**CHARLES MENSAH & 6 ORS**

*(PLAINTIFFS)*

**vs.**

**VIVIAN MENSAH & KWASI AGYEKUMHENE**

*(DEFENDANTS)*

[COURT OF APPEAL, KUMASI]

CIVIL APPEAL NO: HI/140/2024 DATE: 23RD JANUARY 2025

**COUNSEL**

KWAME ADOM APPIAH ESQ., WITH DENNIS OSEI ANTWI, ESTHER ASIEDUWAA OPOKU, ABIGAIL OWUSU ASARE AND PAUL SARBENG FOR 2ND DEFENDANT/APPELLANT.

K. A. ASANTE KROBEA ESQ. WITH MITCHEL OSEI DONKOR FOR PLAINTIFFS/RESPONDENTS.

**CORAM**

MENSAH-DATSA (MRS) J. A (PRESIDING)

BAAH, J. A

BAIDEN, P.K. J. A

**JUDGMENT**

**BAAH, J. A.**

**BACKGROUND**

# Respondents’ reliefs

1. On 26 February 2015, the plaintiffs/respondents (hereafter Respondents) approached the High Court, Kumasi, with a prayer for:
2. *A declaration that property number 38 Block E Fankyenebra devolved on the plaintiffs and the 1st defendant as beneficiaries of the said properties forming part of the estate of the late Nicholas Kofi Mensah.*
3. *A declaration that the 1st defendant alone lacks the capacity to transfer title in property number 38 Block E, Fankyenebra, to the 2nd defendant.*
4. *An order setting aside the purported sale of the property numbered Plot 38 Block E, Fankyenebra, Kumasi, in September 2011, made between the 1st and the 2nd defendants.*
5. *An order of perpetual injunction restraining the 2nd defendant, his privies, assigns, agents and all those who claim title through him from interfering with the plaintiffs’ interest in the said property.*

# Appellant’s counterclaim

1. In his statement of defence dated 27 April 2015, the 2nd defendant/appellant (hereafter Appellant) denied the claims of the respondents and counterclaimed for the following reliefs:
2. *A declaration that the sale of Plot No 38 Block F, Fankyenebra by the 1st defendant was for and on behalf of all the beneficiaries, a representation he relied on to change his position to his detriment.*
3. *An order of specific performance directed at the plaintiffs to complete the transaction by formally conveying the disputed property to him.*
4. *Perpetual injunction against the plaintiffs and the 1st defendant, their agents, assigns, workmen and anybody claiming through them from having anything to do with the disputed property.*

# Respondents’ case

1. With the exception of the 2nd Respondent, all the other Respondents and the 1st Defendant are siblings. Their mother is the 2nd Respondent. Their father was Nicholas Kofi Mensah, a portion of whose estate is the subject matter of the dispute resulting in this appeal. The case of the Respondents is that the property on Plot 38 Block E Fankyenebra, Kumasi, was gifted to their father by one Francis Kojo Poku. It is composed of two detached flats. Before the property could be transferred into the name of Nicholas Kofi Mensah, he passed away. The property was thereafter inadvertently included in the inventory of the assets of Francis Kojo Poku, but same was later released to the estate of Nicholas Kofi Mensah. The Respondents and the 1st Defendant are beneficiaries of the two detached flats, one of which they occupy and the other rented out to tenants.

It was the Respondents case that before the property could be vested in them, the 1st Defendant purportedly sold part of the estate to the Appellant herein without their consent as co-owners, erupting in a dispute that birthed this appeal. The property was vested in the Respondents and the 1st Defendant by the administrators of the estate of Francis Kojo Poku on 9 July 2014.

When information of the sale got to them, they confronted the 1st Defendant and the Appellant and indicated the lack of capacity on the part of the 1st Defendant to effect the sale. They also instructed their solicitor to write to the Appellant for an attempt at amicable settlement, but the Appellant failed to meet them.

The Respondents averred that despite their warnings, the Appellant is renovating the house and is making attempts to develop an undeveloped portion of the property. Their suit was to ensure that the sale was reversed and the efforts of the Appellant in developing the property halted.

# Case of 1st Defendant

1. In her statement of defence filed on 10 May 2016, the 1st defendant (to be referred to in this appeal as 1st Defendant) admitted selling the subject property to the Appellant and sharing the proceeds with the following siblings: David Mensah, Maxwell Mensah, Vivian Mensah (daughter of her deceased brother Michael Mensah), Prince Mensah, Kweku Mensah, Maybel Abena Mensah and Beatrice Mensah. She claimed that it was one “Madam” who put pressure on her to dispose of the subject property to meet the educational expenses of the children mentioned supra.

# Case of Appellant

1. The case of the Appellant is that he got to know of the availability of the subject house for sale through an agent. According to him, the 2nd Respondent represented to him that there are other children of late Nicholas Kofi Mensah by another woman, who were demanding their share of their father’s estate to enable them settle the school fees of one of those children. Subsequent to the representation, the subject house was sold to him by the 2nd, 5th, 6th Respondents and the 1st Defendant with the consent and concurrence of all the Respondents, for the sum of GH¢65,000.00. The transaction was reduced into writing by the solicitor of the Respondents in his Law Office.

According to the Appellant, the sellers demanded an immediate payment of GH¢30,000.00 for the other children of Nicholas Kofi Mensah, as one urgently needed money to pay the school fees. He paid the said GH¢30,000.00 to the 2nd Respondent, while the balance was paid three months thereafter.

He was placed in immediate possession by the 2nd Respondent and the 1st Defendant, who showed him the exterior or parameters of the land attached to the building on the disputed land. Thereafter, he renovated the entire property and moved into occupation.

1. According to the Appellant, he had to project the roofing on his part of the building during the renovation. He sought the permission of the 2nd Respondent. She granted him the permission to do so. Steps he took in the course of the renovation included creating a separate gate for his side of property, construction of a boundary wall between the two flats and the laying of a foundation for the development of the undeveloped part of the property. When the said foundation was laid, the Respondents informed him that since he had extended the wall to cover the undeveloped portion of the land, they were increasing the price of the property by GH¢20,000.00. He found the demand to be unreasonable. Soon thereafter, the solicitor of one of the children of Francis Kojo Poku wrote to him a letter laying claim to the undeveloped portion of the land, on the basis that it was not part of the property gifted to late Nicholas Kofi Mensah. He demanded GH¢20,000.00 for that piece of land.

He claimed that in one meeting with the Respondents, their solicitor demanded a sum of GH¢160,000.00, in addition to the GH¢65,000,00 he had already paid in full as consideration for the property. He rejected the demands.

# Plenary trial

1. In the ensuing plenary trial, the respondents called as their witnesses, Charles Mensah (1st Respondent), Mary Afi Mensah (2nd Respondent) and Margaret Mensah (5th Respondent). The Appellant testified and called the following witnesses: Doris Osei Owusu Boateng (DW1), Kwame Nyanteh (DW2), Beatrice Afriyie (DW3) and Prince Mensah (DW4).

# Decision of trial court

1. The trial High Court, Kumasi, delivered its judgment on 31 October 2019. The sum of the judgment is as follows (pages 269-280):
2. That both parties by their pleadings agree that the 1st Defendant played a leading role in the entire transaction, including negotiating the sale. That the first instalment of the purchase price was paid by a cheque on 21st June 2011. That per exhibit 2, which was witnessed by the 5th Respondent and tendered by the 1st Defendant, Michael Mensah, David Mensah and Beatrice Afriyie acknowledged receipt of the sum of GH¢30,175.00, being their share of their father’s estate sold under the transaction.
3. That since the sale of the property took place before 21 July 2011, the question arising was as to whether the 1st Defendant had the requisite capacity to negotiate the sale of the disputed property to the Appellant? Relying on the cases of **Conney v Bentum Williams [1984-86] 2 GLR 301**, **CA** and **Okyere v Appenteng [2012] 42 G.M.J 33,SC**, he held that beneficiaries of an estate had no capacity to deal with or alienate the property until a vesting assent had vested the property in them, and the said vesting assent has been registered under section 24 of the **Land Registry Act, 1962 (Act 122).**

He held that since the sale of the subject property took place before 21 July 2011, and the property was vested in the beneficiaries (Respondents and 1st Defendant) on 9 July 2014, the 1st Defendant and indeed the entire beneficiaries lacked capacity to alienate the house absent a vesting assent. The sale transaction was accordingly held to be of no legal effect.

1. In addressing the nature of the interest held by the beneficiaries in the estate, the trial judge opined that in Ghana, with the exception of trust property, which is presumed to be joint tenancy, all other conveyances to two or more persons are presumed to be tenancies in common, on account of section 14 (3) of the Conveyancing Act, 1973 (Act 175). As tenants in common, he argued, the Respondents and the 1st Defendant had unity of possession but most importantly, have distinct and quantifiable share in the subject property, with a right of survivorship, even though the property is yet to be shared or divided. As a consequence of the nature of the rights held by the beneficiaries, he held “*no single person in the tenant in common situation can transfer title in the disputed property without the consent of the other persons with interest in the disputed property*”, see page 274 of the record. He contended that with 1st Defendant’s admission that she acted without the consent of the others, coupled with the absence of a power of attorney indicating that the Respondents appointed the 1st Defendant to act on their behalf, the obvious conclusion was that the 1st Defendant sold the subject property to the Appellant without the consent of the 1st, 3rd,4th and 7th Respondents. The sale was accordingly rendered illegal. It was on account of the preceding that he considered the 1st, 3rd, 4th and 7th Respondents entitled to their reliefs.
2. In addressing the Appellant’s counterclaim, he explained the effect of the absence of a document evidencing the agreement.

By references to sections 1(1), 2(1) (a) and 10 of the Conveyancing Act 1973 (NRCD 175), he held that the absence of a written instrument evidencing the transaction between the Respondents and the 1st Defendant on the one side, and the Appellant on the other side was fatal to the case of the Appellant.

1. He found fault with the Appellant for his failure to conduct due diligence searches on the true ownership of the property before acquiring same. He referred to the Appellant’s decision to place one Doris (DW1) in charge of the transaction due to his (Appellant’s) busy schedule and the failure to seek professional advise as to the title and ownership of the subject property. The precedential fodder for his argument were **Amuzu v Oklikah [1998- 99] SCGLR 141; Kusi & Kusi v Bonsu [2010] SCGLR 60** and **Osumanu v Osumanu [1995-96] 1GLR 672**.
2. In the view of the trial judge, the equitable defence of bona fide purchaser for value without notice was not available to the Appellant because the 1st, 3rd, 4th and 7th Respondents acted swiftly and timeously to protect their interests in the subject property.
3. After upholding the claims of the mentioned Respondents, and dismissing the counterclaim of the Appellant, the trial judge sought to resolve the practical issues raised by his decision. He acknowledged that the Appellant paid the sum of GH¢65,000.00 for the disputed property, renovated same with his resources and has been living in the said house since 2011 without paying rent. He found that it was the 2nd, 5th and 6th Respondents and the 1st Defendant who played key roles in negotiating the sale of the subject property, including meeting in the office of Lawyer Sarfo Gyamfi for the sharing of the proceeds of the sale, and in allowing the Appellant to renovate the house to take possession of same. He decided that the said parties are liable to refund the purchase price in addition to the amount of money expended by the Appellant in renovating the house.

In reference to the cost of renovation, he relied on the valuation report tendered by the 1st Defendant (exhibit 6), which put the current value of the subject property at GH¢210,700.00, and the value before the renovation at GH¢97,000.00. By subtracting the value of the house before the renovation (GH¢97,000.00) from the value of the house after renovation (GH¢210,700.00), he found the amount of GH¢113,500.00 as the sum of money that the 2nd, 5th. 6th Respondents and the 1st Respondent are to refund to the Appellant without interest.

The sale of the subject property to the Appellant was set aside and an order made for the vacation of the property by the Appellant as

soon as the sum of GH¢113,500.00 is paid to him by the 2nd, 5th, 6th Respondents and the 1st Defendant. No order was made as to costs.

**NOTICE OF APPEAL**

1. By a notice of appeal dated 1 November 2019, the grounds of appeal were stated as follows:
2. The judgment is against the weight of evidence on record.
3. The Honourable Court did not adequately consider the evidence of the 2nd Defendant.
4. The following additional grounds of appeal were filed by the Appellant on 14 December 2023:
5. The Plaintiffs/Respondents lack the requisite capacity to have instituted the present action as they were not the only absolute owners of the entire property in dispute which said fact they failed to disclose on their writ of summons.
6. The learned judge erred when he failed to consider the Plaintiffs lack of capacity to bring the action in only their names though same became apparent on the evidence that other beneficiaries who participated in the transaction with the 1st Defendant had been left out as Plaintiffs.

# Reliefs

The relief sought by the Appellant is an order setting aside the entire judgment of the trial court dated 31 October 2019.

**SUBMISSION OF COUNSEL FOR THE PARTIES**

# Counsel for the Appellant

1. Counsel for the Appellant first submitted on the two original grounds, including the omnibus ground of appeal before dealing with the additional grounds. We shall endeavour to summate the submission for the purpose of our analysis.
2. On the nature of the interests held by the beneficiaries of the estate, he agreed with the decision of the trial judge that it was a tenancy in common. In his view, the beneficiaries held the property as tenants-in-common. He submitted that a tenancy-in-common could be determined by a co-tenant by: (a) partition (b) sale, and (c) the acquisition by one tenant of the shares of his co-tenants, whether by grant or operation of law. He relied on the authorial views of BJ da Rocha and CHK Lodoh, in ***Ghana Land Law and Conveyancing (2nd ed. page 267).*** As tenants-in-common, he submitted, the beneficiaries other than the Respondents herein were ready and prepared to sever their portion from the rest. According to him, the tenancy-in-common was determined on the day some of the beneficiaries, including some of the Respondents, the 1st Defendant and others not named as Plaintiffs sold the property to the Appellant.
3. According to Counsel, the trial judge excluded matters which were necessary for consideration. He claims that relying on the Appellant’s honest answer that he had not met the 1st Respondent at the time of the transaction, the trial judge (at pages 10 and 11 of the judgment, found at pages 271-272 of the record), that the beneficiaries held the subject property as tenants-in-common, meaning their possession should be unified and their shares undivided. Upon that basis, he held that no single tenant could transfer title in the disputed property without the consent of the other beneficiaries with interest in the property.

According to counsel, the decision left out several critical matters which should also have been considered by the trial judge. He mentioned the following excluded matters.

* 1. The trial judge failed to take into account that the Respondents are not the only beneficiaries of the estate of late Nicholas Kofi Mensah. He listed the other beneficiaries not part of the suit and who participated in and benefited from the transaction as Mabel Mensah, Maxwell Mensah, Prince Mensah, Michael Mensah and David Mensah.
  2. The trial judge acknowledged that some of the Respondents, in addition to the 1st Defendant, and the beneficiaries not made parties to this suit, participated in and benefited from the transaction. That led him to make the following order:

“*I hereby further order the 2nd, 5th, 6th Plaintiffs and the 1st Defendant to pay the above stated sum of money to the 2nd Defendant without interest*”.

Having so found that some of the Respondents teamed up with the 1st Defendant and the other beneficiaries not parties to this case to transfer the property to the Appellant, he could not fathom how the trial judge could proceed to hold that the 1st Defendant sold the property to the Appellant without the consent of the other beneficiaries.

He contended that beside the 2nd, 5th and 6th Respondents, the 3rd Respondent was very much in the known of the sale, leading him at a point to promise to pay off the other beneficiaries from the different mother, who had been exerting pressure for their share of the estate. The sale eventually took place because the 3rd Respondent could not redeem his promise. In the circumstance, he found no merit in the trial judge’s conclusion which excluded the 3rd Respondent as having knowledge of the transaction.

He further referred to exhibit 9, which is the receipt prepared by the lawyer who oversaw the distribution of the proceeds from the sale. In the said receipt, Beatrice Afriyie acknowledged receiving the sum of GH¢30,175.00, as the share of her children who are also beneficiaries of the estate. That receipt was witnessed by the 5th Respondent, a fact which should not have eluded the trial judge.

* 1. He submitted that a joint tenant could transfer his interest in the jointly held property without the knowledge and consent of the other joint tenant(s). If it so happens, the joint tenancy is severed and the joint tenancy is converted into a tenancy in common. He relied on **Owusu-Asiedu v Adomako & Adomako [2007-2008] SCGLR 591**.
  2. He referred the court to the claim of the Respondents that they confronted the 1st Defendant about her lack of capacity (paragraph 12 of the statement of claim, at page 3 of the record) and the 1st Defendant’s denial of the said averment (in paragraph 8 of her statement of defence (found at page102 of the record).
  3. He lamented the trial judge’s treatment of the other beneficiaries, being the children of Beatrice Afriyie. According to him, the trial judge was silent about their presence, role and their rights in the subject property. According to him, everything in the judgment is centred on the Respondents, despite the copious evidence to the effect that the other beneficiaries through their mother, Beatrice Afriyie, teamed up with the 1st Defendant and some of the Respondents to dispose of the property. He submitted that at least eight of the twelve beneficiaries agreed and were involved in the transfer of the property to the Appellant.
  4. Judging from the evidence, he was of the view that the problem of the 1st Respondent was not the sale of the property purportedly without the consent of some of the Respondents, but the quantum of purchase price, which the Appellant refused to top up. He referred to the evidence extracted from the 1st Respondent under cross-examination, appearing at page 128 of the record.
  5. He referred to the renovations done by the Appellant, including changing the roof, building a wall to divide the two properties, the creation of a separate gate by the Appellant for his side of the property in addition to others, all to the knowledge of the Respondents, as evidence of their knowledge of the transfer.
  6. In reference to the trial judge’s decision that the absence of a written instrument on the transfer indicated lack of due diligence required of a prudent purchaser and rendered same invalid, he explained that the property at the time of transaction had not been vested in the beneficiaries of the estate and the Appellant and his agent were not made aware of the interests of the 1st,4th and 7th Respondents at the time of the transaction.

He contended that until interest in an estate is vested in beneficiaries, it is the administrators of the estate who have legal capacity to deal with same. Accordingly, it was the administrators of Nicholas Kofi Mensah who were required to conduct the transaction that resulted in the transfer of the property to the Appellant. The consent of all the beneficiaries were not a pre-requisite for the transaction that disposed of the subject property to the Appellant.

He submitted that since there was no document capturing the names of the beneficiaries, without disclosure by the 2nd, 5th Respondents and the 1st Defendant, there was no way the Appellant could have discovered the interests of the beneficiaries even if due diligence had been carried out.

He relied on section 93 of the **Administration of Estates Act, 1961 (Act 63)** and the authorial views of Aidoo, E.S ***Conveyancing and Drafting, Law & Practice in Ghana (***pages 18-23).

In his view, the transaction accorded with section 93 of Act 63.

* 1. Counsel faulted the vesting assent (exhibit 1). That was because it purported to vest an already sold property in the Respondents, about three years after the sale, and further vested the property in some of the beneficiaries, leaving the others, without any explanation or justification. In his view, the vesting assent was fraudulently procured at the blind side of the administrators/personal representatives of the estate of late Nicholas Kofi Mensah. He prayed the court to pronounce the vesting assent as vitiated by fraud.
  2. That the other administrators did not protest the sale of the property because they participated in and benefited from it. He referred to the evidence extracted from the 2nd Respondent under cross-examination, by which she denied knowledge of the suit and said she was only asked to thumbprint the witness statement. In his view, the 2nd Respondent who participated in the sale and benefited from it was coerced by her children to participate in the trial. He relied on **Amuzu v Oklikah** (supra).
  3. On ground b of the appeal, he first submitted that the property was acquired properly by the Appellant from the administrators of the estate of late Nicholas Kofi Mensah. The transaction took place at the Law Office of lawyer Sarfo Gyamfi, who acted on behalf of the administrators acting as the personal representatives (vendors). Sarfo Gyamfi esquire made payments for the subject property and issued receipts for same. That was after the administrators had agreed in the office of Paapa Dadson to sell the subject house and share the proceeds.
  4. According to him, the valuation report corroborated the claim of the Appellant that he carried out renovations, which further confirm that he went into possession after the renovation without protests from the Respondents.
  5. In respect of the additional grounds of appeal, he submitted that the Respondents lacked capacity to institute the action, on account that they are not the only beneficiaries and the existence of the other beneficiaries, and their absence was not disclosed or explained by the Respondents. He drew the court’s attention to the requirements of **Order 2 rule 4(1)** of the **High Court (Civil Procedures) Rules, 2004 (C.I.47)**. According to him, the Respondents were required to endorse the capacity in which they brought the action on the writ, which should have taken account of all the beneficiaries of the estate. He submitted that the absence of authorization from the other beneficiaries made the writ incompetent. He relied on **Mrs Violet Allan & Anor v Madam Mary Adjanor [2022] 179 GMJ 345**.
  6. In reference to the 2nd Respondent, he contended that her presence and participation in the case amounted to an attempt to take double benefit. That was because, she had in a compromised agreement, been settled with the other semi- detached house. Therefore, any attempt to partake of the second house would amount to eating with both hands.

# Submission of Counsel for Respondents

Counsel for the Respondents addressed together, the original grounds A and B, and thereafter, additional grounds 1and 2.

1. Counsel agreed with his opponent that the late Nicholas Kofi Mensah had other children by another woman who are beneficiaries of his estate. He contended however that counsel for the Appellant failed to show that the said children were beneficiaries of the subject property. He submitted that based on the vesting assent (exhibit A) the subject property is vested in the Respondents and the 1st Defendant. On the allegation of fraud made by Counsel for the Appellant against exhibit A, his response was that exhibit A has not been challenged by anyone, neither has it been set aside. Accordingly, the Appellant who is not a child of late Nicholas Kofi Mensah and the other children not listed in exhibit A have no interest in the subject property that the court can consider. In his view, since the children not listed on exhibit A have no interest in the subject property, they had no locus or interest in the subject matter to transfer it to the Appellant. He relied on the principle of *nemo dat quod non habet* as elucidated in the case of Seidu **Mohamed v Saanbaye Kangberee [2012] 2 SCGLR 1182**.
2. He conceded that the trial judge found as a fact that the 2nd, 5th and 6th Respondents were involved in the sale transaction, but chose to rely on the insistence of the Respondents as corroborated by the 1st Defendant that the sale transaction was by the 1st Defendant alone. Since the Respondents did not cross appeal, we were at a loss as to the utility of the argument which challenges a finding of the trial judge which the Respondents have not appealed against.
3. He agreed with the trial judge and counsel for the Appellant that the subject property was being held by the beneficiaries as tenants in common. As Counsel for the Appellant before him, he relied on section 14(3) of NRCD 175 and the precedent of **Owusu-Asiedu v Adomako & Adomako [2007-2008] SCGLR 591**. He however diverged to the extent that a tenant in common could only alienate “*his or her interest in the property only*” and could not alienate the entire property without the knowledge, consent and authority of the other tenants in common. He submitted that since the 1st Defendant did not own the entire property, she could not have transferred same without the consent and authorisation of the Respondents.
4. He submitted that if it was even assumed that the 2nd, 5th and 6th Respondents sold the property with the 1st Respondent, they lacked the capacity to transfer the property because proprietary interest therein had not been vested in them at the time of the sale. That was because, whereas the transfer took place in 2011, the property was vested in the beneficiaries on 9 July 2014.
5. In response to the submission of the Appellant’s Counsel that because the property at the time of the sale had not been vested in the beneficiaries, it was the administrators who could legally deal with the estate, he submitted that whereas indeed section 93(1) of the **Administration of Estates Act (Act 63**) empowered the administrators to sell the property to advance the interests of the estate, section 93 (2) of Act 63 required the administrators to apply for a court order to sell the property, whether movable or immovable. According to him, no evidence existed in the record to show that the administrators applied for a court order before selling the property. He disputed the claim of Counsel for the Appellant that exhibit C1 is the court order. According to him, exhibit C1 is not an application to the court and is also not an order from the court for the sale of the subject property. In the absence of a court order, the administrators lacked the capacity to dispose of the property.
6. He disputed the claim that the Appellant renovated the property without any objection from the Appellants. He submitted that the Appellant persisted with the renovation in the teeth of the Respondents’ resistance, including a warning letter (exhibit B) which they caused their solicitor to write to him, which was a sequel to an earlier letter on the same subject.
7. He disagreed with the view of Appellant’s Counsel that (a) his client could not find anything if he had exercised due diligence in the absence of the vesting assent and (b) the 1st Defendant and the Respondents who acted with her should have made him aware of the interests of the other Respondents. According to Counsel, it was the duty of an intending purchaser to properly investigate the root of title. He relied on **Kusi & Kusi v Bonsu [2010] SCGLR 60**. He submitted that nowhere in the evidence was it disclosed that the Appellant or his agent conducted due diligence regarding the root of title of the property he intended to purchase. He was of the view that since people were living in the house, the Appellant could have contacted them as to the nature of the interests held in the property. In his view, it was not the duty of the 1st Defendant to provide information to the Appellant.
8. It was Counsel’s submission that the sale transaction violated provisions of the NRCD 175, particularly sections 1(1),(2),2 (1) (a) and 10, which has found elucidation in **Asante-Appiah v Amponsah [2009] SCGLR 90**. He referred us to the fact there is no written document to evince the transfer of the property to the Appellant. According to him, the only documents on the transaction, being receipts (exhibits 4 and 9) do not state that the property in issue had been sold to the Appellant. In respect of exhibit 9, with the exception of the 5th Respondent, none of the Respondents or even the 1st Defendant who was at the helm of the transaction signed. Exhibits 4 and 9 therefore cannot pass as instruments transferring the property to the Appellant.
9. In respect of the two additional grounds filed on 18 December 2023, he submitted that the filing was without leave of the court and violated Rule 8 (7) of the **Court of Appeal Rules (C.I. 19)**. He nonetheless addressed them as a matter of precaution. The two main issues raised by counsel for the Appellant were: (a) since the Respondents sued in a representative capacity, that fact should have been endorsed on the writ of summons, and (b) since some of the beneficiaries of the estate were left out, the instant Respondents lacked capacity to institute the action. Counsel for the Respondents debunked the claim of ~~counsel~~Counsel for the Appellant that the Respondents sued in a representative capacity. According to him, the Respondents sued in their capacity as the beneficiaries and owners of the estate of Nicholas Kof i Mensah. Since with the exception of the 1st Defendant, there are no other beneficiaries of the estate, and the Respondents did not represent anyone else, they were not required to endorse their writ with any representative capacity.

He conceded that the late Nicholas Kofi Mensah had other children by another woman, but those children are not beneficiaries of the property in dispute. He submitted that even though there is no evidence that the late Nicholas Kofi Mensah had another property elsewhere, exhibit A which vested the disputed property in the Respondents and the 1st Defendant, excluded those children as beneficiaries of the subject property. In that circumstance, he deemed the Respondents as vested with capacity to mount the action at the High Court.

**APPEAL AS A REHEARING**

1. An appeal amounts to a rehearing of the case, in particular where the omnibus ground of appeal is canvassed, as in the instant case. Rule 8 (1),

C.I. 19 therefore states:

“*Any appeal to the Court shall be by way of re-hearing and shall be brought by a notice referred to in these Rules as "the notice of appeal*".

In **Tuakwa v Bosom {2001-2002] SCGLR 61,** the apex court per Sophia Akuffo JSC (as she then was), held (at p 61):

*“An appeal is by way of re-hearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial court is against the weight of evidence. In such a case, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that, on a preponderance of probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence…’’*

In the case of **Koglex Ltd (No.2) v Field [2000] SCGLR 175, SC**, Acquah JSC (as he then was), stated the principles upon which an appellate court may consider an appeal as follows:

* 1. *“Where the said findings of the trial court are clearly unsupported by evidence on record; or where the reasons in support of the findings are unsatisfactory…*
  2. *Improper application of a principle of evidence… or, where the trial court has failed to draw an irresistible conclusion from the evidence...*
  3. *Where the findings are based on a wrong proposition of law; where the finding is so based on an erroneous proposition of law, that if that proposition is corrected, the finding disappears; and*
  4. *Where the finding is inconsistent with crucial documentary evidence on record…’’*

Since it is the Appellant who has invited the court to rehear the case and review the judgment of the trial High Court, he had the duty to demonstrate that the trial court considered unnecessary or irrelevant matters or failed to consider relevant matters which if properly considered in this review, has the potential to alter the judgment. The approach we shall adopt is to consider the two grounds of appeal filed on 1 November 2019, after which we may attend to the additional grounds of appeal filed by the Appellant on 14 December 2023.

**GROUNDS 1 AND 2 OF THE APPEAL**

1. *The judgment is against the weight of evidence on record.*
2. *The Honourable Court did not adequately consider the evidence of the 2nd Defendant.*
3. Evidently, the two grounds amount to the same thing. Instead of striking the second one out, we opted to treat them together, as done by counsel for the parties. We shall equally adopt themes under which the grounds were argued by Counsel for the Appellant and responded to by Counsel for the Respondents.

# Nature of the interests held by the beneficiaries in the subject property

1. Even though the issue of the nature of tenancy was not raised in the pleadings, the issues for trial or the witness statements, the trial judge proceeded to attend to it in his judgment. The trial judge decided that on account of section 14 (3) of the **Conveyancing Act, 1973 (NRCD 175)**, the nature of the tenancy of the beneficiaries is tenancy in common, as opposed to joint tenancy. Counsel on both sides took the same position. The issue in contest was as to the incidence of a tenancy in common and how it applies to this case. According to the trial judge (page 274 of the record), as tenants in common, there is unity of possession, even though each tenant held a distinct and quantifiable share in the property, which is transferable to the beneficiaries of a tenant under testacy or intestacy. As a consequence, no single person in a tenancy in common situation can transfer title in the disputed property without the consent of the co- tenants. The trial judge held further that in the absence of a power of attorney indicating that the 1st, 3rd, 4th and 7th Respondents appointed the 1st Defendant to act on their behalf in the sale of the subject property, the 1st Defendant had no capacity to transfer the property to the Appellant.
2. Counsel for the Appellant disputed the trial judge’s conclusion that a tenant in common cannot dispose of the property (his share of the property) without the consent of the other tenants. He referred us to the authorial views of da Rocha, BJ and Lodoh, CK, in ***Ghana Land Law and Conveyancing (2nd ed. Page 267)***, where they state:

“*A tenant in common may also dispose of his share in the property inter vivos. The person to whom his share is disposed steps into his shoes and becomes a tenant in common with the others*.”

On the modes of determination of a tenancy in common, the authors (at page 269) state:

“***Determination of tenancy in common.***

*A tenancy in common may be determined by (a) partition (sale), and (c) acquisition by one tenant, whether by grant or operation of law, of the shares vested in his co-tenants-this is known as union of sole tenant*”

He relied on the case of **Owusu-Asiedu v Adomako & Adomako [2007-2008[ SCGLR 591**, where the Supreme Court held (holding 1):

“*The statement by the Court of Appeal that where, as in the instant case, property is owned jointly, either party may alienate his or her interest only with the knowledge and consent of, or with the concurrence and approval by, or in concert and consultation with, the other joint owner is incorrect because alienation by a joint tenant of his interest without the knowledge or consent of the other joint tenant will usually be an act of severance by which the joint tenancy is converted into a tenancy in common. An act of severance determines the joint tenancy*.”

According to Counsel for the Appellant, the tenancy in the instant case was determined on the day the property was sold to the Appellant by the co- tenants, that is the Respondents and those not named as parties to the case.

1. Counsel for the Respondents backed all the conclusions of the trial judge and disagreed with the conclusions of his friend at the Bar. He submitted that the interest that can be alienated without the knowledge or consent of a tenant in common is "*his or her interest only*” and not the interest of the other co-tenants. And to be able to alienate the entire property, the consent of the other co-tenants is required.
2. The basic and unimpeachable thought gathered from the preceding is that, in either a joint tenancy or tenancy in common situation, a tenant can only dispose of his interest in the property, and not the interest of his co-tenants. The knowledge and consent of the joint or co-tenants is required only where the entire property is to be disposed of. In the instant case, it was the entire interest in the subject matter that was transferred to the Appellant. The question then is, was the subject property sold to the Appellant with the knowledge and consent of the other co-tenants, as the Appellant claim, or it was sold at the back of some of the co- tenants, in particular, the 1st, 3rd, 4th and 7th Respondents, as the Respondents claim. That leads to the question of whether the property was transferred with the consent of the other Respondents.

# Whether or not the subject property was transferred by the 1st Defendant to the Appellant with the knowledge and consent of the other Respondents (co-tenants)

1. The claim of the Respondents that the subject property was sold to the Appellant by the 1st Defendant without their consent suffered brutal assault at the trial court. The claim of the Respondents was mired in contradictions, inconsistencies and half-truths. The trial judge partly rejected their claims and, in the judgment, ordered the “*2nd, 5th, 6th Plaintiffs and the 1st Defendant to pay the above stated sum to the 2nd Defendant without interest*.” See: page 279, paragraph 4 of the record. The Respondents did not appeal against that finding, meaning that they came to court not with the whole truth, but with half-truths. In view of the trial court’s conclusion that the 2nd, 5th, 6th and 1st Defendant acted together to sell the subject house to the Appellant, we need not spend time and resources to review those facts.
2. The requisite enquiry is as to whether the remaining Respondents partook in the transaction or are otherwise bound by it. The evidence on record shows that the 3rd Respondent had full knowledge of the decision to sell. When he learnt that the sale was fuelled by the demand for money by his half siblings to pay school fees, he requested for time to find the money for them so that the sale halted. He however, failed to find the money, for which reason the sale proceeded. He was therefore aware of the decision of the 1st Defendant, the 2nd, 5th and 6th Respondents and the entire body of seven children of their father by Beatrice Afriyie.

The reality then is that, of the fourteen children of late Nicholas Kofi Mensah, only the 1st, 4th and 7th Respondents were not involved in the transaction. The 4th and 7th Respondents were out of the country. The 1st Respondent, who was in Accra, has a history of a nonchalant attitude when it came to his late father’s affairs. According to him, he was not around when his father died so did not know the steps that were taken. He was not even aware that letters of administration has been granted. In a democratic society like Ghana, the decision of the majority must prevail. The decision of the majority of the children of late Nicholas Kofi Mensah backed by the widow (second Respondent) was sufficient to give validity to the sale of the property to the Appellant.

The sale transaction which involved the administrators could not be vitiated or reopened by the 1st Respondent or any other person on ground of the smallness of the quantum of the consideration. With the involvement of the widow, the administrators and majority of the beneficiaries, the trial judge’s conclusion that the Appellant did not conduct due diligence search could not be correct.

# Whether or not the administrators of late Nicholas Kofi Mensal had capacity to sell the property.

1. It is common cause that at the time of the sale of the subject property to the Appellant, letters of administration had been granted the administrators who were yet to vest the estate in the beneficiaries. In that circumstance, counsel for the Appellant pleaded the legal right of the administrators to deal with the property in a manner deemed fit by them, including sale of the estate, whether movable or unmovable. His anchor was section 93 (1) and (2) of the **Administration of Estates Act, 1961 (Act 63)** and the teachings of the erudite E.S. Aidoo, ***Conveyancing and Drafting, Law & Practice in Ghana*** (pages 18-23). Counsel contended that exhibit C1, found at page 115 of the record, is an order of the court applied for by the administrators to sell the property under their administration.

Counsel for the Respondents conceded the right of the administrators to sell property of the estate, but on account of section 93 (2) of Act 63, argued that the sale can only be effected under a court order. Counsel rejected the submission that exhibit C1 is a court order for the sale of the property.

Section 93 of Act 63 provides:

“***Section 93—Realisation of Assets.***

* 1. *Subject to subsection (2) of this section the personal representative may, so far as required for the purposes of administration, sell and convert into money any movable and immovable property of the deceased other than those household chattels and immovable property to which sections 3 and 4 of the Intestate Succession Law, 1985 (PNDCL 111) apply.*
  2. *Notwithstanding subsection (1) of this section if the personal representative is of the opinion that the conversion into money of those household chattels and the immovable property referred to in that subsection is necessary for the purposes of administration, he shall apply to the Court for an order to sell and convert into money those household chattels and immovable property*”

E.S Aidoo (supra), explains the utility of purchasing property from personal representatives of a deceased thus (pages 18-23):

“*All the property of a deceased person vest in his personal representatives. There is therefore less danger in accepting transfer from such persons*”

The capacity of personal representatives to dispose of a property in the estate is a given. However, as argued by counsel for the Respondents, section 93 (2) of Act 63 commands that an application should be made for a court order before such a sale can be legal. We align with counsel for the Respondents to disagree that exhibit C1 is either the application for the court order or the court order itself. There is nothing on the face of exhibit C1 to bestow it with that attribute. The conclusion we make is that the administrators with majority of the beneficiaries sold the property to the Appellant without the requisite court order envisaged under section 93 (2), Act 63.

1. What then is the effect of the sale to the Appellant without the court order? The obvious reason behind the requirement of a court order is the protection of the interests of the beneficiaries which may be at risk in the hands of greedy and malicious administrators.

In this case, the property was sold to the Appellant by the administrators in conjunction with majority of the beneficiaries. That is not a scenario section 93 of Act 63 had envisaged. Added to that, some of the beneficiaries had a legal combat in court, resulting in the court asking them to resolve the case. That was when the Eminent late Paapa Dadson esquire made unsuccessful efforts to resolve the case. When the case ended in the hands of Sarfo Gyamfi esquire, he supervised the sale to the Appellant. He prepared the receipts (appearing at pages 116-117 of the record) issued on behalf of the sellers to the appellant. Since the case was already in court and the court had encouraged the administrators and beneficiaries to settle, coupled with the fact that the sale was not only by the personal representatives but in conjunction with the widow and majority of the children who are beneficiaries, the failure to seek a court was not fatal to the transaction by which the subject property was sold to the appellant.

# Whether or not the Appellant has sufficiently performed to require specific performance from Respondents

1. The Appellant paid the full purchase price before being let into possession . Upon the purchase of the property in September 2011, the Appellant was asked by the vendors to wait for a sitting tenant to move before he took possession. The entire properties of the estate are two semi-detached houses on the same piece of land. The mother of the Respondents (2nd Respondent) and the other Respondents live in one of the houses. Before the Appellant went into possession, he took several steps to renovate the entire building to his taste. He erected a fence wall to demarcate the two semi-detached houses. He changed the roof by projecting higher than that of the other building. He constructed a new gate to gain his separate entrance. The 1st and 5th Respondents confirmed the renovations carried out by the Appellant under cross examination. See pages 133, 136 and 157 of the record.

None of the Respondents objected to the extensive renovations done by the Appellant under their watching eyes. It was only when the 1st Respondent arrived from Accra and learnt of the purchase price that he instigated the first resistance to the renovations, leading to a letter written by their solicitor to the Appellant. Even then, the main concern of the 1st Respondent was the purchase price, which prompted him to instigate a renegotiation of the purchase price. It is our holding that the Respondents did not object to the renovations because they were fully aware and most were part of the sale of the property to the Appellant and most had benefited from the proceeds of the sale. They are estopped by conduct from challenging the transaction.

# Whether or not the additional grounds of appeal filed on 18 December 2023 are competent

1. In the notice of appeal filed by the Appellant on 1 November 2019, two grounds were communicated, with an intimation that further grounds were to be filed on receipt of the judgment.

On 18 December 2023, two additional grounds of appeal were filed by the Appellant. It was the submission of Respondents’ Counsel that the additional grounds of appeal filed without leave, were incompetent. Nevertheless, he addressed them by way of caution.

In the reply filed on 6 August 2024, Counsel for the Appellant submitted that the said grounds were filed before the compilation of the record of appeal at the registry of the trial court. According to him, same were included in the records before the parties were given copies to peruse and before the records were transmitted to this court. According to Counsel, there is no rule of this court that requires an appellant to seek leave before filing additional grounds of appeal at the trial court and before Form 6 is issued, and the record of appeal transmitted to this court. In that regard, he considered Rule 8(7), C.I. 19 inapplicable to this case. He prayed the court to apply Rules 8(8), and 63, C.I.19, on account that the Respondents have had knowledge of the said grounds and their lawyer has sufficiently adverted his mind to them and addressed on them.

1. Rule 8 (2), C.I.19 require an appeal to this court to be filed in the court below, that is the trial High Court or Circuit Court, as the case may be. No other provision addresses the addition, subtraction or modification of the grounds of appeal except Rule 8 (8), C.I.19, which provides:

“*The appellant shall not, without leave of the Court, argue or be heard in support of a ground of objection not mentioned in the notice of appeal, but the Court may allow the appellant to amend the grounds of appeal on the terms that the court thinks fit*.”

Rule 8 (9) in which Counsel for the Appellant sought refuge, also provides:

“*Despite subrules (4) to (8), the Court in deciding the appeal shall not be confined to the grounds set out by the appellant but the Court shall not rest its decision on a ground not set out by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground*.”

Counsel for the Appellant further found succour in the calming arms of Rule 63, which provides:

“*Where a party to the proceedings before the Court fails to comply with the Rules or with the terms of an order or the directions given or with a rule of practice or procedure directed or determined by the Court, the failure to comply is a bar to the further prosecution of proceedings unless the Court considers that the non-compliance should be waived*.”

1. There is no express provision in the Court of Appeal Rules on the filing of additional grounds of appeal. However, implicit in Rule 8 (8), is the need to apply for leave to file additional grounds of appeal. That was because, a ground not included in the notice of appeal cannot be argued without the court’s leave. Secondly, amendment with leave under Rule 8 (8) may involve altering the original grounds filed, replacing them or adding further grounds.
2. There is an opinion that a window exist within which an appellant may file additional grounds of appeal without leave. Mathew Appiah in ***Civil Practice & Procedure at the Court of Appeal in Ghana (2020, page 42)*** elucidates the opinion thus:

“*It must however be noted that an appellant is entitled to file additional grounds of appeal within the period which the appellant is entitled to automatic filing of notice of appeal without any leave since in that case the appellant is entitled to file a notice of appeal. However, after the expiration of the period within which an appellant is entitled to automatic filing of the notice of appeal, any grounds of appeal filed must be with the leave of the Court of Appeal in strict compliance with the Rules.* ”

It is now settled beyond any shadow of doubt in this court that an appellant requires leave of the court to file additional grounds of appeal. In an instance where an appellant had filed two notices of appeal, with the second notice of appeal canvassing grounds not found in the first notice of appeal, the Supreme Court, in **Boateng v McKeown Investment Ltd [2020] GHASC 81 (5 February 2020),** per Amegatcher JSC held per (at page 7):

*“The import of rule 9 of C.I.19 is that the jurisdiction of the Court of Appeal is invoked when a ‘notice of appeal’ is filed in the registry of the court. Only one notice of appeal is contemplated by the rule. After a valid notice of appeal has been filed any addition to the notice in the form of additional grounds or amendments must comply strictly with rule 8 (7). The rule, however, vests the Court with power to determine an appeal outside the grounds stated in the notice of appeal but this is a discretion granted to the court and not to the parties. An appellate court, therefore, should not without leave of the court permit any party to amend the grounds or argue grounds of appeal not stated in the notice of appeal*…”

1. What then is the effect of the additional grounds of appeal filed by the appellant in the context of our discretion to permit arguments on grounds of appeal filed without leave?

It is noted that the additional grounds of appeal was filed at the time the record of appeal was being compiled. It was made part of the record without protest from the Respondents. By the mechanics of fate, this court did not detect its presence in the course of hearing of the appeal. Counsel for the Appellant has addressed us on those grounds, and counsel for the Respondents, despite the belated protestation, has also addressed us on same.

1. The jurisprudence on the fate of grounds of appeal filed out of time and without leave is quite fragmented. Generally, any additional ground of appeal filed without leave ought to be struck out. In **Nana Osei Akoto VI v Kwadwo Fosu (Civil Appeal No. J4/26/2020, dated 1 February 2023, SC)**, it was held that additional grounds of appeal filed without leave must be struck out. There are a few exceptions to the rule. Firstly, where counsel has inadvertently filed additional grounds without leave, he may seek leave of the court for the submission on same to be allowed. This is quite an easy task where counsel on the other side has responded to the submissions on the additional grounds of appeal, See: Mathew Appiah (supra, page 43) and Serwaa Boateng (supra, page 51).

In **Volta Aluminium v Akuffo & Ors [2003-2005] 1GLR 502,SC**, it was held (holding 1):

“*The defendant did not seek leave of the court before filing its additional grounds of appeal and in accordance with Rule 6 (6) of the Supreme Court Rules, 1966 (CI 16) the defendant’s argument based on the additional grounds should be ignored. However, since by Rule 6 (7) of CI 16 the court was not obliged in deciding the appeal to confine itself to the grounds set forth by the appellant, nor was the court precluded from resting its decision on a ground not set forth by the appellant, in the interest of justice account would be taken of such of the additional grounds of appeal which would be helpful in the rehearing of the instant case by way of appeal. In any case, since the plaintiffs were given notice of the additional grounds and they in fact addressed them in the statement of case, there would be no injustice in resting any decision on any additional grounds…*”

# See also: Hotel Majorie ‘Y’ Ltd v Monyo [2013-2014] SCGLR 1342.

1. This court may may consider arguments on grounds of appeal filed without leave under the provisions of Rule 8 (9) and Rule 63, C.I.19. It was our decision that in the instant case where: (a) the additional grounds of appeal were filed before the record of appeal was prepared and duly formed part of the record (b) the additional grounds of appeal was part of the record of appeal transmitted to this court upon the issuance of Form 6 (c) the additional grounds of appeal were part of the record utilized for the hearing of the appeal, and (d) both counsel have had the opportunity to address on it in their written submission, the non-compliance by the appellant ought to be waived in the interest of substantive justice. We hereby waive the non-compliance by the Appellant and will consider the submissions made by counsel for the parties under the additional grounds of appeal.
2. It is self-evident that the two additional grounds of appeal are thematically and logically linked. They both question the capacity or locus standi of the Respondents to institute this action. The first ground question the failure of the Respondents to endorse on the writ of summons, the representative nature of the capacity in which they instituted the action, while the second ground castigates the trial judge for his failure to attend to the issue of Respondents’ capacity which was apparent on the face of the record. For the sake of emphasis, we shall hereunder reproduce the two additional grounds, which we shall hereafter treat together, on grounds of convenience, logic, economy of thought, time and space.

# Additional grounds of appeal

1. “*The Plaintiffs/Respondents lack the requisite capacity to have instituted the present action as they were not the only absolute owners of the entire property in dispute which said fact they failed to disclose on their writ of summons.”*
2. *“The learned judge erred when he failed to consider the Plaintiffs lack of capacity to bring the action in only their names though same became apparent on the evidence that other beneficiaries who participated in the transaction with the 1st Defendant had been left out as Plaintiffs*.”
3. Two themes of capacity are raised by the additional grounds of appeal. These are:
4. Failure of Respondents to endorse the representative nature of their capacity on the writ of summons, and
5. Failure of the trial judge to pronounce on the capacity of the Respondents which was apparent on the face of the record.

To re-summarise, the submission of counsel for the Appellant on these grounds are as follows:

1. That the Respondents in their statement of claim averred that they with the 1st defendant are the only beneficiaries of the estate of late Nicholas Kofi Mensah.
2. As a consequence, the vesting assent vested the subject property exclusively in their names.
3. When the Appellant denied their claim and averred in his statement of defence that there are other beneficiaries, the Respondents in their reply denied same.
4. The 1st Defendant in her witness statement admitted and revealed the names of the other children of late Nicholas Kofi Mensah.
5. Under cross-examination, the 1st respondent admitted that his late father was survived by 14 children by different women, with six coming from his mother.
6. That all the other children of late Nicholas Kofi Mensah are beneficiaries of his estate, being the subject property.

Based on the preceding, counsel for the Appellant argued that the pleadings of the Respondents should have disclosed the existence of the other children who are beneficiaries of his estate. It was his submission that since all the beneficiaries were not in court, the Respondents were suing in a representative capacity, which should have been endorsed on the writ, in conformance with Order 2 rule 4(1) of **the High Court (Civil Procedure) Rules, 2004 (C.I.47)**. He contended that the actions of the Respondents were aimed at overreaching the other beneficiaries vis a vis their interest in the disputed property. He prayed the court to declare the Respondents as lacking capacity to institute the action. He relied on **Mrs Violet Allan & Anor v Madam Mary Adjanor [2022] 179 GMJ 345.**

1. The response of Counsel for the Respondent, equally summarised supra, may also be re-summarised as follows:
2. That the Respondents sued in their personal capacities as beneficiaries of the estate, based on the vesting assent, and not in a representative capacity. They therefore have capacity.
3. That even though there are other children of late Nicholas Kofi Mensah who have interests in his estate, those children were excluded from the subject estate on account of the vesting assent.
4. That the Mrs Violet case is inapplicable to this case on account of the peculiar facts.
5. The writ of summons issued by the Respondents is defective in terms of the endorsement of Respondents’ capacity. The Respondents unilaterally declared themselves the sole beneficiaries of the subject estate, based on exhibit A, which vested the said property in them. Under cross-examination, the following evidence was extracted from the 1st Respondent (found at pages 124-125 of the record):

*Q. How many children survived your father?*

*A. I know he had 14 with different women. Our side 6 (1 passed away).*

*Q. At least you know 4 children who (sic) live at Amakom Sobolo?*

*A. I know he had children but I didn’t know where they lived.*

*Q.* ***Would you agree with me that apart from the children***

***from your mother’s side, the other children begotten not of your mother equally have interest in your father’s estate?***

***A. Yes, I agree****.*

*In her evidence-in-chief (witness statement, at page 112) , the 1st Defendant listed the other children of her father by Beatrice Afriyie as Mabel Mensah, Maxwell Mensah, Kwesi Mensah, Kwaku Mensah and David Mensah.*

1. In the face of the existence of other children of late Nicholas Kofi Mensah who have interest in his estate, how was a vesting assent issued exclusively in favour of the Respondents? The vesting assent is defective for the following reasons.
2. The subject property was a gift from late Francis Kojo Poku to late Nicholas Kofi Mensah. Francis Kojo Poku passed away before he could documentarily divorce it from his estate and vest it in the name of Nicholas Kofi Mensah. The personal representatives of Francis Kojo Poku took steps to divest it from the estate of Francis Kojo Poku at a time Nicholas Kofi Mensah had also passed away. That was why they executed the vesting assent in favour of the Respondents herein.
3. Since Nicholas Kofi Mensah had died at the time the vesting assent was executed, and his estate was being managed by his administrators, the personal representatives of Francis Kojo Poku should have transferred or vested the property in the administrators of the estate of Nicholas Kofi Mensah, to be administered on behalf of the estate.
4. Rather strangely, the personal representatives of Francis Kojo Poku usurped the legal duties of the administrators of Nicholas Kofi Mensah, and arbitrarily and in a discrimatory manner, vested the property in some of the children of late Nicholas Kofi Mensah. Exhibit A does not disclose the formular applied to arrive at the names of the Respondents as the sole beneficiaries. It does not also disclose the legal basis or formular for exclusion of some of the children from the property.
5. In doing so, no mention is made in the vesting assent, exhibit A, of the fact that the property belonged to the late Nicholas Kofi Mensah and after his death, his estate.
6. The late Nicholas Kofi Mensah was survived by 14 children. There is no evidence on record that the children met and decided that his estate be vested in the Respondents to the exclusion of the others. So either the Respondents deceived the personal representatives of Francis Kojo Poku that they were the only surviving children or the two sides colluded to exclude the other children as beneficiaries. Either way, fraud was perpetuated by the Respondents from which they cannot benefit. Fraud is apparent on the face of exhibit A in the context of the uncontested evidence. The bravado of the fraud is crystally clear and its intimidating, terrifying and rancorous noise pierces the ears of anyone who peruses the facts of this case. No court bent on doing justice will suffer such fraud to trample and prevail over the just case of a party before it. We repudiate it in the mighty interest of justice.
7. On the face of the vesting assent, exhibit A, the Respondents as beneficiaries take their root of title directly from the estate of Francis Kojo Poku, which should not be the case, since the subject property was gifted to their father and not to them as individuals.

Their names do not appear in the last Will and Testament of Francis Kojo Poku as beneficiaries, so the vesting of the assent did not spring from the Will.

1. Evidently, exhibit A was contrived by the personal representatives of Francis Kojo Poku to directly but illegally bestow the subject property on their favoured stock of the pool of Nicholas Kofi Mensah’s children.

Since the vesting assent and the Respondents’ capacity was at the centre of the trial and has been addressed on by counsel on both sides, we as an appellate court are entitled to raise any legal issues with it either suo motu or on application, at any stage of the trial or in this judgment. On grounds of public policy, the court cannot see an illegality and close its eyes to it. The defects on the face of exhibit A makes it an incompetent document upon which the Respondents could anchor their root of title and capacity to issue the writ of summons.

1. The Respondents as beneficiaries of the estate of late Nicholas Kofi Mensah had the capacity to sue to protect the property whether or not letters of administration had been granted and whether or not the property had been vested in them. But in view of the defective nature of the vesting assent, they could only sue as beneficiaries and not as vestees. Refreshingly, they endorsed on their writ that they sued as “*Beneficiaries of the estate of late Nicholas kofi Mensah.*” The unresolved question is, since there are other beneficiaries, should that not have reflected in the endorsement to the writ of summons?
2. Assuming without admitting that exhibit A is valid in terms of the legality of the personal representatives of late Francis Kojo Poku directly vesting the gifted properties of late Nicholas Kofi Mensah to a select group of his children instead of the whole, the writ will still be defective in terms of its endorsement. Notwithstanding the exclusive list of names mentioned in the vesting assent, the undisputed evidence from both sides proves that late Nicholas Kofi Mensah was survived by 14 children. There is no evidence to the effect that the children outside the vesting assent mandated the listed siblings to hold the property in trust for the whole. There is no court order or administrative decision that excludes the other children as beneficiaries of their father’s estate, inclusive the subject property. The net effect then is that the Respondents hold the property in trust for all the children of late Nicholas Kofi Mensah. The action could therefore not have been in their personal or individual capacities. The capacity of the Respondents and the rights of the beneficiaries of the estate of late Nicholas Kofi Mensah is not at the say so of the Respondents. It is at the say so of the law whose commands require obeisance by all including the court. Since the Respondents in reality sued for themselves and others not listed on the writ, their action was in a representative capacity which should have reflected in the endorsement on the writ of summons. The defect amounts only to an irregularity which is remediable by adding to the endorsement after the words “***Beneficiaries of the estate of the late Nicholas Kofi Mensah***” the words “**Suing for themselves and on behalf of the other beneficiaries of the estate of Nicholas Kofi Mensah**”

**CONCLUSION**

1. The court’s conclusions are as follows:
2. The vesting assent , exhibit A, from which the Respondents trace their root of title in the subject property, and upon which their capacity was founded , is incompetent and could not be the basis of their title and capacity. The action of the Respondents could not be founded on the vesting assent but in their capacity as beneficiaries. There are other children of late Nicholas Kofi Mensah who are beneficiaries of his estate and have not been excluded by a court order, any administrative decision or agreement of the beneficiaries. Their rights in the subject property could not be vanquished or diminished at the say so of the Respondents. The Respondents in that regard sued in a representative capacity, that is, on their own behalf and on behalf of the other beneficiaries. We uphold the submission of Appellant’s Counsel and find the ratio in **Mrs Violet Allan & Anor v Madam Mary Adjanor** (supra) applicable. We however do not find the need to invalidate the originating process where, as in the instant case, the endorsement on same can be rectified to reflect the true capacity in which the action was brought.

To reflect the representative capacity in which the Respondents brought the action, and in the interest of substantive justice, we suo motu amend the endorsement to the writ, by adding to the endorsement after the words “***Beneficiaries of the estate of the late Nicholas Kofi Mensah***” the words “ **Suing for themselves and on behalf of the other beneficiaries of the estate of Nicholas Kofi Mensah.**”

1. Despite the claim of the Respondents that only the 1st Defendant sold the property to the Appellant, the trial court found that the 2nd, 5th, and 6th Respondents teamed up with the 1st Defendant to effect the sale. The evidence on record also shows that 3rd Respondent was fully made aware of the decision to sell. He attempted to save the property by promising to provide money to his half siblings to resolve the issue of school fees which had fuelled their demand to have the property sold. He could not redeem his promise. The fact then is, all the children of Beatrice Afriyie, the widow and all ~~the~~ children ~~of the~~with late Nicholas Kofi Mensah with the exception of the 1st, 4th and 7th Respondents, knew about or were involved in the sale.

The decision of the majority of the children of late Nicholas Kofi Mensah backed by the widow (second Respondent) was sufficient to give validity to the sale of the property to the Appellant.

The sale transaction which involved majority of the beneficiaries and the administrators could not be vitiated or reopened by the 1st Respondent or any other person on ground of the smallness of the quantum of the consideration. With the involvement of the widow, the administrators and majority of the beneficiaries, the trial judge’s conclusion that the Appellant did not conduct due diligence search could not be correct.

1. The sale was not only by the personal representatives. It was effected by the personal representatives and majority of the beneficiaries. That is not a scenario envisaged by section 93 of Act 63. Once the case was already in court and the court had encouraged the administrators and beneficiaries to settle, coupled with the fact that the sale was not only by the personal representatives but in conjunction with the widow and majority of the children who are beneficiaries and same supervised by a lawyer, the mischief that section 93 (2) of Act 63 seeks to cure had been addressed. The failure to seek a court order was therefore not fatal to the transaction by which the subject property was sold to the Appellant.
2. The Respondents did not object to the extensive renovations done by the Appellant under their watching eyes from next door. It was only when the 1st Respondent arrived from Accra and learnt of the purchase price that he instigated the first resistance to the renovations, leading to a letter written by their solicitor to the Appellant. The main concern of the 1st Respondent, as he admitted under cross-examination, was the perceived smallness of the purchase price, which prompted him to instigate its renegotiation. It is our decision that the Respondents did not object to the renovations because they were fully aware, and most were part of the sale of the property to the Appellant and had benefited from the proceeds of the sale. They are estopped by conduct from challenging the transaction.
3. The review of the evidence and the judgment reveals that the judgment of the trial court entered in favour of the Respondents on 31 October 2019 is against the weight of evidence on record. The trial judge considered matters that had no probative evidential value and left out relevant matters. A consideration of the relevant matters let to a dramatic shift in the final judicial opinion that the weight of the evidence compels. Once majority of the beneficiaries and the personal representatives validly sold the subject property to the Appellant, they could not insist on renegotiation of the purchase price based on the instigation of the 1st Respondent. They may not have followed all the legal requirements to the full but having transferred their beneficial interest in the property to the Appellant, any legal rights outstanding to them would automatically transfer to the Appellant under the doctrine of feeding the estoppel. The evidence on record rather supports the reliefs sought by the Appellant in his counterclaim.
4. On grounds of merit, we uphold the appeal and set aside the judgment of the trial High Court dated 31 October 2019, which went in favour of the Respondents. We substitute same with judgment for the Appellant, based on his counterclaim.
   1. We declare that the sale of the subject house to the Appellant was done by the personal representatives of the estate of late Nicholas Kofi Mensah and the widow, in conjunction with majority of the children/beneficiaries for and on behalf of the estate of late Nicholas Kofi Mensah.
   2. Based on the full performance of the sale agreement by the Appellant, the extensive renovation done on the property under the watching eyes of the Respondents and to avoid unjust enrichment by the Respondents, we order specific performance of the sale agreement by the Respondents through the personal representatives. We order the administrators/personal representatives of the estate of late Nicholas Kofi Mensah to formerly convey the subject property to the Appellant within three

(3) months from today. Failing that, the Registrar of the High Court is ordered to execute a Deed of transfer in favour of the Appellant within two months after the three months given the administrators.

* 1. Perpetual injunction is hereby issued against the Respondents and the 1st Defendant, their agents, assigns, workmen, and anybody claiming through them from having anything to do with the disputed property.

1. Costs of GH¢10,000.00 is awarded in favour of the Appellant and against the Respondents.

**(SGD)**

**ERIC BAAH,**

**(JUSTICE OF APPEAL)**

**(SGD)**

**I agree GEORGINA MENSAH-DATSA (MRS),**

**(JUSTICE OF APPEAL)**

**(SGD)**

**I also agree KWAMINA BAIDEN,**

**(JUSTICE OF APPEAL)**