**IN THE SUPERIOR COURT OF JUFICATURE**

**IN THE SUPREME COURT OF JUSTICE**

**ACCRA – GHANA**

**CORAM: ANSAH, JSC (PRESIDING)**
**ADINYIRA (MRS), JSC**
**ANIN YEBOAH, JSC**
**AKOTO BAMFO (MRS), JSC**
**AKAMBA, JSC**

**CIVIL APPEAL**

**NO. J4/41/2012**

**25TH NOVEMBER 2015**

**IN THE MATTER OF AN APPLICATION FOR GRANT OF LETTERS OF ADMINISTRATION WITH WILL AND CODICIL ANNEXED BY MARY QUARCOO AND NII KOJO ARMAH II – RESPONDENTS**

**AND**

**IN THE MATTER OF ENTRY OF CAVEAT BY MRS. VICTORIA WELBECK AND AGNES ASHONG – APPELLANTS**

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**J U D G M E N T**

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***ANSAH JSC:-***

***Introduction and background***:

This is an appeal from the decision of the Court of Appeal which affirmed the decision of the trial High Court. One Joseph Nii Narh Ashong whose estate is the subject of controversy between the parties

herein died on the 27th day of July, 1989. A widow and nineteen children survived him. The deceased was purported to have made a will dated 14 April 1985 and thereafter, a purported codicil executed on 15 July 1989. In the said will and codicil, two executors were appointed by the testator, namely Elisha Adjetey and Victor Albert Otoo. They applied for Probate but before it was granted, Elisha Adjetey died and Albert Otoo renounced probate. The estate thus remaining unadministered for a while, it became necessary for the first applicant, Mary Quarcoo, a surviving widow of the testator and a beneficiary under the Will as well as the head of family of the deceased to jointly apply for Letters of Administrations with will and codicil annexed, to administer the estate.

**The Caveat**

Mrs. Victoria Welbeck and Agnes Ashong caveated against the grant for the reason as alleged by the caveatrixes that the said will and the codicil read on 11 September 1998 was a forgery and therefore not a true and original last will of the deceased for the signature as it appears on the purported will is not similar to any of the deceased's specimen signatures.

Consequently, the parties joined issues on 'whether or not the purported Will of the said Joseph Nii Narh Ashong dated the 14th of April 1985 and the codicil dated 15th July 1989, were procured by the proponent by fraud and consequently null and void'. The validity of the alleged will was thus put in issue. The alleged will was tendered in evidence as Exhibit M. The trial judge having reminded himself that the case concerned a deceased person therefore it must be looked at with great care, proceeded to critically analyze or evaluate fully the evidence on record including the oral evidence by the witness to the said will and codicil as well as the expert evidence of the court witness, and eventually gave judgment for proponents. The caveatrice's appeal was dismissed in totality and she has hence, appealed to this court.

**The Appeal to the Supreme Court:**

There are two Grounds of Appeal before this court, namely;

a. Both the High Court and the Court of Appeal erred in law when they declared the Last Will of Joseph Nii Narh Ashong valid.
b. The judgment was against the weight of the evidence adduced at the trial.

Counsel for the appellants argued the two grounds together by focusing on three main issues which according to him should tip the evidence and consequently, the decision in the lower courts in his favor, namely;

1. That the evidence of PW1 and PW 2 are contradictory,
2. That the trial Judge as well as their Lordships at the Court of Appeal did not rely on the expert evidence of the court and if they had done so, their decision would have been different from their judgment at both courts below.
3. That their Lordships below dwelt on the fact that PW1 and PW2 were not cross-examined, which he believes not to be the case as borne by the evidence.

Legal Analysis

It is provided in the Wills Act, 1971, (Act 360) section 2 that:

(1) No will shall be valid unless it is in writing and signed by the testator or by some other person at his direction.
(2) No signature shall be operative to give effect to any disposition or direction which is underneath or which follows it, or which is inserted after the signature has been made.
(3) The signature of the testator shall be made or acknowledged by him in the presence of two or more witnesses present at the same time.
(4) A signature by some other person at the direction of the testator shall be made by that other person in the presence of the testator and two or more witnesses present at the same time.

(5) The witnesses shall attest and sign the will in the presence of the testator, but no form of attestation shall be necessary.

(6) Where the testator is blind or illiterate, a competent person shall carefully read over and explain to him the contents of the will before it is executed, and shall declare in writing upon the will that he had so read over and explained its contents to the testator and that the testator appeared perfectly to understand it before it was executed.

**Concurrent findings of facts:**

This appeal comes on the back of two concurrent findings of the court below.

The position of the Supreme Court in cases which travel beyond the High court as well as the Court of Appeal in an appeal, is that an appellate court should be slow to disturb the concurrent findings of fact by two court below unless the finding are so perverse and unsupported by the evidence on record. See *Obrasiwa II v. Otu* (1996-97) SCGLR 618, *Achoro v Akanfela*, [1996-97] SCGLR 09, *Obeng v Assemblies of God Church*, [2010] 32 GMJ 132 SC, *Akuffo-Addo v Cathline* [1992]1 GLR 377 SC, *Fosua & Adu-Poku v Dufie (Deceased) & Adu-Poku Mensah* (2009) SCGLR 311, *Gregory v Tandoh IV & Hanson 2010 SCGLR 971; Kusi v Kusi & Bonus 2010 SCGLR 60*. The duty of the court in these cases is consequently, to examine the findings of the two lower courts below in the light of the evidence on the records and to establish whether the findings are so perverse and unsupported by the evidence on record.

The requirements for obtaining probate are the same as those for letters of administration with will annexed. Therefore, where the validity of the will is challenged in an application for letters of administration with will annexed, a plaintiff must prove the will in the same way as he would in an application for probate. The onus was on the plaintiff to prove

positively that the will was duly executed, in that it complied with the requirements of sections 1 and 2 of the Wills Act, 1971 (Act 360).

> *"The rule enunciated by Parke B is that in every case the onus lies on the propounders of the Will to satisfy the Court that the instrument is the Last Will of a free and capable testator, must, however, be taken, I think, to refer to the first stage so to speak, of the onus, for the onus does not necessarily remain fixed; it shifts. Where there is a dispute as to a Will those who propound it must clearly show by evidence that prima facie, all is in order, that is to say, there has been due execution and that the testator had the necessary mental capacity and was a free agent. Once they have satisfied the Court, prima facie, as to these matters, it seems to me the burden is then cast upon those who attack the Will and they are required to substantiate by evidence the allegation they have made as to lack of capacity, undue influence and so forth."* See – **Johnson and others v. Maja and others 13 WACA 290** at 292".

In the instant case, since the will appeared ex facie to satisfy the formalities of due execution, under normal circumstances the maxim *omnia praesumuntur rite esse acta* would apply and the will would be presumed to have been properly executed and attested, and probate in common form, would be granted. However, since the validity of the will has been challenged, it must be proved in solemn form by calling a witness who was present and saw the execution to give evidence in proof.

The evidence of the defense having thrown a measure of suspicion on the proper execution of the will, the *onus probandi* lay on the plaintiff to prove affirmatively that Joseph Nii Narh Ashong knew and approved of the contents of the document and that it was properly attested.

## **Validity Of The Will**

The central issue in this case is the validity of the will and codicil which the deceased testator executed in 1985 and 1989 respectively. The only

evidence adduced to excite the trial court's suspicion is the sequence the witnesses took in signing, to attest that they witnessed the signature of the testator. The case of the Appellants is that the evidence of PW1 and PW2 were conflicting and contradicted each other. PW1, Mr. James Edmund Aryee Addo at pages 19 and 20 of the record of appeal stated as follows: 'the deceased told me he would like to invite me to his house for an important discussion. … I went to see the deceased. The deceased invited me to his sitting room. I found already seated with the deceased, one Lawyer Addo and one Mr. Hammond. The deceased said he had made a will and that he would like Mr. Hammond and I to be witnesses to the will. I thought of it for some time and eventually decided to be a witness to the will because I had known him for years and was a family and close friend to my father. Mr. Hammond also agreed to be a witness to the deceased's will. The deceased got up into the bedroom and brought out certain documents. The deceased gave the document to Lawyer Addo. Lawyer Addo got the document and went through and said it was the deceased's will. In order to make sure of what I was to sign I collected the document and read the 'headline'. I agreed and signed as a witness. Mr. Hammond also signed. The deceased, the late Ashong, also signed. Thereafter the deceased went into his bedroom and brought out a bottle of schnapps. He opened the drink, poured libation, and shared the drink…"

Mr. Samuel Ashietey Hammond's account of the signing as a witness is found at page 21 of the record of Appeal and it was as follows: "…He sent for me to come and be a witness in respect of a document - a will that he had prepared. When I got there I signed because he asked me to sign to be a witness to the document. When I got there I saw Mr. Ashong (deceased), Lawyer Addo and another Addo. The last Addo, was PW1, who had just given evidence. When I got there the paper was there I signed and Addo also signed. Mr. Ashong signed and Mr. Addo PW1 (signed) Lawyer Addo also signed and I also signed the will. After that we all departed."

Both witnesses gave account of how they were called on the 15/07/89 to witness the codicil.

Section 2 (3) of the Wills Act 1971 (Act 360) states that:

*3) The signature of the testator shall be made or acknowledged by him in the presence of two or more witnesses present at the same time".*

I am of the opinion that all the two witnesses were present when the testator signed the will. This can be gleaned from the evidence of both PW1 and PW2. Therefore any inconsistencies in relation to the sequence of the signature of the testator and that of the witnesses are of negligible legal consequences, if any at all. The relevant provision of Act 360 that is engaged here has not been breached. The requirement is that a testator signs or acknowledges his signature in the presence of two or more witnesses who must also sign to attest same. In the instant matter the testator signed his signature in the presence of the two witnesses as recounted above. There cannot be any difficulty on the part of the witnesses to identify the signature of the testator as per their evidence they saw him sign the will. The other requirement that both witnesses must be present at the same time when witnessing signature has also not been breached.

From the evidence, both witnesses stated that Lawyer Addo signed the will. This is not borne out on the face of the will and hence it is immaterial whether it was at the back of the will or, or the envelope in which the will was placed. Clearly if Lawyer Addo signed the will, a fact which is not borne by the evidence, he could not have signed as a witness as he drafted the will as the legal representative of the testator.

The evidence of the Respondents thus failed to excite the suspicion of the trial judge at the first tribunal on the proper execution of the will. The *onus probandi* that lay on the respondents had been discharged to prove affirmatively that Joseph Nii Narh Ashong knew and approved of the contents of the document and that it was properly attested.

Counsel for the Appellants at the initial trial stage in the High Court did not succeed in shaking the foundation of the evidence-in-chief of the witnesses. Counsel failed to cross-examine PW1 and in the case of PW2, the witness confirmed that 'when I got there the paper was there. It was on the table. He told me he wanted me to sign so I signed.' This is after confirming the presence of PW1 which is tandem with the provision of Act 360. Clearly, the onus on the Appellant was to rebut the maxim *omnia praesumuntur rite esse acta,* which stood intact at the end of the evidence of PW1 and PW2 and therefore the will which was presumed to have been properly executed and attested had now been proven solemnly as per rules of court.

**Evidence of the expert:**

It is the case of Appellants that the trial Judge as well as their Lordships at the Court of Appeal did not rely on the expert evidence of the court and if they had done so, their decision would have been different from their judgment at both courts below. Our brother S. A. Brobbey JSC, in his book, "***PRACTICE AND PROCEDURE IN THE TRIAL COURTS AND TRIBUNALS OF GHANA", SECOND EDITION***, at paragraph 222 on page 103, states:

> "The important point to note is that the issue of the competence of an expert is one of law for the court to decide. An equally important point to note is that expert evidence is only a prima facie evidence and should not be taken as a substitute for what the court has to decide".

It is a point of law that a court witness, as in this instant case, is an officer of the court and therefore in as much they are experts in the type of evidence they give, they do not decide the issue; the court decides the issue. Therefore it is up to the court or the trial judge to apportion the requisite weight as the case may be to the evidence so given by the expert. This is supported by section 114 (1) of the Evidence Act 1975; which provided that:

> *"In any action at any time the court in its discretion may, on its own motion or at the request of any party, appoint a court expert to inquire into and report upon any matter on which an expert opinion or inference would be admissible under section 112".*

Section 112 of the Evidence Act 1975 states:

> *"If the subject of the testimony is sufficiently beyond common experience that the opinion or inference of an expert will* ***assist*** *the court or tribunal of fact in understanding evidence in the action or in determining any issue, a witness may give testimony in the form of an opinion or inference concerning any subject on which the witness is qualified to give expert testimony".*

The key word used is 'assist'. The hand writing expert's evidence can be found at page 34 of the Record of Appeal. It is to be treated like that of any other witness. It was held in *Osei and others v. The Republic* [1976] 2 GLR 383-393 that: 'in jury trials a jury was not permitted to draw its own unaided conclusions from a comparison of handwriting because the guidance of an expert was a crucial requisite. However, when the opinion was that of the court itself, judges might form their own opinion on disputed handwriting'. In the instant case, the trial judge had able guidance from a well qualified writing expert but even then, in compliance with the legal regimen which should be followed before expert opinion could be endorsed, it was only when his own observations coincided with the opinion of the expert that he gave it his approbation. See *R. v. Harvey (1869) 11 Cox C.C. 546; R. v. Tilley [1961]1 W.L.R. 1309, C.C.A.; R. v. O' Sullivan [1969]1 W.L.R. 497, C.A.; R. v. Smith (Thomas) (1909) 3 Cr. App. R. 87, C.C.A.; R. v. Rickard (1918) 13 Cr. App. R. 140, C.C.A.; R. v. Appeal (1951) 13 W.A.C.A. 143 and State v. Lawmann [1961] G.L.R. (Pt. II) 698, S.C.* cited.

It is a point of law that a handwriting expert is not required to state definitely that a particular writing was by a particular person. His functions were to point out similarities or differences in two or more

specimens of handwriting submitted to him and leave the court to draw its own conclusions. In other words, a handwriting expert having examined, deciphered and compared the disputed writing with any other writing, the genuineness of which was not dispute, was only obliged to point out the similarities or otherwise in the handwriting; and it was for the court to determine whether or not, the writing was to be assigned to the testator.

In the instant case, the report was supposed merely to assist the court in deciding the vital issue of whether or not the signature on the purported will as being that of Joseph Nii Narh Ashong, was a forgery. And the trial judge was right in treating the evidence of the expert as a guide to arrive at this conclusion. In the opinion of the trial judge, any insignificant variation in the signature on the will and codicil, was attributed to the testator's condition of health, age and posture. It is for the appellant to show that this opinion of the trial judge is so perverse or manifestly unsupported by the evidence adduced. In my opinion the appellant failed to convince this court that this is the case. At the High Court the Caveatrice, the appellant herein, relied heavily on the evidence of the expert witness to establish the alleged forgery. When that evidence failed, they were left with no other evidence to establish the forgery. I am minded to incline with the thinking of the trial judge on the issue of weight to be given to the expert witness evidence.

In conclusion, the appellants herein have not succeeded in advancing any arguments in this instant appeal to support their grounds that the decisions at the High Court as well as the Court of Appeal are so perverse in law or unsupported by the evidence on record.

The circumstances under which letters of administration with will annexed would be granted were where a will appointed no executors, or where the executor appointed in the will predeceased the testator or where the executor had renounced or refused to act or where the appointment was void for uncertainty. In the instant case, the will appointed executors but the said executors renounced probate or were unable to act as such.

The requirements for obtaining probate were the same as those for letters of administration with will annexed. Therefore, where the validity of the will was challenged in an application for letters of administration with will annexed, a plaintiff must prove the will in the same way as he would in an application for probate in solemn form. The onus was on the propounder of the will (the Respondent herein) to prove positively that the will was duly executed, in that it complied with the requirements of sections 1 and 2 of the Wills Act. 1971 (Act 360). Letters of Administration with will annexed could therefore be granted in favour of the plaintiff. See *Kotei (Decd.), In Re: Kotei v Ollennu* [1975] 2 G.L.G. 107; *Mackay v. Rawlinson* (1919) 35 T.L.R. 223; *Barry v. Butlin* (1980) *2 Moo P. C.* 480; *Tyrrell v. Painton* [1894] p.151, C.A. and *In* Re: *Cole (Decd.), Cudjoe v. Cole* [1977] 2 G.L.R. 305, C.A. were cited. It was held in the latter case that:

*(1) The will was valid because on the facts, the formalities required by section 9 of the Wills Act, 1837 7 Will. 4 & 1 Vict. C 26, which was applicable at the date of the execution of the instant will were complied with. The mere fact that the testator had already signed his name before the Reverend Father arrived made no difference. The testator acknowledged his signature before the two witnesses who in turn signed their respective names in the presence of the testator and in the presence of each other both at the same time. Section 9 of the Wills Act, 1837, did not require any more ritual than these. Even if the testator was assisted in signing his name, that fact did not invalidate the will because section 9 of the 1837 Act permitted him to direct somebody to sign for him in his presence. Section 9 clearly stated that "no form of attestation shall be necessary."If there had been no attestation clause at all, the two attesting witnesses gave oral evidence to demonstrate that the section of the Act was complied with. It was on account of such possible frailties in attestation clauses capable of generating legal confusion that perhaps compelled the legislators to enact that no form of attestation clause shall be necessary*. Ilott v Genge (1842) 3 Curt.160; Gaze v Gaze (1843) 3 Curt, 451 and Keigwin v Keigwin (1843) 3 Curt, 607 cited. Re Colling (Decd*); Lawson v von Winckler [1972] 3 All E.R. 729 distinguished.*

The appellants offered evidence of the defects in the execution of the Will. The judge said he was not satisfied that the Will had not been executed by the alleged testator. The Court of Appeal also critically evaluated the evidence to find out whether the findings by the trial Court were supportable. In its opinion, the learned trial judge made a critical analysis of the evidence before him and consequently affirmed his judgment.

I have also read and critically evaluated the evidence on record and I am satisfied that the findings of the two courts below are amply supported by the evidence. As was stated in *Bakers-Woode v. Nana Fitz* (2007 – 2008) 2 SCGLR 897, it is then not permissible for the Supreme Court to interfere with the determination by the trial judge. The appellants have not been able to discharge their burden in this appeal and in the courts below and therefore the Will of Joseph Nii Narh Ashong who died on the 27th day of July 1989, remains valid.

The Appeal is hereby dismissed.

**(SGD) J. ANSAH**

**JUSTICE OF THE SUPREME COURT**

**(SGD) S. O. A. ADINYIRA (MRS.)**

**JUSTICE OF THE SUPREME COURT**

**(SGD) ANIN YEBOAH**

**JUSTICE OF THE SUPREME COURT**

**(SGD) V. AKOTO BAMFO (MRS)**

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