IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA

CORAM: BROBBEY, JSC (PRESIDING)
DATE-BAH (DR), JSC
YEBOAH, JSC
ARYEETEY, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL APPEAL
NO. J4/1/2010
9TH JUNE, 2010

ASAFOATSE LAWER KORNOR DJABAKOR … PLAINTIFF/ RESPONDENT/ APPELLANT

VRS.

1. TETTEHYUM AMARTEY
2. JAWANO AMARTEY … DEFENDANTS/APPELLANTS/RESPONDENTS
3. MYSTERY KOFI AMARTEY
4. STEPHEN LAFIA AMARTEY
5. FRANCIS KATA AMARTEY

J U D G M E N T

ARYEETEY, JSC

In this judgment we refer to the plaintiff/respondent/appellant as the plaintiff and the defendants/appellants/respondents as the defendants. What the plaintiff took to the High Court for determination was in respect of his family's ancestral land which his great-grand-father, Tei Djabakor, and his brother

Tetteh Akporsuer acquired by settlement. According to his pleading, his ancestors gave a portion of their land to the defendants' ancestor by name Numo Amartey in 1910 as a licensee. What brought about the dispute between the plaintiff's family and the defendants' family, being descendants of Numo Amartey, is the refusal by the defendants to recognize the plaintiff's family as owners of the land in respect of which they are licensees. Besides, the defendants by their conduct assert their rights supposedly as owners of the land in dispute which their ancestor Numo Amartey acquired by settlement. The plaintiff's claim before the High Court was therefore for the following reliefs:

(i) Declaration of title of the Djabakor-Akporsuer-Kornor family of Tsangmer clan of Osudoku, to the triangular piece or parcel of land at Old Kadjanya in the Osudoku Traditional area ...

(ii) A declaration that, by denying the title of the plaintiff's family to the Old Kadjanya land, the defendants have forfeited the customary license granted to them.

(iii) An order for recovery of possession of the land at the Old Kadjanya described in (i) above.

(iv) An order that the first defendant shall refund to the plaintiff's family the amount of ¢9,522,000.00 being compensation which he collected from Irrigation Development Authority for wild palm trees, on the land at Old Kadjanya.

(v) General Damages for trespass from December 14th 2002, when the customary license was revoked by the plaintiff's family to the date of judgment.

(vi) Mesne profits.

(vii) An order for permanent injunction restraining the defendants, their children, agents, assigns, workmen etc from interfering with the land in whatsoever manner.

The trial court gave judgment in respect of all the reliefs claimed by the plaintiff. Sowah J., reading the judgment of the trial court had this to say at pages 285-286:

> "The general rule that the head of a family as a representative of the family is the proper person to institute a suit for the recovery of family land is so settled that there is no need to belabour the point. (See Kwan v. Nyeni [1959] GLR 67 and Yormewu v. Awute [1987-88] 1 GLR 19, CA). So also is the principle of law that a plaintiff whose capacity is put in issue must establish it by cogent evidence (See Sarkodee IV v. Boateng II [1982-83] GLR 715.
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> Was the plaintiff able to establish his claim to be the head of family? It was submitted by the plaintiff that there is sufficient evidence on record proving his capacity. PW1, Michael Kwao, PW2 Godlieb Kofi Agorku and PW5 Col. Amuzu, all grantees of land, testified that they had been invited by Tawiah Kornor, an elder of the family and introduced to plaintiff after the funeral of Asafoatse Akwetey Djabakor as the new head of family. Raphael Teye Kofi Kornor, PW6, a member of plaintiff's family testified that he was one of 3 nominees chosen but lost out to plaintiff who was duly elected by the elders of the family. The elders were named without challenge. I consider such evidence from a contender convincing proof of plaintiff's status. In addition, PW 10, Gordon Van Tay, also testified that whilst an engineer with Impregillo Reccelli, he obtained a Right of Entry to win gravel on the disputed land from the plaintiff."

The learned judge then gave a summary of the grounds upon which the defendants base their contention that the plaintiff lacks capacity to pursue the action and continues at page 286 of the record of appeal as follows:

> "In sum it is contended for defendants that cogent evidence had not been led to establish any of the above. It is argued that rather, the evidence of PW7, Emmanuel Kofi Klemeh that there is no division in the

functions and roles of heads of family in the Osudoku traditional area had corroborated defendants' assertion. PW7, head of Tsungwanya family had been called to testify as to his boundary with the plaintiff.

Apart from stating in their evidence that they did not know plaintiff as Asafoatse and 1st defendant stating that he knew Mama Korletey as head, no evidence of rebuttal of plaintiff's assertion was adduced. ... Further the defendants did not deny that Asafoatse Akwetey Djabakor was the former head of family. When PW7 was asked, "What was the title of the immediate past head of family?", his answer was: "Asafoatse". The defendants themselves and counsel repeatedly referred to Akwetey as Asafoatse. I therefore fail to see the basis of the challenge to plaintiff being head by reason that as Asafoatse he cannot by custom be head of family. Here again no evidence was led or authorities cited to support the assertion. I find that sufficient evidence of the plaintiff's capacity was led."

Subsequently the defendants appealed and filed as many as twenty grounds of appeal, that is Grounds "a - t". However for the purposes of the judgment of this court we would only refer to the first three grounds as reproduced below since they relate directly to the only two grounds of appeal filed in this court. The first three grounds before the Court of Appeal are:

a. It was an error of judgment when the High Court held that the plaintiff suing as "functional head of family" had capacity to sue, even though there is a substantive head of family who is alive and has not been deposed, and there is also another person who is termed "the ceremonial head of family" all within the same family at the same time.
b. It is an error to hold that there is a dichotomy in the traditional office of a head of family.

c. It is erroneous to hold that the plaintiff is the "functional head of family" even though none of the persons who allegedly installed him and are all still alive was called to substantiate the allegation when challenged.

The remaining 17 grounds of appeal before the Court of Appeal relate essentially to the ownership of the land in dispute. The Court of Appeal determined the issue of ownership in favour of the plaintiff but allowed the appeal on the basis that the plaintiff lacked capacity in the first place to bring the action. Therefore the appeal before this court has to do only with headship of the plaintiff's family and the capacity of the plaintiff to bring the action.

In his written submissions, counsel for the appellant reminded the court that the plaintiff sued on behalf of Djabakor-Akposuer-Kornor family and had authority to pursue the action and highlighted paragraphs 1 and 2 of his Statement of Claim. He pointed out that even though the plaintiff sued on behalf of Djabakor-Akposuer-Kornor family the majority of the Court of Appeal erroneously at page 548 lines 3 and 4 of the record of appeal referred to his family as Djabakor-Akposuer-Kornor clan and in another breath as Tetteh Akposuer and Numatsu clan as stated in exhibit 4. He referred to the evidence of the witnesses respecting proof of plaintiff's headship of his family, notably the evidence of PW1, PW2, PW5, PW6, PW7 and PW 10. He submitted that documents which were tendered in evidence in proof of the headship of the plaintiff of his family were ignored by the majority decision. It is his stand that exhibit E titled RIGHT OF ENTRY which gave Impregilo Recchi J. V. and their workmen licence to enter a portion of plaintiff's family land to win gravel was signed by plaintiff as head of family in 1985.

According to the plaintiff's counsel since the defendants' counsel did not ask any question in cross-examination when the documents exhibits E and F were tendered in evidence they are deemed to have admitted the contents of those documents especially when they did not lead any evidence in rebuttal. He relied on the case of Takoradi Flour Mills v. Samir [2005-2006] SCGLR 882. Also, he referred to the case of Akrofi v. Otenge [1989-90] 2 GLR 244, SC. In that case it was held that since the plaintiff's evidence that he was the head of his family was supported by a member of the family, the defendants who denied his capacity should have mentioned the person they contended was the head of family and, if necessary, called witnesses to support them, especially since in Ghanaian local communities the heads of the various families were well-known and it was thus easy to come by that evidence. However the defendants did not even take the first step to discharge their burden; they led no evidence in rebuttal. Thus the only evidence on record on the issue of the headship of the family was that of the plaintiff and his witness. Since that evidence was credible and the defendants had failed to discharge the burden that then shifted to them, they had to lose on that issue.

On the issue of a family having a 'functional head' and 'ceremonial head' counsel for the plaintiff referred to the AMENDED REPLY TO THE AMENDED STATEMENT OF DEFENCE filed on 2nd August 2004. Paragraph 3 of that document reads:

"Plaintiff denies paragraph 1a of the amended statement of defence and says that he is the functional head of the Djabakor family and as such he is the actual and active head of the family as distinguished from one Tawiah Kornor who (although, not specifically appointed as ceremonial head) is generally regarded as the ceremonial head by virtue of being oldest member of the family."

Counsel further contended that there is nothing wrong with the positions of 'functional' and 'ceremonial' heads of family so far as customary law is concerned. He referred to what the trial judge said about 'functional head' in the portion of her judgment quoted above. The question posed by the two judgments of the majority decision on 'functional' and 'ceremonial' heads have an answer in paragraph 3 of the AMENDED REPLY TO THE AMENDED STATEMENT OF DEFENCE quoted above. Counsel argued further that *"As to which of the two can sue and be sued, the plaintiff explained that the ceremonial head sued the 1st defendant at the circuit court, Accra for palm trees i.e. Suit no. TCC113/96 as a result of equivocal legal advice, to the effect that he (plaintiff) could sue and the 'ceremonial' head too could sue. That suit was dismissed on the grounds that Tawiah Kornor, the ceremonial head referred to in those proceedings as 'Setse' in Ga-Dangme meaning 'Stool father' had no capacity to sue as head of family. It is therefore known that the ceremonial head cannot sue for the family and that is why the plaintiff herein as the functional head sued at the High Court."*

The response from the defendants' counsel was brief. He submitted that since capacity was put in issue that must be established. He referred to the cases of Akrong V Bulley [1965] GLR 469 and Sarkodee I v. Boateng II [1982-83] GLR

715 and submitted that there is no position of 'functional' head of family in contrast with 'ceremonial' head of family known to customary law.

The majority decision consists of the judgment of Ofoe, J.A. and that of Mariama Owusu, J.A. After giving an extensive overview of the case law relating to the right of the head of family to sue and be sued, Ofoe J.A. had this to say on the subject of 'functional' head of family and 'ceremonial' head of family at page 554 of the record of appeal:

> "How can the respondent say that Tawiah Kornor sued as the ceremonial head when clearly from the process filed in that case and the evidence before the court he sued as the head of family and not as a ceremonial head? If we accept the respondent's evidence in the circuit court that Tawiah Kornor sued as ceremonial head is he contending that as ceremonial head Tawiah could also sue on behalf of the family? If the answer is yes then the respondent is saying that both the ceremonial head and functional head can sue. The public will have to know who the head of family is. For by law it is only the head of family who can sue and can be sued. It can't be acceptable having both functional head and ceremonial head suing as and when the family wants it."

Also to Mariama Owusu, J.A. the use of the descriptions 'functional' head of family and 'ceremonial' head of family makes it impossible to identify who is the head of the family especially when there is evidence that both the functional' and 'ceremonial' heads sued on behalf of the plaintiff's family. She expressed this in her judgment at pages 571 and 572 of the record of appeal in the following words:

> "From the cross-examination and the answers given, the trial judge's observation that there are no strict rules as to how a family should run its internal affairs is begging the question. The problem is not the

description of someone as the ceremonial head, but the ceremonial head suing for and on behalf of the family when the head of family is there and even testified for the ceremonial head as PW1. The duty is cast on the plaintiff to tell the court the respective roles of the functional and ceremonial head. This the plaintiff did not do and same must be held against him. Obviously when Tawiah Konor instituted the action in the circuit court, he was not performing a ceremonial function. The principle in the Kwan v. Nyieni [1959] GLR 67, 68-69 states that: "As a general rule the head of family as representative of the family is the proper person to institute a suit for recovery of land." And exceptions to the general rule could not avail the said Tawiah Kornor as the head of family was there and testified for the said Tawiah Kornor as PW1. ... Even if Tawiah Kornor in exhibit 1 sued as the ceremonial head, still the respondent needs some explanation to do as to why he the head of family is there and some other member of the family is suing on behalf of the family. With the descriptions functional and ceremonial head it becomes difficult to say who the head of the family is especially when the ceremonial head also sues on behalf of the family as in exhibit 1. It is for these reasons that I say the respondent was not able to establish his capacity at the court below and his claim should have failed on this ground. I agree that the appeal be allowed".

However Irismay Brown, J.A. who wrote the minority judgment was of the view that the description of the plaintiff as 'functional' head of his family did not make any difference. This is what she said at pages 577 and 578 of the record of appeal:

"The case of the plaintiff was that he was the functional head, and sues with the authority of the family to protect a portion of the family's land. His position as one of the principal elders of the family is indisputable. Evidence of appointment and the succession to the position of Asafoatse in 1985 was not disputed. His statement that he sits on the family war stool was not challenged, but more importantly he provided conclusive

evidence of being the main source of power in relation to the family land. In 1985 he wrote and restrained the first defendant from clearing a portion of the disputed land. Beneficiaries of grants of the disputed land made by the family testified that they had to introduce themselves to him and recognise him as the person with authority over the land.

The plaintiff participated in arbitration between one of the grantees, one Kwapong and the first defendant in respect of the disputed land. Judgment of the arbitration and of a subsequent hearing at the Circuit Court in favour of the said Kwapong also confirmed the family's ownership of the land. In 1990 he caused a warning letter to be written to the first defendant by an elder of the family Mama Korletey about the illegal fishing in a stream on the diosputed land. He sold palm trees growing on the disputed land to a lady for distilling alcohol.

He received a complaint and reported to police when one of the grantees of the family, one Colonel Amuzu was being harassed by members of the defendants' family. He joined the 'Ceremonial head' Tawiah Kornor in an application for compensation for portions of the disputed land affected by the irrigation project. He had testified as the first witness for the family in the Circuit Court suit by Tawiah Kornor already mentioned above. Finally in 2002 he caused a letter to be written to the defendants revoking their licence on the land.

He produced evidence to the court that the person alleged by the defendants to be head of the family Mama Korletey is ill, has had a stroke and cannot speak very well. Plaintiff tendered in a medical report exhibit Q in support. This evidence was not challenged by the defendants. There is no record that Mama Korletey had ever claimed to be the head of plaintiff's section of the family. It is also on record that there is a dispute pending as to Mama Korletey's headship and his position is being challenged by one I. K. Apafo, another member of the

family. In the light of the above evidence and in the light of the activities of the defendants to consolidate their claims over the disputed land, it is not surprising that other members of the family including the plaintiff herein would be propelled in pursuing an action against the defendants."

The two grounds of appeal filed before this court are as follows:

1. That the Honourable Court of Appeal ignored finding of fact and evidence on record that the plaintiff/respondent/appellant is the functional head of family and has been recognised as such by all family members and grantees of the family who dealt with him as such and without any challenge from a rival claimant to the headship of the family and fell in error by holding that he has no capacity to sue for and on behalf of the family.
2. That the Honourable Court of Appeal erred when it held that customary law forbade a family to regard the oldest in the family as ceremonial head and at the same time have a functional head.

Looking at the conclusions of the majority judgment it does not appear as if they took into consideration the pains taken by the learned trial judge to point out indisputable pieces of evidence which convinced her to take the stand that indeed the plaintiff was the accredited head of his family and acted with the total support of the family. Besides, they did not indicate where the trial court went wrong. After all it is the trial court that has the exclusive right to make primary findings of fact which would constitute the means by which the final outcome of the trial would be arrived at. Where such findings of fact are supported by evidence on the record and are based on the credibility of witnesses, the trial tribunal having had the opportunity and advantage of seeing and observing their demeanour and having become satisfied of the truthfulness

of their testimonies touching on any particular matter in issue, the trial court's finding is virtually unassailable.

In the case of Cross v. Hillman Ltd. [1969] 3 WLR 787 at 798, C.A. Lord Widgery cautioned that an appellate court *"... which sees only the transcript and does not see the witnesses, must hesitate for a very long time before reaching a conclusion different from the trial judge as to the credibility and honesty of a witness".* The appellate court can only interfere with the findings of the trial court if they are wrong because (a) the court has taken into account matters which were irrelevant in law, (b) the court excluded matters which were critically necessary for consideration, (c) the court has come to a conclusion which no court properly instructing itself would have reached and (d) the court's findings were not proper inferences drawn from the facts. See the case of Fofie v. Zanyo [1992] 2 GLR 475. However, just as the trial court is competent of make inferences from its specific findings of fact and arrive at its conclusion, the appellate court is equally entitled to draw inferences from findings of fact by the trial court and to come to its own conclusions. See also Kofi (Oppong) v. Fofie [1964] G.L.R. 174, S.C.; Praka v. Ketewa [1964] G.L.R. 423, S.C.; Azagba v. Negov [1964] G.L.R. 450, S.C.; Asibey III v. Ayisi [1973] 1 G.L.R. 102. In Adorkor v. Gatsi [1966] G.L.R. 31 at 34, S.C., the Supreme Court summed up appellate powers as follows:

> "The law governing this is that while findings of specific facts are within the competency of the trial court alone, a finding of fact which is an inference to be drawn from specific facts found is within the competency of an appeal court no less than the trial court; in other words, an appeal

court is in as good a position as the trial court to draw inferences from specific facts which the trial court may find."

What the Court of Appeal set aside in the Fofie v. Zanyo case (supra) were not inferences draw from facts but the very findings on specific facts of the trial judge. This court therefore ruled that since the conclusions of the trial court were supported by the evidence, most of which were supplied by the plaintiff and his witnesses there was no lawful warrant for the Court of Appeal to differ from the findings of the trial court.

Neither of the two judgments which constitute the majority decision pointed out what the trial judge did wrong in her consideration of the evidence which led to her conclusion that the plaintiff is the head of his family and had the mandate of the family to sue on its behalf, judging from the evidence before her. In effect the conclusion of the majority decision was that the plaintiff has no capacity to sue irrespective of the leadership role the plaintiff plays in matters affecting his family's interest in land and ancillary matters, coupled with his recognition by members of his family as well as outsiders to be the person who represents his family in all land transactions. The majority decision that the titles "functional head of family" and "ceremonial head of family" are unknown to customary law and practice completely ignored the specific finding of the trial court based on the evidence. Neither was that decision based on detailed analysis of the evidence before the court which would illustrate the areas where the trial court went wrong. In any case the decision of the trial court was based on a primary finding of fact. The conclusion of that court is that indeed the plaintiff is the head of his family and acted as such with the backing of members of his family

without exception. That issue had to be dealt with first. The question to ask is: Is the appellate court entitled to substitute its own findings of fact for that crucial finding of fact by the trial court judge without coming out with what went wrong with the conclusions of the lower court?

In the case of Kyiafi v. Wono [1967] GLR 463, CA it was held that, as stated in the head note:

> "The principles which regulate the right of an appellate court to interfere with findings of fact made by a trial court were as follows: Where the appellate court was satisfied that the reasons given by the trial court in support of its findings were not satisfactory or where it irresistibly appeared to the appellate court that the trial court had not taken the proper advantage of having seen and heard the witnesses, then in such a case the matter would become at large for the appellate court, in which the appellate court was under a duty to give such decision as the justice of the case required, and, if need be, reverse the decision of the trial court and substitute its own judgment for it. In any other case the appellate court should not interfere with the findings of fact made by a trial court."

For the reasons given in this judgment we allow the appeal.

B. T. ARYEETEY
JUSTICE OF THE SUPREME COURT

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JUSTICE OF THE SUPREME COURT

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