IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – GHANA AD - 2016

CORAM: ANIN YEBOAH JSC
BENIN JSC
AKAMBA JSC
APPAU JSC
PWAMANG JSC

CIVIL APPEAL

NO. J4/48/2014

6TH JUNE 2016

1.	**ALEC GRANT SAM**	**-**	**PLAINTIFFS/RESPONDENTS**
2.	**JEANNIE THERESA SAM**		**/APPELLANTS**
3.	**JULIANA SAM**		
	VRS		
1.	**UNILEVER GHANA LTD**	**-**	**1ST DEFENDANT**
2.	**NANA AFEDU IV**	**-**	**2ND DEFENDANT/APPELLANT**
	(SUBST. BY STEPHEN FOLLEY)		**/ RESPONDENT**
3.	**KODWO X.Y. AHLIJAH**	**-**	**3RD DEFENDANT/APPELLANT**
			/RESPONDENT

JUDGMENT

AKAMBA, JSC

PROLOGUE

Ecclesiastes 3 v 22: Wherefore I perceive that there is nothing better, than that a man should rejoice in his own works; for that is his portion: for who shall bring him to see what shall be after him?

FACTS

The plaintiffs/respondents/appellants Alec Grant Sam & others, (hereinafter simply referred to as the plaintiffs) commenced an action in the High Court, Cape Coast against the defendants/appellants/respondents, Unilever Ghana Ltd & Others, (hereinafter referred to as the defendants) for twelve reliefs, inter alia;

(i) A declaration that the plaintiffs, as representatives of the descendants of William Edward Sam (Deceased), are vested with reversionary title to all that piece or parcel of land lying and being situate at the then Low Town, Cape Coast on the road to Saltpond and popularly known as and referred to as "SAM'S HILL" and which is bounded on the South by the Ashanti Road, on the North and East by W.E. Sam's property and on the West by Governor Rowe Road.

(ii) A declaration that the disputed land was the subject matter of a leasehold Agreement dated 12th November,1902, and executed between W.E. Sam as Lessor on the one hand and F&G Swanzy (ie. 1st defendant's predecessors in title) on the other hand as lessees for 99 years.

(iii) A declaration that WE Sam who died Testate on 11th July, 1906, by his Last Will and Testament devised the disputed land to his son Thomas Birch Freeman Sam (Deceased) and his heirs.

(iv) An order for Recovery of Possession of the disputed land

(v) An order of perpetual injunction restraining the defendants, their agents/ servants/ relatives/ assigns from, in anyway, having anything to do with the disputed land

PLAINTIFF'S CASE

The plaintiffs' case, as gleaned from the accompanying Statement of Claim, is that the late William Edward Sam (Snr) (W.E.Sam, Snr) who hailed from Adja Beppoh near Tarkwa came to settle at Cape Coast. Whilst at Cape Coast, W.E. Sam (Snr) affiliated himself with the Afedu Abadzi family of Cape Coast presently headed by the 2nd defendant. W.E.Sam (Snr) was an accomplished personality in his time. He was the strongest indigenous holder of shares in the mines on the Wassaw Fields and an accomplished Mining engineer and adviser of the mines. Apart from his financial resourcefulness, he invested also in the education of his children. He had two children.

The plaintiffs are the great grandchildren of the aforesaid W. E. Sam, (Snr) had two sons, Thomas Birch Freeman Sam (T.B.F.Sam) and William Edward Sam, Jnr (W.E.Sam, Jnr). Fate was unkind to him as W.E.Sam, (Jnr) died in a mining accident in 1896 leaving T.B.F Sam as the sole surviving issue of W.E.Sam (Snr). On 12th November, 1902, W.E.Sam, (Snr) leased out his property situate in Cape Coast and known as Sam's Hill to F&A Swanzy, the predecessors in title of the 1st defendant, Unilever Ghana Ltd for ninety-nine (99) years with a reversion clause in favour of 'the lessors, his heirs, executors, administrators or assigns' in the event of the lessees closing up their business in this country during the term of the lease. W.E. Sam, (Snr) died in 1906. By his last will and testament, admitted to probate on 29th September 1906 he devised the said property known as 'Sam's Hill' to his sole surviving son, T.B.F Sam and his heirs. T.B.F Sam had three children; E.W.A.B. Sam (father of 2nd plaintiff), Alec Sam (father of 1st plaintiff) and Thomas Ansah Sam (father of 3rd plaintiff). T.B.F Sam sent all of his three children to Britain where they grew up and later returned to the then Gold Coast.

Meanwhile, the 2nd defendant's family, after the demise testate of the late W.E. Sam created the impression that the estate of W.E. Sam, (Snr) had devolved on the Afedu Abadzi family of Cape Coast.

It is the plaintiffs' case that, under an assumed capacity, the Afedu Abadzi family of Cape Coast on 25th February, 1948 executed a Deed of Sale represented by one Akosua Kwakyewaa, on the one hand, with United African Company Ltd (a predecessor of the 1st defendant), on the other hand after T. B. F. Sam had died in about 1941; subsequently, Central Properties (Ghana) Ltd (a predecessor in title of the 1st defendant) purported to execute a Deed of Surrender dated 24th June, 1957, in favour of Chief Afedu of Cape Coast (a predecessor of the 2nd defendant) registered in the Deeds Registry as No. 2015/1957 in respect of the disputed property leased out in 1902 by W.E Sam Snr.

According to the plaintiffs, on 19th September, 1995, the 2nd defendant herein purported to execute a Deed of Sale in favour of the 3rd defendant herein in respect of the disputed property.

In a nutshell, the plaintiffs contend that the 1st and 2nd defendants perpetrated fraud in the manner in which they dealt with the disputed property after the demise testate of the late W.E Sam, (Snr).

DEFENDANTS' CASE

The defendants denied that the late W.E Sam Snr was the owner of the disputed property. The 1st defendant contended that once W.E Sam (Snr) was affiliated with the Afedu Abadzi family of Cape Coast, he meant to change his domicile and became a member of that family thus; he would be bound by the custom and practices of that family headed by 2nd defendant.

2nd defendant, admitting paragraph 7 of the plaintiffs' Statement of Claim, contended that the late W.E Sam (Snr) deceased as a member of 2nd defendant's Abadzi family could only build on or cause to be built on the land belonging to the said family, but he could not dispose of any house built on 2nd defendant's family land by any alleged Will as he had only a life interest therein.

However, 3rd defendant contended that he is a prudent purchaser for value and that the failure of the plaintiffs to challenge the authenticity of the Deed of Sale dated 25th February, 1948 estopped them from raising any objection now. He further contended that, the plaintiffs are caught by acquiescence and laches.

After a full trial, the learned High Court Judge found that the disputed property contained in the lease agreement of 1902 on the expiration of 99 years became vested in W.E Sam (Snr), his heirs, executors, administrators and assigns in accordance with the terms of the said agreement.

The court found all transactions relating to the disputed property by the 2nd defendant and his predecessors to be wrongful and fraudulent. The Court granted an order of perpetual injunction against the defendants from any further dealings with the property.

The 3rd defendant dissatisfied with the decision filed a Notice of Appeal consisting of only one ground namely:

The judgment cannot be supported by the plaintiffs' claim with regard to the evidence.

On the 17th November, 2006, the Court of Appeal by a unanimous decision allowed the appeal and set aside the judgment.

Dissatisfied, the plaintiffs mounted a challenge against the decision of the Court of Appeal. They premised their attack on the following six (6) grounds:

i. That the judgment is against the weight of evidence adduced at the trial.
ii. That the Appellant Court erred in relying on evidence which was refused in an earlier application for leave to adduce fresh evidence on appeal.
iii. That the Appellant Court erred in finding that, to the extent that the devise in the Last Will and Testament of the deceased to the extent that it did contain the name "Cape Coast " did form part of the Estate of the Testator.
iv. That the Appellant Court erred in not finding that to the extent that the testator was the Lessor in the 1902 Leasehold Agreement, the residuary clause in the testator's Last Will and Testament adequately took care of the disputed property as forming part and parcel of the Estate of the deceased.
v. That the Appellate Court erred in not finding that in the face of the 1902 Agreement and the 1934 litigation the land was situate at Cape Coast.
vi. Other grounds to be filed upon receipt of the record of proceedings.

It must however be noted that no additional grounds were filed.

GROUND ONE

THAT THE JUDGMENT IS AGAINST THE WEIGHT OF EVIDENCE ADDUCED AT THE TRIAL.

This oft relied upon ground of appeal otherwise called the omnibus ground of appeal calls upon the appellate court to re-hear the matter on the record by reviewing the evidence on record in order to ascertain whether there is satisfactory evidence in support of both the findings and conclusions of the court below. In this wise, the burden falls upon the appellant to demonstrate to the court what pieces of evidence on record which if applied in his favour could have changed the decision in his favour or what or which pieces of evidence have been misapplied or wrongly applied against him. See **Djin vs Musah (2007-2008) 1 SCGLR 686 –** "The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against."

The Court of Appeal overturned the decision of the trial court on the basis that the evidence on record showed that the property in dispute is situated at Axim as established by exhibit G, the Will of the late W.E.Sam, Snr. Certainly, the fulcrum of the plaintiff's complaint in this appeal centers on the identity of the location of the disputed property in the Will of W.E. Sam.

Thus the court in this instance is called upon to construe the Will so as to identify the location of the disputed property in order to give effect to the intention of the testator. It bears remembering that the Will is the declaration or embodiment of the wishes and intention of its maker, the testator. To construe, according to Black's Law Dictionary, Eight Edition by Bryan A. Garner, means 'the act or process of interpreting or explaining the sense or intention of a writing; the ascertainment of a document's meaning in accordance with judicial standards.'

This principle is well stated in the **Law of Wills in Ghana (1998**) authored **by Samuel Azu Crabbe at page 226** thus:

"In the construction of a will by the court, the overriding principle is that effect must, as far as possible, be given to the intention of the testator. This intention is to be ascertained from the words of the will."

The intention of the maker of the Will can only be construed by reference to the words used therein. This position was aptly stated by **Lord Wensleydale** in **Grey v Pearson 1857 6 HLC p 106** as follows:

"In construing wills and indeed statutes and all written instruments the grammatical and ordinary sense of the words is to be adhered to, unless that could lead to some absurdity or some repugnancy or inconsistency in the rest of the instrument in which case the grammatical and ordinary sense of the word may be modified so as to avoid that absurdity and inconsistency but no further."

I will determine the grounds of appeal together under the omnibus ground 'the judgment is against the weight of evidence'. The reason for this approach is because the grounds listed as (ii) to (iv) are the lapses for which the plaintiff contends that the judgment is against the weight of evidence. Did the Court of Appeal premise its decision upon evidence which was rejected in an earlier application to adduce fresh evidence? There is no evidence on record to suggest that in the decision of the Court of Appeal delivered on 17th November 2006, their Lordships, relied upon any document purported to have been an indenture, made between a King Quarcoe Kinnah of Axim and W.E. Sam of Cape Coast as claimed by the plaintiff in his written submissions. Their Lordships simply gleaned their answer from exhibit G, the Will, to arrive at their determination. An appellate court is entitled to re-hear the appeal by scrutinizing the record and arriving at its own decision one way or the other. We have also looked closely and critically at the record of appeal and in particular at the exhibit G, the Will, that is at the center of this appeal. (See page 145 particularly at page 148 of the ROA). The testator, William Edward Sam died on 17th July, 1906 at Cape Coast. We have gone beyond looking at the exhibit G in a cursory fashion. We have looked at it intently employing the use of magnifying glasses. It emerges clearly therefrom that the devise to Thomas Birch Freeman Sam pertains to "my land known as Sam's Hill situate at Low Town Achim". The location therein given refers to a five

letter word ‘Achim’ and not any four letter word which the Court of Appeal read as ‘Axim’.

The identity of the land is put beyond doubt by the memorandum of agreement, exhibit H, made between W.E. Sam and F & A. Swanzy Limited wherein the property is described as Sam’s Hill outside the town of Cape Coast. It is significant to observe that ‘exhibit H’ was made on 12th November 1902, prior to the devise (exhibit G) and identifies the property as: “All that plot of land situate **on a hill outside the town of Cape Coast on the road to Saltpond and known as Sam’s Hill** and bounded on the North by the Ashanti Road on the South and East by Mr. W.E. Sam’s property and on the West by Governor Rowe’s road”

In any case the respondents’ rebuttal evidence was based upon exhibits 1, 2 and 9 which did not advance their cause. Exhibit 1 dated 1st May 1883 bears neither address nor an addressee. It is also unsigned. Its dubious origin is further compounded by the addition of ‘Ghana Letter’ at the bottom of each of the six pages of the letter. In 1883 the word ‘Ghana’ as a nation could not have been contemplated. Exhibits 2 and 9 did not relate to the land in dispute nor did they highlight any issue in contention. The trial judge rightly rejected them after duly evaluating all the evidence put before the court. This is what the trial court considered:

“IDENTIFICATION.

There was some confusion as to the identity of the property in dispute because in the will the description of the devise to T.B.F.S was not legible apart from the first letter ‘A’. Evidence had also been led by the defence that Sam Senior had another property in Low Town Axim also known as Sam Hill. The confusion however is of no consequence. The contingency upon which the property in dispute became vested was not dependent on the Hill but on the expiration of the lease. The reversionary clause clearly described the property as Sam Hill situated in Cape Coast. Other properties devised in the Will with the exception of that to T.B.F.S is clearly distinguishable from that described in the Lease.”

Clearly there is no basis for the Court of Appeal's claim that a mistake had been committed by the trial judge in arriving at the conclusion quoted above that Sam's Hill as described in the Will was situated in Cape Coast and not Axim as claimed by the respondents. The trial judge's conclusion was clearly borne by the evidence before her. We would set aside the Court of Appeal's conclusion on this ground and restore the trial judge's decision.

OWNERSHIP OF PROPERTY

The Court of Appeal affirmed the finding made by the trial judge as to the ownership of the disputed land. This is what the Court of Appeal stated on the issue:

"Even though the trial court found that the whole property was self-acquired by W.E. Sam, which we endorse, there is another compelling fact which goes to confirm the ownership of the property which the 2nd defendant/appellant asserts to be the ancestral property of the Afedu Amanful Family. Where the origin of the property is lost in history, one way by which the quandary can be resolved is by examining the name of the place…….

We hold therefore that Sam's Hill was originally acquired by WE Sam as self-acquired property."

We affirm these concurrent findings as they are amply supported by the evidence on record.

The residuary clause in exhibit G provides as follows:

"I give to and for the use of my dear grandson William Edu Sam one equal half of all my shares securities concessions and the residue of my real and personal estates wheresoever situate not disposed of by my will and to my said Trustee the other equal half upon trust to pay two thirds of the income arising therefrom to my son Thomas Birch Freeman Sam for life and the remaining one third to his children after the decease of the said Thomas Birch Freeman Sam to transfer the whole capital to the said children in equal proportions on their attaining twenty - four years …." [See page 149 of ROA]

In conclusion, since per exhibit G made on 21st April 1906 'the land situate on a hill outside the town of Cape Coast on the road to Saltpond known as Sam's Hill ' was devised to Thomas Birch Freeman Sam and since per exhibit H this same land was the subject of an earlier 99year lease agreement between the testator of exhibit G and Messrs F and A Swanzy of London and Gold Coast, it stands to reason to state that the reversionary interest in the property the subject of the present dispute was devised to the aforementioned Thomas Birch Freeman Sam and his heirs. It is trite to observe also that since the testator of exhibit G was the lessor of the lease agreement entered in 1902 with Messrs F and A Swanzy of London and Gold Coast, he certainly was aware of the reversion to himself, his heirs and administrators' in that agreement when he subsequently devised the said same land to Thomas Birch Freeman Sam.

The plaintiffs who are descendants of the said Thomas Birch Freeman Sam have the requisite capacity to mount the present action as they did and are also entitled to their reliefs which we hereby grant. The defendants' contend that the plaintiffs are not entitled to their reliefs on grounds of laches and acquiescence but this is not borne by the evidence as rightly determined by the trial judge. The plaintiffs exercised diligence in initiating their action when they returned from the United Kingdom where they lived for several years to discover the fraud in respect of the land bequeathed to them. The plaintiffs' action was devoid of any sloppiness hence the defence of laches and acquiescence does not arise. Laches refers to slackness or unreasonable delay in pursuing their right or claim upon discovery of the fraud in respect of the disputed land. Acquiescence refers to a person's tacit or passive acceptance; implied consent to an act. [See Black's Law Dictionary, Eight Edition, by Bryan A. Garner]

That the Appellate Court erred in not finding that in the face of the 1902 Agreement and the 1934 litigation the land was situate at Cape Coast.

This ground of dissatisfaction is otiose in the light of our earlier conclusions.

We find merit in this appeal and consequently set aside the decision of the Court of Appeal. We affirm the decision of the trial High Court.

EPILOGUE

Proverbs 27 v 23- Be then diligent to know the state of thy flocks, and look well to thy herds.

In conclusion, we note that the predecessor of the appellants had been diligent, albeit by the standards of his day, in the tabulation and identification of his self-acquired properties and the future distribution of same. However being a human endeavor certain lapses in the writings of those days had given cause for this avoidable litigation. Counsel for the 3rd Defendant in his written submission equated the plaintiffs' initiation of their action in the manner of Miguel de Cervantes' character called Don Quixote taking up his 'sword and lance' in order to 'stake their claim on a piece of land which they allege was bequeathed to them by W.E. Sam (Snr) over a century ago.'

In the end and indeed from the evidence on record, it was the defendants (particularly the 2nd defendant) who had embarked upon a quixotic errand to claim their non-existent land, a land they claim was their ancestral land despite the overwhelming evidence that same was the self-acquired property of W.E. Sam (Snr) (deceased) which land he had bequeathed to his son Thomas Birch Freeman Sam and his heirs. Success in litigation is not achieved by chivalry or bravado but by the outlay of credible and reliable evidence.

The appeal is allowed.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) YAW APPAU

JUSTICE OF THE SUPREME COURT

(SGD) G. PWAMANG

JUSTICE OF THE SUPREME COURT

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