IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA-AD 2014

CORAM: **OWUSU (MS), J.S.C. (PRESIDING)**
ANIN YEBOAH, J.S.C.
BAFFOE BONNIE, J.S.C.
GBADEGBE, J.S.C.
AKOTO BAMFO (MRS), J.S.C.

CIVIL APPEAL
NO.J4/44/2013

15TH MAY 2014

1. **NII MATE TESA)**
   (SUBSTITUTED BY DANIEL MARKWEI MARMAH)
2. **NII MATEI TESA**
   (SUBSTITUTED BY MARMAH MARTEI) **PLAINTIFFS**
3. **NII TAWIAH KWEI** **RESPONDENTS**
   (SUBSTITUTED BY CHRISTOPHER ANERTEY KWEI) **RESPONDENTS**
4. **ERIC A. KWEI (DR.)** **CROSS- APPELLANTS**
5. **ATAA KWAKU MENSAH**
   (SUBSTITUTED BY NII OBAAYO)
6. **FREDRICK SHAMO KWEI**
   (SUBSTITUTED BY SAMUEL AYIKU)

VRS

1. **NUMO NORTEY ADJEI FIO** -- **DEFENDANT/APPELLANT**
   (SUBSTITUTED BY NII ADJEI SANKUMA) **RESPONDENT**

2. EMPIRE BUILDERS LIMITED
3. ODAI AYIKU IV.
(SUBSTITUTED BY AFORTEY ODAI IV.) } **DEFENDANTS**
4. **NII AKPOR ADJEI II(SHIKITELE, TESHIE**)

5. **NUMO ADJEI KWANKO II** **DEFENDANT/APPELLANT**
(AYIKU & OSABU WULOMO OF TESHIE) --- **APPELLANT**

6. **ALFRED ANANG**
7. **MOUFID EL-DAS** } **DEFENDANTS**

JUDGMENT

_____-__

GBADEGBE JSC:

This is an appeal from the unanimous decision of the Court of Appeal that affirmed the decision of the trial High Court in the matter herein. By the said decision, the Court of Appeal had substantially accepted the case of the plaintiff/respondent/respondent (hereinafter conveniently described as the plaintiff) and rejected the defendants' (also conveniently referred to as the defendants) claim to the disputed land. By the appeal herein, the 5th defendant seeks an order reversing the decision of the Court of Appeal whiles the 1st to 4th plaintiffs and the 6th plaintiff have appealed praying for an order reversing the order that had them struck out as plaintiffs on grounds of misjoinder.

We think that from the processes filed in the proceedings herein, the issues for our decision turn on whether the concurrent findings of fact made by the two lower courts are right and or are instances of a blunder or miscarriage of justice. Then we also have to consider the points of law relating to the

question of estoppel by two previous judgments that was strenuously pressed on the court by the defendants as well as the question touching the capacity of the 5th respondent to maintain the action in view of the determination by the Court of Appeal that the other plaintiffs who were proved to have originated from the female and not the male line were not members of the family on whose behalf the plaintiffs sued in the High Court.

In our thinking the grounds that pose for our consideration the right of the rival parties to the disputed land, its extent and description being particularly in the domain of facts that were concurrently upheld by the two lower courts, this court as the final appellate court can only interfere with those findings of fact ifit is established with absolute certainty that there has been some error or blunder resulting in miscarriage of justice. Also included in this consideration is the ground of appeal formulated "**The judgment is against the weight of the evidence."** See: **Mondial Veneer (Gh) Ltd v Amuah Gyebu** [2011] SCGLR 466, 470 per Wood CJ. We have carefully read the record of appeal and anxiously considered the written briefs submitted to us by the parties herein and have come to the conclusion that the findings of fact relating to which of the rival parties to the action herein owns the disputed land, its description and extent are amply supported by the evidence on the record without the slightest suggestion of any error or blunder that might justify our interference. In this regard, we wish to reiterate the settled attitude of appellate courts regarding issues of fact that as these are primarily within the domain of trial courts except where such findings are proved to have been due to considerations that might be said to be perverse and unreasonable resulting in a miscarriage of justice, it is not proper that they interfere even if in considering the evidence they would have come to a different conclusion from that of the trial judge. They can only do so when the findings of fact are not supported by the evidence but the mere fact that from

the admitted evidence it was open to the trial court to have accepted either of the rival versions is not sufficient ground for their interference but, unfortunately, so it seems, the defendant by his urgings in the matter herein seeks to persuade us to embark upon a review of the evidence that was thoroughly sifted by the two lower courts for the purpose of preferring their version of the facts. But, the choice as to which of the contested versions is preferable is a matter for the trier of fact and the said version having been affirmed by the intermediate appellate court-the Court of Appeal for very clear reasons that are contained in the lead judgment of Akamba JA (as he then was the reasons advanced by the Court of Appeal impress me in view of the tedious nature of the task that they were faced with and we are unable to embark upon an examination of the evidence for the purpose of determining that which is preferable. Reference is made in this regard to the cases of **Odonkor v Amartei** [1992] 1 GLR 577, 585 per Hayfron Benjamin JSC; and **In re Agbenu (decd); Agbenu v Agbenu** [2009] SCGLR 636, 639 per Atuguba JSC. We think it is for this reason that the line of authorities precludes us as the final appellate court from interfering in regard to concurrent findings of fact by two lower courts that are not proved to have been due to an error or blunder that has resulted in miscarriage of justice. The result is that the grounds of appeal filed by the defendant that are numbered as "C" "D" and "F" fail and are dismissed.

Having disposed of the factual grounds, we next turn to the ground which concerns the capacity of the plaintiffs who sued as joint heads. In his judgment, the learned trial judge relying on article 17 of the 1992 Constitution after finding that save the 5thplaintiff the others lacked the capacity endorsed on the writ came to the that although they were not descended from the patrilineal line as the endorsement asserted having been begotten by female members of the family, they were competent to be joined to the suit in that

capacity. This finding was contested on appeal to the Court of Appeal and rightly resolved in our opinion by the learned justices of the Court of Appeal when they held that they were incompetent to sue and proceeded to strike them out. It does appear to us that the decision of the learned justices on the said point which has been appealed to us was right and was one that looked at the case from a purely substantive perspective as indeed is required of us by Order 1 rule 2 of the High Court Civil Procedure Rules), CI 47 of 2004 Indeed, there is ample power in the court under order 4 rule 5 (2) to make such an order. In our view, having struck out the other five plaintiffs their joinder to the action was a mere instance of misjoinder that from the rules cannot by itself operate to defeat any action and therefore the submissions urged on us by the defendants based only on the said misjoinder looks to us as being without substance. See Order 4 rules 5 (1) and 2 of the High Court (Civil Procedure) Rules, CI 47. We think that the learned justices of the Court of Appeal thought that as the matter had travelled for a considerable length of time spanning about a quarter of a century in which the rival parties had put forward their cases for a consideration on the merits, it was better and accorded with reasonableness to have the case considered so that the rights of the parties would be decided thereby and avoiding a resort to another action. In so acting, the learned judges were not without authority and by so preceding the court did not give undue advantage to any of the parties such as did not occasion a miscarriage of justice to the contestants. So said, the next matter to be considered is whether on the admitted evidence, the 5th plaintiff- the sole plaintiff had placed before the court sufficient evidence to enable a decision to be made in his favour?

In our opinion an answer to the said question necessarily involved a consideration of the rival cases put forward by the parties contained in the record of appeal. Having carefully in our view attended to the admitted evidence, the learned justices of the Court of Appeal concluded that the

plaintiff had made out his case. That quite frankly implied the rejection of the cases of the defendants. The conclusion reached by the learned justices' points to the effect of the evidence that appears from the record of appeal. Akamba JA (as he then was) in the lead judgment to which the others agreed considered the entire evidence that was placed before the trial court and after considering all the evidence came to the view that the plaintiff's case looked more probable. We do not think that the approach of the learned justices to the consideration of the evidence falls short of what is required of them by law.

It being so, the question that next arises from the grounds of objection contended before us by the defendants is whether having struck out the plaintiffs named on the writ save the 5th, it was proper for the learned judges to have acted upon the evidence of persons who testified as plaintiffs but were found by them to have been wrongly joined to the action? This is an objection that in our opinion goes to form and not substance as by the rules of evidence; every person is competent to testify in an action. The evidence led by the said misjoined plaintiffs was not illegal but relevant for the purpose of the trial. Accordingly, the learned justices were right in taking them into account. Where they erred in my view was when they failed to exercise the powers conferred on them by virtue of Order 16 rule 7(1) of the High Court (Civil Procedure) Rules, CI 47 following the order that struck out the plaintiffs save the 5th to amend the endorsement to bear out the order. That error is, however, something which this court can correct in the exercise of the powers conferred on the High court in appropriate cases in Order 16 rule 7(1) as follows:

> **"For the purpose of determining the real question in controversy between the parties or correcting any defect or**

error in the proceedings, the Court may, at any stage of the proceedings either of its own motion or on the application of any party, order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner as it may direct"

The authority conferred on the court under this rule should be read conjunctively with that provided in Order 81 rule 2 following non-compliance with the rules to set aside wholly or in part proceedings or allowing such amendments to be made as it considers just. Both rules are remedial in nature and seek to preserver at her than destroy that which is capable of being cured.

As this matter is in the nature of a re-hearing, we are of the view that this is a power which we can exercise as we are vested with the authority of the trial court as was done in the case of **Koranteng v Klu** [1993-94]1GLR 280 holding 3. We think that had the learned justices of the Court of Appeal directed their minds to the power conferred on them under the said rule, they would have utilised it to correct the error in the writ consequent upon their order striking out the1st to 4th and the 6thplaintiffs.

In coming to this view of the matter, we have not disregarded Order 16 rule 5 of CI 47. In our view, although the heading to the said rule which has the heading **"Amendment of writ or pleading with leave"** might create the impression that the processes provided for in the rule can only be amended following an application for leave by a party, a careful reading of this together with rule 7(1) reveals that a court can amend any document in a cause for the purpose of enabling it to decide on the true nature of a case. Similarly, the heading to rule 7(1) which reads **"Amendment of other documents"**

might leave one with the impression that it deals with documents other than writs and pleadings but as headings are for convenience only and do not form part of the enactment for the purpose of construction such a meaning will undermine the purpose of amendments and in particular the power conferred on courts by themselves to make amendments for the purpose of determining the real matter in controversy. This is a power that courts have used for a considerable time and indeed was available under the repealed rules of court as Order 28 rule 12, which was expressed in substantially the same words and enabled judges not only in courts of first instance but also on appeal to exercise the power to amend processes without an application by either party. This power was exercised by the Supreme Court in the case of **Dove v Wuta-Ofei** [1966] GLR 299, 317. Indeed, it appears that this is a power available to judges at common law as was done in the case of **Nottage v Jackson** (1883) 1 QBD 627, 638 and **Losky v Green**, 142 ER, 145. In our opinion, placing such a restrictive meaning on rule 7 (1) which employs in relation to the court's power to amend a wide discretion by the use of the words "any document in the proceedings" would undermine the overriding objective of the rules as provided for in Order 1 rule 2 of the High Court (Civil Procedure) Rules, 2004, CI 47. Accordingly, by virtue of the powers conferred on the court under rule 7(1) of Order 16, the endorsement of the capacity of the plaintiff to the writ is hereby amended to read "Ataa Kweku Mensa suing on behalf of himself and other members of the Numo Kofi Anum family…." so that there is only one plaintiff and the title of the action also amended accordingly. The authority conferred on the court is intended as provided in Order 1 rule 2 of the High Court rules to eliminate expense, multiplicity of actions and delays and ensure that the trial of actions without sacrificing any of the objectives of the rules contained in CI 47.

We think as the learned justices of the Court of Appeal found at page 411 of the record of appeal that in view of the rival claims to the land, **"it was absolutely necessary"** for the plaintiff to t to initiate the action herein in order to safeguard the family property. This, in our opinion, is sufficient to dispose of the issue of his capacity. We also add that in our opinion as the parties all claim to hail from the same locality, Teshie and indeed the defendants asserted that they belonged to the same clan, that merely denying the capacity of the plaintiff without any indication by them as to who to their knowledge as members of the same clan was the head of the Numo Kofi Anum family. In our view, the nature of the denial by the defendants of the capacity asserted by the plaintiffs was not to the point of substance and was therefore not credible. The requirement as to the content of a good pleading that denies a specific averment requires that it be denied substantively and not evasively.

This leads us to the question of the 5th plaintiff not tendering any evidence in the matter. We think that there is no obligation on a party litigant to personally testify in support of his case. The correct position is that a party may rely on the evidence of his witnesses and when such evidence satisfies the evidential burden as was found by the learned justices of the Court of Appeal as in our thinking the admitted evidence points to, the failure to testify cannot by itself operate adversely against the evidence led in the matter. This is supported by the decision of this court in **In re Ashalley Botwe Lands; Adjetey Agbosu and Others v Kotey and Others** [2003-2004]1 SCGLR 420, 448. There was before the court substantial evidence including estoppel by conduct tendered on behalf of in the judgment of the Court of Appeal at page 422. The matters to which the estoppel related falling within the realm of recent acts of ownership on the land stood tall against the acts relied on by the defendants and were compelling to tilt the scale of justice in favour of the

plaintiff. We venture to add that the conduct of the defendants in standing by and allowing the plaintiffs make grants of the disputed property without any objection brings the evidence relating thereto within the scope of section 26 of the Evidence Act, NRCD 323 in the following words:

> **"Except as otherwise provided by law, including a rule of equity. When a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest and such relying person or his successor in interest."**

By virtue of section 24 of the Evidence Act, we are in the light of the defendants conduct precluded from considering any other fact to the contrary the effect of which is that the disputed land belongs to the plaintiffs.

The next point of relevance my Lords, is that which touches and concerns the issue of estoppel by judgments in the cases entitled **Kwarteng v Klu** [1991] 2 GLR 93; **Koranteng v Klu** [1993-94] 1 GLR 280 on which great reliance was placed by the defendants in seeking to disprove the claim of the plaintiffs. Both the trial court and the intermediate appellate court thought otherwise. We have patiently read the lead judgment from which the appeal herein has been launched and are of the opinion that the conclusion reached therein regarding the said point is right. We do not think that the mere fact that the parties to this action as the defendants contend belong to the same clan means that every case that was taken out or defended by the clan through representatives should as a matter of law be binding on them under the rule whereby they would be precluded from asserting to the contrary in

any subsequent proceeding. To be binding and have the force of estoppel by a previous judgment, the said claim should have been initiated and or defended by the persons alleged to be privies of the plaintiffs in the same right. In considering the ground relating thereto, Akamba JA (as he then was) expended quite some time at pages 426 to 430 of the record of appeal in regard to the issue of estoppel and came to the conclusion that the issues dealt with by the Kwarteng case were different from those before the court in this action. Indeed, at page 430, the learned justice observed that what was in issue previously dealt with lands initially settled upon by the ancestors of the parties but the action herein concerns other Teshie lands that are outside the original settlements and owned by individuals and families which was not the subject matter of the previous determination in the Kwarteng case and additionally there is no nexus between the plaintiffs and any of the parties to the previous case. As some of the features that would have the effect of mutuality to enable the principle of estoppel by a previous judgment to be sustained were absent, the ground of appeal based thereon is without substance and fails. See: **Prah v Ampah** [1992] 1 GLR34, 38.

Then there is the cross appeal by which the 1st – 4th and 6thplaintiffs invite us to reverse the decision of the Court of Appeal relating to the holding by the learned justices of the Court of Appeal that they lacked capacity to be joined to the instant action. We have read the record of appeal and the written briefs in relation to the said ground of appeal and have come to the conclusion that the learned justices of the court below were right for the reasons provided in the judgment, the subject matter of this appeal. The plaintiffs themselves asserted a specific capacity which was not supported by the evidence and accordingly, the order striking them out was right. The cross-appeal is therefore dismissed.

For the above reasons, the appeal and the cross-appeal fail and are hereby dismissed. The decision of the Court of Appeal is hereby affirmed.

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS)
JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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

(SGD) V. AKOTO BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

COUNSEL

E. A. ACCAM ESQ. FOR THE PLAINTIFFS/RESPONDENTS/ RESPONDENTS/ CROSS-APPELLANTS .

OSAFO BUABENG ESQ. FOR THE 1ST DEFENDANT/APPELLANT / RESPONDENT

FOSU GYEABOUR ESQ. FOR THE 5TH DEFENDANT/APPELLANT/APPELLANT.