IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- 2011

CORAM: BROBBEY,(PRESIDING) J.S.C.

DR. DATE-BAH,J.S.C.

ADINYIRA (MRS.),J.S.C.

BONNIE,J.S.C.

ARYEETEY ,J.S.C.

CIVIL APPEAL
J4/17/2008

23RD NOVEMBER, 2011

OPANIN YAW OKYERE (DECEASED)
SUBSTITUTED BY YAW PEPRAH
SUING AS HEAD OF ANIMA KORKOR FAMILY
OF SENIAGYA, ASANTE - - - APPELLANT

VRS.

1. OPANIN APPENTENG OF THE ESTATE OF
   AKUA ATTAA (DECEASED)
2. AKUA ADOMAA OF SENIAGYA, ASANTE … RESPONDENTS

J U D G M E N T

BROBBEY JSC:

I have had the benefit of reading in advance the opinion of my learned brother Date-Bah JSC. I agree with his analyses of the facts and the law as well as his interpretation of the law, particularly in respect of the devolution of the state of deceased persons to beneficiaries and devisees before vesting assents are granted

The import of the judgment in this case is this: when a person died testate or intestate, his estate dissolves on the executor or personal representative until vesting assent have been executed to the beneficiaries or devisees; until that granted the beneficiaries and devisees have no ……or locus standi over any portion of the estate.

In the light of the peculiar circumstances that sometimes bedevil the administration of estates in this country, it is felt that some clarification is necessary on the interpretation of the law as given in this judgment so that we may not be taken as interpreting the law to result in absurdity. It is common knowledge that in this country some estates are dissipated by the inaction of the executors or personal representatives. Others go to waste or are lost as a result of the active misuse or abuse of the estate left by deceased persons when executors or personal representatives refuse or fail to attend to duties entrusted to them under estates or selfishly make use of the estate to their benefit or benefit of undeserving others.

If the law is that a beneficiary or devisee has no title to sue or be sued until the grant to him of a vesting assent, what does he do in any of situations postulated above? At equity, such a person should be able to mount an action to protect the estate, or to save it from being dissipated or wasted. The plaintiff in such an action will be acting on the basis of his expectant interest in the estate, not in his capacity as a title holder under a will or grant at customary or statutory law. The plaintiff is such an action may take the advantage to apply to the court to the executor to renounce probate or to appoint another person to administer the estate. It is obvious that in such an action, the

lackadaisical or disinterested executor may fail or refuse to participate or mount any opposition. If he does oppose the action, he will put to the necessary inquiries which will not only protect the estate but enable the tribunal, as a court of equity, to give directions on the appropriate management of the estate.

In his capcity as persons with expectant interest, any member of the family of a deceased who dies intestate or beneficiary of such estate will qualify to mount such an action. Similarly, any devisee or beneficiary under any will may qualify to mount such an action.

These will be additional to any action that may be taken against any executor de son tort.

This view is necessary to be expressed so as to dispel any wrong impression that the interpretation of the law in this judgment may give rise to.

[SGD] S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

DR. DATE-BAH JSC:

This is an appeal which turns principally on an assessment of the weight of evidence adduced at the trial High Court and a point of law argued before this court. The plaintiff's action was dismissed by the trial High Court. His appeal to the Court of Appeal against this dismissal also failed. He has now turned to this Court for redress.

Madam Akua Attaa (deceased) by her last Will dated 11th August 1983 made several devises to the second defendant Akua Adomaa. These devises were challenged by the plaintiff on behalf of the Anima Korkor family of Seniagya, Asante, on the ground that

the subject-matter of the devises were the family property of that family and therefore the deceased testatrix lacked capacity to make the devises. In response, the second defendant counterclaimed that the properties devised to her by the testatrix were the testatrix's self-acquired properties. The trial High Court entered judgment for her on her counter-claim. The first defendant was the sole executor of the will under which second defendant counterclaimed.

In the Court of Appeal, after a careful review of the record of the proceedings at the trial High Court, Ansah JA, who delivered the judgment of the Court, concluded that (at p. 342 of the Record):

> "In this case, as I have striven to say, the trial judge weighed the evidence before him and accepted that of the second defendant and her witnesses but rejected that of the plaintiff and his witnesses. The probabilities weighing in favour of the second defendant according to him, he entered judgement for her on her counterclaim. We have not spared ourselves the task of reading the record over and have come to agree that the evidence supported all the findings made and they are preponderated more in favour of the counterclaim than the claim. We must be very slow and loth to interfere with his findings of facts and rather hold him better entitled to a verdict of this court than the plaintiff on his claims both in the court below and here too."

Faced with these concurrent adverse findings of fact of the courts below, the plaintiff/appellant/appellant before this court has an uphill task to persuade this Court to reverse these findings of fact. In consequence, he has, wisely, sought to base his appeal to this Court on errors of law.

The grounds of appeal filed by the appellant before this Court were as follows:

"GROUNDS OF APPEAL

1. The Court of Appeal erred in law when it failed to evaluate the legal effect of Section 1(1) of the Administration of Estate Act, 1961 (Act 63) and to apply the said effect to

1st Defendant/Respondent who failed to enter an appearance, file a Defence or defend the action by entering judgment against him.

PARTICULAR OF ERROR IN LAW

(a) Failing to appreciate that by provisions of Section 1(1) of Act 63, the movable and immovable property of deceased person shall devolve on his personal representatives with effect from his death.

(b) Failing to appreciate that as executor, the 1st Defendant was a personal representative of the deceased testator as defined by Sect. 108 (1) of Act 63.

(c) Failing to appreciate that as executor, 1st Defendant denied *(sic)* his title and authority from the will of the Testator and that the personal property of the Testator including all rights of action vested in him upon the Testator's death and that his right to sue of course reciprocated by his ability to be sued.

(ii) The Court of Appeal erred in law when it held that the failure of the Plaintiff/Appellant to move a Motion for default judgment debarred him from inviting the Court of *(sic)* to enter judgment for him in his written address at the close of the case.

(iii) The Court of Appeal decided the case on a wrong premise and perception that the Plaintiff and Defendant are members of the same family, the members of which trace their origin to a common ancestress ANIMA KORKOR.

(iv) The Court of Appeal erred in law when it failed to address the locus standi of 2nd Defendant to Counter-claim in view of the fact that no Assent had been vested in her by 1st Defendant executor. "

The appellant has argued before this Court that since, by section 1(1) of the Administration of Estates Act, 1961 (Act 63), "the movable and immovable property of a deceased person shall devolve on his personal representatives with effect from his death", a default judgment should have been entered against the first defendant, who had not defended the plaintiff's action. This same point had been argued before the Court of Appeal, which had effectively dealt with it as follows, *per* Ansah JA:

"Another additional ground was that the trial judge should have entered interlocutory judgment in default of appearance and defence by the first defendant. I think that point was misconceived. Where there was default of pleadings, or appearance, the trial judge did not enter judgment *suo motu*. Such judgments were always given upon application so that the plaintiff should not ask for the judge to enter one for him in his written submissions to this court or the court below.

The plain fact in this case was that the plaintiff filed a motion for judgment in default of defence on 9/3/93; the second defendant opposed the application but the plaintiff never moved the court for a ruling on it. Thus the application was never heard and was presumably abandoned. On 21/4/93, the 2nd defendant filed a motion for interim injunction and an order to account and the suit progressed to trial and eventually, judgment. It was wrong for the plaintiff to appeal to this court to enter the judgment at this stage of the proceedings, for he should have been more vigilant and seen to it that his motion was heard and default judgment entered for him. His indolence contributed in no default judgment being entered for him."

We consider that this position of the Court of Appeal is correct and therefore the appellant's appeal to this Court on this identical ground is dismissed.

The appellant further argued that the second defendant had no *locus standi* to defend a title suit against her until a Vesting Assent had been executed in her favour by the first defendant. This argument was also held by the Court of Appeal to be mistaken. Ansah JA said (at pp. 340-1):

"There was no doubt that the testatrix gave and bequeathed landed properties to Akua Adoma in her will that on the pleadings has been admitted to probate. The Administration of Estates Act, 1963, Act 63 governs the administration of estates in Ghana and provided in section 1(1) that:

"The movable and immovable property of a deceased person shall devolve on his personal representatives with effect from his death."

By the interpretation in section 108 of Act 63, 'personal representative' means executor, original or by representation, or administrator for the time being of a deceased person'. In her will, the testatrix appointed Opanin Kwaku Pusuo and Kwabena Apenteng as her Executors/Trustees of her will. The properties in dispute devised to the second defendant in the will became vested in her on the death of the testatrix; see *Elliot v King* [1966] GLR 654 which decided among others that:

"The will was regarded as a conveyance of the property …took effect from the death of the testator or testatrix to vest the property in the devisee." The properties having been devised to the second defendant in the will, they vested in her by the operation of law and the fact of the death of the testatrix, hence there was no need for executing any formal vesting assent by the executor so as to clothe her with the capacity to sue and be sued in respect thereof."

This statement of the law is problematic. The appellant is right to point out, in his Statement of Case, that this is a statement of the old common law position and that the law in Ghana, after the enactment of the Administration of Estates Act, 1961 (Act 63), is different.

Under the common law of England, before the enactment of the Land Transfer Act, 1897, the real estate of a deceased did not vest in his personal representative, but passed immediately to his heir or devisee, as the case may be. There was thus no need for probate or letters of administration. An executor or an administrator would not have any rights over the devised property, since it was already vested in the devisee. This common law position was changed by the Land Transfer Act, 1897, which, however, never applied in Ghana. Under this Act, in relation to deaths occurring after 1897, all the property of a deceased became vested in his or her personal representative. The personal representative had full powers of management and could therefore sell the

property vested in him or her in order to pay debts owed by the estate. To transfer title to a devisee, a personal representative had to execute a conveyance or an assent. An assent did not need to be in writing. Any conduct of the personal representative which showed that he had assented to the gift was sufficient. This led to the unsatisfactory situation where to establish the title of a devisee, he or she might have to prove facts showing the personal representative's assent. This mischief was cured by the provision in the Administration of Estates Act, 1925 that no assent made after 1925 could pass a legal estate in land unless it was in writing and signed by the personal representative. This had the effect of making provision for a proper paper title for the interests of devisees. This provision made it clear that a devisee's title was based on the assent and not on the will. The Administration of Estates Act, 1961 of Ghana borrowed these building blocks from the 1925 Act of England. The current Ghanaian law is no longer the common law position stated by Ansah JA (as he then was).

Abban JA confirms the current Ghanaian law as follows in the judgment of the Court of Appeal which he delivered in *Conney v Bentum-Williams* [1984-86] 2 GLR 301, 314-316:

> "Furthermore, the executors should have transferred the legal estate in the land to the defendant's vendors by formally executing a vesting deed or assent in their favour. The contention of counsel for the defendant would have been valid in the absence of the Administration of Estates Act, 1961 (Act 63). Before the passing of that Act, real estate devised under a will vested in the devisee at the death of the [p.315] testator; because the English Land Transfer Act of 1897 which on the death of a testator vested the property first in the personal representative never applied in this country and so they had no power to assent to its vesting in the devisee: see France v Quartey (1925) DCt '21-'25, 194. In that case Michelin J at 196 stated the position in the following words, "The law simply regarded the will as a conveyance of the property." And in Hammond v Lamptey, High Court, Accra 10 May 1961, unreported Ollennu J (as he then was) made the position even clearer when he said:

"First, the real estate: by the law applicable to this country which is the same as was in England in 1874 and before 1898, as under the Wills Act, 1873, real estate devised vested at the death of the testator in the devisee thereof and not in the personal representative. The devisee therefore takes the devised property without the necessity of formal conveyance thereof to him by the executor."

In Brown v Darko [1961] GLR (Pt II) 539, the same view was expressed by the same learned judge where at 541-542 he said:

"But neither the said Land Transfer Act, 1897 [60 & 61 Vict., c. 65], nor the Conveyancing Act, 1911 [1 & 2 Geo. 5, c. 37] applies to Ghana they not being statutes of general application in force in England on July 24, 1874. Under the Wills Act, 1837 [7 Will. 4 and 1 Vict., 26] which is the statute applicable to Ghana, real estate does not vest in personal representatives and so they have no power to assent to its vesting in a beneficiary, or to convey it to such person.

The situation has now been altered completely by the provision in Act 63 which came into effect on 7 June 1961; and the testator Cleland having died after this date, his will was caught squarely within the ambit of this Act. The relevant sections of the Act, ie sections 1 (1), 2 (1) and 96 (1), are as follows:

"1. (1) The movable and immovable property of a deceased person shall devolve on his personal representatives with effect from his death ...

2. (1) The personal representatives shall be the representative of the deceased in regard to his movable and immovable property...

96. (1) A personal representative may assent to the vesting, in the form set out in the Third Schedule to this Act, in any person who (whether by devise, bequest, devolution, appropriation or otherwise) may be entitled thereto..."

> It is therefore necessary that before carrying out the intentions of the testator, the will must first be admitted to probate and thereafter a beneficiary of any real estate under the will must have a vesting assent executed in his favour by the executors to whom probate has been granted. Until this is done, any purported sale of the real estate by the beneficiary or the devisee will be of no legal consequence and the purchaser thereof will not have a valid title. The defendant's vendors were in this serious predicament; for the evidence clearly showed that no vesting assent was executed in their favour by the executors in respect of the disputed land and this has still not been done. It followed that they could not transfer or confer a valid and effective title on the defendant."

It is clear from this passage from Abban JA's judgment that the statement of law by Ansah JA, relying on *Elliot v King (supra),* was *per incuriam* and should be overruled. A devisee cannot sue or be sued in relation to the devised property before a vesting assent has been executed in his or her favour. Accordingly, in the absence of a vesting assent executed in favour of the second defendant, she could neither sue or be sued on her devise. The appellant's complaint on this score is justified and has to be upheld.

What then is the impact of this point of law on the success of the appeal? It means, first, that the Court of Appeal's affirmation of the learned trial judge's dismissal of the action of the plaintiff/appellant/appellant is upheld. The first ground of appeal is dismissed, since there is even more reason to affirm the dismissal of the action against the second defendant since, as explained above, she lacked the capacity to be sued in relation to her devise, not having been a beneficiary of a vesting assent.

It must also mean that the second defendant/respondent/respondent's counter-claim is dismissed. She had no *locus standi* to bring it. The appeal is thus allowed on the counter-claim. In other words, the fourth ground of appeal based on the contention of no *locus standi* for the second defendant because no Assent had been vested in her by the Executor succeeds.

The third ground of appeal, even if it were conceded, would not make any difference to the outcome of this appeal. Whether or not the plaintiff and the defendants are members of the same family has no impact on the validity of the devises made by the testatrix to the second defendant, in the light of the finding of fact by the two courts below in this case that the property in question was the self-acquired property of the testatrix. After reviewing the record of appeal, we also confirm this finding of fact. Incidentally, with the holding that the second defendant could neither sue or be sued in this case, the findings of fact made in relation to her probably fall away. In any case, in our view, the third ground of appeal does not provide a basis for reversing the Court of Appeal's decision.

In the result, the appeal succeeds in part.

[SGD] DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

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