THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: ANSAH, JSC (PRESIDING)

GBADEGBE, JSC

APPAU, JSC

PWAMANG, JSC

DORDZIE (MRS.), JSC

CIVIL APPEAL
NO. J4/47/2018

12TH JUNE, 2019

ROWLAND KOFI DWAMENA ..... PLAINTIFF/RESPONDENT
CROSS-APPELLANT/RESPONDENT

VRS

1. RICHARD NARTEY OTOO
2. THE REGIONAL LANDS OFFICER
   LANDS COMMISSION, ACCRA ..... DEFENDANTS/APPELLANTS/
   CROSS-RESPONDENTS/APPELLANTS

JUDGMENT

PWAMANG, JSC:-

My Lords, before us is an appeal against the judgment of the Court of Appeal dated 1st June, 2017 which, by majority decision, dismissed the appeal of the 1st defendant/appellant/appellant, who shall be referred to as the 1st defendant.

The antecedents of this appeal are as follows. On 13th June, 2012, the plaintiff/respondent/respondent, to be referred to as the plaintiff, sued Edward Kabu Otoo and two others in the High Court for declaration of title to land at Osu on which he built a house but could not register title documents given to him by the Osu Stool on account of prior registration by the said Edward Kabu Otoo. The 1st defendant herein, who initially was the 2nd defendant, was added to the suit because he also applied to register the land in his name at the Land Title Registry. In addition to the relief of declaration of title, the plaintiff endorsed his writ of summons with a prayer for the Lands Commission to be ordered to delete the records of the defendants and process his document. Accordingly, he made Lands Commission a nominal party as the 3rd defendant. In his defence filed on 17th October, 2012, the 1st defendant pleaded that the property in dispute belonged to Edward Kabu Otoo who acquired it from the Osu Stool before his death in 1944. The 1st defendant claimed that he was the late Edward Kabu Otoo's customary successor so he counterclaimed for recovery of possession, general damages and perpetual injunction. In a reply the plaintiff pleaded that the 1st defendant, by not challenging him when he was developing the land, was estopped by the doctrine of estoppel by acquiescence from claiming it. The Lands Commission filed a statement of defence and stated that they had no interest in the land and would abide by the decision of the court. As Edward Kabu Otoo had died long ago, his name was struck out and the case proceeded with only the present 1st defendant. The Lands Commission did not participate in the trial.

After a full trial, the High Court gave judgment on 14th April, 2015 against the 1st defendant but did not grant plaintiff his reliefs prayed for. In effect, plaintiff was only left in possession of the land. In the court's opinion, while the plaintiff did not prove valid title to the land, the defendant was indeed guilty of acquiescence. The 1st defendant appealed against the judgment to the Court of Appeal and plaintiff also cross-appealed. As stated above, the Court of Appeal dismissed the appeal and allowed the cross-appeal by granting the plaintiff declaration of title and an order for the Lands Commission to delete the defendants' records and register his document.

In this final appeal by the 1st defendant, the sole ground of appeal is that the judgment is against the weight of the evidence. This ground of appeal is an invitation to the court to comb through the record that was placed before the lower court and decide for ourselves whether, having regard to the evidence and the law relevant for a determination of the case, the lower court was right in its findings and conclusions. See **Akufo Addo v Catheline [1992] 1 GLR 377.**

However, when we examined the record after the hearing of the appeal, we noticed that in the proceedings at the Court of Appeal, the plaintiff made submissions in respect an earlier case determined by this court on facts related to those in this case. That case is intituled **Otoo & Ors v Otoo & Ors** and reported in **[2015] 81 GMJ 90.** That earlier litigation also started from the High Court, Accra upon a writ of summons by Nora Otoo, Emmanuel Otoo and Felix Otoo who claimed, as beneficiaries under the Will of the late Edward Kabu Otoo who died in Accra in 1944, for declaration of title to landed properties at Achimota and American Embassy Annex at Osu that formed part of the deceased's estate. They brought the action against principal members of Otoo family of Osu, including the 1st defendant herein, who disputed their ownership and claimed the properties as belonging to the whole Otoo family.

There was a full trial after which the High Court gave a judgment on 26th October, 2009 in favour of the plaintiffs and granted the reliefs they claimed. However, the defendants appealed and the Court of Appeal reversed the decision of the High Court by their judgment dated 23rd May, 2013. The plaintiff appealed to this court and the final judgment of this court dated 17th July, 2014 was given in favour of the plaintiffs and against the defendants therein to the effect that, Edward Kabu Otoo died testate and the properties in question devolved on the plaintiffs per the provisions of his Will. By that final judgment, the defendants, including 1st defendant herein, had no interest whatsoever in those properties. The last Will of the late Edward Kabu Otoo that had been admitted to probate was, by providence, reproduced in the judgment of this court and it is clear that the testator devised all his landed properties and none fell into intestacy so as to devolve on a customary successor, if he indeed ever had one.

The reference to that case was contained in the grounds of cross-appeal and written submissions of the plaintiff in this case at the Court of Appeal. He submitted that the 1st defendant, in view of the Supreme Court decision in Otoo v Otoo (supra), did not have any interest in the property in dispute and no capacity to defend the suit. The response of the 1st defendant to those submissions then was that, it was the plaintiff who sued him so that decision to which plaintiff was not a party was of no relevance. He also alleged that he had, in any case, filed a writ of summons in the High Court seeking to set aside the Supreme Court judgment. In the lead judgment of the majority of the Court of Appeal, which went in favour of the plaintiff, it was held that the judgment was not tendered in evidence at the trial and could not be sneaked into the record of appeal so it was disregarded. Though the plaintiff raised the issue in the appeal before the Court of Appeal, since the Court of Appeal gave judgment in his favour, he did not mention that matter in his statement of case in this final appeal.

That notwithstanding, this court has power, on its own motion, to take judicial notice of the earlier judgment and apply it in coming to our decision in this appeal. For, it is provided by Section 9 of the **Evidence Act, 1975 (NRCD 323)** as follows;

9. Judicial notice

(1) This section governs the taking of judicial notice of facts in issue or facts which are relevant to facts in issue.

(2) Judicial notice can be taken only of facts which are

(a) so generally known within the territorial jurisdiction of the Court, or

(b) so capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, that the facts are not subject to reasonable dispute.

(3) Judicial notice may be taken whether requested or not.

(4) Judicial notice shall be taken if requested by a party and the requesting party

(a) gives each adverse party fair notice of the request through the pleadings or otherwise, and

(b) supplies the necessary sources and information to the Court.

(5) A party is entitled, on timely request, to an opportunity to present to the Court information relevant to the propriety of taking judicial notice and the meaning of the fact to be noticed.

(6) Judicial notice may be taken at any stage of the action.

(7) In an action tried by jury the Court may, and upon a timely request shall, instruct the jury to accept as conclusive the facts which have been judicially noticed.

When plaintiff raised the issue about the judgment in Otoo v Otoo (supra) at the Court of Appeal, he did not make reference to Section 9(4) of NRCD 323 so as to have compelled the Court of Appeal to properly consider the effect of that judgment on the appeal. The Court of Appeal too did not advert their minds to their powers under Section 9(3) of the Act to, *suo moto,* take judicial notice of the judgment without it being tendered in evidence at the trial. We are of the opinion that that judgment finally determined certain facts relevant to some primary issues that arise in this case and it ought to have been considered. We are in no doubt that if the attention of the Court of Appeal had been drawn to the legal doctrine of judicial notice, or if they adverted their minds to it, they would certainly have considered the earlier judgment of this court in Otoo v Otoo in coming to their decision in this cause.

Therefore, pursuant to our powers under subsection (3) of section 9 reproduced above, we, on our own motion, decided to take judicial notice of our earlier judgment as part of the evidence to be applied in the determination of this appeal. In accordance

with subsection (5) thereof, we held a further hearing of the appeal at which we notified the parties of our decision and requested them to file additional statements of case on the propriety of taking judicial notice of our judgment and the effect that judgment ought to have in the determination of the appeal. The plaintiff filed further statement of case but the 1st defendant did not. We shall consider these submissions in addition to those the parties made on the issue in the Court of Appeal.

It is trite learning that the doctrine of judicial notice is one of the exceptions to formal proof of facts before a court or tribunal, which is by adduction of evidence. Judicial notice may be taken only of facts which are notoriously true or are capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned. Courts frequently take judicial notice of geographic information, scientific data and statutes that are passed by the legislature or under its authority. Where a fact is subject to dispute on reasonable grounds, a court ought not to accede to an invitation to take judicial notice of it. Courts may take Judicial notice of court records, including final judgments, in other cases either by the court itself or other courts. By **Section 127 of NRCD 323,** final judgments of courts in Ghana are admissible evidence in proceedings.

In respect of court decisions, judicial notice may be taken of the fact that such a judgment was given, but under certain conditions, it may in addition be taken of the facts and questions adjudicated therein. Long before the passage of the Evidence Act of 1975, the Privy Council in the Gold Coast case of **Angu v Attah (1916) P.C. 1874-1927 (Privy Council Appeal No. 78 of 1915)** held, in relation to the existence or content of a rule of customary law, proof of which was then a question of fact, that, a judge was entitled to take judicial notice of its determination by a court in another case. Of course, upon attaining Independence we abolished that rule, which became known throughout the Commonwealth as the rule in *Angu v Attah,* and provided in the Courts Act of 1960 (as it is in **section 55** of the current **Courts Act, 1993, Act, 459**) that proof of the existence and content of a rule of customary law is a question of law. In recent times, the Supreme Court in the case of **Republic v High Court, Denu; Ex parte Agbesi Awusu II (No. 1) [2003-2004] SCGLR 864** at **890,** in determining

an application for prohibition, took judicial notice of matters determined in a ruling by the High Court judge though the ruling was not properly introduced into evidence by a competent affidavit.

There are circumstances, such as we have in this case, where the need to take judicial notice of adjudicated facts from another case may arise for the first time in appellate proceedings. This may occur where final judgment in that other case was given after the trial of the case on appeal so it could not have been taken into account or where the existence of that final judgment was unknown to the parties and the trial court, or where it was deliberately concealed from the trial court as in this case. Section 9(6) of NRCD 323 provides that judicial notice may be taken at any stage of the proceedings, and this includes appeal proceedings, so it is competent for a court to take judicial notice of a fact in the course of determining an appeal. See also the case of; **In re Indian Palms Association Ltd 61 F.3d 197, 205-06.**

Generally, the main purpose of the doctrine of judicial notice is to bring about judicial economy by saving time and resources proving what is already known. But when judicial notice is taken of adjudicated facts, the doctrine has the additional advantage of ensuring consistency in courts judgments which engenders confidence in the overall administration of justice. However, these laudable objectives of the doctrine have to be matched against avoiding prejudice to the case of the party against whom the doctrine is invoked. Therefore, it is only in exceptional cases, where there are compelling reasons, that a court may take judicial notice of adjudicated facts. Where an adjudicated fact is to be judicially noticed, it must be in a final judgment that binds the party against whom it is being raised. See **Kilory v State of California (2004) 119 Cal App 4th 140.** If the determination is open to challenge by the party affected, then it does not satisfy the statutory criteria of being beyond reasonable disputation. Furthermore, the adjudication must conclusively undermine the basis of the claim or defence of the party against whom it is applied.

Judicial notice of a final judgment in this form appears similar to the doctrine of *stare decisis* but the difference is that *stare decisis*, or judicial precedent, covers only determination of questions of law whereas judicial notice would be taken of a final decision against a party on a fact, such as a capacity he claims to have. There is also the principle of *res judicata* which operates in respect of both questions of law and fact, but that operates where the parties in both cases are the same or they are privies but with judicial notice, it would suffice if only one party is involved in both cases. Besides that, by the rules of civil procedure, *res judicata* has to be pleaded and proved but judicial notice, by definition, is not pleaded and even the court on its own motion may invoke the doctrine.

The circumstances in which an appellate court may take judicial notice of a final determination of a fact or question in another factually related case is well illustrated by the case of **Butler v Eaton (1890) 141 U.S. 240** in which the United States Supreme Court was confronted with circumstances somehow similar to those we are facing in this case. In that case, Madam Eaton was sued by Butler, the receiver of Pacific National Bank of Boston, for recovery of sums of money due from her in respect of old and new stock she had subscribed to in the bank which was in receivership. She admitted the amount due on the old stock but denied the claim in respect of new stock. In her defence, she relied on a judgment against the Bank rendered by the Court of the state of Massachusetts which was given in her favour in respect of the new stock. The Circuit Court upheld her defence and ruled against the receiver but he pursued an appeal all the way to the Supreme Court of the United States. In the meantime, the Bank had also appealed against the judgment of the Massachusetts Court up to the Supreme Court of the United States. By the time the receiver's appeal came up for hearing, the Supreme Court had already decided the appeal by the Bank against Eaton and in favour of the Bank and had set aside the judgment of the Massachusetts Court. At the hearing of the appeal by the receiver, the Supreme Court took judicial notice of its earlier judgment in the appeal by the Bank, though the parties there were different. Bradley J, who authored the opinion of the court, held that;

*"**It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force, or effect, and ought never to have existed.** Why, then, should not we reverse the judgment which we know of record has become erroneous, and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object? Upon full consideration of the matter, we have come to the conclusion that we may dispose of the case here. We therefore reverse the judgment of the circuit court, and order that the cause be remanded, with directions to enter judgment for the plaintiff in error against the defendant in error for the whole amount sued for in the action, namely, $8,000, with interest and costs, and take such further proceedings as may be proper in conformity with this opinion."(emphasis supplied).*

In the case before us, the 1st defendant defended the case and counterclaimed in respect of the land on the basis that he was customary successor of the late Edward Kabu Otoo. But by the earlier judgment of this court in Otoo v Otoo, it has been finally and conclusively determined that the properties of the late Edward Kabu Otoo were devised in his last Will and 1st defendant cannot claim any interest as a customary successor. That decision is binding against 1st defendant and effectively nullified his defence and counterclaim. He alleged that he issued a writ of summons in the High Court seeking to set aside the Supreme Court judgment but that is a red herring and does not amount to reasonable disputation of the validity and binding effect of the Supreme Court judgment. As the plaintiff submitted in his further statement of case, 1st defendant had no business defending the case not to talk of counterclaiming. He has been a busy body.

The plaintiff submitted in his further statement of case that the property in dispute in this case appears to be different from the properties that were the subject matter of the Otoo v Otoo case. According to him, the land in this case appears to be covered by paragraph 7 of the Will of the testator which talked of freehold land at the bottom of Kuku Hill, Osu. However, though the plaintiff failed to indicate the location of the land in

the description of it in his pleadings, his own witness, James Kwaku Buckman, said in his evidence-in-chief that the land in dispute is near the Old American Embassy. In Otoo v Otoo the properties in issue were stated to be at Achimota and near American Embassy Annex. The plaintiff himself in his submissions in the Court of Appeal had stated that the property is covered by the devise in paragraph 8 of the Will of the testator which meant that it was at American Embassy Annex. He appears to have a change of mind now that the court has raised the issue and, depending on how it is resolved, the judgment of the Court of Appeal in his favour may be disturbed. In our opinion, the evidence shows that, on the balance of probabilities, the land in dispute in this case is part of the properties which were the subject matter in the Otoo v Otoo case. This court in the earlier judgment decreed title to those lands in the plaintiffs in Otoo v Otoo but the Court of Appeal has declared the plaintiff as the owner. This incongruous outcome could have been avoided if the Court of Appeal had taken this court's judgment into account.

This court has become painfully aware that ownership of lands that this court has settled in final judgments are clandestinely re-litigated in the lower courts by parties who lost. Even when some lower courts become aware that the Supreme Court has given judgment in respect of land in dispute before them, instead of ensuring that the case is determined in line with our decision, they condone this contemptuous conduct and render rulings that are either plainly contrary to our decisions or eviscerate our judgments of their potency. This attitude towards judgments of the apex court of the country must cease.

It has been said without number in this court that an appeal is a rehearing and we are clothed with all the power and authority the High Court and the Court of Appeal had in relation to this case. See **Article 129(4) of the 1992 Constitution**. It is provided by **Order 4 Rule 5(2) of the High Court (Civil Procedure) Rules, 2004 (C.I.47)** as follows;

5. (2) At any stage of proceedings the Court may on such terms as it thinks just either of its own motion or on application

(a) order any person who has been improperly or unnecessarily made a party or who for any reason is no longer a party or a necessary party to cease to be a party;

(b) order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceedings are effectively and completely determined and adjudicated upon to be added as a party.

In the case of **Morkor v Kuma [1998-99] SCGLR 620,** this court, in an appeal, struck out a managing director who was improperly made a defendant jointly with her limited liability company in a suit brought in respect of an agreement executed by the limited liability company. The court, speaking through Sophia Akuffo, JSC (as she then was), said as follows at pages 636 to 637 of the Report;

"Indeed, it seems that the rationale for the whole of Order 15, r 6 (the equivalent of Order 4 r 5 of C.I. 47)(sic) is to ensure that proceedings are so managed by the court as to ensure that the dispute before it is resolved in the most efficacious and complete manner possible. It is for this reason that the rule empowers the court, suo moto, to order that a party cease to be a party or that other persons be added as parties. Where, in fact or in law, a person is not a proper party to a suit, then, no matter how actively the person had participated in the suit, the fact would remain that she was never a proper party."

By our earlier decision in Otoo v Otoo, it has been established that the 1st defendant was not a proper party to this case right from the start and the fact that he participated in it up to this stage does not change that position. In the circumstances, we hereby strike him out as a defendant and dismiss his counterclaim on the strength of the earlier decision of this court.

But, it is often said that misjoinder or non joinder does not defeat proceedings in a cause so, it may be argued that, notwithstanding the misjoinder of the 1st defendant, we can determine the issue of the ownership of the land in this case as the Court of Appeal did. Such an argument does not take particular note of the provisions of **Order 4 r 5(1)** which are that;

"(1) No proceedings shall be defeated by reason of misjoinder or non-joinder of any party; and *the Court may in any proceeding determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the proceedings* (emphasis supplied)."

In the absence of the 1st defendant, who has been struck out, the other party apart from the plaintiff is the Lands Commission, but it made it clear right from the start of the case that it had no interest in the land in dispute. What that means is that the proceedings in this case affected the interest claimed by only the plaintiff so they were not properly constituted to enable proper adjudication as contemplated in law. We understand the rule to mean that, if after dealing with the misjoinder, there are persons before the court who claim rights and interest in the subject matter or question in the case, only then would proceedings continue. If after the disjoinder there is only one party and no one is disputing over the subject matter or question with her in the proceedings, then there will be no basis to continue to determine anything. That is the circumstances of this case.

In conclusion, for the reasons explained above, there has not been any competent proceedings in this case on which the High Court could have determined the ownership of the land in dispute. We therefore set aside the judgments of the High Court dated 14th April, 2015 and of the Court of Appeal dated 1st June, 2017 and strike out the suit.

Before we rest from this opinion, we wish to deprecate the conduct of the 1st defendant for wasting judicial resources and those of the plaintiff, by continuing with proceedings in this case after the Supreme Court had shot down his dream of inheriting

the late Edward Kabu Otoo. It surprises us that he continued pursuing appeals in this case after judgment had been given against him by the Supreme Court in the earlier case. If he is not a virtuous person to have notified his relatives who won at the Supreme Court about the instant case, he ought to have known that the truth will come out sooner than later because, decisions of the Supreme Court are reported and made available to lawyers and the general public. Judgments of the Supreme Court are final and it is fool hardy to wish them away.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

GBADEGBE, JSC:-

I have had the opportunity of reading the judgment of Pwamang JSC to which I hereby express my agreement. I do, however wish to say a few words on section 9 of the Evidence Act, NRCD 323 of 1975. The said section of the Evidence Act enables the court to take judicial notice of adjudicative facts which are not subject to reasonable dispute. Section 9(1) and (2) of the Act provides as follows:

> *"(1) This section governs the taking of judicial notice of facts in issue or facts which are relevant to facts in issue.*
>
> *(2) Judicial notice can be taken only of facts which are either:*
>
> *(a) so generally known within the territorial jurisdiction of the court, or*
>
> *(b) so capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be disputed."*

In the Commentary on the Evidence Act, it is provided at page 13 on section 9, Judicial notice as follows:

"There has been some debate amongst legal scholars as to whether evidence may be admitted to dispute a fact which has been judicially noticed. The view is taken in section 9 that a fact can be judicially noticed only when it is not subject to reasonable dispute. An opportunity is provided by this section to contest the propriety of taking judicial notice. However, once the court concludes that the matter will be judicially noticed, the court will have concluded that the matter is not subject to reasonable doubt. Therefore, no evidence disputing the judicially noticed fact will be in order…."

The question which then arises is in what circumstances will the court take judicial notice of facts contained in other records. In my view, resort to this should only be in cases where but for the judicial notice, the result would have been otherwise. Such an approach will ensure that it is only notice of facts not proved before the court but contained in other records and beyond reasonable dispute as is the judgment in the case of Otoo v Otoo and Others variously reported in [2015] 81 GM J 90 and [2013-2014] 2 SCGLR 777 to which the attention of the Court of Appeal was drawn by the plaintiff before us in his written brief at page 185 of the record of appeal and discussed extensively up to page 191. Although the reference to the said decision was made by the plaintiff in his written submission filed before the Court of Appeal, it being part of the record of appeal on which this re-hearing is being conducted, we are bound in the interest of justice to spend some time considering its effect on the facts in issue before us. This is notwithstanding the fact that the Court of Appeal paid no attention to it. In our view, although judicial notice operates in the area of facts, the question whether in view of the facts in issue, judicial notice could be taken of a particular set of facts related to the issues before the court is a question of law. In compliance with the requirements of fairness provided in rule 6 (8) of the Supreme Court Rules, CI 19, we offered the parties the opportunity to address us on the impact of the said decision on

the appeal herein before adjourning to consider our decision in the matter. By so doing, we made compliance with section 9(5) of the Evidence Act as well.

Having considered the said judgment, we are of the view that the decision of the Supreme Court on the status of the Edward Kabu Otoo (deceased) was determined in it. In its decision which is reported variously as Otoo v Otoo (supra), the court concluded that Edward Kabu Otoo (deceased) died leaving behind a testamentary document. Had the said judgment been made part of the pleadings and or proceedings in the trial court, it would have had a preclusive effect by way of estoppel by judgment. Although it does not have such an effect, taking judicial notice of the said fact enables us to avoid a miscarriage of justice and hardship by reaching a view of the facts that is binding on the parties in so far as it relates to the question of the status of the estate of Edward Kabu Otoo (deceased). Pursuing this course of proceeding enables us to avoid not only hardship to the parties affected by the said judgment but also brings about consistency in the decisions of the same court on the question of the status of Edward Kabu Otoo (deceased). I venture to say that it would be ridiculous if we were to reach a different view of the question whether the said decedent died testate or intestate. As was noted by E. M. Morgan in his article entitled "Judicial Notice" published in 1944, 57 Harvard L. Rev 269, the doctrine is based on the need to protect the credibility of the judicial system. A different conclusion on the said fact would undermine respect for the administration of justice. Therefore, the power conferred on courts under section 9 of the Evidence Act is a powerful tool that enables justice to be done to parties in appropriate instances such as have arisen in the matter herein. As indicated in the judgment of my brother Pwamang JSC, this court previously exercised the power available to it under section 9 of the Evidence Act in the case of The Republic v The High Court, Denu Ex parte Togbe Agbesi Wusu II and Another [2003-2004] 2 SCGLR 864.

Before the enactment of the Evidence Act, Abban J (as he then was) took judicial notice of a record before a traditional council in a judicial review application entitled The Republic v Frempong II and Another, Ex parte Ababio II [1973] 1 GLR 208. The case concerned the decision of a traditional council in a chieftaincy matter that resulted in the destoolment of the applicant. The exercise of the said power by the court is a recognition that statute apart, there is power in a court to take notice of records of proceedings in cases other than those before them. In the Ababio case (supra), the purpose of the judicial notice being taken of the record of the tribunal was to prevent the respondents to the application from contradicting the recorded reasons of the tribunal which was clear and unambiguous. In his judgment in the Ababio case at page 213 Abban J (as he then was) expressed his views as follows:

> " *.. The meeting having clearly recorded the reasons for destooling the applicant, it is not open to the first respondent, and for that matter, any elder of the divisional council who was present at the meeting to throw over those reasons. The applicant who is affected by the decision is entitled to go by the stated reasons, and the respondents are prevented from adding to, varying or contradicting the reasons which they have clearly and unambiguously stated as grounds for declaring the applicant destooled…."*

The above decision emphasises that apart from statute, there is power in a court to prevent parties from contradicting records and or other proceedings regularly obtained from being impeached in subsequent proceedings affecting a prior determination. The attitude of the court may be justified on grounds of requirements of fairness in judicial proceedings and estoppel by conduct, the latter being utilized to prevent a person who has previously by clear words expressed a particular view in an official record from seeking to contradict it in subsequent proceedings affecting it. In either of these instances, the rationale of the court taking judicial notice of the record in another matter to decide the pending proceedings seeks to prevent the miscarriage of justice

and definitely to avoid hardship to the party against whom the previous record operated. From this analysis of the situation that existed before the enactment of the Evidence Act, NRCD 323, it can be contended that the new legislation only sought to acknowledge a power which the courts were exercising previously. Examining the Ababio case (supra) in terms of the statutory requirements contained in section 9 (1) (and (2), it is clear that the law retains the element of the record being clear and unambiguous by the use of the words in sub-section 2(b) of being:

> *"so capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably disputed."*

The power conferred on us under section 9 of the Evidence Act is not exclusive to our jurisdiction. Other jurisdictions such as California in the United States of America have similar provisions. For example, in the case of Popcorn Equipment v Page (1949), 92 Cal. App. 2d 94, 96 while recognizing the existence of such a power, the court observed:

> *"Only in exceptional cases will the court depart from the general rule, for example to avoid unreasonable hardship."* See: Sewell v Johnson (1913) 165 Cal. 762.

The taking of judicial notice in my view, should as said above be in exceptional cases as the rule of expediency is that cases should be decided on the evidence laid before the trial court with the opportunity being offered to the proponent's adversary to argue the legal effect of the evidence introduced and if necessary to introduce contrary evidence to refute it. In its nature, judicial notice is an exception to evidence as the criteria for deciding disputes. As cases are determined having regard to proof of contested facts in terms of the evidential burden depending on whether the action is civil or criminal, reliance to a mode by which indisputable facts that do not go through the ordinary motions of proof in a court of law may be applied in the determination of facts in issue must be in exceptional cases only if the judicial function is not to lose

one of its fundamental attributes that provides some assurance to parties that cases will not be determined without regard to proof of matters in contention. Without such a restraint on the taking of judicial notice, the trial judge in particular loses his impartiality as he can on his own under section 9(3) of the Evidence Act take judicial notice of facts in issue or related to the facts in issue notwithstanding the absence of any such request from the parties to the dispute. Such an independent inquiry by a judge runs contrary to the reasonable man's perception of the judge as an impartial arbiter who interrogates the evidence tendered before him to determine whether the requirements of formal proof have been satisfied. Thus, authority aside, on grounds of principle inherent in the adversarial system of adjudication, a departure from the evidential requirement of proof of facts in issue must be done in exceptional cases in order to uphold the integrity of the adjudicative process. In my opinion its absence would deprive the adjudicative process of fairness, which is the hall- mark of any civilized judicial system. As indicated earlier in this delivery, in order not to occasion any injustice to the parties, we invited them to file supplementary briefs on the effect of the judgment in the said case before proceeding to consider our decision in the matter.

The fact that the deceased Edward Kabu Otoo died testate is a fact relevant to the decision of ownership of the disputed plot and enables the court to consider the indisputable fact found in the prior case of Otoo v Otoo (supra) against the decision of the trial High Court and the intermediate appellate court. This approach enables us to decide one way and avoid a miscarriage of justice. It is only when the facts in respect of which judicial notice is taken have the potential of affecting the outcome of the decision to be rendered in the pending proceedings that we are empowered by section 9 of the Evidence Act, NRCD 323 to take judicial notice of them. My Lords, I have no doubt that taking judicial notice of the fact that the deceased Edward Kabu Otoo died testate enables us to reach one view of the matter and therefore justifies our regard to the judgment in the exercise of the power conferred on us under section 9 of the Evidence Act.

N. S. GBADEGBE

(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

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

J. ANSAH

(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

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

Y. APPAU

(JUSTICE OF THE SUPREME COURT)

DORDZIE (MRS.), JSC:-

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

A. M. A. DORDZIE (MRS.)

(JUSTICE OF THE SUPREME COURT)

COUNSEL

ERIC NARH FOR THE 1ST DEFENDANT/APPELLANT/APPELLANT.

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