IN THE SUPERIOR COURT OF JUDICATURE
SUPREME COURT OF GHANA
ACCRA

CORAM: AKUFFO (MS), JSC (PRESIDING)
ADINYIRA (MRS), JSC
OWUSU (MS), JSC
BAFFOE-BONNIE, JSC
ARYEETEY, JSC

CIIVIL APPEAL
J4/26/2009
10TH FEBRUARY, 2010

ASHIE NEEQUAYE ... PLAINTIFF/RESPONDENT/RESPONDENT
(SUBT. BY JULIANA KOOTSO NEEQUAYE)
H/NO. 3/2/2 ABEBRESEM STREET
OSU-ANORHOR, ACCRA

VRS

ADEE KOTEY ... DEFENDANT/APPELLANT/APPELLANT
218 EAST CHRISTIANBORG
OSU-ACCRA

J U D G M E N T

BAFFOE-BONNIE, JSC:-

The PL/RESP/RESP (hereinafter referred to as plaintiff), originally instituted this action claiming among others:

(a) A declaration that the original house number 160 was allocated to Moses Neequaye which house was later exchanged for plot 218 renumbered F.793a/2 and 801/2 East Christianborg Osu and same formed part of his estate.

(b) A further declaration that the said house i.e plot 218……was never allocated to Clifford Cudjoe but that he held the house in trust for the beneficiaries of the estate of Moses Neequaye (deceased)

The basis of their claim is simply that their father and predecessor in title Moses Neequaye, was allocated the subject matter of the suit by the State Housing Corporation when his own house was wrecked by the earthquake that rocked Accra and its environs in 1939. Subsequent to the allocation but before the completion of the instalmental payments of the building, the defendants father, one Clifford Cudjoe, was permitted to live in the houe on his return from Burma Campaign in the 2nd World War. He lived there with another son of Moses Neequaye. When the installmental payment ended, the family sought to have the documentation on the building done in the name of Dina Neequaye. It was then that they got to know that Clifford Tagoe had earlier in 1949 attempted to have the documentation effected in his name through an affidavit he swore to that effect.

The affidavit of Clifford Cudjoe, notwithstanding, the SHC did the documentation in the name of Dina Neequaye and this has remained so till today. Clifford Cudjoe died and when the family of Moses Neequaye wanted to take over the property, the children of Clifford Cudjoe, with the active support of one Seth Neequaye, another son of Moses Neequaye, resisted this take over claiming, the property belonged to their father Clifford Cudjoe. The family sued Seth Neequaye who later died and was substituted by the current defendant.

At the end of the trial the trial judge dismissed the plaintiffs claim on the grounds that the plaintiff lacked capacity to bring the action. This was because at the time of the institution of the action the plaintiffs had not applied for L/A to administer Moses Neequaye's estate and that since they were suing in a representative capacity it was only the head of family who could sue. On the basis of the evidence on record he also dismissed the defendant's counterclaim.

Dismissing the defendant's counterclaim the trial judge held;

> *"On the evidence as a whole I find that preponderance probability(sic) would be in favour of the plaintiff in respect of the following:-*
>
> i. *That the original house number 160 was allocated to Moses Neequaye, that it was later exchanged for plot 218……"*

Neither the plaintiff nor the defendant appealed against this judgment.
The plaintiff who had secured an L/A in respect of the estate of Moses Neequaye, even before the suit was actually dismissed for want of capacity, instituted the current action claiming virtually the same reliefs as those in the earlier action. The defendant raised 3 main issues in her statement of defence.

1. That since by their own showing the property passed on to Dina Neequaye on the death of Moses Neequaye the plaintiff should have applied for L/A to administer the estate of Dina Neequaye and not that of Moses Neequaye. And so they still lacked capacity to institute the action in respect of the property.
2. That by their failure to appeal against the decision of Justice Yakubu Armah with regard to lack of capacity the plaintiffs are estopped from relitigating on the property.
3. The action was statute barred.

The issues set down for trial at the High Court were as follows

1. *Whether or not the plaintiffs as administrators of the estate of Moses Neequaye(deceased) have capacity to institute the present action.*
2. *Whether or not the plaintiffs are stopped from contesting the facts found by the trial judge in suit No. 175/81*
3. *whether or not the action is statute barred*
4. *Whether or not the doctrine of res judicata is applicable to this case*

The trial judge resolved all these issues in favour of the plaintiffs. Feeling aggrieved, the defendants appealed to the Court of Appeal. The appeal failed. The defendant has appealed to this court and, the difference in wording notwithstanding, I find that the issues before us for resolution are essentially the same as those ruled upon by the learned judges of the High Court and the Court of Appeal.

Since an appeal is by way of rehearing , I propose to deal with the present appeal as if this court were a court of first instance and make the necessary orders as were

available to the trial High Court. I will however remind myself of the admonishment of Acquah JSC(as he then was) in the case **of Achoro and Another v Akanfela and Another [1996-97]SCGLR 209** where he said,

" *In an appeal against findings of fact to a second appellate court like the Supreme Court, where the lower court had concurred in the findings of the trial court, especially in a dispute, the subject matter of which was peculiarly within the bosom of the two lower courts or tribunals, this court would not interfere with the concurrent findings of the two lower courts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice, was apparent in the way in which the lower courts had dealt with the facts."*

See also the case of **Nyame and Tarzan Transport [1973] IGLR 8 CA 9.**

RES JUDICATA

I am a little bit intrigued that even at this late stage, and in spite of the decision of trial judge and the learned Justices of the Court of Appeal, the defendant insists that Justice Yakubu Armah's decision on capacity and his reasons for so finding operates as *res judicata*. The fact is, from the legion of authorities on res judicata, by no stretch of imagination can we say that Justice Armah's judgment operates as *res judicata,* That judgment did not touch on the merits of the case at all. If anything it is the findings that the learned judge made in dismissing the defendant's counterclaim that could operate as *res judicata*, because those findings touched on the facts of the case and the defendants did not appeal against the findings of fact made by Justice Yakubu Armah leading to the dismissal of their counterclaim.

The plea of *res judicata* is a well established part of our law and it is usually expressed to be based on a final judgment. In the case of **In re Sekyedumase Stol: Nyame v Kese alias Konto [1998-99]SCGLR 476 at pg 478,** Acquah JSC as he then was, delivering the judgment of this court said:

"My lords, the plea of res judicata is never a technical plea. It is part of our received law by which a final judgment rendered by a judicial tribunal of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies and , as to them

constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action"

In the case of ***Dahabieh v SA Turqui &Bros [2001-2002]SCGLR498*** ,this court reiterated the above cited position of the law in the following terms,

" it is well-settled under the rule of estoppel that if a court of competent jurisdiction has tried and disposed of a case the parties themselves and their privies cannot, thereafter, bring an action on the same claim or issue. The rule applies to issues actually dealt with in the previous litigation as well as those matters which properly belonged to that litigation and could have been brought up for determination but were not raised."

Yakubu Armah's decision that the plaintiff lacked capacity to institute the action was borne out of the fact that since the property in dispute had become family property on the death of Moses Neequaye, the head of family was the only person customarily authorized to bring the action. Citing the case of **Kwan vs Nyieni and another 1959 GLR 59 at page 72/73**, he said,

"It should be mentioned here that at the death of Moses Neequaye the house or whatever interest he had in the house in dispute would vest in the family. The customary law as I understand it has been clearly explained by the court of appeal in Kwan vs Nyieni and another as follows;

' as a general rule the head of family is the proper person to institute suits for the recovery of family land;……'.

In the instant case the plaintiff in cross examination admitted that one Akwetey Palm was head of Moses Neequaye's family and the said Akwetey Palm was alive when the action was taken. It is therefore clear that the said Akwettey Palm would have been the proper person to have taken this action."

Later on he concluded as follows;

"I have come to the conclusion that the plaintiff has failed to establish that she had been authorized by the family to take this action in a representative capacity or the

accredited successor of her late father Moses Neequaye. It means she lacked capacity when she took the action. I would dismiss the plaintiff/s claim for want of capacity."

These statements represent the true state of customary law. However, if the plaintiff later overcame this legal hurdle and secures the necessary authorization, either from the Head of family (power of Attorney)or the court (i.e L.A to administer a deceased person's estate), such a person could return to court, and the earlier holding cannot operate as *res judicata*. It is my view that having secured the necessary Letters of Administration to administer the estate of Moses Neequaye, the plaintiff was vested with the requisite capacity now to relitigate.

I will therefore not disturb the trial judge and the learned justices of appeal's holding on this issue.

CAPACITY

Equally intriguing is the defendant's insistence that the plaintiffs lack capacity to institute this action. The defendant/appellant insists that the plaintiff lacks capacity because, by their own showing, granted that the property was acquired by Moses Neequaye, the property had passed on to Diana Neequaye and therefore on the death of Diana the property vested in her estate and not that of Moses. So securing L.A. in respect of the estate of Moses will not confer on them capacity to bring an action in respect of the property which now forms part of the estate of Diana. This is how she put it in her statement of defence;

> *If the plaintiffs' allegation in paragraph 8 of the statement of claim is to be accepted, it would follow that the said house had passed and vested in the estate of Dina Dei Neequaye.*

The plaintiffs have not applied for L/A to administer the estate of Diana Neequaye who died before 1981 the date of the first action in suit no1745/81, hence they lack capacity to sue.

Ingenious as this argument may sound it really does not contain much to write home about. The plaintiff brought this action as administrator of the estate of Moses

Neequaye whose estate she claims, the subject matter of this litigation forms part of. She is not seeking to administer the estate of Dina Neequaye. She has all along insisted that the property was acquired by Moses Neequaye and that it was they the children who authorized their sister Dinah to have the documentation prepared in her name. Dina therefore holds the property only in trust for the other children. These facts are not disputed by the children of Dinah. And they couldn't be controverted by the defendant either. Because after all they are consistent with the earlier findings of Yakubu Armah J in the earlier suit from which the defendant did not appeal. Therefore if any body could challenge the capacity of the plaintiff to institute an action in respect of this property it is the children of Dinah and not the defendant. The defendant has no LOCUS STANDI to challenge the plaintiffs' claim of the property for the estate of Moses Neequaye as against that of Dinah Neequaye.

STATUTE BARRED

The appellant has referred copiously to the English Real Property Limitation Act of 1883 and said whatever interest Moses Neequaye had in the property was extinguished when the administrators failed to bring an action within twenty tears of the death of Moses Neequaye. Counsel relies on the dictum of **Korsah CJ in the case of Nsiah v. UTC (1959) GLR 79** at pg 85 where he said,

'*With regard to the last issue viz., whether or not the claim is barred by statute, I am in full agreement with the views expressed by the judge as follows:-*

"By section 6 of the real property limitation act 1883 where an administrator claims, the time runs from the time of the deceased death and the same limitation applies to the plaintiff who has sued in respect of the estate of the deceased intestate…".'

The appellant had forcefully canvassed this argument at both the trial court and the Court of Appeal to no avail. Despite the reasons given for the dismissal of this argument by the two courts below he feels dissatisfied and has come before us. Clearly, from his argument it is the appellant who has failed to appreciate the import of the said section and the decision of the court in Nsiah v. UTC.

The section does not mean that accrual of cause of action in computing when limitation period starts. It does not mean that time starts running immediately a person dies, even if in his lifetime the deceased person's title or interest in the property was not questioned! What it means is that if in the lifetime of a person his interest in a property is challenged, or he deals with the property in a manner detrimental to or inconsistent with his interest in the property, then any person claiming through him has to come to court within twenty years of his death. That in essence was the import of the decision of this court in the Nsiah v. UTC case.

As the facts of this case show and as the two lower courts rightly found, in the lifetime of Moses Neequaye there was no adverse claim by the father of the defendant to the property in dispute. On the death of Moses, the plaintiffs found that Clifford Cudjoe, the appellant's father, had tried to gain access to the house through fraudulent means, but this was scuttled when the property was documented in the name of Dina Dei Neequaye on the insistence of her sibblings. Thereafter Clifford caved in, accepted his fate and only continued living in the house as licensee of the respondents. Therefore, the only time an adverse claim was made in respect of the property was after the death of Dina Neequaye in 1980 when, on the instigation of Seth Neequaye, the defendants and her sibblings started to claim that the property belonged to Clifford Cudjoe**. Section 10(1) of the Limitation Decree,1972 NRCD 54** which had then come into effect in 1972 provides that,

No action shall be brought to recover any land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or if it first accrued to some person through whom he claims.

We are not told of when the demand for the documents was made and refused. Suffice it to say that the refusal occasioned the institution of an earlier action in November 1981.That action was dismissed in 1991 for want of capacity. The current action was instituted in February 1993 which will still be within the limitation period of twelve years when the adverse claim was made. Therefore, on this ground too, the appeal is not sustainable.

The appeal therefore fails on all grounds and same is dismissed

P. BAFFOE-BONNIE
JUSTICE OF THE SUPREME COURT

S. A. B. AKUFFO (MS)
JUSTICE OF THE SUPREME COURT

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

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