

GHANA / JUDGMENT

CAROLINE OTOO VRS NORA ODOFOLEY OTOO (J4/17/2019) [2024] GHASC 17 (24 April 2024)

COURT
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IN THE SUPERIOR COURT OF JUDICATURE IN THE SUPREME COURT ACCRA – A.D. 2024
CORAM: SACKY TORKORNOO (MRS.) CJ (PRESIDING) BAFFOE-BONNIE JSC KULENDI JSC
ASIEDU JSC GAEWU JSC CIVIL APPEAL NO. J4/17/2019 24TH APRIL, 2024 CAROLINE OTOO
PLAINTIFF/APPELLANT/APPELLANT VRS NORA ODOFOLEY OTOO DEFENDANT/
RESPONDENT/ (SUBST. BY MERCY DESAH LOKKO) RESPONDENT J U D G M E N T

GAEWU JSC: This is an appeal by the Plaintiffs/Appellants/Appellants (hereinafter referred to as “the Plaintiffs”) against the judgment of the Court of Appeal, Accra dated 4th day of December 2013 which affirmed the judgment of the High Court, Accra dated the 2nd day of May 2012 in favour of the Defendant/Respondent/ Respondent (hereinafter referred to as “the Defendant”).
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BACKGROUND

On 5th July 1985, H/L A. K. B. Ampiah, J, (as he then was) in a divorce suit in Suit No. D & MC.49/84 intituled: Mrs. Susana Korkoi Otoo (Petitioner) v. Joseph Kabufio Otoo (Respondent) recorded the day’s proceedings as follows: “Dr. Acheampong for the Petitioner Mingle for the Respondent Hearing: Dr. Acheampong: We have agreed that the Respondent release the property situated at Kotobabi to the Petitioner so that half of the land measuring 82 feet by 180 feet containing the proposed building of the Respondent’s daughter Margaret Otoo which is affected by a judgment of this court be granted to Margaret Otoo. The Petitioner takes the existing building and its surrounding land. Both of us agreed that the marriage be dissolved. The Respondent has agreed to give the Petitioner a total sum of C3,000.00 inclusive of costs by way of compensation. Mr. Mingle: These are agreeable. Per Curiam: The only issue for the determination is whether or not the marriage was customary or was under the Ordinance”. The Plaintiffs who are some of the children, beneficiaries and administrator/ administratrix of the estate of their late mother Susana Korkor Otoo claim against the Defendants who are the executors of the last will and testament of Joseph Kabufio Otoo as follows: ‘1. Declaration of title

to that part of the land situated at Kotobabi, Accra on which is sited a building known as H/No C505/13 2. Declaration that the said building was settled on Susana Korkoi Otoo by Joseph Kabufio Otoo, by virtue of an agreement reached by the Page 2 of 28 parties in a divorce Suit No. DMC49/84, and thus forms part of her estate. 3. An order compelling the Defendants to formally convey the aforesaid building to the estate of Susana Korkoi Otoo. 4. Any further or other reliefs.

THE CASE FOR THE PLAINTIFFS It is the case of the Plaintiffs that sometime in the year 1984, their mother, Susana Korkoi Otoo, who had petitioned for the dissolution of her marriage to their father, Joseph Kabufio Otoo, sought as one of the reliefs, the settlement of the property known as H/No. C505/13, Kotobabi, Accra, on her. The Plaintiffs claim that in the course of the divorce proceedings, Joseph K. Otoo, settled the Kotobabi property on Susana Korkoi Otoo by virtue of an agreement reached between the parties to the divorce and according to the plaintiffs, this property settlement was later confirmed by Lawyer E. A. Mingle, lawyer for their father in the divorce proceedings when he appeared as a witness before the Circuit Court, James Town, Accra, in the Criminal Case of The Republic v. Leticia Ashirifi, Court Case No. 111/86. The Plaintiffs stated that although their father, Joseph Kabufio Otoo, was not able to formally convey the said property to Susana Korkoi Otoo before his death on 19th July 1986, he implicitly acknowledged the agreement by leaving the settled property out of his will.

THE CASE FOR THE DEFENDANTS The Defendants denied that Joseph Kabufio Otoo settled the Kotobabi property on Susana Korkoi Otoo and that he had always maintained the said house as his personal property. The Defendants stated further that Joseph Kabufio Otoo was only prepared to settle a property located at Mamobi on Susana Korkor Otoo. The Defendants contend that the agreement by Mr. Mingle made on behalf of Joseph Kabufio Otoo was done without his consent and therefore not binding on him or his estate. The Page 3 of 28 Defendants stated further that the late Joseph Kabufio Otoo never implicitly or expressly acknowledged any agreement with respect to the property at Kotobabi and that the judgment of the Court of Appeal titled Susana Korkoi Otoo v. Joseph Kabufio Otoo & ors.in Suit No. CA110/2011 dated 17th May 2001 involving the same parties and the same issues operate as estoppel per rem judicata against the Plaintiffs. At the end of the trial, the High Court held that the Plaintiffs were estopped by the judgment of the Court of Appeal dated 17th May 2001 titled Susana Korkoi Otoo v. Joseph Kabufio Otoo & ors.in Suit No. CA110/2011 from relitigating the matter and accordingly dismissed the claim of the Plaintiffs and entered judgment for the Defendants. Dissatisfied by the decision, the Plaintiffs filed an appeal at the Court of Appeal on 18th July 2012 on two grounds as follows: 1. 2. The judgment is against the weight of evidence and That in concluding that the plaintiffs are estopped by the judgment of the Court of Appeal dated 17th May 2001 titled Susana Korkoi Otoo v. Joseph Kabu Otoo & ors., the trial judge erred. The Court of Appeal on 4th December 2013, dismissed the appeal and affirmed the judgment of the trial High Court. The Appellants still not satisfied with the decision have filed a Notice of Appeal to this court on 27th February 2014 on the following grounds: A. B. The judgment was against the weight of evidence Additional grounds of appeal will be filed upon the receipt of the records. On 19th June 2018 the Plaintiffs filed three additional grounds of appeal as follows: 1. The Court of Appeal erred when it wrongfully upheld the finding made by the learned trial judge that by reason of the Residuary Clause in his will the testator Joseph Otoo could not implicitly have acknowledged the property settlement agreement announced to the court by counsel for the

parties in the High Court Suit No. 49/84. Page 4 of 28 2. The Court of Appeal erred when it wrongfully upheld the finding made by the learned trial judge that the property settlement agreement announced to the court by counsel for the parties in the High Court Suit No. D&MC 49/84 was made without the consent of the Respondent Joseph Otoo. 3. The Court of Appeal erred when it wrongfully affirmed the conclusion reached by the learned trial judge that the Plaintiffs are estopped by the judgment of the Court of Appeal dated 17th May 2001 in Civil Appeal No. CA110/2000 entitled *Susana Korkoi Otoo v. Joseph Kabu Otoo* from relitigating this matter. And as a result, the Plaintiffs were granted leave on the 20th day of December 2018 to argue the additional grounds of appeal.

CONSIDERATION OF GROUNDS OF APPEAL 1. That the judgment was against the weight of evidence. The very first ground of this appeal complains that the judgment is against the weight of evidence. This is also known as the omnibus ground and having so pleaded, this put an obligation on this Honourable Court to review the proceedings in its entirety to make up its own mind about the pieces of evidence led, for it is trite that an appeal is in a nature of a re-hearing. Thus, it is now settled law that the appellate court is entitled to consider the entire facts and the law upon which the decision of the lower court was based. This principle is covered by many well-known authorities such as *Tuakwa v. Bosom* [2001-2002] SCGLR 61; *Oppong v. Anarfi* [2011] 1 SCGLR 556; *Agyeiwaa v. P & T Corp.* [2007-2008] 2 SCGLR 285; and *In - Re Bonney (deceased) v. Bonney* [1993-1994] 1 GLR 610 @ 617 per Aikins, JSC. In *Tuakwa v. Bosom* supra, Sophia Akuffo, JSC, (as she then was), at p.65 of the report, stated as follows: Page 5 of 28 “Furthermore, an appeal is by way of rehearing... it is incumbent upon an appellate court in a civil case, to analyse the entire record of appeal, take into account the testaments and all the documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence”. *Akoto Bamfo*, JSC, (as she then was) in *Oppong v. Anarfi*, supra, made the same point at page 167 of the report as follows: “There is a wealth of authorities on the burden allocated to an appellant who alleges in his notice of appeal that the decision is against the weight of evidence led... it is incumbent upon an appellate court in such a case, to analyse the entire record, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on the preponderance of probabilities, the conclusions of the trial judge are reasonable or amply supported by the evidence”. The same point was reiterated in *Agyeiwaa v. P & T Corp.* supra by Georgina Wood, CJ, (as she then was) as follows: “The well-established rule is that an appeal is by way of rehearing and an appellate court is therefore entitled to look at the entire evidence and come to a proper conclusion on both the facts and the law. In *Owusu-Domena v. Amoah* [2015-2016] 1 SCGLR 790 @792, holding 2, the Supreme Court delivered itself as follows: “Where the appeal was based on the omnibus ground that the judgment was against the weight of evidence both factual and legal arguments could be made where the legal argument will help advance or facilitate a determination of the Page 6 of 28 factual matters – *Attorney General v. Faroe Atlantic Co. Ltd* [2005-2006] SCGLR 271 @ 306 cited”. From the list of case cited supra and other well known cases, it is thus settled law that the appellate court is obliged to give the evidence another look and to analyse the entire record before it. When the Supreme Court, being the apex court, is taking another look at the entire record of the Court of Appeal, it may interfere

with the findings of the lower court as necessary, to do justice. This principle of law was stated by the Supreme Court, by Georgina Wood, CJ, (as she then was), in the case of *Continental Plastics Ltd v. IMC Industries-Technik GMBH* [2009] SCGLR 298 @ 307-308 as follows: “An appeal being by way of rehearing, the second appellate court is bound to choose the finding which is consistent with the evidence on the record. In effect, the court may affirm either of the two findings or make an altogether different finding based on the record”. So now the question is under what circumstances can the Supreme Court, being the last appellate court interfere with the concurrent findings of the two lower courts? These have been stated clearly in authorities such as *Koglex Ltd (No. 2) v. Field*

[2000] SCGLR 173; *Gregory v. Tandoh IV & Hanson* [2010] SCGLR 971; *Fosua & Adu-Poku v. Dufie (deceased) & Adu Poku Mensah* [2009] SCGLR 310; and *Obeng & ors. v. Assemblies of God Church, Ghana* [2010] SCGLR 300. In *Koglex Ltd (No. 2) v. Field* supra, this court stated per Acquah, JSC (as he then was), as follows: “Instances where such concurrent findings may be interfered with are:

- (i) Where the said findings of the trial court are clearly unsupported by evidence on record; or where the reasons in support of the findings are unsatisfactory. Page 7 of 28
- (ii) Improper application of a principle of evidence; ... or where the trial court failed to draw an irresistible conclusion from the evidence...
- (iii) Where the findings are based on a wrong proposition of law...
- (iv) Where the finding is inconsistent with crucial documentary evidence on record. The very fact that the first appellate court had confirmed the judgment of the trial court does not relieve the second appellate court of its duty to satisfy itself that the first appellate court's judgment is like the trial courts also justified by the evidence on record. For an appeal, at whatever stage, is by way of rehearing and every appellate court has a duty to make its own independent examination of the record of proceedings”. In *Obeng & ors. v. Assemblies of God Church* supra, Dotse, JSC (as he then was) stated at page 323 of the report that: “Where findings of fact made by the trial court are concurred in by the first appellate court, the second appellate court must be slow in coming to a different conclusion unless it is satisfied that there are strong pieces of evidence on record which are manifestly clear that the findings of the trial court and the first appellate court are perverse. It is only in such cases that the findings of fact can be altered thereby disregarding the advantages enjoyed by the trial court in assessing the credibility and demeanour of witnesses”. Again, in *Gregory v. Tandoh IV & Hanson* supra, the learned jurist Dotse, JSC, (as he then was) reiterated as follows: “It is therefore clear that, a second appellate court like this Supreme Court, can and is entitled to depart from findings of fact made by the trial court and concurred in by the first appellate court under the following circumstances: - First, where from the record of appeal, the findings of fact by the Page 8 of 28 trial courts are clearly not supported by evidence on record and the reasons in support of the findings are unsatisfactory. Second, where the findings of fact by the trial court can be seen from the record of appeal to be either perverse or inconsistent with the totality of evidence led by the witnesses and the surrounding circumstances of the entire evidence on record of appeal. Third, where the findings of fact made by the trial court are consistently inconsistent with

important documentary evidence on record. Fourth, where the first appellate court has wrongly applied the principle of law (see *Achoro v. Akonfela*). The second appellate court must feel free to interfere with the said findings of fact in order to ensure that absolute justice is done in the case". Again, in *Fosua & Adu-Poku v. Dufie (deceased) & Adu Poku Mensah supra*, Ansah, JSC (as he then was), stated that: "The second appellate court would justifiably reverse the judgment of the first appellate court where the trial court committed a fundamental error in its findings of fact, but the first appellate court did not detect the error but affirmed it and thereby perpetuated the error. In that situation, it becomes clear that a miscarriage of justice had occurred, and a second appellate court will justifiably reverse the judgment of the first appellate court ... Thus stated, it cannot be said an appellate court cannot set aside a judgment where two lower courts had made concurrent findings of facts". It is to be noted that in the instant appeal the two lower courts made concurrent findings in favour of the Defendants. Thus, although the burden on the Plaintiffs is heavier than usual, it may be discharged by appropriate evidence on the records of appeal. Page 9 of 28 Based on the foregoing authorities, we now proceed to examine and analyse the pieces of evidence and the conclusions drawn, in answer to the grounds of appeal. And in doing so we propose to analyse the grounds of appeal in the manner argued before us by the Plaintiffs. Thus, by considering first, additional ground 2 as follows: The Court of Appeal erred when it wrongfully upheld the finding made by the learned trial judge that the property settlement agreement announced to the court by counsel for the parties in the High Court Suit No. 49/84 was made without the consent of the Respondent Joseph Otoo. On this ground of appeal, the Plaintiffs have criticized the trial court's holding that the Plaintiffs are not entitled to a declaration of title to the disputed Kotobabi H/No. C505/13, because there is no conclusive proof that the testator settled the house on their mother and that there is no enforceable order of the court to support that claim. Also the Plaintiffs disapprove the Court of Appeal's judgment which was to the effect that the agreement Mr. Mingle purported to make on behalf of Mr. J. K. Otoo was not binding on Joseph K. Otoo or his estate since it has already been determined by the Court of Appeal that J. K. Otoo never intended to convey the Kotobabi property to Susana Otoo and that the testimony given by Mr. Mingle in the criminal case cannot be relied upon to prove that the property was settled on Susana Otoo. Indeed, from the records of appeal, the trial judge held at page 129 of the records of appeal as follows: "From all the foregoing, I hold that the Plaintiffs are not entitled to a declaration of title to the disputed Kotobabi property H/No C505/13 because there is no conclusive proof that the Testator settled the house on their mother. There is no enforceable order of the court to support that claim". Page 10 of 28 The Court of Appeal's judgment also at page 262 and 264 of the ROA found as follows: "Page 262 -Thus the agreement Mr. Mingle purported to make on behalf of Mr. J. K. Otoo was not binding on him nor his estate, since it has already been determined by this court and affirmed by the Supreme Court that J. K. Otoo never intended to convey the Kotobabi property to Susana Otoo, the testimony of Mr. Mingle in the criminal case cannot be relied upon to prove the property was settled on her". Again, at page 264, the Court of Appeal found as follows: "The Petitioner appealed to this court which held in its judgment of 17/5/2001 that the trial judge, Ampiah, J, could not have intended to make

any order in respect of the terms of settlement announced to the court since the parties clearly intended to resolve their issues out of court". The Court of Appeal judgment dated 17th May 2001 referred to by the Court of Appeal in its judgment was tendered in evidence at the trial as Exhibit J and this judgment can be found at pages 170 to 180 of the ROA. Counsel for the Plaintiffs refers to page 179 of the ROA, and the portion of the judgment Exhibit J, as follows: "From the standpoint of the Respondent, Counsel did not carry out his instructions, so their position is that there was a mistake in the pronouncement to the court that the Respondent had agreed to give away the Kotobabi house or that his counsel did not carry out his instructions which were limited to the Mamobi house." Counsel also referred to page 179A of the record where the Court of Appeal in the judgment dated 17th May 2001, Exhibit J, stated as follows: "Even though the party cannot unreasonably withhold consent he has already given per his counsel, yet in this case, the order cannot be made before the objection... So apart from saying he gave no consent to the lawyer to consent to give away the house and so counsel's assent was a mistake, the Respondent Page 11 of 28 is effectively withdrawing his consent in respect of the Kotobabi house since no order has been made... especially as one party does not confirm the terms of agreement and has clearly evinced an intention to resile from it as not representing his true instruction to counsel". From the evidence in the ROA, there is no evidence as held by the Court of Appeal that the Supreme Court affirmed that J.K. Otoo never intended to convey the Kotobabi property to Susana Otoo. This is because under cross-examination by Defendant's Counsel, Rudolph Nortey, the 1st Plaintiff, testified as follows: "Q. Petitioner once brought a case of arrears of rent and ejectment against Mrs. Dua in High Court? A. Yes. Q. The case for the Petitioner then was that the Kotobabi house she has been given the Kotobabi house under Justice Ampiah's judgment? A. Yes. Q. The judgment of the court presided by Lutterodt J, Kotobabi house was never settled on the Petitioner? A. That is correct. Q. As a result, Petitioner appealed to Court of Appeal? A. Yes. Q. Whilst that appeal was pending, Petitioner brought an application on 3-8-90 before Ampiah, J, to amend his judgment of 1986? A. Yes. Q. What was the result of the amendment? A. Justice Ampiah granted the amendment and said the Kotobabi house was given to the Petitioner. Page 12 of 28 Q. Justice Ampiah's judgment which he amended was quashed by the Supreme Court? A. Yes. Q. The Supreme Court decision you applied to be substituted for the Petitioner who was then dead? A. Yes. Q. After you were substituted, you brought another application before J. Tweneboa Kodua to amend J. Ampiah's judgment? A. Yes. Q That motion was dismissed on 11-11-96 by Tweneboa Kodua? A. Yes. Q. After the ruling was dismissed, you appealed to Court of Appeal? A. Yes. Q. The Court of Appeal dismissed your appeal? A. Yes. Q. Both Tweneboa Kodua and the Court of Appeal said no Kotobabi was settled on Petitioner? A. Yes. Q. After Court of Appeal, you filed yet another appeal in the Supreme Court? A. Yes. Q. The appeal was also dismissed because you were out of time for failing to file your written submission on time? A. Yes. Page 13 of 28 It is therefore clear from the above evidence that the Supreme Court never affirmed the decision of the Court of Appeal as the case was not heard on its merit but rather struck out on procedural grounds of non-filing of written submissions within the time allowed by the rules of procedure. Apart from the proceedings in the divorce suit No. DMC/4984 of 5/7/1985

quoted supra where Justice Ampiah recorded the agreement reached by the parties in respect of the Kotobabi house, it is submitted further on behalf of the Plaintiffs that there are enough pieces of evidence on record that Joseph Kabu Otoo consented and settled on the mother of the Plaintiffs the Kotobabi house. Counsel for the Plaintiffs refers to the judgment of Ampiah, J, at page 39 of the ROA in the divorce suit where Ampiah, J, stated in the judgment as follows: “During the course of trial, counsel and parties reached a settlement whereby a house was settled on the Petitioner. One would have hoped that this would end the squabbles between the couple, but they decided to proceed with the matter”. Also, at page 40 of the ROA, Ampiah, J, concluded his judgment as follows: “Since the Respondent has offered the Petitioner a house to live in as her house, I do not think that I should make any order respective the other reliefs sought. The parties have also agreed that an amount of C30,000.00 be paid to the Petitioner by the Respondent as compensation and costs. I order accordingly”. Also in the criminal case No. 111/86, intituled the Republic v. Leticia Ashirifi found at page 45 to 46 of the record, lawyer Mingle who was also Joseph Kabufio Otoo’s lawyer in the divorce proceedings testified as follows: “In 1978, the late J. K. Otoo, three of his brothers and PW 1 engaged me to prosecute a land suit at the High Court on their behalf, the action was against a Madam Acquaah Harrison & 1 other; that land suit was settled. It was in respect of a piece of land at South Labadi. By the terms of the settlement, Page 14 of 28 Madam Acquaah Harrison was to buy another piece of land for PW 1. It was part of the settlement that the said Madam Acquaah Harrison be given C6,000.00 to J. K. Otoo and his brothers, to give another piece of land for PW 1 and he in turn give PW 1 a piece of land at Kotobabi. Madam Acquaah Harrison was to construct a foundation on this piece of land at Kotobabi. This was to replace a platform which Madam Acquaah Harrison had destroyed. The settlement was in 1979. 5 years afterwards in 1984, the late J. K. Otoo engaged me to defend a divorce suit against him by the mother of the accused, Madam Susana Korkoi Otoo. It was a relief sought that the late J. K. Otoo should settle on her a house at Kotobabi, J.K. Otoo was unwilling to do this, as we proceed, I was able to persuade the late J.K. Otoo to give up that house, he agreed to convey the house at Kotobabi to the mother of the accused. The property at Kotobabi consists of two plots, on one of the plots, he had a house, a two-bedroom house, and the other given to PW 1. During the settlement, Dr. Acheampong and I had the opportunity to see the title deed on the property and we agreed that the house to be settled on mother of the accused should carry with it land measurement 120 x 85 feet. During the settlement, I was told by the late J. K. Otoo that he had asked that a wall be constructed to partition the land, he had asked PW 1 to do this. H/H Mrs. Akoto-Bamfo, (as she then was), in her judgment in the criminal case stated supra noted at page 2 of the judgment appearing at page 48 of the ROA as follows: “In her defence as per both her cautioned statement and evidence in court, the accused averred that there was divorce suit between her mother and her late father. An award of the house at Kotobabi was made in favour of her mother. She later visited the house to find that a wall had been erected dividing the house into 2. When her mother denied having authorised anybody to put up the wall, she is acting upon the advice of her mother, had it pulled down. DW 2 corroborated the evidence of the accused on the award of the Kotobabi house to her mother. Page 15 of 28 In

his evidence, Mr. Mingle then acting as solicitor for the late Kabu Otoo, corroborated the evidence of the accused and DW 2 on the award. He however averred that an earlier grant of the land in issue was made to the complainant and that it was brought to the notice of Dr. Acheampong in the course of the settlement". However, Counsel for the Defendants in his submission on this ground of the appeal avers that the agreement made by Mr. Mingle, lawyer for Joseph Kabu Otoo in the divorce proceedings was done without his consent. Counsel relies on the Court of Appeal case of Civil Appeal No.110/2000 and subsequently the Court of Appeal judgment from which the instant appeal emanates. It is the contention of the Defendants counsel that Joseph Otoo was not present in court on the day when his lawyer, Mr. Mingle agreed to the settlement of the Kotobabi property on Susana Otoo. As noted earlier, the court of appeal judgment No.110/2000 was tendered in evidence as Exhibit J. In this judgment Exhibit J, the honourable court of appeal Coram: Benin, JA (Presiding), Farkye and Ansah, JJ.A, stated at page 9 of the judgment (see page 179 of the ROA) that "It is true the respondent was absent from court when the terms of the settlement were announced" The court appears to have based its finding on an affidavit sworn by Nora Odoforley Otoo, who came into the case after the death of Joseph Otoo. However, we are unable to agree with the court that Joseph Otoo was absent from court on the day the agreement to settle the Kotobabi house on Susana Otoo was announced and the same recorded and noted in the record book. From the ROA, it is noted from Exhibit D, (the divorce proceedings dated 5th July,1985; 29th November,1985; and 10th January,1986 respectively) that Ampiah J the trial Judge was not seen noting and recording the parties who attended the day's proceeding in his record book. On 5th July,1985 for instance, after recording Dr. Acheampong representing the petitioner, and Mingle representing the respondent the parties themselves were not noted and recorded as present in court. However, the petitioner, Mrs. Susana Kokoi Otoo was sworn in Ga to testify in the case, and she testified and was cross examined by Mr. Mingle. This is a confirmation that the Petitioner was in court on 5th July 1985, and was just not recorded as being in court. The Respondent Page 16 of 28 may have been in court too or may not have been in court. Also, on 29th November 1985 the proceedings of that day only showed the lawyers Dr. Acheampong and Mingle being recorded as present, however, the Respondent, Joseph Kabu Otoo was called and sworn in Ga language to testify which he did and was also cross examined by Dr. Acheampong. Again, on 10th January,1986 apart from the lawyers Dr. Acheampong and Mr. Mingle being recorded as present, none of the parties were noted as being in court. It is therefore not conclusive to say that because Joseph Kabu Otoo was not recorded as present on the 5th of July,1985 when the settlement was announced to the court this meant that he was not present, and his consent was not sought by Mr. Mingle his lawyer and that the announcement was without his consent. In *In Re Arthur (Deceased) Abakah &Anor. v. Attah-Hagan & Anor.* [1972] GLR 435, Azu Crabbe, JSC, Lassey and Archer, JJ.A cited with approval the dicta of Lord Esher M.R. in *Mathews v. Munster* (1887) 20 QBD 141@143 held that: "A consent order made by a court is binding on a party and cannot be withdrawn if it is made, as in this case, as a result of consent given in court by counsel with authority and full knowledge of the facts. However, it can be set aside if the party discovers

that (a) it was made without his consent at all or

- (b) counsel had exceeded his instructions; and also, on the ground of fraud, mutual mistake, or on some other ground upon which a court can set aside an agreement.” Admittedly, the agreement reached by the parties to settle the Kotobabi house on Susana Korkoi Otoo and announced by counsel in open court to Ampiah, J, (as he then was), which he recorded in the proceedings of 5th July 1985, was not reduced into a formal order of the court. However, the failure by the judge to formally make an order to that effect did not take away the fact that an agreement was reached, announced and same is therefore binding on the parties. Page 17 of 28 The duty of a lawyer as stated by Lord Esher MR, in *Mathews v. Munster* supra is to advise his client out of court and to act for him in court, and until his authority is withdrawn, he has, regarding all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client. Counsel is presumed to have the authority of his client to settle and compromise an action and if an action is settled in the presence of his client, his consent will be inferred and will be precluded from saying that he did not understand the proceedings. Thus, even if at all Joseph Kabu Otoo was not present in court when the agreement was announced to Ampiah, J, his counsel, Mr. Mingle’s authority to settle and compromise the action was not withdrawn as he conducted the case for Joseph Kabu Otoo up to judgment. Moreover, there is no evidence to support the trial court and the Court of Appeal’s finding that the authority of Joseph Otoo to the settlement in the divorce suit was made without his consent. The second ground argued by the parties is that the Court of Appeal erred when it wrongfully affirmed the conclusion reached by the learned trial judge that the plaintiffs are estopped by the judgment of the Court of Appeal dated 17th May 2001 in Civil appeal No. CA110/2000 entitled *Susana Korkoi Otoo v. Joseph Kabu Otoo* from relitigating this matter. In *Sasu v. Amua-Sekyi* [2003-2004] 2 SCGLR 742, the Supreme Court speaking through Dr. Date-Bah, JSC (retired) regarding the law relating estoppel per rem judicatam and other related issues stated that the modern English common law on estoppel per rem judicatam was lucidly expounded by Diplock L.J. in *Thoday v. Thoday* [1964] P 181 @ 197 - 198, in a passage approved in House of Lords by Lord Goff of Chieveley in *Republic of India v. Indian Steamship Co. Ltd* [1993] AC 410 @416-417. Diplock LJ, in that passage expresses the view that estoppel per rem judicatam is a generic term which has two species. “The first specie, which I will call ‘cause of action estoppel’, is that which prevents a party to an action from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or Page 18 of 28 existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties. If the cause of action was determined to exist, i.e., judgment was given upon it, it is set to be merged in the judgment, or, for those who prefer Latin, transit in rem judicatam. If it was determined not to exist, the unsuccessful plaintiff can no longer assert that he does; he is estopped per rem judicatam. This is simply an application of the rule of public policy expressed in the Latin maxim ‘nemo debet bis vexari prouna et eadem causa’. In this application of the maxim causa bears its literal Latin meaning. The second specie, which I will call again ‘issue estoppel’, is an extension of the same rule of public policy. There are

many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues between the parties as there are conditions to be fulfilled by the plaintiff in order to establish his cause of action; and there may be cases where the fulfilment of an identical condition is a requirement common to two or more different causes of action. If in litigation upon one such cause of action, any of such separate issues as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by a party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfilment of the identical condition assert that the condition was fulfilled if the court has in the first litigation determined that it was not, or denied that it was fulfilled if the court in the first litigation determine that it was". In *re Kwaben Stool; Karikari v. Ababio II* [2001-2002] SCGLR 515 it was held in holding 2 as follows: "if an action is brought, and the merits of the questions are determined between the parties, and the final judgment is obtained by either, the parties are precluded, and cannot canvass the same question again in another action, although some objection or argument might have been urged upon the first trial which would have led to a different conclusion. In order that estoppel by record may arise Page 19 of 28 out of a judgment, the court which pronounced the judgment must have had jurisdiction to do so". In *re Sekye Dumase Stool, Nyame v. Kese @ Konto* [1998-1999] SC GLR 476, the types of estoppel per rem judicatam was stated as follows: "The plea of res judicatam really encompasses three types of estoppel: cause of action estoppel, issue estoppel in the strict sense, and issue estoppel in the wider sense. In summary, cause of action estoppel should properly be confined to cases where the cause of action and the parties (or their privies) are the same in both current and previous proceedings. In contrast, issue estoppel arises where such a defence is not available because the causes of action are not the same in both proceedings. Instead it operates where issues, whether factual or legal, have either already been determined in previous proceedings between the parties (issue estoppel in the strict sense) or where issues should have been litigated in previous proceedings but, owing to 'negligence, inadvertence or even accident', they were not brought before the court (issue estoppel in the wider sense) otherwise known as the principle in *Henderson v. Henderson* (1843) 3 Hare 100...The rationale underlying this last estoppel is to encourage parties to bring forward their whole case so as to avoid a succession of related actions. The judgment relied upon by the trial High Court and the Court of Appeal that the Plaintiffs are estopped from relitigating this matter was tendered at the trial as Exhibit J and it is the judgment as noted earlier Coram Benin JA, (presiding), Farkye and Ansah JJ. A, titled Suit No. CA110/2000, *Mrs. Susana Korkoi Otoo - Petitioner/Appellant v. Joseph Kabu Otoo & ors - Respondents/Respondents*. To have a clearer understanding of what was before the court, we would like to reproduce from the judgment itself the facts and what the issues were before the court. Benin JA, (as he then was) who wrote the lead judgment proceeded as follows: "The brief facts of this case are that the Petitioner sued the Respondent for the dissolution of Page 20 of 28 their marriage, among other reliefs prominent among them being an order for the release of a house at Kotobabi for her as part of the settlement

package. What happened was that during the course of the hearing, counsel for Petitioner read out to the court what he said were the terms of settlement reached between the parties on most of the triable issues. Counsel for Respondent announced his agreement to the terms. The court duly recorded these terms in the proceedings, and then proceeded to hear evidence on the only issue left on which the parties had reached no agreement. Judgment was eventually given by the court in respect of this one issue on which evidence was adduced. There was no judgment entered, or order made, in respect of the terms of settlement announced to the court. several events occurred since then. For our present purposes, what has brought about this appeal was the refusal of the High Court to amend the judgment by granting an order or enter judgment for the Petitioner/Appellant on the accord reached which had been recorded by the court, and which they claim the first trial judge, Ampiah, J, (as he then was), had omitted to do specifically and in more lucid language when giving final judgment in the action. The application was made under Order 28 of the High Court (Civil Procedure) Rules, 1954 (LN 140A). In the ensuing argument, counsel for the applicant relied on Rules 11 & 12 of the Order. The application came before another judge of the High Court, Tweneboah Koduah, J, who dismissed it in a reasoned decision. That dismissal has resulted in this appeal, on the main ground that the trial erred in refusing the application to amend". So, in effect the then Court of Appeal itself recognized and accepted that the core issue placed before it for determination was whether Tweneboah Koduah, J, of the High Court erred in refusing to amend upon the application by Mrs. Susana Korkoi Otoo, the judgment of Ampiah, J, under Order 28 of the High Court (Civil Procedure) Rules (LN 140A). Rules 11 & 12 of the then Order 28 of LN 140A on which the application was brought to amend Ampiah J's judgment read as follows: Page 21 of 28

11. Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court or Judge on motion or summons without appeal.
12. The Court or a Judge may at any time, and on such terms as to costs, or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings. In effect, the application to amend Ampiah, J's judgment was procedural in nature, and this is what was refused. And the refusal was what was before the Court of Appeal. In *Republic (No. 2) v. National House of Chiefs; Ex-parte Akrofa Krukoko (Enimil VI Interested Party) (No. 2)* [2010] SCGLR 145. Date-Bah, JSC, (retired), stated as regards *res judicata* in relation to procedural interlocutory matters, as follows: "In the case of the *Pocklington Foods Inc. v. Alberta (Provincial Treasurer)*

[1995] 123 DLR (4th) 141, "The Alberta Court of Appeal determined that *Res Judicata* and issue estoppel did not apply to procedural interlocutory motions. I agree with this view of the law, and I am not aware of any Ghanaian precedent to the contrary which is binding on this court. I consider therefore that this court should follow the persuasive authority of

that decision. This view is also in accord with the opinion of the leading text writer of the Ghanaian Law of Evidence, the late Justice Ofori Boateng who in his book ‘The Ghana Law of Evidence (at page 18) spells out certain preconditions which have to be established first before estoppel per rem judicata can apply. Amongst these he spells out the following: i) That the judgment was final, in that, it determined the disputed rights of the parties in the case, and was not just an interlocutory judgment, for example a preliminary matter such as an interim injunction or Page 22 of 28 committal order in a criminal trial or a coroner’s finding relating to cause of death. ii) That the judgment was on the merits of the case. A judgment will not be on the merits if, for example, the case was dismissed for want of prosecution or in default of appearance or any procedural step iii) Nolle prosequi granted will not constitute a decision on the merit. In a civil action, a case discontinued before judgment will also not be a judgment on the merits”. Based on the foregoing authorities therefore, even though the then Court of Appeal per Benin, Ansah and Farkye, JJA, made some pronouncements in their judgment concerning some issues relating to the consent of counsel for Joseph Kabufio Otoo and the absence of any formal recording of the order of the terms of settlement, the main issue before them was the wrong adoption of the procedure for amending the judgment of Ampiah, J. And therefore, the civil appeal judgment was not in any way an estoppel that prevented the Plaintiffs from mounting a new action regarding the agreement reached and recorded in the Record Book by Ampiah, J in respect of the Kotobabi H/No. C505/13. This ground of appeal therefore succeeds. The next ground argued by the Plaintiffs is that the Court of Appeal erred when it wrongfully upheld the finding made by the learned trial judge that by reason of the residuary clause in his will, the testator Joseph Otoo could not implicitly have acknowledged the property settlement agreement announced to the court by counsel for the parties in High Court Suit No. 49/84. As noted, the land situate at Kotobabi together with the building erected thereon known as H/No. C505/13 in contention between the parties, originally belonging to Joseph Kabufio Otoo, was not specifically devised in his last will and testament. However, at paragraph 14 of the said will and testament, Joseph Kabufio Otoo wrote as follows: “I bequeath and devise all properties that I may die possessed of and not already disposed of herein to all my children begotten of Effuah Otoo to be shared Page 23 of 28 among them equally”. This clause is what is normally referred to as the residuary clause in a will which is a gift of property by way of general non-specific description. It covers any property of a testator which has not otherwise expressly been disposed of in a will or a codicil thereto before the testator’s death. The clause may cover properties acquired by the testator between the date of the will and the date of his death and gifts which lapse and properties to which the testator may be entitled to at the time of his death. - See Brown v. Higgs [1800] 31 ER 700; Jackson v Kelly

[1751] 28 ER 184 cited in Ghana Land Law and Conveyancing, 2nd Ed. by B. J. Da Rocha and C. H. K. Lodoh. Also, in the absence of contrary intention, such a gift includes all properties which have been ineffectively disposed of by the preceding clauses in a will and also properties which the testator had made no attempt to devise or bequeath specifically as

well as those comprised in an attempted bequest or devised but which had failed by reason of lapse and other factors. - Ghana Law of Wills by N. A. Josiah-Aryeh. The will of Joseph Kabufio Otoo specifically at clause 6 confirmed the gift of the land of the other portion of the Kotobabi house to Margaret Odoforkor Otoo, reflecting the agreement reached and announced to Ampiah, J, in the divorce proceedings of 5th July 1985 in the divorce Suit No. DMC49/84, leaving however the main building now in contention. It is the contention of the defendant that the testator having left out the said house, it falls into the residuary gift per clause 14 of the will. This argument was accepted by both the trial High Court and the Court of Appeal. The plaintiffs', however, are of the view and contend that the testator by leaving out the Kotobabi house in the will had implicitly acknowledged the property settlement agreement reached and announced to the court. The question posited by the plaintiffs which still lingers is: "why would the testator leave the other half of the Kotobabi property out of his will after making a specific devise of the vacant land"? Or to put it in another way "was the Kotobabi property still available to the testator to bequeath in his will"? From the record of appeal, the following pieces of evidence could be discerned:

- a) On 5th July 1985 the parties and their lawyers in the divorce Suit No. Page 24 of 28 DMC 49/84 announced their agreement to settle the Kotobabi property on Mrs. Susana Korkoi Otoo, the petitioner and this agreement was noted and recorded by the presiding judge. b) On 2nd May 1986, judgment in the divorce Suit No. DMC 49/84 was delivered on the only remaining issue of whether the marriage between Korkoi Otoo and Joseph Kabufio Otoo was customary or was under the Ordinance. c) In the judgment in Suit No. DMC 49/84, the judge stated as follows: "During the course of trial, counsel and parties reached a settlement whereby a house was settled on the petitioner. One would have hoped that this would end the squabbles between the couple but they decided to proceed with the matter". d) Again, in the judgment of the same divorce Suit No. DMC49/84, the judgment stated and held that: "Since the respondent has offered the petitioner a house to live in as her house, I do not think I should make any order respective the other reliefs sought". e) On 2nd July 1986, that is two months after the judgment in the divorce suit, that is, the testator wrote and signed his last will and testament without any reference at all to the Kotobabi property agreed to be settled on the petitioner. f) Sadly, on 19th July 1986, Joseph Kabufio Otoo, the testator, died. g) On 4th August 1987, Ebenezer Addo Mingle, legal practitioner and lawyer for Joseph Kabufio Otoo in the divorce Suit No. DMC 49/84 testified in a criminal case before the Circuit Court presided over by Mrs. Akoto-Bamfo in Court Case No. 111/86 titled The Republic v. Letitia Ashirifi in respect of the Kotobabi house as follows: "...During the settlement, Dr. Acheampong and I had the opportunity to see the title deed on the property and we agreed that the house to be Page 25 of 28 settled on mother of accused should carry with it land measuring 120 by 85.1 feet. During the settlement, I was told by the late J. K. Otoo, he had asked that a wall be constructed to partition the land, he had asked PW 1 to do this". It is thus evidently clear that at the date and time Joseph Kabufio Otoo wrote and signed his last will and testament, he knew that the Kotobabi house was no longer available to him as his property to be bequeathed. It was because of the agreement reached that the court did not

find it necessary to ask the parties to the divorce suit to lead evidence as regards the relief B of the petition for the Kotobabi house to be released to the petitioner. Agreement, it has been said, is not a mental state but an act, and, as an act, is a matter of inference from conduct. The parties are to be judged, not by what is in their minds, but by what they have said or written or done. In the divorce proceedings, the parties have announced to the court their agreement for the Kotobabi house to be settled on Susana Korkoi Otoo. This agreement was judicially recorded by the presiding judge. And subsequently the testator, two months after the judgment in the divorce suit, wrote and signed his will and left out the Kotobabi house from being bequeathed to any beneficiary. This conduct was a confirmation that the Kotobabi house was no longer under the ownership, possession, control and management of Joseph Kabufio Otoo, the testator. As noted, there is clear evidence on record that the parties to the divorce suit agreed that the Kotobabi house be settled on the Petitioner. This agreement was vividly captured in the record of proceedings covered in the divorce suit. The failure of the High Court, presided over by Ampiah, J, (as he then was), to make a formal order in the final judgment delivered by him in the divorce suit, was a sheer or mere oversight which this court under Article 129 (4) of the 1992 Constitution has power to correct.

- See Owuo v. Owuo (2017-2020) 1 SCGLR 780. The said Article reads: “(4) For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any Page 26 of 28 other authority, expressly or by necessary implication given to the Supreme Court by this Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law”. Even the Court of Appeal has power also under Article 137(3) of the 1992 Constitution which is in similar terms as Article 129(4) to correct the error committed by the High Court in not making a formal order of the settlement reached by the parties. Hence, the Court of Appeal erred in their conclusion which recognised the Kotobabi house as falling under the residuary clause instead of having been settled on the Petitioner in the divorce case. On the basis of the foregoing, therefore, we agree with the submission of learned counsel for the plaintiffs that the Kotobabi house which was the subject matter of the settlement by the parties and their lawyers in the divorce suit and announced in open court to Ampiah, J, was implicitly acknowledged and deliberately left out of the last will and testament of Joseph Kabufio Otoo, the testator who was at all material times, aware and mindful of the fact that by the settlement, he had completely divested himself of all his putative interest in the said Kotobabi house and as a result could not convey same to any beneficiary under his will. In the circumstances, the residuary clause at paragraph 14 of the will of Joseph Kabufio Otoo could not by any stretch of legal imagination be invoked and interpreted and/or called into play as the defendant did not deprive Mrs. Susana Korkoi Otoo of what had legally become hers by the agreement reached and announced to the court. In our opinion therefore the learned justices of the Court of Appeal were wrong in interpreting the will of the testator, Joseph Kabufio Otoo, to give effect to the residuary clause in the will in favour of the

defendants and much to the detriment of the plaintiffs. In conclusion, the appeal succeeds in its entirety. The judgment of the Court of Appeal dated 4th December 2013 in which it affirmed the judgment of the High Court dated 2nd May 2012 is hereby set aside. Judgment is entered in favour of the plaintiffs on all their reliefs. Page 27 of 28 (SGD) E. Y. GAEWU (JUSTICE OF THE SUPREME COURT) (SGD) G. SACKY TORKORNOO (MRS.) (CHIEF JUSTICE) (SGD) P. BAFFOE-BONNIE (JUSTICE OF THE SUPREME COURT) (SGD) E. YONNY KULENDI (JUSTICE OF THE SUPREME COURT) (SGD) S. K. A. ASIEDU (JUSTICE OF THE SUPREME COURT) COUNSEL PETER ZWENNES ESQ. FOR PLAINTIFF/APPELLANT/APPELLANT. ERIC MENSAH ESQ. FOR THE DEFENDANT/RESPONDENT/RESPONDENT WITH HIM, MELLISA AMARTEIFIO & SHARON BORTEYE. Page 28 of 28

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