IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – AD 2025

CORAM: LOVELACE-JOHNSON (MS.) JSC (PRESIDING)

PROF. MENSA – BONSU (MRS.) JSC

ASIEDU JSC

GAEWU JSC

ADJEI-FRIMPONG JSC

19TH MARCH, 2025

CIVIL APPEAL
J4/81/2024

KINGSFORD ODOI CHARWAY … PLAINTIFF/APPELLANT/RESPONDENT

VRS

MOSES MENSAH KODIA …

DEFENDANT/RESPONDENT/APPELLANT

J U D G M E N T

ADJEI-FRIMPONG, JSC:

My Lords, the provisions in Order 4 rule 9 subrules (2) --(5) of the High Court (Civil Procedure) Rules, (2004) C.I. 47 have codified the customary law principles on family

representation in suits to protect family property as espoused in KWAN VRS NYIENI (1959) GLR 67 C.A.

To sum them up, the provisions prescribe that the head of family in accordance with customary law may sue and be sued on behalf of or as representing the family. If for any good reason the head of family is unable to act or if he refuses or fails to take action to protect the interest of the family, any member of the family may, subject to the rules, sue on behalf of the family. Where any member of the family sues, a copy of the writ shall be served on the head of family. The head of family when served may, within three days of the service of the writ apply to the court to object to the writ or to be substituted as Plaintiff or to be joined as Plaintiff. And where the head of family is sued as representing the family, but it appears that he was not protecting the interest of the family, any member may apply to the Court to be joined as a defendant in addition to or in substitution for the head. Ostensibly, the provisions are intended to formalize customary rules, bring certainty to bear on them and ensure their integration into the regular judicial processes. Such integration is necessary to ensure relativity among the units of the pluralistic legal system created under the 1992 Constitution.

The foregoing is worth-stating and at the very outset of this delivery. Running through this ligation, has been the disputed capacity of the Plaintiff/Appellant/Respondent (herein 'Plaintiff') to commence the action on behalf of his family. The issue has dominated the decisions of the two lower courts and is still pertinent in this second appeal. The rules referred to are a subject of consideration in this decision.

The trial High Court applied the law to the evidence on record and in the end disposed of the matter on the singular question of want of capacity on the part of the Plaintiff. The

Court declined determining the merits of the matter even though evidence had been received on the merits through numerous witnesses in a full trial.

We pause here to comment that the approach of the trial court did not demonstrate a good case management practice. If the learned judge knew the matter could be settled on the question of capacity, then it was not necessary to receive evidence on the merits when the issue of capacity could be determined as a preliminary point. The provision in Order 33 rule 3 of the High Court (Civil Procedure) Rules, C.I 47 is a useful case management tool. It states:

> *"The Court may order any question or issue arising in any cause or matter whether of fact or law, or partly of fact and partly of law, and raised by the pleadings to be tried before, at or after the trial of the cause or matter and may give directions as to the manner in which the question or issue shall be stated."*

As will be noted *anon*, and as the trial court itself recognized, the issue of the Plaintiff's capacity arose on the pleadings. Her decision to proceed on the drudgery of a full trial only to settle the matter on want of capacity owes a lot to proper case management. Trial judges should do well to apply their minds to issues before them and at the earliest opportunity, deploy the right case management strategies to dispose them of. This helps to economize judicial time and resources and enhance the image of the courts.

That said however, the decision of the learned trial judge not to resolve other issues beyond the question of capacity in her judgment was appropriate, granted her determination of the capacity question was right. It is axiomatic that capacity is a threshold question. It strikes at the very substratum of the action and can only found a determination on the merits when it was established to exist by the claimant in the action.

This Court reiterated the well-established principle when it noted in ALFA MUSAH VRS DR FRANCIS ASANTE APPIAGYEI, Suit No. J4/32/2017 judgment dated 2nd May 2018 as follows:

> *"We think the law is that when a party lacks the capacity to prosecute an action, the merits of the case should not be considered. However, the two lower courts, with due respect, proceeded at length to discuss all the issues raised as if the appellant's case should be considered on merits. If a suitor lacks capacity, it should be construed that the proper parties are not before the court for their rights to be determined. A judgment, in law, seeks to establish the rights of the parties and declaration of existing liabilities of parties. In the case of Akrong & Ors v Bulley [1965] GLR 469 the then Supreme Court after holding that the plaintiff lacked capacity to prosecute the action as an administrator of the deceased, did not proceed to discuss the merits. For proceeding to discuss the merits when the proper parties are not before the court is not permitted in law. In this appeal, regardless of the other issues raised, the High Court and the Court of Appeal for that matter erred in determining the other issues."* See also COMFORT OFFEIBEA DODOO (SUBST. BY VIVIAN ANKRAH) VRS NII AMARTEY MENSAH (SUBST. BY DAVID OBODAI) & ORS [2020] 162 G.M.J. 1 at 36.

The Court of appeal however took a different position on the question of capacity. It reversed the decision of the trial court and went into the merits of the action. In the end, the Plaintiff's case prevailed, hence, this appeal.

Commencement of the Action:

The Plaintiff commenced the land suit in a capacity he described as Principal Elder of the Nii Adjei Charway Family of La, suing for and on behalf of the family. The following is how he indorsed his writ:

> *"The Plaintiff, principal elder of Nii Adjei Charway family of La, suing for and on behalf of that family, claims against the Defendant:*
>
> *(i) Declaration that the parcel of land situated at Oyarifa, Accra, delineated on the plan attached hereto and marked site B containing an approximate area of 40.64 acres, bounded on the North by Asumang We land, on the North-West by the Accra-Aburi motor road, on the East by Amanfro land and on the South by Oduman family land is part of the Nii Adjei Charway Family land at Oyarifa.*
>
> *(ii) Declaration that the plotting made in the records of the Lands Commission Secretariat, Accra, of the large tract of land at Oyarifa in the name of the Defendant which includes the Nii Adjei Charway family land mentioned in (i) above as owner is of no legal effect as far as the said Nii Adjei Charway family land is concerned.*
>
> *(iii) Cancellation of the said plotting as far as it affected the said Nii Adjei Charway Family land*
>
> *(iv) Damages for trespass to the said parcel of land*
>
> *(v) Mandatory injunction compelling the Defendant forthwith to remove or cause to be removed from the said Nii Adjei Charway family land any building, house or structure erected by him or upon his grant to authority on the said land.*

(vi) *Injunction restraining him by himself, servant or agent, from in any way whatsoever entering the said land for the purpose of making adverse claim to it or doing or causing to be done any act or thing inconsistent with the title of the Nii Adjei Charway family."*

The Defendant/Appellant/Respondent (herein 'defendant') for his part counterclaimed for:

(i) *"A declaration of title to ALL THAT PIECE OF LAND situate and being at Oyarifa—Accra containing an approximate area of 180.40 acres more or less bounded on the North by Lessors land measuring 1940 feet more or less on the North East by Lessor's land measuring 3180 feet more or less on the South East by Lessor's land measuring 750 feet more less on the South by Lessor's land measuring 3370 feet more or less on the West by Lessor's land measuring 2550 feet more or less which piece of land is delineated on a site plan.*

(ii) *An order of perpetual injunction to restrain the Plaintiff's Family, its assigns and agents from interfering with defendant's quiet and peaceful enjoyment of the aforesaid land*

(iii) *Punitive costs."*

That a Claimant whose capacity has been challenged must prove it by cogent evidence is now a well-settled principle. In the oft-cited SARKODIE I VRS BOATENG II [1982-83] GLR 715 S.C., it was described as elementary that a Plaintiff or Petitioner whose capacity was put in issue must establish it by cogent evidence and that it was no answer for a party whose capacity to initiate action has been challenged to plead to be given a hearing on

the merits because he had an iron-cast case against the opponent. In NYAMEKYE VRS ANSAH [1989-90]2 GLR 152 at 153 C.A. it was held:

> *"As a general rule, the head of family as representative of the family is the proper person to institute suits for the recovery of family land: see Kwan v Nyieni [1959] GLR 67 at 72 C.A. And, where the authority of a person to sue in a representative capacity was challenged, the onus was on him to prove that he has been duly authorized. He cannot succeed on the merits without first satisfying the court on that important preliminary issue: see Chapman v Ocloo [1957]3 WALR 84."*

Also in REPUBLIC VRS HIGH COURT, ACCRA; EX PARTE EASTWOOD LTD & OTHERS [1995-96]1 GLR 689 at 669-700, Hayfron-Benjamin JSC noted:

> *"The locus of a party to litigation is a preliminary issue and must be determined before the case or application is heard on its merits. It is to be determined more by the adduction of oral or documentary evidence than by reference to statute. For party who ordinarily may not possess the requisite standing to litigate may be invested with the necessary authority to do so. Even if such evidence were available for this court to determine whether in the circumstances the learned judge properly decided the locus standi of some of the parties that would be tantamount to determining the matter as on appeal."*

In his statement of claim, the Plaintiff pleaded his capacity as follows:

> *"1. The Plaintiff is a member and principal elder of the Nii Adjei Charway Family of La and institutes this action for and on its behalf with the knowledge and consent of the other principal elders."*

The Defendant pleaded in paragraphs 1 and 2 of the statement of defence thus:

> *"1. Save as hereinafter expressly admitted, the Defendant denies every material allegation of fact contained in the Statement of Claim as if same has been set out in extenso and denied seriatim.*
>
> *2. The defendant is not in a position to admit or deny the averment contained in paragraph 1 of the statement of claim and will put the Plaintiff to strict proof at the trial."*

Certainly, the Plaintiff's pleading in the paragraph 1 above was a material allegation of his capacity to sue. If the Defendant wished to deny it, he must traverse specifically. The law requires that any traverse must be specifically pleaded. The word "traverse" in pleadings means denial of pleaded facts. The essence of specific traverse is to put the other pleader on sufficient notice as to the case that awaits him to meet. In respect of an essential and a material allegation, a general traverse is not sufficient. The Defendant's pleading in paragraph 2 was a general traverse which afforded no sufficient answer to the Plaintiff's paragraph 1. In LEWIS & PEAT (N.R.I.) LTD V AKHIMIEN [1976]7 S.C 157 at 163—4 the Nigerian Supreme Court observed:

> *"…We are of course not unmindful of the first paragraph of the statement of defence. Nowadays almost every statement of defence contains such a general denial. (See Warner v Sampson (1959)1 Q.B. 287 at 310-311. However, in respect of essential and material allegations, such a general denial ought not be adopted; essential allegations should be specifically traversed. (See WALLERSTEINS V MOIR (1974)1 W.L.R. 991 at 1002 Per Lord Denning M.R.; also, Bullen & Leake & Jacobs, Precedents of Pleadings 12th Edition 83)."*

Order 11 rule 13 sub-rule (2) of the High Court (Civil Procedure) Rules, C.I. 47 however prescribes two methods of traversing an allegation. It states:

> *"(2) A traverse may be made either by a denial or by a statement of non-admission and either expressly or by necessary implication."*

What is the difference between the two? A denial (usually a positive denial) presupposes that the defendant understands the allegation, mostly has knowledge of it but denies its truth. On the other hand, by a statement of non-admission, the defendant expresses lack of knowledge of the allegation and hence states he can neither admit not deny it and puts the Plaintiff to proof. Whilst in spite of the conceptual difference between the two, the Plaintiff must adduce evidence to prove the allegation pleaded, they engender different consequences. A denial would usually require the Defendant to lead contradictory evidence after the Plaintiff has given evidence in proof of the allegation. A statement of non-admission would generally leave the Defendant with just an obligation to cross-examine to test the Plaintiff's case without adducing evidence in rebuttal. This is on account of his lack of knowledge of the allegation. See STANDARD BANK FACTORS LTD V FUNCOR AGENCIES (PTY) & ORS 1985 (3) S.A 410 (C).

In the instant case, the Plaintiff's averment in the paragraph 2 above was a statement of non-admission and not a denial properly so called. It nonetheless imposed an obligation on him to adduce evidence to prove his capacity.

From the record, the two lower courts appeared *ad idem* on the obligation the Plaintiff assumed to prove his capacity to institute the action. The High Court posited as follows:

"The Court observes the fact that in civil litigation, the capacity of the parties to the litigation is very crucial and the court will not discuss or consider the substance of the matter if the Plaintiff has no capacity...

The question or issue of capacity is the bedrock or foundation of every action, it is incumbent on a party to prove his or her capacity whenever it becomes an issue. A party is bound to prove or disclose his/her capacity immediately it is raised. The issue of capacity like the issue of jurisdiction can be raised at any stage of the case, even on appeal. A party whose capacity is questioned carries the burden of proving or establishing same at the stage it is raised… Plaintiff avers in paragraph 1 of his statement of claim as follows:

> *"1. The Plaintiff is a member of and principal elder of Nii Adjei Charway Family of La, and institutes this action for and on its behalf with the knowledge and consent of the other principal elders."*
>
> *The defendant in paragraph 2 of his statement of Defence and Counterclaim denied the above averment as follows:*
>
> *"2. The defendant is not in a position to admit or deny the averment contained in paragraph 1 of the statement of claim and will put the plaintiff to strict proof at the trial."*

The Plaintiff in his Reply and Defence to the defendant's Counterclaim "joins issue with the defendant … on the statement of defence, except where same consists of admissions". This enjoins the plaintiff to lead evidence to establish the fact that he is a member and principal elder of the Nii Adjei Charway Family of La and he has been clothed with capacity to sue on behalf of the family." See page 236C to 236D of ROA.

In the Court of Appeal, the learned justices recognized the burden the Plaintiff assumed to prove his capacity even though they were to reach a different conclusion. They observed:

> *"For the purposes of this appeal it is the issue of the capacity of the Appellant to initiate the action that needs to be settled since the Respondent has put the Appellant to strict proof as this appeal is by way of a rehearing."* Page 316.

The High Court considered the evidence adduced by the Plaintiff but was not satisfied that the burden was discharged. According to the court, the Plaintiff had on 15th October 2010 testified that his Head of Family was one Nii Ashitey Armah who was old and could not walk which was why he delegated him to sue. However, when being cross-examined on 27th October 2010, the Plaintiff gave a different account by stating that the head of family gave him a power to take up the matter and when questioned about the power, he indicated that the power was in the form of the release of the land documents (a Statutory Declaration) to him. The trial court queried:

> *"The mere possession of "land document" consisting of Statutory Declaration signed by the plaintiff himself, unregistered, but allegedly released to the plaintiff by the head of family cannot pass as a power from the alleged head of family (Nii Ashitey Armah) to plaintiff to initiate this action."* Page 236F ROA. The trial court proceeded on a further analysis as follows:
>
> > *"The Plaintiff per his writ (page 2) states: "KINGSFORD ODOI CHARWAY, Principal elder of Nii Adjei Charway Family of La, suing for and on behalf of that*

family…" The statement of claim on page 3 also states: "The plaintiff, principal elder of the Nii Adjei Charway Family of La, suing for and on behalf of that family claims against the defendant…" The Plaintiff failed to indicate that he has the consent and authority of the head of family to institute the action. In fact, no reference was made to the head of family. Again, the plaintiff failed to serve a copy of the writ on the head of family Nii Ashitey Armah. Plaintiff failed to indicate that the head of family refused to act for the family. If the head of family gave him power as he alleged on 27th October 2010 then he failed to exhibit the alleged power. The document the plaintiff claimed the head of family gave to him was executed by the plaintiff, PW3 and others. The document does not contain the signature of the head of family Nii Ashitey Armah nor his predecessors in title."

Additionally, the trial court observed critical inconsistencies in the evidence as to the particular family the Plaintiff was suing for. The court had observed that whereas the Plaintiff himself called his family as the Nii Adjei Charway Family of La, his first witness Rubin Annan Sowah had referred to the Plaintiff's family as the Abese Kwankoranyawe Charway Family. PW2 had also referred to the Plaintiff's Family as La Kpakplanyawe Family. PW3 described as the Plaintiff's sibling had referred to the Family as La Abese Kpakplanyawe family whereas PW4 called the Family Odoi Charway Family. PW5 said the Plaintiff came from the Nii Charway Family. The court further observed that DW1 who said he knew the Nii Adjei Charway Family stated that the Plaintiff was not a member of that family. In the view of the trial court:

"The Plaintiff should have led further evidence to thrown [sic] more light on whether or not the three different families referred to above by the plaintiff and his witnesses, refer to the same family. Especially when DW1 testifies that the plaintiff does not come from the Nii Adjei Charway Family. There is nothing like Charway We, that Charway is a name

given to people in different houses but there is no particular place called Charway We." Page 236G.

The trial judge then concluded:

> *"The Plaintiff and his witnesses could not adduce sufficient evidence to establish the family the plaintiff hails from, that he is a principal elder of his family, and the fact that the head of family gave him power to sue on behalf of the family. The alleged documents released to plaintiff was not signed by the head of family nor his predecessors in title but by the plaintiff himself makes the plaintiff's assertion that the documents were released to him by the head of family doubtful."* Page 236i.

Proceeding to dismiss the suit for want of capacity, the trial court sought support from the provisions in Order 4 rule 9 and such cases as IN RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU & ORS VRS KOTEY & ORS [2003-2004]1 SCGLR 420; GHANA MUSLIM REPRESENTATIVE COUNCIL & ORS VRS SALIFU & ORS [1975]2 GLR 246; ARMAH VRS KAIFIO [1959] GLR 23 and ASANTE-APPIAH VRS AMPONSAH [2009] SCGLR 90

The Court of Appeal however thought there was evidence to establish the Plaintiff's capacity. For the learned justices, this was not a case brought under the exceptions in KWAN VRS NYIENI (supra). They determined that the Plaintiff brought the action on the authorisation of the head of family based on the land documents released to him. They noticed that the word "power" mentioned in the evidence was the result of wrong interpretation not in reference to a power of attorney in the real sense of the term. They delivered themselves this way:

"It is our view that the Interpreter was the one who used the word or translated Appellants' speech in Ga by using the word 'power', the appellant obviously from his position that his brother had given him the land documents to work with was not talking about a power of attorney in the legal sense, but authorisation to prosecute the case. As a result, this situation is an exception to cases where the issue of capacity is raised and persons are found wanting because they do not have power of attorney and they have not served a copy of the Writ on the head of family as required under Order 4 rule 9 of C.I. 47. It is not the case here that the head of family has refused to take an action to safeguard the family lands. As a result, the case of KWAN VRS NYIENI (1959) GLR 67 is distinguishable. The finding of the court at page 236K of ROA that the Appellant failed to indicate that he had the consent and authority of the Head of Family cannot hold. We are of the opinion that under the circumstances here the word power should not be taken literally to mean a power of attorney. The Appellant testifies that his aging brother had given him the land documents to take the action. We are of the view that expecting a power of attorney will be out of sync with the scenario before us. The Appellant did not bring the action under the Kwan supra exception, consequently the case of ASANTE-APPIAH VRS AMPONSAH [2009] SCGLR 90 will not apply as the learned trial judge found at page 236M of the ROA in his judgment because the evidence shows that he had the consent or blessing of the family when the land documents were given to him to take this action." [page 317 ROA]

The learned justices also held that the Quarters are made up of a number of families hence PW3 mentioning La Abese Kpakplanyawe and the Charway Family. DW1 also admits quarters exist and he is aware of Abese as a Quarter and also knows the Charway Family, Besides, DW1, an outsider is not expected to know the members of Appellant's family.

Appeal to the Supreme Court:

As already noted, having resolved the issue of capacity in favour of the Plaintiff, the learned Justices proceeded to determine the merits of the matter. They gave judgment in favour of the Plaintiff on the reliefs sought. The appeal in this Court is on the following grounds:

(a) The justices of the Court of Appeal erred in holding that the Plaintiff/Appellant/Respondent had capacity to institute the action.

(b) The judgment was against the weight of evidence.

For what we have said about the question of capacity, we shall first consider the first ground of appeal and determine the second ground based on the decision we come to. Below is a summary of the rival arguments made on behalf of the parties.

Counsel for the Defendant refers to the Plaintiff's plea of capacity in the statement of claim as follows:

> *"1. The plaintiff is a member of and principal elder of the Nii Adjei Charway Family of La and instituted this action on its behalf with the knowledge and consent of other principal elders."*

According to Counsel, from this averment, the Plaintiff did not bring the action on behalf of or on the authorisation of the head of family. The Plaintiff clearly brought the action in his own capacity as a member or elder of the family without recourse to the head of family. Meanwhile the writ was not served on the head of family as required by the provisions in Order 4 rule 9. Counsel points out that it was when the Plaintiff sensed his lack of capacity that he then sought to gather some evidence that he was authorized by

the head of family. He argues that by not pleading that he was authorised by the head of family to bring the action, the evidence in that direction was contrary to his pleadings. Even then, Exhibit A1, the document by which the Plaintiff sought to prove the alleged authorisation shows that the Plaintiff himself and one Isaac Anyetei Sowah were the joint heads of the family and not Nii Ashitey Armah who was said to be the head of family. By this, Counsel contends that the Plaintiff peddled falsehood by his testimony that the head of family authorized him to sue. This was also inconsistent with the account of PW3 that the family met and delegated the Plaintiff to take the action.

He argues further that, contrary to the observation by the learned Justices of the Court of Appeal, there was nothing to show that there was a wrong interpretation of the word "power". He contends that, Counsel for the parties, the parties themselves and the trial court had no problem at all with the Ga interpretation.

Additionally, he referred to the testimonies of the Plaintiff and his five witnesses who gave inconsistent accounts of the name of the family the Plaintiff belonged to. In effect Counsel thinks the analysis of the trial judge was right and there was no basis for the Court of Appeal to reverse the decision.

Responding, Counsel for the Defendant submits that the Plaintiff has failed to demonstrate any error in the decision of the Court of Appeal. He refers to the provisions in Order 4 rule 9 of C.I 47 under which a member of family may bring an action for and on behalf of the family. He points out that the Plaintiff had indorsed on his writ that he was a principal elder of the Nii Adjei Charway Family and stated in his evidence that he brought the action because the head of family was old and unwell. PW3 who said he was the Plaintiff's brother testified in support of this position. Reference was made to the case of IN RE ASHALLEY BOTWE LANDS (supra) and ARMAH VRS KAIFIO (1959) GLR 23.

Further Counsel argues, in the capacity in which the Plaintiff sued, power of attorney was not necessary. Whilst admitting that the writ was not served on the head of family as required by the rules, that default did not render the action a nullity. Order 81 of C.I 47 and the cases of OPOKU & ORS VRS AXES CO LTD (NO.2) [2012]2 SCGLR 121; BOAKYE VRS TUTUYEHENE [2007-2008]2 SCGLR 970; REPUBLIC VRS HIGH COURT ACCRA; EX PARTE ALLGATE CO. LTD AMALGAMATED BANK LTD. INTERESTED PARTY {2007-2008]2 SCGLR 1041 cited. Counsel contends that in this case, the head of family is not adversely affected by the non-service as the judgment has inured to his interest as head of the family.

My Lords would readily notice that the document on which the Plaintiff relies to say that the head of family authorized him to bring the action is Exhibit A1 series. This is a Statutory Declaration made on 29th February 2008. The relevant portion appears as follows:

> *"STATUTORY DECLARATION BY KINGSFORD ODOI CHARWAY AND ISAAC ANYETEI SOWAH CONFIRMING OWNERSHIP OF LAND SITUATED AT OYARIFA NEAR ADENTA—ACCRA.*
>
> *We, KINGSFORD ODOI CHARWAY and ISAAC ANYETEI SOWAH both of P.O. Box 550, La Accra in the Greater Accra Region of the Republic of Ghana do solemnly declare that:*
>
> *1) We are the declarants herein.*

2) *We are the present joint heads of the NII ADJEI CHARWAY FAMILY of Kwakwranya of La, Accra.*

3) *We have the consent and concurrence of the Principal Members of the said family to make these declarations…"*

The document was signed by the Plaintiff and the said Anyetei Sowah and witnessed by Gladys Charway and Beatrice Charway (PW3).

The declaration states two significant things; first the Plaintiff was a joint head of his family, and second the declaration was made with the consent and concurrence of other principal members of the family. It is the same plaintiff who indorses his capacity as "Member and Principal elder" of his family. Of course, if, as the document indicates, the Plaintiff was a joint head of family, he did not require the authority of any person to sue for and behalf of his family. He would have been the proper person to sue in terms of Order 4 rule 9 sub-rule (2).

On the other hand, if the indorsement and the evidence of the Plaintiff and PW3 were anything to go by, then what was contained in Exhibit A1, that the Plaintiff himself was the head of family was a falsehood. Exhibit A1 would tell a lie of itself and cannot form the basis of the Plaintiff's authority from the head of family to commence the action. We believe that where the Plaintiff testified on oath that he had been authorized by the head of family to sue and relied on a document (not necessarily a power of attorney) to back such claim, the document must state so. The principle that a party whose capacity has been challenged must prove it by cogent evidence must be understood to mean evidence which is credible and capable of sustaining the action. The Plaintiff ought to have adduced evidence to explain away the contradiction between the oral and documentary

evidence he adduced which strikes at the very root of his capacity. We are quick to remind ourselves that Exhibit A1 wherein the Plaintiff describes himself as joint head of family is documentary as against his oral evidence referring to somebody else. Ordinarily, a court leans in favour of documentary evidence as against oral evidence unless there is sufficient evidence on record to discredit the documentary evidence or render it unreliable. The onus was on the Plaintiff to demonstrate why what he said later in evidence must be preferrable to his own statutory declaration which was duly stamped in law, more than a year before he commenced the action.

We have earlier in this delivery referred to the provisions in Order 4 rule 9 of the High Court (Civil Procedure) Rule, C.I. 47 which now regulate representation of the family in civil litigation in this jurisdiction. It seems to us that the need to be certain on the headship of a family is crucial for a member to bring an action on behalf of the family. This is in the light of the mandatory requirement under sub-rule (4) of Order 4 rule 9 to serve the writ on the head of family and the power conferred on the head of family under sub-rule (5) to apply to object to the writ, to be substituted for the member or to be joined to the action. Given the material contradiction in the Plaintiff's account, little wonder that he failed to comply with the provision in Order 4 rule 9 sub-rule 4. Having made a solemn declaration to be a joint head of the family, who was he to serve the writ on? himself or the Ashitey Armah whom he later claimed to be the head of family?

It appears the learned justices of the Court of Appeal did not pay due attention to the declaration in Exhibit A1. When they determined thus; "*The Appellant did not bring the action under the Kwan supra exception, consequently the case of ASANTE-APPIAH VRS AMPONSAH [2009] SCGLR 90 will not apply as the learned trial judge found at page 236M of the ROA in his judgment because the evidence shows that he had the consent or blessing of the family when the land documents were given to him to take this action."* they ought to have gone

further to examine the contents of the document (Exhibit A1) to determined what it actually stated. Had they done so, they would have noticed that the document contradicted the account of the Plaintiff and that of PW3. PW3's evidence was that the head of family Ashyitey Armah was unwell and when the family met, they delegated the Plaintiff to act. The Plaintiff himself never said that the family met and delegated him to sue. He would have said so if that was the case. In any event, that testimony of the PW3 even if true was of no moment. The rules do not require the consent of the family for a member to sue. The member may sue subject to the service of the writ on the head of family in terms of Order 4 rule 9 sub-rule 4. And again, Exhibits A1 contradicts the PW3' account on who is the head of the family.

We also note material conflicting accounts about the identity of the family the Plaintiff purported to represent. The Plaintiff himself called his family as the Nii Adjei Charway Family of La. The five (5) witnesses he called identified the family of Plaintiff in varied terms as follows:

PW1

Q: *Do you know where the plaintiff comes from in this country*

A: *Yes, he comes from La Abese*

Q: *Do you know the family of which he comes from*

A: *Abese Kwakoranya Charway Family* [page 42 ROA]

PW2

Q: *Have a look at the Plaintiff, do you know him*

A: *Yes*

Q: *What about the defendant*

A: *Yes*

Q: *Are they also Gas*

A: *Yes*

Q: *From which part of Ga*

A: *The plaintiff comes from La Kpakplanyawe.* [page 48 ROA]

PW3

Q: *Are you a Ga*

A: *Yes*

Q: *Which part of Ga*

A: *I come from La Abese Kpakplanyawe family*

Q: *Look at the plaintiff, do you know him*

A: *Yes*

Q: *Where does he come from*

A: *He comes from Abese Kpakplanyawe family, he is my brother.* [page 52 ROA]

PW4

Q: *Does the plaintiff have a family*

A: *Yes*

Q: *Do you know the name of his family*

A: *Yes*

Q: *What is the name of plaintiff's family*

A: *Odoi Charway Family* [page 56 ROA]

PW5

Q: *Do you know the plaintiff*

A: *Yes*

Q: *Where do you know him*

A: *At Oyarifa*

Q: *Is he a Ga*

A: *Yes*

Q: *Where does he come from*

A: *He is also a native of La*

Q: *Does he have a family*

A: *Yes*

Q: *What is the name of his Family*

A: *Nii Charway family.* [page 62 ROA]

The trial judge thought it was relevant for the Plaintiff to have testified to clarify that those families refer to the same Nii Adjei Charway Family which he mentioned. This was more so when DW1 had said he knew the Nii Adjei Charway family but the Plaintiff was not a member of that family. The trial judge could not be faulted. The Court of Appeal

however thought otherwise. Its reasoning was that *"It is the case that Quarters are made up of families hence PW3 mentioning La Abese Kpakplanyawe and Charway family".*

Learned Counsel for the Defendant has submitted as follows:

> *"This observation created a wrong impression that the Nii Adjei Charway family is a family within La Abese Kpakplanyawe as a quarter. The problem with this observation is that neither the plaintiff nor any of his five witnesses stated that the Nii Adjei Charway Family is within a quarter. Secondly, plaintiff's witnesses talked about different families but not quarters. In this light, whereas PW1 mentioned Abese Kwakoranya Charway family, PW2 mentioned La Kpakplanya We. Whereas PW3 mentioned Abese Kpakplanya We family, PW4 mentioned Odoi Charway family. Finally, PW5 mentioned Nii Charway Family. Therefore, whereas families might exist within quarters, none of the witnesses stated that plaintiff's family was a family within a particular quarter. There were no established facts for the Court of Appeal to make that inference."*

We think we must agree with this submission. There is no question that the learned Justices were entitled to draw inferences from specific facts. In ADORKOR VRS GATSI [1966] GLR 31 at 34 the principle was stated as follows:

> *"The law governing this is that while findings of specific facts are within the competency of the trial court alone, a finding of facts which is an inference to be drawn from specific facts found is within the competency of an appellate court no less than the trial court; in other words, an appeal court is in as good a position as the trial court to draw inferences from specific facts which the trial court may find."* See also KOFI (OPPONG) VRS FOFIE [1964] GLR 174, S.C.; PRAKA VRS KETEWA {1964] GLR 423 S.C.

However, in the instant case, all the witnesses called by the Plaintiff described the different names as families. There was no reference to a quarter to allow a connection to be drawn between that and the named families to form the basis of an inference. It is trite that inferences are drawn from a premise and a premise is made of factual matters, not vague assumptions or a judge's own presumptions. With due respect to the leaned Justices, we think their inference was not supportable by the facts on record and ought to be rejected.

In the end we think the appeal must succeed on the first ground. We hold that the learned Justices erred when they reversed the holding of the trial court and held that the Plaintiff proved his capacity.

Before we rest from this decision, we desire to address one procedural point which Counsel for the Plaintiff raised in his statement of case. It turns on the effect of failure of a plaintiff who sues as a member of family to serve the writ on the head of family. Counsel's contention is that failure to serve the writ in this case did not render the judgment a nullity. Although Counsel makes the submission in reaction to a purported statement by his colleague on the other side, it does not appear that Counsel for the Defendant made the statement that the non-service of the writ on Nii Ashitey Armah rendered the judgment of the trial court a nullity. Assuming that statement was made, we do not come to that conclusion in this appeal and we shall demonstrate in a moment. But the point we have made in this decision is the patent impracticality on the part of the Plaintiff to serve the writ, had he ever sought to do so, given the confusing state of his own evidence. For us, that was the key point and not the effect of failing to serve the writ.

We shall however state that for two key considerations, it does not appear to us right to state that failure to serve the head of family with a writ of summons in a suit filed by a

member renders a judgment or proceedings in the suit a nullity. First, the provisions under Order 9 rule 4 particularly sub-rules (2)-(5) read as whole and considered purposively, do not give that indication. To ease reference, the provisions are as follows:

> *"(2) The head of family in accordance with customary law may sue and be sued on behalf of or as representing the family.*
>
> *(3) If for any good reason the head of family is unable to act or if the head of family refuses or fails to protect the interest of the family any member of the family may subject to this rule sue on behalf of the family.*
>
> *(4) Where any member of the family sues under subrule (3) a copy of the writ shall be served on the head of family.*
>
> *(5) A head of family served under subrule (4) may within three days of service of the writ apply to the court to object to the writ or to be substituted as plaintiff or be joined as plaintiff."*

It will be seen that the rules allow the member to commence the action first before serving the head of family with writ. This means prior consent is not necessary and the requirement of service comes after the issuance of the writ. The rules then create a discretion in the head of family who has been served to take one of three steps; apply to object, to be substituted or to be joined. The *raizon d'etre* of the rule is to allow the head of family assert his position as the prime and ultimate representative of the family in terms of sub-rule (2). He may decide not to exercise any of the three options under sub-rule (5). If he decides not to, the action will not be defeated. And noticeably, of the three options that may be exercised, apart from the application to object which may lead to the

termination of the action, the remaining two, i.e., the substitution and the joinder sustain the action. The makers of the rule therefore did not intend to make the non-service of the writ on the head of family result in a nullity. They would have specifically provided for that consequence if that was their intention. Thus, although the requirement to serve the writ on the head of family under sub-rule (4) is expressed in mandatory terms ("*shall"* is used), a purposive interpretation of the rules as a whole does not lead to treating the default generally as resulting in a nullity. We are of the view that failure to serve the head of family must be treated as an irregularity to be dealt with under the rules on non-compliance pursuant to Order 81 of C.I 47. Under Order 81 rule 2, the other party may bring an application to set aside the proceedings either wholly or in part and the court may deal with the matter as appropriate for non-compliance. The provisions are these:

> *"(2) The Court may, on the ground that there has been such a failure as stated in subrule (1), and on such terms as to costs or otherwise as it considers just (a) set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein; or (b) exercise its powers under these Rules to allow such amendments to be made and to make such order dealing with the proceedings generally as it considers just."*

We believe resorting to these provisions is a better way of dealing with a default under subrule (4) instead of treating the default as resulting in a nullity.

The second consideration is based on the provisions in Order 4 rule 5, which, whilst providing that no proceedings shall be defeated by reason of misjoinder or non-joinder, allow the court, at any stage of the proceedings to make or unmake any person a party to the proceedings. In our considered view, even where a member who sued failed to serve the head of family with the writ, the court still has power, pursuant to Order 4 rule 5

subrule (2) to order the joinder of the head of family to the action as a necessary party without the action or proceedings being defeated in terms of the rules. The provisions are:

> *"(2) At any stage of proceedings the Court may on such terms as it thinks just either of its own motion or on application (a) order any person who has been improperly or unnecessarily made a party or who for any reason is no longer a party or a necessary party to cease to be a party; (b) order any person who ought to have been joined as party or whose presence before the Court is necessary that all matters in dispute in the proceedings are effectively and completely determined and adjudicated upon to be added a party."*

This position of ours however does not help the fortunes of the Plaintiff's case. Even if we were to excuse the grave hitch about the headship of his family and consider him as a member, by reason of our finding that the very identity of the family he sought to sue for is also unascertained, it would be impracticable for any amendment to be made to remedy the default assuming he made an application for it or the court had sought on its own motion to amend the capacity.

In the final analysis, we allow the appeal on ground (i) for which reason we decline to consider the second ground of appeal. We set aside the judgment of the Court of Appeal dated 20th July 2022 in its entirety and restore the judgment of the trial court dated 30th April 2018.

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

(SGD.) **A. LOVELACE – JOHNSON (MS.)**
(JUSTICE OF THE SUPREME COURT)

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

(SGD.) **S. K. A. ASIEDU**
(JUSTICE OF THE SUPREME COURT)

(SGD.) **E. Y. GAEWU**
(JUSTICE OF THE SUPREME COURT)

COUNSEL

MARCUS AMOS TABIL ESQ. FOR PLAINTIFF/APPELLANT/RESPONDENT

RAPHAEL ALIJINA ESQ. WITH LAMBERT LUGULIAH ESQ. FOR DEFENDANT/ RESPONDENT / APPELLANT