IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: APPAU JSC (PRESIDING)
PWAMANG JSC
AMEGATCHER JSC
TORKORNOO (MRS.) JSC
KULENDI JSC

CIVIL APPEAL
NO. J4/15/2021

1ST DECEMBER, 2021

1. LAWRENCE AGYEI
2. MAAME ADWOA ASIAMAH

……. PLAINTIFFS/RESPONDENTS/RESPONDENTS

VRS

BERNARD OPOKU SAKYI (alias NANA KWESI) ……. DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

KULENDI JSC:-

INTRODUCTION:

This is an appeal against the concurrent judgment of the Court of Appeal, Cape Coast dated 29th day of January, 2020by which judgment the Court of Appeal affirmed the judgment of the High Court invalidating a purported Last Will and Testament of Fred Opoku Sakyi (deceased). The Appellant invokes the jurisdiction of this Court pursuant to a Notice of Appeal filed on 1st April, 2020.

BACKGROUND:

The biblical aphorism of Ecclesiastes 9: 5, to wit "the living know that they will die, but the dead know not anything..." perhaps, sums up the reason why people make wills and the elaborate legal processes put in place to regulate inheritance or succession. When one dies, one literally loses control or grip of everything they owned, laboured for and saved to accumulate, be they cars, houses, or bank accounts. The law allows a certain amount of postmortem control where the dead's hand rules from beyond the grave at least to a point through a will. Squabbles over money, dead bodies and the estate of the deceased are often settled in law courts. This case is one of such instances. Whereas the Appellant contends that Fred Opoku Sakyi, the deceased, died having made a will dated 23rd July, 2012, the Respondents contend that the alleged will is fraudulent and a fabrication by the Appellant, who, together with his maternal siblings are the primary beneficiaries of the said will. It is further contended by the Respondents that the alleged fabricated will is intended to disinherit the children of the deceased who are of different mothers other than the Appellant.

By a Writ of Summons and Statement of Claim dated 12thJune, 2014, the Respondents, commenced a probate action at the Cape Coast High Court to contest a will allegedly made by the late Fred Opoku Sakyi (deceased) and sought the following reliefs against the Appellant:

a. A declaration that the document entitled Last will and Testament of Fred Opoku Sakyi is not the handiwork of the deceased.
b. An order setting aside the said will as having been procured by fraud.
c. An order directing that the estate of Fred Opoku Sakyi is to be distributed under the Intestate Succession Law (PNDC Law 111).
d. An order referring the conduct of the defendant and all those connected with the preparation and execution of the said fake will purported to be that of Fred Opoku Sakyi (deceased) to the Cape Coast Police for criminal investigation and prosecution under the Criminal laws of Ghana.

e. An order of perpetual injunction restraining the defendant, his siblings, agents, assigns or any person or persons lawfully claiming through him from having anything to do with the estate of Fred Opoku Sakyi.

The material allegations upon which the Respondents grounded the above reliefs are as follows:

The 1st and 2nd Respondents are the customary successor and eldest child of the deceased respectively whilst the Appellant is the second child of the deceased.

The deceased, in his lifetime, had eight children from five different women.

The Appellant and three other children are from one mother whilst the other four children are from the four other women.

The deceased was, at the time of his death on 6th January 2014, possessed of a drug store as well as other immovable and movable properties.

It is the case of the Respondents that upon the demise of the deceased, the Appellant and his three siblings solely took over the deceased's pharmacy shop and other properties and denied the other children of the deceased access to the properties of the deceased and any benefits there from.

The Respondents allege that the Appellant secretly prepared a will and declared it to have been prepared by the deceased. In the alleged will, the Appellant is the named sole Executor. Also, in the said will, the deceased allegedly bequeathed the entirety of his properties to the Appellant apart from the sum of Gh120,000.00 each to be given the 2nd Respondent and one Benewaa.

The Respondents contended that the deceased loved all his children equally yet in the said will, the deceased did not give the other children anything, a strange occurrence, since in their belief, the deceased would never disinherit any of his children.

The Respondents contended that the will was fraudulent, as the signature on the will was not that of the deceased. It was further contended that on Monday the 23rd day of

July 2012, when the will was alleged to have been executed in Cape Coast, the deceased was in the United States of America. It was also alleged that the deceased never appended his signature on the so-called will in the presence of the alleged attesting witnesses.

After trial, the learned trial judge declared the alleged will of the deceased as not being the handiwork of the deceased and set same aside. The Court further ordered that the estate of the deceased be distributed in accordance with the Intestate Succession Law, 1985 (PNDCL 111) and perpetually restrained the Appellant and his siblings, agents or assigns from intermeddling with the estate of the deceased, save that the Appellant and his immediate family were to continue to reside in the house of the deceased until distribution.

The Appellant, dissatisfied with the judgment, appealed to the Court of Appeal seeking a reversal of the judgment of the High Court and for an order declaring the will of the deceased as valid. However, the Court of Appeal in a judgment dated 29th January2020 affirmed the judgment of the High Court and dismissed the appeal in its entirety.

Consequently, the Appellant, by the instant appeal prays that the said judgment of the Court of Appeal be set aside, and the alleged will of the deceased be declared as valid.

GROUNDS OF APPEAL

The grounds of appeal as contained in the Notice of Appeal filed by the Appellant on 1stApril, 2020 are as follows:

a. The finding by the Court of Appeal that the signature of the Testator on the will in issue was not authentic is not borne out of the record;
b. The Court of Appeal failed to give adequate consideration to the evidence of the defendant and his witnesses;
c. The court below erred in affirming the judgment of the trial High Court;
d. The judgment of the court below is against the weight of the evidence on record; and

e. Additional ground(s) of appeal may be filed.

Although the Appellant indicated in his Notice of Appeal that he may file additional grounds of appeal, there is nothing before us indicating that additional grounds of appeal have been filed by Appellant or that leave has been granted for the filing of same. We shall therefore treat the indication of filing additional grounds of appeal as abandoned.

An examination of the grounds of appeal together with the omnibus ground 'd' show that they all require an evaluation of the evidence adduced at trial to determine the question of the validity of the will. We shall therefore subsume all the other grounds of appeal into the omnibus ground of appeal and consider them jointly.

Whenever it is alleged that a decision is against the weight of evidence adduced at trial, an appellate court is mandated to evaluate the evidence on record and to satisfy itself whether the decision of the court below is justly supported having regard to the evidence on record. In a judgment of this Court dated 2nd December, 2020 in Suit No.: J4/55/2020 entitled BINGA DUGBARTEYSARPOR vrs. EKOW BOSOMPRAH, this Court intimated that an appellant who relies on the omnibus ground of appeal, that is to say that the judgment is against the weight of evidence, has a duty to demonstrate the lapses in the judgment complained of and to point the appellate Court to the specific portions of evidence on record which have been improperly applied against him. This dicta followed the cases of: Abbey & Others v. Antwi [2010] SCGLR 17 at 34, *Tuakwa v Bosom [2001-2002] SCGLR 61;* Djin v MusahBaako [2007-2008] SCGLR 686; Atuguba and Associates Vrs Scipion Capital (UK) Ltd and Another[Civil Appeal NO. J4/04/2019; Judgment delivered on 3rd April, 2019]; Agyenim-Boateng Vrs. Ofori & Yeboah (2010) SCGLR 861 at page 867.

Of course, an appeal is by way of rehearing and an appellate court must of necessity review the entire Record of Appeal and satisfy itself of the legal propriety or justification of the judgment appealed against. Where the decision of the court below cannot be justified by the evidence on record or by the application of known principles of law,

then irrespective of the failure of an Appellant to specifically pinpoint the pieces of evidence or the lapses thereof which have been misapplied against the Appellant, the appellate court must nonetheless reverse the impugned decision. In other words, the failure of the Appellant to argue his case under the omnibus ground with pedagogic robustness does not relieve us of our duty to examine the evidentiary foundations of the findings or inferences reached in a particular case, the persuasiveness of the concurrent finding nonetheless.

In fidelity to the law, justice and good conscience, this court can undertake a review of concurrent findings by the trial and first appellate court and vary same where there are obvious errors, which errors are unfounded, perverse and unjustified.

In the instant appeal, the Appellant seeks a reversal of the concurrent finding of the High Court and the Court of Appeal on the falsity of the will of the deceased. We shall therefore undertake a review of the foundations of the findings so made and determine whether the inferences and conclusions of the trial court which were affirmed by the Court of Appeal are justified and therefore ought to stand.

LAW AND ANALYSIS

The form of a will and the test of its validity is one which is prescribed by the Wills Act, 1971 (Act 360).

Section 2 of Act 360 states as follows:

"(1) No will shall be valid unless it is in writing and signed by the testator or by some other person at his direction.

(2) No signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, or which is inserted after the signature has been made.

(3) The signature of the testator shall be made or acknowledged by him in the presence of two or more witnesses present at the same time.

(4) A signature by some other person at the direction of the testator shall be made by that other person in the presence of the testator and two or more witnesses present at the same time.

(5) The witnesses shall attest and sign the will in the presence of the testator, but no form of attestation shall be necessary.

It can be seen from section 2 above that any instrument which is alleged or contended to be a will must, as a matter of statutory requirement, be in writing, signed by the testator or someone at the testator's direction and the signature must be made or acknowledged by the testator in the presence of at least two attesting witnesses present at the same time. Therefore, in a probate action, it must first and foremost be established that the instrument alleged to be a testamentary deed is one which conforms in structure with the statutory requirements of a valid will.

Also, sections11(1) and 17 of the Evidence Act, 1975 (Act 323) states that:

"11(1). For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party."

17. Except as otherwise provided by law,

(a) the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof;(b) the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact."

A reading of the said sections 11 (1) and 17 of the Evidence Act shows that the burden of proof may, where the law allows or permits, be shifted. When read together, section 2 of the Wills Act and sections 11(1) and 17 of the Evidence Act creates an exception whereby the burden of proof that a document intended and/or presented for probate is a valid will is imposed on the executors or propounders of the will, be they Plaintiffs or

Defendants in any action, to prove conclusively that the provisions of the Wills Act were satisfied in relation to that testamentary document. This is because, it is not any document that will fit the statutory definition of a will in Ghana. Therefore, a court before whom the validity of a will is put in issue must, as a pre-requisite, satisfy itself that the alleged will is one which qualifies as such, before determining whether the will ought to stand or be set aside having regard to the contentions and evidence of the party who seeks to have same set aside. The propounder of the will is therefore the better person to assist the Court on its initial determination of the statutory conformity of the document alleged to be a will.

These provisions constitute the statutory basis for the rules of procedure set out in Order 66 of the High court (Civil Procedure) Rules, 2004, particularly rules 26 and 28 thereof which states as follows:

"Rule 26—Proof of will in Solemn Form

(1) Where for any reason the executors of a will are in doubt as to its validity or the validity of the will is disputed, the executors may if they consider it necessary to do so, prove the will in solemn form in an action commenced by writ asking the Court to pronounce the will as valid.

Rule 28—Action to Declare will Invalid

(1) Any person who claims to have an interest in the estate of a deceased testator may, instead of issuing a notice to the executor to prove the will under rule 26 (2) of this Order, bring an action against the executor for a declaration that the will is invalid.

(2) In an action brought by an interested party under sub rule (1), the Court may join as plaintiff or as defendant any person who claims or appears to have an interest in the estate of the deceased."

The principles that may be derived from these provisions have found judicial expression by this Court in a judgment dated 4th November 2020 in Suit No.: J4/51/ 2019 entitled

SENTI VRS KWAME AND ANOTHER. Where in, this Court, speaking through Amegatcher JSC held as follows:

"The legal burden placed on executors named in a will whenever the validity of the will is called in question is to lead evidence to demonstrate that the will is in writing, signed by the testator or some other person at his direction in the presence of two or more witnesses present at the same time and the witnesses have attested and signed the will in the presence of each other and of the testator. *Such evidence will normally be provided by the lawyer who prepared the will and supervised its execution and the attesting witnesses who were present when the testator executed the will*. The law requires that they lead evidence to propound the will. *Thus, once executors produce evidence conclusively that the provisions of the Wills Act have been satisfied, they would have discharged the burden of proof required of them and the onus then shifts to the person challenging the validity of the will to lead concrete evidence to disprove the evidence led in proof of the due execution of the will."*

Also, in the case of IN RE OKINE (DECD); DOODOO AND ANOTHER V OKINE AND OTHERS [2003-2004] SCGLR 582, this Court per Professor Kludze, JSC (as he then was) held that:

"the burden lay on the propounder of a will to satisfy the court that the

document presented for a probate was the freely executed will of a competent testator. If the proof provided by the propounder left the court in doubt, the will might be denied. Therefore, in the instant case, the plaintiffs assumed the onus probandi under which they must prove both capacity of the testator and due execution of the will."

The above principle was reiterated by Pwamang JSC in a judgment of this Court dated 22nd January, 2020in Suit No. J4/05/2019 entitled: THOMAS TATA ATANLEY & ORS. V. KOFIGAH FRANCIS ATANLEY & ORS. as follows:

"The settled position is that, in such a case the proponents of the will have the burden to satisfy the court that the document presented as the will and Testament of the

deceased was freely made by her and was duly attested to by two witnesses who were present at the same time. The proponents are further to satisfy the court that the testator at the time she executed the will was corpus mentis not suffering from any impairment of mind. Once the proponents of the will discharge this burden on them, then the burden of proof shifts to the party alleging that the document is a forgery or does not meet the requirements of the Wills Act to prove those allegations."

In the present case, the Appellant is the Executor of the alleged will in which he is the beneficiary of 100% of all the estate of the deceased excepting the amount of GHS 120,000 to be paid the 2nd Respondent and Benewaa Opoku. The Appellant therefore, as the Executor of the will, is the rightful person to prove its validity.

Apart from the above, it is important to emphasize that the very nature of a challenge to the validity, the existence or non-existence of a will require that the person making the positive assertion of the existence of a will or its validity establishes same. How can one logically expect that a Plaintiff who asserts that a deceased did not make a will produces evidence of such a negative assertion? It is not practically feasible for any Plaintiff to be expected to prove the negative. The Absurdity of proof of the negative is an exception to the burden of proof. Under our law, no Plaintiff can be required to prove a negative assertion when the Defendant asserts a positive claim on the same issue. This principle was followed by this Court in its judgment dated 16th June, 2021 in Suit No.: J4/08/2021 entitled: **George Akpass Vrs Ghana Commercial Bank Ltd** where the Court per Amegatcher JSC reasoned as follows:

"The position of the law admits of no controversy. Section 14(1) of the 8Evidence Act 1975 NRCD 323 contemplates situations where the evidential burden may shift. One such situation is where, as a rule, the plaintiff who is the party on whom the burden rest asserts the negative and the defendant who is required to disprove asserts the positive."

[See also the cases of: Boakye v Asamoah & Anor. [1974] 1 GLR 38, Salifu v Mahama & Ors [1989-90] 1 GLR 431, Benin J (as he then was)]

Consequently, a Plaintiff who alleges that a document purported to be the last will and testament of a deceased is a not that of the deceased, does not carry the legal and evidentiary burden of proving the negative. Both burdens rest on the propounders of the will to prove the positive, that is to say that the document propounded to be the last will and testament of the deceased is indeed his or her will as it conforms with the statutory requirements of the Wills Act.

This Court must therefore consider the evidence on record which was offered by the Appellant in proof of the validity of the will. It must be emphasized that it is only after the Court is satisfied that the will is prima facie valid that the burden shifts to the Respondents to prove their assertions and their counter contentions.

We shall now examine the pieces of evidence that informed the decision of the High Court which was affirmed by the Court of Appeal impugning the validity of the will in issue.

It is worthy of note that the Appellant, in his bid to prove the validity and due execution of the will called Georgina Ankai-Taylor (DW1) who testified as one of the attesting witnesses to the execution of the will. The Court found at page 595-596 of the Record of Appeal that the testimony of DW1 was unreliable because DW1 contradicted herself as to when the will was executed. Whereas on the face of the will, it was allegedly executed on Monday 23rd July, 2012, the statutory declaration that was sworn to by DW1 on 17th March 2014 whilst depositing the will at the High Court stated that the will was executed on 5th January, 2014 by the testator in the presence of DW1 and DW2. It is significant to note that the statutory declaration in which DW1 stated that the will was executed on 5th January 2014 was made within three months of the death of the testator whilst the Witness Statement in which DW1 stated that the will was executed on 23rd July, 2012 was filed in 2017.

Evidently, of the two contradictory dates of the execution of the will given by DW1, one would reasonably assume the date contained in the Statutory declaration of 17th March, 2014 to be the more likely to be true. This is because, the Statutory declaration was

signed by DW1 within three months of the demise of the deceased. Therefore, the facts contained therein are more proximate to the occurrence of the events and consequently DW1 had a better opportunity to perceive, recollect or relate to the matters contained in the declaration. It is in the Statutory Declaration of 17th March, 2014 that DW1 stated the will to have been made on 5th January, 2014. In contrast, the averments contained in the Witness Statement dated 1st June, 2017 were made remotely in time and DW1 would be relatively less likely to recollect and perceive the matters to which the averments relate, moreover the Witness Statement was prepared in the teeth of litigation when the disputes and contentions of the parties were known to DW1. No wonder the evidence of DW1 under cross-examination where the actual truthfulness and veracity of her testimony as well as her credibility was tested is so revealing and we intend to address this shortly.

Also, per the said Witness Statement, DW1's evidence in chief is that she got to know that the document was the will of the testator after the demise of the testator. According to her, it was "after his death, and on realizing that it was his last will and testament" that she was advised to deposit same at the registry of the High Court. DW1 however contradicted herself during cross- examination.

At page 498 of the Record of Appeal, DW1 testified during cross-examination as follows:

> "Q: You read the will before you signed?
> A: No, he did not give me the chance to read it before I signed it.
> Q: And you knew it was a purported will that you signed?
> A: He told me it was a will.
>
> Q:Do you still stand by paragraph 12 of your Witness Statement?
>
> A: Yes, I stand by it.
>
> Q: You stated in your Witness Statement that you realized it was a will after the death of Fred Opoku Sakyi. Do you still stand by it?

A: Yes.

Clearly, from the foregoing, the credibility of DW1 was irredeemably impugned by these significant inconsistencies in her testimony on the alleged will and its execution. Where the witness's previous statement is inconsistent with her evidence in chief per her Witness Statement, and more importantly, evidence under cross -examination, this renders the witness's testimony to be unworthy of credit. In this case, DW1's prior statement being the statutory declaration conflicts her evidence in chief per her Witness Statement and her evidence given under cross-examination.

Another point of consideration by the courts below is their ocular assessment of the signature on the alleged will as compared to other signatures of the testator on other documents on record.

The trial High Court and the Court of Appeal found the manner of the execution of the will by the testator questionable. The testator, despite his name being typed on the will, still wrote his name under the typed name and squeezed his signature under his handwritten name. This was not the same for the witnesses since none of the witnesses wrote down their names under their typed-written names prior to signing. The impression raised here is that the name of the testator formed an integral part of the signature. This impression is fortified by the fact that the two attesting witnesses testified that they saw the testator sign the document. At what point did the testator write his name before squeezing his signature underneath? None of the witnesses spoke to this question.

It is worthy of mention that one of the contentions raised by the pleadings of the parties was whether or not at the time of the purported execution of the will, the deceased was in Ghana. Whilst the Respondents contended that the deceased was in the United States on the date the will was said to have been executed, the Appellant contended otherwise. Appellant stated in his defence that he shall tender the passport of the deceased at trial to prove that the deceased was in Ghana and did execute the will on the date in issue. Indeed, the Appellant did tender photocopies of three pages of

the passport of the deceased. The photocopies of the pages of the passport can be found at pages 402 to 404 of the Record of Appeal.

The trial judge in resolving the issue of whether or not the deceased was indeed in Ghana on the date he was said to have executed the will, stated as follows:

"I take the view that these three pages of the passport do not make any statement. I take the view that it would have been preferable for the whole passport to be tendered to enable the court arrive at an informed decision about the testator's travel movements. The Defendant also failed to lead any evidence to explain the contents of the passport. As stated earlier, the say-so of a party is not sufficient to discharge the burden of proof."

The Court of Appeal affirmed the above findings of the trial court.

We are of the firm opinion that indeed the passport pages which were tendered did not assist the court to resolve the issue of whether or not indeed the testator was within Ghana on the date he is said to have executed the will.

Further, the evidence of DW2 under cross examination further collapses the case of the Appellant. Under cross examination, which may be found at page 503 and 504 of the Record of Appeal, DW2 gave a step-by-step account of how he signed a document which later turned out to be the will in issue. He recounted what happened as follows:

"... Later after taking our drinks we also went to the car. At the car, the late Opoku Sakyi opened the driver's side of the car and took out a brown envelope. He then pulled out a paper but did not show me the content. He then asked me to sign the document. After I signed, he gave same to the lady (that is Ankai Taylor Georgina) [DW1] to sign. I was then of the view that the paper I signed had to do with the GPRTU case. After that we left the venue and he took me to my store. He then left. Later as usual he came, we met in the evening."

An inescapable inconsistency in the testimony of DW2 is the fact that under cross-examination, even though he rendered a vivid step-by-step account of what happened, he omitted to mention that the deceased signed the document he pulled out of the brown envelop, in his, DW2's presence, and in the presence of DW1, both being present at the same time. It is this document which turned out to be the purported last will and testament of the deceased.

We have already opined that the net effect of the provisions of section 2(1) and 3 of the Wills Act, is that any instrument which is alleged or propounded to be a will or testamentary disposition must be in writing, signed by the testator or someone at the testator's direction and the signature of the testator must be signed or acknowledged by the testator in the presence of at least two attesting witnesses both present at the same time.

We have also reiterated this Court's enunciation of the principle that whenever the validity of a will is called into question, both the legal and evidentiary burdens to demonstrate that the document proposed to be a testamentary disposition conforms with the strict requirements of the will's Act is on the Executors and or propounders of the will.

Consequently, the failure of DW2, despite the detailed tenure of his evidence to speak to the question of whether or not the document that was removed from the brown envelop was signed by the testator or some other person at his direction in the presence of DW1 and DW2 is fatal and leaves the court in doubt as to whether the statutory requirement of validity have been met.

We are of the considered opinion that, following the introduction of the High Court (Civil Procedure) (Amendment)Rules, 2014, C.I 87 which amended Rule 1 of Order 38 of C.I 47, and also inserted among others, Rule 3B, 3E and particularly 3E(4), trial Courts in evaluating the credibility of witnesses and determining what weight to place on their testimonies must place more premium on the testimony of witnesses under cross-examination than on the evidence in chief of witnesses adduced by way of Witness

Statements. This is because the procedure for the delivery of evidence in chief by way of Witness Statement denies the trial court the opportunity to avail itself of some of the criteria or basis for determining the credibility of a witness whilst testifying in chief under section 80 (2) of the Evidence Act 1975, NRCD 323, including the demeanor of the witness, the substance, coherence and consistency of the testimony, the existence or non-existence of any fact testified by the witness, the capacity and opportunity of the witness to perceive, recollect or relate any matter about which he testifies, the character of the witness as to traits of honesty, truthfulness or their opposite et cetera.

With the introduction, as a general rule, of evidence in chief by way of Witness Statement, other than giving oral evidence, our courts ought not fail to take into account the fact that notwithstanding the requirement of an endorsement of a statement of truth, Witness Statements are largely a careful rendition by a lawyer of the prospective witnesses testimony tailored to support his or her Client's preferred version of the facts in contention and expressed in a manner that conforms with the courts rules of procedure and evidence. Consequently, under the procedural regime of C.I 87, the real test of any witness statement, however comprehensive, coherent and chronological, is under the heat of cross-examination. It is only under cross-examination that the witness, who practically has a free pass of his or her evidence in chief is confronted with all the nuances of challenging and or testing the credibility, coherence and consistency of the testimony and possibly, the demeanor of the witness as well as the witness' claim per his or her statement of truth, to ownership of the testimony set out in the witness statement.

It is for these reasons that we prefer the testimony of DW2 under cross examination to that in his evidence in chief by way of Witness Statement in which his testimony was obviously tailored to conform with the requirements of section 2 of the Wills Act. In contrast, under the test of cross-examination, even though DW2 exhibited an admirable degree of detail and chronology in his Witness Statement, he fatally failed to speak to the crucial question of whether or not he saw the testator sign the document that turned out to be his last will and testament. For this reason alone, we affirm the finding

of the trial court which was affirmed by the Court of Appeal that the alleged will is invalid.

Another piece of evidence worth considering is the forensic analysis of the signature on the will. Per Exhibit 'C', a report from the forensic department of the Ghana Police Service, a forensic comparison of the signature of the deceased on the will with the signature of the deceased on indentures, cheque leaflets, and ledger cards, shows that, whereas the signatures on the indentures, cheque leaflets, and ledger cards were all the same, the signature on the will was different.

The Forensic report concluded as follows:

"In view of the above, the Last will and Testament of Fred Opoku Sakyi marked Appendix "A" could not be authentic due to the fact that the handwritten name and signature representing Fred Opoku Sakyi were printed an indication that they were scanned from another document and pasted on the will".

The Forensic report is telling. What is more, the Appellant did not object to the tendering of the forensic report by the Respondents. Also, there was no attempt by the Appellant to impugn or challenge the authenticity of the report or the expertise of the author. In fact, the witness was not questioned on the veracity of the forensic report save a suggestion that the report was prepared without a court order and was self-serving.

The Court of Appeal relied on Exhibit C in arriving at its concurrent finding of the invalidity of the will. The Appellant has said in this appeal that the Court of Appeal erred in its reliance on the Forensic report. The plaint of the Appellant is premised on the fact that the author of the report, "Exhibit C" was not in court to be cross examined.

The summary of Appellant's plaint on Exhibit C can be found at page 7 of the Submissions of the Appellant as follows:

"The Court of Appeal in rejecting the will of the Testator also relied heavily on an alleged forensic report (Exhibit "C") at pages 361 to 366 of the ROA. My Lords, there was absolutely no mention of this alleged forensic report in the pleadings. The reference for the first time to a forensic report was in paragraph 15 of the Witness Statement of the 2nd plaintiff. See page 354 of the ROA... If there was the need for a forensic examination, the High Court should have ordered it. It should not have been done on the blind side of the court and the defendant... Furthermore, and most importantly, the author of Exhibit C, the expert, was not called as a witness to testify as regards the findings contained therein... The forensic expert was a very material witness and his failure to testify robbed Exhibit C of probative value, if it had any..."

The Respondents have, in rebutting the above arguments, argued in their Statement of Case as follows:

"It was a forensic report of the expert witness which was tendered into court. Suffice to say that the Defendant could have raised an objection to the tendering of the report at the Case Management Stage at the trial court on ground that same was not pleaded in the statement of claim or any other justifiable ground, the Defendant failed to raise such objection and the document was tendered through the Witness Statement of the 2nd Plaintiff into court as evidence. Thus though there was the need to call the expert witness who authored Exhibit C, that did not vitiate the probative value that the Court of Appeal and for that matter this Court may place on the forensic report in reaching its judgment."

We have analyzed both arguments of counsel and are of the opinion the mode of the introduction of Exhibit C does not make it expert evidence, properly so-called.

Sections 67(1) and 112 of the Evidence Act states as follows:

"67(1)A person is qualified to testify as an expert if he satisfies the court that he is an expert on the subject to which his testimony relates by reason of his special skill, experience or training.

112. If the subject of the testimony is sufficiently beyond common experience that the opinion or inference of an expert will assist the court or tribunal

of fact in understanding evidence in the action or in determining any issue, a

witness may give testimony in the form of an opinion or inference concerning

any subject on which the witness is qualified to give expert testimony."

From the language of sections 67(1) and 112 above, an expert may give an expert opinion as a Witness to assist the Court to understand evidence or determine an issue. The expert must satisfy the Court that he is an expert on the subject to which his testimony relates. Sections 67(1) and 112 above do not contemplate an occasion where the expert may testify through a non-expert or another expert. In the instant case, 'Exhibit C' was a report which was annexed to the Witness Statement of the 2nd Respondent. 'Exhibit C' therefore was part of the testimony of the 2nd Respondent. 2nd Respondent is not a handwriting expert and did not pretend to have special skill, experience or training in forensics examination. Therefore, the testimony of 2nd Respondent did not constitute an expert opinion, much less 'Exhibit C', tendered by her in court. The author of 'Exhibit C' did not write it as an opinion to the Court. In any case, the language of sections 67(1) and 112 contemplates the said expert to testify as a witness and "give the expert testimony". It is for these reasons that we say that the mode of introduction of Exhibit C does not make Exhibit C an expert testimony or expert opinion properly so called. That said, we wish to consider whether or not the said Exhibit C, could pass as first-hand hearsay and for that matter was admissible. This is because, a court has no inclusionary discretion to admit inadmissible evidence. Hearsay evidence is inadmissible unless it falls under any of the statutory exceptions,

one of which is first hand hearsay under section 118 of the Evidence Act, 1975 (NRCD 323).

Section 118 (1)(a)and (b)(iii) reads as follows:

For the purposes of section 117, evidence of a hearsay statement is admissible if

(a) the statement made by the declarant would be admissible had it been made while testifying in the action and would not itself be hearsay evidence, and

(b) the declarant is

(i) unavailable as a witness, or

(ii) a witness or will be a witness, subject to cross-examination concerning the hearsay statement, or

(iii) available as a witness and the party offering the evidence has given reasonable notice to the Court and to every other party of the intention to offer the hearsay statement at the trial and that notice gave sufficient particulars (including the contents of the statement to whom it was made and if known when and where) to afford a reasonable opportunity to estimate the value of the statement in the action."

A look at Exhibit C shows that sufficient particulars were given about the declarant of the Exhibit C and satisfied the requirements of section 118(1)(b)(iii) (supra). Also, the Witness Statement to which Exhibit C was attached was filed on 12th May 2017 and trial started on 10th July, 2017. The Appellant therefore had ample notice of the intention of the Respondents to rely on the Forensic report. Also, the author of Exhibit C could have been requested to appear in court by the Appellant. This, the Appellant failed to do. In

fact, the Appellant did not object, or raise any of the section 118(1)(b)(iii) (supra) qualifications for his benefit. Therefore, Exhibit C qualified as one of the exceptions to hearsay and was thus admissible as such. It being admissible, the trial court was entitled to consider same in the evaluation of the respective strengths of the case of the parties.

Upon a careful evaluation of the evidence on record, we are of the opinion that indeed the evidence proffered by the Appellant at trial was not sufficient to discharge the burden of proof placed on a propounder of a will as to its due and valid execution. The pieces of evidence proffered by the alleged attesting witnesses of the will did nothing but raise doubts and suspicion as to whether or not indeed the will was the deed of the deceased. Assuming without admitting that the Appellant, as the propounder of the will, discharged the burden by sufficient evidence to prove that the provisions of the Wills Act were satisfied, the relevant question will be whether or not the Respondents led sufficient evidence to prove the allegation that the will was forged. In evaluating the evidence on record in relation to this question, we are conscious of the terms of section 13 (1) of the Evidence Act, 1975 (NRCD 323) which requires that:

"In a civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt."

This carries a higher degree of proof and therefore requires more compelling, cogent, persuasive, enticing and credible evidence. [See Fenuku vrs John Taye [2001-2002] SCGLR 985; SUSU BAMFO VRS SINTIM[2012]1SCGLR 136 (Holding 3)

Having regard to this relatively higher standard of proof beyond reasonable doubt, we are of the considered opinion that the uncontested and unchallenged forensic evidence coupled with the inconsistencies in the evidence adduced by the Appellant on the execution of the will leads us to the compelling conclusion that the document in issue is not the will of the deceased. In other words, we are persuaded and of the view that the

document alleged by the Appellant to be the last will and Testament of Fred Opoku Sakyi is a forgery, fake and was fraudulently procured.

In the circumstances, we are of the considered opinion that this appeal is unmeritorious. It is dismissed as such. The judgment of the Court of Appeal which affirmed the judgment of the trial Court is hereby affirmed. This matter being a probate action involving claimants in respect of the same estate, we shall make no order as to cost.

E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

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