IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
DOTSE, JSC
BAFFOE-BONNIE, JSC
AKOTO- BAMFO (MRS), JSC
APPAU, JSC

CIVIL APPEAL
NO. J4/64/2016

25TH APRIL, 2018

EVELYN ASIEDU OFFEI ..... PLAINTIFF/APPELLANT/RESPONDENT

VRS

1. YAW ASAMOAH
2. ODEHYE KWAKU GYAPONG ..... DEFENDANTS/RESPONDENTS/APPELLANTS

JUDGMENT

APPAU, JSC :-

The appellants herein who were the defendant and co-defendant in the trial High Court, would be referred to simply as defendants in this judgment, while the respondent who was the plaintiff would maintain the title; plaintiff.

The authorities are legion 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 was against the weight of evidence. In such a case, it is the duty of the appellate court

to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that, on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence on record. And it is immaterial whether the appeal is a second one from the Court of Appeal to the Supreme Court. See the cases of: *1.* ***AKUFO-ADDO v CATHELINE [1992] 1 GLR 377;*** *2.* ***TUAKWA v BOSOM [2001-2002] SCGLR 61;*** *3.* ***ARYEH & AKAKPO v AYAA IDDRISU [2010] SCGLR 891 @ 899;*** *4.* ***ACKAH v PERGAH TRANSPORT LTD & Others [2010] SCGLR 728*** *and 5.* ***KOGLEX LTD (No. 2) v FIELD [2000] SCGLR 175.***

In holding (3) of the *Akufo-Addo v Catheline case* (supra), this Court held: - *"Where an appellant exercised the right vested in him by rule 8 (4) of L.I. 218, which is now rule 6 (5) of C.I. 16 and appealed against a judgment on the general ground that; 'the judgment was against the weight of evidence', the appellate court had jurisdiction to examine the totality of the evidence before it and come to its own decision on the admitted and undisputed facts".*

The plaintiff sued the defendant for herself and on behalf of her family for title to a piece of land and lost in the trial High Court on the ground of want of capacity. The defendant who counterclaimed for title to the same subject matter succeeded in his counterclaim. Plaintiff appealed against the decision of the trial High Court on several grounds including the finding of want of capacity on her part and the oft-quoted omnibus or general ground that the judgment was against the weight of evidence. The Court of Appeal affirmed the trial court's decision that plaintiff lacked capacity to institute the action but dismissed that part of the judgment that upheld defendant's counter-claim. The defendants appealed to this Court against the decision of the Court of Appeal dismissing their counterclaim. They contested as many as six (6) grounds of appeal including the omnibus ground that; *'the judgment of the Court of Appeal was against the weight of evidence'*. The plaintiff did not appeal against the decision of the Court of Appeal affirming the finding by the trial High Court that she lacked capacity to institute the action. However, the defendants' omnibus ground that the judgment of the Court of Appeal was against the weight of

evidence adduced at the trial, indicts the whole judgment of the Court of Appeal but not only that part that dismissed defendants' counterclaim. Accordingly, this Court is mandated by law, to consider the totality of the evidence on record to enable it come to its own conclusion as to whether or not the findings (both legal and factual), which the two lower courts made on the crucial issues before them, including the question of capacity, were properly made.

In the recent case of ***OWUSU-DOMENA v AMOAH [2015-2016] 1 SCGLR 790***, this Court explained further its earlier decision in *Tuakwa v Bosom* (supra) when it held that: - "*The sole ground of appeal that the judgment is against the weight of evidence, throws up the case for a fresh consideration of all the facts and law by the appellate court".* Benin, JSC speaking for the Court at page 799 of the report stated as follows: - *"We are aware of this court's decision in Tuakwa v Bosom [2001-2002] SCGLR 61 on what the court is expected to do when the ground of appeal is that the judgment is against the weight of evidence. The decision in Tuakwa v Bosom, has erroneously been cited as laying down the law that, when an appeal is based on the ground that the judgment is against the weight of evidence, then, only matters of fact may be addressed upon. Sometimes, a decision on facts depends on what the law is on the point or issue. And even the process of finding out whether a party has discharged the burden of persuasion or producing evidence is a matter of law. Thus when the appeal is based on the omnibus ground that the judgment is against the weight of evidence, both factual and legal arguments could be made where the legal arguments would help advance or facilitate a determination of the factual matters".* His Lordship referred to the decision of this Court in ***ATTORNEY-GENERAL v FAROE ATLANTIC CO. LTD [2005-2006] SCGLR 271 at p. 306*** per Wood, JSC (as she then was) for support.

These recent decisions of this Court referred to supra appear to have punched holes in the Court's earlier decision in ***BROWN v QUARSHIGAH [2003-2004] 2 SCGLR 930 at p. 932***, which was premised on the dictum of Osei-Hwere, J in *NKRUMAH v ATAA* [1972] 2 GLR 13 @ p. 18 that a party who gave notice that he intended to rely solely on the omnibus ground should not be permitted to argue points of law. Whilst the omnibus ground empowers the Court to consider in general

the correctness or otherwise (both legal and factual) of the judgment or decision appealed against, **Rule 23(3)** of the rules of this Court **[C.I. 16]** on the general powers of the Court in the determination of civil appeals, equips the Court with authority to make any order that the Court considers necessary for determining the real issue or question in controversy between the parties. Again, **Rule 6 sub-rule 7(b)** of **[C.I. 16]** obliges the Court not to confine itself to the grounds set forth by the appellant in the notice of appeal when deciding an appeal. It again permits the Court to rest its decision, where necessary, on a ground not set forth by the appellant in his/her notice of appeal subject to the condition that where the Court intends to rest its decision on a ground not set forth by the appellant, or on a matter not argued before it, the parties should be afforded reasonable opportunity to address the Court on that ground or matter – ***Rule 6 sub-rule (8)*** and ***ANKUMAH v CITY INVESTMENTS CO. LTD [2007-2008] 2 SCGLR 1064 @ 1065***. The only exception to this rule is that where the party against whom the point is taken can have no legal or satisfactory answer if given the opportunity to reply, the Court needs not comply with the provision of rule 6 (7) (b) – ***AKUFFO-ADDO v CATHELINE*** (supra) and ***TINDANA (No. 2) v CHIEF OF DEFENCE STAFF & ATTORNEY-GENERAL [2011] SCGLR 732 @ 736.***

In our consideration of the appeal, we found that the issue of capacity was not properly addressed by the two lower courts. The Court therefore, in compliance with Rules 6 sub-rule (7) (b) and 23 (3) of C.I. 16, ordered the parties to address the issue of the plaintiff's capacity notwithstanding the fact that plaintiff did not file any appeal against the decision of the Court of Appeal. In his written submissions on the issue as directed by this Court, filed on 9th April 2018, the defendants' counsel virtually repeated the same arguments he advanced in the Court of Appeal on why he thought the respondent had no capacity to institute the action against defendants. According to him, since plaintiff's case was that her father purchased the land with a syndicate, the land did not belong to her father alone but to all the members of that syndicate. So without the consent of the syndicate members, she had no capacity to sue over the said land. He went on further to assert that plaintiff did not show that the said land was shared among the syndicate members after the

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alleged purchase for which she could sue in respect of her father's portion. Another leg of defendants' argument was that, granted the land purchased by the syndicate was shared among the members of the syndicate and that the disputed land was her father's portion, plaintiff failed to prove that she was either the customary successor or administratrix of her late father's estate to clothe her with authority to sue over her father's estate. Counsel therefore contended that both the trial High court and the Court of Appeal were right in dismissing plaintiff's case on grounds of want of capacity.

Plaintiff's counsel, on the other hand, was of the view that what the trial court judge held and later affirmed by the Court of Appeal as capacity to dismiss plaintiff's case, was nothing less than cruelest justice. According to counsel in his submissions filed on 11th April 2018, for the over thirty (30) years that the late Dr Asiedu-Offei lived after the purchase of the land, he cultivated same without any hindrance from any person including the so-called syndicate members. Again, no member of the so-called syndicate has since his demise, challenged his beneficiaries' interest in the said land to this day aside of the alleged gift of same made to the co-defendant by the Akim Abuakwa Traditional Council, which by law, owns no land in Ghana.

Upon our evaluation of the evidence on record, we found that both counsel for the parties and unfortunately the two lower courts, did not appreciate the import of the evidence led by the plaintiff and her witnesses. As a Court of justice, we are mandated by law to give a decision that reflects the totality of the evidence on record, but not necessarily one that is in line with the submissions made by counsel. Whether or not a party has capacity to institute an action is a question of law that could be determined after a factual evaluation of the evidence on record. As a legal question, it could be raised at any time at all by any of the parties in litigation or even by the Court suo motu when the circumstances call for its invocation. In this case, both the trial court and the Court of Appeal were of the view that the plaintiff did not have capacity to institute the action. According to the Court of Appeal, plaintiff did not have capacity because: -

(i) *The disputed land did not belong to plaintiff's father alone but to a syndicate of 23 members including plaintiff's father. Plaintiff could not therefore sue without the consent of the syndicate members; and*

(ii) *Granted the land belonged to plaintiff's father, she was not the customary successor of her late father to clothe her with authority to institute the action.*

These were the same arguments advanced by the defendants in their submissions filed on the 9th of April 2018 as re-called above. This was what the Court of Appeal said:

"The issue of capacity goes to the root of any matter and we shall first of all address ground (v) of the appeal. The plaintiff's father who acquired the land with the syndicate in 1935 died in 1966. The plaintiff and her siblings continued to enjoy their father's portion of the land whilst the other twenty three continued to enjoy their respective portions. The purchase price of five hundred and sixty pounds was paid by the syndicate for the land. Exhibit 'B' being part-payment of one hundred pounds paid by the syndicate to their grantors on 2nd November 1935 was issued in the names of all the twenty-three syndicates. All the other receipts were issued in the names of the plaintiff's father and the other syndicate members. The plaintiff, while under cross-examination, responded to a question posed by the defendants' lawyer as follows:

A.'My Lord, if it really belongs to a syndicate, the receipt was issued to my father alone'.

The above answer contradicts all the receipts issued in respect of the land to the syndicate, including the plaintiff's. Exhibits 'A', 'B', 'C', 'D', 'E' and 'F' were issued in the name of the syndicate and they controvert the evidence of the plaintiff. The trial High Court Judge rightly found that the land the plaintiff is seeking to litigate as the property of her father was the property of the syndicate and not the exclusive property of her father and therefore lacked capacity to institute the action. The plaintiff failed to prove that she was the customary successor of her late father and could

sue to protect his property. The land was acquired by the syndicate and would need their consent to sue on their behalf. On the other hand a member of the syndicate or a customary successor or administrators of the syndicate could maintain an action to protect the property whenever it is in danger. The plaintiff who is neither the customary successor nor the administrator of her late father's estate instituted the action as if the property was the self-acquired property of her father and therefore lacks capacity to institute the action. She could have maintained an action in respect of her father's portion of the land but would need the requisite capacity which she has failed to prove." {Emphasis added}

We are of the view that, the Court of Appeal did not properly evaluate the evidence on record before it when it affirmed the trial court's conclusion that plaintiff lacked capacity to institute the action since the emphasized portion of the judgment quoted above, which prevailed on the Court of Appeal to come to that conclusion, could not be inferred from the evidence on record. In the first place, plaintiff never said anywhere in her evidence in-chief that her father and twenty-three (23) syndicate members purchased the land in dispute in 1935. Again, she never said anywhere in her evidence in-chief that after the said purchase, they divided the land amongst themselves with each holding on to his portion. Also, there is no evidence on record to suggest that after the death of plaintiff's father in 1966, plaintiff and her siblings enjoyed her father's portion of the disputed land whilst the other twenty-three (23) syndicate members also enjoyed their portions of the said land. It was counsel for the defendants, who during cross-examination of plaintiff after her evidence in chief, suggested to plaintiff that her father purchased the land in the company of a syndicate and the plaintiff answered in the affirmative. It is worth quoting these questions and answers which appear at page 106 (Vol. One) of the Record of Appeal (RoA):

"Q. Your father purchased this land in company of a syndicate? Is that right?

A. Yes.

Q. How many people formed the syndicate?

A. My lord they are 23 groups".

The affirmative answer to the question that his father purchased the land in the company of a syndicate as quoted above, did not mean that it was her father and the syndicate members who jointly purchased the land. In her evidence in-chief at **p. 88, Vol. 1** of the **RoA**, plaintiff said: *"my father, as the leader of a syndicate, purchased the land in dispute"* from the late Chief of Asunafo, Nana Kwadwo Boadi and his elders, which sale was confirmed by the then Okyenhene Nana Sir Ofori Atta I {Emphasis added}. When the sentence; *"my father, as a leader of a syndicate, purchased the land in dispute",* is placed in its proper context, what it means is that when his father purchased the land in dispute, he was the leader of a syndicate. She did not say that her father and the syndicate members purchased the land in question as both the trial court and the Court of Appeal concluded. Again, the contents of the receipts covering payment for the land which plaintiff tendered in evidence as Exhibits **A, B, C, D, E** and **F** indicate that the land was sold to Dr Asiedu Offei & Co. Nowhere in the record has the term; "Dr Asiedu Offei & Co" been defined to mean 'Dr Asiedu Offei and 23 syndicate members'. No name apart from Dr Asiedu Offei appeared on any of the receipts and there was no evidence that a group of persons contributed monies for the purchase of the land by Dr Asiedu Offei. As we shall demonstrate infra in this judgment, the answers that plaintiff gave in subsequent questions posed by defendants' counsel during cross-examination explained vividly what she meant by a syndicate.

The fact that Dr Asiedu Offei purchased land from the Asunafo Stool which purchase was confirmed by the Okyehene Nana Sir Ofori Atta I was corroborated by all the witnesses plaintiff called and even the two witnesses called by the defendants; i.e. (D.W.1 & 2). In his examination in-chief, D.W.1 Emmanuel Ofosu Baah who said he was the Assistant Secretary to the Akim-Abuakwa Traditional Council admitted that plaintiff's late father Dr Asiedu Offei had land in the area in dispute and that it was the same land that plaintiff is claiming in this matter. When asked whether the land of the co-defendant which he said the Akim-Abuakwa Traditional Council had gifted to him shared boundary with that of plaintiff's late father, he said he could not tell

because he had never been to the land or the area in question. For purposes of clarity, I wish to quote that part of his evidence in-chief which appear at pages 106 – 107 of Vol. Two of the RoA:

"Q. Do you know the land in dispute?

A. Yes...

Q. Do you know those who share boundary with the land in issue?

A. I cannot specifically say at the moment but I know there are people who share boundary with that particular land.

Q. Now tell us what you know about the land in issue.

A. My Lord, I am aware that there is a dispute between the plaintiff and Kwaku Gyapong and Yaw Asamoah with the plaintiff claiming the part that Kwaku Gyapong assigned to Yaw Asamoah as her land...

Q. Is the land the same as the one being claimed in this matter?

A. Yes, my Lord, because Kwaku Gyapong's land covers an area of three square miles and it shares boundary with that of Asiedu's land.

Q. You said that you are aware that Asiedu has land in the area?

A. Yes my Lord.

Q. Are you aware that the two of them share boundaries?

A. I cannot say yes because I have not been to that area..."

D.W.2 Kwaku Sono 'aka' Joseph Oppong said he was the nephew of the co-defendant. He exhibited complete ignorance about the identity of the land. He also admitted that plaintiff's father had land on the Asunafo Stool land but denied he purchased it as lands are not sold in Okyeman. This is part of his examination in-chief when led by defendants' counsel, which appears at pages 128-129 of Vol. Two of the RoA:

"Q. There is a dispute over a land which is part of Asunafo Stool land. Are you aware of it?

A. Yes my Lord.

Q. And the matter is between Evelyn Asiedu who represents Doctor Amoako Offei or Mr Asiedu and Odehye Kwabena Gyapong also known as Okai Boateng?

A. Yes my Lord.

Q. Do you know where the land in dispute is located?

A. Yes my Lord.

Q. Tell the court.

A. It is sharing boundary with the Kwahus.

Q. Have you been to the land before?

A. I know the land but I have not been all round it...

Q. And are you aware also that Doctor Offei bought some land from Asunafo Stool land?

A. We do not sell Okyeman lands.

Q. Is Doctor Offei Amoako having any land at Asunafo?

A. Yes my Lord..."

According to plaintiff, after her father had acquired the land, he placed twenty-three (23) tenant farmers on the land to farm for him on **'abunu'** or share-cropping basis **(p. 96 – Vol. One of RoA).** Plaintiff called some of these tenant farmers as witnesses to support her case. When plaintiff's evidence in-chief is juxtaposed with her evidence during cross-examination and that of all her numerous witnesses, it comes out clearly that what plaintiff meant by a **'syndicate'** throughout her evidence is the twenty-three (23) groups of tenant farmers that plaintiff's father entrusted the land to after he had purchased same alone but not that he purchased

it with the said groups. We quote below part of the testimony of the plaintiff during cross-examination by counsel for the defendants, which appears at pp. 106-107 of Vol. One of the RoA.

"Q. Your father purchased this land in company of a syndicate. Is that right?

A. Yes my Lord.

Q. How many people formed the syndicate?

A. My Lord they are 23 groups.

Q. Can you mention their names?

A. Majority of them have died and they have their children who have succeeded them. The only surviving person who is alive is Opanin Kwame Addo who is the leader of the gang now.

Q. <u>When they purchased this land did they distribute or share the land among them?</u>

<u>A. Since my father was the leader of the syndicate he took care of the whole land.</u>

<u>Q. What do you mean by your father took care of the whole land?</u>

<u>A. It means that at the end of every year the tenants come and made payments to him.</u> {Emphasis added}

Q. Since your father died, to whom have the tenants been accounting?

A. <u>My lord, they have been accounting to me</u>. {Emphasis added}

Q. You are saying this land does not belong to your father alone, is that correct?

A. My father was the leader of the syndicate and therefore he made total payment of the land.

Q. That is not the question; he bought this land with a syndicate and I am saying that since he bought it with a syndicate and there were 23 of them, this land does not belong to your father alone.

A. <u>The land belongs to my father.</u>

Q. <u>If the land belongs to your father, then why 23 groups?</u>

A. <u>My lord, I said that they are tenant farmers and the tenant farmers have been grouped into 23 to cover the whole land".</u> {Emphasis supplied}

The testimony of the plaintiff as elicited from the above-quoted cross-examination; particularly the last question and answer, considered holistically with the evidence on record, clearly sums up plaintiff's case. Her late father purchased the disputed land as his personal property and gave it out or entrusted it to twenty-three (23) groups of tenant farmers to develop same on share-cropping basis. It is these twenty-three (23) groups of tenant farmers who were plaintiff's father's tenants which plaintiff termed **'syndicate'**. Plaintiff never said the land belonged to her late father and the tenant farmers. This piece of evidence was not controverted in any way by the defendants throughout the trial. The testimonies of the tenant farmers and boundary owners who plaintiff called as witnesses stood solid even after cross-examination. The first witness of plaintiff was Patrick Kwabena Addo who said he was one of plaintiff's father's tenants. He corroborated plaintiff on the boundaries and said the whole land in dispute belonged to plaintiff's late father. P.W.2 Opanin Kwame Kissi who said he was the head of the Abosi group, gave evidence as boundary owner to the disputed land which he said belonged to plaintiff's late father **– (See pp 158-162, Vol. One of RoA).** He corroborated plaintiff's testimony on the boundaries of the disputed land and the fact that Dr Asiedu Offei purchased same in 1935. He added that the co-defendant was using force to drive them away from the land. P.W.3 Yaw Asare said his father by name Yaw Donkor was Dr Offei's tenant. After his father's death, he is presently on the father's portion as Dr Offei's tenant. He corroborated the boundaries as mentioned by plaintiff. P.W.4 gave his name as Nene Akutter Komesour, one of the boundary owners mentioned by plaintiff as forming boundary with the disputed land. He corroborated plaintiff's testimony as

to her father's ownership of the disputed land. P.W.5 Kwaku Agyei said he was from the Gyedu Mankatta family mentioned by plaintiff as one of the boundary owners to the disputed land. He corroborated plaintiff's testimony in every respect. P.W.6 Tamatey Kwame Musa testified that he had been the tenant of Dr Offei working on a portion of the disputed land for the past forty (40) years. He corroborated plaintiff's testimony to the core.

Plaintiff's case was that she had sued for herself and on-behalf of the entire Asiedu Offei family of Larteh. She prayed for a declaration of title to the disputed land which, according to her, belonged to her said family, which included her siblings; perpetual injunction and general damages of GHc5,000.00 for the destruction of food, tree and other crops on the land. Paragraphs 1, 2, 3, 4 and 5 of her amended statement of claim dated 10th July 2007 and filed on 11th July 2007 pursuant to the order of Tom Bentil, J. dated 9th July 2007, which could be found at page 341 of the RoA (Volume One) were as follows:

"1. The plaintiff brings this action for herself and the Asiedu Offei family of Larteh.

2. The plaintiff is the daughter of late Dr. E.S. Asiedu Offei (sic) belonged to the patrilineal system of succession.

3. In 1935 Dr Asiedu Offei purchased a piece or parcel of land from Asunafo Stool which transaction was confirmed by the Okyehene Nana Ofori Atta I.

3(a). The plaintiff says that her father's portion is described in paragraph 1 in the endorsement of the writ.

(a)1. The plaintiff says that the land her father purchased was demarcated by a team including Kwasi Acheampong who was appointed by Nana Ofori Atta I, the Okyehene.

(a)2. The plaintiff says that Kwasi Acheampong gave evidence at the hearing in the case Opanin Kwasi Adade and Others vrs. Atta Yaw and

Others. The plaintiff will seek leave of the court to tender a certified true copy of his evidence.

(a)3. The plaintiff states that her father, Rev. Annor Nyarko and Adu Abranh initially decided to buy the land together as a syndicate but the two men withdrew after the initial payment. Her father paid the whole purchase price of the land.

4. The plaintiff states that her father entered into Abunu tenancy agreements with 23 tenant farmers who cultivated cocoa and other crops on portions of his land.

5. Late Op. Kwasi Adade was appointed by the plaintiff's father as supervisor/caretaker of the land and the tenant farmers."

In answer to paragraphs 1 and 2 of plaintiff's statement of claim quoted above, the defendant, in an amended statement of defence filed on 13th October 2008 pursuant to an order of the trial court dated 22nd September 2008, stated as follows:

"1. Save that the defendant admits that the plaintiff brings the action on her own behalf, he is not in a position to admit or deny the averment that the plaintiff does so for and on behalf of the Asiedu Offei family of Larteh and at the trial the defendant will be put to the strictest proof of that averment.

2. Similarly the defendant is not in a position to admit or deny the averment contained in paragraph 2 of the statement of claim and will at the trial put the plaintiff to the strictest proof thereof".

The question is; what strictest proof does one who can neither deny nor admit an allegation need? The law is certain that a party, who intends to deny an averment in a pleading, must do so specifically and that a pleading to the effect that one could neither admit nor deny an averment is no denial. Order 11 rule 13(3) of the High Court Civil Procedure Rules, 2004 [C.I. 47] provides: ***"Subject to rule (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit shall be specifically***

***traversed* by the party in the party's defence or defence to counterclaim and a general statement of non-admission shall not be a sufficient traverse of them".**

Enoch D. Kom in his book 'Civil Procedure in the High Court', first published in 1971 by the Ghana Publishing Corporation, made the point clear at page 49 as follows: - **"In traversing a fact the defendant must 'DENY' or say that 'DOES NOT ADMIT' it. Such expressions as *'the defendant puts the plaintiff to proof', 'the defendant is not in a position to admit or deny'* a fact must not be used because they have been held to be insufficient traverse, evasive denial, and not answering the point of substance, *Harris v Gamble* (1878) 7 Ch. D. 877; *Rutter v Tregent* (1879) 12 Ch. D. 758".**

On representative capacity, the author under reference above wrote on the same page that where a defendant **"denies the *locus standi* of the plaintiff suing in a representative capacity, e.g. as a trustee, personal representative, head of family, customary successor or the alleged constitution of a partnership, he must do so specifically"**. Again, Order 18 rule 8(20) of the English Rules of Court; i.e. The Supreme Court Practice, 1993 Volume 1 (otherwise known as the White Book) on which our rules of court are rooted states: **"If either party wishes to deny the right of any other party to a claim as executor, or as trustee, whether in bankruptcy or otherwise, or in any representative or alleged capacity, he must deny the same specifically, otherwise, such representative capacity will be admitted…"**

The defendants did not specifically deny the plaintiff's claim that she brought the action for herself and on behalf of the Asiedu Offei family of Larteh. Their answer to that pleading was that they could neither admit nor deny that averment, which in the eye of the law is no denial. The farthest the defendant went in challenging plaintiff's capacity was when he averred under paragraphs 6 and 7 of his amended statement of defence dated 13th October, 2008 that; **(a)** the plaintiff did not seek the consent of the syndicate members whom she claimed purchased the disputed land with his father in 1935 before pursuing the action and **(b)** she was neither the administratrix nor executrix of her late father's estate to clothe her with authority to

institute an action involving her father's estate. But looking at the nature of plaintiff's claim, those averments could not be a proper challenge to her capacity because plaintiff did not sue either as a representative of a syndicate that owns the disputed land, or as an administratrix or an executrix of her late father's estate to claim or protect his late father's property. Her case was that the land over which she sued belonged to her late father and upon his death intestate in 1966 the said land had become family property. It is for this reason that plaintiff, as a member of her father's patrilineal family, sued for and on-behalf of her family. Plaintiff and her siblings are members of her father's patrilineal family so the fact that she said in her evidence that she instituted the action on her own behalf and on behalf of her siblings doesn't make any difference. Without any specific denial that the plaintiff was representing her family (which includes her siblings), which is the Asiedu Offei family of Larteh, there was no need for her to call further evidence to establish that fact.

Plaintiff said this same disputed land was a subject of dispute before the Circuit Court, Koforidua in 1967. The suit was between some of her late father's tenants on the one hand, and other persons who trespassed on portions of the land on the other hand. He gave the title of the case as; Opanin Kwasi Adade & Others v Attah Yaw & Others. According to her, the co-defendant in this case joined in the suit as a co-defendant to support the trespassers whilst her late uncle Amoako Offei who was her late father's younger brother and customary successor, also joined her father's tenants as the co-plaintiff. However, during the trial, the co-defendant was involved in a murder case for which he was convicted and sentenced. The case could not therefore continue and remained pending while the co-defendant was serving his prison sentence until her uncle the late Amoako Offei who was the co-plaintiff also died. When the co-defendant came out from prison after the death of her uncle Amoako Offei, he purportedly leased a portion of the disputed land to the defendant in 1999, knowing very well that it was a subject-matter of dispute then pending in the Circuit court, Koforidua before his incarceration. When she learnt of it, she instituted this action against the defendant to protect the family's interest in the land. The co-defendant later applied to join the action. Both the High Court and the

Court of Appeal therefore misconceived the evidence on record when they concluded that; **(i)** the land belonged to a syndicate of 23 farmers including plaintiff's father so without the express consent of the other owners, plaintiff had no capacity to institute the action, and **(ii)** plaintiff did not demonstrate that she was the customary successor of her late father so granted the land belonged to her late father at all, she had no capacity to litigate on same.

As this Court demonstrated supra in this judgment, the above conclusion and holding of the Court of Appeal clearly shows that the Court of Appeal, just like the trial High Court, did not appreciate the totality of the evidence on record. The fact is that plaintiff did not sue because of her late father as such. She sued for and on behalf of her family which now owns the disputed property. The issue that arises therefore is; *whether or not the plaintiff could institute the action for and on behalf of her family.* From the pleadings on record, her membership of the Asiedu Offei family on whose behalf she sued has not been questioned in any way by the defendants. This Court, in the *IN RE: ASHALEY BOTWE case*; i.e. **ADJETEY ADBOSU & Ors v KOTEY & Ors [2003-2004] SCGLR 420** took pains to explain the decision in KWAN v NYIENI [1959] GLR 67, on who could sue for and on behalf of a family under our customary law. This Court held: ***"the general rule recognised in Kwan v Nyieni, namely, that the head of family was the proper person to sue and be sued in respect of family property was not inflexible. There are situations or special circumstances or exceptions in which ordinary members of the family could in their own right sue to protect the family property, without having to prove that there was a head of family who was refusing to take action to preserve the family property. One of the special or exceptional circumstances is upon proof of necessity to sue…"*** Wood, JSC (as she then was) added that: ***"given that society and indeed, customary law is dynamic and not static, the Court of Appeal in Kwan v Nyieni had left the matter open for possible expansion of those special circumstances when the need arose. Therefore, the question whether any particular case falls within the stated exceptions rather than***

the rule, or even an exception not identified in Kwan v Nyieni, is dependent on the particular facts of the given case".

As an elder female member of the family, plaintiff is empowered under the law to sue to protect her family's property when it becomes necessary or when the need arises for her to do so. Her case was that, after the death of her uncle who was contesting the land with the co-defendant and others in the 1967 suit, the co-defendant on his return from prison leased a portion of the disputed land to the defendant in 1999, notwithstanding the pendency of that suit. She was therefore compelled to take this action on behalf of the family because she and her siblings were beneficiaries of the property and it was to her that the tenant farmers on the land were atoning tenancy under the abunu or share-cropping terms after the death of her uncle Amoako Offei. The circumstances in this case are such that plaintiff has satisfied the requirements by which an ordinary member of a family could sue to protect the family's property. The Court of Appeal's holding that plaintiff did not have capacity to sue because she neither sought the consent of the syndicate members nor was the customary successor or administratrix of the estate of her late father who died in 1966, was therefore misplaced. That conclusion, which is not supported by the evidence on record, is a permitted ground for this Court to interfere in the concurrent findings of the trial court and the Court of Appeal as was held in the *Koglex case* cited supra viz; ***(i)*** *where the said findings of the trial court are clearly unsupported by the evidence on record or where the reasons in support of the findings are unsatisfactory and* ***(ii)*** *where the trial court has failed to draw an irresistible conclusion from the evidence.*

The fact is that from the pleadings and evidence on record, the plaintiff had capacity to sue and both the trial High Court and the Court of Appeal should have considered her case on the merits. We therefore dismiss the Court of Appeal's finding that plaintiff had no capacity to institute the action notwithstanding the fact that plaintiff did not appeal against that finding. We do so, on the strength of rule 23(3) of the rules of this Court [C.I. 16], which empowers the Court in the determination of a civil appeal, to make any order that the Court considers necessary for determining the real issue or question in controversy between the parties.

As for the identity of the land, it was not in question as the Court of Appeal rightly found. The defendants knew the land over which the plaintiff had sued them and rightly counterclaimed for title to the same land as described by the plaintiff in their counterclaim. The first relief defendant sought in his counterclaim was: - *"By way of counterclaim the defendant repeats paragraphs 1-16 of his statement of defence and counterclaims against the plaintiff as follows: - i) Declaration of title to the land herein in dispute"* – **(See Vol. Two, p. 48 of RoA).** Also, in his evidence in-chief, the co-defendant admitted that it was the same land that was gifted to him by Okyeman Council that plaintiff's father had occupied. When his lawyer asked him why the land was gifted to him by Okyeman Council, this was what he said: - *"Trouble erupted and even gunshots were involved and that landed me in trouble. The use of the gun resulted in the death of somebody and I was accused of that person's death. I was therefore sentenced to death. I was the first person to appear before the Koforidua High Court when it was opened. I was then sent to the Usher Fort Prison. It was after 10 years that I was released to come home. When I reached home my people immediately installed me again the next day. During the installation, Okyeman honoured me. I was given 'Apakan' freely. In addition to the 'Apakan', Okyeman again ordered that my grandfathers' land which I helped to recover, three-mile square should be demarcated for me to help me to look after my children whom I left behind and also to compensate me for the suffering I went through. <u>But plaintiff's father had sent some people to work on the land. I therefore informed Okyeman on what was going on on the land. So from 1982 there was litigation between me and plaintiff's father"</u>* {<u>Emphasis added</u>} – {**See page 269 of the RoA Vol. One**}

Again, during cross-examination of co-defendant by plaintiff's lawyer Mr Asante Ansong, co-defendant admitted that the land that was the subject-matter of the dispute between him as co-defendant and plaintiff's uncle the late Amoako Offei as co-plaintiff in the Koforidua Circuit Court, was the same land in dispute in the instant case. It is worth quoting that part of the cross-examination which appears at pp. 283-284 of the RoA, Vol One, to clear all doubts on this issue:

"ANSONG: Nana in 1971 you were in the case entitled Op. Kwasi Adade & 1 anor. Vrs Atta Yaw & 1 anor. You were in that case, not so?

CO-DEFT: Yes, I was then the chief.

ANSONG: So you were a party to the suit?

CO-DEFT: I was not a party to the suit. The chief whom I succeeded was in the suit. He was called Baffour Awuah.

ANSONG: Did you join it later?

CO-DEFT: Yes, I later joined it. This was so, because those elders of mine who were in the case at first were not there and I joined it to complete the case.

ANSONG: Amoako Offei also joined the action not so?

CO-DEFT: Yes my lord.

ANSONG: Amoako Offei was also a party.

CO-DEFT: No. This lady gave him power of attorney. That's why he is here.

ANSONG: Amoako Offei, do you know that he was a full brother of the late Dr. Offei?

CO-DEFT: I do not know of that. What I know is that he is the nephew of Dr. Offei and documents show that he succeeded Dr. Offei.

ANSONG: I am putting it to you that he was the brother of Dr. Offei and he joined the case to represent Dr. Offei's interest.

CO-DEFT: I cannot dispute that fact because he joined the case as a nephew of Dr. Offei and that he succeeded Dr. Offei.

ANSONG: And the matter before the court was about land. Not so?

CO-DEFT: That is so.

ANSONG: ***<u>And that, that land is the land which is the subject-matter of the instant action, not so?</u>***

CO-DEFT: ***<u>Yes, that is so...”</u>*** {Emphasis supplied}

From the answers co-defendant gave during cross-examination as re-called above, the co-defendant was showing his true chameleon colours as a witness not worthy of credit when somewhere in his testimony and in his written statement of case filed in this Court on 07/04/2017, he muddied his case by saying that the land that was gifted to him by the Okyeman Council was different from the one plaintiff claimed her father purchased in 1935. We agree with the Court of Appeal that the parties were *ad idem* as to the identity of the disputed land notwithstanding co-defendant's double-tongue that the land that plaintiff's father bought from the Asunafo Stool was different from the one that the Okyeman Council gifted to him. We therefore agree with the Court of Appeal that there was no evidence that the Akim Abuakwa Traditional Council owned the land at Asunafo which had, in any event, been sold by the Asunafo Stool with the concurrence of the Okyehene to plaintiff's late father as far back as 1935.

Since the Court of Appeal found that the land did not belong to the co-defendant as same could not have been conveyed to him on the *nemo dat quod* principle, the court should have entered judgment for the plaintiff, had it not wrongly dismissed her action on want of capacity. With the dismissal of defendant's counterclaim, and having found that the disputed land belonged to plaintiff's father and upon his death in 1966 to his family, justice demands that we do what the Court of Appeal failed to do by entering judgment for the plaintiff on her reliefs 1 and 2, upon our finding that she had capacity to institute the action, notwithstanding the fact that plaintiff did not appeal against the decision of the Court of Appeal. Any failure on our part to take this course, taking into consideration the peculiar circumstances of this case, would amount to denial of justice since there cannot be a drawn game in a civil legal tussle; the standard of proof being one on the preponderance of the probabilities.

With regard to relief 3, though there is evidence that the defendant entered the disputed land with labourers to clear portions for the cultivation of oil-palm after the

co-defendant had leased same to him, plaintiff did not lead enough or satisfactory evidence on the alleged destruction of cocoa trees and other food and cash crops and their value apart from the pictures that were tendered in evidence during the trial. This leaves the quantum of the general damages plaintiff is entitled to at large, as she could not establish with clarity any special damages suffered.

In conclusion, we affirm the Court of Appeal's decision to dismiss the defendant's counterclaim and enter judgment for the plaintiff on her reliefs.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

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

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

DOTSE, JSC:-

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

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

BAFFOE-BONNIE, JSC:-

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

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

AKOTO-BAMFO (MRS), JSC:-

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

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

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