IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ANSAH, JSC (PRESIDING)
ADINYIRA (MRS), JSC (PRESIDING)
BAFFOE-BONNIE, JSC
AKOTO-BAMFO (MRS), JSC
APPAU, JSC

CIVIL APPEAL

NO. J4/36/2017

12TH DECEMBER, 2018

1. TOGBE AKPOMA I
   (SUING AS HEAD OF FAMILY
   OF RUDOLPH KOFI MENSAH (DECEASED))

2. KEN MENSAH
   (CUSTOMARY SUCCESSOR OF RUDOLPH
   KOFI MENSAH (DECEASED))

VRS

MRS. GLADYS MAWULI MENSAH
(ADMINISTRATRIX OF THE ESTATE OF
RUDOLPH KOFI MENSAH (DECEASED))

JUDGMENT

AKOTO-BAMFO (MRS), JSC :-

The appellants herein filed a Notice of Appeal against the decision of the Court of Appeal which set aside the decision and orders of the High Court dated the 18th of June 2015.

They formulated their sole Ground of Appeal thus:

> "The learned Justices of Appeal erred in holding that the family of Rudolf Mensah (deceased) have no interest in his estate."

A brief background of the events leading to these proceedings is necessary for an appreciation of the issues raised.
Rudolf Mensah (deceased) was an Ewe who hailed from Vakpo in the Volta Region. He died intestate survived by a wife, a daughter and members of his extended family.

The wife applied for and was granted Letters of Administration and then proceeded to distribute the estate as the sole administratrix. Taking the view that they had been left out of the administration without any basis, the Head of Family and the successor commenced an action before the High Court for a declaration that the family was entitled to a 25% share of the residue of his estate and an order for account among other reliefs.

The defendant resisted the claim and contended that upon the death intestate of her husband, the ¼ share of the residue devolved on her daughter since her deceased husband's system of inheritance was patrilineal. According to her, the family had no beneficial interest in the estate.

3 issues were set down for legal arguments namely:

1. Whether or not by Ewe custom and practices the deceased is to be inherited by his daughter solely
2. Whether or not the paternal family of the deceased is entitled to a share of the residue of his estate.
3. Whether or not the defendant can distribute the residue of the estate of the deceased without reference to his paternal family.

The learned trial Judge held that the family was entitled to 25% of the residue since, in his view, it was inconceivable that a surviving child would benefit twice under the intestate law, whereas nothing devolved on the family.

Naturally aggrieved by the decision, the respondent lodged an appeal against same premised on some 5 grounds.

In its decision, the Court of Appeal overturned the decision of the High Court and held that the daughter, being the surviving child, was the sole beneficiary and thus entitled to the residue in accordance with Ewe custom.

In his submissions before this court, learned counsel for the appellants contended that the learned trial judge could not be faulted, for, he made the right conclusions having appropriately considered the issues relating to the interpretation of the relevant provisions of the Intestate Succession Act, particularly Section 5 thereof, which gave expression to the intentions of the framers of the Act. He further submitted that the learned judge's approach was in consonance with the modern purposive approach to the interpretation of statutes.

He urged that since it was the intention of the framers of the Act to correct the anomalies existing in the inheritance system pertaining to the customs of the various communities, it was inconceivable that the same piece of legislation would make provision for the surviving child to benefit twice whereas the family had absolutely nothing.

In reference to Section 5 (1) of the Act, he argued that since under sub sections (a) and (b) thereof, it was abundantly clear that the surviving child had been adequately catered for, an interpretation which additionally vested the residue in her would be absurd and contrary to the intendment of the framers of the law . He accordingly urged that the decision of the High Court be restored.
In answer, learned counsel for the respondent submitted that the law was settled and that there was no ambiguity as had been established in a long line of decided cases as well as the texts of learned text writers on the subject that under Ewe custom, children were the sole beneficiaries under their patrilineal system of inheritance.

According to him, even though it was within the right of the Head of Family to appoint a successor upon the death of a member of the family, such an appointee only stepped into

the shoes of the deceased father and had no beneficial interest in the enjoyment of the estate.

According to him, the learned judge of the High Court went astray, set up his own issues and proceeded to make findings on them, contrary to the well established legal principles.

We are of the firm view that the complaint against the procedure adopted by the trial court in evaluating the evidence is well founded, for it is obvious that even though issues for determination were set down, the learned Judge went on a foray and set up his own issues upon which he made pronouncements in flagrant breach of the time tested principles which, among others, forbid a judge from setting up a case differently from those set down by the parties in the case; in other words, he cannot substitute the parties settled issues with his own.

Dam v J. K. Addo & Brothers
1962 2 GLR 200 and
Adjuwah v Ogbo 2005 – 2006
SC GLR 494

Rudolph Mensah was an Ewe from Vakpo in the Volta Region.

A common thread runs through the submissions of both counsel; they are agreed that the system of inheritance of the Ewes is patrilineal i.e. the system of inheritance through the male line.

Indeed learned counsel for the appellants submitted "it was very clear that both sides were agreed that generally, in patrilineal communities, children inherit their fathers. It is a notorious fact that Ewes are patrilineal and therefore in this matter, there is no need to restate the said legal position"

Thus while not essentially disputing the fact that children inherited their fathers under the customary law & practices of the Ewes; he curiously argued that the framers of the law

could not have intended that the surviving child inherited twice under the same distribution. He contended that since nine-sixteenth of the estate devolved on the surviving child as provided for under Section 5 (1) (b) of PNDC LAW III, the child in the instant appeal stood to benefit twice if the 25% share of the residue was also vested in her since Rudolph Mensah was not survived by his parents.

Section 5 of the Intestate Succession Act provides:
5(1) Where the intestate is survived by a spouse and by a child the residue of the estate shall devolve in the following manner:

a. Three-sixteenth to the surviving spouse;
b. Nine-sixteenth to the surviving child;
c. One-eighth to the surviving parent;
d. One-eighth in accordance with customary law.

(2) Where there is no surviving parent one-fourth of the residue of the estate shall devolve in accordance with customary law.

Section 5(2) undoubtedly provides that 25% of the residuary estate should devolve in accordance with custom.
What then is the custom of the Ewes?
Under Article II of the 1969 Constitution the laws of Ghana have been clearly spelt out.

Article II(2) defines the Common law of Ghana to include rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature.

Article II (3) defines Customary law as the rules of law which by custom are applicable to particular communities in Ghana.

It admits of no ambiguity that the system of inheritance among the Ewes is patrilineal and as submitted by learned counsel, it is a notorious fact, indeed Justice Kludje in his book

Ewe Law of property stated the position of the law after reviewing the various decisions of the courts.
In the said book, he further outlined the role of the customary successor and concluded that his role was that of a positional successor who had no beneficial interest in the property.

According to him the only persons entitled to the beneficial enjoyment of the estate are the children.
Thus, while largely accepting the position that the children inherited under the patrilineal system, Learned counsel's main bone of contention was the 25% share of the residue; which according to him should inure to the benefit of the family since the law did not envisage that the surviving child inherited under Section 5(1) (b) as well as under Section 5(2) of the Intestate Succession Act.

Since Rudolph Mensah was an Ewe, it is undoubtedly the custom applicable to the Ewes which should be used in determining the class of persons entitled to the 25% of the estate which devolved in accordance with Ewe customary law.

The custom of the Ewes clearly states that the children are the sole beneficiaries under its system of inheritance, the principle is clearly stated in a plethora of decisions. In re Tamakloe Unreported suit NO. 78/44High Court, Accra, Attipoe v Shoucaire D. C. (Land) 1948-51 17, Khoury v Tamakloe D. C. (Land) 1948-51, 201

It is to be noted that the Intestate Succession Act was enacted to give the nuclear family a greater portion of the estate, where therefore the law intends that the family inherited, it was expressly so stated. That the protection and wellbeing of children and spouses were of paramount interest to the framers is beyond question; significantly the word’ family 'never appeared under the relevant Section, 5, the operative word being “custom". In the absence of words clearly vesting the 25 percent in the family, the court cannot import these words into the Statute.

The submissions of the learned counsel for the appellant that the framers of the law never intended that the children benefitted more than once cannot be a correct statement of the law in the face of express provisions of the Act, for neither is it stated therein nor is it the custom of the Ewes that the family as an entity inherited under the patrilineal system. We are fortified in this view by Section 10 of the Intestate Act which provides "where the rules of succession under customary law applicable to a portion of the estate provide that the family of the intestate is entitled to a share in the estate" we are of the firm view the law makers expressly used the word 'family' where they intended that the family inherited. As noted that under section 5 (2) of the Act , there was no mention of the word' family'; were it the intention of the lawmakers that the family inherited the ¼ share of the residue under Section 5, they would have so expressly stated.

The concerns raised by learned counsel on the 'double' inheritance by the daughter were addressed in the case of In re-Larbi (decd) Larbi & Anor. V Larbi (1972) 2 GLR 506 at Page 511 where Archer J A (as he then was) delivered himself thus; " Since there is only 1 surviving child of the late Larbi who is entitled to succeed to the share due to the family at Larteh it follows that this child has an interest in the two-thirds with his mother and has also an interest in the one-third jointly with the matrilineal family".

Even though the case cited was in relation to a matrilineal system of inheritance, the case clearly established that in appropriate circumstances, it is permissible for a beneficiary to inherit both under custom and statute.

We accordingly decline the invitation to restore the decision of the High Court; we hereby dismiss the appeal and affirm the decision and orders made by the Court of Appeal.

V. AKOTO-BAMFO (MRS.)
(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my sister Akoto-Bamfo, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my sister Akoto-Bamfo, JSC.

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

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my sister Akoto-Bamfo, JSC.

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

APPAU, JSC:-

I agree with the conclusion and reasoning of my sister Akoto-Bamfo, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

COUNSEL

CHARLES HAYIBOR FOR THE PLAINTIFFS/RESPONDENTS/APPELLANTS.

NUTIFAFA NUTSUKPUI FOR THE DEFENDANT/APPELLANT/RESPONDENT.