

IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – AD 2025

CORAM: SACEY TORKORNOO (MRS.) CJ (PRESIDING)

LOVELACE – JOHNSON (MS.) JSC

ASIEDU JSC

DARKO ASARE JSC

ADJEI-FRIMPONG JSC

2ND APRIL, 2025

CIVIL APPEAL

J4/63/2023

NUMO ALFRED QUAYE

...

**PLAINTIFF/RESPONDENT/
APPELLANT/CROSS RESPONDENT**

VRS

1. LEMUEL MARTEY QUARSHIE ...

DEFENDANTS/APPELLANTS/

2. LETICIA NARKOUR NARTEY

RESPONDENTS/ CROSS APPELLANTS

J U D G M E N T

ADJEI-FRIMPONG, JSC:

My Lords, for the second time in a few months, this Court is being called upon to pronounce on the ownership of the land, subject matter of this suit. The earlier decision was delivered on 18th December 2024 in the suit intituled NUMO ALFRED QUAYE VRS

EDUSEI POKU, Suit No. J4/15/2022. On account of the apparent legal implications the earlier decision bears upon this, we desire to recount what transpired therein in some detail. Henceforth the earlier case will be referred to as the “EDUSEI POKU’S CASE.

The Plaintiff therein Numo Alfred Quaye who is the same Plaintiff/Respondent/Appellant/Cross-Respondent here (herein ‘Plaintiff’) commenced that suit in the High Court against a certain Lawyer Edusei Poku who died in the course of those proceedings. He was substituted for by his wife Veronica who pursued the matter up to this Court. The claim the Plaintiff made which was not any different from what obtains here was that, the land in dispute belonged to his Ayiku Gberbie Family of Prampram. He alleged that the Defendant Edusei Poku had trespassed onto a portion of the land measuring 5.66 acres for which he sought the following reliefs against him:

- A. *“A declaration of title to all that piece or parcel of land situate, lying and being at Afienya, Mataheko in the Greater Accra Region of the Republic of Ghana and bounded on the south-east by Tema-Ho motor road, measuring 10,717.7 feet more or less, on the south-west by 9,725.1 feet more or less, on the north by a distance of 551.6 feet more or less, on the north-east by a distance of 3,439.4 feet more or less, on the north-west by the lessor’s property measuring 3,058.9 feet more or less, on the north-east by the lessor’s property measuring 2,107.8 feet more or less and contained approximate area of 1,112.09 acres or 450.0 hectares more or less.*
- B. *Damages for trespass.*
- C. *An order for the recovery of vacant possession of the portion of the land measuring 5.66 acres trespassed onto by the Defendant.*

D. Perpetual injunction to restrain the defendant by himself, agents, workmen and all claiming through him from interfering with plaintiff's ownership, possession and/or enjoyment of the land.

E. Any other reliefs found due."

The Defendant resisted the Plaintiff's claim stating that he lawfully acquired his 5.8-acre land from the Prampram Paramount Stool then occupied by Nene Larbi Agbo III, who acted with the consent and concurrence of the principal elders of the stool. He counterclaimed against the Plaintiff for declaration of title to his said land, recovery of possession, damages for trespass and perpetual injunction.

In the High Court, the Defendant succeeded. The learned trial Judge made interesting findings and conclusions including those touching on the Plaintiff's capacity and time bar. On both issues, the learned Judge was not satisfied that the Plaintiff discharged the burden he had assumed on the pleadings. What was remarkable of the time bar finding was that the Defendant did not plead limitation, nonetheless, the learned trial Judge found evidence on record to rule that the action was statute-barred. It dismissed the Plaintiff's claim and entered judgment for the Defendant on the counterclaim.

The Court of Appeal reversed the trial Judge's decision on the grounds including the fact that not only did the trial Judge err in raising limitation *suo motu* but also that the evidence did not support the finding. The learned Justices set aside the judgment of the trial court, entered judgment for the Plaintiff on his claim and dismissed the Defendant's counterclaim.

On further appeal, this Court coram Pwamang JSC (presiding) Kulendi, Gaewu, Darko Asare and Adjei-Frimpong JJSC, affirmed the decision of the Court of Appeal. The effect of the affirmation is no doubt that the Plaintiff's Ayiku Gberbie Family was decreed as owners of the Mataheko land. In law this judgment is subsisting. We shall rest the EDUSEI POKU's case for now and come back to it as and when necessary.

In the instant action, the Plaintiff, representing his Ayiku Gberbie family sued the Defendants, a son and mother for the declaration of title to the same land he claimed in the EDUSEI POKU's case. Specifically, the reliefs he sought by his latest amended writ and amended statement of claim were:

- a. *"Declaration of title to all that land described as land situate, lying and being at Prampram bounded on the South/East by Tema-Ho motor road, measuring 10,717.7 feet more or less, on the South/West by Lessor's property measuring 9,725.1 feet more or less, on the North/West by the Lessor's property measuring 3,420.7 feet more or less on the North by Lessor's Property measuring 551.6 feet more or less, on the North-East by Lessor's Property measuring 2017.8 feet or less and containing an approximate area of 1,112.09 acres or 450.0 Hectares more or less and more particularly delineated on the plan attached and thereon edged pink.*
- b. *Declaration that the land covered by schedule III above belongs to the Plaintiff's family as part of the generality of the Plaintiff's family land and that the Defendants are trespassers onto the Plaintiff's family land.*
- c. *Recovery of possession of the land described under schedule III herein.*
- d. *Damages for trespass.*

e. Perpetual injunction restraining the Defendants, their assigns, servants, agents and all person(s) claiming any interest through Defendants.

f. Costs including Solicitors charges."

As has always been his case, the Plaintiff claims the land as the property of his Ayiku Gberbie Family. The root of title of his family founded on traditional evidence is traced to the period of the Kantamanto war around 1826 when their forebear Lartey Gberbie alias Agbokpanya settled at Mataheko Afienea. He was said to be a fetish priest, herbalist, hunter and farmer who after the war treated wounded warriors. He was the one who named the place Mataheko. The land has since devolved on the family who are now the allodial owners.

It was further the Plaintiff's case that it was his family that in 1974 granted a portion of the land to a certain TEE TEYE Farms, an entity owned by the 2nd Defendant's brother by name Samuel Tetteh Nartey (deceased). The grant was made for farming purposes only. In his lifetime, he atoned tenant to the family and paid customary rent to it. Upon his death his successor Nathaniel Nartey successfully prayed to the family for waiver of contractual obligations on the land. The family of the deceased continued to live on the land managing the remnants of the produce of the farm. In recent times however, the Defendants have encroached upon portions of the land granted to TEE TEYE FARMS and beyond, purporting to divest portions to unsuspecting purchasers.

The Defendants deny the ownership of the Plaintiff's family over the land. By their statement of defence which was amended several times, the latest dated 21st July 2014, they plead their claim to the land in the following paragraphs:

“7. The Defendants say further to paragraph 5 of the Amended Statement of Claim that the name Mataheko was given to the area by some settlers from Ada who settled there on the authority of the Prampram Stool.

8. The Defendants say in further answer to paragraph 5 of the Amended Statement of Claim that the Plaintiff’s family are not the allodial title holders of the Afienya lands.

9. The Defendants aver in further answer to paragraph 5 of the Amended Statement of Claim that more than 40 years ago, the 2nd Defendant, in the company of her brothers; Teye Nartey and Samuel Tetteh Nartey (deceased), presented drinks to Nene Anokwe, the then Chief of Prampram to seek his permission as the jurisdictional traditional chief and head of Prampram people to settle and farm on some portions of the Defendants’ family land as was the custom.

10. Further to paragraph 5 of the Amended Statement of Claim, the Defendants aver that the said Nene Afutu directed the 2nd Defendant and her brothers to the then Afienya Chief, Nene Afutu Nartey, who showed the 2nd Defendant and her brothers, Olowe Clan Family lands situate at Afiedenyigba-Afienya and its environs.

11. Further to paragraph 5 of the Amended Statement of Claim, the Defendants state that portions of Afiedenyigba-Afienya lands belong to Olowe Clan where their great grandfathers owned by way of settlement.

12. Further to paragraph 5 of the Amended Statement of Claim, the Defendants aver that as was the practice and custom in the days, a member of a family who wished to occupy the family land, farmed on the vacant family land to the extent that his strength of work will permit such family member.

13. Further to Paragraph 5 of the Amended Statement of Claim, the Defendants aver that the 2nd Defendant and her brothers settled on the said parcel of land where they started farming thereon, on a vacant virgin communal land.

14. The Defendants aver further in answer to paragraph 5 of the Amended Statement of Claim that the 2nd Defendant and her descendants, and her brothers and their descendants have settled, farmed and enjoyed the fruits of the said land all these years without interference, let or hindrance."

Following from the above they plead laches and acquiescence and time bar against the Plaintiff in paragraphs 48 and 49 of the Amended Statement as follows:

"48. The Defendants further aver that Plaintiffs family are estopped by laches and acquiescence from claiming ownership of the 2nd Defendant's land.

49. The Defendants aver that the Plaintiff family is statute barred from bringing this action against Defendants and shall rely on section 10 of the Limitation Act, 1972 (NRCD 54)."

The 1st Defendant alleged that members of the Plaintiff's family have entered upon their land and caused damage to his two-acre maize farm with a bulldozer. He therefore counterclaims against the Plaintiff for the following reliefs:

- a. "One thousand and Four Hundred and Forty Ghana Cedis (GHC1,440.00) being damages for the destruction of two acres of maize belonging to the 1st Defendant by members of the family of the Plaintiff.*

- b. Compensation for the damage caused to the farm of the 1st Defendant.*
- c. Costs on full indemnity basis.*
- d. Any other order(s) that the Honourable Court may deem fit to make.”*

The 2nd Defendant for her part sought the following tall list of reliefs against the Plaintiff:

- a. A declaration of title in favour of the 2nd Defendant of all that piece or parcel of land situated at Afiadenyigba-Afienya in the Greater Accra Region of the Republic of Ghana, and containing an approximate area of 183.08 acres, more or less and bounded on the North East by land measuring 1,554.6 feet more or less on the South East by land measuring 3,405.8 feet more or less and on the South East by land measuring 3,405.8 feet more or less and on the South West by land measuring 3,472.9 feet more or less which piece or parcel of land is more particularly and delineated on the plan and shown edged PINK.*
- b. A declaration that the vesting assent dated 3rd March, 2000 with registration number AR/8410A/2003 and LVB 2937A/04 and made by Numo James Lartey Gberbie the customary successor on behalf of Numo Lartey Gberbie did not vest the 2nd Defendant's lands in the Gberbie Family.*
- c. An order declaring the registration of the vesting assent dated 3rd March, 2000 with Registration number AR/8410A/2003 and LVB 2937A/04 and made by Numo James Lartey Gberbie registered at the Lands Commission, Accra over the 2nd Defendant's land as null and void and of no effect.*
- d. An order directed at the Lands Commission to expunge the registration of the Vesting Assent dated 3rd March 2000 with registration number AR/8410A/2003 and LVB*

2937A/04 and made by Numo James Lartey Gberbie the customary successor on behalf of Numo Lartey Gberbie and all subsequent registrations based on it from its records.

- e. An order directed at the Lands Commission to register all that piece or parcel of land situated at Afiadenyigba-Afienya in the Greater Accra Region of the Republic of Ghana, and containing an approximate area of 183.08 acres, more or less and bounded on the North East by land measuring 1,554.6 feet more or less on the South East by land measuring 3,405.8 feet more or less and on the South East by land measuring 3,405.8 feet more or less and on the South West by land measuring 3,472.9 feet more or less which piece or parcel of land is more particularly and delineated on the plan and shown edged PINK in the name of the 2nd Defendant.*
- f. An order directed at the Plaintiff's family and its members to produce a true and proper account of all monies received from the sale and other disposition of portions of the 2nd Defendant's lands and upon the submission of the said account.*
- g. An order directed at the Plaintiff's family and its members upon submission of the accounts to pay to the Defendants all monies received by them from the sale or other disposition of 2nd Defendant's lands.*
- h. An order for recovery of possession of any portion of the land described in the schedule attached hereto which is in the control, custody or possession of the Plaintiff's family or its members their agents and assigns.*
- i. A perpetual injunction restraining the Plaintiff's family and its members, their agents, assigns and servants from interfering in any way with the Defendants and Defendant's Family use, quiet enjoyment or possession of the lands.*

j. *Damages for trespass against the Plaintiff.*

k. *Costs on full indemnity basis."*

After trial, the High Court gave judgment in favour of the Plaintiff dismissing the Defendants' counterclaims. The Court made certain decisive findings which may be captured in the following outline:

- i. "That the Plaintiff could not prove his capacity as head of his family there being no evidence that the then beleaguered head of family, one Francis Teye Numo Gberbie was removed before the purported installation of the Plaintiff as head. Nonetheless, since the Plaintiff was still a principal member of the family, the writ would be amended to allow the Plaintiff assume capacity to maintain the action;
- ii. That the Plaintiff was able to prove that his family were the allodial owners of the land;
- iii. That even though the Plaintiff's Vesting Assent (Exhibit M) could not properly vest the land in the Plaintiff's family, it nonetheless showed that the Plaintiff's family considered the land as their property and attempted to register the document;
- iv. That Exhibit M was a document in public records and a search would put any buyer on notice of the interest of the Plaintiff's family;
- v. That whilst the Plaintiff could not prove that they granted the land to TEE TEYE FARMS, the Defendants could not also prove that the land was their family land, their evidence on it being inconsistent;

- vi. That the evidence rather showed the Defendants acquired the land from the Prampram Stool whereas there were judicial decisions that showed that Prampram lands are for families; and
- vii. That the Defendants went onto the land for farming and that their presence on the land including their purported allocation of portions to third parties were recent developments. The pleas of limitation and laches and acquiescence could therefore not succeed."

With the exception of the resolution of the capacity question which the Court of Appeal agreed with the trial Court, the learned Justices disagreed largely with and reversed the decision of the trial Court. In the opinion of the learned Justices, once the trial Court made that crucial finding that it was not the Plaintiff's family that granted the land to the Defendants or their TEE TEYE FARMS, the Plaintiff should have lost since the Defendants had been on the land since 1974.

The Learned Justices also found that the Defendants had adduced extensive and cogent evidence of possession spanning a period of over 40 years and that even if the land belonged to the Plaintiff's family, the equitable defences of laches acquiescence would avail the Defendants.

Their Lordships also questioned the failure on the part of the trial Court to resolve the issue of whether the land was situate at Mataheko or Afiadenyigba referring to the JACKSON'S Report (Exhibit P) which captures Afiadenyigba and not Mataheko.

Also questioned by their Lordships were some of the final orders made by the trial Court including that which allowed the Defendants to retain the portion of the land on which

they had their buildings asking the sort of interest that was being created thereby in favour of the Defendants.

Further, the Learned Justices touched on the question of limitation. They expressed the view that the rules of pleadings required that plea of limitation be specifically pleaded before a party can rely on it. They in this case did not find the Defendants plead the defence for which reason they were not entitled to a favourable finding.

We pause here to quickly indicate that, contrary to the position of their Lordships, the defence of limitation as we have set out already, was actually pleaded in paragraph 49 of the Amended Statement of Defence dated 21st July 2014. [Page 154X, Vol 2 ROA]. This error has been raised in the Defendant's cross-appeal in this Court. We shall, by way of rehearing determine whether or not there is evidence to support the plea in favour of the Defendants.

In the final orders of the Court of Appeal, the 1st Defendant's counterclaim was dismissed for the reason that reliefs for compensation could not be granted in the absence of specific evidence as to quantum of loss, it being in the nature of special damages. The learned justices however granted the 2nd Defendant parts of the reliefs in her counterclaim in varied forms.

Appeals in the Supreme Court.

Both sides are aggrieved by the decision of the Court of Appeal. By a Notice of Appeal filed on 14th January 2019, the Plaintiff appealed in this Court on the following grounds:

- (i) *The judgment of the Honourable Justices of the Court of Appeal was against the weight of evidence, in that the court erred in selecting only a portion of the evidence on record to ground its judgment in favour of the Defendants/Appellants.*
- (ii) *The Honourable Justices of the Court of Appeal erred when they dismissed the Defendants-Appellants' appeal ground of limitation (sic), and yet proceeded to evaluate limitation in favour of the Defendants-Appellants, and in the process erred in the determination and effect of the period of limitation.*
- (iii) *The Honourable Justices of the Court of Appeal erred in law in using possession, without more, to favour 2nd Defendant-Appellant's counterclaim. [Page 177-178 Vol. 4 ROA]*

On these grounds, the Plaintiff wants the entire judgment of the Court of Appeal reversed and judgment entered in his favour.

The Defendants on the other hand cross-appealed against aspects of the decision of the court below on the following grounds:

- (i) *The Court of Appeal erred in not holding and or finding that the Plaintiff's case is statute-barred.*

- (ii) *The Court of Appeal erred in law and fact when it dismissed the ground of appeal on the Limitation Act on the ground that the defendants did not specifically plead the defence of the Limitation Act as enjoined by the provisions of Order 11 R 8 of C.I 47.*
- (iii) *The finding that the defence of the Limitation Act 1972 (NRCD 54) was not available to the defendants was against the weight of evidence.*
- (iv) *The Learned Judges of the Court of Appeal erred in dismissing the ground of appeal against the decision of the High Court to suo motu amend the plaintiff's capacity to maintain the suit.*
- (v) *The decision of the Court of Appeal Judges to uphold the decision of the Trial High Court Judge to suo motu amended (sic) the capacity of the plaintiff was wrong in law.*
[Page 179-180 Vol 4 ROA].

The Defendants on these grounds claim the following reliefs in this Court:

- i. *"An order that the Plaintiff's case is not maintainable same being caught by the Limitation Act, 1972 (NRCD 54)*
- ii. *An Order that the Plaintiff's case is not maintainable on grounds of want of capacity."*

Certainly, by our subsisting judgment in the EDUSEI POKU's case, the compass of this appeal has shrunk. The reason is plain. By our decision in the EDUSEI POKU's case the effect of which is a pronouncement of ownership of the Mataheko lands in favour of the Plaintiff's family, we must ordinarily come to the same decision. This is for the sake of consistency in judicial decision making. Properly guided by the well-founded common

law maxim *stare decisis et non quieta movere*, we cannot be heard to pronounce the opposite. We must stand by previous decisions and not disturb settled matters. It must require very good reasons to make a departure. It must appear to us right to do so. This principle is expressly spelt out in the provision in article 129(3) of the 1992 Constitution this way:

“(3) The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so, and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law.”

See FREDERICK NYEMEKYE VRS FKA COMPANY LTD, Suit No. J4/29/2024 judgment dated 23rd October, 2024.

For the foregoing reason, it will be proper to first determine the cross-appeal. The dual grounds of capacity and limitation on which it is based are fundamental and strike at the very substratum of the action. It is axiomatic that capacity goes to the root of every action and when it fails, the entire action collapses. See AMISSAH-ABADOO VRS ABADOO [1974] GLR 110; SAM JONAH VRS DUODU-KUMI [2003-2004]1 SCGLR 50; REPUBLIC VRS HIGH COURT, ACCRA, EX PARTE ARYEETAY (ANKRAH INTERSTED PARTY) [2003-2004]1 SCGLR 398; SARKODIE IV VRS BOATENG II [1982-83] GLR 715.

For the plea of limitation, its success will mean not just that the Plaintiff and his family would be barred from bringing the action, but their right in the land the Defendants occupy would have extinguished. This is clearly provided for in Section 10 of the Limitation Act, 1972 (NRCD 54) particularly in subsection 6. The provisions are:

“10. (1) No action shall be brought to recover any land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to some person through whom he claims, to that person.

(2) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (in this section referred to as “adverse possession”).

(3) Where a right of action to recover land has accrued, and thereafter, before the right of action is barred the land ceases to be in adverse possession, the right of action shall no longer be deemed to accrue until the land is again taken into adverse possession.

(4) For the purpose of this Decree, no person shall be deemed to have been in possession of any land by reason only of having made a formal entry thereon.

(5) For the purpose of this Decree, no continual or other claim upon or near any land shall preserve any right of action to recover the land.

(6) On the expiration of the period fixed by this Decree for any person to bring an action to recover land, the title of that person to the land shall be extinguished.”

Determination of the Cross-Appeal

We shall begin by addressing grounds (iv) and (v) which involve the question of capacity. The issue that emerges for our consideration is whether or not the amendment of the Plaintiff’s capacity by the learned trial judge which was affirmed by the Court of Appeal was proper in law.

The High Court addressed the Plaintiff’s capacity this way:

“The evidence of the Plaintiff’s attorney is that Alfred Afedi Quaye was appointed as the acting head of family but in Exhibit G it is stated that Numo Alfred Afedi Quaye was appointed as substantive head of family. The question is since the Plaintiff’s evidence is that there was a head of family in the person of Francis Teye Numo Gberbie, could the family appoint another head of family without taking the first step of removing that head of family before installing a new head of family? [Page 66 Vol. 3 ROA].

The learned judge proceeded to examine the oral testimonies and available documentary evidence especially Exhibit 2. That was a writ filed by the Plaintiff and an entity called Gberbie Wem Youth Foundation against Francis Teye Numo Gberbie challenging the latter’s headship of the family. He reasoned thus:

“The import of exhibit 2 is that as at 14th March 2014, Francis Teye Numo Gberbie considered himself as the head of the Plaintiff’s family. The Plaintiff having given [sic] evidence that Francis Teye Numo Gberbie was once appointed as head of the Plaintiff’s family and there being no evidence that he has been removed as head of family, I hold that the Plaintiff is not the head of Ayiku Gberbie family.” [Page 68 Vol. 3].

His Lordship then posed the crucial question and answered himself thus:

“Having found that the Plaintiff is not the head of the Ayiku-Gberbie Family, should the suit be dismissed on grounds of capacity? Will the Ayiku Gberbie family be estopped from initiating another action in protection of the family’s land? I think the answer is that the Plaintiff or any member of the family can come to court in a representative capacity to protect the family’s property.”

And relying on such cases as ISLAMIC MISSION VRS GHANA MUSLIMS MISSION [1997-98]2 GLR 953; HANNA ASSI (NO.2) VRS GIHOC REFRIGERATION AND HOUSEHOLD PRODUCTS LTD (NO.2) [2007-2008] SCGLR 16 he decided:

"Since there is documentary evidence that the Plaintiff is a principal member of the Ayiku Gberbie Family, as per Exhibit B which is a declaration by the principal members of the family on 5th May 2010 that Francis Teye Numo Gberbie is the head of family in place of James Lartey Gberbie and Exhibit C dated 29th June 2010, I amend the title of the suit to read as follows: Numo Alfred Quaye suing for and on behalf of Ayiku Gberbie family as a principal member of the said family."

The Learned Justices of the Court of Appeal had little difficulty affirming this decision of the trial Judge. Relying on the case of OBENG VRS ASSEMBLIES OF GOD CHURCH, GHANA [2010] SCGLR 300, they ruled:

"In the instant case, the conduct of the Trial Court was therefore not novel and this court in appropriate cases has the power to do so. Consequently, all the grounds of appeal in respect of the Trial court's order suo motu in amending the Plaintiff's capacity and the consequential amendment therefrom are not maintainable and are hereby dismissed."

Before us, Learned Counsel for the Defendants contends that the decision to amend the Plaintiff's capacity was erroneous. His argument is grounded in the provisions in Order 4 rule 9 subrules 3, 4 and 5 which provide:

"(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.” Counsel’s argument then proceeded this way:

“It is submitted under the special provisions of Order 4 R 9 of the (C.I. 47), it is the head of family who is clothed with capacity to institute action to protect family property but if for any good reason, he is unable to act any member of the family may sue on behalf of the family subject to satisfaction of subrules (4) and (5). That member of the family is mandated under subrule (4) of the Rule 9 to serve a copy of the writ on the head of family. The rule is couched in mandatory terms, it says “where any member of the family sues under subrule (3) a copy of the writ shall be served on the head of family”. It is submitted that failure to serve a copy of the writ on the head of family makes the writ and or subsequent proceedings a nullity and it cannot by any stretch of the imagination give the Plaintiff the capacity he lacked.”

We see the strong force in Counsel’s argument, but we reject it. Reading the provisions in Order 4 rule 9 as a whole, we do not find anything that takes away the power of the Court to amend the capacity of a party in deserving cases to do substantial justice. Unsurprisingly, Counsel did not cite any authority for his proposition and we also find none. Neither do we subscribe to Counsel’s view that failure to serve the writ issued by a member on the head of family results in treating the proceedings as a nullity. This Court has in a recent unanimous decision in *KINGSFORD ODOI CHARWAY VRS MOSES MENSAH KODIA* J4/81/2024 judgment dated 19th March 2025 held that such a default

ought to be treated as an irregularity. The view of the Court which I had the privilege of expressing is contained in the following passage of the judgment:

“For two key considerations, it does not appear to us right to state that failure to serve the head of family with the 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...It will be seen that the rules allow the member to commence the action first before serving the head of family with the 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 with the writ 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) and 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 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... We believe resorting to these

provisions [Order 81 rule 2] is a better way of dealing with a default under subrule (4) instead of treating the default as nullity.

The second consideration is based on the provisions in Order 4 rule 5 which, while providing that no proceedings shall be defeated by reason of misjoinder and 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..."

On authority, the power to amend capacity in deserving cases to do substantial justice sits not only within the confines of the rules of procedure. It is also traceable to the Court's inherent jurisdiction. This was the view taken by Francois J.A. (as he then was) in *MUSSEY VRS DARKO* [1977]1 GLR 147 when the Court of Appeal allowed an amendment to substitute the name of the Plaintiff R. A. Darko in place of an entity called Okofoh Enterprises. The learned Judge had relied on the case of *MERCER ALLOYS CORPORATION & ANOR VRS ROLLS ROYCE LTD.* [1972]1 ALL ER 211. That was a case involving two companies as Plaintiffs, one of which ceased to exist after a merger with another company. The suit itself, on the Defendant's concession resulted in a consent judgment. The Defendant who was unaware of the non-existence of the company subsequently sought to set aside the consent judgment on the grounds that at the material time of its concession the company had ceased to exist. The Plaintiffs responded with an application to amend the capacity by substituting the merger entity for the original Plaintiff company. The English Court of Appeal allowed the amendment. Davies L.J whose opinion Francois J.A applied in *MUSSEY VRS DARKO* delivered himself at page 214 thus:

“There was some discussion whether the court had power to make such an amendment to the proceedings at this stage, that is to say after judgment. The ‘slip’ rule, RSC Ord 20, r 11 was referred to; but for myself, I do not think that that rule is apt to cover the present case. There was also reference to RSC Ord 15, rr6 and 7; I think it may very well be that those rules would enable the court to make the suggested amendment. Apart from those rules, fundamentally, in my view, the power to make such an amendment rests in the inherent jurisdiction of the court to make such amendments as are necessary to meet the justice of the case.” (Emphasis added) See also GHANA PORTS AND HARBOURS AUTHORITY VRS ISSOUFOU [1991]1 GLR 500; OBENG VRS ASSEMBLIES OF GOD (supra). We are willing to follow these decisions in their main lines to meet the justice of the case.

For the foregoing reasons, we think the decision of the learned trial Judge to amend the capacity of the Plaintiff which was affirmed by the learned Justices of the Court of Appeal is supportable in law. We shall therefore dismiss the grounds (iv) and (v) of the cross-appeal.

We shall now come to question of limitation as contained in grounds (i) (ii) and (iii) of the cross-appeal.

Summary of the Parties’ Arguments on the plea of Limitation.

The Defendants attack the decision of the Court of Appeal on two phases. The first is on the view of Court of Appeal that the rules of pleadings under Order 11 rule 8 of the High Court (Civil Procedure) Rules (C.I. 47) require that limitation be specifically pleaded before a court could make a finding of it. It is here argued that even in the absence of a

specific plea of limitation, a court could make a finding of it if there was obvious evidence on record in support of the finding. SASU VRS AMUA SEKYI [2003-2004]2 SCGLR 742 cited.

The second is on the apparent erroneous position of the Court of Appeal that there was no pleading of limitation. It is pointed out and rightly so that there was a plea of limitation. It is argued that not only was there a specific plea of limitation, there was also sufficient evidence to support the plea. Reference was made to several portions of the evidence adduced by the Defendants to support the contention.

The Plaintiff's position on the limitation question is captured in his argument under his second ground of appeal which was that; *The Honourable Justices of the Court of Appeal erred when they dismissed the Defendants-Appellants' appeal ground of limitation (sic), and yet proceeded to evaluate limitation in favour of the Defendants-Appellants, and in the process erred in the determination and effect of the period of limitation*".

Whereas the Plaintiff agrees with the Court of Appeal's stance that the rules of pleadings required a specific plea of limitation before a finding could be made, he finds error in the Court proceeding to evaluate the evidence to reach the conclusion that the Plaintiff was caught by the defence of laches and acquiescence. This is how Counsel for the Plaintiff expressed the position:

"Therefore, my Lords, there is no gainsaying the fact that by dismissing the defendants appeal grounds of limitation, the Court of Appeal respectfully had no basis in law to invariably accept the equitable defences of laches and acquiescence in favour of the defendants as these equitable defences are anchored on the defence of limitation. It is unjustified, fundamentally wrong and legally unacceptable for the defendants to rely on

them when the bedrock of limitation had failed by not being specifically pleaded.” The case cited in support of this argument is this Court’s decision in AMIDU ALHASSAN AMIDU & ANOR VRS MUTIU ALAWIYE & 6 ORS, Civil Appeal No. J4/54/2018 dated 24th July 2019.

We must confess our difficulty in coming to terms with the contention of Plaintiff’s Counsel. We are not aware of any law which says that when limitation fails for lack of pleading, a court cannot proceed to find laches and acquiescence where same was specifically pleaded and there was evidence to prove it.

We are not in any doubt that limitation, and laches and acquiescence, are bedfellows. Surely, there is a thin line between them. They both seek to proscribe the bringing of long and dormant claims. They share the conclusive effect of promoting justice through the prevention of claims that have been allowed to slumber until evidence is lost, memories were faded and perhaps witnesses have disappeared. Both epitomize the maxim *vigilantibus, non dormientibus, jura subveniunt*. They however differ in their approach apart from one being statutory and the other equitable. One draws a specific and definite timeline, the other leaves it open and subjects it to equitable principles. Laches and acquiescence may be applied to prevent a party from bringing an action even if the limitation period had not expired. In the words of Dotse J.A. (as he then was) in the unreported case of TSURU III VRS OBODAI & ORS, Suit No. H1/228/04:

“It is important to note that the common law and equity evolved the principles of laches and acquiescence. It operates to protect the innocent or to sanction the non-vigilant or indolent party to a suit. However, since 1972 Ghana has passed or enacted Limitation Decree, NRCD 54. The general effect of the principles of laches and acquiescence and the Limitation Decree is to limit the time within which action ought to be taken by a party to

vindicate or enforce his legal rights by civil action. Whereas the courts applying the principles of laches and acquiescence exercise discretion in the circumstances to fix or bar action for undue delay, NRCD 54 fixes a definite time bar.”

Reading the decision of the Court of Appeal, the learned Justices clearly held that limitation failed because it did not pass the test of pleadings. Their Lordships however found evidence to establish laches and acquiescence and made the finding in favour of the Defendants. The following is how they delivered themselves after reproducing the provisions in Section 10(1) and (2) of NRCD 54:

“These provisions presuppose that a party who seeks to rely on statute of limitation as defence in an action to recover land must prove that he had been in adverse possession of the land, subject matter of the action and that such possession has been continuous for more than twelve (12) years to the knowledge of the true owner. See the cases of MMRA VS, DONKOR [1992-93] part 4 GBR 1632 and the Unreported judgment of the Supreme Court dated 29/6/2016 in Civil Appeal No. J4/4/2016 in the case of MRS VIVIAN AKU-BROWN DANQUAH VS. SAMUEL LANQUAYE ODARTEY. Under the provisions in Order 11 Rule 8 of the High Court (Civil Procedure) Rules the defence of limitation provision is one which ought to be specifically pleaded. We have examined the amended statement of defence and counterclaim filed by the Defendants on 26/11/2012. Nowhere in the entire 33 paragraphed pleadings did the Defendants specifically plead the defence of the limitation provisions as they are enjoined to do by the provisions of Order 11 Rule 8 of C.I. 47. They are therefore estopped from raising it for the first time in this appeal.”

Their Lordships then turned to the defence of laches and acquiescence thus:

*“Having said that however, with respect to the equitable defence of laches and acquiescence, it was the Trial Court which in its judgment made references on to the duration and exercise of possessory rights by the Defendants and concluded that the Defendants defence cannot be anchored on long interrupted possession because physical developments by the Defendants and their grantors is less than twelve (12) years when undisputed evidence on record is that the Defendants had been in possession for nearly forty (40) years...However, the Trial Court reduced the period of possession to twelve (12) years even where the evidence on record including the evidence of Plaintiff’s own PW2 manifestly shows that the 2nd Defendant had been disposing portions of the land to third parties during the lifetime of the husband of PW2 who was the brother of the 2nd Defendant. **While we dismiss the grounds of appeal which give rise to the determination of the issue of limitation for the reasons aforesaid, we uphold the leg of the Appellants’ submissions on the Defendants reliance on the equitable defences of laches and acquiescence even if the land in dispute belonged to the Plaintiff’s family which the Defendants have denied and have demonstrated so by the evidence.”***

The Learned Justices were demonstrably drawing a clear line between a failed plea of limitation (albeit erroneously) and a successful plea and proof of laches and acquiescence which in our considered opinion they could do. We are in doubt of the soundness of learned Counsel’s argument. The AMIDI ALHASSAN AMIDU case which Counsel so strongly relied on is no authority for the novel principle he sought to espouse. Nowhere did the Court say in that case that there could be no finding of laches and acquiescence because limitation had failed. All the court sought to emphasize was that laches and acquiescence like limitation, were required to be particularly pleaded. Consequently, noted the Court, a pleading in the case that the 4th, 5th, 6th and 7th defendants were on the land as tenants of the 1st Defendant who were the owners of the land did not amount to

relying on adverse possession over a stated period to defeat the Plaintiff's claim on grounds of estoppel by acquiescence or laches or the statute of limitation.

On our analysis of the law and the facts, we hold that the Court of Appeal was right on the issue of laches and acquiescence as same grounded its decision.

Let us finally state for this argument that, granted there was any merit in Counsel's contention, by virtue of our discovery in this case that contrary to the Court of Appeal's observation, the defence of limitation was actually pleaded, Counsel's contention founded on the supposed absence of the limitation stands completely debunked.

Proof of limitation

The 2nd Defendant testified to the first ever challenge they encountered with the Plaintiff's family on the land as follows:

"Q: Can you tell the court the circumstances that led to why they brought you to this Court?"

A: On one occasion, we cultivated maize and I heard the sound of a machine working and I saw plenty people with a machine grading our maize farm. We couldn't do anything so we reported to the police and the police asked them to stop. They promised that they would stop but they did not stop. We went back to the police. The police went with the 1st Defendant to arrest those working. It was at the police station that they introduced themselves as Gherbie Family. At the police station one of them called Moses said he

was the youth leader and that he ordered that the maize be raised down and the court ordered him to stop. They were found guilty at the court. In that court, they said they were bringing us to the High Court.” [Page 230, Vol 2 ROA]

The 2nd Defendant vehemently denied that they went to the land upon the grant of the Plaintiff’s family narrating their inception upon the land as follows:

“A: *In those days, if one wants to settle on particular piece of land within a particular traditional area, drinks must be sent to the chief of the area for security reasons. When we went to the Buburam that is Prampram Chief and he directed us to the Afienya Chief. So, when we went to the Afienya chief he asked us where we came from and our families because if one wants land he goes to the chief, the chief will show you your family land. They [sic] chief gave us people to go and show us the Olowe family land so they showed us the Olowe family land. It was vast and they said we could farm as much as we could.” [Page 231 Vol. 2]*

To indicate the point in time when they assumed possession and started working on the land, the 2nd Defendant who said she was illiterate answered under cross-examination:

“Q: *When did you start farming on this land?*

A: *I was on this land before General I.K Acheampong staged the coup d’etat and also before the change in driving from left to right.” [Page 258 Vol. 2]*

She repeated the same position later under cross-examination thus; *"I have not put it in my mind when I started farming but I stated that I started before the change from left to right."* [Page 263 Vol. 2]

To a question which appears to have come from her Counsel's own calculation of the period, she stated:

"Q: Since you have been on the land for about 40 years, did anybody challenge your being on the land?"

A: No one has ever challenged me on the land because I have never seen anybody."
[Page 240 Vol 2].

She also denied ever performing any obligations to the Plaintiffs for their occupation and use of the land.

On their activities on the land, the 2nd Defendant said:

"Q: Can you tell the court what you have done on the land?"

A: I farm in the valley within the land where I had constructed three dams, reared cattle and have given portions to some of my family members.

Q: The land that you have given to family, what did they use it for?"

A: They built houses on it, some to churches including Methodist Church.

Q: *The land you are talking about, how many acres is it?*

A: *183 cares was the land."* [Page 233 Vol 2]

She later added:

"Q: *Who were the other people who farmed with you on the land?*

A: *At that time, I was farming on the land with my sister's children, my brother's children and my siblings. I also more or less hired labourers."* [Page 258 Vol 2]

To further show the extent of her farming activities on the land the 2nd Defendant tendered Exhibits 4 and 5. These were awards she won as best farmer on two occasions. Exhibit 5 is the Best Rice Farmer Award for the Dangme West District for the 2005 2^{1st} National Farmers Day Celebration. She received the same award in 2006 by Exhibit 4. [Page 462-463 Vol 3]

In all this, the record does not bear denial from the Plaintiff, of the salient facts that the 2nd Defendant and her people had been in possession since the 1970's and that she had made grants to third parties. Indeed, when opportuned to deny Defendant's long presence on the land, the Plaintiff's attorney could only afford the following answers:

"Q: *They are saying that the 2nd Defendant with her brother called Teye Nartey, they own the land.*

A: *It is not true.*

Q: *This Teye Nartey, has he ever approached you?*

A: *I have not seen him personally*

Q: *The Defendants are saying that they have ever lived on this land and gave birth to their children there?*

A: *If he lived on the land and gave birth to children does not mean that he owns the land."* [Page 149 Vol 2]

XXXXX

Q: *Do you know what time they came to the land?*

A: *I don't know the time they came to live on the Mataheko land but something happened and we reported to the Afiencya Police and then she said she had lived on the land for thirty years. The Police said if that was Prampram custom, then he will also find some land and live on it for thirty years."*

Like her mother, the 1st Defendant also narrated their physical presence and activities on the land in his own evidence thus:

"A: *The land itself is more or less twofold; upper part and the lower part. The upper part is the residential area and the lower part is the farming area. At the lower part which is the farming area, there is a big dam for irrigation which depicts that the area is a mechanized farming area. We also have two fishponds on the land. We also have two farmhouses on the land. We have two cattle ranges [sic] on the land. We cultivate various farm produce on the land apart from rice. We have dilapidated*

farming tools on the farm which we no longer use but they are still on the land. At the residential area too, we have allocated some portions of the land to artisans like mechanics and various churches.” [Page Vol. 3]

He stated that his farming activities on the land and others elsewhere together contributed to his emergence as the National Best Farmer of the 28th National Farmers Day (2012) the Certificate of Merit of which he tendered as Exhibit 8. Also tendered were pictures of the cattle ranch he had on the land (Exhibits 9 and 10).

He also narrated the first time the Plaintiff’s family ever confronted them on the land thus:

“In the year 2011, early morning we heard the sound of a machine in the farm. When we approached where the sound was coming from, we saw about 30 people with a bulldozer destroying our two-acre maize farm so when we saw the scene, we immediately left to the Police Station to make a report. The police invited the Plaintiffs’ family and we all met at the Police Station. At the Police Station, one of the Plaintiff’s family members introduced himself as the youth leader by name Moses Awuley Gberbie.

XXXXX

Moses A. Gberbie also said that where they had graded, if the Defendants will not allow them to possess it, then they will take the entire from the Defendants. Later on, the Police took us and Moses Awuley Gberbie to a court at Dodowa and the title was Republic Vs Moses Awuley Gberbie...” (See Exhibits 6 and BB).

Finally, he explained the period they had occupied the land without any challenge thus:

“Q: How long have you the 1st Defendant farmed on the land.

A: We were actually born into the farming and when I became of age and started farming myself, it is over 17 years now.

Q: In all your 17 years of farming on this land, has anybody approached you or your mother over this land?

A: No

Q: You have also told this court that you have given portions of this land to some people including family members?

A: Yes

Q: Can you tell this court some of the family members you gave the land to?

A: My mother has given a portion of this land to her brother Samuel Tetteh Nartey on which he has built and put his children in. [Page 278 Vol.2]

The above testimonies of the Defendants were largely supported by the three witnesses they called. DW1 who said he went to show the Defendants the land indicated that he did so some forty years ago. DW2 and DW3 were grantees to the Defendants the latter attesting the grant of a portion to the Mount Zion Society of the Methodist Church.

In our evaluation, the mass of evidence both oral and documentary adduced by the Defendants amply supports a finding that their possession of the land not being derivative from the Plaintiff's family, had been long, open and notorious such as to engender the latter's assertion of their right of ownership. There being no such challenge to what appears as overwhelming evidence of adverse possession and for what we are inclined to believe, for a period of some forty years, this action commenced on 4th April 2012 is caught up by the statute of limitation as pleaded.

The sheet anchor of the Plaintiff's case on this issue was the account of PW3 (originally PW2) Victoria Akweley Odonkor which was rejected by the two lower courts. The culmination of PW3's evidence was that her late husband Samuel Tetteh Nartey who owned the company TEE TEYE FARMS was the one who took a grant of the land from the Plaintiff's family. She said in the lifetime of her husband they used to present farm produce to the Plaintiff's family on festive occasions as a form of acknowledgment of the grant from them.

The learned trial judge analyzed the evidence together with other testimonies of the Plaintiff's witnesses and found material contradictions leading to his conclusion that the land was not acquired from the Plaintiff's family. The learned justices of the Court of Appeal agreed. At first blush, the account of PW3 seemed to us as credible. Upon our re-evaluation, we find that her testimony was not entirely credible and that the finding of the two lower courts were supportable. For instance, PW3 it was, who named one of those she and her husband presented farm produce to, to acknowledge their ownership of the family as PW1 Joseph Moses Nee Tetteh. When it got to PW1 his answer was:

"Q: But were you ever present at such presentation?"

A: *No, I have never been present to receive these items but I was told anytime they presented the items, it was sent to the chief fetish priest and the head of family."*

We are inclined to affirm the finding of the trial court as affirmed by the Court of Appeal that it was not the Plaintiff's family that granted the land to the Defendants. We also hold that the land no doubt was allodially owned by the Plaintiff's family as this Court held in the EDUSEI POKU's case. Nonetheless, the action is caught by limitation with the effect that the right of the family over that portion measuring 183.8 acres is extinguished by operation of law. Although, the title of the Defendants would be bad, their successful plea of limitation sanctifies it. This is aside the holding of the Court of Appeal on the plea of laches and acquiescence as we have already found supportable.

The law appears settled that the cumulative effect of the Subsection 10 (1) which bars action after twelve years and Subsection 10 (6) which extinguishes the title of the lawful owner of land was the creation of a specie of interest in favour of the party who successfully invokes those provisions of the Limitation Act (NRCD 54). See KLU VRS KOFI KONADU APRAKU [2009] SCGLR 741; GIHOC REFRIGERATION & HOUSEHOLD PRODUCTS LTD (N0.1) VRS HANNA ASSI (NO.1) [2007-2008] SCGLR 1; ARMAH MMAI BOI & ORS VRS ADJETEY ADJEI & ORS Suit No. J4/8/2013 Judgment dated 19th March, 2014.

In our final analysis grounds (i) (ii) and (iii) of the Defendants' Cross Appeal succeed and the Plaintiff's appeal fails in its entirety. We affirm the judgment of the Court of Appeal dated 28th November 2018.

(SGD.)

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

(SGD.)

**G. SACKY TORKORNOO (MRS.)
(CHIEF JUSTICE)**

(SGD.)

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

(SGD.)

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

CONCURRING OPINION

LOVELACE – JOHNSON JSC:

The designation of the parties at the High Court will be maintained in this appeal. Judgment in this matter was entered in favour of the plaintiff by the High Court and the defendant's counterclaims dismissed. Upon an appeal to the Court of Appeal, the said judgment was set aside and the counterclaim of the 2nd defendant granted with some variation.

Both parties have appealed to this Court.

The fourth (iv) and fifth (v) grounds of appeal in the defendants' notice of cross appeal state as follows:

- (iv) *The Learned Judges of the Court of Appeal erred in dismissing the ground of appeal against the decision of the High Court Judge to suo motu amend the plaintiff's capacity to maintain the suit"*
- (v) *"The decision of the Court of Appeal judges to uphold the decision of the trial High Court judge to suo motu amend the capacity of the plaintiff was wrong in law"*

These two grounds question the capacity of the plaintiff to bring the present action. It being trite that capacity goes to the root of an action and that a lack of capacity cannot be cured by even the most iron caste case on the merits, it is proper that the issue be dealt with in the preliminary. See the case of **SARKODEE 1 VRS BOATENG 11 [1982-83] 1 GLR 715**

What did the Court of Appeal state regarding the issue of the plaintiff's capacity and the trial court's act of amending same? After referring to the case of **Nyamekye vs Ansah [1989-90] 2 GLR @163** and stating that the case of **Obeng vs Assemblies of God Church, Ghana [2010] SCGLR 300@ 323-324** was judicial support for the trial court's approach, the Court of Appeal concluded at page 143 of volume 4 of the Record of Appeal (ROA) as follows:

"In the instant case, the conduct of the Trial Court was therefore not novel and this court in appropriate cases has the power to do so. Consequently, all the grounds of appeal in respect of the Trial Court's order suo motu in amending the Plaintiff's capacity and the consequential amendments therefrom are not maintainable and are hereby dismissed."

What exactly did the trial court do, which in the opinion of the Court of Appeal was sanctioned by the **Obeng vs Assemblies of God Church** case supra?

After making a finding that the plaintiff was not the head of the Ayiku Gberbie family, the High court proceeded to amend the title of the suit and paragraph 1 of the statement of claim to describe him as a principal member of that family. The learned trial Judge based his authority to do so on the following cases;

In Re Ashalley Botwe Lands; Adjete Agbosu & Ors vs. Kotey & Ors. [2003-2004] SCGLR 420

Islamic Mission vs. Ghana Muslims Mission (1997-98] 2 GLR 593

Hanna Assi (No.2) vs. Gihoc Refrigeration and Household Products Ltd (No.2) [2007-2008] SCGLR 16

The question to be answered is whether these reasons are indeed supported by the position of the law on such an amendment, which amendment was also upheld by the Court of Appeal.

An examination of the reasons for upholding the capacity to sue of the 6th plaintiff appellant in the **Ashalley Botwe** case, even if he was NOT the head of family (and the court held that the self-serving statutory declaration to that effect, not having been challenged in re that issue and the defendants not having produced evidence in rebuttal was sufficient proof that he indeed was), was that, under the rule of necessity, (which

was considered an acceptable exception in the **Kwan vs. Nyieni case**) he could be treated as such.

In the **Islamic Mission vs. Ghana Muslims Mission** case the plaintiffs had sued one S. K. Boafo per the defendant mission instead of it being per their trustees. The court allowed the amendment of the title of the case to avoid multiplicity of suits and to do substantial justice even though by law, it was the trustees who should have been sued. The court also stated that since it was the plaintiffs who wrongly described the defendants, they could not be allowed to take advantage of their own error of putting the wrong party down as defendants.

This was a Court of Appeal judgment on a writ issued under the High Court (Civil Procedure) Rules, 1954 (LN 140A). The relevant provisions regarding litigation on behalf of stools are presently as prescribed in the High Court (Civil Procedures) Rules, 2004 C. I. 47 and it is those that are applicable in this matter.

The writ in the **Hanna Assi (No.2)** case was issued under LN 140A the applicable rules at the time. This court stated, as it has stated in many other cases, that as much as possible, pleadings should not disable the doing of substantial justice and that the power of amendment particularly aids and abets such an objective. The court made reference to Order 28 r 12 of LN140 which stated as follows:

“The court or judge may at any time, and on such terms as to costs or otherwise as the Court or Judge may think just, amend any defect or error in any proceedings and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.”

It is also worthy of note that the court also stated as follows at page 22 of the Law Report:

“However, it is trite learning that certain rules of procedure are fundamental and a breach of them can nullify the proceedings affected by such breach.....Thus though a writ of summons is in a broad sense a matter of pleading, a fundamental defect in instituting proceedings by it can be perilous”

The current rules i.e., Order 16 rule 5(4) of C I 47 provide clear circumstances under which amendments can be made, one of which allows an amendment to alter the capacity of a party only in two situations. It is these provisions which should apply since the writ in this matter was issued under C I 47.

Even where a court is acting suo motu, it must act within the rules.

As stated earlier the Court of Appeal in this matter took the position that the amendment to clothe the plaintiff with capacity to sue found judicial support in the **Obeng vs. Assemblies of God church** case.

This is what this court said in part in that case:

*“In this court, we take the view that since the courts exist to do substantial justice, it would be manifestly unjust to non-suit the plaintiffs because they added “Executive Presbytery” to their name on the writ of summons.... On the facts, once the plaintiff church had been registered as a corporate entity..... the plaintiffs cannot be denied the capacity which they **already** have”. Emphasis mine.*

How can the above-stated be used as justification by the Court of Appeal to uphold the amendment by the High Court suo motu to clothe the plaintiff with capacity in the light of the clear rules of Order 16 rule 5(4)?

Order 2 rule 4(1)(a) of CI 47 requires a writ to be indorsed with the capacity in which a plaintiff sues and where this capacity is a representative one, it must be so stated. Presumably, this was why the plaintiff's amended writ was titled as follows:

"Numo Alfred Quaye

Head of Ayiku Gberbie Family

Suing per his lawful Attorney

Joseph Moses Nee Tetteh

H/No PR/NJ 236 Afienya

Afienya Accra

Vrs.

Lemuel Martei Quashie

Letitia Narkuor Nartey

Afienya-Accra"

He was undoubtedly purporting to sue as head of family.

The amended statement of claim also describes him as head of the Ayiku Gbebie family of Prampram, Accra

Order 16 rule (5) (4) although titled **Amendment of writ or pleading with leave** is worthy of consideration. It states as follows:

*“An amendment to alter the capacity in which a party sues may be allowed.... if the new capacity is one which the party **had at the date of the commencement of the proceedings or has since acquired.** Emphasis mine.*

The amended writ and amended statement of claim can be found at pages 20 and 22 of volume one of the ROA.

The amended writ in this case was issued on 1st June 2012. The applicable law on who sues on behalf of the family is clearly stated as follows in Order 4(9) of CI 47 which was enacted in 2004.

Representation of stools and families

(1)

(2) *The head of a 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 a family is unable to act or if the head of a family refuses or fails to take action 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 sub-rule (3), a copy of the writ shall be served on the head of family.*
- (5) *A head of family served under sub-rule (4) may within three days of service of the writ apply to the court to object to the writ or be substituted as plaintiff or be joined as plaintiff.*
- (6) *.....*
- (7) *An application under sub-rule (5) or (6) shall be made on notice to the parties in the action and shall be supported by an affidavit verifying the identity of the applicant and the grounds on which the applicant relies.*

It is not in dispute that the High Court found as a fact that plaintiff was NOT the head of the Ayiku-Gberbie family. That being so, was the amendment by the High Court clothing him with capacity to sue as head of family, a capacity which he did NOT have at the time he issued the writ and which he NEVER ACQUIRED (since there was a true head of family all the time) sanctioned by the rules i.e., Order 16 rule (5) (4) of C I 47 or within the court's discretion to amend suo motu? Clearly not! As stated earlier, a court's exercise of discretion must be exercised within the rules on the issue at stake.

The case of **Standard Bank Offshore Trust Company Limited etc. vs. National Investment Bank Limited etc.** stated in part as follows per Benin JSC (as he then was)

"It must be emphasized that the capacity to sue must be present before the writ is issued; such authority must appear in the endorsement and/or statement of claim accompanying the writ; it cannot be acquired whilst the case is pending; and an amendment cannot

be sought to introduce it for the first time. A writ that does not meet the requirement of capacity is null and void. Nullity may be raised at any time in the course of the proceedings, even on a second or third appeal....

*This situation is clearly distinguishable from that in **Obeng vs. Assemblies of God**, supra which was relied on by the Respondent. In that case, the plaintiff had sued in its corporate name which was correct but had added the words "Executive Presbytery". It is instructive to note that the amendment **was not what conferred capacity on the plaintiff**. In the **Akrong vs. Bulley** case, supra, the Supreme Court was minded to allow the case to stand if they found something **on the writ and statement of claim** to show that the plaintiff had also sued in her capacity as a dependent, meaning they would not have dismissed the writ if another legal capacity had been disclosed, beside the one which was found to be illegal. In other words, the addition of improper title to a proper one will be cured by an amendment as in the **Obeng vs. Assemblies of God** case, as the writ has already disclosed a valid capacity in law, **But where the amendment is to enable the plaintiff to acquire capacity for the first time, it cannot be granted.** Emphasis mine.*

In the present case, the plaintiff persistently took the position that he was the head of family, the position in which he sued. The court found as a fact that he was not. He told an untruth. That untruth cannot be clothed with the justification or the exception in Order 4 (9) (3) which is reproduced hereunder for emphasis;

*"If for any good reason the head of family is unable to act or if the head of family refuses or fails to take action to protect the interest of the family any member of the family may **subject to this rule sue on behalf of the family**"*

Clearly, there is no evidence on record that the real family head was unable, refused or failed to take action in respect of this case because the plaintiff falsely presented himself as head of family...when he was not!

The courts have stated ad nauseum that in exceptional circumstances an ordinary member could sue to protect family property *without having to prove that a recalcitrant head of family was refusing to do so*. Some of such are where a member has been authorized by family members to sue or there is a necessity to sue. It is also understood that there may be certain other situations when an ordinary member may by pass the head of the family to sue. **That is not the situation here! The plaintiff claimed to be a head of family, when he was not! He made a false claim. There is no recalcitrant head of family, there is no authority from other members of family and there is no evidence of a necessity to sue. To put it bluntly, he told an untruth.** He had no capacity to sue, right from the start, he does not fall into the exceptions listed in **Kwan vs. Nyieni [1959] GLR at 67** by any stretch of the imagination and this court should not condone his untruths.

Furthermore, even if the plaintiff was covered by order 4 rule (9) (3) supra, (and he is not so covered) this action will fail because he failed to satisfy sub-rule 4. This states that:

“Where any member of the family sues under sub-rule (3) a copy of the writ shall be served on the head of family”.

It is the provisions of order 4 rule 9 of C I 47 which govern the issue of capacity in this action since the writ was issued after its promulgation. Service of the writ on the true head of family is mandatory, where a non-head of family issues it, for the reasons stated in sub-rule 3. The word used is **SHALL**. Of course, the true head of family was NOT served because the plaintiff was pretending to be such when he was not.

Even if Plaintiff falls within the exceptions in the **Kwan vs. Nyieni** case (and I find that he does not, for reasons earlier stated) his action would have to fail due to his failure to serve the true head of family with this writ.

This Court stated in the **Standard Offshore case** supra as follows per Benin (JSC);

"....it must be noted that in all the cases cited whereby this court had declared non-compliance with a rule of practice to be fatal in the proceedings, it has been based on mandatory provisions of the rules. The rules of court form an integral part of the laws of Ghana, see article 11(1)(c) of the 1992 Constitution. Consequently, they must be treated with equal amount of respect in order to produce sanity in court proceedings. Where a rule is mandatory by the use of the word shall', it shall be so regarded in view of section 42 of the Interpretation Act, 2009 (Act 792). Where a court finds it necessary to express 'shall' as directional only, it must be forthcoming with reasons before deciding to exercise discretion waive non-compliance. There must be reasons why some of the rules are mandatory whilst others are discretionary, a fact which a court must always bear in mind in deciding whether to waive non-compliance or otherwise."

I digress with the above however, because the plaintiff had no capacity to bring this action at the date of its commencement and had not acquired one at the time of the amendment by the trial court, whichever way one looks at it. As a result, the trial court had no jurisdiction to hear the matter.

The Court of Appeal erred in not so finding. Both courts did not advert their minds to the relevant provisions of C1 47. The courts cannot amend writs and pleadings, outside the

parameters provided by the rules to confer capacity on a party who did not have one from the onset or acquire one in the course of the proceedings.

A last word. For the avoidance of doubt and at the risk of stating the obvious, I hold the position that an issue of lack of capacity cannot be cured by an amendment under the cover of Order I rule 2 of C 1 47 which requires the rules to *“be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between parties may be completely, effectually and finally determined and multiplicity of proceedings concerning any of such matters avoided.”*

Grounds (iv) and (v) of the cross appeal of the defendants are hereby upheld.

I find that the plaintiff’s action is not maintainable for want of capacity.

(SGD.)

A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

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