IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2021

CORAM: DOTSE, JSC (PRESIDING)
MARFUL-SAU, JSC
LOVELACE-JOHNSON, JSC
TORKORNOO (MRS), JSC
PROF. MENSA-BONSU (MRS), JSC

CIVIL APPEAL
NO. J4/46/2020

13TH JANUARY, 2021

KASSEKE AKOTO DUGBARTEY SAPPOR & 2 ORS.
(SUBSTITUTED BY ATTEH SAPPOR) …….. PLAINTIFF/APPELLANT/APPELLANT

VRS

1. VERY REV. SOLOMON DUGBATEY SAPPOR
(SUBSTITUTED. BY EBENEZER TEKPETEY AKWETEY SAPPOR)
2. WILLIAM TETTEH SAPPOR ..DEFENDANTS/RESPONDENTS/
3. FREDERICK NMONMLOTEY SAPPOR RESPONDENTS
4. FRED DUGBATEY SAPPOR
5.ALHAJI TUDJANI

JUDGMENT

PROF. MENSA-BONSU (MRS), JSC:-

This is an appeal against the unanimous judgment of the Court of Appeal dated 11th April, 2019,in favour of the Defendants/Respondents. The action that has culminated in

this appeal to the Supreme Court was originally commenced by the 1st Plaintiff/Appellant/Appellant herein, KassekeAkotoDugbarteySapporon the 23rdNovember, 2011, in the High Court, Accra. In a judgment dated 29thNovember, 2013, the High Court found for the Defendants and the Plaintiff appealed to the Court of Appeal. The Court of Appeal dismissed the appeal of the 1stPlaintiff/Appellant on the grounds of lack of capacity. Aggrieved and dissatisfied with the judgment Plaintiff/Appellant/Appellant has filed the instant appeal to this honourable court against the judgment of the Court of Appeal.

FACTS

On or about 23rdMay, 2006, the 1st-4thDefendants as head of family and principal members of the Sappor family respectively, obtained the grant of Letters of Administration from the High Court, Accra, to administer the estate of their family member, Margaret Sappor (deceased). By a vesting assent dated 16thMarch, 2007, the 1st-4thDefendants assented to the vesting of the said family property in the 2ndand 4thDefendants for their personal and beneficial use.By a contract of sale executed between the 2ndand 4thDefendants of the one part as Vendors, and the 5thDefendant as Purchaser, the 2ndand 4thDefendants purported to sell the said property to the 5thDefendant as owners thereof, for the purchase price of four hundred thousand Ghana cedis (GH¢400,000).

The Plaintiff brought this action, originally in his own name and on behalf of the Koleh We Clan, a branch of the Sappor Family, contending that the purported sale of the said property was wrongful and fraudulent. He further alleged that pursuant to the contract of sale aforesaid, whichhe described as "illegal", the parties to the transaction purported to execute an indenture dated 12thSeptember, 2007, in furtherance of a fraudulent scheme; and that this had wrongfully divested the Sapporfamily of the ownership and benefit of the said property. Healso alleged that the 1st – 4th Defendants had concealed the wrongful sale of the said property from the Sappor family until it

came to light in the course of a related legal proceeding in Suit No. BL 63/2008 entitled *Very Rev. Solomon DugbarteySappor&Ors*. vs. *AfiBingaDugbarteySappor.*Against the 5th Defendant, the Plaintiffs contended that he knew or ought to have known that the purported sale of the property to him was wrongful or fraudulent as the 2ndand 4th Defendants had failed to demonstrate that they had the express authority of the Sappor Family to enter into the transaction. The Plaintiff accused the 5th Defendant of having acted recklessly, or in concert with the purported vendors, when he purported to purchase the said property without doing due diligence on the property.

The Defendants mounted a vigorous defence to this action. In their Statement of Defence filed on the 16th January, 2012, they categorically denied all the averments of the Plaintiffs in support of the claim, and contended that the 1stPlaintiff "was an imposter and not a member of the Sappor family"; and therefore lacked capacity to commence this action on behalf of the Sappor family. Soon thereafter, counsel for Plaintiff applied for joinder of two co-plaintiffs, Samuel DugbarteySappor and Joseph NarhSappor, who were persons acknowledged to be principal members of the Sappor Family, as 2ndand 3rdPlaintiffs respectively. The pleadings, however, were not amended.

The trial High Court delivered judgment in favour of the Defendants. Aggrieved by, and dissatisfied with, the judgment of the trial High Court, the Plaintiffs filed Notice of Appeal at the Court of Appeal on 17th December, 2013. Before the appeal could travel very far, the 2nd and 3rd appellants abandoned the appeal, leaving the 1st appellant to fight the appeal by himself. (During the pendency of the appeal the 1st Plaintiff/Appellant died and was substituted by AttehSappor). The issue of his non-membership of the Sappor Family and consequent lack of capacity to bring the action either in his own name or, to represent the family,reared its head again.The Court of Appeal analysed the legal capacity of the 1st Appellant to maintain the suit,and delivered its unanimous judgment on 11th April, 2019, in favour of the Defendants. Against this unanimous decision of the Court of Appeal, the Plaintiff filed a Notice of Appeal to the Supreme Court on 6th May, 2019, seeking further hearing of the case.

GROUNDS OF APPEAL.

i. The Court of Appeal failed to appreciate that the withdrawal of appeal by Samuel DugbarteySappor (2nd Plaintiff) and Joseph NarhSappor (3rd Plaintiff) at the appeal stage should not have affected the capacity of the Appellant at the hearing and determination of the appeal.

ii. That the Court of Appeal gravely fell into error of law and fact when she [sic] held that Plaintiff/Appellant, like PW1, is from the female line of the Sappor Family and therefore not a member of the Sappor Family.

iii. The Court of Appeal gravely fell into error of the law and fact when she held that the Plaintiff does not have the locus standi/capacity to institute the action to protect property belonging to the Sappor Family.

iv. The judgment of the Court of Appeal is perverse and against the weight of evidence adduced at the trial.

v. That further grounds of appeal may be filed upon the receipt of the Record of Appeal

Three of the substantive grounds of appeal are all related to the issue of his capacity to bring the action, whilst the fourth is the usual omnibus ground which opens the case up for re-hearting. No substance was put to ground (v), as no further issues were subsequently filed. It would therefore be appropriate to start the discussion with **Ground (iv)**, the omnibus ground.**Grounds(i)** and (**iii)**are discussed together, as both relate to the capacity and consequences of such lack of capacity on the fortunes of the suit and are, hence, two sides of the same coin.

Ground iv

The essence of the Plaintiff's complaint was that the entire judgment of the Court of Appeal could not be supported given the weight of evidence adduced at the trial, and therefore it was perverse.Relying upon the statement of law in a long line of cases on the powers of an appellate court, the Appellant in his statement of case, argued that

"[T]he Court of Appeal having the power of rehearing ought to have dealt with the record as it existed at the Trial Court and adopted the posture of the Trial High Court Judge which would have energized the Court of Appeal to determine the present appeal on its merits." The Appellant has thus challenged the conclusions of the Court of Appeal, and thrown an invitation to this honourable court to give further consideration to the evidence adduced in support of the case. It is indeed, a correct statement of law that an appeal is by way of re-hearing as *Tuakwa* v *Bosom* [2001-2002] SCGLR 61, where the plaintiffs sole ground of appeal at the Court of Appeal was that "the decision of the trial court was against the weight of the evidence". At p.65 Akuffo JSC (as she then was), held that,

> "an appeal is by way of a re-hearing particularly where the appellant, that is the plaintiff in the trial in the instant case, alleges in his notice of appeal that, the decision of the trial court is against the weight of evidence. In such a case, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testaments and all the documentary evidence adduced at the trial before it arrives 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".

The point was further extended in *Evelyn AsieduOffei*. *Yaw AsamoahOdehyeKwakuGyapong*(Unreported); decision by Supreme Court, coramAdinyira (Mrs) JSC (Presiding), Dotse JSC, Baffoe-Bonnie JSC, Akoto-Bamfo (Mrs) JSC andAppau JSC; judgment delivered on 25th April, 2018([2018] DLSC 1. The facts of that case were that the plaintiff had sued the defendant for herself and on behalf of her family for title to a piece of land acquired by her father for himself and a group of farmers. The defendant counterclaimed for title to the land. Her capacity to bring the action was challenged, and judgment was found for the defendants by the trial High Court on the ground,*inter alia,*of want of capacity. The Plaintiff appealed against the

decision of the trial High Court on several grounds including on the finding of want of capacity on her part to represent the group. The Court of Appeal affirmed the trial court's decision that plaintiff indeed lacked capacity to institute the action, and also dismissed the part of the judgment that upheld defendant's counter-claim. The Plaintiff did not appeal further. However, the Defendants,aggrieved by the decision on their cross-appeal,appealed further to this Court.The Defendants' omnibus ground of appeal that the judgment of the Court of Appeal was against the weight of evidence adduced at the trial, opened the way for the Supreme Court to exercise its power of re-hearing the case. Speaking for the court, Appau, JSC stated the law thus:

> 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. (**Emphasis supplied)

Analysing the entire record meant re-examining the decision as it affected the party who had not even complained. Consequently, the court was able to uphold the Plaintiff's position, and to dismiss the Defendant-Appellant's appeal because capacity is a fundamental issue that remains relevant in the entire life of a case.

Failing to acknowledge the fatal blow dealt to his cause by the withdrawal of first the 3rdPlaintiff on 7th July, 2016, and then the 2ndPlaintiff on 11thNovember, 2016, well

before the Court of Appeal came to determine the case, Plaintiff-Appellant went on to instruct the court thus:

> *Rehearing of appeal in our candid opinion is done by reference to the record at the trial court and no other facts should be imported by an appellate court without following due process…. In the circumstances of this case the Court of Appeal imported without any justification the status of the parties at the Court of Appeal stage. The Court of Appeal failed to appreciate that the withdrawal of appeal by Samuel DugbarteySappor (2nd Plaintiff) and Joseph NarhSappor (3rd Plaintiff) at the appeal stage should not have affected the capacity of the Plaintiff at the hearing and determination of the appeal. There is no dispute that at the trial stage there were three Plaintiffs and same ought to have been referred to as parties in evaluating the evidence by way of rehearing*.

Despite the effort to instruct the court in its duty, the Appellant does not go further to affirm whether there were, in fact, "three Appellants" by the time the matter came before the Court of Appeal, even as he sought to suggest that the issue of the 1st Plaintiff's capacity to bring the action having become moot by not featuring in the judgment of the trial court, it ought to remain so. Even when clearly, things had significantly changed by the time the Court of Appeal came to hear the case, the Appellant still insists the changed circumstances should have been ignored or overlooked by the Court of Appeal. His contention that the Court of Appeal Appeal "ought to have dealt with the record as it existed at the Trial Court and adopted the posture of the Trial High Court Judge", is indeed an ingenious argument to cure a nagging problem of the want of capacity that was initially an issue but that had been addressed by the joinder of co-plaintiffs that occurred before the case was heard by the trial High Court. Surely urging an appellate court to ignore any developments in the case and to concentrate only on what happened at the trial courtis tantamount to

urging on us the novel proposition that an appellate court, which is exercising its power of re-hearing, must wear blinkers and only focus on issues deemed relevant by the appellant. If this, indeed represented the law, why would Kpegah, JSC in Akufo-Addo v Catheline [1992] 1 G.L.R. 377 at p. 391 state the law thus:

> One must understand what the phrase 'by way of re-hearing means'. It must be pointed out that the phrase does not mean that the parties address the court in the same order as in the court below, or that the witnesses are heard afresh. … It does also mean that the Court of Appeal is not to be confined only to the points mentioned in the notice of appeal but will consider (so far as may be relevant) **the whole of the evidence given in the trial court, and also the whole course of the trial.**(emphasis in original).

To put beyond doubt the duty of an appellate court, it is provided under Rule 6 sub-rule 7(b) of the Supreme Court Rules 1996 (CI 16) as amended, that when deciding an appeal, the court "shall not, … confine itself to the grounds set forth by the appellant or be precluded from resting its decision on a ground not set forth by the appellant."Clearly, the law anticipated such situations, and prescribed a solution.

WHAT IS CAPACITY?

Capacity to bring and maintain the action remains a cardinal hurdle that must be jumped if either party is to remain in the case. It is for good reason that Order 2(4) of High Court (Civil Procedure) Rules 2004, (CI 47) as amended, insists on the capacity of the plaintiff being indorsed on the writ before it becomes a competent writ. Rule 3 of the Court of Appeal Rules, 1997 as amended, grants the right of audience only to "A person who **is a party to any cause or matter before the Court**…"(emphasis supplied) Therefore, just as there cannot be a "phantom plaintiff" so there cannot be a "phantom appellant". Black's Law Dictionary defines 'Capacity' or Standing as: "A party's

right to make a legal claim or seek judicial enforcement of a duty or right capacity…" Thus, one's ability to appear in court to make a claim hinges on whether one is recognized in law as having sufficient interest in any matter to seek a hearing on any particular issue. This "sufficient interest" must remain throughout the life of the case, or one's legal ability to stay connected with a case making its way through the courts would be lost.

When can the issue of capacity be raised? The authorities agree on one point: capacity is so fundamental that it can be raised at any time.

In *Evelyn AsieduOffei* v. *Yaw AsamoahOdehyeKwakuGyapong* , supra, Appau JSC on the issue of capacity, stated thus:

> 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 subrule (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.

Thus, in that case, the issue of the capacity of the original plaintiff, whose capacity to sue had been successfully challenged at both the trial court and the Court of Appeal and who had accepted the verdict and not appealed against the decision, remained relevant during the consideration of the further appeal of the cross-appellant. This means that the fact that an appellate Court re-hears a case means that it must consider the entire dossier and not only aspects deemed relevant by the parties; and that the parties must remain competent throughout the proceedings. The point was further emphasized in the case of *NiiKpobiTettehTsuru III &2 Ors* v. *Agri-Cattle & 4 Ors* Civil Appeal No. J4/15/2019 delivered on 18th March, 2020, when this honourable Court held as follows:-

> The law is trite that capacity is a fundamental and crucial matter that affects the very root of a suit and for that matter it can be raised at anytime even after judgment on appeal. The issue is so fundamental that when it is raised at an early stage of the proceedings a court mindful in doing justice ought to determine that issue before further proceedings are taken to determine the merits of the case. Thus a plaintiff whose capacity is challenged needs to adduce credible evidence at the earliest opportunity to satisfy the court that it had the requisite capacity to invoke the jurisdiction of the court. If this is not done the entire proceedings founded on an action by the plaintiff without capacity would be nullified should the fact of non-capacity be proved…."

Therefore, the effect of any primary barriers, such as want of capacity in the Plaintiff, or Appellant by the time it is due to re-hear the case remains relevant throughout the case. To hold otherwise would mean to gloss over an important an issue as the capacity of the parties to maintain the action.

Undaunted by the formidable hurdle of capacity he had failed to scale, Plaintiff-Appellant in his Statement of Case stated that *"Indeed, the Trial High Court in its judgment dated 29th November, 2014, commented as follows "However the participation of the 2nd and 3rd Plaintiffs who are members of the Sappor family saved the matter from being thrown out and giving legitimacy to the case to be heard on the merits".* He then went further to assert that though the 2nd and 3rd Plaintiffs had withdrawn from the Appeal by the time it came before the Court of Appeal for determination "the withdrawal of Samuel DugbarteySappor and Joseph NarhSappor at the Court of Appeal did not change the record as it existed at the trial court where both of them were parties to the action to the very end." In the course of pressing his point, the Plaintiff-Appellant neglected to observe that the issue of capacity that had been raised against him earlier, had been resolved by his joinder of the two acknowledged principal

members of the Sappor family, and therefore his lack of capacity ceased to be an issue by the time judgment was rendered in the High Court. Unfortunately, this position advocated by Counsel for Plaintiff-Appellant is not supported by law.

The Court of Appeal at page 5 of its judgment, stated the law correctly when it said that "The issue of capacity is a threshold and foundation issue which can be raised at any time. It can be raised by the court itself because the lack of capacity deprives the court of the jurisdictional competence to entertain an action at any stage of a judicial proceedings." All the authorities are emphatic that capacity remains a live issue throughout the life of a case and that once a party does not meet the threshold requirement of capacity, there is no need to go beyond that point to deal with the substantive issues. Inthe case of*Sarkodee I* v *Boateng II* (1982-83) 1 GLR 715, the Supreme Court dismissed an appeal from a decision of National House of Chiefs declining to uphold the validity of an effort to destool the Paramount Chief of New Juaben. by one kingmaker only. Having found that the Petitioner lacked capacity to destool a Paramount Chief by himself when, traditionally, it took the whole group of kingmakers to install the chief, the Court went further to comment on why it could not vault the insurmountable barrier of lack of capacity to examine any issues of the substantive case. Apaloo CJ at p.724 stated thus:

> it is claimed in one of the more serious grounds of appeal that substantial questions were involved in the suit and it was unjust for the appellant to be driven from the 'judgment seat' on the preliminary objection raised by the respondent. But it is no answer for a party against whom a serious issue of locus standi is raised to plead that he should be given a hearing on the merits because he has a cast-iron case against his opponent.

This sentiment was re-echoed in *Duah* v *Yorkwa* (1993-94) 1 GLR 217 at p 235, when the Court of Appeal, per Brobbey JA (as he then was), stated emphatically that "Where

a person's capacity to initiate proceedings is in issue, it is no answer to give that person a hearing on the merits even if he has a cast-iron case".

Therefore the Court of Appeal was right when it stated that

> "We are of the opinion that the Plaintiff/Appellant is not a member of the Sappor family of the Ada Foah and had no capacity or locus standi to commence the action at the court below on his own, nor can he prosecute this appeal for the Sappor family. Having come to this conclusion, it is unnecessary to discuss any of the other interesting matters raised in this appeal. We will accordingly dismiss the appeal and affirm the judgment of the trial High Court dated 29th November, 2013".

Groundsi and iii.

"i. The Court of Appeal failed to appreciate that the withdrawal of appeal by Samuel DugbarteySappor (2nd Plaintiff) and Joseph NarhSappor (3rd Plaintiff) at the appeal stage should not have affected the capacity of the Appellant at the hearing and determination of the appeal."

iii. "The Court of Appeal gravely fell into error of the law and fact when she held that the Plaintiff does not have the locus standi/capacity to institute the action to protect property belonging to the Sappor Family."

In his appeal, plaintiff-appellant contended that the 2nd and 3rd Plaintiffs participated fully in the trial before the High Court, and when they were dissatisfied with the judgment of 29th November, 2013, caused a Notice of Appeal to be filed at the Court of Appeal; and that it took three years before they withdrew from the case in 2016. If events occurred within those three years to cause them to change their minds about appealing the decision of the High Court, why should it be held against them? Whatever

be the case, the Appellant concedes that the withdrawal occurred before the appeal could be heard, and therefore he was the lone appellant in the Court of Appeal.

Again, the Appellant complains in his Statement of Case that the Court of Appeal failed to appreciate that the withdrawal of appeal by Samuel DugbarteySappor (2nd Plaintiff) and Joseph NarhSappor (3rd Plaintiff) at the appeal stage ought not to have affected his capacity to maintain the appeal. According to him,

> *the Court of Appeal had imported without any justification the status of the parties at the Court of Appeal stage; and had failed to appreciate that the withdrawal of appeal by Samuel DugbarteySappor (2nd Plaintiff) and Joseph NarhSappor (3rd Plaintiff) at the appeal stage should not have affected the capacity of the Plaintiff at the hearing and determination of the appeal. There is no dispute that at the trial stage there were three Plaintiffs and same ought to have been referred to as parties in evaluating the evidence by way of rehearing.*

Although he concedes at the same time that it is "the 2nd and 3rd plaintiffs who gave legitimacy to the action before the High Court", he still found it necessary to complain that there should be any consequences from their having withdrawn from the appeal. The High Court had,in fact, stated on the issue of capacity that "the participation of the 2nd and 3rd Plaintiffs who are members of the Sappor family saved the matter from being thrown out and giving legitimacy to the case to be heard on the merits". This should have alerted the appellant that his legitimacy as a party had been lost when his two co-plaintiffs withdrew from the appeal, and caused him to re-consider his position. However, the significance of this statement by the High Court appears to have been lost on the Appellant.

In response to the Plaintiff's case, the Defendants' Statement of Case said,

It is important to note that the 1st Plaintiff was the originator of this action. Having realized the weakness of his case on grounds of want of capacity the 2nd and 3rd Plaintiff's applied to join this action as true and proper family members to keep the case alive. The pedigree of 2nd and 3rd Defendants is not in question as the evidence on record shows that they are members of the Sappor family. However they do not fall under the exception to the general rule stated in Kwan v Nyieni…The question in this case to ask is whether there are special circumstances warranting the invocation of the exceptions to the general rule regarding the appropriate person to initiate proceedings on behalf of the family.

The Court of Appeal, having referred to the various authorities and the evidence on record it came to the conclusion, correctly in our opinion, that the Appellant herein is not a member of the Sappor family of Ada Foah and had no capacity or locus standi in the matter to commence the action at the High Court in his own name.This is also a correct statement of the law.

WHO CAN MAINTAIN AN ACTION ON BEHALF OF THE FAMILY?

Could the appellant prosecute the appeal on behalf of the Sappor family, even if he could not do so in the capacity of a member of the family? The question of who can maintain an action to safeguard family property has been answered by authorities from *Kwan* v, *Nyieni* onwards. All agree that although it is technically-speaking the right of the head of family, under certain circumstances any member of the family can take action when family property is under threat of being lost. However, they are also all agreed that the person must either be a member of the family, or authorized by the family.

WHO ARE MEMBERS OF A FAMILY?

In seeking to determine who are members of a family in Ghana, Counsel for the Appellant, strangely enough for a Ghanaian, resorted to the definition of 'family' in Black's Law Dictionary to make a case for why the Appellant could be regarded as a member of the Sappor family. The Dictionary's definition of 'Family' is as follows:

> "Generally, a family refers to a group of persons connected by blood, by affinity or by law especially within two or three generations. A family could also be a group of persons who lived together and have a shared commitment to a domestic or social relationship".

Counsel for the Appellant then continues

> "My Lords, the evidence on record revealed that the Plaintiffs at the trial and the Defendants are all related by blood, shared commitment, affinity and have lived together as elders and members of the wider DugbarteySappor Family."

This recommendation by Plaintiff-appellant is a strange mode for determining who is a member of a family in Ghana, and flies in the face of customary law principles which have become notorious by the number of times it has been re-stated in the courts and by learned authors, from Sarbah in the Nineteenth Century through Ollennu to modern times.

It bears restatement that in Ghana, membership of a family is usually determined by unilineal descent. Generally speaking, the family is either matrilineal or patrilineal. As the acknowledged authority on customary law Mr. Justice N.A. Ollennu points out in his book '*The law Testate and Intestate Succession in Ghana*': Sweet and Maxwell, Accra Waterville Publishing House.1966, at page 75

> The immediate paternal family of a deceased male or female consists of his or her father, the father's brothers and sisters and all who are paternally from the same father as himself or herself, i.e., his or her paternal brothers (if any), his or her paternal sisters (if any), in the case of a man, his own children and paternal ground children, and in either case, surviving children of all his or her paternal brothers, dead or alive, save that so long as their fathers' lived, such children of brothers would not normally be regarded as principal members of the family"… Therefore the paternal family consists of a unit of all people, male and female, all of whom are descendants in the direct male line from a common male ancestor, however remote that ancestor may be".

There is also ample authority to indicate what constitutes the traditional 'family' in Ghana.According to N.A Ollennu in his *Principles of Customary Land Law in Ghana*,

> under Customary Law in Ghana, the family consists of the entire lineal descendants of a common ancestor either for purposes of ownership of property or for purposes of social life. The family may be of three kinds: it may be matrilineal, it may be patrilineal depending upon the tribe and it may be joint patrilineal and matrilineal."

However, in this case, no evidence was led to show that the applicable customary law in the instant case is a joint patrilineal and matrilineal one. It being the usual patrilineal system in Ghana, there is ample authority to determine who belongs, and who does not. S.A. Brobbey JSC (as he then was) in '*The Law of Chieftaincy in Ghana'*, Advanced Legal Publications Accra, 2008, pp.102-107, discusses the nature of family membership and entitlement to chieftaincy stools and Skins and relies on *ReAdum Stool; Agyei&Anor v.Fori&Ors* (1998-99) SCGLR 191. In that case, the Supreme Court had occasion to affirm the customary law on membership of a patrilineal family. The facts of that case

were that after the death of the occupant of the Adum Stool in Kumasi, a dispute erupted as to the succession. Both parties were agreed that the stool was inherited by patrilineal succession. However, the question was whether only sons of those who had ascended the stool could be Adumhene or whether anyone from the customary *Ayete* family (those who provide the chief with wives by custom, therefore notional "sons") could ascend to the stool. The Plaintiffs contended that as sons of the Adum Stool they should have been consulted on the selection, and that 2nd Defendant did not qualify. The Kumasi Traditional Council found for the Defendants. This was affirmed by the Judicial Committee of the Ashanti Regional House of Chiefs. On further appeal to the National House by the Petitioners, the Appeal was upheld and the decision reversed. This prompted a further appeal to the Supreme Court by the Defendants. The court held per Aikins JSC,citing Ollennu on the paternal family at p. 199

> "A person's immediate family in a patrilineal community consist of his children either male or female; his paternal brothers and sisters being children of his father, paternal ground father and descendants of the paternal uncles in direct male line. His wider family consists of the immediate families of all those who trace their ancestry though males from the common male ancestor. From this lineage it will be seen that the children of daughters are outside his family. On the other hand, a person's family in a matrilineal community consists of his mother, maternal brothers and sisters, children of his sisters, maternal grandmother and descendants of maternal aunts in the direct female line. The children of his male sons are outside his family"

In the instant appeal, Counsel for the Appellant comes to a strange conclusion in his Statement of Case when he asserts

> "it is not in dispute that the mother of PWI was a member of the Sappor Family. By blood PW1 is a member of the Sappor family but cannot inherit from the Sappor Family. …The matter before the court does not concern inheritance but a property belonging to the Sappor Family. What was in dispute was whether he was a member of the Sappor family. Once 1stPlaintiff's mother is from the Sappor family then 1stPlaintiff is a member of the Sappor family by blood or affinity but may not inherit from the Sappor family.

This is indeed a strange conclusion to draw. The conclusion is qualified as 'strange' because it defies logic. How can a person who is acknowledged to be a member of a family not be qualified to inherit property from the family, but can fight to protect it?

As a local proverb loosely translated goes, "However long a fallen tree trunk stays submerged in a stream, it does not thereby become a crocodile." This simply means that long association with a family does not render one a member without more. A person who has not been formally adopted into a family cannot claim rights of membership. Adoption is known to customary law as cases such as *Poh* v *Konamba* (1957) 3 W.A.L.R. 74; *Tanor* v *Akosua Koko* [1974] 1 GLR 451' ; *Plange* v *Plange* (1968) CC 88; as well as *SaakyiMami* v *Dede Paulina* [2005-2006] SCGLR 1116, all affirm. However, there is a difference between 'fostering' and 'adoption', and while the former transplants a child from one family into another, the latter does not. Therefore, there must be evidence of such adoption where it forms the basis of one's claim to membership of a family and not merely one's say so. It is common for members of a family to foster the children of vulnerable children of poor members of the family by taking them in ans raising them as their own, but this neither alters the child's parentage nor divests the original parent of parental rights over the child. Where the child by customary law belongs to the family of the non-custodial parent, care and support from the custodial family does not extinguish membership of the original family. Therefore, the length of stay or association with a family does not make one a member

unless definite steps are taken to effect customary adoption. Not having led any evidence to establish his locus in the family, he must have known that he was on slippery ground and that his capacity risked being jeopardized if the two new co-plaintiffs decided to opt out. The Appellant's patrilineage was known in the community. Indeed, the name 'Akoto' was his father's name so his patrimony was undisputed, and that being his father's son, he belonged to a different family from his mother's. A mere statement that his grandfather adopted him and added the 'DugbarteySappor' to his name was not sufficient to establish his membership of that family.

Capacity to sue on behalf of a family has been well litigated. From cases such as *Kwan* v.*Nyieni*[1959] G.L.R. 67, (CA) to *In re AshalleyBotwe Lands; AdjeteyAgbosu* v.*Kotey and Ors* [2003-2004] SCGLR 420, the law is replete with authorities on who may sue on behalf of a family. On this occasion however, the issue pertains to a "non-member". It is acknowledged in cases such as *Affram v DidiyeIII*[1999-2000] 2 GLR 148 that it is possible for a "non-member" of a family to be appointed as head of family. As Benin JA (as he then was points out at pp157-158 of the report,

> It is not denied that plaintiff is a maternal grandson … so that being a patrilineal family, he is not entitled as of right to enjoy its wealth, let alone be its head. But it must be pointed out that having a legal right to enjoy a right or occupy a position in a family is entirely different and must be distinguished from the situation where those who have the right have surrendered same to s third party, albeit temporarily. I is not uncommon in this country for communities and towns, etc to appoint even white men who are total strangers to occupy particular stools for their lifetime only. …[i]t all is that it is for the true owners of a stool, family property, etc to appoint a competent person to occupy or oversee same… And nobody can begrudge any family from appointing a child of one of its true members to

> be its head. .. In my view there is no hard and fast rule that inhibits any family from appointing the head of family from the paternal or maternal side only as the case may be. Any competent, trustworthy and helpful person related to the family by blood may be appointed by the family.

Therefore, Plaintiff-appellant could have led evidence to establish his capacity to represent the family, even if he was not a "full member" of the family when his capacity to sue in his own name or on behalf of the family same was challenged very early on in the suit, but he did not. What he did instead, was to get two acknowledged principal elders of the family to join the suit. In a recent book entitled '*Contemporary Trends in the Law of Immovable Property in Ghana*', Black Mask Ltd, Accra, 2019 the learned author Yaw D. Oppong at pp520-521 relying on *Ameoda* v *Pordier (Consolidated)* [1962] 1 GLR 200 states thus

> It is a well-known customary law that, where necessary, the family may authorize a non-member of the family to prosecute a case on behalf of the family. In applying the principle, the court would usually assess the evidence and, if it finds that there is evidence that the plaintiff was authorized by the family to prosecute the case on behalf of the family, and the case therefore comes within the exception laid down in *Kwan* v *Nyieni*, the court will permit the said plaintiff to prosecute the case.

Was there evidence of such authorization by the family? There is no such evidence. To the contrary, the Appellant was contesting the capacity of the Defendants to deal with family property, although they were acknowledged as the head and principal elders of the Sappor Family, and proved on the evidence to have that capacity.

He asserts *"the learned Justices of the Court of Appeal gravely fell into error when they held that Plaintiff, like PWI, is from the female line of the Sappor family and therefore*

not a member of the Sappor family. Further, holding that the Plaintiff does not have the capacity to institute the action to protect the family property is with due respect erroneous… To our mind 1st Plaintiff as head of the Korle We Clan can institute an action in that capacity over a property belonging to the family."

On the evidence, the Appellant could neither establish his membership of the family, nor his appointment as head of a branch of the family, except on his own say so, his capacity to maintain the appeal was irredeemably compromised. Therefore, the Court of Appeal was right when it concluded that the loss of interest by the two acknowledged principal elders of the family to prosecute the appeal cast the Appellant in the role of "the outsider who weeps louder than the bereaved", or more properly, the "officious by-stander".

In the circumstances, the Court of Appeal was right to come to the conclusion it did, and we cannot fault its judgment. We, therefore, have no option but to dismiss the appeal.

PROF. H. J. A. N. MENSA-BONSU

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS)

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS)

(JUSTICE OF THE SUPREME COURT)

COUNSEL

EDWARD SAM CRABBE FOR THE PLAINTIFF/APPELLANT/APPELLANT.

MOHAMMED SAHNOON FOR THE DEFENDANT/RESPONDENT/RESPONDENT.