to the facts of this case. Undoubtedly, the general principle enunciated therein, namely (as stated in the headnote) that****: "a claim for declaration of title or an order for injunction must always fail, if the Plaintiff fails to establish positively the identity of the land claimed with the land the subject-matter of his suit",*** *is sound law, but applicable only in appropriate cases. I would therefore not advocate a slavish application of this principle even where the identity or boundaries of the land claimed is undisputed. In land claims, where the identity or the boundaries the subject-matter as pleaded is admitted by an opponent, the elementary principle which*

rather comes into play is that which was expounded in ***FORI VS. AYIREBI [1966] GLR 627, SC,*** *namely, that where the averments were not denied no issue was joined and no evidence need be led on them".*

(68) Not having raised the issue in the trial court nor made it a ground of appeal in this court, the composite site plan and the report tendered by Frank Wontumi CW1, during the proceedings of 12th March 2014 at the trial court, as well as Exhibits CW1 A and CW1 B tendered by the same witness during the proceedings of 5th July 2023, renders the issue moot and of no consequence to the outcome of the instant appeal.

CROSS-APPEAL

(69) We now proceed to determine the cross-appeal which is formulated thus: "***The Court (of Appeal) erred when it failed to grant an order for perpetual injunction and recovery of possession to Plaintiff in respect of lands outside the 1st Defendant's family settlement area which have been alienated to 3rd and 4th Defendants and other third parties".*** Having found that the 1st Defendant's family are usufructuary owners whose interest is founded on long years of possession, the 1st Defendant's family cannot lay claims to any land outside their area of settlement which will have the effect of depriving the allodial owner of those lands.

(70) In order to bring the issue of ownership of the disputed land to complete closure, as aforesaid, this court on the 8th day of February 2023 directed the Regional Surveyor of the Lands Commission, Greater Accra Region to undertake the production of a composite plan with the view to identifying the respective positions of the parties in relation to the disputed land. On the 5th day of July 2023, a representative of the Survey and Mapping Division of the Lands Commission,

Greater Accra Region, Mr. Frank Wontumi 'CW1' testified before this court. From the evidence of "CW1" which was adduced before us, the area identified as the portion of land on which the 1st Defendant's family prior to the commencement of this action is the area edged broken green in the composite plan tendered as Exhibit "CW 1 (1A)". The said parcel of land from the evidence covers an approximate area of 3.63 acres.

(71) The report of the surveyor in relation to the composite plan, admitted in evidence as Exhibit "CW1 B" stated as follows on the area of the 1st Defendant's settlement prior to the institution of this action.

> ***"Portion of land in the possession of 1st Defendant/ Respondent/ Appellant family being their area of settlement prior to the commencement of the suit as pointed out by the Plaintiff/ Appellant/Respondent to the surveyors is edged BROKEN GREEN and marked C1,C2,C3,C4 …; size of land is 3.63 acres."***

(72) Having already determined that the Plaintiff's family holds the allodial title to the entire area but the 1st Defendant's family has been in occupation of a portion of same for several years prior to this action, it becomes imperative to confirm the boundaries of the area which was in the occupation of the 1st Defendant's family at the time of the institution of this action in order to clearly and distinctly set out the respective rights and obligations of the two families in relation to the land in dispute. The need for this exercise arises from the nature of the interest the 1st Defendant's family has in the land in dispute. As already stated, the interest the 1st Defendant's family is an interest that has evolved from long occupation.

(73) We note that, during the trial on 5th July 2023 before this court, that crucial evidence of CW1 in relation to the area which was said to be in the occupation of the 1st

Defendant's family at the commencement of this action, being an area of 3.63 acres was not challenged by the Defendants' counsel during the proceedings. Not even when this court invited both counsel to state any objection on the admissibility of the composite plan tendered by CW1. For emphasis, we reproduce a portion of the cross examination of 'CW1' by the Defendants' counsel.

" Q: Apart from physically going to show their portion of the land, they never submitted any site plan. What is the size of the land as indicated by Survey instruction "B" by the Respondent"?

A: It is 3.63 acres.

Q: Was it in town or outside human settlement?

A: It is situate in town and shown as broken green on the composite plan."

(74) In the oft-cited case **of TAKORADI FLOUR MILLS VS. SAMIR FARIS [2006] SCGLR 882**, this court cited with approval the principle of law on the effect of the failure by a party to cross examine on a material fact, as was espoused by **OLLENU JA IN TUTU VS. GOGO, Civil Appeal No 25/67, dated, 28 April 1969, CA.** In the latter case, the respected jurist stated thus: ***"in law, where evidence is led by a party and that evidence is not challenged by his opponent in cross-examination, and the opponent did not tender evidence to the contrary, the facts deposed to in that evidence are deemed to have been admitted by the party against whom it is led, and must be accepted by the court."***

(75) On the basis of the well-established position of the law and the evidence above, we do not have any difficulty holding that, the usufructuary interest of the 1st Defendant's family in the land in dispute is confined to the area edged broken green on Exhibit "CW1A" and it covers an approximate area of 3.63 acres.

Having specifically identified the interest of the 1st Defendant family in the land in dispute, the issue that arises is the concomitant effect that determination, has on the grants made by the 1st Defendant's family beyond the area over which it holds the usufruct. In our view, any attempt to resolve that issue in this judgment will unavoidably result in this Court making a determination of the rights of a number of persons who are not parties to this suit and who have not been given the opportunity of being heard on their respective interests for our consideration. In the **IN RE: ASHALLEY BOTWE LANDS; ADJETEY AGBOSU VS. KOTEY & OTHERS** case, (Supra) Georgina Wood JSC *(as she then was)* at page 454 of the report gave this admonition when this court was confronted with a similar issue. Her Ladyship said as follows:

"Plainly, I see an order directed at the beneficiaries who were never parties to this action, persons who have acquired from the respondents, but who were however not heard in these proceedings, contrary to the fundamental and plain rule of natural justice, the audi alteram partem rule. To order an annulment, cancellation of their documents, without any notice to them and without having given them a hearing, is in my view erroneous, as the intention clearly is to dispossess them of their "properties".

(76) Guided by the above statement of the law which has deep rooted foundations at common law, we refrain from making any pronouncements on the propriety of grants made by the 1st Defendant's family of those parcels of land which by the evidence of 'CW1' were made during the pendency of this suit and particularly the grants which fall outside of the area of 3.63 acres over which the 1st Defendant's family hold the usufruct interest.

(77) However, with respect to the 3rd and 4th Defendants, that is, Netas Properties Limited and Ghana National Association of Teachers, they being parties to this suit against whom reliefs including recovery of possession and perpetual injunction have been sought by the Plaintiff, as has been held in this judgment, their grantor the 1st Defendant's family, did not and does not have any interest in the subject matter of their grants. ***A fortiori***, the grants made to them passed no title to them. However, being a Court of equity and of policy, we decline to grant the Plaintiff the relief of recovery of possession and perpetual injunction sought against them subject however that, in the pursuit of substantial justice and the promotion of peace and stability in the community, we direct the 3rd and 4th Defendants to regularize their respective grants with the Plaintiff's family and thereafter, atone tenant to the said Plaintiff's family.

(78) We however, grant the order for perpetual injunction to restrain the 1st Defendant's family from developing or alienating or in any way interfering with the rights of the Plaintiff's family to any portion of the land in dispute beyond the area of 3.63 acres over which we have in this delivery confirmed the 1st Defendant's family's usufructuary interest.

(79) In respect of this parcel of land over which the 1st Defendant's family holds the usufruct, it is our view that the provisions of Section 5 of Act 1036 are statutorily sufficient to regulate the relationship between the Plaintiff's family and the 1st Defendant's family. Suffice it to say that, the 1st and 2nd Defendant family is by application of the law, entitled to develop and/or alienate parcels of land within the area of 3.63 acres over which we have declared their usufructuary interest, subject to the recognition of the title of the Plaintiff's family which is the absolute or allodial owner, in accordance with the provisions of Section 5 of the Land Act

2020 (Act 1036). Save for the orders and directions hereinbefore made, both the appeal and cross appeal succeed in part.

I.O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

P. BAFFOE BONNIE

(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

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