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

CORAM: DR. DATE BAH JSC (PRESIDING)
ANIN-YEBOAH JSC
P. BAFFOE-BONNIE JSC
A. A. BENIN JSC
J. B. AKAMBA JSC

CIVIL APPEAL.
No J4/11/2012

26TH JULY, 2013

KOFI MANU **PLAINTIFF/APPELLANT/RESPONDENT**

VRS.

AKOSUA AGYEIWAA & 3 ORS. **DEFENDANTS/RESPONDENTS/APPELLANT**

JUDGMENT

AKAMBA, JSC

This is an appeal by defendants/respondents/appellants, herein after simply referred as appellants, from the judgment of the Court of Appeal sitting in Kumasi dated the 22nd day of October, 2009. The Court of Appeal allowed the appeal on reliefs 1 and 3 on the writ of summons and in addition ordered the appellants to vacate all rooms they had unilaterally taken over. They were also ordered to hand

over the lease documents on the property to the plaintiff/appellant/respondent, hereinafter simply, the respondent.

BRIEF BACKGROUND

The suit was initiated in the High Court, Kumasi by Nana Owusu Akyaw Prempeh, customary successor of Opanin Kofi Boakye Asamoah (deceased) as plaintiff and upon his demise was substituted by the present respondent, Kofi Manu. The evidence on record is that following the death of Opanin Kofi Boakye, the 1st defendant (now appellant) who is the widow of the deceased, together with her children, the 2nd to 4th defendants (appellants), realizing that the Will left by the deceased did not appear to entitle them to any immediate place of abode of their own, pleaded with the respondent (plaintiff), to be allowed to occupy some rooms on the ground floor. The plaintiff obliged and the defendants offered aseda. Subsequent events and actions of the defendants portray contradictions, betrayal and ingratitude for which reason the plaintiff, now respondent, mounted his action at the High Court seeking the following reliefs, namely:

(i) A declaration that upon the true and proper interpretation of the provisions of the last Will and Testament of Opanin Kofi Boakye Asamoah, late of Nkwantakese, the 1st, 2nd, 3rd, and 4th defendants have no interest in any rooms in the ground floor of House No. Plot 7, Block 2, Manhyia, Kumasi.

(ii) A declaration that by challenging and denying the title of the plaintiff as customary successor to Opanin Kofi Boakye Asamoah (deceased) the defendants have forfeited their license to live in the rooms in the Ground floor in House No. 7, Block 2, Manhyia, Kumasi to the Plaintiff.

(iii) An order compelling the 1st defendant to surrender the lease on the property in question to the plaintiff.

(iv) An order of perpetual injunction restraining the Defendants from insulting the Plaintiff or committing acts of nuisance against Plaintiff.

(v) An order ejecting defendants from the rooms they are occupying in the Ground floor in the said property.

The High Court, per Kpentey, J, entered judgment for the defendants, appellants herein. In the decision, the trial High Court found that the testator did not devise any room on the ground floor of the house to anybody, hence the ground floor fell into intestacy and automatically devolved onto his matrilineal family. The court also held that the intestate estate of Kofi Boakye Asamoah was caught by the Intestate Succession Law 1985 (PNDCL 111) notwithstanding that Kofi Boakye Asamoah died long before the law was passed. In this vein, the court purported to employ an alleged purposive application of the law by ascertaining any inadequacy in the old law which the PNDCL 111 sought to remedy which the trial judge then applied to the case before him. Accordingly, the court determined under section 4 of PNDCL 111 that the un-devised portion of the house would devolve on the 1st defendant and her children by late Kofi Boakye Asamoah. The plaintiff's claim was therefore dismissed and judgment entered on the counterclaim for the defendant.

The plaintiff, Kofi Manu, who was dissatisfied with the decision, filed an appeal to the Court of Appeal upon no less than seven grounds.

The Court of Appeal overturned the decision of the High Court stating that the trial court erred when it held that the intestate estate of late Kofi Boakye Asamoah was caught by the Intestate Succession Law, 1985 (PNDCL 111). It found the law inapplicable to the case and therefore set aside the order and entered judgment for the appellants, respondents herein. The appellate court declined to eject the (respondents), appellants herein from the rooms that the respondent had permitted or authorized them to use pending the completion of the rooms devised to them on the 1st and 2nd floors of the house, which they are to occupy for life. The appellants were however to vacate any other rooms, apart from the seven rooms, unilaterally occupied by them. Lastly, all lease documents taken by the appellants were to be surrendered to the respondent.

GROUNDS OF APPEAL

The defendants/appellants who have expressed dissatisfaction with the decision of the Court of Appeal have filed the following grounds of appeal as contained in the notice of appeal filed on 4th November 2009:

" i. The judgment of the Court of Appeal is against the weight of evidence.

ii. The Court of Appeal fell into error when it held that in the absence of a specific counterclaim by the defendants/respondents/applicants, the appellants were not entitled to a relief that a part of their father's estate was caught by PNDCL 11 (sic).

iii. Further grounds of appeal would be filed upon receipt of the record of proceedings."

There is no record that the appellants subsequently filed any further grounds of appeal upon receipt of the record of proceedings as stated in their notice of appeal. There is also no evidence on record that the appellants sought and were granted leave to urge any grounds other than those filed in the notice of appeal. In any case the appellants appear to have adopted a totally different approach to urging their appeal than is prescribed by rule 6 of CI 16, (1996), the rules of this court. They appear to be oblivious of the requirements of CI 16 and on their own initiative merely abandoned the grounds filed in the notice of appeal and then proceeded to urge grounds fashioned as 'issues presented' in their statement of case filed on 15th November 2011. The 'issues presented' were three and stated as follows:

"1. Whether or not a Court of Law can grant a relief not specifically stated on the writ of summons or counterclaim.

2. Whether or not a customary successor can distribute an Estate without Letters of Administration.

3. Whether or not in the interpretation of a will, the intent of the Testator is to be gathered from the surrounding circumstances especially the content of the will."

It is unfortunate to observe that the appellant's statement of case was fashioned by counsel from reputable chambers. This court being the final appellate court, like the Court of Appeal, resolves appeals based on grounds of appeal arising from allegations of error of fact or law or mixed law and fact. The Supreme Court Rules CI 16, (1996) provide adequate rules with respect to the practice and procedure

for the conduct of practice before this court. Rule 6 (4) and (5) of CI 16 sets the tone as follows:

" 6 (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."

The respondent refused to swallow the bait evident in the appellants' lapses which respondent described as a failure to address the fundamental issues raised in their appeal. There being no record of any leave having been sought by and granted to the appellants to urge any additional grounds of appeal, the respondents also refusing to respond to those grounds purportedly argued, and rightly so, this court has nothing else than strike out those so called 'issues presented' and argued by the appellants, which we hereby do.

We will now proceed to deal with this appeal in the context of the original two grounds of appeal filed, notably that the judgment is against the weight of evidence and secondly that the Court of Appeal erred when it held that in the absence of a specific counterclaim by the defendants/respondents/appellants/applicants, the appellants were not entitled to a relief that a part of their father's estate was caught by PNDCL 11 (sic).

This court has clarified the position as to what is entailed when an appellant places reliance upon the omnibus ground of appeal.

The Judgment is Against the Weight of Evidence.

In **Brown vs Quashiegah (2003-2004) SCGLR 930 @ 942**, this court per Dr Twum, JSC, espoused the general principle that in determining the omnibus ground of appeal, which is by way of re-hearing, the appellate court is placed in the same position as if the exercise was the original re-hearing. The court may, in exceptional circumstances, receive evidence in addition and may review the whole case and not merely the points as to which the appeal is brought. This is however subject to the rule of practice in our courts which requires the plaintiff to invoke it by filing appropriate grounds of appeal. In setting down the grounds of appeal, the so-called omnibus ground should be distinguished from misdirection or errors of law, challenge to jurisdiction or capacity, etc. In the view of the court, a party who only gives notice that he intends to rely on the so called omnibus ground should not be permitted to argue points of law. In short an appeal based on the omnibus ground allows the party to argue solely issues or points of fact; it does not permit reliance or arguments on points of law. The rules make specific provisions for invoking arguments on point of law which must be adhered to. We would in this context, barring any exceptional reasons, limit discussions on this ground to any dissatisfaction on findings of fact, if any.

There is no challenge to the concurrent findings by the High Court and the Court of Appeal that the property was solely acquired by the testator hence there is no cross-appeal by the respondent. This court has reiterated clearly in such cases as **Achoro v Akanfela (1996/97) SCGLR 209; Koglex Ltd No 2 vs Field (2000) SCGLR 175** that where a first appellate court had confirmed the findings of the trial court, the second appellate court would not interfere with the concurrent findings 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 court had dealt with the facts. In this case however the bone of contention is not to doubt that the property in contention is the self acquired property of the testator but rather to the interpretation to certain expressions or words employed by the testator in his devise. The deceased wrote the Will in 1967 some

five years before his demise. For a period of some nine and half years before his demise, the testator was stricken with a stroke and bedridden and nursed by the wife and children. Meanwhile, work on the building stopped when the testator took ill. At this time only five rooms on the "ground floor" of the building under construction had been completed. It is relevant to be guided by the devises in the Will under consideration as follows:

"(1) I hereby appoint my brother Joseph Asamoah of Nkwanta-Kese and Kwaku Fosu also of House No. O. I. 113 Kumasi Ashanti to be the Executors and trustees of this my Will.

(2). I hereby bequeath five (5) rooms in the **First Floor** of my uncompleted house situate on Plot Number 7 Block 2 Manhyia Extension District, Kumasi to my children by wife Akosua Agyeiwaa whose names are; Mary Asamoah, Comfort Asamoah, Grace Asamoah, Harriet Asamoah and Kofi Boakye Asamoah.

(3) I bequeath two (2) rooms in the **first floor** to my wife Akosua Agyeiwaah.

(4) I bequeath five (5) rooms in the **second floor** in the said house to my children mentioned above.

(5) I bequeath two (2) rooms in the **second floor** of my said house to my wife Akosua Agyeiwaah.

(6) I bequeath one (1) room in the **first floor** of the said house to my brother Joseph Asamoah.

(7) *I direct that if I am unable to complete the said building before I die the beneficiaries to the said rooms should complete them for their own use for life.*

(8) I hereby devise my cocoa farm situate lying and being at Tanom on Duayaw Nkwanta Stool Land at a place commonly known and called "TANO ANO" and bounded by the properties of Kofi Boatchey, Kwaku Mensah, Yaw Nyarko, Yaa Kraah, Kwabena Nimsem, Kwaku Krah and Kofi Dwumah to my wife Akosua Agyeiwaah and my children by her mentioned above. I bought this farm for four hundred and fourteen New Cedis with my mother-in-law ADJOA ADDAI who contributed two hundred (NC 200.00) towards its purchase. There was a

misunderstanding between us regarding this farm and my mother-in-law the said Adjoa Addai has sold her share to me upon payment of the said sum of Two hundred New Cedis (NC 200.00). I direct that my wife Akosua Agyeiwaah and my children by her whose names are mentioned above pay to my said mother-in-law the balance of the said two hundred New Cedis (NC 200.00) after deducting the amount my said mother-in-law realized from the sale of crops she has already sold."

The actual areas of contention in the above Will pertain to the descriptions of the relevant floors of the uncompleted building devised. As stated supra, at the time of the testator's demise only the ground floor of the building had been partially completed. The remaining floors - be they first or second, had not been embarked upon at all. So, in essence what was sought to be devised to defendants was not yet in existence. However, it appears the testator envisaged that situation when he directed in paragraph 7 of the Will as follows: "I direct that if I am unable to complete the said building before I die the beneficiaries to the said rooms should complete them for their own use for life." Indeed the appellants did not deny that the devises made to them were in respect of rooms on the 1st and 2nd floors of the building which was then under construction. Their contention was however that the description or expression 1st and 2nd floors in the Will, as used by the testator meant the ground and 1st floors since the ground floor was being constructed when the Will was made. Certainly, there is no ambiguity in the distribution of the estate that the testator made in his Will. The testator had devised rooms on the 1st and 2nd floors of the yet to be completed house to the wife and children, the appellants herein and also to the brother Joseph Amoah. The ground floor which was under construction at the time of the devise was not bequeathed. This finding of fact was correctly made by the trial court and also affirmed by the Court of Appeal.

Error of Law - The Court of Appeal fell into error when it held that in the absence of a specific counterclaim by the defendants/respondents/applicants, the appellants were not entitled to a relief that a part of their father's estate was caught by PNDCL 11 (sic).

It can be recalled that the trial court after correctly determining that the ground floor of the disputed property was not devised under the Will raised eyebrows when it purported, without any foundation and/or justification, to apply or invoke the Intestate Succession Law, 1985, (PNDCL 111) to the facts in this case which occurred some thirteen years before the coming into existence of the said law. The Court of Appeal rightly reversed the appendage stating that the said law was inapplicable in the instance. The appellate court further refused to order the appellants herein to vacate the rooms they occupied by the permission of the respondent pending the completion of their rooms on the 1st and 2nd floors. The Court of Appeal however gave no reasons for its refusal to order the vacation of the appellants from the rooms.

In dealing with this issue of error of law in granting a relief in the absence of a specific relief sought, we will first thrash out the position pertaining to the ground floor rooms which had fallen into intestacy and what rights or interests the appellants have, if any, in them. The appellants were wife and children respectively of the deceased testator and all of Akan origin.

The interest of a wife and children in the intestate estate of a deceased husband and father respectively in an Akan family was recognized as far back as 1965, when Archer J (as he then was) in **Quaico etc v Fosu & Anor (1965) C.C. 105** in a case involving the estate of the late Kofi Antubam gave a refreshing highlight of the customary law position at the time. In the case, Kofi Antubam who hailed from Wassaw Akropong in the Wassaw Amenfi Traditional Area had died intestate leaving two widows both married under customary law and nine children. The plaintiff, head of the late Antubam's family, took out an originating summons for the determination of whether the defendants and their nine (9) children have any interest in the estate of the late Antubam, and if so the nature and size of that interest. The plaintiff's contention was that by Akan custom, which applied to the deceased, children do not belong to their father's family and hence have no interest whatsoever in his estate except a right to reside in their father's self acquired house during good behavior. The court held that the defendants and their children have an interest in the estate of the said Kofi Antubam; the defendants as widows have a right of residence during widowhood in any house

built on land self acquired by the deceased during their life-time subject to good behavior; the interest of the widows and the children is equivalent to a determinable life tenancy which entitles them to a share of the income accruing from the houses in which they are entitled to reside ; the widows and children are entitled to be maintained by the Head of Family or Successor by the payment of adequate allowance to the widows during their widowhood and also to the children until they are capable of maintaining themselves. These payments may be periodical or amount to annuities; by Akan customary law, the self acquired property of the deceased has become family property on his death intestate and the maternal family have become the successors to the estate subject to the life interest of the deceased's children and occupancy rights of the widows during their widowhood in the houses built by the deceased on self-acquired land. Since it seems that the widows and the children have an interest not only in the immovable property but have to be maintained as of right from the whole estate, they are akin to beneficiaries who derive some advantage or benefit from the whole estate. Their interest and rights to maintenance are subject to the life interest of each member of the maternal family in the whole estate vested in the successor. Their interests are inextricably mixed up in the indivisible estate and accordingly they are entitled to shares in the estate if ultimately the whole estate is converted into money or partitioned. The widows and children do not inherit but they claim interests from the inheritors, that is, the maternal family through the head of family or the successor.

The above case sums up the customary law position in the intestate estate of an Akan family before the promulgation of the Intestate Succession Law in 1985. Both the trial court and the Court of Appeal rightly found that under the Will of the late Opanin Kofi Boakye Asamoah, rooms in the yet to be constructed 1st and 2nd floors had been devised leaving no mention what so ever of the rooms on the ground floor. Equally significant is that both courts found that the rooms on the ground floor in the circumstance fell into intestacy. Without any measure of doubt, the Court of Appeal was right in its view that the PNDCL 111 was inapplicable to the case which originated in 1972, thirteen years prior to the promulgation of the law. From this premise, the ground floor rooms of the

uncompleted house having fallen into intestacy, the widow and children i.e. appellants herein at the time did not inherit but claimed interests in the rooms from the inheritor, respondent herein, that is, the maternal family through the head of family or the successor. They (appellants) have an interest and a right to maintenance in those rooms which are subject only to the life interest of each member of the maternal family in the whole estate which is vested in the respondent. We are prepared to hold that it was in recognition of the appellants' interest and right to maintenance in those rooms that the respondent acceded to their request to be permitted to occupy some rooms on the said ground floor which was sealed with the aseda. It is significant to add that the continued occupancy of those rooms by the appellants is subject to good conduct. The least a family head or successor would expect from the widow and children of the deceased is respect and good behaviour towards such head and family members. Despicable conduct in the nature of regular scathing confrontations, insolence, insubordination, such as arrogation of more rooms than assigned to them certainly go beyond the line of good conduct. The appellants appear to have taken that perilous path in their mistaken belief that they had unfettered rights to everything in the building in dispute. That trend could lead to very dire consequences for the appellants. It is worth observing from the whole conduct of this case that the parties and notably the appellants and indeed their counsel had not appreciated the facts grounding their claims hence the numerous fishing expeditions embarked upon by them.

When the Summons for Directions was filed on 12/3/97 by the solicitor for the plaintiff, respondent herein, eleven issues were filed to guide the outcome of the proceedings. The very last issue states "any other issue raised by the pleadings". It is within the scope of the pleadings and evidence on record for the trial court and the Court of Appeal to determine on the status of the appellants' occupancy of the rooms on the ground floor as has been the case as aptly pronounced upon by this court in the **Gihoc Distilleries & Household Products Ltd (No 1) vs Hanna Assi (No 1) 2005-2006 SCGLR 1**.

However, looking closely at the ground of appeal raised for our determination, it being an apparent error of law, the same does not call for any resolution. It

appears that the appellants did not go beyond the initial filing of their notice of appeal to take an urgent second look with a view to stating exactly what relief/s they wanted from this court. Failing this, this court would not ordinarily grant any relief which a party has not formally asked for. The only instance when a relief has been, so to speak, granted without being specifically asked for is in an instance when that relief emerges or is apparent from the evidence on record. The error of law filed to aid the appellants herein, as above stated, assumes that the Court of Appeal made a finding that a part of the deceased's estate was caught by PNDCL 11 (sic). This is not borne out by the record. This is the conclusion made by the Court of Appeal per Yaw Appau, J.A:

"In my view, the trial court erred when it held that the intestate estate of the late Kofi Boakye Asamoah was caught by the Intestate Succession Law, 1985 (PNDCL 111). The law was inapplicable in this case because the parties were not in the trial court over the distribution of the intestate estate of the late Kofi Boakye Asamoah. I will therefore allow the appeal and set aside the order of the trial court that decreed that the undevised portion of the disputed house should devolve on the 1st respondent and the children of the late Kofi Asamoah. In its place, I give judgment for the appellant on reliefs 1 and 3 of his claim as endorsed on the writ of summons."

The considerations upon which the ground of appeal was fashioned are therefore non-existent or simply incorrect; hence nothing can be founded upon it.

In the premises, this ground of appeal fails and is dismissed.

(SGD) **J. B. AKAMBA**
JUSTICE OF THE SUPREME COURT

(SGD) **DR. S. K. DATE BAH**
JUSTICE OF THE SUPREME COURT

(SGD) **ANIN YEBOAH**
JUSTICE OF THE SUPREME COURT

(SGD) **P. BAFFOE BONNIE**
JUSTICE OF THE SUPREME COURT

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

COUNSEL

OBENG MANU JNR. FOR THE PLAINTIFF /APPELLANT/RESPONDENT.

KWAME BOAFO AKUFFO FOR THE DEFENDANTS/RESPONDENTS /APPELLANTS.