IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – AD 2021

CORAM: DOTSE, JSC (PRESIDING)

MARFUL-SAU, JSC

AMEGATCHER, JSC

LOVELACE-JOHNSON, (MS.) JSC

PROF. MENSA-BONSU, (MRS.) JSC

CIVIL APPEAL
NO. J4/44/2019

24TH MARCH, 2021

1. SOLOMON TACKIE 2. AGO BANNERMAN (SUING AS JOINT HEADS OF THE TACKIE AND BANNERMAN THOMPSON FAMILIES)	PLAINTIFFS/APEELLANTS/ APPELLANTS
VRS	
1. JOHN NETTEY (SUBSTITUTED BY FRED BIBI AYIMEH) 2. SAMPSON KOFI BADU	DEFENDANTS/RESPONDENTS/ RESPONDENTS

JUDGMENT

PROLOGUE

DOTSE, JSC:-

What looked like an ordinary appeal where the intermediate Court of Appeal concurred in the findings of the trial High Court and which should have led to an evaluation of the

grounds of appeal argued in the statements of case of the parties soon evaporated into thin air. This came about after deep and sober reflection on the unprecedented style of the manner in which learned counsel for the plaintiffs presented his arguments in support of the appeal. This style of presentation was considered to be an assault on, and a violent breach of, the settled rules of procedure of this court and the lower courts as well. This phenomenon therefore necessitated a thorough and comprehensive analysis of our opinion in this judgment.

The facts of this case admit of some controversies, and it might be very useful to set them out from the perspectives of the plaintiffs and the 1st Defendant. Thereafter, it will be necessary to refer to the various overt acts of ownership of the parties in relation to the properties in dispute.

Finally, it is of utmost necessity to consider the customary law rules of intestate succession as are applicable to the families in contention; as well as rules of interpretation of what constitutes a valid Will; what is customary law Will, (Samansiw); what properties a Testator can include in his Will; and what probate of a Will can vest in the Executors of the Will and subsequently in the beneficiaries thereof.

THE APPEAL

This is an appeal by the Plaintiffs/Appellants/Appellants hereafter referred to as the Plaintiffs (who described themselves as joint representatives of the Hanson-Sackey and Bannerman-Thompson families), against the judgment of the Court of Appeal dated 24th July, 2019, in which the properties in dispute were adjudged to belong to the 1st Defendant/Respondent/Respondent hereafter referred to as the 1st Defendant representing the Nettey family who trace their root of title to their grandparents Afua Sackey and Abla Sackey respectively.

It must immediately be apparent that, the plaintiffs have lost twice in this legal contest. The learned trial High Court Judge, on the 20th day of December 2017 dismissed the Plaintiffs claims, their appeal to the Court of Appeal was also similarly dismissed, hence this appeal to the Supreme Court.

FACTS OF THIS CASE

The uncontroverted facts of this appeal are that, the properties in dispute were originally owned by one Afua Sackey who had siblings of the full blood namely James Hanson Sackey a brother, and Abla Sackey a sister respectively.

It is not in dispute that Afua Sackey died without any spouse or child surviving her. During the lifetime of Afua Sackey, she was reputed to have performed various overt acts of ownership in respect of the properties. For example, Afua was reputed to have leased part of the properties in dispute to one Hykel Elias Farah, a Syrian trader for 25 years, from 2nd May 1929 to be renewed thereafter for another term of 10 years. This transaction was registered as 1694/1925 a.k.a No. 294/1925. Secondly, one Paul Yeboah was reputed to have taken over the leasehold of Hykel after several assignments were made to him thereafter. These assignments to Paul Yeboah were made by the representative of Afua Sackey, namely Abla Sackey, sister of Afua.

It is also not in dispute that, James Hanson Sackey, the brother of Afua had several children among whom was one Samuel Quao Sackey, who was literate and a nephew of Afua and Abla.

He subsequently helped manage the properties first for Afua and after her death for Abla who became the owner of the properties. This came about as a result of a customary law will "Samansiw" that was reputed to have been made in Abla's favour by her sister Afua, shortly before she died.

This S. Q. Sackey therefore managed the properties for Afua in the first instance and later Abla.

Abla Sackey, was reputed to have begotten the following children:-

- Margaret Yaa Chia Nettey
- Robert Nertey Sackey-Nettey
- Elizabeth Kai Nettey
- Rebecca Tsotso Nettey

- Comfort Maanan Nettey and
- Beatrice Dei Kotey

James Hanson-Sackey on the other hand had the following children

- Kojofio Sackey
- J. Quao Sackey (Auctioneer)
- Mrs. Adjuah Jacobson (Nee Hanson Sackey)
- Emmanuel Easmon Sackey
- **Samuel Quao Sackey**
- Louis Hanson Sackey
- Emmanuel Quaofio Hansen-Sackey
- Kate Naa Adjeley Hansen-Sackey

It was reputed that Afua Sackey had a half uterine brother by name William Attu Kwamina Afful, whose father is from Edina and he also had five children.

It is part of the case of the plaintiff's that, the properties in dispute belong to Samuel Quao Sackey, and that during his lifetime the said S. Q. Sackey devised in his Will the said properties to his wife **Sarah Fatuma Sackey** and his daughters **Selina Betty Tackie** and **Mary Bannerman Thompson** in equal shares the said properties which included H/NO D. 835/4, Tudu, Accra or House No. D.385/4 Okaishie, Kojo Thompson Road, Accra and commonly referred to as Maria House.

The 1st Plaintiff also testified that the said properties were vested in all the beneficiaries named in the Will by the Executors of the last Will and Testament of S. Q. Sackey.

He also contended that all the said beneficiaries performed various overt acts of ownership in respect of the properties. As a result of the death of the original beneficiaries, the 1st Plaintiff averred that he and the 2nd Plaintiff and other cousins have assumed management and control of the said properties. The 1st Plaintiff asseverated that their parents performed various overt acts of ownership in respect of the properties in dispute and even litigated in respect of some of the properties which will be referred

to later in this delivery. **The plaintiffs referred to the 1st defendant as a trespasser and an intermeddler who has laid false claims to the properties referred to supra. The 1st Plaintiff contended that the judgments obtained by 1st defendant in respect of some of the properties against occupiers and or tenants were procured by fraud and accordingly sought the reliefs which will be referred to shortly against the defendants.**

On the contrary, the 1st Defendant, in his testimony as per the witness statement and cross-examination set out in great detail the family tree of the Hanson Sackey siblings and the genesis of the properties in issue.

It was based essentially on the above facts, that the plaintiffs commenced the action against the defendants in the High Court, claiming the following reliefs.

RELIEFS THE PLAINTIFFS CLAIMED AGAINST THE DEFENDANTS IN THE HIGH COURT

i. An order of this Honourable court setting aside the judgment of the District Court dated 2nd December 2010 in Suit No. A9/38/11 intitutled *John Nettey v Sampson Kofi Badu* as well as judgment of the District Court dated 17th August 2015 in Suit No. A2/6/15 intitutled *John Nettey v Sampson Kofi Badu* on grounds of Fraud.

ii. A further order setting aside the execution and or all processes carried out pursuant to the said judgment referred to in relief (i).

iii. A declaration that the plaintiffs are the legal owners and beneficiaries of the said House No. D 835/4, Tudu, Accra or House No. D385/4, Okaishie Kojo Thompson Road, Accra and commonly referred to as Maria House under the Estate of the late Samuel Quao Sackey.

iv. A declaration that it is unconscionable for the 1st defendant and his family not being the rightful owners to collect rents income from tenants in the said house.

v. An order directed against the defendants to account to the Plaintiffs for all monies collected by way of rent from the tenants in the said House No. D835/4 Tudu, Accra or House No. D385/4, Okaishie, Kojo Thompson Road, Accra and commonly referred to as Maria House from December 2010 to date of judgment/

vi. Recovery of possession of the house/property from the Defendants

vii. An order of perpetual injunction restraining the defendants, their agents, servants, assigns, privies, workmen and anybody or person (s) claiming through the Defendants from dealing with or otherwise interfering with the possession of the said House No. D 835/4, Tudu, Accra or House No. D385/4 Okaishie, Kojo Thompson Road, Accra and commonly referred to as Maria House by the Plaintiff.

viii. Cost and legal counsel's fees

ix. Any other reliefs that this Honourable Court may deem fit.

TRIAL IN THE HIGH COURT AND JUDGMENT THEREOF

After trial, during which the 1st Plaintiff testified as per his witness statement and was extensively cross-examined as well as their sole witness P.W.1 Georgina Lartey Mingle whose evidence in chief is contained in her witness statement and who was duly cross-examined as well.

Fred Ayimey, then acting as an Attorney, testified for and on behalf of the 1st Defendant as per the relevant witness statement and was cross-examined by learned counsel for the plaintiffs.

After evaluating all the pieces of evidence, oral and documentary, the learned trial Judge on the 20th of December 2017 concluded his judgment in the following terms:-

> *"Looking at the evidence on record I hold that assuming the plaintiffs have any interest in the subject matter at all,* ***per their conduct they slept on same since equity aids the vigilant and not the indolent.***

Per the totality of evidence led I hold that ***the plaintiffs have never exercised any possessory right over the disputed land for which same has ratified any fraud if any perpetuated by the defendant." Emphasis supplied***

The learned trial Judge referred to the case of ***GIHOC Refrigeration & Household Products Ltd. v Jean Hanna Assi [2006] I MLRG 99****, and concluded:*

"In the circumstances I hold that assuming the plaintiffs have any right to the land at all same is statute barred." Emphasis supplied

APPEAL AGAINST HIGH COURT DECISION TO COURT OF APPEAL AND ITS DISMISSAL

The Plaintiffs felt aggrieved by the decision of the High Court and appealed against same to the Court of Appeal.

The Court of Appeal in a well considered unanimous decision dismissed the plaintiffs appeal in the following terms:-

"The trial Judge held that assuming the plaintiffs have any right to the land at all ***same were statute barred****.* ***This perhaps was a blanket statement which should not be the position.*** *From the evidence on record, the appellants sought first a declaration setting aside the judgment of the District Court dated 2nd December 2010 in* ***Suit No. A9/38/11*** *entitled* ***John Nettey v Sampson Kofi Badu*** *as well as judgment of the District Court dated 17th August 2015"* in Suit No. A2/6/15 entitled ***John Nettey v Sampson Kofi Badu on the ground of fraud.***

From a simple calculation, the first case in the District Court was decided in 2010 and the action for setting it aside was brought six years later in 2016, ***clearly this action is not caught by the provision under section 5 of the Limitation Decree, 1972 (NRCD 175).***

However, the appellants relief for a declaration ***that they are the legal owners of the said property is barred under section 10 (2) and 10 (6) of the***

Limitation Decree 1972 (NRCD 175) taking into consideration that the tenant was put in possession in the year 2000 which means the action was brought before the trial court 16 years after their right accrued.

Conclusion

From the analysis of the evidence and the law given above, the trial Judge adequately considered the evidence on record before delivering his judgment. The judgment is supported by the evidence and the judgment is hereby affirmed." *Emphasis supplied*

APPEAL TO THE SUPREME COURT

The plaintiffs feeling aggrieved by the decision of the Court of Appeal which dismissed their appeal to that court, yet again appealed to the Supreme Court on the 30th day of July 2019 and filed a Notice of Appeal against the decision of the Court of Appeal dated 24th July 2019 with the following as the grounds of appeal.

1. The judgment of the Court of Appeal is against the weight of the evidence.
2. The learned Court of Appeal erred when it rejected Plaintiff's case which is rooted in fraud same perpetrated by the Defendants at the District Court to obtain judgment at the blind side of the Plaintiffs being branch Heads of the Family.
3. The Learned Court of Appeal erred when it affirmed the decision of the High Court and thereby occasioned grave miscarriage of justice; as the judgment amounts to disinheriting Plaintiffs' lineage from the subject-matter family property, which at all material times Plaintiffs have enjoyed proceeds thereof as beneficiaries.

Reliefs Sought from the Supreme Court

(i) That the decision of the learned Court of Appeal be reversed.

(ii) That judgment be entered for the Plaintiffs/Appellants/Appellants for the reliefs endorsed on their Writ of Summons.

The above then constituted the grounds of appeal upon which learned counsel for the plaintiffs should have submitted their statements of case. But this was not to be, as will soon be demonstrated.

OBSERVATIONS BY THE COURT ON THE ARGUMENT OF LEARNED COUNSEL FOR PLAINTIFFS IN HIS STATEMENT OF CASE IN SUPPORT OF THE GROUNDS OF APPEAL

We have already referred to the three grounds of appeal filed by the plaintiffs against the judgment of the Court of Appeal as per the Notice of Appeal. This Notice is regulated by Rule 6 of the Supreme Court Rules, 1996 (C. I. 16) as amended by C. I. 24.

In the context in which we wish to make these observations, we deem it appropriate to set out the said relevant references in context as follows:-

> *"PART II-CIVIL APPEALS*
>
> *6. (I) Any appeal to the Court in a civil cause or matter shall be brought by notice of appeal in the Form I set out in Part 1 of the Schedule to these Rules and shall be filed with the Registrar of the court below.*
>
> *(2) A notice of civil appeal shall set* ***forth the grounds of appeal and shall state-***
>
> *(a) the address for service of the appellant;*
>
> *(b) whether the whole or part of the decision of the court below is complained of and in the latter case the part complained of;*
>
> ***(c) the nature of the relief sought;***
>
> *(d) the name and address of counsel for the appellant, if any, which address shall be an address for service;*
>
> *(e) the names and addresses of all parties affected by the appeal; and*
>
> *(f) the particulars of any misdirection or error in law, if so alleged.*
>
> ***(4) The grounds of appeal shall set out concisely and under distinct heads the grounds upon which the appellant intends to rely at the***

hearing of the appeal, without any argument or narrative and shall be numbered seriatim; and where a ground of appeal is one of law the appellant shall indicate the stage of the proceedings at which it was first raised.

(5) No ground of appeal which is vague or general in terms or discloses no reasonable ground of appeal shall be permitted, ***except the general ground that the judgment is against the weight of evidence;*** *and any ground of appeal or any part of it which is not permitted under this rule may be struck out by the Court on its own motion or on application by the respondent.*

(6) The appellant shall not, without the leave of the Court, argue or be heard in support of any ground of appeal that is not mentioned in the notice of appeal.

(7) Notwithstanding sub rules (1) to (6) of this rule the Court-

(a) may grant an appellant leave to amend the ground of appeal upon such terms as the Court may think fit; and

(b) shall not, in deciding the appeal, confine itself to the grounds set forth by the appellant or be precluded from resting its decision on a ground not set forth by the appellant.

Thus, apart from setting out the grounds of appeal, an appellant is obliged under sub-rule 2 (b) of Rule 6 of C. I. 16 to state whether the whole or part of the decision of the court below is complained of. In the instant case, the Plaintiffs indicated they were appealing against the whole decision of the Court of Appeal. An appellant is also enjoined by Rule 6 (2) (c) of C. I. 16 to also indicate the nature of the relief sought. In this context, the Plaintiffs indicated that, they wanted the decision of the Court of Appeal to be reversed and ***more specifically that, "judgment be entered for the plaintiffs on the basis of the reliefs endorsed on their writ of summons."***

Rule 6 (6) of C. I. 16 referred to supra states clearly that, ***"the appellant shall not, without the leave of the court, argue or be heard in support of any ground of appeal that is not mentioned in the notice of appeal."***

However, we have observed that, learned counsel for the plaintiffs, Jonathan T. Sarblah in his 39 page statement of case filed for and on behalf of the plaintiffs on 5th March 2020 devoted quite considerable energy in arguing principles of law and views of academic writers which were not raised as distinct grounds of appeal or argued in relation to the grounds of appeal. We could have glossed over these issues but the phenomenon is fast gaining grounds in this court, and the earlier it is nipped in the bud the better for the practice at the apex court.

For example, learned counsel for the Plaintiffs raised very key, and notable principles of law in his statement of case. But these principles of law were made to stand alone and not made referable to the three grounds of appeal that were filed. Instances of some of these wrong and unprecedented arguments contained in the statement of case are the following:-

1. Intestate Succession Applicable Laws
   References were made to academic and well researched articles on the subject by (a) *Kwabena Bentsi Enchill in 1 [1972] Vol IX UGLJ* pages 123-134 on Intestate Succession Revisited, (b) Prof. Kludze's paper on Problems of Intestate Succession in Ghana, Volume IX [1972] No. 2 UGLJ 89-122 (c) Gordon Woodman's article on ***Youhana v Abboudi [1974] 2 GLR*** 201- Choice of Law for Inheritance on Intestacy, and the *Application of Common Law [1974] Vol. XI No 1. UGLJ, 97-105.*

Learned counsel for the plaintiffs also made references to the case of ***Larkai v Amorkor (1933) 1 WACA 323*** as well as Halsbury's Laws of England, 4th Edition on Executors and Administrators Vol. 17 (2) Re-issue, paragraphs 583, 587 and 612.

Based on the above quotations and references, without any analysis and discussions, learned counsel stated on page 5 of his statement of case as follows:-

"My Lords,

THE FAMILIES IN THE DISPUTE

The contrasting claim of root of the Respondent vis-à-vis the claim of root of the Appellants is that, the ***Respondent acting as the head of Nettey family traced their root to Abla Sackey, t****he sister of Afua Sackey and contended that Samuel Quao Sackey who was the son of James Quao Sackey and the brother of Afua Sackey; even though he was the caretaker/manager of* ***Maria House*** *until his death,* ***did hand over the documents on same to Abla Sackey before his death****. In arguing further, he only managed Maria House for Abla Sackey* ***due to Samansiw or death declaration of Afua Sackey*** *and therefore, Maria House no longer was the property of the larger Hansen-Sackey family;* ***but rather, became the Estate property of Abla Sackey and devolved on her descendants, "solely" under customary law."*** *Emphasis supplied*

All references in the above quotation to the Respondent are to the 1st defendant's side of the family herein, and those to the Appellants refer to the Plaintiffs family herein.

Learned counsel for the plaintiffs, Jonathan Sarblah continued his discussions of legal principles in a vacuum by referring to Article 36 (8) of the Constitution 1992 which provides as follows:-

"The state shall recognize that ownership and possession of land carry a social obligation to serve the larger community and, in particular, the state shall recognize that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned and are accountable as fiduciaries in this regard."

Even though this is a binding constitutional provision, learned counsel has failed to link the said provision to any particular ground of appeal in this case.

Worst of all, learned counsel failed to appreciate the constitutional provisions vis-à-vis the reliefs he sought in the High Court and what the appeal herein entailed.

Learned counsel for the plaintiff then discussed the principle of community of interest and relied on the above constitutional provision and the case of ***In Re Agyemang (Decd); Addae v Fosua, [1968] GLR 519.***

Based again upon the said statement of case, learned counsel for the plaintiffs on page 11 of the statement of case states a contrary case to what was contained in their original case as set out in their reliefs and pleadings in the High Court and concluded as follows:-

> *"In putting the totality of the facts of this case together, it is clear as the* ***"noon-day sun"*** *that all the three (3) parties in this Appeal being the Hansen-Sackey family, the Bannerman-Thompson family and the Nettey family, all trace their root to the common ancestor-* ***Afua Sackey who originally acquired the interest and title in Maria House;*** *same gifted to her by her husband,* ***lawyer Sawyer. Thus, they are all accordingly entitled to benefit from the Estate of their common ancestor-Afua Sackey who died intestate and without a spouse or child.***
>
> *Accordingly, by virtue of statute law and customary law on Intestate succession, Maria House cannot become the sole property of Abla Sackey or her Estate upon her death to devolve on her descendants solely.* ***Even on the scenario where it does pass to Abla Sackey for her life time same automatically, reverts upon her death to the Hansen-Sackey family which includes the descendants of both*** James Hanson Sackey and Abla Sackey *thereof*". *Emphasis supplied*

There is indeed a significant shift of the goal posts by the plaintiffs when they initially stated unequivocally that the 1st defendant was a "trespasser, and intermeddler in the

properties in dispute." Refer to the endorsement of the Writ of the Plaintiff in the High Court already referred to supra.

Based on other legal submissions by the plaintiffs in their statement of case ***that the judgment of the Court of Appeal contains errors of law without any substance,*** learned counsel for the plaintiffs posed the following legal issues for determination in contra-distinction to the grounds of appeal and the reliefs they sought as per the Notice of Appeal filed and already referred to.

LEGAL ISSUES FOR DETERMINATION

i. Whether or not the learned Court of Appeal properly applied customary law for the determination of the ownership of Maria House. Reference Article 11 of the Constitution 1992. He then relied on the following statutory provisions:-

ii. Administration of Estates Act, 1961 (Act 63) Sections 1 and 2 respectively.

iii. Head of Family Accountability Act, 1985 PNDCL 114 – Section 3 thereof.

iv. Intestate Succession Act, 1985, PNDCL 111- In this respect, learned counsel submitted that, intestate survived by neither spouse, parent nor child is survived by family.

In relying on all the above legal principles, it becomes clear that the plaintiffs have either forgotten or abandoned their reliefs upon which the case has been contested from the trial High Court to this court. Secondly, per the Notice of Appeal filed in this court as recent as 30th of July 2019, the Plaintiffs relied on the three grounds of appeal contained therein, as well as the ***reliefs that the judgment of the Court of Appeal be set aside and judgment entered on behalf of the plaintiffs as per their reliefs claimed in the High Court."***

RELIEFS WHICH MAKE 1ST DEFENDANTS BRANCH OF THE FAMILY TRESPASSERS AND INTERMEDDLERS AND FOR WHICH REASON A PERPETUAL

INJUNCTION WAS EVEN SOUGHT AGAINST THEM TO PERPETUALLY INJUNCT THEM FROM HAVING ANYTHING TO DO WITH THE PROPERTIES IN DISPUTE

From their pleadings all through the various levels of the court, the plaintiffs have evinced a strong inclination to hold onto their claims contained in their pleadings as per the pleadings on record.

As per Rule 6 (6) of C. I. 16, which states:-

> ***"The appellant shall not, without the leave of the court, argue or be heard*** *in support of any ground of appeal that is not mentioned in the notice of appeal." Emphasis*

It is thus abundantly clear that, all the above legal principles and claims that the descendants of the 1st Defendants are also entitled to a share in the disputed properties cannot be allowed.

This is because the plaintiffs have neither sought the leave of the court nor amended their case in the courts below before the instant appeal.

PRINCIPLE OF DEPARTURE

The position should therefore be made clear that, parties before this court in appeal cases, especially appellants, and in instances where the respondents have not counterclaimed, have a duty to ensure that their arguments contained in their statement of case is consistent with their grounds of appeal filed, and also referable to the reliefs they seek as per the Notice of Appeal. This is because, per the Rules of procedure, in the Supreme Court Rules, this court will not depart from its settled practice and/or donate or grant to the parties reliefs which they have not solicited as per their pleadings in the courts below or as contained in their Notices of Appeal. See Rule 6 (6) of C. I. 16 of the Supreme Court Rules.

We have also looked at the state of the pleadings in the trial High Court, and are satisfied that the reliefs and the state of the pleadings are consistent with the case put forward by the plaintiffs before the lower courts. We also further observe that, sufficient indication had been given the plaintiffs as per the pleadings and evidence of the 1st Defendant, such that if they were minded to, and were serious about it, they could have taken advantage of Order 11 rule 10 of the High Court (Civil Procedure) Rules 2004, C. I. 47 which provides as follows:-

> *10 (1) A party shall not in any pleading make any allegation of fact or raise any new ground or claim, inconsistent with a previous pleading made by the party.*
>
> *(2) Sub rule (1) shall not be taken as limiting the right of* ***a party to amend or apply for leave to amend previous pleading of the party in order to plead allegations or claims in the alternative."*** *Emphasis supplied*

S. Kwami Tetteh, in his invaluable book *"Civil Procedure, A Practical Approach"* at page 282 writes thus:-

> *"Except upon amendment, a party may not plead a departure i.e. introduce a new ground of claim or fact that is inconsistent with a previous pleading of the party.* ***A departure occurs when a party abandons a position taken in the previous pleading for a new position in a subsequent pleading."***

Our own illustrious brother, Marful-Sau JSC put it beyond doubt in his book *"A Practical Guide to Civil Procedure in Ghana*" on page 53 as follows:-

> *"By the rule on pleadings, parties are bound by the facts contained in their respective pleadings.* ***The only way that a party can change his or her pleading is by way of amendment. Order 11 r. 10 of C. I. 47 provides that a party shall not in any pleading make any allegation of fact or raise any***

new ground or claim inconsistent with a previous pleading made by that party. *This is what is termed as the rule against departure." Emphasis supplied*

See cases like ***Nyamah v Amponsah (2009) SCGLR 361*** where the court held that, *"the husband in his pleadings asserted that the disputed house… belonged to his father…. He cannot now claim that the house belonged to him alone. The conduct of the husband offends against the rule of departure from pleadings."*

See also ***Klah v Phoenix Insurance Co. Ltd [2012] 2 SCGLR 1139.***

It is therefore apparent that, the plaintiffs, not having taken advantage of the rules by amending their pleadings in the trial court as per Order 11 r. 10 of C. I. 47, cannot now depart from their pleadings by setting up an entirely new case when they have also failed to take advantage of Rule 6 (6) of the Supreme Court Rules C. I. 16 as amended, by which they could by leave of the court argue new grounds of appeal not contained in the Notice of Appeal, provided these are consistent with the record of appeal.

Secondly, the principles of law urged upon this court by learned counsel for the plaintiffs, Jonathan Sarblah must be referable to the grounds of appeal filed and not argued in isolation without any reference or nexus to the said grounds of appeal.

We therefore wish to sound a note of caution to practitioners before the Supreme Court to be conversant with the Rules of Procedure in this court to ensure compliance. In future, such slips will not be tolerated, and defaulting lawyers risk their cases not being considered on the merits.

We now proceed to discuss the arguments of substance made by the learned counsel in respect of the grounds of appeal.

GROUND I

JUDGMENT OF THE COURT IS AGAINST THE WEIGHT OF EVIDENCE

Learned counsel for the plaintiffs referred to the case of ***Oppong Kofi and Others v Attibrukusu III [2011] 1 SCGLR 176*** and invited this court to rely on the following statement in the said case to guide it in our determination of the appeal, which is that:-

> *"Consequently, in considering the appeal by the defendant, the main focus of the Supreme Court, would be to look closely at the totality of the evidence adduced at the trial court and seek to do what, in the view of the court, both the trial High Court and the Court of Appeal did not do adequately, i.e. to draw necessary inferences from the facts that had been clearly established by the evidence, both oral and documentary. It was only when that had been done, that the* ***"expectations of justice"*** *would be fully met.* ***Koglex (No.2) v Field [2000] SCGLR 175 and 185.***

Learned counsel urged this court to apply the above principle as the Court of Appeal woefully failed in their duty to consider the totality of the evidence adduced by the parties.

Learned counsel then set out in a chronological form what in their view constituted the established facts by the parties which the lower courts overlooked. This will be considered in graphic detail during our analysis later in this delivery.

Learned counsel for the plaintiffs then submitted to this court as follows:-

> *"That from the totality of documentary evidence and the oral evidence adduced at the trial, inferences of the facts supra can* ***clearly be established and conclusion drawn on same to the effect that Maria House is a family property of Hansen-Sackey family to which both or all the parties herein have beneficial interest thereto."*** *Emphasis supplied*

Learned counsel for the plaintiffs then referred to what in his view constituted perverse findings by the trial court which were concurred in by the first appellate court. These are

- "That the plaintiffs failed to demonstrate that the judgment of the District Court were fraudulent.
- That the evidence depicts that the 1st Defendant's predecessors had been in absolute possession of the property since 1929.
- "That I wonder what the plaintiff's family were doing when the 1st defendant (sic) predecessors were exercising their rights of possession over the land."

Learned counsel for the plaintiffs then referred to the conclusions reached on the findings referred to supra by the learned trial High Court Judge, and added that these were perverse and concluded thus:

> *"The findings and conclusions drawn by the trial High Court and concurred in by the Court of Appeal are not borne out by the totality of the evidence before the trial court and is also inconsistent with his locus classicus, the* ***Oppong Kofi & Others v Attibrukusu III*** *case supra."*

Learned counsel also argued that on the authority of ***Frimpong v Biney, and Anr. Suit No. J4/24/2015***, dated 11th May 2016, the Supreme court per Pwamang JSC laid down the principle that, ***"if the findings cannot be supported by the evidence or that they are perverse as being inconsistent with the undisputed facts or documentary evidence on the record, then it may set aside the findings of the lower court. See Gregory v Tandoh & Anr. [2010] SCGLR 971***." Emphasis supplied

ARGUMENTS OF LEARNED COUNSEL FOR THE 1ST DEFENDANT RAY APPIAH-AMPONSAH IN RESPONSE TO GROUND I OF THE APPEAL

Learned counsel for the 1st Defendant anchored his arguments in respect of this ground of appeal by referring extensively to the reliefs the plaintiffs claimed in the case.

Aside the reliefs, learned counsel then made references to the averments contained in paragraphs 1, 2, 3, 4, 12 and 17 of the statement of claim of the plaintiffs and concluded on the basis of these averments that, the plaintiffs have messed up their entire case by

departing from same and this cannot be salvaged as per the evidence from cross-examination of the 1st Plaintiff on record.

In order to put matters in their proper perspective, it is considered appropriate to set out in extenso the said paragraphs of the statement of claim.

1. "The Plaintiffs are current heads of family as well as customary successors of the Hansen Tackie and Bannerman Thompson families of Accra and bring this act for themselves and for all beneficiaries of the Estate of the late Samuel Quao Sackey.

2. The Plaintiffs aver that the late **Samuel Quao Sackey (deceased) died possessed of various properties including House No. D 835/4 Tudu, Accra or House No. D385/4, Okaishie, Kojo Thompson Road, Accra and commonly referred to as Maria House which is the subject matter of this suit.**

3. The Plaintiffs aver that by the Will of the said Samuel Quao Sackey, probate of which will was granted by the High Court, Accra on the 24th day of September 1962, the said Samuel Quao Sackey devised to his wife and children all his properties which included House No. D835/4, Tudu, Accra or House No. D385/4, Okaishie, Kojo Thompson Road, Accra and commonly referred to as Maria House as tenants in common and in equal shares.

4. The plaintiffs aver that by virtue of a Vesting Assent made the 29th November 1963 between Emmanuel Daniel Tackie and Hansen Myers Bannerman therein referred to as Executors of the one part and **Sarah Fatuma Sackey, Selina Betty Tackie and Mary Bannerman Thompson** therein referred to as beneficiaries and same registered as Land Registry No. 525/1964 the said properties were vested in the respective beneficiaries.

12. The plaintiffs aver that 1st Defendant who is a **trespasser** and an **intermeddler** have assumed false claims as to ownership of the said House No. D 835/4, Tudu,

Accra or House No. D385/4 Okaishe, Kojo Thompson Road, Accra and commonly referred to as Maria House and commenced legal action at the District court against the 2nd defendant, a lessee of the above property.

17. The plaintiff will contend that the **1st Defendant have no shade of right and or any colour of right to claim any interest in any portion of the said house the subject matter of this suit."**

After referring to extracts of the evidence of the 1st Plaintiff under cross-examination, learned counsel for the 1st Defendant made the following significant arguments:-

That the learned trial High Court Judge, adequately considered the evidence led at the trial, both oral and documentary and concluded that the plaintiffs have failed to prove their claims on a balance of probabilities and therefore rightly dismissed their claims. Learned counsel for the 1st Defendant also on the same basis, concluded that the Court of Appeal was thus right in dismissing the appeal. Learned counsel in this regard referred to the Supreme Court case of ***Richard v Nkrumah [2015] 80 GMJ 176*** on circumstances under which the Supreme Court would concur with the concurrent findings of facts by the two lower courts.

Learned counsel for the 1st defendant relied on the family tree or genealogy of the parties and concluded that, on a factual basis, the 1st defendants established that Afua Sackey made a *"Samansiw"* to her sister Abla Sackey, and therefore Afua Sackey did not die intestate.

As a matter of fact, learned counsel for the 1st defendant established in his statement of case that the properties in dispute, precisely Maria House, never formed part of the Will of James Quao Sackey and that of Samuel Quao Sackey. By parity of reasoning, it therefore meant that there was no documentary evidence to support the reliefs the plaintiffs claimed. It is interesting to

observe that, the 1st relief of the Plaintiffs against the defendants in the High Court was for an order to set aside the two judgments obtained by the 1st defendant against the 2nd defendant in the District Court in Suit Numbers (1) A9/38/11 and A2/6/15 on grounds of fraud. However during cross-examination, the 1st Plaintiff stated that he was not aware of the said judgments before he instituted the action against the defendant herein.

After referring to the averments contained in paragraph 17 of the Statement of claim and answers given by the 1st Plaintiff under cross-examination, learned counsel for the 1st Defendant concluded his arguments on this ground of appeal thus:-

> *"My Lords, it is submitted that the Court of Appeal and the High Court were right in wondering "what could have possibly changed to inform the sudden change of position by the Appellants?* ***The Court of Appeal referred to the evidence of the 1st Defendant on record depicting that their predecessors in title had been in absolute and exclusive possession of the property in dispute, the 1st Defendant showed evidence of lease agreements by their predecessors and tenants of the property from 1929 without any challenge from Plaintiff's family."*** Emphasis supplied

Learned counsel therefore urged this court to dismiss this ground of appeal.

ANALYSIS OF GROUND ONE

In a concurring opinion in the case of ***Abbey & Others v Antwi V, [2010] SCGLR 17*** at pages 34-35 Dotse JSC, stated the following as the guiding principle where an appellant alleges that the judgment, like in ground one of the instant appeal was *"against the weight of evidence."*

> *"It is now trite learning that where an appellant alleges that the judgment of the trial court is against the weight of evidence,* ***the appellate court is under an***

obligation to go through the entire record of appeal to satisfy itself that a party's case was more probable than not."

The locus classicus in this respect, appears to have been reiterated with greater clarity and emphasis by our distinguished sister, Sophia Akuffo JSC (as she then was) in the case of ***Tuakwa v Bosom [2001-2002] SCGLR 61 at 65*** where she held as follows:-

> *An appeal is by way of rehearing, particularly where the appellant, …alleges in his notice of appeal that, the decision of the trial court is against the weight of the evidence. In such a case….* ***it is incumbent upon an appellate court, in a civil case to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on a balance of probabilities, the conclusions of the trial Judge are reasonably or amply supported by the evidence."*** Emphasis supplied

See also the following cases

- ***Ampomah v Volta River Authority [1989-90] 2 GLR 28***
- ***Djin v Musah Baako [2007-2008] 1 SCGLR 686***
- ***Ago Sai & Others v Kpobi Tetteh Tsuru III [2010] SCGLR 762, at 791 - 792***
- ***Akufo-Addo v Cathline [1992] 1 GLR 377***
- ***Mintah v Ampenyin [2015-2016] 2 SCGLR 1277 at 1282 and finally***
- ***International Rom Ltd (No.1) v Vodafone Ghana Ltd & Fidelity Bank Ltd. (No. 1) [2015-2016] 2 SCGLR 1389 just to mention a few.***

ROAD MAP

What all these authoritative decisions require of an appellate court, such as this Court especially, when a ground of appeal like the instant, formulated on the basis that *"the judgment is against the weight of evidence"* have to do are the following:

i. Consider the case as one of re-hearing. This means an evaluation of the entire record of appeal.

ii. Consider the reliefs claimed by the plaintiff and if there is a counterclaim by the Defendant, that must equally be considered.

iii. Consider and evaluate the evidence led by the parties and their witnesses in support of their respective cases especially the cross-examination as this is the evidence that is now elicited from the parties and their witnesses after the tendering of the witness statements.

iv. An evaluation of the documents tendered during the trial of the case and how they affect the case.

v. An evaluation of the application of the facts of the case vis-à-vis the laws applied by the trial court and the intermediate appeal court.

vi. A duty to evaluate whether the trial court and Court of Appeal correctly or wrongly applied the evidence adduced during the trial.

vii. The burden on the final appellate court, such as this court is generally to carefully comb the record of appeal and ensure that both in terms of substantive law and procedural rules, the judgment appealed against can stand the test of time. In otherwords, that the judgment can be supported having regard to the record of appeal

The above criteria are by no means exhaustive, but only serve as a guide to appellate courts such as the task facing us in the instant appeal.

EFFECT OF THE CDR REPORT AND OR ARBITRATION ON THE FORTUNES OF THE CASE OF THE PLAINTIFFS

Before we deal with the substance of this appeal, we feel obliged to analyse the effect of the CDR Arbitration report and its effect on the appeal herein.

Learned counsel for the plaintiffs in a final push on the rejection by both the trial court and the intermediate Court of Appeal of the CDR /Arbitration Committee Report, concluded his arguments on this ground of appeal as follows:-

> *"That the trial High Court left out relevant findings and conclusions of the CDR Committee Reports of 1986/87 and the Court of Appeal also fell into the same error. In conclusion, learned counsel urged this court to rely on this CDR Committee Report as well as necessary customary and statute law to hold and rule that Maria House is the self acquired property of Afua Sackey, who having died intestate, without spouse or child makes* ***Maria House an immediate family property of Hansen-Sackey family*** *thereof, of which James Hansen Sackey's descendants who are the Appellant families herein, and Abla Sackey's descendants who are the Respondent family herein duly belong thereto; clearly establishes that the judgment of the learned court of appeal is against the weight of evidence."*

It should be noted that, after the decision of the CDR Arbitration panel on 13th April, 1987 which has been referred to supra, there is a clear record that the 1st Defendant's predecessors, resiled from further proceedings at this CDR Arbitration. This is how this has been captured by the record (see exhibit G series).

> "*After a three week transition without any word after the second sitting, from James Hansen Sackey the panel extended an invitation to him to appear before it on the 12th May 1987 to submit the feedback but he failed to do so for no reason. James Hansen Sackey was again invited to appear on the 22nd May 1987 for the same reason but he responded rather on the 21st May 1987* ***with the report that the case had been filed at the traditional court and that his party would write to the Secretariat. This absurd reaction from the Margaret Nettey party was viewed with all seriousness as a protest against the panel's decision and upon that, the panel set itself to delve deeper into the case through deeper investigations and therefore invited family members and outsiders who are close to the family, for interview and to give***

statement concerning the issue. *However, upon investigation the allegation by James Hansen Sackey that the case had been filed at the traditional court, the panel discovered that the writ filed at that court involves a lease/tenancy case and not that which was pending at this Secretariat." Emphasis supplied*

It was after this that the panel proceeded to give their decisions which have already been referred to supra. What this means in law is that, the Margaret Nettey branch of the family, which initially agreed to the arbitration before the CDR, unequivocally resiled from the said proceedings.

We have already referred to the dictum of Ollennu J, (as he then was) in the case of ***Budu v Caesar & Others [1959] GLR 410 at 413*** where the learned Judge stated that it is only when an award has been published that the parties cannot resile from the arbitration. Having thus evinced a clear indication that they have resiled, it was wrong for the CDR to continue with the arbitration and publish the new award referred to supra.

Being required to be a voluntary decision of the parties to submit to the arbitration, the parties are therefore at liberty to withdraw and or resile from an arbitration as the decision referred to supra illustrates. Indeed this phenomenon has been one of the essential characteristics of an arbitration.

A person or group of persons cannot be bound to continue with a customary arbitration if they have lost confidence in the panel. Having thus withdrawn, the 1st Defendant's predecessors should be deemed as having resiled from the CDR arbitration. The said decision therefore has no effect and lacks validity.

RELIEFS CLAIMED BY PLAINTIFFS

Applying the above criteria, we first look at the reliefs the plaintiffs endorsed their writ with. This has been referred to in extenso. The plaintiffs anchored their case heavily on relief (III) which for want of emphasis we quote again as follows:-

"A declaration that the plaintiffs are the legal owners and beneficiaries of the said House No. D835/4 Tudu, Accra or House No. D. 385/4, Okaishie, Kojo Thompson Road, Accra and commonly referred to as Maria House under the Estate of late Samuel Quo Sackey".

Closely linked to the above is also relief (VII) where the plaintiffs claimed perpetual injunction against the Defendants. In support of these reliefs, the Plaintiffs averred in paragraph 2 of their statement of claim that, the properties mentioned in relief (III), supra, belonged to Samuel Quao Sackey who devised the said properties in his Will to the beneficiaries therein named. They further asseverated that, the Executors named in the Will obtained Probate of the said Will from the High Court, Accra on 24th September 1962 and subsequently by a vesting Assent made on the 29th day of November 1963 the Executors therein named conveyed the properties in dispute to **Sarah Fatuma Sackey, wife of the Testator, and Selina Betty Tackie and Mary Bannerman Thompson children of the Testator and** predecessors of the Plaintiffs. The Plaintiffs therefore contended that, the 1st Defendant and his branch of the family have to be perpetually restrained from dealing with the properties.

What this means therefore is that, at some point in time, the properties in dispute must have become duly vested in Samuel Quao Sackey, the Testator, to have clothed him with the necessary proprietary rights of title to enable him make devises of same in his last Will and Testament.

This important legal nexus between the Testator and the properties in dispute, was not lost on the learned trial Judge. Indeed he was up to the task and analysed this legal conundrum in the following introductory remarks in his judgment on 20/12/2017 and supported same with the long quote of the cross-examination of the 1st Plaintiff on 22nd November, 2016, by which the Plaintiffs woefully failed to support the substance of their claims.

"And having made their claim as beneficiaries from the probates of the last Will and Testament of James Hansen Sackey, see Exhibit A and also from the probate of Samuel Quao Sackey dated 24th September 1962. See Exhibit B, the plaintiffs indeed had to prove same during the trial but this is what transpired from the proceedings during cross-examination on 22nd November 2016; which failed to support their claim."

Quotations from the cross-examination of 1st Plaintiff by Counsel for 1st Defendant

Q. You filed a probate which you have labelled STA?

A: Yes my Lord

Q. It is in respect of whose Will?

A. Samuel Quao Hansen Sackey

Q. Is Samuel Quao Hansen Sackey different from J. Hansen Sackey?

A. J. Hansen Sackey is the father of Samuel Quao Hansen Sackey?

Q. I am suggesting to you that Exhibit STA has nothing to do with the subject matter of this case

A. I will leave that to my lawyer

Q. Look at the probate of James Hansen Sackey, Exhibit A, can you tell the court whether the property in dispute, House No. D835/42 has been mentioned in the Will of James Hansen Sackey

A. That property is not mentioned here. (Emphasis mine)

Q. You would agree with me that James Hansen Sackey listed all his properties in his Will and gave all of them to his children?

A. Yes my lord [Emphasis mine]

Q. I am therefore suggesting to you that the subject matter of this suit, House No. D. 835/42 Accra which is also at times referred as

D 385/4 Okaishie Kojo Thompson Road, Accra, has never been a property of the late James Hansen Sackey as it is not mentioned in the Will.

A. Yes, my Lord (Emphasis mine)

Q. Kindly take the Will of Samuel Kwao Sackey, Exhibit B, and patiently go through it and see whether Maria House the subject matter of this suit has been mentioned in it

A. No, my Lord

Q. You made reference to a vesting assent which is attached to the probate, Exhibit D, executed between Emmanuel Daniel Tackie and Hansen Myers Bannerman Thompson as the executors on one side and Sarah Fatuma Sackey, Selina Betty Tackie and Mary Bannerman Thompson they executed it on 29th November 1963, you are aware of that document?

A. Yes, my Lord

Q. And the purpose of Exhibit D was to vest the property of the late Samuel Hanson Sackey to his beneficiaries of his estate?

A. Yes, my Lord

Q. This vesting assent does not make reference to the subject matter in dispute?

A. Yes my Lord"

The proceedings during cross-examination on 1st day of December 2016 revealed as follows:-

Q. **"You would agree with me that from the previous proceedings the Will of Samuel Quao Sackey never mentioned or devise House No. D835/4 Thompson Road, Accra to any of the persons you have mentioned in paragraph 7 of your witness statement.**

A. Yes, my Lord

Q. You stated in paragraph 10 of your witness statement that there were series of litigation in or about July 1987, who were the plaintiffs in that litigation.

A. Mrs. Selina Betty Tackie who happens to be my mother, Mrs. Mary Bannerman Thompson who is my aunty.

Q. These two names you have mentioned, they claimed to be beneficiaries of the estate of the late Samuel Quao Sackey.

A. Yes my Lord

Q. Based on that believe that the subject matter of this case is part of their estate that is why they mounted this litigation?

A. Yes my lord

Q. Apart from Exhibit G series up to H, look at the defendants Exhibit 10 series filed by the 1st defendant which you have referred to as litigation at the District Court between Mrs. Bannerman Thompson against Akrashie and 5 others with Suit No. A9/8/08, have you seen that?

A. Yes my Lord

Q. The Exhibit 10 A, up to D are the proceedings as well as the Writ which went on at the District Court?

A. Yes my lord

Q. At page 7 of Exhibit 10 D, the court made an order that the suit is struck out for want of prosecution?

A. Yes, my Lord

Q. You now realized that you have no judgment at the District Court as you claimed that you are victorious?

A. No, my lord

Q. You mounted this case at the District Court after you have gone to the CDR?

A. Yes my lord

Q. Refer to the 1st defendant's Exhibits 7, 8 & 9?

A. Yes, my Lord

Q. If you say that your mothers put the 2nd defendant in the property which mothers are you talking about?

A. Mrs. Selina Betty Tackie and Mrs. Bannerman Thompson

Q. Exhibit 7 shows tenancy agreement?

A. Yes, my Lord

Q. Efua Sackey is the lessor and Ernest Kofi Badu is the lessee, you agree with me?

A. That is what I see

Q. That lease agreement was executed on 1st May 1985?

A. That is what I see on the document

Q. In Exhibit 8, the lessor there is Elizabeth Kai Nettey?

A. Yes my Lord

Q. And that Exhibit 9 executed on 6th June 2000?

A. That is what I see on the document.

Q. The 2nd defendant has been a tenant in the property from 1st May 1985 up to 6th June 2000 and he was put there by the 1st defendant predecessor and their descendants including the 1st defendant?

A. That is what I see"

Continuing further, the learned trial High Court Judge held thus:-

"Having critically examined the documentary and oral evidence adduced by the plaintiffs I hold that they failed to demonstrate that the defendants fraudulently procured the judgment complained of.

Aside the judgments complained of there is evidence before me depicting that the 1st defendant's predecessors in title had been in absolute and exclusive possession of the property in dispute since 1929 without any challenge by plaintiffs family.

In all these cases, acts of ownership are receivable not as admission, since they operate in favour of the party exercising them, but as evidence of possession, and thus as proof of title.

In situations where the defendant is in possession, the task of the plaintiff becomes more daunting; since the possession can be used as basis to claim title." Emphasis supplied

The learned trial High Court Judge then referred to the case of ***Odonkor & Ors v Amatei [1992-1993] GBR 59, SC*****,** (holding 10) and concluded his judgment as follows:-

"I wonder what the plaintiffs' family were doing when the 1st defendant predecessors were exercising their rights of possession over the land. *Section 26 of the Evidence Act, 1975, NRCD 323 reads:-*

"Except as otherwise provided by law, including a rule of equity, when a party has by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such a belief, ***the truth of the thing shall be conclusively presumed against that party or his succession in any proceedings between that party or his successors in interest." Emphasis supplied***

From our own observations, the above conclusions by the learned trial Judge were validly made.

MATTERS ARISING FROM THE EVIDENCE UNDER CROSS-EXAMINATION OF THE PLAINTIFF

1. That the 1st Plaintiff was unable to testify as to whether the properties in dispute were included in the last will and Testament of Samuel Quao Sackey. Indeed when pressed by learned counsel for the 1st defendant, he said he will leave the answer to his lawyer.
2. The 1st Plaintiff laboured to admit that the properties in dispute were also not included in the Will of James Hansen Sackey, who was the father of Samuel Quao Sackey and brother of Afua Sackey, the original owner of the properties.
3. If the properties in dispute, did not form part of the last Will and Testament of both father and son, James Hansen Sackey and Samuel Quao Sackey respectively then the plaintiffs did not establish any basis or nexus for their root of title to the properties in dispute.
4. The evidence under cross-examination of the 1st Plaintiff vividly concluded that, the properties in dispute including Maria House did not form part of the probate of both James Hansen Sackey and Samuel Quao Sackey.
5. The 1st Plaintiff categorically admitted during cross-examination that the Vesting Assent of Samuel Hanson Sackey Exhibit D, never included or made reference to the properties in dispute.
6. It also emerged that, the mother of the 1st Plaintiff, Mrs. Selina Betty Tackie and her sister, Mrs Mary Bannerman Thompson never had any judgment in respect of the properties in dispute. As a matter of fact, even though they purported to take some action before the District Court, Accra Community Centre the said suits were on the basis of the foregoing discussions **struck out on the 4th day of September 2008 for want of prosecution.**

It is also interesting to observe that, in this Suit No. A9/08/08, Mrs. Mary Bannerman-Thompson sued 6 Defendants, namely Akrashie, Kofi Badu the 2nd Defendant herein, Amadu Maiga, Seidu Ibrahim, Habibu Seidu and Madam Evelyn.

From the records, the 1st Plaintiff's maternal Aunt, Mrs. Mary Bannerman-Thompson never obtained any judgment against the 1st Defendant, nor against anybody claiming through them.

7. On overt acts of possession in respect of the disputed properties, the 1st Plaintiff was virtually compelled to corroborate the evidence of the 1st Defendant during cross-examination when he stated that, Exhibit 7 indicated clearly that, it was Margaret Nettey, acting as head of the Efua Sackey family who leased the properties in dispute on the 1st day of May, 1985 to Ernest Sarpong Kofi Badu the 2nd Defendant herein for ten years, and renewable thereafter for periods of five years, which was indeed renewed by Elizabeth Kai Nettey, on the 1st day of May 1995, See Exhibit 8.

   Per Exhibit 9, the same Elizabeth Kai Nettey again renewed the lease in respect of the properties in dispute to the same lessee, the 2nd Defendant herein Ernest Badu on the 6th of June, 2000.

8. All the above overt acts of ownership and possession indeed were so pronounced that the learned trial judge cannot be faulted for holding that the Plaintiffs failed to show that the defendants fraudulently procured the judgments in issue.

On the authority of the celebrated case of ***Tsrifo v. Duah VIII (1959) G.L.R. 63 at 64, Ollennu J,*** (as he then was) held as follows:

> *"Where the evidence of one party on an issue in a suit is corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses,* ***a court ought not to accept the uncorroborated version in preference to the corroborated one, unless for some good reason (which must appear on the face of the judgment) the court finds the uncorroborated version incredible or impossible."***

See also the cases of ***Ago Sai & Others v Kpobi Tetteh Tsuru III [2010] 762 at 785, Yaw v Domfeh [1965] GLR 418 SC*** and recently in ***In Re WA NA; Issah***

Bukari substituted by ***Mahama Bukari & Anr v Mahama Bayong & Others [2013-2014] 2 SCGLR 1590 at 1608*** where the principle in ***Tsrifo v Duah VIII*** supra was applied.

The result was that, from the evidence of the 1st Plaintiff under cross-examination copiously referred to, supra, in substance, the said evidence corroborates the essential key characteristics of the case of the 1st Defendant as indeed was alluded to by the learned trial judge.

From the narrative, the 1st Plaintiff agreed that, the 2nd Defendant had been a tenant of the 1st Defendant's predecessors of the disputed properties since 1st May 1985 up to 6th June 2000 a period of approximately 15 years, continuous.

Having re-examined the entire record of appeal in line with the principle of law referred to in the case of ***Tuakwa v. Bosom*** supra, we are more than satisfied that the concurrent findings made by the trial court and the Court Appeal as was laid down by this court in the case of ***Obeng and Others v. Assemblies of God Church, Ghana, [2010] SCGLR, 300*** at 323 that, if there are no compelling reasons to disturb the findings of fact so ably formed by the trial court and concurred in by the Appeal Court then a second appellate court like this court should not depart from the findings. See also the case of ***Achoro v. Akanfela [1996-96] SCGLR 209 holding***, (2).

We now consider the legal issues raised by the cross-examination of 1st Plaintiff on the Testamentary Dispositions allegedly made by James Hanson Sackey and Samuel Quao Sackey in respect of the disputed properties.

CAPACITY TO MAKE A WILL

In Ghana, a person of or above the age of eighteen years may dispose by will any property belonging to him which is self-acquired. See the Wills Act, 1971 (Act 360).

It should however be noted that until the passage of the Wills Act in 1971, the law on Wills in Ghana had been governed by the Wills Act, 1837 of England. It must also be

noted that, a property or properties held on behalf of a group of persons, such as a family, ***a property which is communally owned or is a community property cannot be the subject-matter of a testamentary disposition by an individual person in his own right as if the subject property is his self-acquired property.***

A.K.P., Kludze in his invaluable book "Modern Law of Succession in Ghana" 2015 Edition, page 17 writes thus:-

> *"Any purported disposition of family property by Will is ineffectual because "nemo dat quod non habet. See* ***Bransby v Grantham (1587) Plowd. 525, 526; 75 E. R. 776, 777, Hastings (Lord) v Douglas (1634) Cro. Car 343, 346, 79 E. R. 901, 903****.*

The learned author explained further on pages 17 -18 as follows:-

> *"Indeed this is the meaning of section 1 of the Wills Act, 1971 which provides that a person may make a will* ***"disposing of any property which is his or to which he may be entitled at the time of his death or to which he maybe entitled thereafter."***

Section 3 of the Wills Act, 1837 provided thus as follows:-

> *"It shall be lawful for every person to devise, bequeath, or dispose of, by his Will executed in manner hereinafter required, all real estate, and all personal estate which he shall be entitled to, either at law of in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of would devolve upon the heir at law…"*

See also ***"The Law on Family Relations in Ghana"*** W. C. Ekow Daniels, Chapter 10 pages 435 – 436.

From the above textbook writings and the principles espoused therein, it is very apparent that a Testator can only devise property that is his own self acquired at the time of its devise in the Will, or as at the time of his death.

Having admitted during cross-examination that the devises contained in the Will of Samuel Quao Sackey of the disputed properties to the named beneficiaries, through whom the plaintiffs claim their root of title is imaginary, and non-existent, the said contention is therefore false, and the effect is that the devises contained therein are null and void and of no effect whatsoever.

That being the case, it means that, the purported Vesting Assents relied upon by the plaintiffs flowing from the Will of James Hansen Sackey and Samuel Quao Sackey are false, fraudulent and convey absolutely nothing to the plaintiffs in respect of the properties in dispute.

HAVE THE PLAINTIFFS MADE OUT A CASE FOR WHICH THEY SHOULD HAVE JUDGMENT?

It should be appreciated that, in these proceedings, the defendants have not counterclaimed. Thus the burden of proof is on the plaintiffs to establish their case on a balance of probabilities.

However, as has been amply demonstrated in this delivery, the plaintiffs have only succeeded in demonstrating their ability in shifting their goal posts as and when necessary.

The Plaintiffs initially claimed absolute ownership of the properties in dispute through devises made by their predecessors in Wills. These contentions have been proven to be incorrect as the Wills contained no such devises. As a result, the Plaintiffs shifted their positions to claims of joint interest with the 1st Defendant's branch of the family.

The claims of the plaintiffs have indeed showed a marked departure, which has been proven not to be consistent with rules of procedure allowed under the Rules of this court and of the lower courts.

It is interesting to observe that, it is the same plaintiffs who described the **1st Defendant as a trespasser and an intermeddler, but who has now been accorded**

recognition as a descendant of Abla Sackey, a sister of the full blood to Afua Sackey, who originally owned the properties.

The principle of law decided in the case of ***Tsrifo v Duah VIII*** supra applies.

SAMANSIW OR NUNCUPATIVE WILL

The plaintiffs have as it were, made a complete turn around and come to support the case of the 1st Defendant. The only point of departure is the issue of the nuncupative Will, Samansiw that the 1st defendant has pleaded and led evidence on.

In paragraph 12 of the Defence of the 1st defendant, the following averments are contained therein.

> ***"1st Defendant says Afua Sackey called a meeting and made a Samansiw and gave the documents to the (sic) Abla Sackey (the sister) and that is why Samuel Quao Sackey gave the documents to Margaret Nettey the eldest daughter of Abla Sackey before he Samuel Quao Sackey died in 1962 according to the writ.*** *Emphasis supplied*

The 1st defendant amplified the said averments on the incident of the Samansiw in the witness statement as per paragraph 13 of the said statement.

The evidence of the 1st defendant during cross-examination by learned counsel for the plaintiffs showed his resilience and credibility as a witness of truth. Indeed, he appeared to us as a very thoughtful and principled witness whose evidence is to be preferred to that of the 1st plaintiff.

OVERT ACTS OF OWNERSHIP

The following acts indicated quite clearly that the evidence of 1st defendant on overt acts of ownership in respect of the disputed properties since 1929 to date prove that he and their predecessors in title have had long and undisturbed management and control over the properties.

- 2nd May 1929 – Lease agreement between Afua Sackey and Hykel Elias Farah- Registered as No. 294/1929 and or 1694/29 for 25 years to be renewed for further 10 years.
- An assignment between Joseph Moses Gossayn, - a Lebanese Merchant, assigned the residue of his term as an Assignor to Paul Yeboah for the remainder of the term referred to in paragraph one supra.
- 1st May 1985 – Lease Agreement between Margaret Nettey, Head of Family of Efua Sackey and Ernest Sampong Kofi Badu (2nd Defendant) stamped as AC 3858/B/85 for ten (10) years.
- 1st May 1995 – Lease Agreement between Elizabeth Kai Nettey, Head of family of Efua Sackey and Ernest Sampong Kofi Badu for five (5) years and stamped as LVB 12593/98.
- 6th June 2000 – Lease Agreement between Elizabeth Kai Nettey (Lessor) and Ernest Sampong Badu.
- Exhibit E 2 – Proceedings before A. S. Dombo, Ag. Chief Rent Officer sitting over case ***No. ARC 1929/2010 dated 8/6/2010 between John Nettey – Complainant v Sampong Kofi Badu – Tenant/Respondent.*** This was a case in which the complainant, 1st Defendants' predecessor took action against the tenant 2nd defendant herein for recovery of possession and rent arrears. At the end of the proceedings it was ordered as follows:-

  > ***"Rent Magistrate shall issue an order to compel Respondent/tenant to settle all rent arrears due as at 30th September 2010 totalling GH¢74,200 with manse (sic) profit to complainant/landlords and also "evict" him as tenant forthwith."*** *Emphasis supplied*

On the contrary, the only incidents of overt acts on the part of the plaintiffs and their predecessors worthy of note ended miserably and constitute the following acts:-

a. **Exhibit J**, which is a letter dated **19/11/1997** signed by **Mrs. Mary Bannerman Thompson** to Mr. Frempong, a tenant of H/No C53/2 Adabraka – Accra to vacate the said property, on grounds stated in the letter, **exhibit J.**

It is worth noting that H/NO C53/2 Adabraka is not one of the disputed properties as per the writ of summons herein.

b. Institution of **suit Nos P.204/9/86 dated 13/7/1987 between Mrs. Selina Tackie and Mrs Mary Bannerman Thompson v Margaret Nettey and Paul Yeboah and Suit N. A9/8/08 between Mrs. Mary Bannerman Thompson v Akrashie and 5 others in 2007. Both suits were at the District court/community centre, Accra and were all struck out for want of prosecution.** *Emphasis supplied*

VALIDITY OF "SAMANSIW"

Having considered in context the above pieces of evidence and the various overt acts of ownership performed by the contending parties herein, and putting these in context against the established characteristics of a valid *"Samansiw"* this court will examine the emerging essentials of a valid nuncupative Will or samansiw in the light of the following respected judicial decisions.

c. ***Summey v Yohuno [1960] GLR 68-73***
d. ***Mahama Hausa v Baaku Hausa [1972] 2 GLR 469***
e. ***In re Armah Dec'd; Awotwi v Abadoo [1977] 2 GLR 375, CA***
f. ***Prempeh vAgyepong [1993-94] 1 GLR 255***
g. ***Buckman & Others v Ankomayi & Anr [2013-2014] 2 SCGLR 1372 at 1383 – 1384*** Where our respected sister, Vida Akoto-Bamfo (JSC) speaking on behalf of the court, after analyzing the judicial decisions referred to supra and also referring to in extenso the rationale of Franocis JSC's decision in **Prempeh v Agyepong** supra, held as follows-

"the pristine formulations of Sarbah, Rattray and Ollennu have had to yield to three simple rules, namely self acquired ownership in the testator, his sanity at the time of the declaration and attestation by credible disinterested witnesses, two at least in normal circumstances, but one permissible in extreme exigencies". Having referred to the said principles, the court then reformulated the essential requirements or characteristics of a Samansiw thus:

i. ***The property must be self acquired***
ii. ***The testator must be sound in mind and***
iii. ***The declaration must be attested to by two credible disinterested witnesses."*** *Emphasis*

The essential requirements of Samansiw have thus been recast as stated supra. See the invaluable work of Yaw Oppong *"Contemporary Trends in the Law of Immovable Property in Ghana",* chapter 6, Section B, part II pages 798-802.

We have also considered the pioneering works of Ollennu, Kwabena Bentsi-Enchill, A.K. P Kludze, Gordon Woodman and W. C. Ekow Daniels, and agree that the three essential criteria set out supra should be the guiding essentials or characteristics to determine the validity of a customary law will, Samansiw.

Using the above in context, we are of the considered opinion that it is highly probable that Afua Sackey made a Samansiw in respect of the properties to her sister Abla Sackey. This is consistent in Samuel Quao Sackey handing over all the documents of title in respect of the said properties to the children of Abla Sackey.

We have indeed verified from Exhibit 6, which is a document relied upon by the 1st Defendant which was attached to his witness statement and tendered as part of their case. This document contains very important recitals on the management of the property in dispute.

From these recitals, it is clear that, the following transactions have been noted in Exhibit 6.

i. By an Indenture of Lease, referred therein as the **Principal lease, dated 2nd day of May 1929 and registered as No. 294/1929 and made between Efuah Sackey as Lessor and Hykel Elias Farah as Lessee,** the property was demised from 1st day of June, 1929 for 25 years at a yearly rental of £60.

ii. **On the 18th day of October 1929**, by an **Indenture of Mortgage** registered as No. 655/1929 and made between the **Lessee on the one part**, (and this is Hykel Elias Farah) and the **Bank of British West Africa Ltd**. hereinafter called the **Bank,** the hereditaments comprised in the principal Lease were assigned by the Lessee to the Bank for an overdraft of current account.

iii. **On the 8th day of March 1933, an Indenture of Assignment** (called the Assignment) and registered as No. 173/1933 and made between the said **Hykel Elias Farah** as **Vendor** and the Bank, joining the said hereditaments and premises demised by the principal lease were for the consideration therein mentioned assigned by the Lessee (Hykel Elias Farah) to Michael Solomon Haick also known as Michael Haick (deceased) **for the residue then unexpired of the 25 years created by the principal lease and WHEREAS**

iv. **By a further Indenture of Assignment, (called the 2nd Assignment) dated 7th day of March 1949, registered as No. 304/1949 between William Bedford Vanlare Esquire, District Magistrate, Accra (as he then was)** The Administrator of the Estate of Michael Solomon Haick, otherwise known as Michael Haick (deceased) (hereinafter called the Administrator) and Joseph Moses Gossayn of Accra, the Lessee herein, the hereditaments in the principal lease were for the residue of the unexpired term of 25 years assigned by the Administrator to the Lessee for the residue of the unexpired term of 25 years created by the principal lease.

v. **On the 1st of June 1954,** at the request of the Assignor, the Lessor granted a further lease of the premises for a further term of ten years, and evidence by an Indenture of Lease dated the **15th day of November 1951** and stamped as **No. 52/1952.**

vi. And whereas by an Indenture of Lease dated the **15th day of November 1951**, stamped at the District Treasury as No. 51/1951 and made between "**Dedey Sackey" Head of the Family of Efuah Sackey, late of Accra** deceased with the consent and concurrence of the said family aforesaid **therein described as the Lessor of the one part,** the hereditaments described was demised to the Assignor herein, And whereas the Assignor's beneficial owner of the property assigned in respect of the residue of the term of twenty (20) years commencing from the first day of June 1964 created by the above named Indenture of Lease."

The significance of this long narrative on the noted transactions in respect of the disputed properties show clearly that, as at the date when the last assignments and noted transactions were recorded in 1951, Afua Sackey and her sister Abla had died and so also was their only male brother of the full blood, James Hansen Sackey. If as the Plaintiff's would want the court to believe that Samuel Quao Sackey was the one who inherited the disputed property either as an adopted son or as of right, why was his name not recorded in the said 1951 and 1954 transactions as he was still alive by those then? It must be reiterated that, once a transaction has been held to constitute a valid customary law Will "Samansiw", it confers absolute interest on the beneficiaries so named and the devises do not lapse after the death of the original beneficiary such as Abla.

It was as a consequence of this that Abla's descendants, the 1st Defendants herein claim the disputed properties. Devises contained in any valid Samansiw, must be noted do not confer only life interest in the beneficiaries and after their death the property becomes family property as was erroneously contended by the plaintiffs.

This we dare say speaks volumes and lends further credence to the fact that it was because of the Samansiw of which he was alleged to be present and aware of that he did not engage in any transactions in his personal capacity after the death of his Aunts, Efua and Abla.

It is also of interest to note that, of the persons reputed to be present at the meeting when the "Samansiw" was declared in favour of Abla Sackey by Efua her sister were

Samuel Quao Sackey and his senior brother the wealthy James Quao Sackey- the Auctioneer and other representatives of the Sackey family.

In essence, the Samansiw thus appears to have satisfactorily complied with the requirements of persons needed to be present at such a declaration to give it legitimacy as stated in the case of ***Buckman and Others v Ankomayi & Anr***, supra.

ISSUE OF SAMANSIW

It is worth noting that learned counsel for the plaintiffs made a weak reaction to the evidence of the 1st defendant on the claim that Afua Sackey made a valid nuncupative will in favour of her sister Abla Sackey before she died in 1941.

The evidence for this claim has been provided by the 1st defendant in his witness statement and amplified by Exhibit 4 which was attached to the witness statement, and is headed "*History of the Sackey Family, Afua Sackey, Abla Sakey (sic), James Hansen-Sackey and William Attu Kwamina Afful."*

Part of this reads on the Samansiw as follows:-

> *"The longevity of life is based on God's will and grace; not by men's desire, unfortunately, Afua Sackey became ill in September 1940 and she left Nima to join her sister Ablah at Adabraka for healthcare. The sickness pretaracted (sic) and Afua Sackey peacefully died on 17th February 1941 at the age of 78 years."*
>
> ***Before her death, she summoned a meeting of the Sackey family and told them that as customary law demands as she had no child, her only sister Ablah Sackey should become the sole beneficiary and inheritor of her property.***

The family members present at the meeting were namely, ***Ablah Sackey, Kojofio Sackey, J. Quao Sackey (Auctioneer) Mrs Adjoa Jacobson, Emmanuel Easmon Sackey, Samuel Quao Sackey and three (3) daughters of Ablah Sackey, Margaret Yaahia Nettey, Elizabeth Kai Nettey and Rebecca Tsotso Nettey****.*

All of them were witnesses of Afua Sackey's statement that her only sister Ablah Sackey should be the sole beneficiary and inheritor in ***accordance with Ga customary law called "shamansho" and should therefore be accepted and upheld****.*

In 1929 Afua Sackey asked Samuel Quao Sackey to manage the leasing of her property at Okaishie to a Lebanese named Mr. Gosassyn. The lease was made for twenty (20) years but sometime in 1937/38 Afua Sackey needed some money and the money was provided and the lease was extended. Ablah Sackey who inherited Afua Sackey's property also died in 1944." Emphasis supplied

The above quotation formed part of exhibit 4, attached to the witness statement of the 1st defendant. Learned counsel for the plaintiff, in an attempt to water down this evidence of the samansiw, engaged the 1st defendant in this question and answer session during cross-examination thus:-

Q. "I am putting it to you that your statement in paragraph 13 is a figment of your own imagination since you were not a witness to the allegation made about the samansiw?

A. In our defence, we produced a family history and it is there in the family history.

Q. Who wrote the family history?

A. It was written by the late Isaac Akrashie Vanderpuye, my cousin

Q. I am putting it to you that family history written by the said Isaac Akrashie Vanderpuye does not reflect the true state of affairs in respect of the property in dispute.

A. It reflects the true state. I can again refer to the last assignment that Mr. Kwao Sackey made before he died.

Q. When did Mr. Kwao Sackey die?

A. According to evidence supplied by the plaintiff it was in 1962

Q. And what was the last assignment that Mr. Kwao Sackey made?

A. That last assignment is dated 1951

Q. What is the last assignment that is dated 1951

A. It is one of the exhibits, it is between the one who had it and Mr. Paul Yeboah, i.e. exhibit 6

Q. Can you tell the court what exhibit 6 has to do with Mr. Kwao Sackey?

A. At that time, Afua Sackey was dead, Abla Sackey who inherited the property also died in 1944. Thus in 1951 if the property belonged to Samuel Kwao Sackey, his name should have been in that document as the owner.

Q. I am putting it to you that what you are saying is a figment of your imagination.

A. The claim of plaintiff is that, the property belongs to Samuel Kwao Sackey and if Afua Sackey is dead, Abla is dead and in 1951 the property is being leased, Samuel Kwao Sackey's name should have been there as the owner. However, he put the name "Dede Sackey" as the head of the Sackey family on the assignment." Emphasis

We have already referred to in detail the various notations in this Exhibit 6. It bears emphasis that, this exhibit correctly refers to all the valid and noted transactions made by Efua Sackey before her death in 1941, and thereafter by Dede Sackey in 1951 after the death of Abla Sackey also in 1944.

What is worthy of note is that, Samuel Quao Sackey is reported to have died in 1962, meaning he was alive by the date of the transactions, in 1951 and 1954. We can only conclude that the matter speaks for itself that he knew the properties did not belong to him hence did not claim the properties in the assignments noted therein.

Taking all the above into consideration and applying them to the circumstances of grounds one and three of appeal, we are of the firm opinion that the plaintiffs did not seriously challenge this evidence of samansiw in favour of Abla Sackey. Besides, the subsequent conduct of Samuel Quao Sackey confirms the assertion that he indeed was present at the family meeting called by Afua Sackey when the said declaration was made in favour of Abla Sackey. That being the case, it is clear that the plaintiffs have no claims whatsoever to the properties in dispute.

On the basis of the foregoing discussions, it is our considered decision that, the plaintiffs have not made a good and sufficient case on this ground of appeal, including in part ground three as well, to enable this court overturn the lower court decisions. The appeal is thus dismissed in respect of this ground of appeal, and partly in respect of ground three which deals with the matter of samansiw.

We could have rested our decision on the above rendition , but we will be gracious in considering very briefly grounds two and part of three together as follows:-

GROUND TWO

The learned Court of Appeal erred when it rejected Plaintiff's case which is rooted in fraud same perpetrated by the defendants at the District Court to obtain judgment at the blind side of Plaintiffs being branch heads of the family.

GROUND THREE

The learned Court of Appeal erred when it affirmed the decision of the High Court and thereby occasioned a grave miscarriage of justice as the judgment amounts to disinheriting plaintiffs' lineage from the subject-matter family property, which at all material times Plaintiffs have enjoyed proceeds thereof as beneficiaries.

ARGUMENTS OF LEARNED COUNSEL FOR THE PLAINTIFFS IN SUPPORT

The arguments of learned counsel for the plaintiffs Jonathan Sarblah in respect of grounds 2 and 3 are somewhat incoherent, disjointed and illogical.

In one breath, learned counsel as pointed out supra, just referred to quotations from the Constitution 1992, Statutes and decided cases to make up for non-existent grounds of appeal.

Based on references to Articles 11 (1) (2) and 36 (8) of the Constitution on the sources of Law and fiduciary duty of heads of family and the case of ***Welbeck v Okai [2006] 3 GMLR 217 at page 224***, learned counsel concluded that the conduct of the 1st Defendants' branch of the family by excluding them from partaking in the proceedings in the suits instituted by 1st defendants predecessors at the District Court in respect of the disputed properties constituted fraud.

In this respect, learned counsel relied on the CDR Arbitration of 1987 in support of his arguments. Relying on the case of ***Owuo v Owuo [2017-2018] 1 SCGLR*** at page 730, learned counsel reiterated his allegation of fraud on the part of the 1st defendant in respect of the said judgments.

In respect of ground three, learned counsel for plaintiffs, again just referred to Statutes of general application like the Intestate Succession Act, 1985 (PNDCL 111) and Head of Family (Accountability) Act, 1985 (PNDCL 114) and argued that,

> *"Where the intestate is not survived by a spouse, a child or a parent the estate shall devolve in accordance with customary law."*

It is interesting to observe that, on this ground of appeal, learned counsel for the Plaintiffs again made a significant departure from his case at the trial High Court to this court in the following terms:-

> "*In the instant case of Afua Sackey, the original owner of Maria House, who died sometime after 1929 without a spouse or child. The application of both customary law and statute law to the devolution of the property of her Estate ought to be conferred on both her immediate brother* ***James Hansen Sackey and immediate Sister Abla Sackey. He continued that, the Intestate, being a native Ga from a matrilineal system of inheritance, the intestate properties were to be enjoyed by the descendants of Plaintiffs and 1st Defendants predecessors."*** *Emphasis supplied*

References were made to several cases which are not worth considering. It is significant to note that, learned counsel for the plaintiffs rested his arguments on the fact that, both descendants of James Hanson Sackey and Abla Sackey are entitled to the properties in dispute.

ARGUMENTS BY LEARNED COUNSEL FOR THE 1ST DEFENDANT

The brief response of learned counsel for the 1st defendant, Ray Appiah-Amponsah in respect of these two grounds of appeal are as follows:-

1. That, the admission by the 1st plaintiff during cross-examination that he was never aware of the pendency of the two suits instituted by the 1st Defendant against the

2nd Defendant for rent arrears and recovery of possession speaks volumes and amounts to inconsistency on the part of the plaintiffs. What must indeed be noted is that if the 2nd defendant who has been a tenant in the disputed premises for a considerable length of time since 1985 has defaulted in the payment of rent, and had been taken to court to enforce the payment of same by the 1st defendant, and this phenomenon is unknown to the plaintiffs and or their predecessors in title, then it smacks of the fact that they had no interest in the properties. Besides, court proceedings are public events and if the plaintiffs had been vigilant, they would have known about these proceedings.

2. Learned counsel for the 1st Defendant again made references to the cross-examination of the 1st plaintiff wherein he admitted that the subject properties in dispute never formed part of the devises in the Wills of both James Hanson Sackey and Samuel Quao Sackey.

As a matter of fact, the reference to the CDR Arbitration report to bolster the case of the plaintiffs is unfortunate. This is because, as is stated elsewhere in this delivery, the CDR Arbitration does not qualify to be labelled as an Arbitration. The 1st Defendant's predecessors resiled from the proceedings at the CDR before the award was published. That being the case, that report loses its significance.

For this and the other reasons more comprehensively dealt with elsewhere, in this delivery the proceedings before the CDR is rejected.

We further observe that, the learned trial Judge, spent considerable energy and time on the issue of fraud. In evaluating the assessment of the issue of fraud raised by the Plaintiffs as regards the procurement of the judgments by the 1st Defendant by fraud, we observe that the analysis and conclusions of the matter by the learned trial Judge are in tune with current learning and procedure on the principles involved in setting aside of judgments on grounds of fraud.

For example, the learned trial Judge correctly applied the principles of law enunciated in notable judicial pronouncements in the following cases on fraud.

h. Dzotepe v Hahormene III (No.2) [1984-86] GLR 294 C.A

i. Lartey and Lartey Ltd v Beany and Anr [1987-88] I GLR 590

j. Poku v Poku and Others [2007-2008] 2 SCGLR 996

k. Fenuku v John Teye [2001-2002] SCGLR 985 and

l. ***Jonesco v Beard [1930] Ac 298 at 300-301***

Where it was held per James L.J as follows

> *"You cannot go to your adversary and say "You obtained judgment by fraud" and will have a rehearing of the whole case until that fraud is established.* ***The thing must be tried as a different and positive issue. Emphasis supplied***

Indeed the key principles that flow from all the above decided cases are that:-

1. The fraud must be distinctly alleged and proven in a suit.
2. An action must be taken to set aside the judgment alleged to have been procured by fraud
3. The burden of proof is on the person who is alleging fraud and the burden of persuasion where criminality is alleged is proof beyond reasonable doubt as provided for under section 13 (1) of the Evidence Act, NRCD 323.
4. The victim of fraud must take prompt steps to set aside the transaction whilst the influence of the fraud or illegality still operates.

In the instant appeal, we observe that, whilst the plaintiffs were lackadaisical in their approach, they even during the time of the trial behaved as if they were still not aware of the contents and effect of the judgments alleged to have been obtained by fraud. Besides, the type of action commenced by them and the evidence led in support of the fraud did not meet the accepted standards set out above. Under the circumstances, we are of the considered view that, the Court of Appeal was right in affirming the decision

of the trial High Court on the refusal to grant the reliefs on the setting aside of the judgments obtained by the 1st Defendant from the District Courts on grounds of fraud.

We concede the legal submissions by learned counsel for the 1st Defendant that, since the principal actors in this case, namely Afua Sackey, Abla Sackey and Samuel Quao Sackey all died in 1941, 1944 and 1962 respectively before the Intestate Succession Act, Head of Family (Accountability) Act, and Administration of Estates Act, (all refereed to supra) were all enacted and came into force, these statutes do not apply to the circumstances of this case.

We accordingly dismiss grounds two and three of the appeal as well

PRELIMINARY LEGAL OBJECTION ON BEHALF OF 1ST DEFENDANT/RESPONDENT/RESPONDENT

Learned Counsel for the 1st Defendant, Ray Appiah Amponsah, in his introductory remarks in the statement of case filed on behalf of the 1st defendant summed up the basis of the preliminary legal objection in the following terms:-

> *"Preliminary legal objection for lack of capacity and locus standi of the plaintiffs to mount the present action and the Arbitration before the Committees for the Defence of the Revolution (CDR) in 1986".*

ARGUMENTS OF COUNSEL FOR 1ST DEFENDANT

Learned counsel copiously referred to the capacity under which the plaintiffs described themselves on the writ of summons thus:-

> ***"1. Solomon Tackie***
>
> ***2. Ago Bannerman Thompson, suing as joint heads of the Tackie and Bannerman Thompson families as well as customary successors and beneficiaries of the Estate of Samuel Quao Sackey" c/o House No. 521/4, Jones Nelson Road, Adabraka- Accra."***

The crux of the arguments of learned counsel for the 1st defendant under this preliminary legal objection has been anchored on averments in paragraphs 1, 2, 3, and 4 of the statement of claim of the Plaintiffs. The substance of the said averments are to the effect that, the plaintiff's root of title to the properties in dispute is provided for under the Will of Samuel Quao Sackey, probate of which had been granted to the named Executors and devises also made to the named beneficiaries. The 1st Defendant, however contends that, the incisive cross-examination of the 1st Plaintiff by counsel for the 1st defendant **disclosed that the properties in dispute, including Maria House did not form part of the devises and bequests in the said Will of S. Q. Sackey upon which the plaintiff's root of title has been founded.**

We have verified from the appeal record and can confirm that the said contentions are indeed borne out from the cross-examination as reproduced elsewhere in this judgment and thus borne out by the appeal record.

Secondly, learned counsel for the 1st defendant made references to the decision of the Committee for the Defence of the Revolution (CDR), one of the Bodies the plaintiffs resorted to in asserting their claims to the disputed properties in 1986, which was concluded in July 1987. It is perhaps of interest to observe that, the (CDR) made the following conclusions after their investigations:-

1. **The real owner of Maria House was the late Mary Afua Sackey, hereafter referred to as Afua Sackey".**
2. **Margaret Nettey has in her possession, Maria House lease documents only and not all documents on Maria House as said in evidence by her representative, James Hansen Sackey.**
3. **Both complainants and Margaret Nettey are related to the late Afua Sackey.**
4. **Afua Sackey, died intestate**
5. **Samuel Quao Sackey was the only one who cared for Afua Sackey and took responsibility of her funeral and burial rites after her death.**
6. **Samuel Quao Sackey was the adopted and only child of Afua Sackey.**

7. **Mrs. Selina Tackie (Nee Sakua Sackey) and Mrs Mary Bannerman-Thompson are the only beneficiaries of the property of the late Samuel Quao Sackey." Emphasis supplied**

It should be noted that, the two complainants mentioned supra are (1) Mrs. Selina Tackie and (2) Mrs. Bannerman-Thompson

Based on all the above findings, the CDR Arbitration Committee concluded their deliberations with the following statement:-

> "*Upon all evidence before the panel, it is established that,* ***the only legitimate heir and sole beneficiary of the property of the late Afua Sackey was the late Samuel Quao Sackey.*** *Since Mrs Selina Tackie and Mrs. Bannerman-Thompson are the only beneficiaries of the late Samuel Quao Sackey,* ***by will, they are the only legitimate beneficiaries of Maria House.***
>
> ***The case therefore goes in favour of Mrs. Selina Tackie and Mrs. Bannerman-Thompson****." Emphasis supplied*

Based on the above, learned counsel for the 1st defendant submitted that, on the authority of the following unreported case of the Supreme Court, Suit No. C. A. J4/15/2019 dated 18th March 2020, intitutled , ***Nii Kpobi Tettey Tsuru III (substituted by Nii Obodai Adan IV for and on behalf of La Stool) and 2 Others v Agric Cattle and 4 Others***, the law on capacity was restated by the Supreme Court as follows:-

> *"The law is trite that capacity is a fundamental and crucial matter that affects the very root of a suit and for that matter,* ***it can be raised at anytime even after judgment on appeal."*** *Emphasis supplied*

The above is undoubted good and sound principle of law which the court restated upon taking into consideration the following prior decisions:-

- ***Naos Holdings Inc v Ghana Commercial Bank [2005-2006] SCGLR 407***
- ***Sarkodie 1 v Boateng [1982- 83] 1 GLR 715 at page 724***

- ***Manu v NS/A [2005-2006] SCGLR 25***
- ***Oppon v Attorney-General and Others, [2000] SCGLR 275***
- ***Ampratwum Co. Ltd v D. I. C [2009] SCGLR 692***
- ***Republic v High Court, Accra Exparte Aryeetey – (Ankrah Interested party) [2003-2004] I SCGLR 398***

Based on the above submissions learned counsel for the 1st defendant urged upon this court to hold and rule that, since the plaintiffs had no capacity to mount the suit, the writ was a nullity and nothing can be founded upon it.

Secondly, learned counsel for the 1st Defendant submitted that in an attempt to resolve the impasse over disputed properties herein, the CDR relied heavily on the Will of the late Samuel Quao Sackey and that the said award was obtained by fraud, illegality and mistake and is incapable of operating as estoppel. Learned counsel referred to the cases of ***Appeah v Asamoah [2003-2004] SCGLR 236*** and ***Adwubeng v Domfeh [1996-97] SCGLR 66 where it was held that an award made by a committee that did not comply with the requirement of a prior agreement was held not to operate as estoppel."***

It should be noted that, learned Counsel for the Plaintiffs did not respond to the above preliminary legal objection by way of a Reply. However, being a legal objection we are minded to analyse the said submissions and deal with it, notwithstanding the non response of the Plaintiffs.

ANALYSIS

We observe that the Plaintiffs indeed endorsed their Writ with the capacity with which they instituted their action as

> *"Joint heads of the Tackie and Bannerman Thompson families as well as customary successors and beneficiaries of the Estate of Samuel Quao Sackey."*

It means that, the plaintiffs claim the following capacities:-

1. Joint heads of the

a. Tackie and
b. Bannerman Thompson, families

2. Customary successors of the Estate of Samuel Quao Sackey
3. Beneficiaries of the Estate of Samuel Quao Sackey

Indeed, per paragraph one of the Statement of Claim, the Plaintiffs averred as follows:-

> *"The plaintiffs are the current heads of family as well as customary successors of the Hansen Tackie and Bannerman Thompson families of Accra and bring their act (sic) for themselves and for all beneficiaries of the Estate of the late Samuel Quao Sackey."*

The plaintiffs then further asseverated in paragraphs 2 and 3 of the Statement of claim that the properties in dispute, namely H/NO. D.835/4, Tudu, Accra or H/NO D385/4, Okaishie, Kojo Thompson Road, Accra and known as Maria House belonged to Samuel Quao Sackey at the time of his death, and that he conveyed the said properties under his Will, probate of which was duly granted by the High Court, Accra to his **wife** and **children**. The plaintiffs further sought to claim lineage to the said S. Q. Sackey through their respective parents whom they claimed were beneficiaries under the said Will.

In our opinion, it is sufficient for the plaintiffs to have laid claims through lineage to Samuel Quao Sackey whom they alleged owned the properties at the time of his death and therefore had authority to make devises in his Will to the beneficiaries therein named. It bears emphasis that, since we have to consider the pleadings, facts of the case, evidence led during the trial and the law, we think it is premature to end the matter at this stage. We are therefore not in a position to uphold this preliminary legal objection on this first ground.

On the second ground which concerns the decision of the Committee for the Defence of the Revolution (hereafter referred to as (CDR) we will deal with the said issue as follows:-

Anybody, who has memories of what Ghana went through during the period 31st December 1981 through to the birth of the 4th Republic on 7th January 1993 will remember

that the (CDR's) were organs of the Provisional National Defence Council, (hereafter) (PNDC) the body that was formed after the overthrow of the 3rd Republic and exercised both the Executive and Legislative powers of the Government of Ghana from 31st December 1981 to 6th January 1993, see *Provisional National Defence Council (Establishment) Proclamation, 1981 and Provisional National Defence Council (Supplementary and Consequential Provisions) Law, 1982 PNDCL 42.*

As a matter of fact, we do not understand the purpose of the report of this dispute by the plaintiffs to the (CDR) and the reference to it before the proceedings in the High Court. This is because, the (CDR) did not have any judicial functions established by law. If the reference and reliance on the (CDR) proceedings was meant to establish a case in arbitration and therefore plead it as estoppel, then it is worth noting that the said proceedings and decision did not qualify to be described as such in the face of the law.

It has been held in a long line of respected judicial decisions as to what constitutes a valid customary arbitration or arbitration, to wit, *"the voluntary submission of a dispute by persons to a person or body for adjudication."*

In the celebrated case of ***Budu II V Caesar & Others [1959] GLR 410 at 413-414 Ollennu J***, (as he then was) laid down the following as essential characteristics of an arbitration, as opposed to negotiations for a settlement, viz.

a. Voluntary submission of the dispute by the parties to arbitrators for the purpose of having the dispute ***decided informally, but on the merits;***
b. a prior agreement by both parties to accept the award of the arbitrators;
c. the award must not be arbitrary, but must be arrived at after the hearing of both sides in a judicial manner;
d. the practice and procedure for the time being followed in the Native Court or Tribunal of the area must be followed as nearly as possible; and
e. publication of the award.

Furthermore, it should be noted that, Ollennu J, (as he then was) made the following notable judicial pronouncement:-

"In the case of arbitration, the award is binding upon the parties to it whether or not they accept it, the parties cannot resile after the award has been published."

Yaw Oppong, in his invaluable book *"Contemporary Trends in the Law of Immovable Property in Ghana"* after discussing and analysing basic principles on arbitration, the new ADR Act, 2010 (Act 798) Sections 89-112 on customary arbitration and reviewing cases like the following

- ***Pong v Mante IV & Others [1964] GLR 593 at 596***
- ***Ankra v Dabra & Anr. (1956) WALR 89***
- ***Manu v Kontre [1965] GLR 375 SC***
- ***Nyansemhwe v Afibiyesan [1977] 1 GLR 27***
- ***Asare v Donkor [1962] 2 GLR 176,***

Settled on the following as key requirements for a valid customary arbitration:-

i. Voluntary submission to the arbitration
ii. Prior agreement to accept the award
iii. Publication of the award

In ***Asare v Donkor*** supra, voluntary submission was explained as follows:-

"It is only when the person against whom the complaint is made after such an explanation, with full knowledge of the implications also expresses his agreement to the proposal of the complainant that an arbitration should be so held, that there could be a lawful submission by both parties, ***otherwise not."***

What is the substance of the evidence in respect of the reference and reliance of the Plaintiffs on this (CDR) Arbitration proceedings?

It is quite apparent that, the CDR Arbitration proceedings lack these basic essential characteristics and as will be unfolded in this delivery, does not qualify as an arbitration capable of being enforced against the 1st Defendant's branch of the family. ***What took place before this CDR proceedings can at best be considered as "a negotiation for settlement".*** It must however be reiterated that the result of a negotiated settlement was not binding on the parties until it was accepted by both. Since the record indicated quite clearly that the **1st Defendant's predecessors showed a clear indication not to continue with the proceedings and therefore resiled from it, the settlement itself was a failure and not binding. See *Mensah v Essah [1976] 1 GLR 424.***

We have perused the exhibits from page 219 labelled *(Arbitration)* to page 242 and hold that, the submission of the dispute to the (CDR) cannot be described as voluntary in the first instance, and also the award apart from being illogical and without any sound reasoning whatsoever lacks legitimacy and does not qualify as an arbitral award properly so called.

For example, the opening sentence on page 219 sets the tone for what happened at the CDR hearings.

> "*1986 Arbitration*
>
> *Both parties agreed by a decision of a larger group to settle this dispute.* ***They are Mrs. Tackie (deceased)*** *and* ***Mrs. Bannerman Thompson v Margaret Nettey and Paul Yeboah".*** Emphasis supplied

Can a dead person take part in this? Basically, what they agreed upon was to settle the matter. However, the body of persons before whom the dispute was submitted are not listed, and there is no record on this.

On page 239 of the record, the proceedings of 13th April 1987 have been noted as follows:-

"The second sitting on the above case took place on the 13th April 1987 with the following present.

1. *Mrs. Bannerman-Thompson*
2. ***Mrs. Tackie (Is it the deceased person?)***
3. *Mr. James Hansen Sackey*

Proceedings commenced with the panel making its decision known to the parties that, after ***careful study of the documents and verbal evidence presented by both sides, (it, the panel) deemed it proper to share the estate in question equally among Samuel Kwao Sackey (deceased) and Madam Margaret Nettey, notwithstanding the fact that Margaret Nettey and her associates had already committed certain legal blanders in respect to that estate.***

At this juncture, Mr. Hanson Sackey asked leave to contact Margaret Nettey and others as to the pronouncement brought about and then feed the panel back with full details of his parties…

The case was then adjourned till further notice." Emphasis supplied

Then on the 13th July 1987, the panel made a somersault, and gave its decision on page 242 of the record already referred to supra.

This decision of the (CDR panel) of the 13th July, 1987, introduced for the first time the issue of the adoption of Samuel Quao Sackey by Afua Sackey.

This finding does not form part of the case of the Plaintiffs whatsoever. This phenomenon really emphasizes the arbitrary, illogical and baseless nature of the CDR panel decision.

For example, if indeed Samuel Quao Sackey was the adopted son of Afua Sackey then she ought not to have been described as having died intestate, and without any child.

All the above show quite clearly that, the deliberations before the (CDR panel) cannot be said to be a judicial or quasi-judicial deliberation whose decision can operate as estoppel.

For example from the above narrative, it shows that the members of the panel are not stated and known, decisions are made arbitrarily without any basis. Cases are adjourned for further consultations and negotiations after decisions have been announced and later the tenor of the earlier decision changed completely without assigning any reasons. This therefore meant that, the decisions arrived at by the CDR panel was not only arbitrary, but also given without hearing all the parties, in a judicial manner, thereby in breach of the rules of natural justice. This is especially so as the record indicates clearly that the 1st Defendant's predecessors had resiled from the proceedings before its second conclusion.

Fundamentally, the fact that, it is unclear how the parties submitted themselves to the arbitration before the CDR makes the process invalid. Secondly, the nature of the proceedings does not conform to the essential requirements of a valid arbitration already referred to supra. Not having any legal mandate as well, the (CDR panel) can at best be described as a "revolutionary organ to wit, body of persons at the community and workplace put together by the PNDC and which was used by the Government at the time to give legitimacy to their authority.

At best, what took place before the CDR may be described as a negotiation for settlement from which the 1st Defendants branch resiled before the award was published.

We therefore hold and rule that, the decision of the CDR panel lacks any real or putative mandate and or authority to have adjudicated the dispute between the parties. In essence their decision lacks merit, and understanding and we refuse to follow and accept it.

Having dismissed the preliminary legal objections, we therefore proceed to conclude our rendition in the following terms.

CONCLUSION

In the premises, the appeal by the plaintiffs against the judgment of the Court of Appeal dated 24th July 2019 fails in its entirety and same is accordingly dismissed. We hereby affirm the judgment of the Court of Appeal of even date.

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

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

A. LOVELACE–JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

COUNSEL

JONATHAN T. SARBLAH FOR THE PLAINTIFFS/APPELLANTS/APPELLANTS.

RAY APPIAH AMPONSAH FOR THE 1ST DEFENDANT/RESPONDENT/RESPONDENT WITH IRENE APPIAH AMPONSAH