IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA

CORAM: ANSAH JSC (PRESIDING)

ADINYIRA (MRS) JSC

ANIN YEBOAH JSC

GBADEGBE JSC

AKOTO BAMFO (MRS) JSC

CIVIL APPEAL

NO.J4/43/2013

26TH FEBRUARY 2014

1. PATRICK ANKOMAHYI - - - PLAINTIFFS /RESPONDENTS

2. GYIMIAMAH ANKOMAYI /RESPONDENTS

VRS.

1. HANNAH BUCKMAN - - - DEFENDANTS/APPELLANTS

2. SUSAN AMOAH /APPELLANTS

3. EDWARD DJAN AMOAH

JUDGMENT

AKOTO-BAMFO (MRS) JSC:

On the 11th of June 2012, the Court of Appeal, by a 2 to 1 majority, affirmed the decision of the High Court which was delivered on the 18th of June 2010. In the said decision, the High Court granted all the reliefs endorsed on the amended writ of summons and statement of claim taken against the defendants therein by the plaintiffs on 29th of June 2009.The Learned High Court made this pronouncement;

a. "That in his lifetime, the late Kojo Amoah told the plaintiffs and his family that upon his death house No. B445/21 North Kaneshie should be given to the plaintiffs.
b. It is as a result ordered that the defendants should immediately take steps to vest the property in the plaintiffs "(These were upheld by the Court of Appeal)

Dissatisfied with the decision of the Court of Appeal, the defendants filed a process titled Notice of Appeal formulated thus:

"That the Judgment of the Court of Appeal is a wrong exercise of discretion". This 'Ground' it must be pointed out is non-existent in terms of procedure.

Learned Counsel must have come to that realization and therefore subsequently, with leave of the Court amended same to read as follows:

"The judgment is against the weight of evidence"``

In order to fully appreciate the issues raised, it is necessary to give a re` sume` of the events culminating into the present appeal.

The respondents, who were the plaintiffs in the court of 1st instance, commenced an action which was subsequently amended against the defendants, the appellants herein for these reliefs:

a. “A declaration that the late Kojo Amoah in his lifetime told the plaintiffs and his family, both immediate and extended that in appreciation of the financial assistance towards the putting up of House No B455/21 North Kaneshie by the late mother of the plaintiffs, the said house should be given to plaintiffs upon his demise”.
b. “An order directed at the defendants to vest House No B445/2 in the plaintiffs in accordance with the wishes and directives of the late Kojo Amoah”.

Their case, as per the amended statement of claim, was that the late Kojo Amoah ,who was the uterine brother of their mother, Akua Panyin, customarily adopted them upon her demise, that when they were handed over to him, Kojo Amoah was given a Bank Accounts Book for the use of the savings therein for their upkeep. He brought them to stay with him, treated them very well, took very good care of them and saw them through their education. They in return served him diligently as any children would. Additionally they formed part of his workforce for the preparation of herbal medicines. On countless occasions, he told the 1st plaintiff, to the hearing of other family members that the property in dispute, the North Kaneshie House in which they lived, should be given to them upon his death owing to the tremendous financial assistance given him by their late mother. It is their case however that, the defendants refused to hand over the North Kaneshie Property to them, contrary to the wishes and directives of the late Kojo Amoah.

In resisting the plaintiffs’ claim, the 1st, 2nd and 3rd defendants asserted that the plaintiffs were neither customarily adopted by their father, Kojo Amoah nor was he given any bank accounts book for their upkeep. They further denied that their deceased father made any declaration that the North Kaneshie house be given to the plaintiffs on account of their mother’s financial contribution. According to them, upon the death intestate of Kojo Amoah they applied and were granted Letters of Administration as widows and child respectively together with the 4th defendant, the customary successor. When the latter refused to corporate with them, they proceeded to distribute the estate and vested the properties in the beneficiaries which included the extended family of the deceased.

These issues were set down for determination by the High Court:

1. Whether or not the plaintiffs were customarily adopted by the late Kojo Amoah.
2. Whether or not the late Kojo Amoah in his lifetime took care of the plaintiffs as done to his biological children and the plaintiffs in turn served and recognized the late Kojo Amoah as their father.
3. Whether or not the late Kojo Amoah in his lifetime said to the plaintiffs that after his death house No 445/21 North Kaneshie be settled in their favour.
4. Whether or not the said declaration made by the late Kojo Amoah to have the said house given to the plaintiffs, was made and said to the hearing of the key members of the family and also the biological children of the deceased.
5. Whether or not the plaintiffs are entitled to fair share of the estate of the late Kojo Amoah in their capacity as the adopted children of the deceased.
6. Whether or not the 1st, 2nd and 3rd defendants have distributed the estate of the late Kojo Amoah.
7. Whether or not the 1st, 2nd and 3rd defendants can validly distribute the estate of the late Kojo Amoah without the involvement of the 4th Administrator of the deceased.
8. Whether or not the plaintiffs are entitled to their claim.
9. Whether or not the 4th defendant is entitled to his counterclaim.

As noted, the Learned Judge found in favour of the plaintiffs and granted them all the reliefs as per the endorsement. Naturally, the defendants turned to this Court after they had failed in their bid to successfully challenge the decision of the High Court.

Before this court, the 1st, 2nd and 3 defendants, as per their amended Notice of Appeal hinged their attack on this omnibus ground, namely that the judgment is against the weight of evidence.

The court of Appeal by its majority decision made concurrent findings with the trial Court.

It is generally settled that where findings of fact made by the trial court are concurred in by the 1st appellate court; the 2nd appellate must hasten slowly in disturbing same or coming to a different conclusion unless it is manifestly clear that the findings of the two courts are not supportable on the evidence or perverse. In such circumstances, this Court has the power to review the evidence as a whole and find whether the conclusions by the High Court as affirmed by the Court of Appeal are supported by the evidence. Achoro vs Akanfela 1996-97 SCGLR 209 Koglex (No2) v Field (2000 SCGLR 175; Obeng v Assemblies of God Church, Ghana 2010 SCGLR 300, Gregory Tandoh and Anr. 2010SCGLR 971

Where, however, a finding made was an inference which the trial court drew from specific findings made, then the appellate court is in as a good position as the trial court to draw inferences from the specific facts found in the trial court. Adorkor v Gatsi 1966 GLR 31.

Where the appellant alleges that that the judgment is against the weight of the evidence led, the court is enjoined to independently evaluate the evidence on record and determine whether proper findings and facts supported by the conclusions reached, were made.

In Tuakwa v Bosom 2001-2002 SCGLR 61 the Supreme Court delivered itself thus: “an appeal is by way of rehearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial Court is against the weight of evidence. In such a case, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that on a balance of probabilities, the conclusions of the trial Judge are reasonably or amply supported by the evidence”.

Before embarking upon an analysis of the statements and the evidence, we wish to comment briefly on the sloppy manner in which the statement of case of the appellant was crafted.

Even though rules 15 sub (6)(10 & 11) of C1 16 stipulate that "the appellant shall set out the full case and arguments to be advanced by the party including the relevant authorities and references to the decided cases and the statute law on which the party intends to rely".

> "10). At any time after the publication of the short list containing the particulars of appeal but not less than seven days before the hearing, each party or his counsel shall submit to the Court a list of the decided cases and the statute law on which he intends to rely at the hearing and shall serve a copy of any such list on the other parties.
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> 11). Notwithstanding anything to the contrary contained in these Rules, any party to a civil appeal may at any time before judgment apply to the Court to amend any part of the statement of his case and the Court may having regard to the interest of justice and to a proper determination of the issues between the parties, allow the amendment on such terms as it may consider fit."

Learned counsel complied with none of these rules; he only filed a 2 paged statement and asked the court to adopt the decision of Akamba J A as he then was. This is most unsatisfactory particularly emanating from the Chambers of a very senior member of the Bar. Senior members of the Bar owe a duty to the profession to nurture junior members in the best practices of the Bar. Rules of Court are not ornamental pieces. They are meant to be complied with.

Two main issues arose from the pleadings; namely (a) whether the plaintiffs were customarily adopted and therefore his children. (b) Whether Kojo Amoah made a declaration in his lifetime that the Kaneshie Property be settled upon the plaintiffs on account of their mother's substantial contribution towards its acquisition.

On the 1st issue i.e. the customary adoption, even though Acquaye J A concurred in the findings of the Learned High Court judge, Dordzie J A "would not be labor too much on whether the late Amoah customarily adopted the respondents or not". It is evident that she took that position because of her finding as per page 299 of the Record, the 2nd page thereof, that "the deceased accepted the respondents in his home recognized

them as his own children. They became members of Kojo Amoah's household. By section 18 of PNDC L 111 they have acquired the right to be regarded children of deceased's household"

Akamba J A then, was however of the view that the essential requirements as settled in a long line of authorities were not met. It is obvious that the court of first instance and the appellate court differ as to whether the plaintiffs were adopted by Kojo Amoah.

What course does the 2nd appellate court take in the face of conflicting findings?

In Continental Plastics (2009 SCGLR 298), this court per Georgina Wood CJ stated as follows;

> "An appeal being by way of rehearing, the 2nd appellate court is bound to choose the finding which is consistent with the evidence on record. In effect the court may affirm either of the 2 findings or make an altogether different finding based on the record".

Were the 1st and 2nd plaintiffs customarily adopted by Kojo Amoah?

It is in evidence that Kojo Amoah was the uterine brother of Akua Panyin, the mother of the plaintiffs. That the plaintiffs were a nephew and niece of Kojo Amoah and therefore they were, in custom members of his family is beyond question. Evidently all the players in the drama were Akans, whose system of inheritance was predominantly matrilineal.

Ollenu JSC (as he then was) in his book The law of Testate and Intestate Succession in Ghana exhaustively dealt with the membership of a family and concluded that "the immediate maternal family of a deceased male or female consist of his or her mother, mother's brothers and sisters and all who were descended matrilineally from the same womb as himself or herself that is his or her surviving uterine brothers (if any), his or her surviving uterine sisters (if any), in the case of a woman, her own children and uterine grand children, and in the case of a man, the surviving children of all his sisters, dead or alive, save that as long as their mothers lived, such children of sisters would not normally be regarded as principal members of the family".(Page 75 of law of Testate and Intestate Succession in Ghana).

It is common knowledge that in almost all the communities in Ghana, children of a deceased are handed over to their successors who are supposed to step into the shoes of the deceased; be mothers or fathers to the children. The issue is whether this handing over ceremony constitutes a customary adoption.

In Plange v Plange 1977 IGLR 312, the essentials of a customary adoption were set out in these terms:

> "(1) The expression of the adopter's intention to adopt the infant before witnesses and (2) the consent of the child's natural parents and family to the proposed adoption". Such consent to be ascertained either from the words expressly uttered by the adopter and deduced from his conduct.

Legal consequences flow from a customary adoption in that the adopted child acquires the status of a child of the marriage and enjoyed the same bundle of rights including rights of inheritance, duties, privileges and obligations as the natural child and the rights and liabilities of the natural parents of the adoptee become permanently extinguished and devolve on the adopter.

In the scenario set out above, did the rights and liabilities of the surviving parent become permanently extinguished and same devolved on the successor? We think not. The surviving parent's rights and liabilities were not affected by the handing over ceremony.

In the case under consideration, Kojo Amoah took custody of his nephew and niece, who, he was customarily obliged to look after. That he did a brilliant job was testified to by the plaintiffs. It is of significance though that he never took steps to change their identities as he did in the case of his step son who was brought into his home when the mother got married to him; for it is trite learning that one way of acknowledging paternity of a child under custom is by naming him.

To hold that such persons become the adopted children of the successor or family member and therefore have the same rights and obligations as the biological children would result in injustice.

Should the surviving natural parent subsequently die, would the “adopted” children be entitled to inherit him? In many households, these are nephews and nieces being looked after entirely by reasonably well- to do uncles and aunties. Are these nephews and nieces adopted children for the purposes of inheriting those uncles and aunties? We think not.

The findings that the plaintiffs were customarily adopted by Kojo Amoah are not supported by the evidence on record.

We would therefore set aside the findings of the High Court and Court of Appeal on this issue. Of particular interest is the finding of the majority in the court of Appeal that the plaintiffs were children of the household within the meaning of the Intestate Succession Law 111 and therefore had a beneficial interest in the North Kaneshie house, and additionally, that the house was built with substantial contributions of Akua Panyin.

Both Akamba and Dodzie JJA, found that the plaintiffs were entitled to a share of the North Kaneshie house as children of the household within the meaning of the Intestate Succession Act.

The question is whether that finding is supportable having regard to the reliefs sought and the evidence. The Intestate Succession Act was enacted for a specific purpose; to protect the nuclear family of father, mother and children. The objectives are clearly stated in the memorandum portions of which we reproduce. If as stated in the memorandum “there is a movement towards involving the wife in the husband’s economic activity and a corresponding weakening of the extended family, nephews and nieces who are undoubtedly members of a matrilineal family ; what would be the justification for putting them in the same category for the purposes of inheritance? Widening the scope of the law to include the plaintiffs in this case would defeat the objectives of the Intestate Succession Act.

Both the trial and the 1st Appellate Court found that the deceased Kojo Amoah made the declaration that the North Kaneshie house be settled upon the plaintiffs on his death. .

Both courts are agreed that the declaration is in the form of a samansiw' the essentials of which were correctly set out by them.

Is the evidence on record supportive of a finding that Kojo Amoah made a samansiw?

The law on customary will has undoubtedly gone through various stages.

In Summey v Yohuno 1960 GLR 68 these were the essentials:

1. The disposition must be made in the presence of witnesses
2. One such witness must be the customary successor of the testator
3. There must be acceptance of the gift indicated by giving and receiving of drinks

Thereafter there is a long line of settled cases each of which modified the essentials, namely Mahama Hausa v Baaku Hausa 1972 2 GLR 469 which dispensed with presence of an inheritable member of the donor's family. See also In re Armah Decd; Awortwi v Abadoo (1977 2 GLR 375 CA)

In Prempeh v Agyepong (1993-94) 1 GLR 225, there was a further modification in these terms: "Customary law is constantly changing especially in the area of nuncupative wills. The social and economic demands of the day have forced the pace. The ancient requirements regarding the kinship quality and plurality of witnesses, and the giving of aseda (thanks) to seal a legacy, have all suffered change. The courts in recent times have rejected or pruned very thinly these requirements, taking care not to throw away the baby with bath water, to use the celebrated expression. Thus the pristine formulations of Sarbah, Rattary and Ollennu have had to yield to three simple rules, namely self-acquired ownership in the testator, his sanity at the time of the declaration and attestation by credible, disinterested witnesses, two at least in normal circumstances, but one permissible in extreme exigencies.

After the modification of the principles referred to above, these 3 essentials emerged;

1. The property must be self acquired
2. The testator must be sound in mind
3. The declaration must be attested to by 2 credible disinterested witnesses.

Undoubtedly, there is ample evidence that the North Kaneshie property was the self acquired property of Kojo Amoah. As to his state of mind at the material time, there is not a shred of evidence that he lacked the requisite capacity to make the disposition.

Was the declaration attested to by 2 credible and disinterested witnesses?

Even though the court of Appeal affirmed the findings of the High Court on the issue, we are of the view that the evidence led was at variance with the findings so made.

1st plaintiff Patrick Ankomayi, PW1 Comfort Esi Amoah, the 1st child of the deceased, Ebusuapanyin Kweku Mensah, PW2 and the 4th defendant, Mathew Kofi Sagoe cannot by any stretch of imagination be described as disinterested and credible witnesses. Comfort Esi Amoah had an axe to grind with the 1st and 2nd defendants. Even though her father had lived with them and had had altogether 9 children by them; she never recognized their status as wives. She was indeed positive that they were mere workers of her father and lodged a complaint of theft against them significantly, in respect of the disputed property.

Ebusuapanyin Kweku Mensah did not only deny that the 1st and 2nd defendants were widows of the deceased Kojo Mensah but further laid claims to the house put up by the deceased in his hometown. According to him he gave the deceased a portion of his land in therein.

The customary successor had issues with the distribution and alternated between recognizing the 1st and 2nd defendants as wives or workers only depending on the circumstances.

They therefore woefully failed the test outlined in the third essential element set out in the Prempeh case supra.

For the foregoing reasons; we would allow the appeal.

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

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JUSTICE OF THE SUPREME COURT

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