

IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – AD. 2025

CORAM: PWAMANG JSC PRESIDING
PROF. MENSA-BONSU (MRS) JSC
KULENDI JSC
DARKO ASARE JSC
ADJEI-FRIMPONG JSC

CIVIL APPEAL
NO: J4/52/2020

11TH JUNE, 2025

1. GODFRED AGYEDOWA BOADI
2. GYAKORANG BOADI
3. ADARKWA KWADWO } DEFENDANTS/RESPONDENTS
 /APPELLANTS

VRS

KWAKU ADDO PLAINTIFF/APPELLANT/ RESPONDENT
(CUSTOMARY SUCESSOR TO
OPANYIN KWAU BOADI FOR
HIMSELF AND ON BEHALF OF
THE BOADI FAMILY OF KADE)
(SUBST BY GEORGE AMOAKO)

JUDGMENT

ADJEI-FRIMPONG JSC:

The subject of this appeal is not of any wide ambit. Following a dispute over the properties of one Opanin Kwaku Boadi (the deceased), the disputants appeared before the Kadehene and his elders in what ended up as customary arbitral proceedings. Upon the announcement of a decision after hearing, the losing side sought to reverse same in the High Court. What transpired has culminated in this appeal.

The deceased, late of Kade died in 1962. To date, his acquisition of a number of properties in his lifetime has suffered no viable debate. He died intestate. As an Akan from a matrilineal system, the question about the status of those properties upon his death is readily answered in law which we shall state in due course.

The 1st, 2nd and 3rd Defendants/Appellants/Respondents (herein Defendants) are some of his surviving children. The Plaintiff/Appellant/Respondent (herein Plaintiff) became his customary successor, the third in line. The deceased had originally been succeeded by his brother Kwadwo Danso (Abeam Danso) who was in turn succeeded by a female by name Kadewaa. The Plaintiff succeeded Kadewaa.

It appears from the evidence that the Defendants had demanded a portion of their father's estate from the successors up to the Plaintiff, but had failed in the bid. They finally commenced the aforesaid proceedings against the Plaintiff before the Kadehene and his elders (the arbitral panel). It was at end of a full hearing including an inspection of the properties involved, that the arbitral panel gave the impugned award. For what is of essence here, the award resulted in some provision out of the estate of the deceased being made in the Defendants' favour.

Challenging the decision, the Plaintiff sought the following reliefs jointly and severally against the Defendants inclusive of the Kadehene as 4th Defendant:

1. A declaration that the alleged redistribution of the estate of Opanin Kwaku Boadi (deceased) on 6/8/99 is null and void.
2. An order for perpetual injunction restraining the Defendants whether by themselves, their servants, agents, privies whomsoever or otherwise howsoever from further interfering in any manner whatsoever with the Plaintiff's ownership possession and control of the said properties or any part thereof.
3. Damages for trespass
4. Refund of the sum of C 150,000 by the 4th Defendant with interest thereon.
5. Costs.

The Defendants resisted the Plaintiffs' claim with the 1st, 2nd and 3rd Defendants counterclaiming for the following reliefs:

- i. A declaration that the distribution of the estate of Opanin Kwaku Boadi (deceased) in the arbitration conducted and determined by a panel made up of the 4th Defendant and his elders, is regular, lawful and legal.
- ii. A declaration that the Plaintiff having acceded to the terms of reference and proceedings of the arbitration is bound by the decision and or determination of the panel made up of the 4th Defendant and his elders.
- iii. A declaration that the Plaintiff is estopped by his own conduct from challenging the decision and or determination of the panel made up of the 4th Defendant and his elders.
- iv. Perpetual injunction restraining the Plaintiff by himself, personal representatives, successor, privies, assigns and agents from interfering with or having anything to do whatsoever with their portion of their late father's properties as decided and or determined by the panel made up of the 4th Defendant and his elders.

For the record, the High Court presided over by Winfred Kpentey J, on 2nd July 2002 delivered judgment dismissing the Plaintiff's claim. [Page 64 – 70 ROA]. The Plaintiff's appeal to the Court of Appeal against the said judgment was successful. The Court of Appeal however ordered a retrial of the matter. The retrial eventually ended in a judgment delivered by C.A Wilson J, on 30th March 2012. [258-274]. Wilson J's judgment was also successfully appealed against at the Court of Appeal. The Court of Appeal's said judgment is what is now before us in this appeal. [347-363]

Judgment of Wilson J.

It will be observed that Wilson J, dealt with the matter in terms of the applicability of the Intestate Succession Law, 1985 PNDC LAW 111. This is how the learned Judge began his delivery:

"This is an action contesting the estate of the late Opanin Boadi as between the Plaintiff (customary successor) and the defendants (beneficiaries) pursuant to Intestate Succession Law PNDC Law 111. The Plaintiff brings this action for the following reliefs:

1. *A declaration that the alleged redistribution of the estate of Opanin Kwaku Boadi (deceased) on 6/8/99 is null and void.*
2. *An order for perpetual injunction restraining the Defendants whether by themselves, their servants, agents, privies whomsoever or otherwise howsoever from further interfering in any manner whatsoever with the Plaintiff's ownership possession and control of the said properties or nay part thereof.*
3. *Damages for trespass*
4. *Refund of the sum of C 150,000 by the 4th Defendant with interest thereon.*

Costs." [Page 258 – 259 ROA].

This position of the learned Judge stems from the evidence adduced and the legal submissions made to him by Counsel for the parties. He captured the submission made by Mr. Asante Ansong, Counsel for the Plaintiff as follows:

"Learned Counsel disputes the arbitration, he argues that the Nana Gyakorang Adutwum and his panel of elders did not have the authority under the Arbitration Act to review or vary the distribution of Opanin Boadi's estate as established and by operation of law. In his written submission, Mr Anson stated:-- I submit that since Kwaku Boadi died in 1962 and the intestate succession (PNDC LAW 111) 1985 received the assent of President Rawlings on the 14th June 1985, the law does not apply in this case. ... Flowing from the immediate foregoing irresistible conclusion I submit with due deference that the Kadehene and his elders exceeded their jurisdiction and acted ultra vires in the attempted settlement of the complaint the defendant put before them, their decision the subject matter is, therefore totally void and of no legal consequence. I urge the court to hold and give judgment to the plaintiff.

Counsel for the Plaintiff Mr. Ansong relies on the reasoning in the decisions of: Omanhene Kobina Foli vs. Chief Obeng Akese (1932) 2 WACA 46 at page 5 and Nyame vs. Yeboah 1961 GLR 281 AT 284.

Counsel for the Plaintiff submits further that the chief of Kade and his panel of elders misconceived his duty, when they turned their mind to the Intestate Succession Act, Law 111, because the chief took the position that law 111 conclusively determined the matters before him." [Page 265]

The learned Judge next turned to the submission of Mr. E.A Oduro Counsel on the other side as follows:

"In reply the defendant's counsel Mr. E.A Oduro submits that the defendant and the plaintiff agreed that the chief and his elders could hear the complaint and that whatever

verdict the panel deliver shall be accepted by both parties. Counsel contends that the proceedings satisfied the requirements of arbitration and were therefore a valid arbitration.” [Page 266]

In judgment, the learned Judge accepted the argument of the Defendants which was to form the basis of his decision to dismiss the Plaintiff’s action. In his view even though the PNDC Law 111 postdated the vesting of the deceased’s estate, the panel of arbitrators nonetheless had jurisdiction under Section 30 of the Chieftaincy Act (Act 759) to determine the matter. He reasoned:

“Now the established proposition of statutory interpretation is that a statute will not be given retroactive effect unless the legislative intent that it has retroactivity is clearly expressed, therefore as rightly argued by the plaintiff’s counsel, PNDC Law 111 should not apply to a litigant who has become a successor or an administrator of an estate before the enactment of the law.

My view however is that retroactive legislation even though is generally not applicable does not take away the adjudicating power of the chief imposed by statute.

Section 30 of Act 759 provides that:- “The power of a chief to act as an arbitrator under customary arbitration in any dispute where the parties consent is guaranteed.” The chief had the authority and power to consider the complaint raised by an individual subject of the stool and therefore the Kadephene had statutory power to mediate, settle or arbitrate which PNDCL 111 could apply. The principle is that where both parties agreed a vested or accrued right does not lie in these circumstances.” [page 267]

Upon this footing, the learned judge considered the general principles governing a valid customary arbitration and examined the evidence on record before him. He was satisfied that the necessary conditions for a valid customary arbitration had been met. He thus concluded:

"From the totality of evidence, the essentials of a valid customary arbitration has [sic] been met, once the conditions satisfied the essential requirement of a valid arbitration, the decision that was arrived at is binding on the plaintiff and the plaintiff cannot resile, parties to a valid arbitration are estopped from relitigating the same issues." [page 272]

Decision of the Court of Appeal

For the Court of Appeal as we gather from its judgment, the issue of jurisdiction of the Kadehene and his elders to arbitrate over an estate which was already vested by law long before the enactment of the Intestate Succession Law, PNDC Law 111 was central to the matter. In the view of the Court, the issue was raised before the trial Judge but he "discountenanced" it and assumed that the general jurisdiction of a chief to sit as an arbitrator provided in Section 30 of the Chieftaincy Act (Act 759) was sufficient to answer the jurisdictional question. This, the learned Justices thought was erroneous especially given that the issue of jurisdiction of an arbitrator was an essential element of a valid customary arbitration on the authority of **DZASIMATU & ORS VRS DOKOSI & ORS [1993-94]1 GLR 463.**

The Learned Justices observed that the dual jurisdictional issue which had been raised in the matter and which the trial Judge had ignored was as follows:

"a. The jurisdictional issue raised by the fact that the chief (4th defendant) who purported to sit with his elders as an arbitral panel, indicated at the outset, that he was going to apply PNDCL 111 1985 to decide the matter before him which was the (re)distribution of the estate of Opanin Kwaku Boadi who died intestate.

The jurisdictional issue of the panel purporting to redistribute properties already shared out by the intestate Opanin Boadi." [page 355]

Of this issue the learned Justices noted:

*"We note at the outset that these jurisdictional issues were raised at the court below but were discountenanced in favour of the other pertinent ingredients of a valid customary arbitration. In our judgment this was erroneous, for as was held in the **Dzasimatu** case, jurisdiction was an essential ingredient of a valid customary arbitration. A customary arbitration is governed by customary law. In our judgment, an arbitration panel will therefore not have jurisdiction if it is called upon to determine any matter unknown to or repugnant to customary law."*

The Justices attacked the decision of the trial Judge from two angles which we have put in a nutshell as follows:

First, that the Plaintiff had testified which testimony had been corroborated by the 1st Defendant during cross-examination that the deceased himself had distributed his properties in his lifetime having given two of his houses to his two wives and four houses to the family as administered by successive customary successors up to the Plaintiff. That the trial Judge ought to have taken a serious view of this corroborative evidence which strengthened the Plaintiff's case that the subject matter of the Defendants' complaint which engendered the arbitration was already distributed. Therefore, any further distribution of the estate by whomsoever especially as the estate had been administered by successive customary successors duly appointed was wrongful. Therefore, the trial judge's holding that the panel was clothed with jurisdiction to entertain the subject of the complaint and hold arbitration thereon was not supportable in law.

Second, that there were two conflicting positions as to whether the arbitration was held to redistribute the estate to give effect to the provisions of the Intestate Succession Law, PNDC Law 111. Whereas the Plaintiff and his witness said that was the position the panel of arbitrators pronounced and held on to, the Defendants alleged otherwise. The

learned trial Judge however failed to address the validity of the arbitration on that resolution but instead “*cavalierly*” stated that: “*The chief had authority and the power to consider the complaint raised by an individual subject of the stool and therefore the Kadahene had the statutory power to mediate, settle and arbitrate which PNDCL 111 could apply*”.

Now, delivering a position of their own, the learned Justices pointed out the pre-1985 law on matrilineal succession upon intestacy and what a child (minor) of a deceased intestate was entitled to which was definitely not a share of the estate of the deceased. **In RE: KOFI ANTUBAM (DECD); QUAICO VRS FOSU & ORS [1965] GLR 138 and ESHUN VRS JOHNFIA [1982-83]1 GLR 1414** cited.

In the view of the Justices, it was common ground that upon the death of the late Boadi, his properties devolved on his successors on account of which the Defendants themselves admittedly approached them for a share of their father’s estate. That being the case, no lawful claim could have been made to the chief and his panel to claim a share of the estate of their father which had devolved on the family and in the hands of a duly appointed customary successor. To the learned Justices:

“It is our view that this claim of children for a share in the already distributed estate of a man subject to matrilineal succession, was contrary to customary law. It therefore lacked legitimacy that would have clothed the panel with jurisdiction to distribute the property of Opanin Kwaku Boadi to give his children a share therein. This is so even if as the learned trial Judge held, the Plaintiff as customary successor (a caretaker of family property) ‘voluntarily’ submitted to the arbitration, a matter that has been canvassed at length and with such force by the respondents in this appeal.”

Appeal in the Supreme Court

The appeal in this Court is on the following grounds:

- (i) *The judgment of the Court of Appeal is against the weight of evidence.*
- (ii) *The Court of Appeal erred in holding that at the time the children asked for a share of their father's property the Estate of Opanin Kwaku Boadi had already been distributed.*
- (iii) *The Court of Appeal erred in holding that the claim the children of Opanin Kwaku Boadi made to be given part of their father's property was contrary to customary law.*
- (iv) *The Court of Appeal erred when it held that the panel of arbitrators "distributed" or "redistributed" the Estate of Opanin Kwaku Boadi*
- (v) *The Court of Appeal erred in holding that the learned trial Judge's holding that the Kadehene's panel was clothed with jurisdiction to entertain the subject matter of the complaint and to hold that an arbitration therein was not supportable in law.*
- (vi) *The Court of Appeal erred in holding that the learned trial Judge discountenanced the issue of jurisdiction.*

In the statement of case of the Defendants, the grounds of appeal were taken in two collections and argued together. Ground (ii) was argued together with ground (iv) and grounds (iii), (v) and (vi) were taken together. Somehow, ground (i) which is the omnibus ground of appeal, that the judgment of the Court of Appeal was against the weight of evidence was not argued. We are mindful of the settled principle that a ground of appeal not argued is deemed abandoned. However, an appeal being by way of rehearing, applying this principle to an omnibus ground of appeal can be problematic. At the same time, the settled practice in appeals is that where a party desires to attack a particular finding on a specific issue, that finding should be raised as substantive ground of appeal in which case an omnibus ground of appeal will be inappropriate. Thankfully, the issues emerging in the other specific grounds of appeal

are capable of disposing of the appeal. We shall therefore proceed to address the relevant issues arising from them as we deem the omnibus ground as abandoned.

PNDCL 111 and the jurisdictional question

The learned justices of the Court of Appeal observed that there were two conflicting positions as to whether the arbitration was held to redistribute the estate to give effect to the provisions of the Intestate Succession Law. Whereas the Plaintiff and his witness said that was the position the panel of arbitrators pronounced and took, the Defendants stated otherwise. They think the trial Judge ought to have resolved that issue instead of hiding under Section 30 of the Chieftaincy Act to posit that the panel was clothed with jurisdiction to deal with the matter.

To start with, let us take a look at the relevant portions of the evidence. The Plaintiff testified as follows on 3rd May 2006 [page 108-109]:

"When I went to the Kade palace for an attempted settlement of the case the chief told me that my children had issued summons against me claiming their father's property in accordance with PNDCL 111 since they inherit."

From the record, the defence at that point raised an objection against that testimony on the ground that PNDCL 111 was not pleaded by the Plaintiff. The trial Judge ruled on the objection as follows:

"By Court: I think the evidence led is generally pleaded in paragraph 12 of the Amended statement of claim filed on 13/6/2001 to wit: "The Plaintiff further avers that the alleged distribution is unlawful and illegal and should be declared null and void". The words illegal and unlawful are being given fresh in the evidence by referring to PNDCL 111 which makes the distribution illegal. I therefore overrule the objection and order that the evidence so led remains on record."

The Plaintiff's evidence then continued:

"My uncle died Kwaku Boadi died in 1962. I was called by the Kade chief for the alleged settlement about seven years ago, that is about 1999... When I went to the chief's palace on his invitation, I met him sitting with his elders and panel members. I didn't go alone. I went in the company of my sister Afua Korang and Afua Ntiriwaa also with Akosua Sakyiwaa as well as my uncle Kwaku Moshie. Also in my company was my late mother Adwoa Pesaa. Immediately after my uncle's death he was succeeded by Kwadwo Danso. He is now deceased. The one who succeeded the estate of Kwaku Boadi after Danso's death, Akosua Kadewaa, Kadewaa is my uterine mother. She is now dead. After her death the estate of Kwadwo [sic] Boadi was succeeded to by me. When I went to the palace, the chief told me Boadi's children say they are claiming their father's properties in accordance with PNDCL 111. So the chief told me he wanted to settle the matter amicably. I told the chief that I would not agree to the settlement since Kwaku Boadi had distributed all his properties before he died. When I said this then the chief asked me whether I don't know of JJ Rawlings' PNDCL 111..."

Under cross-examination on 23/1/07 the Plaintiff repeated the allegation as follows:

Q. After you paid the money what happened

A. The chief told me that the children wanted their father's property because of President Rawlings PNDCL 111." [page 122]

Then on 14/6/07 still under cross-examination, he said:

"Q. Was the complaint that your mother had given Kwaku Boadi's properties to Kwadwo Danso's children but denied the Defendants such properties.

A. They [said] by PNDC L 111, they succeeded their father that is why they summoned me at Kade chief's palace."

PW1 Afua Korang testified on 19/7/07 as follows:

"...When my brother the Plaintiff told them the children the Defendants herein sent him to the chief of Kade. The then Chief was Nana Gyakorang Adutwum, 4th Defendant herein. My brother reported to the Chief when summoned. He went with my uncle Kwaku Mosi (deceased) and myself accompanied the Plaintiff to the chief's palace. There the chief told us that our children had made a complaint to him so he will try to settle the matter. The specific complaint the children made was that according to the Rawlings Court law they were claiming their father's property." [page 128]

On the other hand, the 1st Defendant testified as follows:

"Before the arbitration started, Okyeame Kwame Donkor told the Plaintiff and his family that Opanin Boadi's children had herein moved the Kwaku Addo and the family that after the death of their father the family does not take care of them as a result they defendants went to Kwadwo Danso and told him to give them part of their father's property since they were not being cared for. And that after the death of Opanin Danso they went to his successor Maame Kadewaa to appeal to her to give them part of their father's properties to use in caring for themselves. That Maame Kadewaa too was not looking after them. Even though Maame Kadewaa promised them to give part of their properties, she did not. And therefore the children of Opanin Kwaku Boadi had come to complain to the chief and arbitrators that they want a share of their father's properties."

Under cross-examination on 21/4/08 1st Defendant reacted to the following suggestion as follows:

"Q. Put that when you went to Kade chief your complaint was that Rawlings law at Rawlings time it was the children of deceased who could succeed to the properties. For that reason the chief and his elders should give substantial part of your father's properties to you. What [sic] the chief should share the properties and give you and your siblings your share.

A. That is not correct. It was the cheating and denial of our father's property that is why we lodged the complaint at Kadehene's palace."

Later the same day he responded to another question:

"Q. Put that you went to the chief of Kade and asked him and his elders to give the properties of your father who died in 1962 to your siblings because of President Rawlings PNDC Law 111.

A. That is not correct. Our complaint was what I had earlier told the court."

From the foregoing exchanges, the learned Justices of the Court of Appeal were right on their position that there were two conflicting positions as to whether the arbitration was held on the basis of PNDC Law 111 to redistribute the estate to give the Defendants a share of it. We however find incorrect their observation that the trial Judge "discountenanced" or ignored the issue about the conflicting positions. Examining the record, the trial Judge appears to have accepted the Plaintiff's account that the arbitral panel proceeded to determine the matter on the basis of PNDC Law 111. This is clearly seen from the already cited introduction of the judgment of the trial Court where he authored:

"This is an action contesting the estate of the late Opanin Boadi as between the Plaintiff (customary successor) and the defendants (beneficiaries) pursuant to Intestate Succession Law PNDC Law 111. The Plaintiff brings this action for the following reliefs..."

Beyond the introduction, the learned Trial Judge had also held as we have earlier quoted in this judgment and which we shall requote to ease reference:

"Now the established proposition of statutory interpretation is that a statute will not be given retroactive effect unless the legislative intent that it has retroactivity is clearly expressed, therefore as rightly argued by the plaintiff's counsel, PNDC Law 111 should

not apply to a litigant who has become a successor or an administrator of an estate before the enactment of the law.

My view however is that retroactive legislation even though is generally not applicable does not take away the adjudicating power of the chief imposed by statute.

Section 30 of Act 759 provides that:-“The power of a chief to act as an arbitrator under customary arbitration in any dispute where the parties consent is guaranteed.” The chief had the authority and power to consider the complaint raised by an individual subject of the stool and therefore the Kadephene had statutory power to mediate, settle or arbitrate which PNDC Law 111 could apply. The principle is that where both parties agreed a vested or accrued right does not lie in these circumstances.” [page 267]

What we understand the trial judge to be saying is this; the panel of arbitrators determined the matter on the basis of PNDC Law 111 which they had power to do because under Section 30 of the Chieftaincy Act, the power of a chief to act as an arbitrator in customary arbitration in any dispute where the parties consent to the arbitration, is guaranteed. Consequently, as we understand him, once the parties had consented and submitted to the arbitration of the panel, it could apply PNDC Law 111 even if retroactively. Whilst we do not find a specific statement of the trial Judge of which of the two conflicting positions he accepted, it is inferable from the generality of his analysis that he accepted the account of the Plaintiff as to the legal basis of the decision of the panel. He took the position that, the panel could apply PNDC Law 111, and it was right in doing so.

With this, we believe the learned Justices' attack that the trial Judge discountenanced or ignored the question lacks merit. We find that he addressed the controversy and accepted the Plaintiff's account. He was however not convinced that it was a ground to affect the jurisdictional competence of the panel of arbitrators. We are led by this

evaluation to uphold the Defendants' ground (vi) where it is said: *The Court of Appeal erred in holding that the learned trial Judge discountenanced the issue of jurisdiction.*

This is a convenient point to address the submission of Counsel for the Defendants before us that, the approach of the trial Judge accepting the position that the chief relied on the PNDC Law 111 to make the determination was erroneous.

Arguing the Defendants' grounds (iii), (v) and (vi) together, Counsel points out that the Defendants never pleaded PNDC Law 111 and did not also state anywhere in the pleadings that the Kadephene made that statement about his intention to apply PNDC Law 111. According to Counsel it was the Plaintiff who for the first time in his evidence made that allegation concerning the chief. He points out that when the Plaintiff made that statement on oath, Counsel for the Defendants raised an objection. The objection was however overruled and the statement remained part of the evidence on record. In his submission, Counsel insists that the ruling of the trial Court was erroneous. And in any case, Counsel contends that looking at the smaller portion of the properties that the panel gave to the Defendants compared with the larger portion given to the family, it could not be said that the panel applied PNDC Law 111. The Trial Judge therefore erred in proceeding on the basis that the PNDC Law 111 was applicable and the Court of Appeal also erred in accepting that position.

Arguing further, Counsel contends that the issue that actually arises is whether the chief and his elders as an arbitral panel had jurisdiction to receive a complaint from one or more of his subjects and to sit to arbitrate the complaint. That issue according to Counsel can be determined by taking a look, first at Section 30 of the Chieftaincy Act, 2008 (Act 759). This is the section that provides that the power of a chief to act as an arbitrator in customary arbitration in any dispute where the parties consent to the

arbitration is guaranteed. In Counsel's argument, by the provision in Section 30 of Act 759, the chief and the panel were clothed with jurisdiction to entertain and determine the complaint. In the words of Counsel:

"Clearly, therefore a chief had undoubted jurisdiction at customary law to arbitrate matters or disputes placed before him by his subjects. It is therefore respectfully submitted that it was wrong for the Plaintiff to contend that the trial High Court discountenanced an objection to the jurisdiction of the Chief and equally wrong for the Court of Appeal to favourably receive that contention."

First of all, we doubt that Counsel can at this stage challenge the position taken by the trial Judge on the question of whether the Kadephene and his panel proceeded on the basis of PNDC Law 111. As earlier recapitulated from, when the Plaintiff mentioned PNDC Law 111 in his evidence, the Defence objected on the basis of non-pleading. The trial judge ruled on the point and allowed the evidence to stand. Subsequent proceedings showed that the Plaintiff and PW1 repeated the allusions in subsequent testimonies which also became a subject of cross-examination when the 1st Defendant was in the box. The Defence did not appeal the ruling of the trial Judge that allowed that evidence to stand. The trial Judge at the end of the trial decided to proceed the way he did and judgment went in favour of the Defendants. The Defendants did not challenge the position in the Court of Appeal. Apparently, they were happy with it because over all, the judgment of the trial Court had gone in their favour. We do not deem it right in this Court of second appeal to entertain the argument at this stage.

Even if as the final Court, the question is still viable for our consideration, we shall posit, on our examination of the record, that the stance taken by the trial Judge could not be wrong. It is true the PNDC Law 111 was not specifically pleaded by any of the parties. But the Plaintiff in paragraphs 12 and 17 of their Amended Statement of Claim filed on 13/6/01 pleaded:

"12. That plaintiff was not given reasons for the summons until they were told that 1st, 2nd and 3rd Defendants had made a complaint that they did not receive a fair share of their deceased father's estate who died over 37 years ago and had petitioned the 4th Defendant for redistribution of then estate.

17. The Plaintiff further avers that the alleged redistribution is unlawful and illegal and should be declared null and void."

The Defendants on the other hand pleaded in paragraph 12 of the Amended Statement of Defence thus:

12. The 1st, 2nd and 3rd Defendants deny paragraph 12 of the Plaintiff's claim and aver that the Plaintiff cannot claim to be unaware of their complaints or grievances. Indeed, the complaint lodged at then Chief's Palace was for a distribution of their late father's estate..."

The learned trial Judge thought that the words *illegal and unlawful* in the Amended Statement of Claim were being given fresh in the evidence by referring to PNDCL 111 which makes the distribution illegal. We note that the law in contemplation in the above pleadings was the Intestate Succession Law. The complaint before the panel was made in 1999. The law upon which they could have demanded the distribution of their father's estate was the Intestate Succession Law PNDC Law 111. That was the law that regulated intestate succession based upon which the Defendants could demand their share of their father's state. The customary law position had then given way to the new statutory regime. The learned A.K.P. Kludze writes about this legislative transition as follows:

"The general principle of the judicial customary law, which the courts have generally applied, is that upon the death intestate of a Ghanaian, his self-acquired property becomes

family property. It is therefore stated as a general proposition that it is the family, and not an individual that succeeds to the interests in the self-acquired property of an intestate Ghanaian. This will no longer be the true because, as from 1985, an intestate estate devolves according to the statutory scheme of the Intestate Succession Law, 1985." See MODERN LAW OF SUCCESSION IN GHANA, 2015 ed., page 225-227.

Definitely, by demanding a share of their father's estate, the Defendants were asserting a right in law. The law could not have been customary law because their father died in 1962 and his properties devolved on his maternal family in accordance with customary law. The right they were asserting was statutory, and the statute was the Intestate Succession Law.

Had the Defendants' case been in the nature of praying their 'fathers' as it were, to allow them enjoy portions of their late father's property, as the evidence shows they had been so permitted to live in one of the houses for a number of years, that would have been a different matter. What they did was to assert a right which they thought they had in law. We think the trial Judge was right in overruling the objection and allowing that piece of evidence to stand.

In any event, even if the trial Judge erred in allowing that piece of evidence, the erroneous admission alone without more was not a ground to reverse a verdict on appeal. Section 5 of the Evidence Act states thus:

"No finding, verdict, judgment or decision shall be set aside, altered or reversed on appeal or review because of the erroneous admission of evidence unless the erroneous admission of evidence resulted in a substantial miscarriage of justice."

On our examination of the record, the Defendants have not shown that the admission of the evidence occasioned any substantial miscarriage of justice to them. After all, the error if any, resulted in a favourable judgment for them at the trial the benefit of which they enjoyed until the Court of Appeal reversed the decision for different considerations.

Counsel for the Defendants also relied on the fact that it was a smaller portion of the properties that went to the Defendants compared with what went to the family. That fact, though material, could not on the whole upset the point that PNDC Law 111 was the legal basis for the provision for the Defendants in the award. By the Defendants' own showing all previous efforts to get a share of their father's property had achieved nothing. Without PNDC Law 111 in mind, it was doubtful the panel would be emboldened to award anything. From our standpoint, the distribution by the panel was largely impelled by sheer desire to keep relationships intact without dispossessing various occupants, a disposition which in our considered view does not detract from the fact that the panel was motivated by the dictates of PNDC Law 111, however unbalanced the sharing ended.

For us, the issue of primacy and which the learned Justices of the Court of Appeal tried to answer is whether the Kadehene and his panel lacked jurisdictional competence to proceed with the complaint and give a share of the estate to the Defendants on the basis of the provision in Section 30 of the Chieftaincy Act (Act 759). This is the gravamen of ground (v) the resolution of which will answer grounds (iii) and (iv).

It is required for a valid customary arbitration that the panel must possess jurisdictional competence to determine the subject matter of the complaint. In **DZAMISATU & ORS VRS DOKOSI & ORS [1993-94]1 GLR 463 SC** Amua Sakyi JSC summed up the law as follows:

*"The law on this matter may be briefly restated: A purported arbitration is binding if (a) the submission of the dispute was voluntary: see **Asare v Donkor** [1962]2 GLR 176, SC and **Paul v Kokoo** [1962] GLR 213, SC; (b) the parties agree to be bound by the decision whichever way it went: see **Ankrah v Dabara and Olaga** [1956]1 WALR 89; **Twumasi v Badu** [1957]1 WALR 204 and **Mosi v Fordjour** [1962]2 GLR 74, SC; (c) the rules of natural justice were observed: see **Akakyie ii v Ediyie** [1977]2 GLR 70, CA ; (d) although the arbitrator need not follow any formal procedures: see **Akunor v Okan** [1977]1 GLR 173, CA; (d) the arbitrator acted within jurisdiction: see **Foli v Akese** [1934]2 WACA 46 P.C; and (e) the decision or award was made known: see **Yaw v Amobie** [1958]3 WALR 406 C.A"*

It is common learning that every adjudicating body or authority, customary arbitral panel inclusive, acts within jurisdictional bounds. Jurisdiction is fundamental in every adjudication and is said to be the lifeblood of any form of adjudication. The question of jurisdiction covers several components including the proper constitution of the person or persons to adjudicate, whether the subject matter for the adjudication falls within the competence of the body, whether the adjudication was initiated and conducted by due process of law or whether any condition to the exercise of the adjudicating power has been fulfilled. Also important to mention is that a body or authority may, whilst exercising its adjudicating authority exceed such authority and by so doing deprive itself of jurisdictional competence. This happened in **ODARTEI III VRS BADDOO @ KOBLA** [1977]2 GLR 1 where in a submission to customary arbitration for a case of assault, the arbitrators were held to have exceeded their jurisdictional competence and therefore committed a fatal error when they made an award in respect of the traditional status of the applicant as a subchief.

Want of jurisdiction manifests itself in different ways. In **MANTEY BOTWE [1989-90]1 GLR 479**, a case turning on the validity of a customary arbitral award, Osei Hwera J.A at page 491 of the report cited for support the following passage of LORD PEARCE in **ANISMINIC LTD VRS FOREIGN COMPENSATION COMMISSION [1969]2 WLR 162 at 195:**

"Lack of jurisdiction may arise in various ways. They may be absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening state, while engaged on a proper inquiry, the tribunal may depart from the rules of natural rules of natural justice, it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. Any of the things would cause its purported decision to be nullity."

There is no doubt that by Section 30 of Act 759, a chief's authority to conduct customary arbitration is guaranteed. But is it also true that, having assumed the authority and in the conduct of an arbitration, the chief may engage in acts that may soil his authority and thereby deprive him of his jurisdictional competence. And the end result will be nullification of the final outcome. Our law reports are replete with such occurrences. A convenient summary of some of them is well chronicled in the Learned E.D. Kom's article published some time ago, which we find invaluable in this discourse to cite. He stated:

*"Where an arbitrator exceeds the agreed terms of reference or proceeds to share the subject matter in dispute between the disputants the so-called arbitration is null and void ab initio. Thus in the case of **Omanhene Kobina Foli v Chief Obeng Akesse**, the Privy Council held that the learned arbitrator had misconceived his duty by laying down a new boundary line based on consideration of what would be a fair division of the disputed area*

*between the parties and they accordingly set aside the award on the ground that the arbitrator had acted ultra fines compromise. This decision was followed by the Supreme Court in **Nyame v Yeboah** where it was held that an arbitrary boundary which the Beponhene attempted to fix for the parties if intended to be execution of the award of the alleged arbitration was misconceived and contrary to settled principles of law. Similarly, in **Mensah v Esah** the so-called arbitrator in a dispute of successorship shared the estate between the disputants. The Court of Appeal held that the mere sharing of the estate detracted considerably from any determination of successorship.” See **CUSTOMARY ARBITRATION [1987-88] VOL. XVI RGL 123-147.***

Customary arbitration as the name evokes, is arbitration held in accordance with the custom, tradition and usage of a particular geographical area. It is a practice grounded in the customs, traditions and usages of people in a particular area. Article 11(3) of the 1992 Constitution therefore defines customary law as “*the rules of law which by custom are applicable to particular communities in Ghana*”. It is required that customary arbitration over the dispute of parties be conducted in line with the custom of the parties. The law frowns on the importation of alien or extraneous custom to determine the dispute of parties. It cannot be within the jurisdictional competence of a customary arbitral panel to invoke and apply statutory law or engage in the interpretation of same. It is worse when the application of the statutory law results in upsetting the rights of the parties recognized or vested by customary law. This is a position worth emphasizing. In a society where many now pretend to know their rights, the demarcated jurisdictional lines ought to be deepened before, for instance, a customary arbitral tribunal attempts to interpret the constitution of the Republic.

We state in passing that the Alternative Dispute Resolution Act, 2010 (Act 795) had not been enacted at the time of the arbitral proceedings in issue. The provisions were

therefore inapplicable. Nonetheless, this position we have taken is not out of tune with the arbitrability provisions in Section 1 of the Act that exclude matters of public or national interest, the environment, the enforcement and interpretation of the Constitution and any other matter that by law cannot be settled by an alternative dispute resolution method from.

In the instant case, it is common cause that the deceased died in 1962. By operation of law, his movable and immovable properties having died intestate, devolved in accordance with customary law. Section 1 of the Administration of Estates Act, 1961 (Act 63) provides:

“(1) the movable and immovable properties of a deceased person shall devolve on the personal representatives of the deceased person with effect from the date of death.

(2) In the absence of an executor, the estate shall until a personal representative is appointed, vest (a) in the successor if the entire estate devolves under customary law...”

Case law and various textwriters on customary law are ad idem that the properties of intestate before 1985 devolved on his family in accordance with customary law. In **LARKAI VRS AMORKOR [1933]1 WACA 323 at 329**, Deane C.J noted:

“Now the presumption of law on the Gold Coast is that property held by an individual becomes family property on his death intestate, and that presumption can only be displaced by satisfactory evidence that during his lifetime he parted with the property by giving it to another.”

Excerpts from various texts on the point are legion. A.K.P. Kludze wrote: *“If a Ghanaian died without making a will, until 1985, the law applicable to him was the customary law of his community, because that was his personal law. This was the effect of section 49 of the Courts Act, 1971. Hence intestate succession to a Ghanaian prior to 1985 involved the application of*

the customary law. Since 1985, the Intestate Succession Law now regulates intestate succession." See Modern Law of Succession in Ghana, 2015 ed., page 255.

Ollenu N.A has also stated: "*The first principle of the customary law of succession applicable to all tribes in Ghana is that upon a person's death intestate-male or female- his or her self-acquired property becomes family property.*" See Ollenu, The Law of Testate and Intestate Succession in Ghana, 1966, p.70.

Finally, Bentsi-Enchill opined: "*The basic rule everywhere throughout Ghana is that upon the death intestate of a person, his or her self-acquired property becomes family property. This is so whether the family be patrilineal or matrilineal.*" See K. Bentsi-Enchill, Ghana Land Law, 1964, p.13.

All these authoritative statements were based on customary law principles supported by case law. The known decided cases that attempted a qualification of these principles some of which the Court of Appeal referred to, did not prescribe any right beyond the right to maintenance and occupation to stay in one's father's house subject to good behaviour. See **IN RE: KOFI ANTUBAM (DECD); QUAICO VRS FOSU & ORS (supra); ESHUN VRS JOHNFIA (supra); MANU VRS KUMA (supra).**

The learned Justices of the Court of Appeal reasoned that the claim of children to a share in an already distributed estate of a man subject to matrilineal succession, was contrary to customary law. The Defendants' claim therefore lacked legitimacy that would have deprived the panel of any jurisdiction to distribute the property of Opanin Kwaku Boadi to give them a share thereof. In their view this is so even if the Plaintiff, as customary successor (a caretaker of family property) 'voluntarily' submitted to the arbitration.

We are in full agreement with the reasoning of the learned Justices of the Court of Appeal. The property of the deceased upon his death intestate in 1962 became vested in the family by customary law. This was a statutory prescription by the provision in Section 1 of the Administration of Estates Act (Act 63) to which we have already referred. The decision to give a share of the property to the children based on an application of, or acting upon PNDC Law 111 as we have found, was an act that deprived the Kadephene and his elders of jurisdiction. Customary arbitrators as they were, it was outside their jurisdictional competence to apply or act upon PNDC Law 111 to give a share of the property to the Defendants in clear defiance of customary law which was the law they were bound to apply and uphold.

Reaching this decision, we are mindful of the principle that parties must take their arbitrators as they find them whether they err on the fact or the law. This principle must be understood in its proper context. We believe it is premised on the customary arbitrator staying within the province of pure customary law which is the law that must fully regulate such proceedings. We however have a case here where the arbitrators exceeded their jurisdictional competence by entering onto the arena of applying or acting upon a statute in a manner repugnant to well-established custom and usage of the parties. This is not an ordinary error but one that deprived them of their jurisdictional competence which a court of law should not countenance in the name of holding parties bound by their own chosen arbitrators. See again **ODARTEI III VRS BADDOO @ KOBLA (supra)**. This was the view taken by the learned justices of the Court of Appeal and we roundly uphold it.

Before we rest our discourse, we shall address one point which though pressed strongly on us, will not affect the conclusion we have come to. The evidence on record suggests a keen tussle between the two sides on the issue of whether the panel distributed or redistributed the estate of the deceased. The redistribution argument

was anchored in the position that the deceased in his lifetime distributed his estate and therefore it was unlawful for the panel to redistribute the estate. This was the stance of the Court of Appeal.

On examining the evidence however, the position that the deceased distributed the estate in his lifetime is not supportable. Whilst the evidence shows that the deceased in his lifetime gave a house each to his two wives, that could not amount to distribution of his estate. Certainly, the act took place in his lifetime. It could never amount to distribution of estate. Any property he gave *inter vivos* did not form part of the estate. For, he divested himself of it. The Court of Appeal did not get this right. We for this reason find merit in ground (ii).

In spite of the above, our view is that the properties though not distributed vested in the family in accordance with statutory and customary law. Whether the panel “distributed” or shared, it was still invalid for the reasons we have articulated. The effect, subject to the above is that, grounds (iii) and (iv) fail while we strike out ground (i). In the final analysis, the appeal fails and is dismissed.

(SGD.) **R. ADJEI-FRIMPONG**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **G. PWAMANG**
(JUSTICE OF THE SUPREME COURT)

**(SGD.) PROF. H. J. A. N. MENSA – BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)**

**(SGD.) E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)**

**(SGD.) Y. DARKO ASARE
(JUSTICE OF THE SUPREME COURT)**

COUNSEL

**A. A. SOMUAH ASAMOAH ESQ. FOR THE DEFENDANTS/RESPONDENTS/
APPELLANTS WITH HIM JOSEPHINE BEMPA ESQ. AND KWEIKI ABLOSO
ESQ.**

**SIR S. ASANTE ANSONG ESQ. FOR THE PLAINTIFF/APPELLANT/
RESPONDENT. WITH HIM KOFI OWUSU-POKU ESQ.**