**ALBERT KWAKU APPIAH & 3 ORS.**

*(APPELLANTS)*

**vs.**

**AFUA ANTWIWAA & 4 ORS.**

*(RESPONDENTS)*

[COURT OF APPEAL, KUMASI]

CIVIL APPEAL NO: HI/28/2023 DATE: 2ND NOVEMBER 2023

**COUNSEL**

KWAME ASIEDU-BASOAH, ESQ., FOR PLAINTIFFS/APPELLANTS.

SARFO GYAMFI ESQ., FOR DEFENDANTS/RESPONDENTS

**CORAM**

SUURBAAREH, J.A (PRESIDING)

BAAH, J.A

OFORI, J.A

**JUDGMENT**

**BAAH, J.A**

**BACKGROUND**

This appeal challenges the cogency and rightness of the decision of the High Court, Kumasi, dated 22 February 2019, *coram*; M.C Abodakpi, J. by which the counterclaim of the defendants/respondent was upheld, and the reliefs of plaintiff/appellants dismissed *in toto*.

In this judgment, we shall first sum up the case presented by each side at the *court a aquo* and the decision of the trial court. We shall then set out the grounds of appeal, the submission by counsel for the parties on the said grounds, and proceed to a review of the decision, with the evidence, the submission and the applicable law as our tools. In the conclusion segments, we shall communicate in concise terms, our decisions on the main issues raised in the grounds of appeal.

For the sake of convenience, the plaintiffs/appellants will be referred to as appellants, whiles the defendants/respondents are referred to as respondents.

# CASE OF APPELLANTS.

Appellants identified themselves as the children of late the Albert Kwame Appiah, also known as Nana Appiah Kubi. He will be hereafter be referred to as Nana Appiah Kubi. Their late father, they claimed, was a man of substantial means. On his marital life, which is in issue in this case, appellants alleged that in spite of their late father having been involved with several women, it was only one, namely, Akua Afriyie also known as Nana Akua Afriyie that he formally married.

The marriage to Nana Akua Afriyie, which began as a customary marriage, was later converted into an ordinance marriage. As fate will have it, the said marriage was dissolved by a Circuit Court in Kumasi, on 19 June 2008.

According to them, their father neither before the said divorce nor thereafter, and up to his death, ever married the 3rd respondent or any other woman.

Upon the death of their father, a document purporting to be his last will was brought to their notice. They disputed the authenticity of the said will on account that their father never gave instructions for production of that will, and the alleged testator’s signature thereon was forged. They contend that their father died intestate and prayed for the distribution of his estate under the **Intestate Succession Act, 1985 (PNDCL 111).** They equally disputed the claim the 3rd respondent as a widow of their father, on account that by September 2006 when 3rd respondent allegedly got married to their father, he was still married under the ordinance to Nana Akua Afriyie.

# CASE OF RESPONDENTS

The case of respondents is that the late Nana Appiah Kubi married the 3rd respondent, Naomi Asamoah, under customary law in September 2006, at a ceremony in Ashtown, Kumasi, presided over Nana Kwasi Appiah, and attended by almost all the appellants and some of their family members.

After the marriage, Nana Appiah Kubi and the 3rd respondent cohabited in a cottage in a dense forest where they cultivated large tracks of cocoa farms. When the husband died, she was allowed to perform the widowhood rites as the widow of the deceased.

According to respondents, the appellants in the course of the trial, lodged an interlocutory appeal against the trial court’s ruling that the 3rd respondent was a necessary party to the suit. Respondents’ could not appreciate appellants’ current challenge to the status of 3rd respondent as a widow, when they did not appeal the decision of this court affirming the status of 3rd respondent in the interlocutory appeal.

According to the respondents, Nana Appiah Kubi made a valid will and therefore died testate. By the said will, the testator was alleged to have bequeathed the cocoa farms to his widow, and children, including those not his biological children. They denied the allegation of forgery made by appellants against the will of Nana Appiah Kubi.

# PROCEEDINGS

In the plenary trial at the court below, appellants testified through the 1st appellant, Albert Kwaku Appiah and called four witnesses, namely:

Edward Baah Ketaki, a senior High Court Registrar attached to the wills section (PW1); Godwin Lavoe, Deputy Superintendent of Police and a document examiner (PW2); Charles Kofi Nyansah, Deputy Chief Registrar, Circuit Court, Adum, Kumasi (PW3); Abena Asakoma, sister to Nana Appiah Kubi (PW4).

Respondents also called the following witnesses:

The 1st respondent; the 3rd respondent, the 4th respondent and Nana Kwasi Appiah, an in-law to Nana Appiah Kubi (DW1); Anthony Marshall Arpoh (DW2); (Nana Kwasi Appiah, an in-law to Nana Appiah Kubi (DW1); Anthony Marshall Arpoh (DW2)).

# DECISION OF HIGH COURT

After a plenary trial, the trial High Court, as aforesaid, delivered itself of a judgment on 22 February 2019, by which respondents emerged victorious with their counterclaim (except the relief in counterclaim)? The appellants stood vanquished with their claims. In sum, the trial court held:

* 1. *That appellants failed to prove that the will purporting to be that of Nana Appiah Kubi was not his deed or was otherwise vitiated by fraud. The will was declared legal and made in conformity with the Wills Act, 1971 (Act 360).*
  2. *That the 3rd respondent was lawfully married to the late Nana Appiah, and was therefore his widow.*
  3. *That the gift inter vivos by the testator of part of his cocoa farm to the 3rd respondent was valid*.

The grievance of appellants with the decision *supra*, led to their launch of an appeal to this court on 28 February 2019.

# NOTICE AND GROUNDS OF APPEAL.

In the notice of appeal filed on 28 February 2019, the appellants canvassed the omnibus ground of appeal, which is to the effect that “*The judgment is against the weight of evidence*.’’

On 22 July 2019, the appellants filed the following grounds of appeal:

1. *The trial court erred when it failed to exercise its discretion judicially.*
2. *The trial court erred when it held that the 3rd defendant was a wife of the deceased herein.*
3. *The trial court erred when it held that the will the subject matter in dispute is valid.*
4. *The trial court erred when it held that the will the subject matter in dispute is not fraudulent.*
5. *The trial court erred when it failed to give due consideration to the findings of the forensic expert/plaintiffs’ expert witness.*
6. *The trial court erred when it relied on immaterial and wrongful grounds for its decision and or judgment.*
7. *The trial judge erred when he held that the 1st plaintiff had engaged in acts and conduct that amounted to intermeddling in the estate of the deceased.*

In his written submission, counsel for the appellants abandoned grounds (a), (f) and (g) of the appeal. It was well that he did so, otherwise, this court would have struck them down as vague and therefore inadmissible as grounds of appeal. We also took the view that additional issues (c) and (d) are duplication of each other. That was because, the same analysis of the evidence and the law are required to dispose of those grounds. We shall combine the issues as we consider appropriate.

**Relief**

The relief sought from us, is the reversal of the decision of the court *a quo*, with all its consequential orders.

# NATURE OF AN APPEAL.

It is pedestrian legal knowledge that an appeal amounts to a rehearing. That salutary principle has been provisioned in Rule 8 of the **Court of Appeal Rules, 1997 (C.I.19)**. Judicial elucidation of the rule has been made in many popular cases including **Tuakwa v Bosom [2001-2002] SCGLR**.

Counsel for the parties referred us to a number of these authorities. For their sufficient appreciation of the Rule, and for efficiency in the use of time and resources of the court and the parties, we saw no need to recite the authorities.

We now proceed to the grounds of appeal, beginning with additional issue (b), which is as to whether the deceased was validly married to the 3rd respondent.

# VALIDITY OF THE MARRIAGE BETWEEN THE DECEASED AND THE 3RD RESPONDENT.

The case of respondents was that the 3rd respondent customarily married the deceased at a colourful ceremony in Ashtown, Kumasi, in 2006. The said ceremony was allegedly attended by almost all the appellants and their family members. The ceremony was presided over by the then Suamehene, Nana Kwasi Appiah (DW1). Pictures taken of the ceremony were tendered, and appears at pages 282-287 of the record of appeal. According to respondents, the pictures captures some of the appellants and their family members.

After the marriage, the couple lived in the forest and cultivated large tracts of cocoa farms which is subject matter of this dispute. They wondered why the appellants did not question the wifely position of the 3rd respondent during the life of their father.

According to respondents, the family of late Nana Appiah Kubi recognized the 3rd respondent as his widow. They therefore consulted her on the processes for the funeral, placed her name on the funeral brochure and invitation cards , and allowed her to perform all the rites as a widow.

To buttress the above, counsel for the respondents claimed in his submission that in the course of the trial at the court below, appellants appealed to this court (on an interlocutory appeal), apparently of the necessity of the 3rd respondent as a party to the suit. This court allegedly ruled that she was indeed a necessary party to the suit. The court allegedly ordered the appellants to maintain the 3rd respondent as a widow. He contended that since that ruling was not appealed, it is operative and *estopps* the appellants from repeating the claim that the 3rd respondent was not a duly married wife of Nana Appiah Kubi.

The contentions of appellants against the position of 3rd respondent as wife, or widow of the deceased, were based on law, logic and arithmetic.

According to appellants, Nana Appiah Kubi was married to Nana Akua Afriyie from 1974 to June 2008. The marriage which began as a customary marriage, was converted to an ordinance marriage. The ordinance marriage was dissolved in June 2008 by a circuit court, Kumasi. They referred us to the dissolution decree appearing at page 240 of the record. It was their contention that since the 3rd respondent got married to Nana Appiah Kubi in September 2006, at a time the ordinance marriage between Nana Appiah Kubi and Nana Akua Afriyie was subsisting; same having been dissolved by the circuit court, Kumasi, only on 19 June 2008, the customary marriage between Nana Appiah Kubi and the 3rd respondent was logically and arithmetically impossible and legally invalid.

That was because, an ordinance marriage is monogamous, and is mutually exclusive to a polygamous marriage. Appellants relied on section 76 (1) of the **Marriages Act, 1884-1985 (CAP 127)** and the cases of **Hyde v Hyde (1866) 1P&D 130; Graham v Graham [1965] GLR 407; Barake v Barake [1993-94] 1 GLR 635** and **Ernestina Boateng v Phylis Serwaah & 2 Ors [2021] 172 GMJ 188**.

It was concluded by the appellants that Nana Appiah Kubi could not have validly married the 3rd respondent (Naomi Asamoah) while he was still married to Nana Akua Afriyie under the ordinance. As a consequence, any purported marriage between the deceased and the 3rd respondent was void, without effect, and invalid. They contended that the trial court’s decision that the 3rd respondent was the wife of the deceased was wrong in law since the marriage between the deceased and the 3rd respondent was invalid.

# DETERMINATION

Our enquiry under this ground will first consider the nature of the marriage between Nana Appiah Kubi and Nana Afia Afriyie, and between Nana Appiah Kubi and Naomi Asamoah (3rd respondent) and determine whether the latter marriage was legally compatible with the former.

1. **Marriage under the Ordinance(Marriages Act, 1884-1985- CAP 127)**

Marriages under the Marriages Act are monogamous. Monogamy is a relationship with only one partner at a time, rather than multiple partners. Monogamy is a direct antithesis of polygamy, which is the practice or custom of having more than one wife or husband at the same time.

Section 76(1) of the Marriages Act accordingly provides:

“*A person who is married under this Part, or whose marriage before the commencement of this Part is declared to be valid, shall not during the continuance of that marriage contract a valid marriage under an applicable customary*.’’

The courts within and without, have expatiated on the meaning, scope and effect of legal texts on monogamy. In **Hyde v Hyde (1866) AII ER Rep 175; {LR} 1 P&D 130;35**, the English court of Probate and Divorce, per Lord Penzance held:

“*I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman to the exclusion of all oth*ers.’’

The definition of marriage as between ‘*man*’ and ‘*woman*’ is under assault worldwide by the gay community and their sympathisers, but there is firm agreement amongst all protagonists, that a monogamous marriage is between two persons, (notwithstanding their sexual make- up in some countries) to the exclusion of all others.

A number of local decisions affirm the above marriage principle and law. In **Graham v Graham [1965] GLR 407**, the High Court, Accra, per Kingsley-Nyinah J, held:

“*Customary law marriages, though essentially polygamous, are nonetheless accepted and recognised by the courts of this land. Needless to say, therefore, any two persons, man and woman, who elect to be and are in fact joined together in matrimony as man and wife in accordance with customary law are, to all intents and purposes, and if all the necessary and essential requisites and rites have been complied with and performed, lawfully married and that marriage is recognised as valid in the eyes of the law.*

*It is in recognition of this fact, for example (of validity), that our laws provide that upon the death intestate of a person, one-third part of his estate shall go to his surviving widow in accordance with customary law.*

*But a marriage under the Ordinance is strictly and essentially monogamous. It is a tight union confining the male-contractor to one woman to the exclusion of all others for as long as both parties shall live and the marriage subsists and is not dissolved. That is not the case with a marriage under customary law where the union is comparatively loose and the man is notprecluded for taking unto himself as many wives as he can harmoniously live with and conveniently manage*.’’

In **Barake v Barake [1993-94] 1 GLR 635**, the High Court, Accra, with Brobbey J. (as he was), held:

“*The legal position is however that religion per se is incapable of totally transforming the status of parties married under Cap 127. Once the couple are held to have married under the Ordinance, they remain bound by all the incidents attached to that marriage and status created by that marriage until they take steps, according to the law, to rid themselves of the bond of marriage. Vicissitudes in a person's religious life are incapable of obliterating marital status created under a statute*.’’

Once parties are married monogamously, and that marriage subsist, none has the right to marry another person, notwithstanding conflict, desertion or separation. That fact was emphasized by the Supreme Court in **Ernestina Boateng v Phylis Serwaah & Ors [2021] 172 GMJ 188 at 197**.

The facts of that case are that the wife met the husband in Belgium. They got married under the customary law of Ghana. Thereafter, the wife petitioned for divorce. She prayed for dissolution of the marriage and a declaration of joint ownership of two landed properties in Ghana.

The husband challenged the wife’s claim to joint ownership of the properties. He claimed that after their marriage, he discovered that the wife was in a subsisting monogamous marriage which made their customary marriage void. The wife alleged that the husband (who passed away before the completion of the case) was aware of the earlier marriage, which was only for immigration documents (“marriage of convenience”).

The wife then commenced a fresh action as a result of the death of her husband in the course of the trial. She sought a declaration that she was the legal wife and the lawful widow of the deceased. She further claimed that by the death of her husband in the course of the suit, she became the sole owner of their joint property.

The Court decided that since the earlier monogamous marriage between the wife and another had not been dissolved, the customary marriage between the wife and the deceased was void.

The trial judge found as a fact that the late Nana Appiah Kubi and the 3rd respondent went through a traditional marriage ceremony, attended by family members on both sides, listed in the judgment at page 188 of the record, and presided over by Nana Kusi Appiah (DW1),pictures of which were admitted as ‘’exhibits 4’’ series.

In the face of the huge pile of evidence, we found the claim of the appellants that no such customary marriage was celebrated groundless, and a waste of the time and resources of the parties and the court.

We align with the trial judge that the said customary marriage was indeed celebrated between late Nana Appiah Kubi and the 3rd respondent. In our view, the due and proper enquiry was not as to whether the customary marriage celebration took place, but as to the legal effect of that marriage, *vis-à-vis* the ordinance marriage between Nana Appiah Kubi and Nana Akua Afriyie.

The issue arises because on all the facts, the customary marriage between Nana Appiah Kubi and the 3rd respondent took place in September 2006, while the ordinance marriage between Nana Appiah Kubi and Nana Akua Afriyie was dissolved on 19 June 2008, as depicted in exhibit J1.

Appellants admit that their father was customarily married to Nana Akua Afriyie, before the conversion of that marriage to an ordinance marriage. This fact has been pleaded in paragraph 12 of their amended statement of claim. It also took centre stage in their evidence, mouth- pieced by the 1st appellant. Strangely enough, neither in their pleadings nor evidence did the appellants indicate when the customary marriage was converted into an ordinance marriage.

It is trite legal knowledge that customary marriages are potentially polygamous. Accordingly, a customary marriage contracted by Nana Appiah Kubi after the customary marriage to Nana Akua Afriyie, was valid, absent the ordinance marriage. The appellants were therefore required to prove that at the time Nana Appiah Kubi married the 3rd respondent, he had converted his marriage with Nana Akua Afriyie into an ordinance marriage. The date or period of conversion of the customary marriage to an ordinance marriage was a material fact. Appellants virtually provided no details on the relevant days or periods in their pleadings, or evidence on the said conversion.

The nearest we have is the statement by the trial Circuit Judge in the divorce decree (exhibit J1) that “…*I make an order dissolving the customary marriage and ordinance marriage celebrated between the parties around 1974*.’’

Since exhibit J1 forms part of the case of appellants, we hold that the period put forth by the appellants for the conversion of the customary marriage between Nana Appiah Kubi and Nana Akua Afriyie, was 1974. The respondents did not dispute the statement of 1974 in exhibit J1 as the date for the conversion of the customary marriage to an ordinance marriage. That means, from the year 1974 to 19 June 2008 when the ordinance marriage was dissolved by the Circuit Court, Kumasi, Nana Appiah Kubi was bound by the ordinance marriage and was beholden to his wife, Nana Akua Afriyie.

The trial judge indeed found that, in the face of the ordinance marriage, Nana Appiah Kubi lacked capacity to contract the customary marriage with the third respondent. Yet, he held that the 3rd respondent became the wife of Nana Appiah Kubi after the dissolution of the ordinance marriage.

That decision is quite odd and patently erroneous, for there is no evidence on record that Nana Appiah Kubi formally and legally married the 3rd respondent after the dissolution of the ordinance marriage. There cannot be a marriage without the performance of formalities required at law for that type of marriage.

The invalid customary marriage between Nana Appiah Kubi and the 3rd respondent, could not have been automatically validated upon the dissolution of the ordinance marriage, or on the death of Nana Akua Afriyie. The recognition of the 3rd respondent by the family of Nana Appiah Kubi as wife and therefore widow of the deceased, and the performance by her of widowhood rites, could not amount to formalities of marriage, or ratification of the earlier invalid customary marriage.

Since a customary marriage cannot be contracted by either spouse to a subsisting ordinance marriage, the customary marriage by Nana Appiah Kubi to the 3rd respondent, Naomi Asamoah, was invalid, and is therefore declared null and void. The appeal succeeds on that ground and the decision of the trial court is hereby reversed.

# VALIDITY OF DEVISE TO 3RD RESPONDENT

The appellants have successfully established that the 3rd respondent was not legally married to the deceased. The next issue to resolve is as to the validity of the devise made to the 3rd respondent under the will, absent a valid marriage.

There cannot be any doubt that in the face of the invalidation of the marriage relied on by the 3rd respondent, she could not claim the benefit under the will on ground of being a wife of the deceased.

That however does not foreclose the matter of the gift to her. The respondents alleged, and the appellants did not dispute, that the 3rd respondent stayed with deceased for several years under the assumption that they were validly married. There was no contestation from the appellants also that the 3rd respondent assisted the deceased to cultivate cocoa farms. The appellants did not proffer any theory that the slave trade still exist, and that the 3rd respondent was a slave to the deceased, for which reason she deserved no reward for her toils.

A man or woman who stays with another and create properties under the assumption of a marriage, does not lose his or her fair share of the assets created merely on account that the marriage was invalid. When a marriage is declared invalid in such circumstances, the courts resort to the ordinary rules of contract to partition the assets to avoid the endorsement of exploitation and perpetuation of slavery and injustice.

The partner who has contributed to the creation of the assets is entitled to his or her fair share of same under what may be termed *proprietary quantum meruit*. That was because, the law will not suffer a contributor to the creation of property to forfeit his or her fair recompense, on account of failure of the vality of an assumed marriage.

The apex court has already chartered the path for that circumstance. In **Ernestina Boateng v Phylis Serwaah & Ors [2021] 172 GMJ 188 at 197**, it was determined that notwithstanding the fact that the customary marriage was void, the wife successfully led evidence to show that she contributed to the acquisition of the subject properties. As a result, she was granted a portion of the property on account that the properties were acquired through joint resources.

The Supreme Court expatiated that “*the mere invalidity or illegality of a marriage does not deny a person of the right to jointly acquired property. One only needs to prove that a contribution was made.*’’

The 3rd respondent is therefore entitled to a fair share of the properties she created with the deceased. The formular for achieving this is simple. In the will, the deceased made a devise to the 3rd respondent out of the properties. Notwithstanding the validity or otherwise of the will, the said devise was what the deceased considered to be the fair share of the 3rd respondent. The 3rd respondent appear to be content with the devise. We therefore declare the gift under exhibit A to the 3rd respondent as her fair share of the properties she created with the deceased. We do this not because the 3rd respondent was a wife to the deceased, but because she was a co-creator of the properties. The devise to her under the will is upheld but under the grounds stipulated above.

# VALIDITY OF THE WILL OF LATE NANA APPIAH KUBI

Under this global heading, we shall consider and determine all the remaining grounds of appeal, namely: (a) *Whether or not the trial judge erred by holding that the disputed will was valid (b) Whether or not the trial judge erred by holding that the will was not procured by fraud and (c)Whether or not the trial judge failed to give due consideration to the evidence of the forensic expert.*

It is to be noted that the main complaints by the appellants were that

(a) *The late Nana Appiah Kubi did not instruct the preparation of the will and*

*(b) That the signature on the will did not belong to him, and by extension of the argument, forged*.

The main reason why the appellants contend that the will was not instructed and executed by their late father is their belief that the signature thereon is not that of their father. According to the appellants, the signature on the will differs markedly from samples of the deceased’s signatures on other documents he genuinely executed. They went further to unilaterally commission the Police Forensic Laboratory to scientifically compare the signature on the disputed will and the sample ones.

A documents examiner representing the Police Forensic Laboratory, Deputy Superintendent of police, Godwin Lavoe, testified as PW2. According to the witness, the contested signature on the will and the sample signatures were subjected to all the conventional forensic tests and principles, resulting in the conclusion that the signature on the will is likely not that of the deceased. The witness tendered a copy of the will, the sample documents containing the deceased’s signatures and the chart containing the analysis of the signatures.

The trial judge saw no merit in the contentions of the appellants and concluded that the signature belonged to the deceased. He held the will to be genuine, valid and enforceable.

## Submission of counsel for appellants

It was his submission that even though a person of majority is entitled to execute a will to voluntarily dispose of his assets under the **Wills Act, 1971 (Act 360)**, any disposition made under duress, undue influence or procured by fraud would be invalid under section 3 of Act 360. He relied on **In Re Ayayee (Decd); Kukubor & Anor v Ayayee [1982-83]GLR 866;[1980] DLHC 2137** and **Brown v Quashiegah [2003-**

# 2004] SCGLR 930.

Touching on the essential formalities for making a will, counsel cited section 2 of Act 360 and submitted that whereas a will in writing, executed voluntarily by a testator in the presence of two witnesses is deemed valid, a *jurat* is a necessity only in the case of an illiterate or blind person. He relied on **In Re Cole (Decd); Cudjoe v Cole [1977] 2 GLR 304; Otoo v Otoo [2013-14] 2 SCGLR 810** and **Brown v Ansah**

# [1992] 2 GLR 22.

He wondered as to how a will made by a lawyer, namely, Kwadwo Owusu Afriyie; if indeed it was so made, could contain a *jurat*, when both sides to the case agree that the deceased was a literate and sighted person. Worse, he alleged, was the absence of any proof that the *jurat* was effectuated by an indication that the will was read over and interpreted to the deceased. Based on the above, he submitted that it was not the deceased who gave instructions for the preparation of the will.

He deprecated the refusal of the trial court to adopt the findings of the forensic expert. He contended that no cogent reasons were given by the trial court for so deciding. In his view, respondents failed to prove the validity of the will, and the trial court failed in its duty in evaluating critically, all the circumstances in order to determine the validity of the will. His authorities were: **In Re Okine (Decd); Dodoo & Anor v Okine & Ors [2003-2005] 1 GLR 630; In Re Blay-Miezah (Decd); Ako Adjei & Anor v Kells & Anor [2001] SCGLR 339 and Thomas Tata Atanley Kofigah & Anor v Kofigah Francis Atanley & Anor [2020] 159 GMJ 22**.

In his view, the appellants established fraud in the preparation and execution of the will, on account of which he prayed the court to uphold the appeal, set aside the judgment of the court below, and enter judgment in favour of the appellants.

## Submission of counsel for respondents

Counsel for the respondents agreed that a valid will must in its form, conform with the stipulations in sections 2 and 3 of Act 360, but insisted that the deceased followed the law by instructing the preparation of the will and executing same in the presence of the requisite witnesses. He laid particular emphasis on the evidence of DW2, who participated in the execution, and therefore witnessed the signing of the will by the testator and the witnesses.

In view of the living witness’s due observance of the execution of the will, he was in tune with the trial judge’s decision not to put weight on the forensic report on the deceased’s signature on the will. He submitted that an expert witness becomes necessary only where the subject matter was beyond common experience. That was why, he submitted, an expert witness’s evidence was not binding. He relied on the cases of **Conney v Bentum Williams [1984-86] 2 GLR 30; Sasu v White Cross Insurance Co Ltd [1960] GLR 4.**

In his view, appellants failed to prove beyond reasonable doubt, the allegation of fraud, either in the preparation, or execution of the will, as required under section 13 (1), the **Evidence Act, 1975 (NRCD 323)**.

Our enquiry as to the validity of the will cover the preparation, execution and form of the will.

**Preparation and execution of the will**.

The challenge of appellants to the validity of the will was in relation to its preparation and execution.

In terms of its preparation, they contended that the deceased did not instruct lawyer Kwadwo Owusu Afriyie to prepare the will. That was why, they claimed, the signature on the will is not that of lawyer Kwadwo Owusu Afriyie. Most critically, they alleged that the signature on the will did not belong to the deceased person. The appellants’ challenge to the validity of the will was hinged almost entirely on the evidence of the forensic expert from the Police Forensic Laboratory, PW2, Godwin Lavoe. Based on the forensic examination of the signature on the will and other sample signatures of the deceased, PW2 concluded that the signature on the will was likely not that of the deceased.

To prove that the deceased person instructed the preparation of the will and executed same, respondents called firstly, the deceased’s purported wife, DW3, Naomi Asamoah. She alleged that the deceased made drafts of the will at dawn. The drafts of the will were admitted as exhibits 3 (series). The second witness was Anthony Marshall Arpoh, DW2.

According to DW2, he was a lawyers’ clerk by September 2006, to Kwadwo Owusu Afriyie & Associates. He was at the time of his testimony, a practicing lawyer and head of Legal Affairs, UniCredit Ghana Limited. According to him, the deceased Albert Kwame Appiah Kubi was a client of their law firm. He came to their chambers on three occasions in connection with the preparation of his will.

On his third visit, lawyer Kwadwo Owusu Afriyie was not in the office. The deceased said he had come to execute his will, as he was going for surgery. He called lawyer Kwadwo Owusu Afriyie and informed him about the situation. The lawyer told him that he had already prepared the will so he (DW2) should supervise them to execute same. He duly supervised the deceased and his two witnesses, Kofi Asamoah and Ransford Martin Bour, to execute the will. He identified the will as exhibit A.

DW2 testified that even though the stamp on the will is that of lawyer Kwadwo Owusu Afriyie, he signed the will and marked it “PP’’ (*Per Pro*), indicating that he signed it on behalf of Kwadwo Owusu Afriyie. Having personally witnessed the execution of the will by the deceased and the witnesses, he discounted the claim of appellants that the deceased did not execute the will.

The 1st respondent, Afua Antwiwaa, in her testimony insisted that the signature on the will (exhibit A) is that of her late brother. According to her, the signature on the will looks similar to the ones signed by her brother. The basis of her claim was that the brother gave her a cheque, the signature on which looks similar to the one on the will.

The 4th respondent, Ama Kwawie, a daughter of the deceased who lived with him till she married, was positive that the signature on exhibit A belongs to her father.

# DETERMINATIONS

We determined that the preparation of the will in dispute was instructed by the deceased. We also determined that the will was duly executed by the deceased in the presence of the requisite witnesses as required by the law. The allegation of fraud in the signature of the deceased on the will did not have any merit. The reasons for our determinations are as follows.

* 1. *The 3rd respondent who lived with the deceased as the assumed wife claimed that the deceased got up one night to make drafts of the will. The drafts of the will were admitted as exhibit 3 series. When the contents of the drafts are compared with the will, it is realised that the will (exhibit A), is virtually a reproduction of the drafts (exhibit 3 series). The drafts are in the hand writing of the deceased, who both parties agree was educated. If the deceased did not make the drafts, the appellants who know their father’s handwriting, would have known that.*

*Appellants who subjected their father’s signature on exhibit A to forensic examination, would equally have subjected exhibit 3 series to forensic examination, if they did not believe that their father authored the drafts. If the deceased did not intend to make a will, why was the purpose of him making the drafts? If the deceased intended to complete the will by himself, could he not have finalized the drafts and executed same with his witnesses? Since the drafts were established to have been made by the deceased, and the contents thereof are reflected in exhibit A, a strong presumption is raised in favour of the respondents’ claim that the deceased instructed the preparation of the will.*

* 1. *There was some doubt as to who actually prepared the will.*

*DW2 who at the time of his testimony was a practicing lawyer, was an office clerk to lawyer Kwadwo Owusu Afriyie at the time the will was prepared. DW2 claimed that on the day the deceased visited their chambers, he (DW2) called lawyer Kwadwo Owusu Afriyie who told him that the will of the deceased, who had visited the chambers a few times on the subject, had been prepared so he (DW2) should supervise its execution.*

*A careful look at the evidence and the circumstances however indicate that it was DW2 who prepared the will, most probably, on the instructions of his principal. Firstly, the will has a jurat. It is trite knowledge to all lawyers that a jurat is inserted in documents only where it is to be executed by an illiterate or an unsighted person. The presence of the jurat indicates the preparation by a novice or a non-lawyer. No one fits the bill as the maker of the will than DW2. Secondly, the language of the will, which took after that of the drafts does not show the handiwork of a lawyer. For example, the phrase “Uncultivate Land’’, as appear in the draft, is repeated in the will, instead of being corrected to “Uncultivated Land.’’*

*As aforesaid, the appellants raised a number of issues regarding the will, including its preparation and the presence of a jurat on the will.*

*The Wills Act makes no provision that only lawyers can prepare a will. A testator can prepare his own will, and any person, notwithstanding his professional background, can prepare a will to be executed by a testator. The only caveat is that being a legal document, non-lawyers cannot prepare wills for others for monetary reward. Even where a non-lawyer prepares a will for another for a reward, the effect is possible prosecution under* ***Evidence Act, 1975 (NRCD 323),*** *and not an invalidation of the will.*

*The presence of the jurat in the disputed will in an instance where none was required, was an act in superfluity which neither added to the vality of the will, nor took away anything from it.*

*In the instant case, DW2 as a lawyers’ clerk could prepare the will for the deceased with, or even without instructions from his superior. The will in issue, prepared at the direction of his superior, lawyer Kwadwo Owusu Afriyie, as the circumstances appear to show, was perfectly in order. No law was violated in the preparation of the will.*

* 1. *The decision of the trial judge as to the absence of fraud regarding the signature of the deceased on the will cannot be faulted for the following reasons:*
     1. *DW2 who prepared the will was also the one who supervised it’s execution by the deceased and the witnesses. The cross-examination of DW2 by counsel for appellants did nothing to undermine his claim that he was present and supervised the deceased and the witnesses to execute the will. In the face of the credible eye witness testimony of DW2, the prayer of the appellants for the court to rely on a secondly and non-binding evidence in the form of the forensic report was merit-less.*
     2. *The evidence of PW2, and the forensic report presented by him were only of persuasive nature. It only claims that the signature on the will was likely not that of the deceased. The forensic evidence carried no weight in the face of the credible eye witness account of DW2. When we examined and compared the disputed signature and the undisputed ones on the chart at page 235 of the record, we realised that, as was expected of all signatures, no two of even the samples, were the same. The similarities and differences in the samples are similar with the disputed one. It is important to note that the deceased was around 82 years by the time he executed the will. Added to that, he was of poor health, for which reason he intimated to DW2 that he was slated for an operation. These factors could influence the stability of his body and affect how he wrote or signed his signatures. For that reason, the slight variations between the signatures could not be any matter of consequence. We did not find any stark or marked differences between the disputed signature and the sample signatures as to lead to the conclusion that the will was not executed by the deceased.*
  2. *Even if it was proven that the disputed signature of the deceased differed from his sample signatures would not have automatically proven fraud in the execution of the will. That was because, no law requires a person to have one signature. A person may have as may signatures as possible, provided he uses them appropriately and legally. For instance, a man with ten bank accounts with the same or different banks may have separate signatures for each account. He may also have different signatures for his bank accounts and his other transactions.*

*There is no fetish about a signature or multiples of them in reference to one individual. When it comes to ascertaining the genuiness of a signature, the first point of enquiry is as to whether the alleged executor in truth and in fact, signed or made the mark. If the evidence shows that the signature or mark was indeed made freely and voluntarily by the executor, forensic analysis and reports, even from experts of the United Nations, would be useless and irrelevant.*

*In casu, DW2 saw the deceased with his naked eyes. He supervised the deceased and his witnesses in the execution of the will. In the face of such unimpeachable evidence, the forensic analysis by the Police Forensic Laboratory and the report produced thereof, was of no consequence. The trial judge was justified in rejecting the forensic evidence and the report.*

* 1. *The appellants could not understand as to why, the will respondents alleged was prepared by lawyer Kwadwo Owusu Afriyie, was not signed by him. DW2 did not hide the fact that he signed exhibit A. Against the name of DW2 on exhibit A is the term, “PP’’, which is the abbreviation for “per pro’’. The Latin term “per pro’’ denotes an act done by an agent, based on the authority of the principal. Since neither DW2 nor the respondents claimed that exhibit A was signed by lawyer Kwadwo Owusu Afriyie, the claim by the appellants to that effect had no factual basis. The issue as to whether DW2 could sign exhibit A on behalf of his principal is different from the issue of whether lawyer Kwadwo Owusu Afriyie signed exhibit A. In any case, the presence or otherwise of the signature of a lawyer or his clerk or agent has no relevance to the vality of the will. The signature of lawyers who prepare wills are put there to show the particular lawyer and the law office which did the preparation. The lawyer’s signature is not put on a will to give it validity. The emphasis placed on the absence of the signature of lawyer Kwadwo Owusu Afriyie by appellants was therefore of no moment.*

*The decision of the trial judge regarding the validity of the will is based on the law and the evidence. The appeal on that ground fails.*

# CONCLUSION

We conclude as follows:

1. *The customary marriage between Nana Appiah Kubi and 3rd respondent contracted during the sustenance of the ordinance marriage between Nana Appiah Kubi and Nana Akua Afriyie, was invalid. The decision of the trial court to the contrary was erroneous in law and is hereby reversed.*
2. *The appellants failed to prove beyond reasonable doubt that the will (exhibit A) was not executed by their late father. Their claim of fraud in respect of his signature could not be sustained. There is no law in Ghana or indeed anywhere else that restricts a person to a single signature. An individual may therefore have two or more signatures, which he may deploy for specific transactions. The proper enquiry therefore begins with the question as to whether the executor freely and voluntarily executed a particular document. It is only when that first enquiry remains unresolved positively by credible first hand or primary evidence, that resort may be made to secondary evidence, including expert forensic opinion. In the face of the unimpeached eye witness evidence of DW2, to the effect that he supervised the execution of the will by the testator and his witnesses, the forensic analysis and its report and associated evidence were pointless and irrelevant. In the context of execution of a will or other documents, the primary evidence of a single, credible and competent eye witness is worth more than volumes of expert opinion. We affirm the trial judge’s endorsement of the evidence of the respondents on the execution of the will and the rejection of appellants theory of fraud.*
3. *In spite of the invalidity of the customary marriage between Nana Appiah Kubi and the 3rd respondent, and the reversal of same, the gift made by the deceased in favour of the 3rd respondent remained valid, not on account of the purported marriage, or that it was a valid devise under the will, but for the reason that she assisted the deceased to acquire the properties. As the Supreme Court elucidated in* ***Ernestina Boateng v Phylis Serwaah & Ors [2021] 172 GMJ 188 at 197****, “the mere invalidity or illegality of a marriage does not deny a person of the right to jointly acquired property. One only needs to prove that a contribution was made.’’*

On grounds of *proprietary quantum meruit*, the gift to the 3rd respondent in the will of the deceased is declared as her fair recompense for her contribution to the acquisition of the properties.

The appeal is dismissed, subject to the declaration of invalidly of the customary marriage between Nana Appiah Kubi and the 3rd respondent, and the reversal of the decision to the contrary by the trial court.

# (SGD.) ERIC BAAH

**JUSTICE OF APPEAL**

**I agree. (SGD.)**

# G. S. SUURBAAREH JUSTICE OF APPEAL

**I also agree. (SGD.)**

# ALEX OWUSU-OFORI JUSTICE OF APPEAL