IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: AKUFFO (MS), CJ (PRESIDING)

ANSAH, JSC

ADINYIRA (MRS), JSC

YEBOAH, JSC

BAFFOE-BONNIE, JSC

CIVIL APPEAL
NO. J4/58/2017

23RD MAY, 2018

1. SODZEDO AKUTEYE
2. AGNES AKUTEYE
3. AFI AKUTEYE ..... PLAINTIFFS/RESPONDENTS/APPELLANTS

VRS

1. ADJOA NYAKOAH ..... 1ST DEFENDANT/APPELLANT/RESPONDENT
2. TETTEH AKUTEYE)
3. EBENEZER AKUTEYE) ..... DEFENDANTS

JUDGMENT

AKUFFO (MS), CJ:-

This is an appeal against the judgment of the Court of Appeal, delivered on 19th day of November, 2015, setting aside the judgment of the High Court. The Plaintiffs/Respondents/Appellants (hereinafter referred to as 'the Appellants'), and the

2nd and 3rd Defendants/Appellants/Respondents (hereinafter referred to as 'the 2nd and 3rd Respondents'), are the biological children of one Tsengor Akuteye (deceased), who during his life time, took a lease from the Tema Development Corporation (hereinafter referred to as 'TDC') on house number D/11, Tsinai Agbor Electoral Area, Ashaiman, the subject matter in dispute herein. The 1st Defendant/Appellant/Respondent (hereinafter referred to as 'the 1st Respondent') is the purchaser of the said house.

Background

By a writ of summons issued in the High Court, Accra, on 28th November 2008, the Appellants claimed from the 1st Respondent the following reliefs:

A declaration of title to H/No D/11, Tsinai Agbor Electoral Area, Ashaiman.

a. Recovery of possession of same.
b. Cost.

Subsequently, on 4th February, 2010, and 27th May, 2011, the Appellants amended their writ of summons, against all the Respondents, and whilst materially making the same averments as were contained in their initial Statements of Claim, in their amended Statement of Claim filed on 27th May, 2011, they added averments against the 2nd and 3rd Respondents. In sum, they claimed that, after the death of their father, the 1st Respondent, wielding certain documents purportedly executed by their late father and claiming to be the new owner of the house, went to the house and verbally asked the occupants of the house to give vacant possession. The Appellants contended that their father, who died at the age of 90, was too weak, incapacitated and mentally unstable to have effected a transfer of the property to 1st Respondent and that the documents of sale in the hands of 1st Respondent were obtained with the assistance of 2nd and 3rd Respondents who are also children of their father.

The Appellants, in yet another amended Statement of Claim, made with leave of the Court, pleaded that the purchase of the property was fraudulent, and proceeded, to particularize the fraud as follows:

i. That the 2nd and 3rd Defendants without authority of the family of Plaintiffs in an act amounting to fraud offered the H/No D/11 Ashaiman to 1st Defendant to buy.

ii. That the 2nd and 3rd Defendants long before the death of their father had in their possession documents relating to the house.

iii. That 2nd and 3rd Defendants on their own searched for housing agents who introduced the 1st Defendant to the 2nd and 3rd Defendants and completed the purported transaction.

iv. That the 2nd and 3rd Defendants had suggested to 1st Plaintiff that he should join them in selling the house whereupon 1st Plaintiff refused.

v. That the 2nd and 3rd Defendants threatened to kill 1st Plaintiff as the latter reported the matter to the principal elders of the family who convened a meeting and asked that 2nd and 3rd Defendants pay a fine after the settlement of the issue.

According to the Appellants, after the sale of the property by 2nd and 3rd Respondents, the 2nd and 3rd Respondents used the proceeds to purchase a tractor.

The Respondents contested in its entirety, all versions of the Appellants' claims. The 2nd and 3rd Respondents maintained that the 1st Respondent is the new owner of the property after she duly purchased same from their father during his lifetime, in the presence of witnesses, and that when their father sold the property he issued a receipt to that effect and also wrote to TDC for its consent to transfer the property. In their evidence, the Respondents testified that their late father Tsengor Akuteye himself executed the transaction and that he was in his right frame of mind when he executed the deed of assignment and, further, that he completely understood and appreciated

the nature of the transaction. The 1st Respondent also counter-claimed for a declaration of title to the property, recovery of possession, damages for trespass and perpetual injunction.

The High Court delivered its judgment on the 21st day of May 2014 in favour of the Appellants, granting all the reliefs they sought.

The Respondents, being dissatisfied with the decision of the High Court, appealed to the Court of Appeal on four main grounds. The Court of Appeal delivered its judgment on the 19th day of November 2015, setting aside the judgment of the High Court and granting the 1st Respondent her counter-claim except that for damages for trespass.

It is against this judgment of the Court of Appeal that the Appellants have appealed to this Court on the grounds that:

a. "The Justices of the Court of Appeal erred in reversing the trial judge's finding of fact of fraud against the 2nd and 3rd Defendants in selling the property to the 1st Defendant/Appellant/Respondent;"

b. "The Justices of the Court of Appeal erred in reversing the trial judge's finding of fact that the late Tsengor Akuteye did not understand and appreciate the transaction in selling the property to the 1st Defendant/Appellant/Respondent;" and

c. "The judgment of their Lordships is against the weight of the evidence on record."

Issue for determination

Both the High Court Judge and the Justices of the Court of Appeal determined on the basis of the evidence on record that:

1) The late Tsengor Akuteye was illiterate, but the Deed of Assignment as well as other documents in connection with the transaction, did not bear the requisite

jurat that the contents had been read and explained to the grantor in a language he understood before he appended his mark.

2) The late Tsengor Akuteye executed the transaction for the sale of his house the subject matter in dispute herein

Consequently, the core issue for determination herein is whether the late Tsengor Akuteye, being an illiterate person, fully understood and appreciated that the transaction he entered into was for the sale of the subject matter in dispute herein.

The Effect of Absence of a Jurat on the Validity of a Deed Executed By an Illiterate

The purpose of the Illiterates' Protection Act, 1912 (Cap 262) is stated in its long title which reads as follows:

"AN ACT to provide for the protection of illiterates and for related matters".

Section 3 of this enactment provides that:-

"**Conditions for persons writing letters for illiterates**

A person writing a letter or any other document for or at the request of an illiterate person, whether gratuitously or for a reward, shall

(a) clearly and correctly read over and explain the letter or document or cause it to be read over and explained to the illiterate person,

(b) cause the illiterate person to sign or make a mark at the foot of the letter or the other document or to touch the pen with which the mark is made at the foot of the letter or the other document,

(c) clearly write the full name and address of the writer on the letter or the other document as writer of it, and

(d) state on the letter or the other document the nature and amount of the reward charged or taken by the writer for writing the letter or the other document, and shall give a receipt for the reward and keep a counterfoil of the receipt to be produced at the request of any of the officers named in section 5…"

In the case of **Duodu and Others v Adomako and Adomako** [2012] 1 SCGLR 198, the Supreme Court had the opportunity to expatiate on the scope and intent of this enactment as stated as follows:

> "…the clear object of the Illiterates' Protection Act, 1912 (Cap 262) was to protect the illiterates for whom a document was made against unscrupulous opponent and their fraudulent claims, i.e. those who might want to take advantage of their illiteracy to bind them to an executed document detrimental to their interests."

As is evident from the terms of this provision, there is indeed no requirement that there be a jurat clause certifying that the document was read over and explained to the illiterate person. All it does is specify certain formalities that the physical author of the document must undertake. The jurat clause simply developed as a practice to evidence that the writer of the document has indeed fulfilled his/her formal statutory obligation under the Act, towards the protection afforded by the Act. That is why the presence of the interpretation clause creates only a rebuttable presumption that the document is the deed of the illiterate person. Conversely, that is also why the mere absence of a jurat clause cannot per se vitiate the deed of an illiterate person without any tangible proof that he/she did not understand the contents. Section 3 of Cap 262, is thus a partial shield rather than a total sword.

In law, therefore, the issue as to whether or not an illiterate person fully understood and appreciated the contents of a document before executing same is a question of fact

to be determined by the evidence on record. Hence in **Zabrama v Segbedzi** [1991] 2 GLR 221, it was held, at page 236, that:

> "… the issue whether an illiterate fully understood the contents of a document before making his mark or not 'raises a question of fact, to be decided like other such questions upon evidence'."

The Court continued at page 237 as follows:

> "The presence of an interpretation clause in a document was not conclusive of the fact, neither was it a sine qua non. It was still possible for an illiterate to lead evidence outside the document to show that despite the said interpretation clause, he was not made fully aware of the contents of the document to which he made his mark."

This Court was even more expressive in the hereinbefore mentioned case of **Duodu and Others v Adomako and Adomako,** per Wood C.J., at page 216, as follows:

> "…the courts must not to make a fetish of the presence or otherwise of a jurat on executed documents. To hold otherwise, without a single exception, is to open the floodgates to stark injustice. Admittedly, the presence of a jurat may be presumptive of the facts alleged in the document, including the jurat. But that presumption is rebuttable, it is not conclusive. The clear object of the Illiterates Protection Ordinance, Cap 262 (1951 Rev.) is to protect illiterates for whom a document was made against unscrupulous opponents and their fraudulent claims; those who may want to take advantage of their illiteracy to bind them to an executed document detrimental to their interests. At the same time, the Ordinance cannot and must not be permitted to be used as a subterfuge or cloak by illiterates against innocent persons. Conversely, notwithstanding the absence of a jurat, the illiterate person who fully appreciates the full contents of the freely executed document, but feigns ignorance about the contents of the disputed document, so as to escape legal responsibilities flowing therefrom, will

not obtain relief. As noted, the presence of a jurat at best raises a rebuttable presumption only, not an irrebuttable one. Thus, any evidence which will demonstrate that the illiterate knew and understood the contents of the disputed document, that is the thumb printed or marked document, as the case may be, should settle the issue in favour of the opponent. In other words, in any action, it should be possible for the one seeking to enforce the contents of the disputed document to show that despite the absence of a formal jurat, the illiterate clearly understood and appreciated fully the contents of the document he or she marked or thumb printed."

Thus, it is not the absence of a jurat that would vitiate an agreement, it is rather the proof that indeed, the document was not the deed of the signatory because he/she had no idea what he/she was signing, due to illiteracy, or there was fraud.

Burden of Proof

Section 11(1) of the Evidence Act, 1975 (NRCD 323) provides as follows:

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

Section 11(4) of NRCD 323 also provides thus:

"In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence."

Again, ***section 14 of NRCD 323*** provides as follows:

"Except as otherwise provided by law, unless and until it is shifted, a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting"

Analysis

In law, the burden of proof to establish that an illiterate person understood and appreciated a document before execution is on the person who is relying on the same, the standard of proof being on a preponderance of the probabilities. Therefore, in the

instant case, the burden of proving that the late Tsengor Akuteye fully understood and appreciated the nature of the transaction was on the Respondents. In discharge (successfully in our view) of the burden to prove that Tsengor Akuteye understood and appreciated the nature of the transaction, the 1st Respondent gave a vivid account of how Tsengor Akuteye himself took the transaction documents from under his seat and gave same to the 1st Respondent. She testified that:

> "I intended to buy a house for a store. I saw one Abudu Rahman and told him I wanted a house by the roadside…. Rahman invited me to the H. No D11 – Ashaiman to have a look at it… Rahman saw the owner called Opanin Tsengor Akuteye and that the owner lives at Korleydo and promised to take me there.… At Korleydo the owner was weaving a mat. …He admitted that he was Tsengor Akuteye. He took us to his house and invited three of his children being Tetteh Akuteye, Amuzu Akutey and Ebenezer Akutey. Rahman told Tsengor that I was interested in the house. We negotiated and came to GHC 17,500 new Ghana cedis. I promised to bring money the following day for payment of the house. He asked us of our particulars and we promised to come the following day.
>
> We came the following day to meet with his three sons and Tsengor himself. And we told him we had brought the money. We gave the money to him and his three sons counted the money and confirmed that it was intact.
>
> Tsengor Akuteye raised his chair and brought out some papers. The first was a receipt…(exhibit 1)
>
> He then gave me another document to send to TDC to transfer the document from his name into my name…(exhibit 2)
>
> Tsengor again made a Statutory Declaration in my favour… (exhibit 3)
>
> I also made a Statutory Declaration accepting the sale of the property to me… (exhibit 4)
>
> Later Tsengor Akuteye called me to Korledo. I went with the same people who accompanied me earlier. Tsengor then gave me a Deed of Assignment…(exhibit 5)

He again gave me another document to send to Tema Metropolitan Assembly (TMA) for property rates. The property was transferred from his name to my (sic) and since 2008 I have paid property rates. I have some of the receipts of the payment of property rates… (exhibit 6)

Tsengor also gave me his lease document he obtained from TDC… (exhibit 7)…"

The foregoing evidence by the 1st Respondent was not challenged in any material regard during cross-examination, which centered largely on the alleged advanced age and ill-health of the deceased and the claim that the person who executed the transaction deeds was not Tsengor Akuteye.

Significant portions of the testimony of the 1st Respondent under cross-examination were as follows:

"Q: The person you saw walking was not the owner of the house?

A: Not correct.

Q: The man you met; how old could he have been?

A: I cannot tell. He did not hold a stick and was able.

…

Q: Do you know he died at age 105?

A: I do not know.

Q: The man who sold the house, did he look like a 105-year old man.

A: He will not be.

Q: Before Tsengor's death he was incapacitated and could not walk or eat on his own.

A: Not correct."

It is important to reiterate at this point that the trial Court definitively made a finding of fact that the person that the 1st Respondent met in the house and who executed the transaction documents was Tsengor Akuteye and no one else.

The evidence of the 1st Respondent was corroborated by the evidence of DW1, Abdul Rahman, whose testimony remained significantly unshaken against cross examination, which also centered on the advanced age and ill-health of Tsengor Akuteye and the

claim that the person who executed the transaction deeds was not Tsengor Akuteye. The evidence of the 1st Respondent was further corroborated by DW2, Tetteh Akuteye, who inter alia confirmed that the deceased pulled certain documents from under his seat for execution.

The Appellants were not able to challenge the evidence that Tsengor Akuteye himself brought out the transaction documents and gave same to the 1st Respondent, as, from the records, they were not even present at the time of the execution of the transaction documents. They were all living outside Korledo, the village where Tsengor Akuteye executed the transaction documents.

Now, since it is a crucial part of the Appellants' case herein, (and also at the trial) that Tsengor Akuteye did not understand and appreciate the nature of the transaction he entered into with the 1st Respondent, due (not only to illiteracy) also infirmity of mind caused by advanced age, they have the burden of persuasion in this regard. Thus, the Appellants were required to prove that Tsengor Akuteye was not *compos mentis,* or of full mental capacity, when he executed the transaction documents. It is clear from the record, that they were unable to adduce any shred of evidence, medical or otherwise, to support their assertion. They relied heavily on the age of Tsengor Akuteye, which they asserted to be 105 years old at the time of the execution of the transaction documents, to contend that for that reason he could not have been of sound mind. However, whether or not a person is of sound mind and full mental capacity is purely a question of fact to be proved by cogent evidence. Merely asserting that Tsengor Akuteye was 105 years old at the time of the execution of the transaction documents is no proof that his mental faculties were so addled that he could not transact the business he transacted with the 1st Respondent. At best, that will be a baseless conjuncture. It is noteworthy although the age of Tsengor Akuteye was alleged in their pleadings to be 90 years, the Appellants' in their testimony put the age at 105 years, without any supportive evidence, a clear indication that they really had no idea how old he was. Thus even if age by itself was relevant in this matter, the Appellants were

unable to establish that, indeed, the deceased was of such an advanced age as would make him unduly vulnerable.

We therefore find that, from the Record, the Appellants failed to prove that Tsengor Akuteye was not *compos mentis* at the time of the execution of the transaction documents. The Learned Justices of the Court of Appeal were therefore correct in their findings and committed no error when they reversed the finding made by the learned Trial Judge that the deceased did not understand and appreciate the transaction he made with the 1st Respondent.

In the circumstances, the only factor that could vitiate the transaction would be if, as casually alleged by the Appellants, a fraud was perpetuated on the deceased by any of the Respondents.

According to, section 13 (1) of the Evidence Act, (supra):

> "(1) 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."

Fraud is a crime. However, from the evidence on record, it is patently clear that the Appellants failed to prove that the Respondents, in the transaction, acted fraudulently or committed any crime, such as forging the thumbprint or signature of the late Tsengor Akuteye. No evidence was led by the Appellants to prove fraud against the 2nd and 3rd Respondents at the statutorily required standard of proof beyond reasonable doubt, even though the Appellants, in their pleadings, had particularized fraud against the 2nd and 3rd Respondents. Even if the Appellants had managed to establish that the deceased did not fully understand and appreciate the nature of the transaction he entered into that alone would not necessarily have meant that a fraud was perpetuated on him or that some fraudulent misrepresentations were made to him. The Court of Appeal was therefore right in setting aside the trial Court's finding of fraud against the 2nd and 3rd Respondents.

Conclusion

There is sufficient and cogent evidence on record to show that the 1st Respondent's grantor, Tsengor Akuteye, executed the transaction documents freely and voluntarily, with full understanding of the transaction he was making with the 1st Respondent, despite his illiteracy. Since this shifted the burden onto the Appellants to prove their assertion that Tsengor Akuteye did not understand and appreciate the nature of the transaction he entered into with the 1st Respondent, and it is our view that the record does not support any finding that the Appellants successfully carried this burden, we find that the Appellants have failed to prove their assertion that Tsengor Akuteye did not understand the nature of the transaction he entered into with the 1st Respondent.

We therefore dismiss the appeal herein.

S. A. B. AKUFFO (MS)
(CHIEF JUSTICE)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my sister Akuffo, CJ.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my sister Akuffo, CJ.

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

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my sister Akuffo, CJ.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my sister Akuffo, CJ.

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

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