IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: DOTSE, JSC (PRESIDING)

YEBOAH, JSC

BAFFOE-BONNIE, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL APPEAL
NO. J4/61/2017

11TH JULY, 2018

EBUSUAPANYIN JAMES BOYE FERGUSON
(SUBST. BY AFUA AMERLEY) ……. PLAINFIFF/APPELLANT/RESPONDENT

VRS

1. I. K. IMBEAH ……. DECEASED
2. V. A. ARMAH ……. DECEASED
3. YAW MENSAH ……. 3RD DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

APPAU, JSC:-

This appeal commenced as a representative action in the then District Grade One Court, Saltpond on the 9th of November 1988. About four (4) years later, precisely on the 23rd of September 1992, it was transferred to the High Court on the orders of the District Magistrate, the reason being that the value of the properties the subject-matter in

dispute, far exceeded the jurisdiction of the District Court. The parties filed pleadings in the District Court, which practice was not a strict requirement under the District Court rules. Upon the transfer of the action to the High Court, the parties filed new pleadings through amendments, pursuant to orders of the trial High Court. The original plaintiff in the action, Ebusuapanyin James Boye Ferguson who in the original action in the District Court said he had sued as Acting Head of the Asanawoma Okrah Kona Family for himself and on-behalf of the family, filed his Amended Writ of Summons and Statement of Claim in the High Court on 13th May 1994. In the amended writ, he described himself this time as the Head of family not Acting Head as was the case in the original writ filed six (6) years earlier. He again added the name Ehuren to the description of the family on whose behalf he had sued. Unfortunately, some few weeks after the filing of his amended writ and statement of claim, plaintiff died. His younger brother Joseph Ebenezer Ferguson, who said he succeeded him as Ebusuapanyin, applied successfully to be substituted in his place as plaintiff. He is presently, the respondent in this appeal and hereinafter shall be referred to as such.

The defendants who were sued jointly and severally were three in all. They filed a joint Amended Statement of Defence on 20th February 1995 through their lawyer Ato Mills-Graves. They were; I. K. Imbeah (1st defendant), V. A. Armah (2nd defendant) and Yaw Mensah (3rd defendant). The 2nd defendant died before hearing commenced whilst the 1st defendant, who withdrew from the action after the testimony of the respondent in the trial High Court, also died a couple of months thereafter. The only defendant left and who fought the case from the trial stage to this stage was the 3rd defendant Yaw Mensah. He is the appellant herein and shall hereinafter be referred to as such. The deceased 1st and 2nd defendants shall maintain their titles anytime there is the need to refer to them in this judgment since they were not substituted and therefore not part of this appeal.

Brief facts

The reliefs the respondent sought in his claim were eight in all. The first two reliefs were for a declaration that House No. 2/ BLK 270 situate at Bekyer Asoe Baamu Anafo, Mankessim was family property and an order directed at the 1st defendant (deceased) to render accounts and pay to respondent all rents collected from tenants occupying that house. The third relief was for an order compelling all the defendants to surrender to plaintiff as head of the family, the Post Office Savings book of the late Ebusuapanyin Kweku Ehuren. The fourth relief was for an order compelling the 2nd defendant (deceased) and the appellant herein to account to plaintiff and pay to him as head of the family, all rents that the two had collected from tenants occupying House No. 2/BLK 133 also situate at Bekyer Asoe Baamu, Mankessim, which was family property. The fifth relief was for an order for the return of the family's linguist stick to the plaintiff. The sixth relief was for an order compelling the 2nd defendant and the appellant herein to account for all rents accruing from the family's lands at Porko and Pima. The seventh and eighth reliefs were ancillary reliefs for injunction and recovery of possession of all these properties from the deceased defendants and the appellant herein.

The second relief was against the 1st defendant only and it was personal to him whilst reliefs 4 and 6 were directed against the 2nd defendant and the appellant herein. On the death of the 2nd defendant, the claims made against him personally under reliefs 4 and 6 died with him. They were claims *in personam* and do not survive him. Since he was sued jointly in respect of those reliefs with the appellant, it was for the appellant to answer the charges. There was therefore no need to substitute him as the appellant lamented in his written statement of case. The 1st defendant, on the other hand, reconciled with the respondent and surrendered the documents in respect of the House numbered 2/BLK 270 over which he was sued and other family property under his care, to the respondent. From the appellant's own testimony, the 1st defendant persuaded him in vain, to reconcile with the respondent. Having failed to convince him to reconcile with the respondent, the 1st defendant decided not to have anything to do with the trial. He therefore withdrew from the case before his death. ***{See the testimony of***

appellant during cross-examination at pp. 179 and 180 of the record of appeal referred to infra}. It is therefore the view of this Court that having withdrawn from the case before his death, the 1st defendant ceased to be a party in the action and there was no need to substitute him contrary to appellant's contention in his written statement of case.

The trial High Court granted reliefs 1, 4, 6, 7 and 8 against the appellant. The court declared plaintiff's family owners of the two houses and the farmlands described under reliefs 1, 4 and 5 and ordered the appellant to account to respondent in respect of all rents accruing from these properties which he had collected. The court again restrained him from interfering in these properties and ordered respondent to recover same from the appellant. The trial High Court however, refused to grant reliefs 2, 3 and 5.

Not satisfied with this decision, the appellant appealed to the Court of Appeal on eight grounds of appeal. Apart from the eighth ground of appeal which was in respect of the costs awarded, which appellant said was harsh and excessive, the crux of the remaining seven grounds was that the judgment of the trial High Court was against the weight of evidence adduced at the trial as the trial court failed to give due consideration to the evidence of the appellant. The appellant lost the second time in the Court of Appeal, which affirmed the judgment of the trial High Court. He has now come before us on a second appeal. His grounds of appeal, though two (2) as stated in his notice of appeal filed on 20/10/2015, boil down to the same complaint. They are: ***1. The Court of Appeal did not adequately consider the appellant's case*** and ***2. The judgment was against the weight of evidence adduced at the trial*****.** The first ground is a sub-set of the second, which is the general or omnibus ground. If the Court of Appeal did not adequately consider the appellant's case, what it connotes is that the judgment of the Court of Appeal was against the weight of evidence adduced at the trial. The two grounds could therefore be determined under the omnibus ground and the appellant did just that in his written statement of case filed 28/07/2017.

Appellant's arguments in his written statement of case filed on 28/07/2017

The appellant referred the Court to its own decision in **DJIN v MUSA BAAKO [2007-2008] SCGL 686** on the duties imposed on an appellant whose appeal is founded on the omnibus or general ground that the judgment is against the weight of evidence. According to the appellant, he was required to clearly and properly demonstrate to the appellate court that there were serious lapses in the judgment to the extent that certain pieces of evidence on record were wrongly applied against him and that if those pieces of evidence had been properly applied in his favour, they could have changed the verdict of the trial court in his favour. He therefore set out to demonstrate that the two lower courts were wrong in their concurrent findings for which he was inviting us to interfere. According to him, the two main issues resolved by the two lower courts were: **i.** whether the name Asanawoma existed among Fantis, and **ii.** Whether the Asanawoma-Okrah-Ehuren Kona family existed and owned property in Mankessim. However, in resolving these two issues, the trial court and the Court of Appeal wrongly relied heavily on Exhibits **'A', 'B', 'C', 'D'** and **'E'**, all of which were attributed to the deceased 1st defendant I. K. Imbeah, to find for the respondent without evaluating the entire evidence on record before them.

He argued that both lower courts appeared to have taken the view that once the documentary evidence purporting to come from I. K. Imbeah were tendered without objection, the issue as to their credibility was settled. His contention was that the admission of those documents without objection did not mean that the trial judge had been relieved of his duty to evaluate the entire evidence on record and to subject the received evidence to critical evaluation by reference to other pieces of evidence on record. He argued that events leading to the execution of Exhibit 'A' for instance, and the exchanges of denials and counter denials in respect of the authorship of Exhibit 'A' when the matter first went before the District Magistrate Court should have put the two lower courts on guard as to the genuineness of Exhibit 'A' and the other exhibits. Again, it was against public policy for the trial court to have received in evidence Exhibit 'A' which was allegedly authored by the late 1st defendant at a time he had a lawyer without the knowledge of his lawyer and also at a time he was not alive to speak to the

said document. Appellant charged further that the respondent was expected to lead conclusive evidence in support of his contention that there was in existence, at all material times, the Asanawoma-Okrah-Ehuren Kona family of Mankessim and Abura-Dunkwa. However, apart from Exhibits 'A', 'B', 'C', 'D' and 'E' and even Exhibit '2', respondent did not lead any satisfactory evidence to establish the existence of the alleged Asanawoma-Okrah-Ehuren Kona family different from the original Kona family of Mankessim. He gave an instance of where all the parties agreed that Ehuren who died in 1971, was their Head of family and the fact that he was described as the head of the Kona family of Mankessim but not head of Asanawoma-Okrah-Ehuren Kona family of Mankessim and Abura-Dunkwa.

He submitted that since the exhibits in contention; i.e. A, B, C, D, E and F were created after the litigation had started, they could not constitute evidence to establish the existence of a family by name Asanawoma-Okrah-Ehuren Kona family before the commencement of the action. He concluded by saying that before the commencement of the action in 1988, there existed only one Kona family of Mankessim and that though the respondent's faction which is at Abura-Dunkwa used to be part of the family, they severed their relationship with the family when they failed to secure the headship of the family in 1979. They therefore created the name Asanawoma mainly to wrestle the ownership of the disputed properties from the appellant's family.

Respondent's arguments in his statement of case filed on 17/11/2017

The respondent's arguments, on the other hand, were that the appellant seemed not to appreciate the concepts of 'Family' as a unit and 'Clan' as an entity under customary law. Quoting both Kludze, A. K. P. and Sarbah in their books 'The Modern Law of Succession' and 'Fanti Customary Laws', the respondent drew a distinction between 'Family' as a unit and 'Clan' as an entity. According to him, a Family is a primary unit with its own head clothed with legal personality and owns property while a Clan is not a corporate entity as such and generally does not own property. There could not therefore be a family with the name 'KONA FAMILY' simpliciter since 'Kona' is the title of

a 'Clan' under which falls several different families. He contended that the respondent's claim that their family was known as the Asanawoma-Okrah-Ehuren Kona family was more probable than the appellant's claim that the name of the family was just Kona family as the respondent's version was supported by the totality of the evidence on record. He concluded that the two lower courts did not err in relying on Exhibits A to F to find for the respondent as the said exhibits were not challenged by the appellant during the trial aside of the collaborative content of the testimony of appellant's own witness D.W.3. He prayed the Court to dismiss the appeal as the appellant could not demonstrate that the two lower courts were wrong in their conclusions.

A brief account of the testimonies of the Parties and their witnesses in the trial High Court

The respondent's case in the trial High Court was that the family originated from one Asanawoma of the Kona clan who led them during their migration from Techiman in the thirteenth century to present day Mankessim. When they settled at Mankessim, they met the family of the appellant which was also of the Kona clan. They therefore merged and became one family. Later some of the family members moved to settle at Abura-Dunkwa thus creating a section of the family there. The family therefore has two branches; one in Mankessim and the other in Abura Dunkwa. He the respondent, was the overall head of the two branches of the family with (P.W.1) Yaw Nkrumah as head of the Mankessim branch and P.W. 3 Kobena Ankomah as the head of the Abura-Dunkwa branch. He said though the 2nd defendant and the appellant herein belonged to the family, they broke away when the family refused to appoint the 2nd defendant (dec.) as the head of family after Opanyin Anamoa's death. Again the appellant belonged to a different lineage of the family as the family consists of different lineages and that the properties in dispute belonged to his lineage, which is the Asanawoma-Okrah -Ehuren lineage. He contended further that the late 1st defendant belonged to the Asanawoma lineage that was why he was made to take over the caretakership of the properties after Ebusuapanyin Ehuren's death. However, he joined him in the action because he failed to account to him in respect of rents collected as directed by him.

The appellant on the other hand contended that the respondent was only the head of the Abura-Dunkwa branch of the family and that he had nothing to do with the Mankessim branch which was headed by the late 2nd defendant and after his death he the appellant had become the new head of family. He denied the existence of any Asanawoma in the family and said the family was simply known as the Kona family of Mankessim. According to him, the ancestor of his Kona family of Mankessim was one Okomfo Bekyer who led them from Techiman during the thirteenth century migration. When they settled at Mankessim, the respondent's faction, which is also of the Kona Clan, joined them and they became one family. However, in 1979 when Ebusuapanyin Ehuren died one of the family members in Abura Dunkwa called Tenkorang and the original plaintiff J. B. Ferguson contested the Ebusuapanyin position and lost. As a result of their failure to secure the headship of the family, the respondent and his faction broke away from the main family. The respondent therefore had nothing to do with the properties which belong to the main Kona family of Mankessim of which he was now the head.

Observations and Evaluation of the testimonies of the parties

It is interesting to observe that whilst both parties admitted that they all belonged to the same family until there was an alleged separation in either 1979 or 1988 as they variously contended; each was accusing the other of being the breakaway faction. During the trial, respondent called three witnesses whom he said were all his family members. The appellant also described these same witnesses as his brothers and family members. They were: P.W.1 Samuel Alfred Kontoh; P.W.2 Yaw Nkrumah and P.W.3 Kobena Ankoma. Respondent described Yaw Nkrumah as the head of the Mankessim branch of the family and Kobena Ankoma as the one who succeeded Opanyin Kwame Tenkorang as head of the Abura-Dunkwa branch. All these witnesses corroborated the respondent's testimony that their ancestor was Asanawoma and that the respondent was the overall head of their family. They all claimed that both parties belonged to the same family and that the differences between them arose as a result of the headship of the family after the death of Ehuren and Opanyin Anamoah.

The appellant also called three witnesses. They were; D.W.1 Aba Guraba, D.W.2 Kweku Nyame 'aka' Kweku Seidu and D.W.3 Nana Kwaanan III. None of the witnesses the appellant called during the trial; i.e. D.W.1, 2 and 3 belonged to his family as described. D.W.1 was a daughter to the late Ebusuapanyin Kweku Ehuren and therefore not a member of his father's maternal family. She told the trial court in her evidence in-chief that the appellant was the head of his late father's family but when she was pestered with questions during cross-examination by respondent's counsel, she changed course and said she did not know anything about the parties' family matters as she was not a member of the family. D.W.2 also said he hailed from Anomabo and came to settle in Mankessim as a tailor. Since his family in Anomabo belonged to the Kona Clan, he decided to associate with the appellant's family which also belonged to the Kona clan. He admitted that he knew nothing about the history of the family that owned the disputed properties. D.W.3 on the other hand was the Kyidomhene of Mankessim. He admitted that all the parties in the suit belonged to the same family, which he called the 'Ehuren-Kona family. According to him, his Kyidom family also belonged to the Kona Clan so it is called 'Kyidom-Kona family of Mankessim. His contention was that the family of the parties, which is also of the Kona stock, originally formed part of his family but they broke away to form a separate family. He however did not tell the court when this happened. Whilst he initially said the name of the parties' family was the 'Ehuren Kona family and that there was no name like Asanawoma in Mankessim, he later recoiled and admitted during cross-examination that Asanawoma was the ancestor of Ehuren. He said he did not know the respondent as the head of the family but rather the head of the family was the appellant Yaw Mensah.

The undeniable fact is that the appellant admitted during the trial that P.W.1, 2 and 3 all belonged to his Kona family of Mankessim likewise the 1st and 2nd defendants (deceased). He described P.W.1 and the 1st and 2nd defendants (deceased) as his elder brothers. All these witnesses; i.e. P.W. 1, 2 and 3, though admitted this claim by the appellant that they belonged to the same family, denied his contention that the late 2nd defendant was the head of their family and that he appellant succeeded the said 2nd

defendant as the head of the family. They were all in concert that the respondent was their head of family and that the appellant was just an ordinary member. They added that what the appellant called Kona family of Mankessim was the same as the Asanawoma-Okrah-Ehuren Kona family of Mankessim and Abura Dunkwa. The appellant could not call even a single accredited member of his family to support his case that he was the head of his family. When the two stories of the appellant and the respondent are therefore weighed on the legal scale, the balance of probabilities as to which of the two stories is more probable, tilts in favour of the respondent's. That story carries more weight than that of the appellant because it is supported by the testimony of accomplished family members acknowledged by both parties, while the appellant's remain unsupported. The question is; are there any reasonable grounds that can support this Court's interference in the decision on appeal before us, or has any of the instances that justify our interference in concurrent judgments of this nature as outlined in the decision of this Court in **KOGLEX LTD (No.2) v FIELD [2000] SCGLR 175 @ 177**, been seriously urged on us by the appellant?

Analysis and Findings

There is enough evidence on record to dispel appellant's contention that Exhibits 'A', 'B', 'C', 'D' and 'E' were introduced in evidence after the death of the 1st defendant so they constituted evidence against a deceased person. The record shows clearly that Exhibits A – D, were tendered in evidence during the lifetime of the 1st defendant (now deceased) and in his presence. This was on the 1st day of June 1999. The court records for the day (1st June 1999), which appear at page 84 of the record of appeal (RoA) were as follows:

"Plaintiff – present;

2nd defendant – absent (deceased);

1st and 3rd defendants – present.

Same representation.

By Court: Time 10.45 am. Counsel for the defendants has asked the court to stand the case down to 11.30 am to enable him rush to the hospital for medication. The plaintiff's counsel is at liberty to go on to await the attendance of the defence counsel. The plaintiff also says his counsel is at Court one.

By Court: Time is 11.24 am. Both counsel are now in. The plaintiff is reminded of his former oath for further evidence in-chief..." It was on this day 1st June 1999 that Exhibits 'A', 'B', 'C' and 'D' were tendered in evidence. ***{See pages 85 and 86 of the RoA}*** - Both the 1st defendant and the appellant herein, who was the 3rd defendant, were present in court. The 1st defendant did not challenge the exhibits, particularly Exhibit 'A' which he personally authored, neither did the appellant. Their lawyer too did not challenge any of the documents throughout his cross-examination of the respondent. Before the documents were tendered in evidence, the defence lawyer Mr. Ato Mills-Graves had earlier threatened to withdraw his representation for the 1st defendant because of his conduct. Counsel was not specific on the conduct he was complaining about but from the records, it appeared it was in respect of the authorship of Exhibit 'A'. ***{Please, refer to page 83 of the RoA)***

The appellant's assertion that the documents were tendered in evidence after the death of the 1st defendant and for that matter he had no opportunity to speak to them was therefore not correct. Again, the contention by the appellant that the admission in evidence of Exhibit 'A' was against public policy because at the time the author; i.e. 1st defendant made it; he had a lawyer but nevertheless failed to consult his lawyer, was untenable. The evidence on record shows that Exhibit 'A', which was an affidavit sworn to by the late 1st defendant I. K. Imbeah, was sworn earlier on before a Commissioner of Oaths on 20th March 1989 before the appellant and the late defendants contracted counsel to file their statement of defence and counterclaim in the District Court, Saltpond on 18th April 1989. There is therefore nothing on record to suggest that at the time the 1st defendant swore to the said Exhibit 'A', he was represented by counsel. It was only Exhibit 'E' which is the same as Exhibit 'F' that was tendered in evidence by

P.W.3 after the death of the 1st defendant. And even with regard to this document, which was authored by the late 1st defendant, the appellant did not challenge its authenticity. The fact is that the appellant could not have done so because he knew of its existence. In his own testimony appellant said he had problems with the 1st defendant over Exhibit **'E'**, which means he knew the history behind its authorship. This exhibit was a letter dated 7th April 1989 which the late 1st defendant I. K. Imbeah, addressed to the then Mfatsiman District Council requesting them to pay all rents due to the Asanawoma-Okrah-Ehuren Kona family of Mankessim and Abura-Dunkwa in respect of a family land at Mankessim into the family's bank account. The 1st defendant served a copy of this letter on the original plaintiff J. B. Ferguson whom he described as the Acting Head of family. This was what transpired between counsel for the respondent and the appellant over Exhibit **'E'** during cross-examination at pages 179 and 180 of the record of appeal (RoA):

"Q. ***I. K. Imbeah who you claimed to be your brother, wrote to the Mfantseman District Council saying that he had settled all differences between himself and the elders of Asanawoma-Okrah-Ehuren Kona family of Mankessim and Abura-Dunkwa.***

A. My Lord, the reason why this letter was written to the District Council is that my brother I. K. Imbeah called me and wanted to persuade me to drop this case and I refused. Mr. Ferguson had approached him for me to drop this case or to send this case out of court but I refused. Later he called me again and informed me that he had planned to give me money of which I refused, so as a result, my brother told me that if I am not going to allow him or to withdraw the case, he was going to withdraw himself from the case so I should pursue my case; that is why he withdrew from the case".

As a result of the above testimony from the appellant, which was suggestive that the appellant knew the 1st defendant as the author of Exhibit 'E', the respondent's counsel caused a copy of Exhibit **'E'** to be tendered in evidence again through him without any

objection as Exhibit **'F'**. In fact, the totality of the evidence on record suggests without doubt that both parties belonged to the same family notwithstanding the different names each gave to the family and this Court finds this as a fact. All of them admitted that their head of family before this dispute was the late Ebusuapanyin Kweku Ehuren who died in November 1971. A funeral poster that was printed to mark his final funeral rights and which was tendered in evidence and appears at pages 12 and 13 of the record of appeal (RoA) listed the names of some of the parties as Chief Mourners. The family was described as Kona family of Mankessim. The names started with the 1st defendant I. K. Imbeah (deceased) whom all the parties admitted was the Ebusuabaatan of the family. Following in numerical order were: the original plaintiff Supi J. B. Ferguson, the respondent herein J. E. Ferguson, Opanin Anamoah whom all the parties admitted succeeded to the estate of Ebusuapanyin Kweku Ehuren after his death, Opanyin Kwame Tenkorang who was described as the Ebusuapanyin of the Abura-Dunkwa branch of the family, Opanyin Kweku Impraim, etc. It must be remembered that the appellant in his evidence, mentioned Opanin Kwame Tenkorang as one of those elders who came from Abura-Dunkwa to contest the Ebusuapanyin position when Ebusuapanyin Kweku Ehuren died. The appellant herein was not listed as one of the chief mourners in the said funeral that was held in 1972 long before the institution of this action in 1988.

The undeniable fact is that the dispute between the parties arose after the death of Opanyin Anamoah in 1988 when there were competing claims as to who to succeed him as Head of family. The evidence on record suggests that because of the religious beliefs of Opanyin Anamoah, the 1st defendant who was the Ebusuabaatan was appointed his personal assistant to exercise caretakership over all the family properties. The original plaintiff J. B. Ferguson was then resident in Accra. Both parties attested to that. However, when Opanyin Anamoah died, the 2nd defendant claimed to have been appointed his successor as the Ebusuapanyin whilst the original plaintiff also claimed to be the Ebusuapanyin. The 2nd defendant unilaterally took over the caretakership of the family properties and directed the appellant herein to collect rents accruing from the

said properties. That ignited the institution of the present action by the original plaintiff who is respondent's predecessor. So clearly, notwithstanding the fact that the respondent said their ancestor who led their migration from Techiman in the thirteenth century was Asanawoma whilst the appellant said he was Okomfo Bekyer, the bridge point is that they all belonged to the same Ehuren-Kona family.

As the respondent rightly contended in his written statement of case, the word 'Kona' is the name of a Clan but not that of a family as such. It is the Fanti version of 'Ekuona' as known in Ashanti with the buffalo/reindeer as its symbol. Kludze, in his book Ewe Law of Property, (2nd Edition) published by SonLife Press, was of the view that the word 'Clan' was ambiguous and of imprecise meaning. He stated at page 168 of his book as follows: - ***"Sometimes, the word is used in Ewe to refer to a large unit like the sub-division or saa which comprises several families. On the other hand, it is generally understood in Ghana, especially among the Akan, to mean a totemistic and dispersed group of persons claiming descent from a common mystical ancestress, such as the 'Oyoko' clan or 'Bretuo' clan".***

Sowah, J (as he then was), defined the word **'Clan'** in the case of **ASUON v FAYA [1963] 2 GLR 77** as follows: - ***"It does appear that when the word 'family' is used, it does sometimes mean a family per se and at other times, a clan. It is therefore necessary in this action to distinguish clearly between the words clan and family…A clan is an exogamous division of a tribe, all the clansmen or members of which are held to be related to one another and bound together by the common tie or clanship. This tie in Ashanti is, for all ordinary purposes, belief in a common descent from some ancestress; reaching back still further, it was belief in a common descent from an ancestress who was descended from some animal. Whatever may have been the origin of the clan system, it is now found amongst the Fanti tribes; within each clan in any Fanti town or village there can and often do exist several families unrelated directly by blood ties, but who nevertheless, are members of a clan"*** {Emphasis added}

Sarbah, in his Fanti Customary Laws, 1904 at page 33, defined **'Family'** as consisting of ***"all the persons lineally descended through females from a common ancestress".*** Bentsi-Enchill, on the other hand, defined it; ***"as a group of persons lineally descended from a common ancestor exclusively through males (in communities called patrilineal for this reason) or exclusively through females starting from the mother of such ancestor (in communities called matrilineal for this reason) and within which group succession to office and to property is based on this relationship"*** – See Bentsi-Enchill, K.; 'Ghana Land Law', published by Sweet & Maxwell, London, 1964, page 25.

Brobbey, JSC, made the distinction between a clan and a family clearer when in the case of **AWULAE ATTIBRUKUSU III v OPPONG KOFI [2011] 1 SCGLR 176 @ 202-203**, he defined 'family' in the following words: - ***"By 'family' is meant members who hail from the same family root. 'Family' in this context cannot include members of the same Clan like Oyoko or Aduana. To illustrate this further, there are Aduanas in various Regions or places such as Ashanti in Essumeja, Obo in Kwahu, Asante Akim in Agogo. Their common bond is that they are all described as Aduana and use similar clan symbol but are not related in any other way. An Aduana from Kwawu cannot claim to belong to an Aduana family from Asante Akim in any other way. An Aduana from a different place cannot claim land belonging to the Aduana family in a place totally different from his own Aduana family".***

Based on these definitions, it is undisputed that the word 'Clan' and 'Family' are different in context. The difference lies in the fact that; with regard to clan, aside the fact that members trace their root from a common ancestor, there is no biological relationship between them but in the case of the 'family', members are related by blood. A family is therefore the subset of a clan. There are several Akan families that belong to the Kona or Ekuona clan. As D.W.2 contended in his testimony, his family in Anomabo belonged to the Kona clan so when he came to settle at Mankessim, he associated himself with the appellant's Kona family. In such a situation he did not

belong to the Mankessim Kona family by blood but by association so he was emphatic that he did not know the history of the family he had associated with. D.W.3 also, who is the Kyidomhene of Mankessim said his Kyidom family also belonged to the Kona clan so the name of his family is 'Kyidom-Kona' family. He said all the parties belonged to the same family which he called the Ehuren-Kona family but not Kona family simpliciter. However during cross-examination, he affirmed the respondent's position that Ehuren's ancestor was Asanawoma. This confirms the 1st defendant's admission in Exhibits **'A'** and **'E'** that the family is known as Asanawoma-Okrah-Ehuren Kona family as the respondent contended and as supported by P.W.1, 2 and 3. The addition of Okrah and Ehuren, whom both parties admitted were once heads of the family, was just to lay more emphasis to distinguish the family from any other family that is of the Kona stock. In our view, when you say Kona family, it is not explanatory enough to identify the particular Kona family one would be talking about since from the record, Mankessim alone has several families which are of the Kona clan. The testimony of appellant's own witness D.W.3 attests to this. To call the parties' family 'Kona family' simpliciter would therefore be a misnomer as there are several Kona or Ekuona families spread out in several towns, districts and even regions across the country. Such families originate from different common ancestors whose names are normally used to describe the families in question. It is therefore not surprising that the same family appellants called Kona is what the respondents call Asanawoma after their ancestor. The existence of the Asanawoma-Okrah-Ehuren Kona family all this while could not therefore be disputed as the evidence on record overwhelmingly supports it.

Conclusion

The standard of proof in civil cases, including land, is one on the preponderance of probabilities - {See sections 11 (4) and 12 of the Evidence Act, 1975 [NRCD 323] and the decision of this Court in **ADWUBENG v DOMFEH [1996-97] SCGLR 660 at p. 662**}. In the *Adwubeng v Domfe case* (supra), this Court held at holding (3) as follows: ***"Sections 11(4) and 12 of the Evidence Decree, 1975 (NRCD 323)… have clearly provided that the standard of proof in all civil actions was proof by***

preponderance of probabilities – no exceptions were made. In the light of the provisions of the Evidence Decree, 1975, cases which had held that proof in titles to land required proof beyond reasonable doubt no longer represented the present state of the law…"

We have carefully evaluated the evidence on record vis-à-vis the arguments advanced by both parties in their written submissions, and it is our candid view that the Court of Appeal did not err when it affirmed the decision of the trial High Court in favour of the respondent. The two lower courts properly evaluated the evidence on record before concluding the way they did. The appellant could not put up any strong case to support his contention that he was the head of the family which he called Kona family of Mankessim and which the respondent called the Asanawoma-Okrah-Ehuren Kona family of Mankessim and Abura-Dunkwa. He could not call even a single member of his family to support his claim unlike the respondent who called three witnesses whom the appellant admitted belonged to the family. From the facts, the respondent's case was more probable than that of the appellant. Having failed to demonstrate to the satisfaction of this Court that the evidence on record did not support the concurrent judgments of the two lower courts, the appellant's appeal is bound to fail. We accordingly dismiss same.

YAW APPAU

(JUSTICE OF THE SUPREME COURT)

V.J.M DOTSE JSC:-

I agree with the conclusion and reasoning of my brother YAW APPAU, JSC.

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

ANIN YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Yaw Appau, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

P BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

P BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

G.PWAMANG, JSC:-

I agree with the conclusion and reasoning of my brother Yaw Appau, JSC.

A

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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