IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2013

CORAM: G. T. WOOD (MRS) C. J (PRESIDING)
J. V. M. DOTSE JSC
ANIN-YEBOAH JSC
A. A BENIN JSC
J. B. AKAMBA JSC

CIVIL APPEAL.
No J4/36/2013

29TH JULY, 2013

1. ABDUL RAHMAN OSUMANU GIWAH PLAINTIFFS
2. ALHAJI ALI ADAMU GIWAH /RESPONDENTS
3. HAJIA FATIMA ALHASSAN GIWAH /RESPONDENTS

VRS.

BABA LADI DEFENDANT/APPELLANT
/APPELLANT

JUDGMENT

BENIN, JSC.

By an amended writ of summons filed at the High Court, Accra, the plaintiffs/respondents/respondents, hereinafter called the respondents, sought the under listed reliefs against the defendant/appellant/appellant, hereinafter called the appellant:

a) A declaration that both plaintiffs and defendant are great grand children of Fatima Suka (deceased).
b) An order for the parties to jointly take letters of administration to administer the estate of Fatima Suka.
c) An order for the distribution of the estate of the late Fatima Suka among legitimate beneficiaries.
d) An order to set aside the judgment of the Islamic Judicial Committee.

The respondents claimed that Fatima Suka who died in 1954 was the great grandmother of both parties in this case. At the hearing the family tree was traced and from the record it was clearly so established, as there was no contrary evidence. Whilst the respondents are the grandchildren of Ramatu Osumanu Fulani, the only female child of Fatima Suka, the appellant is the grandson of Mallam Ibrahim Osumanu Fulani, the only male child of Fatima Suka. Hence all the parties are the direct descendants of Fatima Suka. The estate of the late Fatima Suka which the parties are fighting over comprises three houses situate at various parts of Accra, according to the respondents' case as stated in paragraph 4 of the statement of claim, precisely at Cow Lane, Tudu and New Town. The appellant partially admitted this specific averment, by paragraph 3 of his statement of defence. The respondents contended that the late Fatima Suka gifted the Tudu house to her daughter Ramatu in her lifetime. They further posited that in respect of the Cow Lane house the appellant and his family have been in occupation all these years. In respect of the New Town house the rooms were shared out by Fatima among her four grandchildren. The respondents have been in uninterrupted possession of the Tudu house until 2008 when the appellant laid adverse claim to all the three houses claiming sole ownership thereof. The basis of appellant's adverse claim was that in Islamic law inheritance

to deceased intestate estate is through the male line and thus females do not inherit property. This position was affirmed by the Islamic Judicial Committee (IJC) when the matter of the distribution of the estate went before the said Committee. The record at page 131 shows that only the house at Cow Lane was the subject before the IJC whose decision was handed down on 27th March 2008. The appellant also made adverse claim to the New Town house saying it was owned by his father only.

The High Court gave judgment for the respondents. It set aside the decision of the IJC on ground that it sinned against the provisions of Article 17(2) and (3) of the 1992 Constitution of Ghana. The trial court found as a fact that all three houses were owned by late Fatima Suka. Also that the houses at Tudu and New Town were not part of the IJC decision. It found that all the parties herein are the descendants of the late Fatima Suka. The court also found that the deceased gifted the Tudu house to her only daughter Ramatu. The court also found that the deceased distributed the rooms in the New Town house among her four grandchildren. Consequently the court held that the houses at Tudu and New Town did not form part of the deceased's estate and are thus unavailable for distribution. In effect the only house that was available for distribution was the one situate at Cow Lane. The trial court upheld all the reliefs sought by the respondents. After due consideration of the case in terms of the facts and applicable law/s, the Court of Appeal upheld the High Court's judgment and dismissed the appeal accordingly. The appellant was not satisfied with the Court of Appeal's decision and has appealed to this court on four grounds namely:

a) The judgment of the Court of Appeal is against the weight of evidence.
b) The learned justices erred by holding that the estate of Fatima Suka (deceased) was pending before the family when no evidence of that fact was led or adduced at the trial.
c) The learned justices erred in affirming the decision of the court that the Intestate Succession Law, 1985 (P.N.D.C.L. 111) should apply to the distribution of the estate of Fatima Suka (deceased).
d) The learned justices failed to apply the binding decision of the Supreme Court in Agyentoa v. Owusu (2005-2006) SCGLR 383.

Counsel for the Appellant argued the omnibus ground that the judgment is against the weight of evidence, to begin with. He made reference to the decision of this court in the case of **TUAKWA v. BOSOM (2001-2002) SCGLR 61** on what it means when an appeal is said to be by way of re-hearing. He submitted that the Respondents who bore the burden of proof by virtue of sections 10 and 11 of the Evidence Act, 1975 (N.R.C.D. 323) failed to discharge that burden. On the same issue of standard of proof, Counsel cited these cases in support: **DZAISU v. GHANA BREWERIES LTD. (2007-2008) SCGLR 539 at p. 541; MAJOLABI v. LARBI & ANOR. (1959) GLR 190.** In short, Counsel's position was that "the plaintiffs' evidence in proof of the ownership of the subject-matters of dispute is rather short of that burden imposed on them by law. The defendant ….has no burden until the Plaintiffs are able to prove their case in which case the burden will shift on to the defendant."

For his part, Counsel for the respondents also made references to some decided authorities as regards the burden of proof. He cited the case of **ADJETEY AGBOSU & ORS. v. EBENEZER NIKOI KOTEY & ORS (2006) 2 MLRG 111 SC;** also reported in **(2003-2004) SCGLR 420** under the title **IN RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU and Others v. KOTEY and Others**. He said the appellant also had a duty to provide evidence to enable a court after evaluating the entire evidence to make a determination in his favour. He also referred to the case of **ADWUBENG v. DOMFEH (1996-97) SCGLR 660** which decided that by virtue of sections 11(4) and 12 of NRCD 323, the standard of proof in a civil case is one of a preponderance of probabilities.

We have a duty to examine the entire record on the case in order to determine whether the trial court's findings of fact are borne out of the record. If they are we should leave them to stand, regardless of what our own views on them might be. For that purpose, we have to examine the ownership of the houses; first as to the person who originally acquired them, then whether there was any gift inter vivos and the status of the properties since the demise of Fatima Suka. All these arose from the pleadings and evidence was also admitted, so there is no element of surprise.

The ownership of the houses has to be determined first. We have referred to the relevant pleadings on this. The appellant in his pleadings partially admitted that the deceased Fatima Suka owned the three houses but the pleadings fell short of disclosing the extent of the admission. And at the trial the appellant did not lead any evidence to prove that his father owned any of the three houses. The evidence on record that the appellant relied on was that the property rates in respect of the New Town house were in the name of his father, and that they were collecting rents from the tenants in the house. Yet the appellant could not confirm that the title deeds bore his father's name. On the other hand there was evidence on record to show that both sides have been dealing with this property as owners in their own right. The trial court could thus not be faulted for its conclusion that this house was owned by the late Fatima Suka and not the appellant's father.

Was there a gift of any of these properties by the deceased Fatima to anybody in her lifetime? Let us refer to the relevant pleadings on this issue. Paragraph 17 of the statement of claim provides: 'The plaintiffs aver that the house at Tudu was gifted to Ramatu Osumanu Fulani by Fatima Suka in her lifetime and has been in the possession of her family or children and grandchildren at all material moments till date and is not a matter of dispute.' The defendant pleaded in paragraph 15 of the statement of defence thus: 'Paragraph 17 of the statement of claim is vehemently denied.'

A gift inter vivos having been pleaded by the respondents and the appellant having denied same, it was clear that issue was joined on the pleadings. It behoved the respondents to lead evidence to prove that fact; that is, the burden of producing evidence as well as the burden of persuasion lied squarely with the respondents; it did not shift at any time to the appellant.

The appellant's position is that the respondents did not lead any evidence to prove the gift. On proof of gift inter vivos, Counsel for the appellant cited three relevant decisions of this court. These are **MAHAMA HAUSA v. BAAKO HAUSA (1972) 2 GLR 469; ASARE v. KUMOJI (2000) SCGLR 298; AKUNSAH v. BOTCHWAY & JEI RIVER FARM LTD. (2011) 1 SCGLR 288.** The most important element of a

customary gift that runs through these authorities and several others is that the gift must be offered and accepted and must be witnessed by somebody else other than the donor and donee. Thus when the fact that a gift has been made is challenged, it will not be sufficient to state barely that a gift was made; you have to go on to show the occasion, if any, on which the gift was made; the date; the time, if possible; the venue and most importantly, in whose presence it was made. These factors are by no means exhaustive, but it is important that when you seek to claim a gift was made by a donor who has since died, a bare averment and bare assertion will not suffice as proof. On proof of a customary gift, a relevant case in point is **BARKO v. MUSTAPHA and Another (1964) GLR 78** at p. 81 where the Supreme Court said this, per Sarkodee-Addo, CJ: "*In this case all the evidence we have that a gift was made to the plaintiff of land which included the plot of land in dispute is the bare assertion made by the plaintiff and also by her first witness, her brother, that a gift was made; no evidence was led as to the demarcation of the land in the presence of witnesses……"* See also **IN RE OHENE (DECD.); ADIYIA v. KYERE (1975) 2 G.L.R. 89 CA**. In this case we have examined the record and nowhere do we find any evidence as to when, where and the witness/es in whose presence the said gift was made.

The 1st respondent's testimony on the gift was this: *"In the case of the Tudu house, Fatima Suka in her life time gave that house to Ramatu Osumanu. Ramatu Osumanu is the daughter of Fatima Suka. There had never been any dispute concerning the Tudu house. There are tenants put in the Tudu house by the daughter and son of Alhassan Giwa, ie. the father of 3rd plaintiff. There was no dispute in respect of the Tudu house until 2008 when the defendant went to tell the tenants not to pay rent to us."* This was the evidence the trial court relied upon as constituting proof of the gift. This is the trial court's finding: *"1st plaintiff in his evidence told the court that Fatima Suka gifted the Tudu house to Ramatu in her lifetime and that there has never been any dispute over that house. He told the court that the tenants in the Tudu house were put there by the 3rd plaintiff and her siblings. He said there has never been any dispute over that house until 2008…."* The trial court went on to say that 2nd respondent corroborated this evidence. Far from that; the 2nd respondent never mentioned that this house was

given to their grandmother by Fatima Suka. This is what he said: *"The house at Tudu has no dispute. For a long time that house has been in control of plaintiffs' fathers to date. So it is in the control of we the plaintiffs. The people in the house are the tenants of 3rd plaintiff."* This cannot amount to corroboration of a gift. Indeed the 1st respondent said the deceased "gave" the house to Ramatu in her lifetime. The trial court understood that the word "gave" in the context meant gifted. It might well be the case, but that evidence did not constitute proof of a gift, in view of the consistent case put up by the appellant that the Tudu house has at all material times remained the property of Fatima Suka, and also in view of the denial of a gift by the appellant both in the pleadings and during his own cross examination. These excerpts from the cross examination of the appellant by Counsel for the respondents at pages 53 and 62 of the record are material to this discussion:

"Q- Fatima Suka never made any gift of her property to your father.

A-She did not give her property to anybody in the family……

Q-The Tudu house was gifted to Ramatu by Fatima Suka.

A-It is not correct.

Q-Your father knew of this gift but never challenged it.

A-It is not correct."

The respondents were aware from the pleadings and before the appellant concluded his case that they did not admit the plea of gift. But the trial court relied on the fact that the 1st respondent was not cross-examined on his evidence that Fatima Suka gave the house to Ramatu in her lifetime, and this was taken as an admission. What of the clear rejection of that evidence recorded at page 62 of the record that we have quoted above? Answers given in cross examination form part of the evidence of a party and should be considered by a court in evaluating the evidence as a whole. The trial court should not have glossed over the appellant's answers given in cross examination but should have considered them, in the light of the defence he put up, before coming to a decision. The appellant

had denied that a gift was made thereby putting the onus of proof on the respondents. The trial court was not justified in concluding that the appellant had admitted the claim for the bare reason that he did not cross examine the 1st respondent on his evidence that the late Fatima Suka gave the house to Ramatu in her lifetime. The 1st respondent was about five years old when Fatima Suka died, going by his evidence that he was aged sixty as at the date he testified in 2009. The record shows that Ramatu predeceased Fatima Suka meaning that the alleged gift was made when the 1st respondent was below five years of age, so it is very safe to say that he could not have been an eye witness to the alleged gift. Thus his evidence was at best hearsay in the absence of evidence as to how he came by that knowledge and ought to be treated as such. A court is not entitled to rely on only hearsay evidence to prove a fact which requires to be proven strictly, worse still when the source of that hearsay evidence has not been disclosed to ascertain its authenticity. When it is intended to rely on the exception to the rule against offering hearsay evidence, the law requires the person offering same to give notice thereof but this was not followed in this case. Section 118(1)(b)(iii) of the Evidence Decree, 1975 (NRCD 323) comes into play and it provides: 'Evidence of hearsay statement is not made inadmissible by section 117 if the declarant is available as a witness and the party offering the evidence has given reasonable notice to the court and every other party of his intention to offer the hearsay statement at the trial and that notice gave sufficient particulars (including the contents of the statement; to whom it was made, and, if known, when and where) to afford a reasonable opportunity to estimate the value of the statement in the action'.

It is not in every situation of failure to cross examine that amounts to an admission. The law on this is stated quite clearly in Phipson on Evidence 15th edition, published by Sweet & Maxwell, paragraph 11-26 at page 254 thus: 'Failure to cross-examine will not, however, always amount to acceptance of the witness's testimony, for example if the witness has had notice to the contrary beforehand, or the story itself is of an incredible or romancing character…..' This was applied by the Court of Appeal in the case of **IN RE JOHNSON (DECD.); DONKOR v. PREMPEH (1975) G.L.R. 182** which was cited with approval by this

court in **GHANA PORTS & HARBOURS AUTHORITY & CAPTAIN ZEIM v. NOVA COMPLEX LTD (2007-2008) SCGLR 806** at p. 827. The respondents were aware the appellant did not accept their plea of a gift of the Tudu house to their grandmother; hence they were duty bound to provide proof of the elements constituting this particular gift. They failed to do that so there was no point cross-examining on the bare assertion that the property was given to their grandmother. And more particularly when the person who testified was less than five years old at the time the gift was purported to have been made, making the 1st plaintiff's narration incredible without any further details. Hence for reasons that the respondents had been put on prior notice in the pleadings to prove the gift, and the story as told by the 1st respondent was incredible as it stood, coming from a person who was a kid at the material time and who testified on the event over five decades later without disclosing the source of his information or knowledge, failure to cross examine on that bare assertion did not amount to an admission.

The proper inference to be drawn from all the evidence on record was that apart from the bare assertion of a gift, there was no evidence to support it; the defence was not an afterthought but was based on the true state of affairs in the family. In other words the circumstances of the case would negate any gift, in the absence of evidence to prove the ingredients of the gift. The law on this is settled that the requirements of a valid customary gift must be placed before the court when the issue was joined on the pleadings. See the cases cited above, which are all relevant on this point.

The true position is this. The respondents seemed to have rested their claim on the fact that their grandmother, as well as their own fathers and now they themselves have been in undisturbed possession of this property for several decades. That is not enough to constitute a gift. They were in undisturbed possession just as the appellant, his father and grandfather have been in undisturbed possession of the Cow Lane house for several decades. All of them occupy any of these properties by virtue of their blood relationship with Fatima Suka. Possession of property in such circumstances, however long it may last, does not ripen into ownership.

We will thus set aside the finding that there was a gift of the Tudu house to Ramatu; that house remained the property of Fatima Suka until she died. Ground a) of the appeal thus succeeds.

The issues that remain are whether there had been distribution of the New Town house; whether the decision of the IJC in respect of the Cow Lane house is valid; what happens to the Tudu house in the light of the decision herein that it was not the subject-matter of a gift? If distribution of the estate has not taken place, what law is applicable? These questions form the basis for grounds b, c and d of the grounds of appeal.

Concerning the New Town house, the trial court found that all the parties were entitled to equal shares in it. The record shows that the 1st respondent himself testified that in 1977 the house was shared in equal parts between two factions. The trial court judge alluded to this when he said at page 124 of the record that *"defendant has not led any evidence to show that his father claimed exclusive ownership of the New Town house during his lifetime. If anything at all he owned half of the house while plaintiffs especially 1st plaintiff and his siblings owned the other half following the sharing of the estate of Atta Osumanu Lobi Giwa in 1977."* In effect it was no longer available for distribution. The Court of Appeal affirmed it. Indeed there was evidence both sides had been dealing with this property as landlords collecting rents from tenants they had put in possession. The trial court's findings on this house cannot be faulted and are accordingly affirmed. Thus the New Town is owned 50-50 by the descendants of Baba Mma on one side and 1st respondent and his siblings on the other side.

In respect of the Cow Lane house, the attempt to have it distributed ended in a decision by the IJC that women do not inherit property under Islamic Sharia law. This is the relevant part of the IJC decision, put in evidence as exhibit 2 at page 175 of the record:
'……according to Islamic Sharia (law) of inheritance the child of the late Mallam Ibrahim has to inherit all the properties his grandmother left. The children of the late Ramatu have nothing to inherit at all. Therefore Alhaji Abubakar Baba Mma the son of Mallam Ibrahim is the true and rightful person to inherit what his

grandmother Fatima Suka left behind, that means the children of Madam Ramatu have nothing to inherit.'

For reason of violation of the Constitution referred to above the trial court refused to accept this verdict and accordingly set same aside. The trial court also went to some length in examining Islamic law on inheritance as stated in the Koran which he found contradicted the decision of the IJC.

The trial court's conclusion is justified, for apart from the decision of the IJC being unconstitutional in terms of Article 17(1) and (2) of the 1992 Constitution, it is also clearly against public policy and public decency to deprive someone of a birthright simply on account of one's sex. It sets the clock back on all the gains made in ensuring parity and equity between the two sexes. The relevant provisions of Article 17 of the Constitution under consideration are:

(1) All persons shall be equal before the law.

(2) A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.

Any decision that is given based on inequality between persons for whatever reason will not be allowed to stand. The IJC decision gives a clear indication that the Islamic Sharia regards female as being unequal to male, contrary to Article 17(1) supra. The IJC decision is also untenable for reason that it is discriminatory in terms of Article 17(2) supra, since the respondents were denied the right of inheritance simply because they traced their root to a female. These reasons are sufficient to set aside the IJC decision. The trial court's decision to set aside the IJC decision, which was affirmed by the Court of Appeal is hereby affirmed.

Be that as it may, with the coming into force of the Intestate Succession Law, 1985, PNDCL 111, the distribution of every intestate estate shall be governed by that law, irrespective of one's religion, ethnic or cultural practices. The IJC was bound to apply PNDCL 111 and not the Islamic Sharia in respect of the distribution of the Cow Lane house. In that respect both the High Court and the Court of Appeal were justified in applying that Law.

This conclusion effectively rejects the arguments put up by Counsel for the appellant herein that the Court of Appeal erred in relying on PNDCL 111. Counsel had argued that the Court of Appeal was bound to follow this court's decision in **AGYENTOA v. OWUSU and Another (2005-2006) SCGLR 383** at p. 387 where the court, per Bamford-Addo, JSC, said: "*The law which was applied by the Court of Appeal in arriving at its decisions was the Intestate Succession Law, 1985 (P.N.D.C.L. 111), which was passed during the course of hearing of this case. PNDCL 111, s. 21 thereof stipulated that the provisions of the said statute were to*

be applied to any case of succession pending before the Courts after its passage. The instant case was pending on 5 July 1985-the case having commenced on 12th April 1985 and the Court of Appeal had to apply the provisions of that Law." Counsel's view was that since the distribution of the deceased estate was not pending in any forum, the Court of Appeal was bound to apply the above quoted decision. Instead the Court of Appeal relied on its earlier decision in **IN RE ARMAH (DECD.); ARMAH v. ARMAH (1991) 2 GLR 53**. In that case the court held that the provisions of PNDCL 111 were applicable since the estate had not been distributed prior to the coming into force of that Law since it would be considered a pending matter in terms of section 21(1) thereof. It also held that once the property of a deceased had not been distributed among those entitled thereto, then in the eyes of the customary law it was pending before the deceased's head of family, applying a previous decision of the Court of Appeal in **C.F.A.O. v. ZACCA (1972) 1 GLR 366**. Considering the facts of the present case the decisions in the two Court of Appeal cases cited above are more apt and germane than this court's decision in the AGYENTOA case, supra. In the former cases the matter of distribution had not taken place and the issue had not gone to court when the Law was passed; whereas in the latter case, that is the AGYENTOA case, the matter was already before court when the Law came into force. The Court of Appeal was thus right in not relying on the AGYENTOA decision since it was inapplicable. The ARMAH decision was applicable to the case because the estate or part of it had not been distributed and the matter was sent to court after the Law had come into force, just like the present case. Both parties acknowledged that the estate was not distributed hence their submission to the IJC in 2008 concerning the distribution of the estate of the late Fatima Suka. This debunks Counsel's invitation to the court to hold that the matter was statute barred. Besides, the issue of limitation was not pleaded by the appellant as required by law. Furthermore the Limitation Act will not apply since the parties as said earlier are all occupying the houses by reason of their blood relationship with the original owner and not as owners in their own right or as persons in adverse possession, see section 10 of the Limitation Decree, 1972, (NRCD 54).

Following the rejection of the plea of gift inter vivos, the Tudu house, like the Cow Lane house, has also fallen into intestacy and has to be distributed in accordance with PNDCL 111. Thus it should be included in the inventory of properties that will be the subject of the letters of administration to be taken jointly by all the parties herein as directed by the High Court. Grounds b, c and d fail and are accordingly dismissed.

(SGD) A. A. BENIN
JUSTICE OF THE SUPREME COURT

(SGD) G. T. WOOD (MRS)
CHIEF JUSTICE

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

(SGD) ANIN YEBOAH
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