

GHANA / JUDGMENT

ODAME VRS, ODAME (PA/0799/18) [2024] GHAHC 105 (12 February 2024)

COURT
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12 February 2024

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IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE, PROBATE AND LETTERS OF ADMINISTRATION DIVISION 'COURT 3' HELD IN ACCRA ON MONDAY THE 12TH DAY OF FEBRUARY, 2024 BEFORE HER LADYSHIP JUSTICE SARAH ARYEE (MRS.), J. SUIT NO. PA/0799/18 BETWEEN FREDERICK OWONA ODAME PLAINTIFF H/NO 147/15 MATAHEKO, ACCRA ADJACENT ODORKOR POLICE STATION VRS.

1. JANET ODAME DEFENDANTS H/NO 147/15 MATAHEKO, ACCRA ADJACENT ODORKOR POLICE STATION
2. EMMANUEL KWAME DANSO KWAHU MPRAESO
3. ALEX KWAKU OSEI ACCRA

===== PARTIES:
PLAINTIFF PRESENT, DEFENDANT ABSENT COUNSEL: SETH ANANE AMANKWAH
HOLDING BRIEF OF DOMINIC OPPONG ADADE FOR THE PLAINTIFF PRESENT CANDY
FRIMPONG BAIDOO FOR THE DEFENDANT PRESENT Page 1

===== J U D G M E
N T The onus is on the propounder of the Will to prove positively that the Will was duly executed, in that it complied with the requirements of sections 1 and 2 of the Wills Act, 1971 (Act 360). BACKGROUND OF THE CASE The plaintiff is one of the children of the late Daniel Kwaku Odame, who died on the 11th of December, 2016. He was 90 years old at the time of his death and was survived by a wife and sixteen children. The 1st Defendant is the widow of the deceased. The 2nd and 3rd Defendants are named Executors of the Wills of the deceased which Wills are the subject matter of this suit. The deceased during his lifetime, acquired properties which included a house, numbered H/No. 147/15 Mataheko Accra, H/No. 28 Mpraeso Eastern Region, and a plot of land at Peikuma near Kasoa. A search at the High Court revealed that three different Wills deposited at the Court's Registry in the name of the deceased. The first Will is dated the 7th August 2011, the 2nd dated 21st July 2015 and the 3rd dated 19th April 2016. Probate is yet to be granted to the executors to administer the deceased's estate. Following the reading of the Will dated 19th April 2016, Plaintiff initiated this action against the Defendants by a Writ of Summons and Statement of Claim dated the 5th day of June 2018

seeking the following reliefs:

- a) A Declaration that the late Daniel Kwaku Odame died intestate.
 - b) A Declaration that the purported Will of the late Daniel Kwaku Odame is invalid since the same was not executed according to law. Page 2
 - c) A Declaration that the alleged Will being attributed to the late Daniel Kwaku Odame by the Defendants is not his original and final Will.
 - d) An order of perpetual injunction restraining the defendants, their children, agents, and other person(s) claiming title through them from interfering with the property in dispute
 - e) Any other Order(s) that the Honourable Court may deem fit. The 1st Defendant entered appearance and filed a Statement of Defence on the 28th day of June 2018, this was amended and an amended Statement of Defence was filed on the 9th June 2020. The defendants counterclaimed as follows:
 - a. A Declaration that the late Mr. Daniel Kwaku Odame did not die intestate but the deceased left behind him a valid and properly-executed Will dated 21st July 2015.
 - b. A further Declaration that the Will of the late Mr. Daniel Kwaku Odame dated 21st July 2015 has not been revoked in any way at law by the improperly executed Will dated 19th April 2016 which has failed as conceded by the Defendants.
 - c. An Order for the Executors of the Will dated 21st July 2015 (or any person authorized by the Court) to prove the said Will and obtain Probate or Letters of Administration (With Will Annexed) in respect of the estate of the late Mr. Daniel Kwaku Odame.
 - d. An Order for Plaintiff to account to the Defendants in respect of all the monies Plaintiff has collected from Mr. Odame's Estate from the time of the death of the testator to date.
 - e. Perpetual injunction to restrain the Plaintiff or any person or persons claiming with, by, through, or in trust for the Plaintiff from intermeddling or interfering in any way whatsoever with any or all of the properties belonging to the estate of the late Mr. Daniel Kwaku Odame. The 2nd and 3rd Defendants did not file any defense. The plaintiff on the 23rd day of March 2021 filed a reply to the Amended Statement of Defence and Counterclaim and joined issued with the Defendants on their Counterclaim. ISSUES FOR DETERMINATION Page 3
- 1. Whether or not the testator made a Will dated 19th April 2016 and if it complied with the requirements of the Wills Act, Act 360.
 - 2. Whether or not the Will dated 19th April 2016 revoked the alleged Will of the late Daniel Kwaku Odame dated 21st July 2015 in fact and at law

3. Whether or not the late Daniel Kwaku Odame left a Will dated 21st July 2015 which was properly executed and attested to and which complied with all the legal requirements of a valid Will
4. Whether or not there was a validly executed Will dated 7th August 2011
5. Whether or not the late Daniel Kwaku Odame died intestate
6. Whether or not the parties have been intermeddling in the estate of the late Daniel Kwaku Odame. PLAINTIFF'S CASE The plaintiff is one of the children of the deceased. The 1st defendant was a wife of the deceased. The 2nd and 3rd defendants are executors of the Will being challenged by the plaintiff. The plaintiff avers that before the passing of the late Daniel Kwaku Odame, the 1st Defendant and the Testator's Lawyer Abubakari Issah had a meeting with the witnesses to sign the Will without the presence of the late Daniel Kwaku Odame. The plaintiff claims that during this meeting, the Lawyer and the 1st Defendant informed the witnesses that the late Daniel Kwaku Odame had made changes in the previous testaments but was too sick to be present, and therefore requested that they sign their portions of the Will to be deposited in Court. It is the claim of the plaintiff that the contents of the Will are not the true intentions of the late Daniel Kwaku Odame and that the Will may have been obtained through undue influence, coercion, mistake, or misrepresentation due to the advanced age of the testator. Page 4 DEFENDANT'S CASE The 1st defendant filed a Statement of Defence on the 28th of June 2018 wherein she stated in paragraph 3 that; "3. Paragraphs 1, 2, 3, 4, 5 of the plaintiff's statement of claim are admitted. However, in further response, the 1st defendant avers that the said Will and testament of DANIEL KWAKU ODAME is original, valid, true and unfettered intentions of the testator."
5. The 1st defendant denies paragraph 8 of plaintiff's statement of claim and further states that the Will of her late husband, Daniel Kwaku Odame was signed by himself before two witnesses who were present at the same time and signed before each other, and before the testator as well as witness the testator's signature simultaneously.
6. The 1st defendant denies paragraph 9 of plaintiff's statement of claim and contends that she was never present at any of the meetings that involved the testator and his lawyer and was not privy to any changes that the testator made to his previous Wills and testaments before it was deposited at the courts. The 1st defendant's case is that she is aware that the last three Wills of the late Daniel Kwaku Odame have been lodged at the Registry of the High Court. Additionally, she accuses the plaintiff of intermeddling with the estate of the late Daniel Kwaku Odame. The 1st Defendant denies the allegations of impropriety regarding the improper execution of the Will dated 19th April 2016 in her amended statement of defence. She claims that the Will dated 19th April 2016 was not validly executed because the testator, being a layman, misunderstood the instructions of the Lawyer, Abubakari Issah, who prepared the Will and sent same to the deceased Testator for execution. The 1st Defendant claims that no undue influence, coercion, or other illegal means were exerted on the late Daniel Kwaku Odame in making the Will dated 19th April 2016 or any other Will. Further,

she avers that notwithstanding the improper execution of the Will dated 19th April 2016, the late Daniel Kwaku Odame did not die intestate, but instead left behind a properly executed and Page 5 properly attested Will dated 21st July 2015, which was not revoked by him factually or legally. The 1st Defendant further states that the Lawyer has confirmed that the 21st July 2015 Will was executed by the late Daniel Kwaku Odame in the presence of the same two witnesses, who signed and attested to it in the presence of the late Daniel Kwaku Odame, and the Lawyer in the presence of each. The 1st Defendant again states that the Will dated 21st July 2015 was lawfully, properly, and validly executed by the late Mr. Daniel Kwaku Odame and his attesting witnesses, and has not been revoked by the subsequent Will dated 19th April 2016. Thus, the 1st Defendant claims that the Will dated 21st July 2015 is still in effect and constitutes the late Daniel Kwaku Odame's last Will and Testament.

EVALUATION OF THE EVIDENCE, ISSUES AND THE LAW ISSUE 1: Whether or not the testator made a Will dated 19th April 2016 and if it complied with the requirements of the Wills Act, Act 360. For a Will to be Valid, it has to be prepared in accordance with Section 2 of the Wills Act of 1971 (Act 360). The Supreme Court in the case of SENTI VRS. KWAME AND ANOTHER (J4/51/2019) [2020] GHASC 61 (04 NOVEMBER 2020); "Under section 2 of the Wills Act, 1971 (Act 360) for a Will to be prima facie valid, it must have the following essential ingredients:

1. It must be in writing.
2. It must be signed by the testator or by some other person at his direction.
3. The signature of the testator shall be made or acknowledged by him in the presence of two or more witnesses
4. The two or more witnesses must be present at the same time.
5. The witnesses shall attest and sign the Will in the presence of the testator. Based on Section 2(3) and (5) of the Wills Act (supra), it is required for the testator to acknowledge his or her signature in the presence of two or more witnesses who are Page 6 present at the same time. The witnesses must also sign the Will in the presence of the testator. In the case of IN RE OKINE (DECD) DODOO & ANO VRS. OKINE & ORDS [2003-2005] 1 GLR 630, the court held that the testator's signature must be made or acknowledged by him in the presence of two or more witnesses present at the same time. Further, this principle was stated in the old cases of IN RE KOTEI (DECD) VRS. OLLENU [1975] 2 GLR 107 and the case of IN RE COLE, CUDJOE VRS. COLE [1977] 2 GLR 305 where the Court held that "the witness must attest the signature of the testator in the presence of the testator and they are only attesting the signature of the Testator and not the content of the Will" These principles have been given credence by the Supreme Court and in the recent case of QUARCOO VRS. WELBECK (J4/41/2012)[2015] GHASC 107 (25 NOVEMBER 2015) the Supreme Court once again reiterated this position of the law when it said "The requirement is that a testator signs or acknowledges his signature in the presence of two or more witnesses who must also sign to attest same. In the instant matter the testator signed his signature in the presence of the two witnesses as recounted

above. There cannot be any difficulty on the part of the witnesses to identify the signature of the testator as per their evidence they saw him sign the Will. The other requirement that both witnesses must be present at the same time when witnessing signature has also not been breached.” In this case, Plaintiff has contested the validity of the Will dated the 19th of April 2016. The evidence on record shows that the testator was given the Will by his Lawyer, Abubakari Issah (DW1 in this case), who drafted it. Plaintiff called two witnesses, PW1 and PW2, they were witnesses to the Will dated 19th April 2016. Both witnesses testified that they signed the said Will but the testator was not present during the signing. This was supported by Page 7 the testimonies of the 1st Defendant and DW1, both of whom admitted that the Will was not properly executed according to the requirements of Act 360. Therefore, based on the abundant evidence on record, the Court concludes that the Will dated 19th April 2016 is invalid. ISSUE 2: Whether or not the subsequent Will dated 19th April 2016 revoked the alleged Will of the late Daniel Kwaku Odame dated 21st July 2015 in fact and at law. Counsel for the plaintiff submits that the 2016 Will should be declared invalid and I agree with counsel. I wish to draw attention to the fact that the 2016 Will made no mention of a 2015 Will but mentions specifically the 2011 Will. ISSUE 3: Whether or not the late Daniel Kwaku Odame left a properly executed and attested Will dated 21st July 2015, which complies with all the legal requirements of a valid Will. The 1st defendant amended the statement of defence. The Statement of Defense does not mention a 2015 Will. Surprisingly, the 1st defendant testify both in her Witness Statement filed on the 7th of June 2021 and the Amended Witness Statement filed on 24th March 2023, that “I was with him and his two witnesses when we met with his Lawyer, Lawyer Abubakar Issah and he signed the said Will in their presence and the two witnesses signed their signatures in his presence. The signing was done on 26/07/2015 as indicated in the Will.” As reproduced above, the 1st defendant said that she was never present at any of the meetings that involved the testator and his Lawyer and was not privy to any changes that the testator made to his Will. And yet, in a rather chameleonic style, she says after she Page 8 realized that the 2016 Will was not valid that there existed a 2015 Will which she now claims she was present during its signing by the testator and the witnesses. The witnesses deny signing this Will. The 1st defendant did not mention this Will in her Statement of Defence. The 2015 Will was first introduced in the 1st defendant’s amended Statement of Defence. If she was present during the execution in 2015, then same was in existence in 2018 when she consulted for the preparation of her Statement of Defence for filing, Why did she forget to say anything about it in the Statement of Defence until they were informed at the Registry during the reading of the 2016 Wil that same was not properly executed. The assertion of the existence of the Will dated 21st July 2015 is made by the 1st Defendant. The 1st Defendant has admitted that the Will dated 19th April 2016 was improperly executed and is invalid. However, the 1st Defendant contends that there is a Will dated 21st July 2015, which was duly executed by the testator and properly attested by PW1 and PW2 in the presence of the Testator, DW1, and the 1st Defendant. The 1st defendant in Paragraph 8 of the amended Statement of Defence avers that the late Daniel Kwaku Odame made three Wills dated 7th August 2011, 21st July 2015, and 19th April 2016 and that the Wills were deposited with the Registry of the High Court. 1st defendant introduces the Will dated

21st July 2015 in Paragraph 13 of the amended statement of defence, alleging that this Will was properly executed and properly attested by the late Daniel Kwaku Odame. As it has been established that the 2016 Will is invalid and does not invalidate any previous Will, the validity of the 2015 Will introduced by the 1st Defendant ought to be determined on its merit. P.W.1 and P.W.2 the attesting witnesses to both the 2011 Will and the 2016 Will vehemently deny any knowledge about the existence of a 2015 Will. Counsel for the defendants decides to deal with issues 2 and 3 as the parties had themselves agreed that the 2016 Will was invalid. I agree with her. She submits and forcefully that all that is required of the defendants in the case is to establish that the Page 9 requirements of the law under section 2 of the Act have been complied with in the execution of the 2015 Will, on the face of the said Will. Since it is the defendants who allege the existence of a validly executed 2015 Will, the burden of proof lies on them to establish the existence of such a Will and demonstrate on the balance of the probabilities that it was drafted and executed in accordance with the provisions of Section 2 of the Wills Act of 1971 (Act 360). Concerning the burden of proof in Probate actions, the Court in the case of AKUA PREMPEH & 3 ORS VRS. S.D.A. ODDAI; CIVIL APPEAL NO. 5/2000 dated the 14th of May, 2003 held that the rule enunciated by Parke B that in every case the onus lies on the propounders of the Will to satisfy the Court that the instrument is the Last Will of a free and capable testator, must however be taken, I think, to refer to the first stage, so to speak, of the onus, for the onus does not necessarily remain fixed; it shifts. Where there is a dispute as to a Will those who propound it must clearly show evidence that prima facie, all is in order, that is to say, there had been due execution and that the testator had the necessary mental capacity and was a free agent. Once they have satisfied the Court, prima facie, as to these matters, it seems to me that the burden is now cast upon those who attack the Will and they are required to substantiate by evidence the allegations they have made as to lack of capacity, undue influence and so forth. This position of the law is further strengthened as propounded in the recent case of THOMAS TATA ATANLEY & ORS. VRS. KOFIGAH FRANCIS ATANLEY & ORS. Civil Appeal No. J4/05/2019 dated 22nd January 2020, "Where the validity of a Will is challenged, the proponents of the Will have the burden to satisfy the court that the document presented as the Will and Testament of the deceased was freely made by her and was duly attested to by two witnesses who were present at the same time. The proponents are further to satisfy the court that the testator at the time she executed the Will was corpus mentis not suffering from any impairment of mind. Once the proponents of the Will discharge this burden on them, then the burden of proof shifts to the party alleging that the Page 10 document is a forgery or does not meet the requirements of the Wills Act to prove those allegations." See the cases of; IN RE BLAY-MIEZER (DECED); AKO ADJEI & ANOR VRS. KELLS & ANOR [2001-2002] SCGLR 339, DODOO & ANOR VRS. OKINE & ORS [2003-2004]. In the case of THOMAS BAIDEN & ANOR. VRS. FRANCIS PARKER (Suit No. J4/58/2022 dated the 1st day of February 2023, the Supreme Court stated that; "This assertion was part of his pleadings and he needed to establish those facts. The Defendant was the one who introduced the fact. ... It was then his duty to show or prove this fact by way of evidence." Again in ACKAH VRS. PERGAH TRANSPORT LTD [2010] SCGLR, Adinyira JSC stated that due

to the contentious nature of the issues depicted by the facts, this called for the adduction of evidence by the party who raised the issue. As the respondent herein bears the burden of proof of the issue he was enjoined by the basic rules of evidence to prove the issue on the preponderance of probabilities. The Court granted an application for the appointment of a Forensic Expert to conduct a forensic audit of the signatures. Unfortunately, the services of the Forensic Expert were not able to be procured. However, this Court has the power to make its determination with or without the opinion of an expert. S. A. Brobbey JSC, in his book, "PRACTICE AND PROCEDURE IN THE TRIAL COURTS AND TRIBUNALS OF GHANA", SECOND EDITION, in paragraph 222 on page 103, states: "The important point to note is that the issue of the competence of an expert is one of law for the court to decide. An equally important point to note is that expert evidence is only prima facie evidence and should not be taken as a substitute for what the court has to decide". Further it was held in the case of QUARCOO VRS. WELBECK AND AGNES ASHONG (supra) that, "It is a point of law that a court witness, as in this instant case, is an officer of the court and therefore in as much as they are experts in the type of evidence they give, they do not decide the issue; Page 11 the court decides the issue. Therefore it is up to the court or the trial judge to apportion the requisite weight as the case may be to the evidence so given by the expert". In this case, the absence of forensic expert evidence does not defeat the findings of this Court. I shall proceed to rely solely on the pieces of evidence of both parties and examine which of the party's evidence is more probable. The Supreme Court relying on the American decision in the case of NORTON VRS. FUTRELL, 149 CAL APP. 2D 586 (1957) explained that: "The term 'probability' denotes an element of doubt or uncertainty and recognizes that where there are two choices, it is not necessary that the jury be absolutely certain or doubtless, but that it is sufficient if the choice selected is more probable than the choice rejected." The 1st Defendant and DW1 claim the Testator signed the 2015 Will in the presence of both PW1 and PW2 present at the same time and PW1 and PW2 attested the Will in the presence of the Testator, It is established that where there is a proper attestation clause in a Will, there is a presumption of due execution. This is a rebuttable presumption. The authorities further establish that the evidence of a witness seeking to impeach his act when there is an attestation clause must be viewed with extreme caution and not generally accepted without corroboration. PW 1 under cross-examination; Q: Did you visit him ever in the year 2015 in his Residence? A: I do not recall Q: I am putting it to you that on 26th July 2015, the late Odame who trusted you so well invited you to his residence in the same manner he invited you in 2011 to come and witness his Will. Page 12 A: Nothing of that sort happened Q: I am further putting it to you that present at this 26th July 2015 meeting, where the same persons, yourselves, Emmanuel Adu, Mrs Odame, Mr. Odame and Lawyer Abubakar who were present at the 2011 meeting. A: Nothing of that sort happened Q: I am further putting it to you that just as you signed as a witness in his 2011 Will you also signed as a witness in this 2015 Will both days been Sundays? A: Nothing of that sort happened, I, Emmanuel Adu, Mrs. Odame, and Lawyer Abubakar met only once in 2011 and the late Odame was also present. That is when he signed the Will. We signed another Will in the year 2016, by then the late Odame was not present, he was not well and had relocated to Kwahu. PW 2 also under cross-

examination testified as follows: Q: Do you insist that apart from the 2011 Will and 2016 Will of the late Odame you did not sign any other Will, you are free to tell the Court if you do not remember. A: I signed two Wills and they were the 2011 and 2016 Wills. I did not sign any other Will. Q: You will agree with me that your signature appearing on the 2011 Will Exhibit 4, the 2016 Will Exhibit A, your Statutory Declaration Exhibit B, your Witness Statement, and Exhibit 6 what you just signed before this Court are all the same. A: Yes Page 13 Q: I am putting it to you that this same signature is what appears in the late Odame's 2015 Will and that you indeed signed it. A: No I did not sign any Will like that in 2015. If it is the case that the same signature is appearing on a 2015 Will I do not know where it is coming from. The evidence of PW 1 is corroborated by the evidence of PW 2 to the effect that they both attested to two Wills, namely 2011 and 2016 Wills but never signed any 2015 Will as claimed by the 1st Defendant. They were consistent in their testimony to the Court. Counsel for the defendants submit that the testimony of the two subscribing witnesses that they did not sign any other Will apart from the two they admitted is not credible. I have considered the totality of the evidence on record and I must say with all due respect to learned counsel that I do not agree with her. The evidence of the 1st Defendant and her witness DW 1 who is said to have prepared the 2015 Will was however to be taken with a pinch of salt. The 1st Defendant pleaded at Paragraph 14 of her Amended Statement of Defence that;

14. Defendant avers further to the immediately preceding paragraph that Lawyer Abubakar Issah who prepared all the three Wills referred to in paragraph 6 of the Statement of Claim has confirmed that the late Mr. Daniel Kwaku Odame had previously signed the Will dated 21st July 2015 in the presence of the same two witnesses and the two witnesses had signed and attested to the said Will in the Testator's presence and the presence of each other all in front of Lawyer Abubakar. In her Amended Witness Statement filed on 24th March, 2023, the 1st defendant testified as follows; Page 14 9. I know that my late husband did not die intestate. He left a Will dated 21st July 2015 which he signed on the 26th July 2015 as indicated in the Will. He signed it in the presence of his two witnesses and his Lawyer, Mr Abubakar Issah. 10. I was with him and his two witnesses when we met with his Lawyer, Lawyer Abubakar Issah and he signed the said Will in their presence and the two witnesses signed their signatures in his presence. The signing was done on the 26th of July 2015 as indicated in the Will. 17. Lawyer Issah told us to give him time to look through his papers since he had changed houses and a lot of things were jumbled together. Lo and behold, Lawyer Abubakar found the Will dated 21st July 2015 that I know was properly signed by my late husband and his two witnesses as I happened to be in the room with them at that time. This can be confirmed by Lawyer Abubakar himself. Also under Cross-examination, the 1st Defendant testified as follows: Q: You have told this Court that Elder Nyarko and Elder Emmanuel Adu witnessed the 2011 and 2015 Wills at the Shop in your House at Mataheko. A: That is so Q: I suggest to you that PW1 and PW2 never signed any 2015 purported Will. A: They both signed and I was present after they signed then they went to church. Clearly the above evidence given by 1st Defendant is inconsistent with her own averments contained in her Amended Statement of Defence. 1st Defendant had testified under Page 15 paragraph 17

of her Amended Witness Statement that Lawyer Abubakar would confirm her assertions that the "Will was properly signed by my late husband and his two witnesses as I happened to be in the room with them at that time". The evidence stands uncorroborated. Concerning uncorroborated evidence in matters concerning dead persons, the Courts have countlessly been admonished to tread cautiously. Former CJ. Georgina Wood puts it succinctly in the case of KUSI & KUSI VRS. BONSU [2010] SCGLR 60 at 82 when she took a second look at this principle and made the following observations on uncorroborated evidence in respect of charges against a deceased person. She said "The court must examine the evidence critically, with utmost care, weighing or sifting it thoroughly, to ensure there are no loopholes or that the charge or claim does not suffer from absurdities or the like. A judge in receipt of uncorroborated evidence consisting in the main of charges against a deceased person does not swallow the story lock, stock and barrel, but first views it from a suspicious standpoint. If the story as presented is neither incongruous, preposterous, unreasonable, illogical nor incredible, then the judge may proceed to give it the weight it deserves. The exercise relates to the cogency or the weight to be attached to the evidence given." Where a party's evidence is inconsistent with his pleaded case, a court must reject that inconsistent testimony. In the case of ZABRAMA VRS. SEGBEDZI (1991) 2 GLR 221-, the court accepted the evidence of the defendant and his witnesses whilst rejecting that of the plaintiff and his witnesses which evidence was inconsistent with his pleadings. The Court said; "It is trite learning that where a party's evidence is inconsistent with his pleaded case while that of his opponent is consistent with his pleadings, the opponent's case is preferable to the one who departs from his pleadings. The principle was reiterated by this court in the case of Appiah Vrs. Takyi [1982- Page 16 83] G.L.R. 1, C.A. where it was held that if there was a departure from pleadings at a trial by one party whereas the other's evidence accorded with his pleadings, the latter's case was as a rule preferable. I think the trial court was justified in accepting the evidence of the defendant and his witnesses in preference to that of the plaintiff and his witness. Considering his pleaded case and the evidence led in support, the plaintiff has created for himself a situation in which the credibility of his witness cannot escape unscathed. I am of the view that the plaintiff in this court his case was not adequately considered in the trial court is not altogether justified." DW1 the Lawyer who claims to have prepared the 2015 Will as well as the 2016 and 2011 Wills, said in Paragraph 8 of his Amended Witness Statement that; "8. When I finished drafting the Will dated 21st July 2015, the late Mr Odame met me with his two witnesses, and he signed the said Will in their presence. And the two witnesses named therein signed their signatures in our presence. The signing was done 26th of July 2015 as indicated in the Will. Under Cross Examination of DW1 the following information was elicited Q: In paragraph 8 of your Witness Statement, you have told this Court that the late Odame and his two Witnesses met you and signed the 2015 purported Will. Is that so A: I did with both witnesses. That is in respect of the 2015 Will. It is in paragraph 8 of the Amended Witness Statement. The evidence of DW 1 did not corroborate the evidence of 1st Defendant who had claimed she was present at the signing of the 2015 Will, which evidence contradicted the averments Page 17 contained in her own Amended Statement of Defence. These inconsistencies and contradictions by the 1st

Defendant and DW1 deepen the level of suspicion. Furthermore, the time lapse between the date of discovery of the Will by the Lawyer and its deposit creates a lot of suspicion and the impression that it was not a genuine deed. DW 1 per his amended witness statement gave evidence as follows: "When the Second and new Lawyer of the 1st Defendant came to ask me about these Wills on taking over the Defence, I told him I was not aware that Mr. Odame has passed on and I informed him truthfully about all that I have stated above. I promised the new and present Lawyers that however that I would look for the second Will of 2015 which I had misplaced after I moved into a new house. Sincerely, it pained me that Mr. Odame was likely to be declared as having died intestate at law when I heard about the way and manner the third Will dated 19th April 2016 has been executed by him at Kwahu. For I know how much he wanted to provide for his widow who had a lot for him, to my knowledge. I was extremely relieved when I found the Will date 21st July 2015 in my former and discarded diary. I informed the new lawyer about it and he immediately deposited same in the registry of the Court as required by law." During the cross-examination of DW1 by Counsel for the Plaintiff, the following pieces of evidence were recorded. Q: Can you tell the Court what business you had to do with the 2015 purported Will after the testator and his two witnesses have signed the Will? Page 18 A: I took the said Will away in my diary and just some few days I relocated from my previous fixed place of abode to a new place, hence the said Will was not deposited until the death of Mr. Odame. Q: Will you agree with me that after the 2015 purported Will was executed you had no business again with that Will? A: That is not so, I add the duty to deposit it upon the instruction of the testator thus I still have fiduciary duties with the testator and this was demonstrated when I caused the same to be presented to Lawyer Sampson Obeng to deposit same. Q: I suggest to you that after the execution, you were functus officio A: That is not so, it is not act of fun that all Wills are in three copies, one deposited at the Court Registry, another in the custody of the testator, and a copy with the lawyer who authored it. Q: I further suggest to you that the 2015 purported Will which was in your custody as deposited at the probate registry of the court 4 years after the death of the testator. A: That is so. But as soon as a lawyer took instructions from Mrs Odame and intimated to me of the passing on of Mr. Odame, I delivered same to him for further instructions which was deposited in the Court Registry. Q: I further suggest to you that you have the 2015 purported Will under your direction and custody and depositing same four years after the death of the testator, sins against the Will's Act of 1971 (Act 360) specifically Section 12(1) & (2). A: I got the information from Lawyer Sampson Obeng that the testator's wife has asked him to find out from me if the 2015 Will was deposited at the Court Registry. Page 19 So I told him I could not find the said Will but will take time to look through my documents and having found it I gave it to him. That is lawyer Sampson Obeng to deposit it. It is noted that the 2015 Will was deposited close to four years after the deceased's death and after the suit commenced. The explanation by DW1 for the delay is not acceptable. At any rate section 12 of Act 360 enjoins anybody who has possession of a Will of a deceased person to deposit same in court within fourteen days after becoming aware of the death of the deceased, failing which he or she commits a punishable offence. DW1 in one breath gave evidence under cross-examination that "it is not act of fun that all Wills are

in three copies, one deposited at Court Registry, another in the custody of the testator and a copy with the lawyer who authored it". This suggests perfectly that DW1 is aware that he was not supposed to keep all three copies of the Will but to deposit the Court's Copy at the Registry. In another breath, he suggests that he took the said Will away in his diary and just some few days he relocated from his previous fixed place of abode to a new place, hence the said Will was not deposited until the death of Mr Odame. It is on record that the Testator died on 11th December 2016 and the Will was only deposited after this action was commenced in 2018 by the Plaintiff. Coupled with the 1st defendant's claim that she was present when the 2015 Will was executed but totally failed to mention it in her Statement of Defence before the amendment, these circumstances heighten the suspicion and add to the doubt created by the inconsistencies. It is worth highlighting that DW1 had initially stated per Paragraph 20 of his Witness Statement filed on 7th June 2021 that the meeting for the said execution took place at his office. However, amended the said paragraph 20 of his Witness Statement on 27th March 2023 and stated that the meeting took place at the testator's house/shop. Interestingly, this amendment took place after Plaintiff has closed his case. Further, it is worthy of note, that the 1st Defendant is on record to have testified and agreed with the Plaintiff's Counsel that the Will was deposited after she has been told by the Registrar of the Court that the 2016 purported Will was not read. The following dialogue ensued: Page 20 Q: I suggest to you that because the 2015 purported Will that is exhibit 1 and the 2016 purported Will that is Exhibit 2 are not genuine Wills they could not have been deposited at the lifetime of the testator. A: It was not true Q: I further suggested to you that the 2015 purported Will was executed after you have been told by the Registrar of the Court that the 2016 purported Will was not properly executed. A: Yes. That is why the 2015 Will was read. The above testimonies of the 1st Defendant on record, suggest to this Court that the 2015 Will was only executed after getting to know that the 2016 Will was not valid. At that time, the testator was already dead and could not execute any Will. I carefully observed the demeanor of DW1 during cross examination. He was very jittery and nervous. Highly uncharacteristic of a lawyer. Indeed, the demeanor of a witness is a very important non-verbal indicator employed as an aid to establishing if a witness is speaking the truth or not. As a matter of fact, the testator thought it fit and prudent to maintain one lawyer. if the Lawyer had prepared a Will for the deceased which was executed on July 26th, 2015, how could this same lawyer prepare a new Will in 2016, have this 2016 Will deposited at the Court's Registry, whilst the 2015 Will remain in his custody without same being deposited at the Registry of the Court. It is not the duty of the court to do any guess work. It is for the parties to the suit to lead concrete credible evidence to discharge the burden placed on them and if they fail to do so, they lose their case. The Evidence Act 1975 (NRCD 323) provides a list of attributes that a trial judge may use in assessing the credibility of a witness. Section 80 (2) states as follows:"(2) Matters which Page 21 may be relevant to the determination of the credibility of the witness include, but are not limited to (a) the demeanour of the witness; (b) the substance of the testimony; (c) the existence or non-existence of any fact testified to by the witness; (d) the capacity and opportunity of the witness to perceive, recollect or relate any matter about which he testifies; (e) the existence or non-existence of bias, interest or

other motives; (f) the character of the witness as to traits of honesty or truthfulness or their opposites; (g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial; (h) the statement of the witness admitting untruthfulness or asserting truthfulness. The demeanor of a witness is, thus, an important element in assessing and testing the veracity and truthfulness of a witness's testimony, but it is not the only one. This also found expression in the case of *UNIEX GHANA LIMITED VRS. ROCKSHELL INTERNATIONAL LIMITED* (SUPREME COURT SUIT NO. J4/67/2021 23RD NOVEMBER 2022. In this case, it is evident that DW1, who acted as a witness and the lawyer who drafted the said disputed 2015 Will, displayed signs of restlessness and fumbling with his answers during cross-examination. As stated earlier, he was all jittery and very uncomfortable. As the drafter of the Will, one would expect the witness to exude confidence when answering the questions posed by the Plaintiff's lawyer. Unfortunately, the witness's demeanor did not inspire such confidence. It was abundantly clear that he was being very economical with the truth. Considering the inconsistencies and contradictions in the testimonies of the 1st Defendant and DW1, coupled with the demeanor of DW 1 who claims to have drafted the 2015 Will, I accept the evidence of the witnesses to the Will who were called by the plaintiff as PW1 and PW2 when they say they did not append their respective signatures to any Will of the deceased in the year 2015. The 2015 Will is hereby declared invalid. DW 1 is obviously without a shadow of doubt not a credible witness and I know he was only trying to throw dust into the eyes of the court. Page 22

ISSUES 4 AND 5 Whether or not there was a validly executed Will dated 7th August 2011 and whether or not the late Daniel Kwaku Odame died intestate respectively. There is more than enough evidence on record which support the execution of a Will dated 7th August 2011, which was deposited at the Registry of the High Court on the 9th August 2011 during the life time of the testator. The parties, through their pleadings and evidence, admit to the existence and validity of this Will. Both Witnesses to the Will called by the plaintiff to testify as P.W.1 and P.W.2 corroborated this claim, attesting that they signed the Will at the residence of the late Daniel Kwaku Odame on the 7th of August, 2011, which happened to be a Sunday, before the testator and they were both present at the same time. The 1st Defendant and D.W.1 corroborated this evidence. It is trite that in cases where a party's evidence conflicts with their witness on vital issue, the Court is justified in deciding in favour of the party whose witness's testimony supports their claim. Considering the totality of the evidence before me, I find and hold that the late Daniel Kwaku Odame did not die intestate. The first Will, executed on 7th day of August 2011 is deemed the original, final, and true last Will and Testament of the deceased. ISSUES 6 Whether or not the parties have been intermeddling in the estate of the late Daniel Kwaku Odame. The allegations of intermeddling with the estate of the late Daniel Kwaku Odame is made by the parties against each other. Intermeddling is a criminal offence that require criminal prosecution. It is necessary to initiate criminal proceedings with the appropriate criminal state agency. Page 23 In the case of *THE REPUBLIC VRS. HIGH COURT (COMMERCIAL DIVISION), ACCRA; EX PARTE YVONNE AMPONSAH BROBBEY AND GLADYS NKRUMAH (INTERESTED PARTY). CIVIL MOTION NO.JS/82/2022 · DELIVERED 1ST FEBRUARY. 2023*, it was established that criminal offences

and the jurisdiction to try or conduct an enquiry pertaining to them must be created by substantive legislation and/or the Constitution. The parties may decide to pursue this matter elsewhere.

CONCLUSION

On account of all that have been said above, the Court finds and holds that the deceased Daniel Kwaku Odame did not die intestate. In order to ensure the proper administration and distribution of the Estate of the late Daniel Kwaku Odame (deceased) according to his last Will and Testament, the following Orders are made:

- a) That the purported Wills dated 21st July 2015 and 19th April 2016 are not valid.
- b) That the late Daniel Kwaku Odame left behind a validly executed Will dated 7th August 2011 and he did not die intestate.
- c) That the Executors named in the last Will and Testament of the late Daniel Kwaku Odame dated 7th August 2011, are required to apply for probate in respect of the Estate of the deceased. Once probate is granted, the Executors must proceed to distribute the Estate to the named beneficiaries in accordance with the Will dated 7th August 2011.
- d) That the parties involved in this case are to account to the executors for the monies they have collected and or received from the Estate of the late Daniel Kwaku Odame.
- e) If the executors are not alive, the plaintiff and the 1st defendant may apply for Letters of Administration with the 2011 Will Annexed and distribute the estate according to the 2011 Will. (SGD) Page 24 SARAH ARYEE (MRS.) J, JUSTICE OF THE HIGH COURT Page 25

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