IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2017

CORAM: DOTSE JSC (PRESIDING)
GBADEGBE JSC
AKOTO-BAMFO (MRS) JSC
BENIN JSC
PWAMANG JSC

CIVIL

APPEAL

NO.

J4/19/2016

22ND FEBRUARY, 2017

1. NANA KWASI BRONI -
PLAINTIFFS/APPELLANT
2. YAW AHIMA BOAMPONG RESPONDENTS
SUING IN THEIR CAPACITY AS
NAMED EXECUTORS IN THE
LAST WILL AND TESTAMENT
OF JOHN KOFI DEKYI (DECEASED)

VRS

1. KWAME KWAKYE -
DEFENDANTS/RESPONDENTS
2. KWADWO DEKYI APPELLANTS
3. KWASI FREMPA DEKYI

JUDGMENT

DOTSE JSC:

FACTS

Mr. John Kofi Dekyi passed away on the 9th of July, 2011. From all accounts, he was a man of substantial means consisting of properties spread through Kumasi, Wenchi, Techiman. He was survived by two wives, (about) twenty-three children, numerous grandchildren and other relations.

Upon his death, a Will he was alleged to have executed as his last Will and testament on the 2nd November, 2010 was read in which he had made certain devises to most of his children, grandchildren, wives and family relations.

Dissatisfied with the contents of the Will, the Defendants/Respondents/Appellants (hereinafter Defendants) caveated the Will. The Executors named in the said Will therefore took out a writ to prove the Will in solemn form in the High Court, Kumasi.

The reliefs endorsed on the Plaintiffs/Appellants/Respondents (hereinafter Plaintiffs) reads as follows:

i. Declaration that the last Will and testament of the late John Kofi Dekyi dated 2nd November, 2010 is valid and in

compliance with the provisions of the Wills Act, 1970 Act 360.

ii. An order for the issuance of probate to the Plaintiffs Executors to distribute the estate of the late John Kofi Dekyi in accordance with the provisions of the last Will and Testament dated 2nd November, 2010.

iii. Any other orders as the Justice of the case would require in terms of the rules of this Honourable Court

It was averred by the Plaintiffs in the trial High Court in their statement of claim to the effect, that, the Deceased had executed a last Will and testament on 2nd November, 2010 and had same deposited at the registry of the High Court, Kumasi and that a copy of the said Will and testament shall be tendered at the trial. The Plaintiffs averred further that it was the **Deceased who instructed his Solicitors to prepare the said last Will and testament and that it was duly executed in the law office of his Solicitors in the presence of two (2) witnesses who were the Solicitors law clerks.**

The Defendants however denied the Plaintiffs assertions in their Defence and the substance of their denial that the purported Will was not the deed of the Deceased Testator was anchored on the following:-

i. That as at 2nd November 2010, the Deceased did not have his mental capacity to make a Will and

ii. Finally that the Deceased testator did not execute any Will in the presence of the two law clerks of the Solicitor alleged to have prepared the Will as witnesses.

DECISION OF THE HIGH COURT

The learned trial judge dismissed the claims of the Plaintiffs in his judgment of 28th July, 2014. He held that the Will which was in evidence as Exhibit A could not be the deed of the Testator and was not made by him.

APPEAL AGAINST DECISION OF THE HIGH COURT AND JUDGMENT OF COURT OF APPEAL

Understandably, the Plaintiffs were aggrieved. They filed a notice of Appeal against the said judgment on the 26th of August 2014. Two days later on the 28th of August, they withdrew the notice of Appeal and replaced it with another, filed that same day.

This act of the withdrawal and subsequent re-filing was a very sore point with the Defendants, whose Counsel argued this point doggedly in his statement of case to the Court of Appeal.

Learned counsel's argument was to the effect that, Respondents Counsel had breached Rule 17 of The Court of Appeal Rules, 1997 CI 19 which required prior leave before an appellant could withdraw an appeal. Learned counsel further argued that by withdrawing the notice of appeal without leave meant that the Court of Appeal had no appeal before it and was therefore not seised with jurisdiction to determine the appeal**. The Court of Appeal considered the issue of jurisdiction raised by learned Counsel for the Defendants herein and found no merit in it. The Court then allowed the appeal of the Plaintiffs herein and aggrieved at the outcome, the Defendants filed the following ten (10) grounds of appeal for determination by this court**.

GROUNDS OF APPEAL TO SUPREME COURT

a. The honourable Court of Appeal erred when it held that the Plaintiffs/Appellants/Respondents did not need leave of the court to withdraw their appeal filed on the 26/08/2014.

b. The Honourable Court of Appeal erred in assuming jurisdiction over the appeal when its jurisdiction was not properly invoked by the Plaintiffs/Appellants/Respondents.

c. The whole judgement of the Court of Appeal is a nullity as same was given in want of jurisdiction.

d. The Honourable Court of Appeal erred when it preferred the evidence of PW3 to that of the Court Witness.

e. The Honourable Court of Appeal erred when it relied on the evidence of PW3, a discredited witness as the basis for its judgement.

f. The Honourable Court of Appeal erred when it held that PW1 and PW2 were disinterested witnesses whose evidence should be preferred.

g. The Honourable Court of Appeal erred when it held that the Defendants/Respondents/Appellants should have called the other purported attesting witness as their witness.

h. The Honourable Court of Appeal erred when it failed to hold that the failure of the Plaintiffs/Appellants/Respondents to call the other attesting witness and one Grace who allegedly typed the disputed Will was fatal to their case.

i. The Honourable Court of Appeal erred when it held that the signature on the Will dated 2/11/10 was made by the late John Kofi Dekyi and as such same was valid.

j. The judgment is against the weight of the evidence on the record.

In our considered opinion, all the above grounds of appeal are quite repetitive and can conveniently be subsumed and dealt with by the determination of the following issues:-

ISSUES FOR DETERMINATION

a. Whether or not the Court of Appeal erred in it's decision that leave was not required by the Plaintiffs before they filed the second notice of appeal.

b. Whether judgment is against the weight of evidence.

c. Whether or not the Deceased Testator, John Kofi Dekyi validly executed his last will and Testament on the 2nd day of November 2010 in the presence of two attesting witnesses.

d. Whether or not the Deceased Testator, John Kofi Dekyi was compus mentis at the time he executed his last Will and testament on 2nd November 2010.

The above are the only issues under which this court will consider this appeal and render it's judgment.

In a seventy seven page statement of case filed on behalf of the Defendants, which was repetitive and verbose, the Defendants set out their case in this court (will comment later on this phenomenon). In this statement of case, learned counsel for the Defendants submitted that the second notice of appeal filed was contrary to law and procedure, null and void and thus incapable of invoking the court's jurisdiction. This submission naturally leads to discussion of issue No. “A” set out supra.

ISSUE A

WHETHER OR NOT THE COURT OF APPEAL ERRED IN IT’S DECISION THAT LEAVE WAS NOT REQUIRED BY THE PLAINTIFFS BEFORE THEY FILED THE SECOND NOTICE OF APPEAL.

Before proceeding to deal with the legal issues raised therein, it is considered worthwhile to set out the statutory provisions of the relevant Court of Appeal, Rules 1997, C.I. 19 as follows:-

Rule 17 “Withdrawal of appeal

(1) Subject to rule 15, if the appellant files with the Registrar a notice of withdrawal of his appeal, the Registrar shall certify that fact to the Court, which may thereupon order that the appeal be dismissed with or without costs.

(2) Copies of the notice of withdrawal shall at the expense of the appellant be served on any of the parties with regard to whom the appellant wishes to withdraw his appeal, and any party served shall be precluded from laying claim to any costs incurred by him after the service unless the Court otherwise orders.

(3) A party served with a notice of withdrawal, may on notice to the appellant apply to the Court for an order to recover any costs that he may necessarily or reasonably have incurred prior to the service on him of the notice of withdrawal together with his costs incurred for purposes of obtaining the order and for attendance in court.

In order to really get some understanding from the submissions of learned counsel for the defendants, it is perhaps appropriate at this stage to also set out Rules 8 (1) and (2) of C. I. 19 which deals with Notice and Grounds of Appeal which is what the Plaintiffs filed, withdrew and re-filed without leave.

Rule 8 *"Notice and grounds of appeal*

(1) Any appeal to the Court shall be by way of re-hearing ***and shall be brought by a notice referred to in these Rules as "notice of appeal".***

(2) The notice of appeal shall be filed in the Registry of the court below and shall

(a) set out the ground of appeal;

(b) state whether the whole or part only of the decision of the court below is complained of and in the latter case specify the part;

(c) state the nature of the relief sought; and

(c) state the names and addresses of all parties directly affected by the appeal."

In order to further understand the nature of the document referred to as notice of appeal, it is also considered worthwhile to refer to Rule 10 (1) which deals with service of notice of appeal. It reads as follows:-

> *"The Registrar of the Court below shall, after the notice of appeal has been filed cause to be served a true copy of it on each of the parties mentioned in the notice of appeal."*

This is a clear reference to either the Circuit Court or the High Court which may be the Courts below. However, in the instant case the court below is the High Court, Kumasi. Furthermore, there is no evidence on record that the Registrar effected service of the first notice of appeal on any of the parties.

Secondly, the record of the case in the Court below had not yet been transmitted to the Court of Appeal in terms of Rule 17 set out supra. In otherwords, Form six (6) had not yet been served on

the Court of Appeal to be seised with the appeal for it's jurisdiction referred to in Rule 17 supra to be invoked.

In the case of ***Republic v High Court, (Human Rights Division), Accra, Ex-parte Akita [2010] SCGLR 374,*** the Supreme Court had occasion to pronounce on when the jurisdiction of the appellate court is invoked as follows:-

> *"It was well-settled that once the Civil Form 6 had been served on the trial High Court, that court no longer had jurisdiction over the case. At that point of the proceedings, the court with the appropriate jurisdiction would be the Court of Appeal. Since there was no doubt that the Form 6 had been served on the trial court, that should have effectively ended its jurisdiction. However, the trial High Court proceeded to hear the case for the reason that the motion had been pending in that court before service of the Civil Form 6. That reason was untenable. Rule 21 of the Court of Appeal Rules, 1997 (CI 19), anticipated the situation by which aspects of the case would be pending before the trial court. In that event, the trial court was duty bound to transfer the case to the Court of Appeal. Rule 21 of C.I. 19 was intended to obviate that kind of situation so as to avoid protracting the proceedings unnecessarily. The rule was not intended to prolong the jurisdiction of the trial Court which had been curtailed by the service of Form 6,* ***Republic v High Court; Ex-parte Evangelical Presbyterian Church of Ghana [1991] 1 GLR 323, SC****; and* ***Shardey v***

Adamtey; Shardey v Martey (Consolidated) [1972] 2 GLR 380, CA *cited."*

"Per Ansah JSC concurring on issue of effect of rule 21 of CI 19. By this rule, i.e. rule 21, the High Court retains jurisdiction when the record is not ready for transmission or has for any reason not been transmitted to the Court of Appeal, with the corollary that as soon as it has been transmitted to the Court of Appeal, then its jurisdiction to entertain any application is curtailed except that whatever is meant for the Court of Appeal but was filed in the High Court must be forwarded to the latter court."

What should be noted is that, after the filing of a notice of appeal, there are various processes that have to be complied with to give effect to it such as

1. settlement of appeal record, reference Rule 11 of C. I. 19 and thereafter;
2. the preparation of the record, and
3. finally it's transmission to the Court of Appeal reference Rule 14 of C. I. 19.

It is therefore clear that since none of the above steps had been taken or could have been taken by the Plaintiffs and the Registrar on the 1st notice of appeal before it was withdrawn and another

refiled, there is really no substance in the arguments of learned counsel for the Defendants. However, since quite considerable time and effort had been spent on it, it is deemed worthwhile to deal thoroughly with it in the following terms.

It is important to reiterate the point that, the facts in the case **of Republic v High Court, Accra (Commercial Division) Ex-parte Hesse, Investcom Consortium Holding S. A and Scancom Ltd. – (Interested Parties) [2007-2008] SCGLR 1230** are quite different from the facts and circumstances of this case. In the ex-parte Hesse case supra, even though the Court of Appeal had indicated during the hearing of an application for Stay of Execution whilst an appeal was pending that the appeal was filed out of time, nonetheless, the parties therein had filed their respective Statements of case. This meant that Civil Form 6 had been served on the parties which indicated that the appeal record had been transmitted from the High Court to the Court of Appeal. It was consequent upon this that the parties had filed their respective written submissions. As indicated earlier in this judgment, for the jurisdiction of the Court of Appeal to be invoked, the Court must be seised with the appeal. The processes that culminate in the Court of Appeal being seised with the matter are

i. notice of grounds of appeal, Rule 8;

ii. fulfilment of the conditions of appeal to wit the payment of security for costs for the prosecution of the appeal. Rules 11 (4), 12 and 18 of C. I. 19; and

iii. Transmission of the appeal record and the service of Civil Form 6 thereof, Rule 14 of C. I. 19.

A comparison of the facts therein in the ex-parte Hesse case and that of the instant appeal, confirms the decision of the Court of Appeal that, the decision in the ex-parte Hesse case cannot apply because the facts are different from each other. We accordingly endorse the decision of the Court of Appeal not to apply the ex-parte Hesse case herein.

The Court of Appeal's finding is in accord with common sense rules because any other interpretation will clearly lead to an absurdity and injustice. Counsel for the Plaintiffs herein had filed and withdrawn and refiled a notice of Appeal within two days. Evidently, the notice had not gone before the Court of Appeal for rule 17 of CI 19 to be triggered.

It is also reasonable to infer that the parties therein in the ex-parte Hesse case would have gone to considerable expense at that point in the appeal and suddenly withdrawing it without leave of the court would have worked an injustice on the affected party. This is clearly unlike the instant case where no expense had been incurred by the Defendants when the two day notice of Appeal was withdrawn and refiled.

The Court of Appeal again rightly held that it had not yet been seised of the matter. This was not in dispute. Therefore, not yet being seised of the matter, how could the Plaintiffs seek their

leave in respect of withdrawing a notice of Appeal? In any event, it is clear from the record that the Plaintiffs herein had no intention of abandoning the prosecution of the appeal and to find learned Counsel's submission meritorious would only lead to mischief and work injustice on the Plaintiffs. As held in the same ex parte Hesse case where Wood CJ, quoted with approval the holding in the case of **Republic v High Court, Accra ex parte Yalley (Gyan & Attor Interested Parties) [2007-2008] SCGLR 512** on examining the law on statutory interpretation. This is what Her Ladyship stated in the headnote 1 on page 1231-32 of the Ex-parte Hesse judgment as follows:-

> "*...on the construction of statutes,* ***the literalist, that is the ordinary, plain, or grammatical meaning, should be adhered to if it clearly advance the legislative purpose or intent and does not lead to any outrageous consequences.*** *That rule of construction might fitly be described as the subjective purpose rule with that rule being invoked only where the objective purpose rule would lead to mischief or injustice." Emphasis*

The venerable Lady Chief Justice's reasoning here is unexceptionable and ought to be adopted, and we accordingly apply it in deciding that Rule 17 of C. I. 19 is inapplicable under the circumstances of this case.

Finally, in the case of **Daily Dispatch v Osei-Bonsu II [2010] SCGLR 452,** the competency of the appeal was raised on behalf of the Plaintiff. His Counsel contended that since the process that initiated the appeal was headlined *IN THE COURT OF APPEAL* instead of *IN THE SUPREME COURT*, contrary to rule 6(1) of the Supreme Court Rules, 1996 (CI) 16, the appeal was improperly constituted and should be dismissed in limine. The Supreme Court, speaking through Gbadegbe JSC rightly rejected that proposition. His Lordship stated that, he hoped it was not going to be construed as a relaxation of the rules since the appeal substantially raised questions for determination by the Supreme Court. His Lordship continued, *"**there was an appeal lodged from the decision of the Court of Appeal that must be inquired into by the Supreme Court in order to do substantial justice to the parties and the Court should not be blinded by strict adherence to technicalities."***

Flowing from the above rationalisation, it can therefore be concluded herein without any shadow of contradiction that the Court of Appeal in the instant case rightly rejected the submission of learned counsel for the Defendants and was right in proceeding to hear and determine the appeal therein as it clearly had jurisdiction to do. This therefore resolves issue A set out above in favour of the Plaintiffs.

ISSUE B

WHETHER JUDGMENT IS AGAINST WEIGHT OF EVIDENCE

It is now settled law, backed by a host of cases that where an Appellant complains that a judgment is against the weight of evidence, he is implying that there were certain pieces of evidence on the record which, if applied could have changed the decision in his favour, or that there are certain pieces of evidence that had been wrongly applied against him. The onus is on such an Appellant to clearly and properly demonstrate to the appellate Court the lapses in the judgment being appealed against. See case of **Djin v Musah Baako [2007-2008] SCGLR 686.**

It is again trite law that an appeal is by way of rehearing. In the case of **Tuakwa v Bosom [2001-2002] SCGLR 61,** our respected Sister, Sophia Akuffo, JSC delivering the judgment of the court stated that an appeal is by way of rehearing, particularly where the Appellant alleges in his notice of Appeal that the decision of the trial court is against the weight of evidence.

In such a case, it is incumbent upon an appellate Court, in a civil case, to analyse the entire record of appeal, take into account the

entire testimonies and all documentary evidence adduced at the trial before arriving at its decision. This is to satisfy the court that, on a preponderance of the probabilities, it's conclusion is reasonably or amply supported by the evidence.

This issue will therefore be dealt with and the above principle used as a guide. In evaluating the evidence on the record before setting aside the decision of the trial court, the Court of Appeal laid down the guiding principles as gleaned from the case law over the years in resolving probate matters such as the instant one.

It started off with the case of **Johnson v Maja** (1951) 13 WACA 290, where the Court held thus:-

> "*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,... the burden is then cast upon those who attack the Will and they are required to substantiate by evidence the allegations they have made as to the lack of capacity, undue influence and so forth***" *Emphasis*

This holding was relied on by Apaloo CJ in the case of ***Akenten II & Ors v Osei [1984-86] 2 GLR 437***. The Court of Appeal found that the testimony of PW1, the legal Counsel who prepared the Will and PW2, one of the attesting witnesses stood unchallenged. **It further found that Exhibit A, the disputed Will was prima facie, regular as it had an attestation clause and the signature of the Testator was duly attested to by two witnesses. Again, Exhibit 1 which was tendered in evidence by the Defendants herein was an earlier copy of a 2009 Will executed by the Testator.** This Will did not differ significantly from the disputed one but its validity was not disputed by the Appellants herein. Again, the Court of Appeal observed that the trial judge disbelieved the allegation of the Appellants that the late John Dekyi was not of sound disposing mind, neither was he physically disabled at the time of the execution of Exh A.

After analysing the evidence led on these issues, this was the trial judge's conclusion.

> "***I have found no answers to these concerns because the Defendants who had the burden to provide them, failed to do so. I am unconvinced that on 2/11/2010, late John Kofi Dekyi was so sick that he could not have gone to the office of Lawyer Koffie to make a***

***Will; I also have no reasons to believe that he was not of a sound disposing mind at that time.*"**

Of course, the Court of Appeal was in absolute agreement with the trial judge on his appreciation of the evidence and his conclusion drawn therefrom.

What is unfathomable in this instance is having drawn the right conclusions from the evaluation of the evidence, the trial court still went ahead to hold that the Will could not have been executed by the Testator. This conclusion was not supported by any evidence whatsoever and it was perverse for him to have so held that the Will was not that of the Testator.

At this stage, it may be useful to refer to the case of ***Gregory v Tandoh and Anr. [2010] SCGLR 971 at 975*** to indicate circumstances under which an appellate court like this court may depart from findings of fact by a trial court.

These were stated in the case supra as follows:-

(1) Where from the record of appeal the findings of fact by the trial court were clearly not supported by the evidence on record.

(2) Where the findings of fact by the trial court could be seen from the record of appeal to be either perverse or inconsistent with the totality of evidence led by the witnesses and the surrounding circumstances of the entire evidence on record.

(3) Where the findings of fact are consistently inconsistent with important documentary evidence on record.

(4) Where the trial court wrongly applied a principle of law.

From the above, it is clear and apparent that the final conclusions of the learned trial Judge were perverse. As such it was proper for the Court of Appeal to depart from these findings.

Clearly then, the judgment of the learned trial Judge was indeed against the weight of evidence as was found by the Court of Appeal. Again Counsel for Plaintiffs helpfully provided a Court of Appeal authority to the trial court which he ought to have followed, going by the doctrine of stari decisis. This authority is the unreported case of Civil Appeal No. H1/281/2004 dated 15th May 2008, page 8 intitutled **Nana Kwabena Fosu & John Fosu v Abena Adomah & Eunice Osei,** where our respected brother

Gbadegbe JA (as he then was) opined in the unanimous judgment of the Court of Appeal when he spoke on behalf of the Court as follows:-

> "*PW1, PW2 and PW3 who testified as to the preparation of the Will and its due execution and attestation were cross examined by learned Counsel for the Defendants. The cross examination took a long time but a careful examination of the admitted evidence reveals that it did not have the effect of discrediting in substance their testimony as to the circumstances surrounding the execution of the Will.* ***In fact, it appears that in the course of the cross examination nothing of consequence was established on the allegation of the Testator's alleged lack of mental capacity to make the Will.*** *There was also no mention of any person as having forged the signature of the Testator or directed the making of the forgery.*
>
> *I add that there was no suggestion of any notice for the lawyer, PW1 to have forged the document. I think the defendants must have thought that the facts, bare as they were alleged in their defence without more would suffice to establish forgery. In my view, since it raised the commission of a crime, the defendants were obliged to prove it beyond reasonable doubt and indeed, their cross examination of the Plaintiffs witnesses must lay the foundation for this. Unfortunately, the cross examination only raised the issue of*

the signature not being that of the decedent by comparison with the Will of 1992."

His Lordship further held that:-

> ..."***I am of the thinking that having regard to the fact that PW1 was a lawyer engaged by the deceased to make the Will for him in the absence of any evidence tending to show interest, bias and or the like, his evidence ought to receive great weight. It is known that when Testators seek to consult lawyers to enable them make provision for the distribution of their assets after their call to the maker they often keep this to themselves and as such when direct evidence as to the making of Wills is offered in circumstances that do not raise any suspicion as in the instant case, a court of law should be slow to reject such evidence in the fact[sic] of clearly unsubstantiated challenges that are nothing but idle attacks as indeed has been made by the defendants of and concerning PW1.***"

If the facts in the instant case such as the preparation of Exhibit "A" by PW1 and its due execution by the Testator and PW2 etc., it follows that the learned trial Judge should have taken these facts into consideration.

The reasoning as demonstrated above by Gbadegbe JA (as he then was) in the case referred to supra, is unassailable and it is mind boggling why the trial judge refused to follow it, especially as it is on all fours with the instant case. He rather chose to in the words of the Court of Appeal "*allow himself to be swayed by irrelevant matters...*" which led to the wrong and unreasonable conclusion he came to in his judgment. It is therefore clear that the Court of Appeal judgment is not against the weight of evidence. This issue is also resolved in favour of the Plaintiffs.

ISSUE C

WHETHER OR NOT THE DECEASED TESTATOR, JOHN KOFI DEKYI VALIDLY EXECUTED HIS LAST WILL AND TESTAMENT ON THE 2ND DAY OF NOVEMBER 2010 IN THE PRESENCE OF TWO ATTESTING WITNESSES

It is provided under Section 2 (1), (2), (3) and (5) of the Wills Act, (1971), Act 360 as follows:-

> ***Section 2 (1)***
>
> *"No Will shall be valid unless it is in writing and signed by the testator or by some other persons at his direction.*
>
> ***Section 2 (2)***

No signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, or which is inserted after the signature has been made.

Section 2 (3)

The signature of the testator shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time.

Section 2 (5)

The witnesses shall attest and sign the Will in the presence of the testator, but a form of attestation is not necessary."

The evidence in support of how Exhibit "A", the Testator's Will was prepared was given by PW1, Francis Koffie, the Deceased Testator's Solicitor of many years. The said PWI testified in Court as follows:-

"The Testator had on several occasions instructed me to prepare several Wills but he always made new ones almost every year, withdrawing the last one. ***He was literate, so after I prepared Exhibit "A" based on his instruction he read through it. Two of our office clerks were invited. Rose Mary Bonin and Maxwell Mensah***

Bimpong were invited into my office to witness the execution by Mr. Dekyi of the Will. Both were present when Dekyi signed the Will, after which they also signed as attesting witnesses in the presence of each other and the testator*. After that, I also signed as having prepared it as a lawyer, having done it as a competent person in accordance with the provisions of the Wills Act."* Emphasis supplied.

The above evidence must be evaluated against the background that, the said Will, Exhibit "A" had earlier during the testimony of PWI been tendered by the witness without any objection. Furthermore, there is conclusive evidence from the testimony of PW1 that Exhibit "A" complied with the provisions of the Wills Act, referred to supra. Out of abundance of caution despite the extensive and rigorous cross-examination that PW1 was subjected to, what stands out clearly in his evidence are the following distinctive features and occurrence.

1. That Exhibit "A" is in writing and was duly signed and executed by the Testator, John Dekyi.

2. There were two attesting witnesses both present at the same time that the Deceased Testator signed Exhibit A after which both of them also signed in the presence of each other.

3. PW1, the Solicitor who prepared the Will also signed and endorsed the Will as the person who prepared the Will.

The above therefore satisfies all the essential ingredients of Sections 2 (2), (3) and (5) of the Wills Act, Act 360 as set out supra. Furthermore, as will be established in the course of analyzing Issue D below, there was also evidence on record that the Deceased Testator had the mental capacity at the date of the execution of Exhibit "A". This is what PW1 testified to in court on the mental capacity of the Testator.

> *"To say that the Will was a forgery, with all due respect is unfortunate. I knew Dekyi professionally since 1996, and* ***I daresay he was one person who defied nature because given his age at the time, he could drive himself to court immediately he was 90. He could read unaided. He was meticulous to a fault." Emphasis***

In answer to another question, this is how PW1 again delivered himself on the mental state of the Deceased Testator on 2nd November 2010.

"As a reasonable observer, he walked from his house about 600 metres away to our office. ***He was sound and after the Will was made, he read through it before he signed it. He had no infirmity of mind at the time."*** Emphasis

The above pieces of evidence showed clearly that the Deceased Testator was mentally alert and therefore had the mental capacity to have executed the Will on 2/11/2010. The above evidence was also not disturbed or shaken during cross-examination or by other evidence proffered by the Defendants when they gave evidence. Indeed, Apaloo C.J, sitting as an additional High Court Judge in the case of **Akenten II and Others v Osei** already referred to supra, stated the essential characteristics of a valid Will 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" Emphasis***

The principle in the **Akenten II and Others v Osei** case was earlier applied and stated in the case of **Yankah v Administrator General [1971] 2 GLR 186**, where the court held 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.*** *Although the isolated statement of Mary Adams divorced from the rest of the evidence would seem to indicate that she did not sign the codicil in the presence of the testator and that she was not present when the testator signed the codicil, the* ***evidence of the solicitor who drafted the codicil, the real evidence provided on the face of the codicil itself and the probabilities of this case tell strongly against that interpretation of the evidence.*** *The totality of the evidence showed that the codicil was signed and attested to by the witnesses in the testator's presence. Lloyd v. Roberts (1858) 14 E.R.871 and Wright v. Sanderson (1884) 9 P.D. 149 applied." Emphasis*

These principles of law had been followed by the courts in the following cases which all state unequivocally that, although the initial burden lay on those propounding the Will, the burden shifts

to those in denial once a prima facie case had been established. This is especially so in the instant case where PW1, PW2 one of the attesting witnesses and PW3 a Forensic Expert had testified in proof of the due execution of the Will, Exhibit "A" thereof.

See the case of **In Re Krah (Decd) Yankyerah & Others v Osei Tutu and Anr. [1988-90] 1 GLR 638, holding 2**

> *"In civil trials, although the burden of proof lay on the one who must succeed in the action, it shifted in the course of the trial. In the instant case, the defendants had the particular burden of producing evidence to substantiate their claim that the testator was in the habit of thumbprinting his documents but they had failed to discharge that particular burden of proof. The only inference that could therefore be drawn was that the testator used to sign his name and for an unexplained reason, he did not sign exhibit B. The reason was that which was supplied by the plaintiffs that he was so ill that he was not of sound mind to be able to execute the document under his free will."*

See Otoo No. I v Otoo No. I and Others [2013-2014] 2 SCGLR 777 where the Supreme Court stated unanimously as follows:-

"The cardinal rule in the construction of a will was that the intention of the testator, as declared by him and apparent in the words of his will, must be given effect to, so far as, and as nearly as might be consistent with law.

If the intention of the testator could be ascertained from the will itself, that intention must prevail. If the court of construction was in difficulty when trying to deduce the true intention of the testator, it would apply what was known as the rules or canons of construction such as the will must be read as a whole, in order to ascertain the intention. ***Hickling v Fair [1899] AC 15 at 27; Beaudry v Barbeau [1900] AC 569 at 575; Papillion v Voice (1728) Kel W 27 at 32; 25 ER 478 at 481; Re Palmer [1893] 3 Ch 369 at 373-374; Biney v Biney [1974] 1 GLR 313, CA;*** *and dicta of* ***Lord Wensleydale in Grey v Pearson (1857) 6 HLC 61;*** *and* ***of Adzoe JSC In re Atta (Decd); Kwako v Tawiah [2001-2002] SCGLR 461 cited." Emphasis***

In this instant, it is clear that the Deceased Testator did not intend his estate to fall into intestacy and this must be upheld.

RELEVANCE OF EXPERT OPINION

One related matter connected with the resolution of Issue c as set out supra is the issue of the conflicting expert opinions on whether the signature of the Testator on Exhibit “A” is really his signature as compared to other undisputed documents examined by two forensic experts. The Court of Appeal examined thoroughly why in their opinion CW1, the court expert Godwin Lavoe's evidence could not hold a light to that of PW3.

After comparing the evidence of both experts and going through the authorities on forensic examination, the Court came to the conclusion that the analysis of PW3 showed that he did a far better job than that of CW1 and his expertise clearly outshone that of the Court Witness. One cannot fault the Court of Appeal for arriving at that conclusion. After updating themselves with the authorities on forensic evidence and a careful consideration of the signatures on the record, the court held that the conclusion of PW3 was to be preferred to that of CW1, whose conclusion was tentative and did nothing to resolve the issue before the court.

In any event, it still remained an opinion and it was the court's duty to critically evaluate the evidence and come to the right conclusion. This the Court of Appeal had done by coming to the conclusion that on the totality of the evidence on the record, the judgment of the trial Court was perverse and against the weight of evidence and this they amply demonstrated by their reasoning in the judgment.

Indeed the learned trial Judge was not bound to accept any of the expert opinions that had been led before him. Those pieces of evidence did not relieve him of his duty of the trier of facts before him. The legal authorities are quite certain and clear on this. The Court of Appeal was therefore right in our opinion in departing once again from the findings of fact made by the learned trial Judge.

See for example the cases of **Sasu v Whitecross Insurance Co. Ltd. [1960] GLR 4** where the Supreme Court held and directed that expert evidence is to be received with reserve, and does not absolve a Judge from forming his own opinion on the evidence as a whole.

See also the case of **Fenuku v John Teye [2001-2002] SCGLR 985** where Ampiah JSC speaking on behalf of the court held thus:-

> *"The principle of law regarding expert evidence was that the judge need not accept any of the evidence offered. The Judge was only to be assisted by such expert evidence to arrive at a conclusion of his own after examining the whole of the evidence before him. The expert evidence was only a guide to arrive at the conclusions. In the instant case, on the totality of the evidence adduced, the Supreme Court was satisfied, as the Court of Appeal did, from preponderance of*

the probabilities, that it was more likely than not, that exhibit F was executed by the late Fenuku and that it was not a forgery"

In view of these settled authorities, and having apprized ourselves with the reports of both PW3 and CW1, and taking into consideration the signatures of the Testator on all the various documents examined vis-à-vis Exhibit "A", we come to the irresistible conclusion that, John Kofi Dekyi, the Deceased Testator is the author and executor of Exhibit "A". The legal position might very well be stated that, in evaluating the expert evidence given in trial of cases before the courts, in as much as the court is not bound to accept such opinion hook line or sinker, the court in rejecting or accepting such an expert opinion must proffer explanation for whatever position is taken in the matter. For example, in the instant case, we have indeed satisfied ourselves from ocular observation of the signatures in issue that, the similarities in those signatures make Exhibit A more probable as having been authored by the Deceased.

On the totality of the evidence, the law and our analysis thereof, we conclude that the Deceased Testator validly executed his last Will and Testament which in this case is Exhibit A on the 2nd day of November 2010 in the presence of two attesting witnesses.

ISSUE D

WHETHER OR NOT THE DECEASED TESTATOR, JOHN KOFI DEKYI WAS COMPOS MENTIS AT THE TIME HE EXECUTED HIS LAST WILL AND TESTAMENT ON 2ND NOVEMBER 2010

We have already referred to the testimony of PW1 wherein he stated the good health that the Testator enjoyed even at his ripe age of 90. We also made reference to his enjoyment good mental capacity at all material times. Indeed the learned trial Judge on this point made positive findings of fact and concluded that there was no reason to believe that the Deceased Testator was not of sound disposing mind at the time. In order to set the records straight, we consider it worthwhile to quote in extenso the exact words used by the learned trial Judge in the judgment as follows:-

> "*The snack (sic) is that, though the defendant have failed to adduced evidence of his admission at Okomfo Anokye Hospital on three occasions, when they were quizzed by the lawyer for the plaintiffs, they were unable to give the date of any of those three occasions. It is possible they could have forgotten the dates he was at the hospital. Granted that is the situation, I am of the opinion they could have produced a document to confirm their deceased father was at the hospital. For instance, since DW1 and 3rd Defendant have said they took him to the hospital on all the occasions, was their father not issued with an attendance card or a folder as*

is the usual practice in a respectable hospital like the one in issue? If they could not trace any of these documents, why did they not get the hospital authorities to come to court to testify as to when their father was admitted at the hospital? ***I have found no answers to these concerns because the defendants who had the burden to provide them, failed to do so. I am unconvinced that on 2/11/2010, late John Kofi Dekyi was so sick that he could not have gone to the office of Lawyer Koffie to make a Will; I also have no reason to believe that was not of a sound disposing mind at the time.*** *Emphasis."*

The learned trial Judge later in the same judgment stated unequivocally that he was not convinced that their late father's health deteriorated on his return to Ghana from the USA to the extent that he could not have had the mental capacity to make a Will as he did on 2/11/2010/

With the above quotations, it is clear as daylight that all the reasons upon which the Defendants anchored their challenge to the Will of the Testator on 2/11/2010, to wit its validity in terms of section 2 of the Wills Act, and the Testator having mental capacity to make the Will had been discounted by the trial Judge based on evidence from the record of appeal.

Furthermore, if we take into consideration the various dispositions and devises in Exhibit “A” of the disputed Will, the very nature of these devises makes it clear that it could only have come from a person who was mentally alert and of a strong mind and character.

We have examined the devises in Exhibit A, and we are really impressed that at that ripe age, the Testator had the presence of mind for essential details not only in respect of the beneficiaries, but also in the nature of the properties he devised. There is thus no doubt that he was compos mentis at the material time of the execution of exhibit A.

From the analysis above, it is our respective conclusion that, the Court of Appeal came to the right conclusions on its evaluation of the evidence and their judgment dated 28/07/2015 is affirmed. The appeal will be dismissed as lacking in merit.

PROLIXITY OF STATEMENTS OF CASE FILED BY LEARNED COUNSEL

Finally, before ending the judgment, we wish to comment on the tedious length of the statement of case filed by both parties. The Appellant filed a 77 page document whilst the Respondent filed a 45 page statement of case. Such lengthy statements of case, though may be filed with some scholarship, most of the time extend to unnecessary and tedious length. This Court has had

occasion to caution Counsels on such prolixity in the case of **Smith & Ors v Blankson (subst by) Baffour & Anor [2007-2008] SCGLR 374** wherein our Sister Sophia Akuffo JSC, delivering the judgment of the Court had this to say:-

> "*...this court deplores the prolixity with which Counsel for the Plaintiff-Appellants set out the claims, issues and grounds of appeal. Many of these amounted more to legal submissions than pleadings. It is not by lengthy words and paragraphs that a bad case can be transmuted to a good one. The only ends served by such protracted pleadings is to waste the Court's time and at times confuse the issues. It amounts to an abuse of the process of the courts. Counsel for Plaintiffs-Appellants, a very senior member of the Bar, ought to know better, and he would be advised to desist from such unnecessary rambling and wordy pleadings and submissions in the future... the admission of 26 issues for trial is shocking and unjustifiable; it only affords to Counsel an opportunity to throw waffle all over the place (whether in terms of evidence or arguments) resulting in inordinate wastage of the courts' time and resources.*"

We endorse the above words of our respected Sister and state unreservedly that, counsel should henceforth pay particular attention to substance and relevant detail rather than engaging in polemics. Grounds of appeal for instance must be tailor measured

to specific substantial infractions apparent in the record of appeal which are capable of overturning the judgment appealed against.

In the premises, the appeal by the Defendants against the Court of Appeal judgment of 28th July 2015 fails and is accordingly dismissed. The said Court of Appeal judgment of even date is affirmed.

(SGD) V. J. M. DOTSE
JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO - BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN
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