IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2014

CORAM: J. ANSAH JSC (PRESIDING)
R. OWUSU (MS) JSC
J. DOTSE JSC
N. S. GBADEGBE JSC
J. B. AKAMBA JSC

CIVIL APPEAL
NO.J4/26/2014

17TH JULY, 2014

1. NORA OTOO - PLAINTIFFS/RESPONDENTS
2. EMMANUEL OTOO /APPELLANTS
3. FELIX NORTEY OTOO

VRS.

1. REUBEN OTOO - DEFENDANTS/APPELLANTS
2. RICHARD OTOO /RESPONDENTS
3. RUDOLPH OTOO
4. FRANCIS OTOO
5. NARTEY OTOO

JUDGMENT

DOTSE JSC;

This is an appeal by the Plaintiffs/Respondents/Appellants, hereafter referred to as the Plaintiffs against the judgment of the Court of Appeal dated 23rd May 2013 in favour of the Defendants/Appellants/Respondents, which set aside the decision of the High Court as per the judgment of Ofosu-Quartey J dated 26th day of October 2009.

Since this is an appeal which touches and concerns the construction of a WILL, I intend to commence the delivery of this judgment by reference to an old English case in which the Master of the Rolls laid down some general rules of construction in the celebrated English case of **Thelluson v Woodford, (1798) 4. VES. 227, 329 E.R. 117, 167** also referred to by the Learned *Author of Modern Law of Succession in Ghana,* A.K.P. Kludze, page 83, in which a rule on the construction of Wills was laid down by the court in the following terms:-

> ***"I know only one general rule of construction, equally for courts of Equity and Courts of Law, applicable to all wills, which the courts are bound to apply however they may condemn the object, the intention is to be collected from the whole will taken together. Every word is to have its effect. Every word is to be taken according to the natural and common import; and if words of art are used, they are to be construed according to the technical sense, unless upon the whole will it is plain, the testator did not so intend. The Courts are bound to carry the will into effect, provided it is consistent with the rules of law."***

This being a case which is based entirely on the interpretation of a will executed by Edward Kabu Otoo on the 9th day of February 1944 (deceased of Accra) who died on the 8th day of May 1944 and whose Will was admitted to probate on the 28th day of June 1944, it is important and desirable to set out in extenso the entire devises and bequests in the Will. This is to afford us an opportunity to read the will and inteprete same as a whole in terms of the decision in the English case of **Thelluson v Woodford,** referred to supra.

The Will reads as follows:-

"This is the last will and testament of me Edward Kabu Otoo of No. E 251/2 Russia in Christiansborg in the Accra District in the Eastern Province of the Colony of the Gold Coast, Goldsmith and I hereby revoke all former testamentary dispositions hereto made by me. I appoint Daniel Sackey Quacoo of Castle Road Adabraka, Accra, Auctioneer and C.D Adotey Produce Buyer of Coaltaw to be the Executors and Trustees (hereinafter called my said Executors) of this my will.

1. I direct that my said Executors shall advance to my two sons **Gederah Tei Otoo** and **Joseph Kabufio Otoo** who are Goldsmiths the sum of one hundred pounds (£100) each out of the proceeds of work already done and on hand for sale when there is no more gold in the form of jinkets or otherwise to work with and my said sons shall in turn pay into my banking account in the Colonial Bank the sum of twenty five pounds (£25) annually. All my other sons who are not Goldsmiths by trade are to pay into such banking account the sum of six pounds (£6) annually.

2. I give and devise to my **trusted servant Tetteh Owusu** a plot of my freehold land situate near the Royal cemetery in Christiansborg the extent and dimensions of which shall be sixty (60) feet by eighty (80) feet.

3. I give and devise to my **wife Dora and her son Tetteh Nkunor ahd his wife Adoleyfio** and the issues of the said Tetteh Nkunor and Adoleyfie in joint tenancy my freehold land situate at Kuku Hill in Christiansborg which I acquired from the Ashanti Blohum Quarters of Christiansbory and I direct my said Executors to build a self contained dwelling house on the said land if my said wife Dora shall remain faithful to my memory and look after my household for five (5) years after my demise.

4. I give and devise to my **daughter Ashiorkor** the room she occupies in my house No. E. 252/2 Russia aforesaid and also a plot of my freehold dimensions of which shall be sixty (60) feet by eight (80) feet.

5. I direct my said executors to let or lease my freehold house No. E. 251/2 at Russia aforesaid and the rent accruing therefrom shall after payment for repairs and municipal rates and taxes be paid into my said banking account annually.

6. **I direct my said executors to build or let on building leases my Freehold land situate at Labadi Road Christiansburg, Accra and at Achimota village in the Accra District and the rents accruing therefrom shall after payment for repairs and municipal rates and taxes be paid into my said banking account annually.**

7. **I direct my said executors in their discretion if need be to sell and convert into cash my freehold land situate at the bottom of Kuku to the North of Christiansborg near the property of Mr. Omarboe and pay the proceeds thereof into my said banking account.**

8. **I give and devise all my Freehold properties not specifically devised to all my sons (namely Gederah Tei Otoo, Joseph Kabufio Otoo, Tetteh Nkunor employed in the Railways at Obuasi-Elija , also employed in the Railways,Edward Kabu Nkunor Otoo (alias Akwetey) John Narh Otoo and Nartey Tawiah Otoo in joint tenancy.**

9. I direct my said executors to educate to the extent of giving him a profession one of my grandson-Nortey or Ntoboahene who may have himself promising with inclination or attitude to literacy attainment and whatever shall be spent on such an one shall be refunded by him to my estate within three (3) years from the date of commencement of practice in such profession by him.

10. I direct my said executors on the recommendations of my sons **Gederah Tei Otoo** and **Joseph Kabufio Otoo** to give out loans from my said banking account to such of my children as may be deserving and in real need of financial assistance and to collect same with interest of four Shillings on a pound sterling.

11. I direct my said executors to divide the residue of my personal estates that is to say all goods and chattels trinkets and cash on deposit in the Colonial Bank aforesaid four (4) years after the completion of the professional education of one of my aforesaid grandsons Nortey or Ntoboahene among all my aforesaid sons mentioned in clause 8, hereof and my daughter Asiorkor in equal shares. In the event of my said executors not considering

any of my said grandson suitable to be so educated then in such default I direct that the residue of my personal estate shall be divided among my said sons and daughter ten (10) years after my demise and not until then.

12. It is my wish that all my children shall bear the funeral and burial expenses of Omeche.

13. I direct that my said executors shall pay all my funeral and testamentary expenses and if necessary retain the services of a Solicitor to assist and direct them in carrying out the directions herein contained. In witness whereof I the said Edward Kabu Otoo have to this my Will set my hand this **9th day of February, One thousand Nine hundred and forty four (1944).**

Signed and acknowledge by the above-named Edward Kabu Otoo as his Will in the presence of us present at the same time who in his presence and in the presence of each other have hereunto established our names as witnesses.

(Sgd) S. D. Nortey
House No.G 50/13
Christiansborg

(Sgd) J.W. Nortey
House No.E 164/12
Christiansborg"

Now that the Will of the Testator, Edward Kabu Otoo has been referred to above, it is pertinent at this stage to narrate the circumstances that led to the institution of this suit in the High Court by the Plaintiffs.

BRIEF FACTS OF THE CASE

Mr. Edward Kabu Otoo by his Will dated 9th February 1944 made certain devises. It is the properties listed in clause six which has brought about the litigation, fought tooth and nail all the way to the Supreme Court.

The trial Judge in the High Court entered judgment for the Plaintiffs and on Appeal, the Court of Appeal set aside the judgment of the High Court.

Obviously dissatisfied, the Plaintiffs have mounted this appeal in the Supreme Court.

It is apposite to give a brief background to the cause of disaffection between the Plaintiffs and the Defendants.

They are all grandchildren of the testator, Edward Kabu Otoo, who died testate in 1944. This patriarch begat a total of eighteen (18) children, made up of ten (10) sons and eight (8) daughters from the evidence taken in the High Court. In clause 8 of the Will, he devised all his properties not specifically devised to "**all my sons" and proceeded to name them specifically, to be held in joint tenancy**.

These legatees managed the properties including the Achimota and Labadi Road, Christianborg in joint tenancy till the death of the last survivor Frank Narteh Otoo, father of the third Plaintiff.

After his death, a group of family members constituted themselves into the family heads, elders and principal members of the Otoo Kofi family and represented to Mobil Ghana Limited that they were in charge of the properties which had now been designated as family property. Mobil then paid an amount of Ninety-Six Million cedis to the family, now headed by the first Defendant.

With these facts at the background, it was not surprising that the plaintiffs claimed the following reliefs in the High Court:

1. **"A declaration that by the Will of the late Edward Kabu Otoo dated the 9th of February 1944 the late Gederah Tei Otoo, Jospeh Kabufio Otoo, Tetteh Nkunor, Edward Kabu Nkunor Otoo, John Narh Otoo and Nartey Tawiah Otoo were the beneficiaries of the income from the properties at Achimota, known as the Mobil Service Station and Osu known as the American Embassy Annex.**
2. **A declaration that the Plaintiffs and other beneficiaries being the successors of the said beneficiaries are rightfully entitled to the income from the properties at Achimota and Osu.**

3. **An order for the refund of the sum of Ninety-Six million cedis (¢96,000,000.00) and interest thereon from 2001 to date of payment which the Defendants fraudulently claimed from Mobil Oil Ghana Limited as rent for the Achimota Service Station by misrepresenting themselves as head and elders of the Otoo family.**

4. **An order of perpetual injunction restraining the Defendants, by themselves their agents, assigns or workmen from interfering with the said properties.**

5. **Cost"**

After trial, the High Court delivered judgment in favour of the plaintiffs and dismissed the counterclaim of the Defendants in no uncertain terms. Continuing further, the learned High Court Judge stated thus:

> *I find that the defendant had no legal justification for collecting the ¢96 million and I make an order that the defendants account to the plaintiffs in respect of the money.*
>
> *In sum I give judgment in favour of the plaintiff in terms of the relief endorsed on the writ of summons.*
>
> *I declare that by the Will of the late Edward Kabu Otoo dated the 9th February 1944, the late Gederah Tei Otoo, Joseph Kabufio Otoo, Tetteh Nkunor, Edward Kabufio Nkunor Otoo, John Narh Otoo and Nartey Tawiah Otoo were the beneficiaries of the income from the properties of Achimota, known as the Mobil Services Station, at Osu known as the American Embassy annex.*
>
> *I also declare that the plaintiff and other beneficiary being the successors of the said beneficiaries are rightfully entitled to the income from the properties at Achimota and Osu.*
>
> *I make an order that the defendant account for the ¢96 million for plainitiff within 30 days from the date of this judgment.*

I finally perpetually injunct the defendants by themselves their agents, assigns and workmen from interfering with the said properties at Achimota and Osu.

I assess costs of GH¢1,000.00 in favour of the plaintiffs."

An appeal lodged by the Defendants to the Court of Appeal found favour with the court which upheld the arguments of the Defendants in part and accordingly set aside the judgment of the High Court in the following terms:-

"***Orders By The Court Of Appeal***

In my view, reading of the whole will suggests that the trial Judge misconstrued clause 8. A combined reading of clauses 6 and 7 suggests that it was not the testators intention to limit the enjoyment of rent proceeds from the properties mentioned therein to a selected few, namely the beneficiaries mentioned in clause 8.

It is clear to me that the testator intended that all the freehold properties mentioned in clauses 5 and 6 i.e. properties in Russia, Labadi Road and Achimota village, Accra, be let on lease. Per clause 7 of the property at Kuku Hill is to be sold or converted into cash. The proceeds from rent or sale were to be paid into the testator's bank account. By clause 10 of the Will the proceeds of the said accounts were to be given out as loans to any of the testator's deserving children by the executors, upon recommendation. Nowhere in these clauses did the Testator vest ownership interest in any of the said properties in any particular children.

In my considered opinion, a proper construction of clause 8 of the Will depended on the meaning of the phrase "freehold properties not specifically devised." All the freehold properties mentioned in clauses 6 and 7, and for that matter, clause 5 must be deemed to have been specifically devised. The testator had given the executors specific directions concerning the use to which accruing income from the properties be put. Clearly if the testator had intended that only a few persons should benefit from that income, he would have expressly stated so. So, in my view the trial judge took clause 8 of the Will out of context and thus fell into error.

Ground (a) and additional grounds (2) and (3) therefore succeed.

The appeal accordingly succeeds and the judgment of the trial court is set aside."

The above then constitute the judgment of the Court of Appeal.

GROUNDS OF APPEAL IN THE SUPREME COURT

Feeling naturally dissatisfied with the judgment of the Court of Appeal, the plaintiffs have appealed to this court with the following as the grounds of appeal:

a. The Court of Appeal misdirected itself on the principle of Joint Tenancy when it held that inspite of the testator expressly devising all his freehold land "not specifically devised to all his sons namely Late Gederah Tei Otoo, Jospeh Kabufio Otoo, Tetteh Nkunor, Edward Kabu Nkunor Otoo, John Narh Otoo and Nartey Tawiah Otoo" the true intention of the testator was for all the children to benefit from said devise in clause 8 of his will.

b. The Court of Appeal erred when it held that the use of the words "Joint Tenancy" was not relevant in determining the intention of the testator as to whether the beneficiaries named in Clause 8 of the will took the devised properties as joint tenants or not.

c. The Court of Appeal erred in its interpretation of the will of the testator when it failed to avert its mind to the uncontroverted fact that apart from Clause 8 the testator had devised other properties to other beneficiaries as joint tenants.

d. The Court of Appeal erred in its interpretation of the will of the testator when it held that properties mentioned in Clause 5, 6, and 7 were deemed to have been specially devised.

e. The judgment is against the weight of evidence.

f. Further ground of appeal would be filed upon receipt of the reasons for the judgment and the Record of Proceedings.

From the above grounds of appeal, it is quite clear that ground (a) through to (d) deals specifically and inferentially with the issue of whether the devises by the Testator in clauses 6, 7 and 8 of the Will amount to creating an estate in joint tenancy with the right of survivorship. That being the situation, it might be

more neater to combine all those grounds of appeal into one and deal with them holistically. It was not surprising that learned counsel for the parties in their well written statements of case also adopted the same approach.

I will therefore in this judgment combine these grounds (a) to (d) as one ground of appeal and the remaining ground dealing with the omnibus ground (e) as distinct. The issues therefore that call for determination in this appeal are therefore the following:

ISSUES

1. Did the Testator, Edward Kabu Otoo, create words of limitation in the use of the words ***"Joint Tenancy"*** in the devises in the will he executed especially devises in clauses 6, 7 and 8 of the said Will to specific beneficiaries?

2. Was the judgment of the Court of Appeal against the weight of evidence?

Issue 1

The learned author A.K.P Kludze, in his invaluable book, Modern Law of Succession in Ghana, Chapter 5 on page 81 stated as follows:

> "*The cardinal rule in the construction of a Will is that the intention of the testator, as declared by him and apparent in the words of his will, must be given effect, so far as, and as nearly as may be, consistent with law." See the following cases which were cited in support of the above general proposition of law by the learned author,* ***Hickling v Fair*** *[1899] A.C. 15, 27;* ***Beaudry v Barbeau*** *[1900] A.C. 569, 575:* ***Papillion v Voice*** *(1728) Kel. W.27, 32, 25 E. R. 478, 481;* ***Re Palmer*** *[1893] 3 ch. 369, 373-374."*

Expatiating further on the above principle, the learned author explained further in his book at page 81 as follows:-

> "***If the intention of the testator can be ascertained from the Will itself, that intention must prevail.*** *If the court of construction is in a difficulty when trying to deduce the true intention of the testator, it applies what are known as the rules or canons of construction in order to*

ascertain that intention. ***The testator may not have had these rules of construction in mind when he made his Will, they are, however employed as a matter of convenience dictated by necessity, to give a meaning to the Will." emphasis supplied.***

This same principle was stated by **Lord Wensleydale** in the case of ***Grey v Pearson*** (1857) 6 HLC 61, as follows:-

> "*In construing wills, and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnancy or inconsistency in the rest of the instrument, in which case, the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency but no further."*

In the fairly recent case of **In re Atta (decd) Kwako v Tawiah** [2001-2002] SCGLR 461, the Supreme Court, in a unanimous decision and speaking through Adzoe JSC of blessed memory held that:

> "*When the Courts set out to construe a will, what they do is to look for the intention of a testator as expressed by him, having regard to the other provisions of the Will. The intention which the will itself declares either expressly or by necessary implication is what the Courts will act upon… that the object in all cases is to discover the intention of the testator by reading the will as he had written it and collecting his intention from his words. If his intention cannot be made to appear by the writing, explained by circumstances, there is no will*." Emphasis supplied.

It is a further trite canon of interpretation that in construing documents, the document must be read as a whole.

The resolution of this matter will therefore turn on the ascertainment of the intention of the testator and the proper interpretation to be given to clauses 6, 7, 8 and 10 of the 1944 Will.

See also Law of Wills in Ghana 1998, page 226 authored by a former distinguished Chief Justice and Jurist, S.A. Crabbe which is to the same effect.

There is therefore that uniformity among both the text book writers and case law that in construing Wills, the foremost guide **is the intention of the testator.** This is because, once the testator has indicated his intention on paper, and it is generally accepted that dead persons tell no tales, that intention, whatever meaning and understanding can be made of it must be ascribed to it.

I have perused the written statement of case filed by learned counsel for the parties, and they all took pains to explain this issue at some length.

For example, learned counsel for the plaintiffs, Nene Amegatcher put it this way in his write up:

> ***"The essential character trait of a Will is that it is a product of the testator's intent."*** *A will reflects the thoughts and intentions of the testator and he may express it in any way he likes".*

Learned Counsel for the Plaintiff referred to the distinguished works of Aharon Barak in his book ***Purposive Interpretation of Law,*** Princeton University Press, 2005 when he stated that the ***intent of the testator is an expression of his or her constitutional right to dignity and property.***

On his part, learned counsel for the Defendants Edward Sam Crabbe after a review of the text book writers and case law delivered himself thus:

> "*My Lords,* ***it is a basic rule of interpretation that the construction of a Will must be near to the mind and intention of the maker as the law would permit. The intention must be gathered from the written instrument itself and that instrument must be read as a whole.*** *It is the duty of a court to discover the true intention of the testator in order to arrive at an interpretation that gives the Will its real meaning."*

See the case of **Biney v Biney** [1974] I GLR 313, C.A. It was basically because of the above realization that a Will must be read as a whole that is why we decided to incorporate the entire Will of the testator in this judgment for everyone to attempt to read the true and actual intent of the testator.

It is now important for us to proceed to look at the judgment of the Court of Appeal in order for us to appreciate how they handled the interpretation issues involved therein.

The pith of the Appeal Court's analysis of the case is gleaned from their judgment which states as follows:

> *"**However, in my opinion in the instant case, the interpretation of the phrase "joint tenancy" is neither here nor there. The case for the Plaintiffs is that going by the canons of the construction of wills, the intention of the testator, Edward Kabu Otoo, in clause 8 of the Will was to specifically devise his properties in clauses 6 and 7 to the beneficiaries mentioned in clause 8 "in joint tenancy"; that is to take the said properties as joint tenants.***
>
> *It is also a basic rule of interpretation that the construction of a Will must be near to the mind and intention of the maker as the law would permit. The intention must be gathered from the written instrument itself and that instrument must be read as a whole. It is the duty of a court to discover the true intention of the testator in order to arrive at an interpretation that gives the will its real meaning…*
>
> *In my view, a reading of the whole will suggests that the trial judge misconstrued clause 8. A combined reading of clauses 6 and 7 suggests that it was not the testator's intention to limit the enjoyment of rent proceeds from the properties mentioned therein to a selected few; namely the beneficiaries mentioned in clause 8.*
>
> *It is clear to me that the testator intended that all the freehold properties mentioned in clauses 5 and 6 i.e. the properties in Russia Labadi Road and Achimota Village, Accra be let on lease. Per clause 7, the property at Kuku Hill is to be sold or converted into cash. The proceeds from rent or sale were to be paid into the testator's bank account. By clause 10 of the Will, the proceeds of the said account were to be given out as loans to any of the testator's deserving children by the executors, upon recommendation. Nowhere in these clauses did the testator vest ownership interest in any of the said properties in any particular children.*

In my considered opinion, a proper construction of clause 8 of the Will depended on the meaning of the phrase "freehold properties not specifically devised" All the freehold properties mentioned in clauses 6 and 7, and for that matter, clause 5 must be deemed to have been specifically devised. The testator had given the executors specific directions concerning the use to which accruing income from the properties be put. Clearly, if the testator had intended that only a few persons should benefit from that income, he would have expressly stated so. So, in my view the trial judge took clause 8 out of context and thus fell into error".

In our considered opinion, the judgment of the Court of Appeal correctly stated the applicable legal principles in the construction of Wills but in relating those principles to the circumstances of this case went outside permissible limits and thereby ended into error themselves.

The learned trial Judge in our opinion correctly appreciated the legal principles and applied same in the interpretation of the Will.

The following are indeed some of the reasons why we are of the view with respect that the learned Judges of the Court of Appeal rather fell into error and gave wrong interpretation to the Will of the testator.

We are in agreement with learned Counsel for the Plaintiff when he stated in his written submission that the court of Appeal erred by stating that the phrase "joint tenancy" as stated in clause 8 was neither here nor there. It was not as if the phrase was surplusage. It was an integral part of the testator's wishes. The testator knew perfectly what he was doing when he directed that the freehold estate not specifically devised must go to named beneficiaries. At this point, it is not disputed nor is it in doubt, from the evidence that the testator had eighteen children. Those he made devises to, he mentioned them specifically in the will. In clause 2 for example, he made a specific devise to his "trusted servant". In clause 3, he specifically devised to his wife Dora, her son Tetteh Nkunor and his wife Adoleyfio. In all these clauses, he mentioned specifically the legatees.

In clause 8, he directed that all Freehold properties not specifically devised are to go to ALL my sons namely…" and specifically went ahead to name them. One can see that there was a deliberate pattern here. Why did he use the phrase ALL his sons but still went ahead and named only seven of them when we are aware that he had eighteen children including ten sons? He certainly did not have it in mind to make any devises to the remaining sons and clearly, as Plaintiff's Counsel submits, the expressio unius est exclusio alterius rule must apply. We are in total agreement. What the rule means is that the express mention of one or more things of a particular class may be regarded as silently or inferentially excluding all other members of the class. This is exactly what Edward Kabu Otoo did by his will of 1944.

SCOPE OF THE RULE

It may perhaps be somewhat useful to comment briefly on this rule or canon of interpretation to which reference has been made by learned counsel for the plaintiffs and this is the *"expressio unius est exclusion alterius"* which has been interpreted by Chitty, in his book on Contracts, Vol. 1. General Principles p. 606-607 28th Ed. Sweet and Maxwell as,

> "*the express mention in an instrument of a particular person, power or thing may show an intention to exclude any other person, power or thing."*

Thus in the instant case, where the testator has specifically mentioned in clause 8 of the Will as follows:-

> "*I give and devise all my Freehold properties not specifically devised to all my sons (namely…)"*

and he then proceeded to name the sons as stated therein in clause 8 of the Will, it should be deemed that the testator did not intend to refer to the sons not specifically mentioned.

From the appeal record, it is established that the testator had 18 children, 10 of whom were sons and 8 daughters. However, a count of the names of the sons mentioned in clause 8 of the Will reveals that only the following had been mentioned seriatim as follows:

1. Gederah Tei Otoo
2. Joseph Kabufio Otoo
3. Tetteh Nkunor
4. Elijah Kabu
5. Edward Kabu Nkunor Otoo
6. John Narh Otoo and
7. Nartey Otoo

The count therein is only 7 out of the total number of 10 sons. Was this an omission or inadvertence on the part of the testator?

The intention of the testator is not far to find. This is because, in clause 11 of the Will, he again made specific reference as follows:

> ..*"among my aforesaid sons mentioned in clause 8, hereof and my daughter* Ashiorkor *in equal shares."*

It is thus to be noted that, when the testator again repeated only the sons referred to in clause 8, he had the presence of mind to refer again to that list as he pleased. He also had the presence of mind to add the name of his daughter Ashiorkor out of the 8 daughters that is known on record and even went ahead to name his grandsons ***Nortey*** or ***Ntoboahene*** in clause 11 of the Will.

In our considered opinion, the repetitive nature of the reference to the sons as contained in clause 8 with a reference to that description in clause 11 of the Will must clearly be evincing an intention on the part of the testator which a court of law such as ours should not gloss over.

This is because, it is a cardinal rule of law and interpretation that the intentions of a testator however imperfectly or unfairly viewed unless contrary to law must be given effect to and respected. The intention of the testator, that only those of his sons named specifically must be deemed to be referred to in the Will for purposes of benefitting from the residuary devises must therefore be deemed to be the case using this *"expressio unius est exclusio alterius"* rule of interpretation.

We have considered both the advantages and disadvantages of the said maxim and the caution that normally goes with it, such as was expressed by Aikins JSC of blessed memory in the case of **G.P.H.A. v Isoufou [**1993- 1994] I GLR 24 where he stated thus:-

> "*The maxim "expressio unius est exclusio alterius" must be applied with caution because the omission to mention things which appeared to be excluded might be due to inadvertence or accident or because it never occurred to the draftsman that they needed mention. The maxim was no more than an aid to construction and had very little weight where it was possible to account for the inclusion unius on grounds other than an intention to effect the exclusion alterius".*

In this appeal, we realise the regular pattern of the testator that whenever he wanted to make a specific devise, he never shied away from doing that, reference trusted servant Tetteh Owusu in clause 2, his wife Dora and son Tetteh Nkunor and his wife Adoleyfio in clause 3, daughter Ashiorkor in clause 4, of the will. It is that pattern that the testator again applied when he came to make class devises to his sons, he not only ended there, but continued by naming those of his sons that he considered worthy to benefit.

We therefore hold and rule on the basis of the above maxim notwithstanding the caution in the application of the rule that the testator intended such of his sons not mentioned in the clause 8 and 11 of the Will not entitled to benefit from those devises.

What Then Are The Effects of The Devises In Clauses 6 & 7?

The question that begs for an answer is whether the devises in clauses 6 and 7 were specific devises? We have already reproduced the said clauses in the body of the judgment and it would be unnecessary to repeat them.

In our considered opinion, these two clauses by their ordinary grammatical meaning, admit of no ambiguity or complexity whatsoever. In clause six, the executors were to build or lease the freehold estates of Achimota and Labadi Road and pay the rents accrued from there into a bank account after taxes and municipal rates had been paid and repair works had been carried out on the buildings.

In clause 7, he gave the executors the discretion to sell, only if need be the Christianborg property and pay the proceeds into his banking account. It is obvious that the executors felt no need to exercise that discretion as that property was never sold.

From a plain reading therefore, it can be seen that these properties were devised to no one in particular. In fact, the Court of Appeal came to that conclusion in their judgment; where they stated:-

> ***"Nowhere in these clauses did the testator vest ownership interest in any of the said properties in any particular children. "***

Their reasoning, with all due respect would then become illogical if they recognized and appreciated the fact that ownership was not vested in any particular child. This is where the Court of Appeal again fell into great error, with all due respect, they had stated that a proper construction of clause 8 fell within the phrase *"freehold property not specifically devised"*. This is how they delivered themselves on this particular issue.

> *"In my considered opinion, a proper construction of clause 8 of the Will depended on the meaning of the phrase "freehold properties not specifically devised" All the freehold properties mentioned in clauses 6 and 7, and for that matter, clause 5 must be deemed to have been specifically devised."*

How the learned judges could have come to this conclusion that the properties in clauses 6 and 7 are deemed to be specifically devised is startling, to say the least. If they recognize that the testator did not vest ownership of any of the said properties in any particular children, then the logical conclusion would be that they became properties ***"not specifically devised"*** which would then kick in clause 8 in which that class of property not specifically devised was to go to specified class of beneficiaries to hold as joint tenants!

Again with due deference to the learned Judges of the Court of Appeal, their conclusion is not supported by the record, it is perverse and cannot be allowed to stand.

The testator himself left no stone unturned and tied all loose ends when in Clause 10 and 11 of the will, he directed as follows

10. *"I direct my said executors on the recommendation of my sons Gederah Tei Otoo and Joseph Kabufio Otoo to give out loans from my said banking account to such of my children as may be deserving and in real need of financial assistance and to collect same with interest of four shillings on a pound sterling*

11. *I direct my said executors to divide the residue of my personal estate that is to say all goods and chattels trinkets and* ***CASH*** *(emphasis mine)on deposit in the colonial Bank aforesaid four (4) years after the completion of the professional education of one of my aforesaid grandsons Nortey or Ntobuahun among all my aforesaid sons in clause 8 hereof and my daughter Asiorkor in equal shares.* ***In the event of my said executors not considering any of my said grandsons suitable to be so educated, then in such default, I direct that the residue of my personal estate shall be divided among my said sons and daughter ten (10) years after my demise and not until then."***

Clause 10 made provision for loans to be granted to family members, to be repaid with interest. Not by any stretch of the imagination can this be said to be a legacy. A loan to be paid back to the estate with interest is not a devise.

Clause 11 speaks for itself. The residue of the estate was to go to the sons mentioned in Clause 8 and to one specific daughter.

The Court of Appeal regrettably dug a deep hole for itself when it upturned the judgment of the High Court. The issues were clear and were amply supported by the record. No where did the learned trial judge fall in error when he entered judgment for the Plaintiffs.

The freehold properties in clause 6 and 7 were not specifically devised and cannot be deemed to have been specifically devised as the Court of Appeal wrongly concluded, on both the law and the facts.

Again, looking at it from another angle, even if the properties were specifically devised, they were dealt with by the specific legatees in Clause 8 until the last beneficiary passed. The properties had never been enjoyed or dealt with as property of the whole Otu Kofi Family. These beneficiaries were survived by their children and from the evidence, they all died testate. These properties would

have therefore devolved on their successors and not on the wider family, so which ever way this case is looked at, the wider family is a long way off from benefitting from these properties.

For the reasons stated above, we frown upon and deprecate the conduct of the defendants in seeking to usurp and covet property that is definitely not theirs. The first Defendant's father was not mentioned in the will of 1944.

He was clearly disinherited. The Third Defendant inherited the paltry sum of Ten cedis from his own father, even though his father was among the beneficiaries in the 1944 Will.

From the above, it is quite clear that the freehold properties named in clauses 6 and 7 therefore fall into residue of the estate and therefore passed to the sons mentioned in clause 8 as joint tenants.

Before we conclude our discussion of this joint tenancy limitation, it is instructive to note that the testator must be deemed to have intended the beneficiaries named in clause 8 to enjoy the properties as such. The legal incidents that go with the term "Joint tenancy" as opposed to "tenancy in common" must be deemed to be applicable unless the contrary is shown.

We have perused the submissions of learned counsel for the Defendants, who has urged a contrary meaning on us. Unfortunately, no compelling authority has been urged on us such as will make us submit to that view point.

Accordingly, we endorse learned counsel for the Plaintiff's assertion that the words *"joint tenancy"* should be given their ordinary and technical English law meaning and that is, all parties take the property devised under the principles of "*jus accresendi"* till it passes to a single hand and the tenancy ceases. This is by way an endorsement of the principle of the right of survivorship.

This contention is even supported by operation of section 14 (3) of the *Conveyancing Act 1973 NRCD 173* which states as follows:-

> *"A conveyance of an interest in land to two or more persons, except a conveyance in trust, shall create an interest in common and not in joint tenancy, unless it is expressed in such conveyance that the transferees*

shall take jointly, or as joint tenants, or to them and the survivor of them, or unless it manifestly appears from the tenor of the instrument that it was intended to create an interest in joint tenancy"

The testator definitely intended to create an estate in joint tenancy of the properties devised under the specific clauses mentioned, especially 8.

Based on the above analysis, it is apparent that there were no real and genuine basis for the Court of Appeal to have departed from the findings of fact and law made by the learned trial Judge.

In view of the decisions we have come to on the first issue there is no need to deal with the omnibus ground of appeal, which by inference has been adequately dealt with supra. Under that ground of appeal, we find that the judgment of the Court of Appeal is against the weight of evidence.

CONCLUSION

In conclusion, we allow the appeal by the Plaintiffs against the judgment and orders of the Court of Appeal dated 23rd May 2013 which we hereby vacate and set aside.

Instead, we enter judgment for the 3rd plaintiff who has the right of survivorship under the will and specifically as per the writ of summons filed in this case. Save for the above variation we affirm the judgment of the High Court, dated 26th October 2009.

J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

CONCURRING OPINION

AKAMBA, JSC:

It is impossible to differ from the decision which my respected brother Dotse, J.S.C, has come to and concurred in by my other equally distinguished sister and brothers. I equally concur in the decision and wish to add the following for emphasis. The view is often espoused that when a person writes a Will making provisions by which his/her self acquired properties would be distributed upon his/her demise that this would lead to a peaceful distribution and enjoyment of the estate upon his/her demise. However, like many human endeavors, the writing of a Will has its share of conflicts and does not necessarily conjure a peaceful acceptance of the contents thereof as the present appeal demonstrates. Little wonder that the English say, believing has a core of unbelieving, meaning belief and unbelief are closely related, and sometimes there is need to start from a position of skepticism to arrive at the truth.

BRIEF FACTS

By his will made in 1944, the testator Edward Kabu Otoo, provided for the distribution of his estate upon his demise. Sixty five years after the testator's demise came the test of the clarity of the provisions of the Will when the plaintiffs herein issued a writ in the High Court. The plaintiffs sought among others, a declaration that by the will of the late Edward Kabu Otoo dated 9th February 1944 the late Gederah Tei Otoo, Joseph Kabufio Otoo, Tetteh Nkunor, Edward Kabu Nkunor Otoo, John Narh Otoo and Nartey Tawiah Otoo were the beneficiaries of the income from the properties at Achimota, known as the Mobil Service Station and Osu known as the American Embassy Annex. They further sought a declaration that being the successors of the aforesaid beneficiaries they were rightfully entitled to the income from the said properties at Achimota and Osu. After a full trial, the High Court, Accra on the 26th October 2009 entered judgment for the plaintiffs/respondents/appellants who would be referred herein simply as the appellants. The defendants/appellants/respondents, who would also be simply referred herein as respondents, appealed against the decision. The Court

of Appeal allowed the appeal on the grounds that the trial High Court had fallen into error in its construction of clause 8 of the Will.

GROUNDS OF APPEAL

The appellants have filed six grounds of appeal for determination by this court namely:

1. The Court of Appeal misdirected itself on the principle of Joint Tenancy when it held that in spite of the testator expressly devising all his freehold land "not specifically devised to all his sons namely late Gederah Tei Otoo, Joseph Kabufio Otoo, Tetteh Nkunor, Edward Kabu Nkunor Otoo, John Narh Otoo and Nartey Tawiah Otoo" the true intention of the testator was for all the children to benefit from said devise in clause 8 of his will.
2. The Court of Appeal erred when it held that the use of the words "Joint Tenancy" was not relevant in determining the intention of the testator as to whether the beneficiaries named in Clause 8 of the Will took the devised properties as joint tenants or not.
3. The Court of Appeal erred in its interpretation of the will of the testator when it failed to avert its mind to the uncontroverted fact that apart from Clause 8 the testator had devised other properties to other beneficiaries as joint tenants.
4. The Court of Appeal erred in its interpretation of the Will of the testator when it held that properties mentioned in Clauses 5, 6 and 7 were deemed to have been specifically devised.
5. The judgment is against the weight of evidence.
6. Further grounds of appeal would be filed upon receipt of the reasons for the judgment and the Record of Proceedings.

EVALUATION OF GROUNDS OF APPEAL

The appellants argued grounds one (1) to four (4) together for the simple reason that they are basically the same. This also prompted the Respondents to respond

to the grounds together in similar fashion. For our part we think there is merit in considering the four grounds together which we proceed to do.

What is before us in this appeal is a call to ascertain and give effect to the intention of the testator as expressed in his Will of 1944. This undertaking requires that we look for the intention of the testator as expressed by him in his/her actual words having regard to all the other provisions of the Will. By so doing, the intention which the Will itself declares either expressly or by necessary implications would be what a court of law would act upon. (See in re Atta (dec'd) Kwako v Tawiah (2001-2002) SCGLR 461 at 467.)

Thus the core issue emerging for determination from the four grounds lumped together is the ascertainment of the intention and meaning of clause 8 in the Will of the testator, Edward Kabu Otoo, in particular, as well as its relationship with clauses 5, 6 and 7 of same. In essence we are called upon to construe the meaning and intent of the Will at issue and in particular the relevant clauses indicated above.

The court in this instance is called upon to construe the will so as to give effect to the intention of the testator. This is because the will is the declaration or embodiment of the wishes and intention of its maker, the testator. This principle is well stated in the **Law of Wills in Ghana (1998**) authored **by Samuel Azu Crabbe at page 226** thus:

"In the construction of a will by the court, the overriding principle is that effect must, as far as possible, be given to the intention of the testator. This intention is to be ascertained from the words of the will."

I have stated above that the contentious clauses in the 1944 will which call for interpretation are clauses 5, 6, 7. The will of Edward Kabu Otoo is exhibited at page 303 to 308 of the ROA. The relevant clauses provide as follows:

"5. I direct my said executors to let or lease my Freehold house No E 251/2 at Russia aforesaid and the rent accruing there from shall after payment for repairs and municipal rates and taxes be paid into my said banking account annually.

6. I direct my said executors to build or let on building leases my Freehold lands situate at Labadi Road Christiansborg Accra and at Achimota village in the Accra District and the rents accruing there from shall after payment for repairs and municipal rates and taxes be paid into my said banking account annually.
7. I direct my said executors in their discretion to if need be to sell and convert into cash my Freehold land situate at the bottom of Kuku Hill to the north of Christiansborg near the property of Mr. Omarboe and pay the proceeds thereof into my said banking account.
8. I give and devise all my Freehold properties not specifically devised to all my sons (namely Gederah Tei Otoo, Joseph Kabufio Otoo, Tetteh Nkunor employed in the Railways at Obuasi – Elijah Kabu employed in the Railways, Edward Kabu Nkunor Otoo (alias Akwetey), John Nar Otoo and Nartey Tawiah Otoo in joint tenancy." (Underlined for Emphasis)

The Court of Appeal in construing the relevant clauses above referred did advert to this court's decision in **British Bata Shoe Co. Ltd v Roura & Forgas Ltds (1964) GLR 190, SC.** This is what this court said:

"In the construction of documents the attitude of the courts in Ghana (then Gold Coast) has invariably been to construe every document reasonably strictly, giving it such effect as it is capable of having by the strict application of the principles of (a) English law, where the document is relied on as constituting a transaction known and recognized by English law or (b) customary law, where the document is relied on as evidencing a transaction known and recognized only by customary law."

It is obvious to me that this position of the law is not altered by the current legal disposition wherein the individual's freedom to deal as he/she desires with his/her property is guaranteed. What is important is for the individual to state clearly his/her intentions to avoid any conflicting interpretations arising from absence of clarity of the intentions. **The Conveyancing Decree 1973 (NRCD 175)** even though inapplicable to the instant case has some useful

lessons on devolutions made after its passing. This is evident from a reading of section 14 (3) thereof which provides that:

"14 (3) A conveyance of an interest in land to two or more persons, except a conveyance in trust, shall create an interest in common and not in joint tenancy, unless it is expressed in such conveyance that the transferees shall take jointly, or as joint tenants, or to them and the survivors of them, or unless it manifestly appears from the tenor of the instrument that it was intended to create an interest in joint tenancy."

The above provision reiterates the point that even though the Decree creates a presumption that interests expressed in a conveyance shall be interests in common, such presumption is rebutted by, an express or a manifest statement of the true intention of the maker. In essence a testator can by clear words state his/her intentions that would rebut the presumption created by the Decree. Indeed section 20 of the Evidence Decree, NRCD 323 imposes upon the party against whom a rebuttable presumption operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact.

The intention of the maker of the Will can only be construed by reference to the words used therein. This position was aptly stated by **Lord Wensleydale** in **Grey v Pearson 1857 6 HLC p 106** as follows:

"In construing wills and indeed statutes and all written instruments the grammatical and ordinary sense of the words is to be adhered to, unless that could lead to some absurdity or some repugnancy or inconsistency in the rest of the instrument in which case the grammatical and ordinary sense of the word may be modified so as to avoid that absurdity and inconsistency but no further."

The document under consideration in this appeal is undoubtedly a Will which is known and recognized by English law. Apart from that, the testator expressed himself using words and expressions well known to English law. This is obviously not a document evidencing a transaction known and recognized only by

customary law. Two expressions emerging from the clauses above referred and which are underlined for emphasis, are the bone of contention in this appeal and therefore call for interpretation. These are: "Freehold properties not specifically devised and joint tenancy"

A devise is a testamentary disposition of land or realty; a gift of real property by will. The phrase 'freehold properties not specifically devised' is devoid of any complexities in understanding as it can only in the context used stand for specific pronouncement gifting a particular land to a particular person or persons. But for the desire of the parties to lock horns for the sake of it, the phrase is devoid of any complexity. It means what it says. A specific devise of a property is one that disposes or gifts a particular property to a particular or identifiable person or persons. A specific devise is detailed and exact and leaves no room for doubt or speculation. With this understanding in mind, to who did clause 5, 6, and 7 specifically devise the said landed properties? The answer is obviously a negative one because those properties were not specifically devised. There is no specific mention of any persons to whom those properties are devised under those clauses. It is unfortunate that the Court of Appeal was dismissive of or did not give due consideration to the Plaintiff's submission/argument that the intention of the testator Edward Kabu Otoo, in clause 8 of the will was to specifically devise his properties in clauses 6 and 7 to beneficiaries mentioned in clause 8. Let me repeat the clause 8 here below for emphasis thus:

"8. I give and devise all my Freehold properties not specifically devised to all my sons (namely Gederah Tei Otoo, Joseph Kabufio Otoo, Tetteh Nkunor employed in the Railways at Obuasi – Elijah Kabu employed in the Railways, Edward Kabu Nkunor Otoo (alias Akwetey), John Nar Otoo and Nartey Tawiah Otoo in joint tenancy." (Underlined for Emphasis)

The testator's intention in clause 8 above, following the literal construction of the words used, is so clear it warrants no interpretation other than that the freehold properties not specifically devised (to which category clauses 5, 6 and

7 fall) are given to his seven children listed therein (clause 8). (See Lowther v Bentinck, Rolls Court, Sir George Jessel, M.R.) 31 L.T. 719; 23 W.R. 156)

In the case of **Fenuku and Anor v John-Teye and Anor (2001-2002) SCGLR 985**, this court similarly confronted with the construction of a disputed Will held, among others per Ampiah, JSC as follows: "It is not disputed that in 1954, the English common law rule of interpretation was applicable. Under that common law rule, a conveyance of an interest in land to two or more persons simply without words of severance gave rise to a presumption in favour of a joint tenancy; in that event, the persons became joint tenants holding a single undivided title or interest in the land. Accordingly, the incidence of *jus accrescendi* by which the property vested wholly in the survivor or survivors upon the death of one or two of the joint purchasers, became applicable."

The trial High Court was thus right when it concluded that when a clause in a Will created a joint tenancy for beneficiaries as clause 8 did the last survivor took the residue of the devise on the death of the other devisees by virtue of the principle of jus accrenscendi. In such case the survivor has the ultimate right to take absolutely to the exclusion of all others. Thus in the circumstance of this case this devolves on the 3rd plaintiff/appellant who takes all.

The next phrase worthy of interpretation in the context of this appeal is 'joint tenancy' as used in the aforesaid clause 8. According to Black's Law Dictionary, Eight Edition by Bryan A. Garner (Chief Editor) a joint tenancy is "a tenancy with two or more co-owners who take identical interests simultaneously by the same instrument and with the same right of possession. A joint tenancy differs from a tenant in common because each joint tenant has a right of survivorship to the other's share." The author further states the rules for creating a joint tenancy as follows: "The joint tenants must get their interests at the same time. They must become entitled to possession at the same time. The interests must be physically undivided interests, and each undivided interest must be an equal fraction of the whole – e.g., a one-third undivided interest to each of three joint tenants. The joint tenants must get their interests by the same instrument –

e.g., the same deed or will. The joint tenants must get the same kinds of estates – e.g., in fee simple, for life, and so on."

The devise as per clause 8 is clear enough as to its beneficiaries, namely the seven sons of the testator therein listed. It was made to them at the same time.

The testator having precisely devised those properties not specifically devised as stated in clause 5, 6 and 7, this time round to the children listed in clause 8 was clear enough as to the nature of their holding which is stated to be as joint tenants. The implication of the grant to the beneficiaries as joint tenants is that they hold undivided interests in the said properties. As indicated above, each joint tenant has a right of survivorship to the other's share. In this context therefore it is the 3rd appellant who gains the ultimate right to take the said properties absolutely to the exclusion of all others. The Court of Appeal fell into error when it held that 'it was not the testator's intention to limit the enjoyment of rent proceeds from the properties mentioned therein to a selected few; namely the beneficiaries mentioned in clause 8'. The testator indeed intended exactly what the appellate court ruled against. I would allow the appeal against the decision of the Court of Appeal which I hereby do. I affirm the decision of the trial High Court.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

(SGD) **J. ANSAH**

JUSTICE OF THE SUPREME COURT

(SGD) **R. C. OWUSU (MS.)**

JUSTICE OF THE SUPREME COURT

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JUSTICE OF THE SUPREME COURT

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