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

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
AKOTO-BAMFO (MRS), JSC
BENIN, JSC
APPAU, JSC
PWAMANG, JSC

CIVIL APPEAL
NO. J4/20/2016

12TH DECEMBER, 2018

1. GEORGE ODAMTTEN
2. DORINDA OSEI
3. JULIET OWUSU
4. JUDY OWUSU
5. TONY OWUSU …….. PLAINTIFFS/APPELLANTS/APPELLANTS

VRS

1. RAPHAEL WUTA-OFEI
2. MOHAMMED WOLLEY …….. DEFENDANTS/RESPONDENTS/RESPONDENTS

J U D G M E N T

ADINYIRA (MRS), JSC:-

This appeal is in respect of the Plaintiffs/Appellants/Appellants [Appellants] in original suit no. AL 105/2007 which was consolidated with suit no P 96/2007 and in respect of

the same property, Essie Lodge/Cedar House otherwise known as House No. F 889/2 Cantonments Road, Accra, or Koala Shopping Centre. The property was the self acquired property of one Robert Wuta- Ofei who died intestate in 1970. He was survived by his wife Barbara Wuta Ofei and four children, Roberta, Vida, Percy and the 1st Respondent. The Plaintiffs in both suits at the High Court are the grandchildren of Robert and Barbara Wuta Ofei claiming the property as beneficiaries of the estate of their mother Roberta Wuta- Ofei.

The reliefs sought in both cases are identical, that is, the setting aside of the sale of the said property by the 1st Respondent to the 2nd Respondent, who was the sitting tenant for decades, on the basis that they were not consulted before the sale as they also had an interest in same, and an order of perpetual injunction retraining the Respondents from dealing with the property.

The 1st Respondent claimed the right to sell the property as the head of family, administrator of the estate and the only surviving child of the parents.

The Court of Appeal affirmed the decision of the High Court that upon the death intestate of Wuta–Ofei, a Ga from Osu, succession to his self acquired property became family property and by Osu customary law which is patrilineal it is his children who inherited him. The Court held further that all the four children of Wuta Ofei inherited the property, but the female children had only life interest in the estate. The Court further held that the 1st Respondent being the head of family is clothed with authority to deal with the property.

At the trial the Appellants elected not to lead evidence and they relied on the evidence of Robert Odamtten, the Plaintiff in suit no P96/2007 and we would therefore, where appropriate, refer to his evidence, in determining the appeal.

The grounds of appeal filed are:

1. *That the judgment is against the weight of evidence.*

2. *That the Court of Appeal erred in holding that despite the interstate Succession Law (PNDCL 111) by the customary law of Gas (Osu), female children of a deceased original owner of property, who inherit the property cannot pass on their interest to their children (grand children of the deceased) thus the property reverts to the family of the deceased original owner.*
3. *Additional ground of Appeal may be filed upon receipt of a certified true copy of the proceedings.*

No additional ground of appeal was however filed.

Ground 1

Judgment is against the weight of evidence

Counsel canvassed 2 main issues under this head, namely, estoppel and facts not considered by the Court of Appeal.

Before the Court of Appeal the main issues that arose for determination were; the interest of a female child in the intestate estate of her father under Osu Customary law and the Appellants' capacity to initiate this action.

The Court of Appeal in determining these issues held that:

> *"As rightly noted by both Counsels for the appellant and respondents, the self-acquired property of Robert Wuta-Offei became family property upon his death intestate. Robert Wuta-Offei is a Ga man from Osu. So the question is who are members of his family for purposes of inheritance? By the Customary Law of the people of Osu, inheritance is patrilineal. So in the instant case, the children of Robert Wuta-Offei succeeded to his self-acquired property. The appellant is a son of a daughter of Robert Wuta-Offei and is claiming through her [sic] mother. Being patrilineal system of inheritance, the interest of the appellant's mother in*

the disputed property was limited to the interest she held jointly with her brothers and sisters for life. Thus being a grandchild in a patrilineal area, he is not a principal member of the deceased's family whose consent is needed before the disputed property could be alienated. See the case of ***YAWOGA VS YAWOGA & ANOR. 3 [WALR] 309, 310****, holding (ii) thereof, where Ollenu J. [as he then was] held that:*

> *"**Rank within a patrilineal family is determined by relative proximity in consanguinity to the founder of the family. The principal members of the family of a deceased person are all those surviving members of the class which is closest in consanguinity to the deceased, but so that on the death of a member of this class his rank as a principal member devolves upon his eldest child. Thus, a grandchild of a deceased person is not, in patrilineal areas, a principal member of the deceased's family** [our emphasis] **unless he occupied this position in place of his deceased parent or unless he has been accorded the position of a principal by reason of his achievements or services to the family."***

On the issue of Estoppel

Martin Kpebu, Counsel for the appellants submits that this finding by the Court of Appeal was not borne out of the evidence, as there was "unchallenged evidence accepted by both parties that all the parties to the suit had joint ownership even after the death of Robert(sic) Odamtten in 1997." He argues that the 1st and 2nd Respondents had signed Exhibit C, a tenancy agreement, letting out the property to the 2nd respondent; and based on the fact that the parties have shared revenue from the

property for all these years; he urged us to hold that the 1st and 2nd Respondents are caught by estoppel by conduct, estoppel by deed and estoppel by rem judicata.

Counsel for the Appellants submits further that the Court of Appeal failed to consider the fact that the 1st Respondent unsuccessfully sought the consent of Robert Odamtten to sell the property and also the fact that Lawyer Addo Atuah was instructed to give USD 39,035.09 of part of the proceeds of the sale to him to be shared with his siblings; which facts Counsel submits were unequivocal recognition of the Appellants' interest in the property.

Mr. Addo Atuah, Counsel for the 1st respondent, responds that the contents of Exhibit C cannot change the customary position in respect of this matter and cannot override the legal status of the 1st respondent, firstly, as the sole surviving son and beneficiary of his father's estate, secondly, as the head of family of the Wuta Ofei family and thirdly, his capacity to dispose of the property without the consent and approval of his nephew and nieces i.e. the Appellants.

Contrary to the submissions by Counsel for the Appellants, we are of the opinion that the Court of Appeal stated the true position of customary law and practice of the devolution of property in a patrilineal system not only in Osu, but predominantly in other parts of Ga, Ewe and Guan communities; which position is backed by judicial precedents and learned pronouncements on patrilineal form of inheritance by Justice Ollenu in his book **Testate and Intestate Succession in Ghana** ; and Professor Justice Kludze in his books, **Modern Law of Succession in Ghana, 2015 Edition** and **Ewe Law of Property.**

On the issue of Exhibit C

Exhibit C was a tenancy agreement between the 1st respondent and the representatives of the Appellants and a daughter of Percy Wuta Ofei, all as the lessors on one hand and the 2nd Respondent as the lessee on the other hand.

Counsel for the Appellants submits that prior to Exhibit C; the property had long been leased to Kwatson Impex Ltd, a company close to the 2nd Respondent. As such the 2nd Respondent had always known that it was a family property. Besides the 2nd Respondent was a party to Exhibit C and was thus caught by estoppel by conduct and deed.

The antecedent of Exhibit C was that Roberta Wuta Ofei purported to devise the entire property in her will to her children and the 1st Appellant issued a writ to challenge the devise. In a bid to settle the dispute in relation to the property a committee was formed to manage the property. There was evidence that the revenue from the estate was shared equally between the lessors.

However we don't think this arrangement changed the family nature of the property and the law applicable to the management of family property which under customary law is by the head of family, which in this case was the 1st Respondent and who happened to be the sole beneficiary survivor of Wuta Ofei as well. Furthermore the sharing of the proceeds of the sale with the Appellants was in keeping with the family's arrangement in the sharing of revenue from the property and also showed the goodwill and benevolence of the 1st Respondent towards his nephews and nieces. We therefore hold that, the Respondents are not caught by estoppel by conduct and deed, Exhibit C notwithstanding.

On the issue of 1st Respondent's capacity to sell the property

Counsel for the Appellants submits that as co-owners of the said property, the 1st Respondent lacked capacity to sell the house without their knowledge and consent.

We do not find any merit in the claim by the Appellants that the sale was without their knowledge and consent as there was ample evidence to show that the Appellants led by Robert Odamtten wanted to sell the property to the 2nd Respondent who had been the sitting tenants for decades behind 1st Respondent's back. The 1st Respondent wrote

Exhibit 5, to the 2nd Respondent complaining of his dealings with his nephews and nieces in the negotiations for the sale house without him. The 1st Respondent then went for letters of administration in respect of his late father's estate; which in our opinion was unnecessary, and sold the property to the 2nd Respondent.

In any event Robert Odamtten admitted in evidence that he agreed to the sale and also that he took various sums of monies from the 2nd Respondent in order to persuade his siblings to agree to the sale. Exhibits 1, 2, 3, and 4 are letters and a receipt by Robert Odamtten to the 2nd Respondent on his demands for monies and promises to convince the Appellants. In Exhibit 4, Robert Odamtten wrote he consents to the sale provided the price was right. During cross-examination, he said he was not complaining about the price, except the way the sale took place. Rosalyn Naa Adobea Jopper (DW1) a daughter of Percy Wuta Ofei also said she consented to the sale.

From the foregoing we hold that the sale of the said property by the 1st Respondent to the 2nd Respondent to be valid. Accordingly the appeal on this ground fails.

Ground 2

That the Court of Appeal erred in holding that despite the interstate Succession Law (PNDCL 111) by the customary law of Gas (Osu), female children of a deceased original owner of property, who inherit the property cannot pass on their interest to their children (grand children of the deceased) thus the property reverts to the family of the deceased original owner

Counsel for the Appellants pitches his argument on the decisive date of the devolution of Wuta Ofei's property from the dates that Roberta and Vida Ofei respectively died at a time PNDCL 111 had already come into force.

The flaw in Counsel's argument is that PNDCL 111 is not retrospective and did not affect an estate that had already been distributed according to the personal law of

succession of the intestate. In this case, the property was the self acquired property of Robert Wuta -Ofei who died intestate in 1970 and his wife Barbara Wuta- Ofei obtained letters of administration and administered the estate before she died in 1976. The 1st Respondent and his siblings including the mother of the Appellants were the beneficiaries of the said estate. The patrilineal system of inheritance prior to PNDCL 111 traces the line of succession through the male line and property even if inherited by a female reverts to the paternal family after her death. The rational is that children born to a woman inherit properties belonging to their father and it is through their father's line that they can lay claims to such properties.

Counsel submits further that "it would be the height of discrimination if the alleged restriction on a female inheriting her father's property has only a life interest in same existed as a rule of customary law. Article 17 of the Constitution (1992) prohibits discrimination as such that customary law, if any, ought to be struck down…"

On the facts of the case the Appellants as grandchildren were not discriminated against as they continued to have a share of the revenue from the property proportionately with the 1st Respondent and DW1. The appeal fails on this ground.

Comment

PNDCL 111 introduced a unified system of intestate succession in Ghana, irrespective of the fact that the deceased came from a matrilineal or a patrilineal family, or was married under the Marriage Ordinance, Cap 127, or under the Marriage of Mohammedans Ordinance, Cap 129.

The issue of constitutionality, posed by Counsel may not be relevant in post PNDCL 111 in respect of one house left by an intestate whereby under the provisions of section 4(a) a female child shares one house left by a deceased father with the her mother and male siblings equally as tenants in common under section 4 (a) irrespective of the personal law of the intestate. As such a female child's interest in her father's house is

indefeasible which she can alienate inter vivos, or by will or devolve unto her children upon her death intestate.

However, PNDCL 111 did not totally eliminate the application of customary law, as the respective customary law continues to be relevant because of sections 5 (1) (d), 6 (c), 7 and 8 of the law which specified fractions of the residue of the estate to be distributed according to customary law as specified in section 10. In such a situation a sole surviving female child in a patrilineal system of inheritance would take the proportion to devolve according to customary law as we have held in **Suit No. J4/36/2017** entitled **Togbe Akpoma I v Mrs. Gladys Mawuli Mensah dated 12 December 2018, unreported.**

In the appropriate case this Court has to revisit the customary law and practice that restricts to a life interest, a female child's inheritance of her father's property, in patrilineal system of inheritance, in the context of Article 17 of the Constitution and section 10 of PNDCL 111 and in view of the definition put on the word 'estate' in section 18 of PNDCL 111.

Section 18 defines 'estate' as:

"[T]he self acquired property which the intestate was legally competent to dispose of during the lifetime of the intestate **and in respect of which the interest of the intestate has not been terminated by or on death" [Emphasis supplied]**

The highlighted part of the definition suggests an intestate's interest in a property **may** terminate by or on death.

CONCLUSION

The appeal fails in its entirety and is accordingly dismissed. The judgment of the Court of Appeal is hereby affirmed.

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

AKOTO-BAMFO (MRS.), JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

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

BENIN, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

COUNSEL

MARTIN KPEBU WITH HIM MERCY DE-GRAFT SAVAGEE FOR THE 1ST PLAINTIFFS/APPELLANTS/APPELLANTS.

ADDO-ATUAH WITH HIM OSUMAN MOHADIN FOR THE 2ND DEFENDANT/RESPONDENT/RESPONDENT.