IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

KUMASI – AD. 2018

CORAM: ADUAMA OSEI JA (PRESIDING)

SENYO DZAMEFE JA

WELBOURNE (MRS.) JA

SUIT NO. H1/36/2017

17TH APRIL, 2018

AMA SERWAH …. PLAINTIFF/APPELLANT

VS.

1. **YAW ADU GYAMFI**
2. **VERA ADU GRAMFI ….. DEFENDANTS/APPELLANTS**

J U D G M E N T

ADUAMA OSEI JA:

This is our judgment in an appeal against a judgment of the Commercial Division of the High Court, Kumasi, dated the 22nd of December, 2015, in which the High Court dismissed the action of the Plaintiff/Appellant on the ground that at the time the Plaintiff/Appellant instituted her action, she had not obtained letters of administration and therefore lacked capacity to sue, and also dismissed the counterclaim of the Defendants/Respondents on the same ground of lack of capacity.

In this judgment, the Plaintiff/Appellant is referred to as **"the Appellant",** and the Defendants/Respondents are referred to as **"the Respondents".**

The writ of summons by which the action was initiated was issued in the High Court, Kumasi, on the 14th of January, 2014, and it was indorsed for reliefs against the Respondents jointly and severally as follows:

> **"a. An order for the recovery of the sum of One Hundred and Thirteen Thousand United States Dollars ($113,000) or its equivalent which money was fraudulently diverted into the account of the 2nd defendant with account number 1010243 by the defendants which money the plaintiff was entitled to.**
>
> **"b. Interest on the said amount from 2007 till date of final payment.**
>
> **"c. Costs including legal fees.**
>
> **"d. Any other relief deemed appropriate by this Honourable Court".**

In the statement of claim that accompanied the writ of summons, the Appellant described herself as a trader resident in Kumasi, and she described the Respondents as a married couple also residing in Kumasi and working as a sawmill manager and a trader respectively.

As averred in the statement of claim, the Appellant is a widow of the late Ernest Owusu Baah who died in Italy while working there with a company known as Nuova Ve SRL Fiorano Modenese Modena. He died from injuries he sustained in an accident on 21st April, 1998 and upon his death, she applied for an Italian visa for the purpose of pursuing her deceased husband's pension entitlements. She could not make the trip however, because she was pregnant at the time.

According to the Appellant, in view of her inability to make the trip, she authorised the 1st Respondent, who was a brother of her deceased husband to travel to Italy and assist in the processing of her deceased husband's pension benefits, of which she and her three children by the deceased were the beneficiaries. The names of the children were given as, Afua Dwumfour, Kwaku Owusu and Kwabena Appau.

The Appellant pleaded that the pension benefits were being paid by Institutio Nazionale Providenzo Sociale (INPS), and that the payments were made through various banks according to directives give by INPS from time to time. From 2001, according to the Appellant, she was receiving periodic payments for her own benefit and for the benefit of the children, and in 2007, the payments were being received through account number 0271211872, operated at the Prempeh II Street branch of Barclays Bank, Kumasi. In that year (2007), however, there was a sudden break in the receipt of payments and she had to write to the bank to complain. The response to her complaint was that no payments had been received by the bank for her benefit.

The Appellant stated that, in the circumstance, she resorted to frequent visits to the bank in the hope that she would hear about resumption of payments. On one of such visits, when she enquired about the payments at the bank, much to her surprise, she was asked by a bank staff why she was coming to enquire about payment when she had earlier in the day been paid some money.

According to the Appellant, with this development, she conducted investigations as to what had been happening and the investigations revealed that the 2nd Respondent had conspired with the 1st Respondent to open an account at Barclays Bank with the number, 1010243, using her particulars which included her name, date of birth and address. Through the said account, the Respondents were fraudulently and illegally receiving payments of pension benefits which they knew they were not entitled to but belonged to her and her children. The Appellant alleged that she reported the matter to the Police, and the Respondents are facing criminal prosecution in respect of the various monies they fraudulently diverted into the account they opened.

According to the Appellant, through that account, the Respondents had succeeded in fraudulently taking a total of $113,000.00 from her by diverting payments due to her and her children into the 2nd Defendant's account.

The Respondents however denied the debt and the allegation of fraud made by the Appellant against them, and also contended that the Appellant lacked capacity to institute the action. In their statement of defence, the 1st Respondent denied that it was on the

authority of the Appellant that he got involved in the claims respecting the death of the late Ernest Owusu Baah. The 1st Respondent explained that the late Ernest Owusu Baah was his elder brother and he was working together with him in Italy in the same company, and it was not the Appellant who made him travel to Italy in respect of the claim. The 1st Respondent also stated that the claim was not a pension claim and the payments the Appellant was receiving were not pension payments. The claim and the payments , according to the 1st Respondent, were in respect of insurance compensation payable in respect of the death of his late brother through an accident.

The 1st Respondent alleged in the statement of defence that after the funeral rites for his deceased brother had been performed, he was appointed the customary successor of his brother and he became his next-of-kin thereby. The Respondents alleged that by Italian law, when an employee who was insured sustained an injury in the course of working and he died as a result of the injury, an insurance compensation was payable in respect of his death and the person entitled to receive the said compensation was the next-of-kin.

According to the Respondents, in view of this position of Italian law, when the 1st Respondent returned to Italy from Ghana after the funeral rites, he engaged the services of a lawyer in Italy to pursue the insurance compensation claim in respect of his late brother's death. The 1st Respondent explained that it was in his capacity as the next-of-kin that he pursued the compensation claim and it was not on any authority given him by the Appellant.

The 1st Respondent stated further that the Appellant knew nothing about the compensation and the instructions he had given to a lawyer in Italy in respect thereof and it was when he visited Ghana in 1998 during the Christmas holidays that he informed the Appellant about this. The 1st Respondent also told the Appellant that in view of the circumstances of his late brother's death and the fact that his late brother was survived by children who would have to be cared for, he was going to make the Appellant and the children additional beneficiaries of the compensation payments. In addition to himself as the next-of-kin, therefore, the Appellant and the children were added as beneficiaries. The 1st Respondent explained that the decision to include the Appellant and the children was his own decision and did not arise out of any right they had under the insurance policy.

To facilitate easy receipt of payments by the Appellant and the children, the paying insurance company was directed to transmit the payments to Ghana and an account was opened in Ghana in the name of the Appellant for this purpose. According to the Respondents, it was agreed between them and the Appellant that a third part of each payment would be for the 1st Respondent as the next-of-kin, another third would be for the mother of the deceased, and the remaining third would be for the Appellant and the children. And since the Appellant was living in Ghana while the 1st Respondent was in Italy, the Appellant agreed to reserve the 1st Respondent's share for him upon receipt of each payment.

Explaining how an account was opened in the name of the 2nd Respondent for the receipt of payments, the 1st Respondent stated

in the statement of defence that the insurance claim was subject to annual renewals which the Appellant failed to keep up with and to avoid the claim being lost to the detriment of all of them, he used the Appellant's particulars to obtain a passport for the 2nd Respondent to renew the claim. According to the 1st Respondent, over a period of 7 years, the 2nd Respondent kept renewing the claim annually and in all those years, it was the Appellant alone who was receiving the money.

The 1st Respondent stated that in 2007 he did not have money to renew the documents on the claim and payments therefore ceased. When payments ceased, the Appellant came to inform him about it and he explained to the Appellant that the payments had ceased because they had not been able to renew the documents on the claim. He said he asked the Appellant to provide money for renewal of the documents, but the Appellant refused to provide any money, saying that she had already received a lot of money from the claim and she did not care if no further payments were made.

The 1st Respondent stated that in view of the position taken by the Appellant, he indicated to her that he would find money for the renewal of the documents but would open an account in the name of the 2nd Respondent for her to receive the money on his behalf. The 1st Respondent stated that he renewed the documents and opened the account as indicated to the Appellant but when the Appellant got to know that payments were being received through the new account of the 2nd Respondent, she came to plead for a share to be paid to her. The 1st Respondent however refused to

accede to the Appellant's request and the Appellant reported the 1st Respondent to the Police that he had stolen her money amounting to $169,215.82, and also reported the 2nd Respondent on charges of forging documents.

Having responded to the Appellant's allegations as summarised above, the Respondents proceeded to counterclaim against the Appellant, for recovery of:

i) **Seventy-Thousand United States Dollars, being an amount allegedly spent by the 1st Respondent in processing the insurance claim in Italy for the benefit of the Appellant;**

ii) **Six Thousand United States Dollars, being in respect of the renewal of the documents on the insurance claim for the benefit of the Appellant in the first two years;**

iii) **Fifteen Thousand Euros, being in respect of the renewal of the documents for the benefit of the Appellant;**

iv) **A third part of the sum of $117,600.00, being the 1st Respondent's share of payments received by the Appellant as insurance compensation claim for 7 years which share the Appellant failed to pay to the 1st Respondent; and**

v) **Thirty-Thousand Euros, being an amount used by the 1st Respondent to renew the insurance claim documents for the benefit of the Appellant when payments ceased.**

When attempts to settle the matter at the pre-trial stage failed the following issues were set down by the pre-trial judge as the issues for trial:

"Whether or not the Plaintiff has capacity to institute this action against the Defendants.

"1. Whether or not the payments resulting from the death of Ernest Owusu Baah was insurance compensation or pension benefits.

"2. Whether or not the 1st Defendant was a beneficiary under the pension and/or insurance compensation resulting from the death of Ernest Owusu Baah.

"3. Whether or not the 1st Defendant expended money in the processing and yearly renewal of the insurance compensation and/or pension benefits of the deceased.

"4. Whether or not the 1st Defendant in his capacity as customary successor and next of kin of the late Ernest Owusu Baah is entitled to benefit from the insurance compensation and/or his pension benefits.

"5. Whether or not there was an arrangement between the Plaintiff and the 1st Defendant to divide the insurance compensation and pension benefit of the late Ernest Owusu into three parts in the ratio of 1/3 to the Plaintiff and children, 1/3 to 1st Defendant and 1/3 to the mother of the deceased.

"6. Whether or not the Plaintiff fulfilled her part of the agreement relative to the sharing of the insurance compensation and pension benefits of the deceased.

"7. Whether or not the insurance compensation and pension benefits form part of the estate of the late Ernest Owusu Baah.

"8. Whether or not the Defendants have committed fraud.

"9. Whether or not the Plaintiff is enitled to her claim.

"10. Whether or not the Defendants are entitled to their counterclaim".

The action went through a full trial and, as stated above, judgment was delivered by the trial Court on the 22nd of December, 2015, dismissing the Appellant's claim for lack of capacity, and the Respondents' counterclaim on the same ground.

The Appellant has filed this appeal because she is dissatisfied with the judgment of the trial Court and she is in the appeal asking this Court to set aside the entire judgment. The judgment is at page 292 to page 296 0f the appeal record, and the notice of appeal is at pages 297 and 298 of the same record.

The grounds on which the Appellant is asking this Court to set aside the judgment of the trial Court are that the said judgment is against the weight of the evidence adduced at the trial, and that the trial Court erred when it dismissed the Appellant's case on the ground that she has no capacity to commence the action.

Counsel for the Appellant started his submissions in support of the appeal with Ground (b) which, as has just been noted, contends that the trial Court erred when it dismissed the Appellant's action on the ground that she had no capacity to commence the action. In arguing this ground, Counsel conceded that capacity is essential to the institution of every proceeding in Court and that where the capacity of a plaintiff was challenged, he was obliged to establish his capacity to prosecute his case on the merits. Counsel also conceded that in the present case, the capacity of the Appellant was challenged by the Respondents in their statement of defence. Counsel submitted however that the trial Court was in error in holding that the Appellant needed letters of administration to be entitled to institute her action. In the view of Counsel, the claim in respect of which the Appellant instituted her action fell outside the estate of the late Ernest Owusu Baah and the Appellant did not, therefore have to obtain letters of administration in respect of his estate to clothe herself with capacity to sue. Counsel contended

that the Appellant had been nominated by her late husband to receive the payments for her benefit and the benefit of her children. In his view, in the light of the nomination, as soon as her husband died, the Appellant became legally entitled to the money as of right.

It was further submitted by Counsel for the Appellant that even assuming the subject matter of the Appellant's claim formed part of the estate of the late Ernest Owusu Baah, having regard to the facts and circumstances of the present case, the Appellant's lack of letters of administration did not bar her from instituting the action. In the view of Counsel, it was clear from the evidence that the Respondents were dissipating monies which belonged to the Appellant and her children and to which the Respondents, particularly the 2nd Respondent whose account was being used, had no valid claim. Counsel cited the case of ***Okyere (Decd.) (Substituted by Peprah) Vs. Appenteng & Adoma*** [2012] 1 SCGLR 65 (76), in support of his position. In the view of Counsel, the Respondents were dissipating the monies to the detriment of the Appellant and her children and the Appellant was therefore properly before the Court to claim what duly belonged to her and her children.

Ground (a), which Counsel for the Appellant argued next, contends that the judgment of the trial Court is against the weight of the evidence adduced at the trial. Considering that the trial Court dismissed the Appellant's action for lack of capacity, I understand the Appellant to be saying under this ground that the decision of

lack of capacity is not supported by the evidence adduced at the trial.

It seems to me, however, that in arguing this ground, Counsel was going beyond the issue of lack of capacity and was seeking to establish that the Appellant's case against the Respondents was strong and unimpeachable. I do not think it was necessary for Counsel to go to this length under this ground.

Now, in response to the arguments advanced on behalf of the Appellant, Counsel for the Respondents submitted that lack of capacity, when successfully canvassed, disposes of the entire suit and it places no obligation on the Court to carry out a full trial. In the view of Counsel for the Respondents, the decision that the Appellant lacked capacity in the present case was sufficient ground for the dismissal of her action and the trial Court was therefore right in dismissing the action.

Regarding the decision that the Appellant lacked capacity, Counsel contended that the money or monies in respect of which the Appellant sued automatically formed part of the estate of the late Ernest Owusu Baah. In view of this, since the late Owusu Baah died intestate, an action against the Respondents in respect of the monies without letters of administration could not succeed. It would be an action instituted without capacity.

Counsel noted that in the present case, the deceased's mother was alive, and the 1st Respondent who processed the claim was also alive. The Appellant could not therefore claim that the subject

matter of her action became hers automatically. The Appellant's claim was therefore not outside Ernest Owusu Baah's estate and the Appellant could not sue without letters of administration.

Counsel did not also consider that the case of ***Okyere(Decd.) (Substituted by Peprah)*** (supra), cited by Counsel for the Appellant was helpful to the Appellant's case. In his view, the said case did not mean that letters of administration did not have to be taken out and the property in issue vested in the beneficiary before the beneficiary could sue in respect of the property. Counsel noted that in the present case, from paragraph 17 of the statement of claim, the Appellant had been receiving the money. The question of the property being dissipated did not therefore arise and the Appellant could not claim that she was suing to protect the estate.

In this appeal, Counsel for both parties agree that capacity is essential to the institution of an action in court. In ***Asante-Appiah Vs. Amponsa*** [2009] SCGLR 91 (95), cited by Counsel for the Respondents, the Supreme Court per Brobbey JSC underscored that where the capacity of a plaintiff to sue has been challenged, his failure to establish the capacity in which the action is prosecuted is sufficient basis on which to dismiss his claims. In ***Okudzeto Vs. Attorney-General*** [2003-2015] 1 GLR 559 (583), I sought to explain in the High Court that the question which a challenge to capacity raises is whether the person suing has a vested interest in the subject matter of his claim. Does he stand in such a relationship with the subject matter of the claim as to entitle him to a right of appearance in a court of law in respect of it? The

focus here is on the subject matter of the claim and how the plaintiff relates to that subject matter.

Because lack of capacity calls for the dismissal of an entire action, it is obviously a serious matter for a plaintiff to be told that he lacks capacity. And this, to my mind, underscores the need not to see an investigation into capacity as a perfunctory exercise done with scant regard to the facts on the ground, but as a factual exercise that should lead us to a discovery of the true nature of what the plaintiff is suing about and how he relates to it. It is when the true nature of the subject matter is known that we can make a just determination as to whether or not the plaintiff is entitled to sue about the subject matter.

As noted above, in the present case, the general ground that the judgment is against the weight of evidence is one of the two grounds on which the Appellant is questioning the judgment of the trial Court. By this ground, the Appellant is complaining that the trial Court did not adequately evaluate the facts before concluding that the Appellant lacked capacity to sue.

In the judgment appealed from, the process towards determining that the Appellant lacked capacity started with the outlining of the claims made in the action by the parties, followed by the outlining of the issues set down for determination by the Court, a reference to what transpired in Court on the 8th of September, 2014, and then the decision on capacity. That decision, as I find from the judgment, was based solely on what transpired in Court on the 8th of September, 2014, and this was in a case which had gone

through a full trial, and in which the testimonies of the partes, their witnesses, their exhibits as well as the addresses of their Counsel were available to the Court.

But what was it that transpired in Court on the 8th of September, 2014? Counsel for the Respondents asked the Appellant whether the money she was receiving (the subject matter of her claim) formed part of her husband's estate and she answered that it did. The follow-up question was whether she had obtained letters of administration and her answer was that she had not. It was the put to her that she had no capacity to come to Court and she insisted she had. But the trial Court saw it differently. If from her own mouth the money she was receiving formed part of her deceased husband's estate and she had not obtained letters to administer that estate, then she did not have capacity to sue for the money.

That was a logically drawn conclusion. But were the facts from which the conclusion was drawn true? The Appellant agreed with Counsel for the Respondents that the money she was receiving formed part of her husband's estate. But what if the facts before the Court proved otherwise? The Appellant may not have understood **"estate"** in the context of the question she was asked and, in the face of that possibility, does her statement, which in my view, is nothing more than an opinion, have to prevail over what the facts before the Court actually say?

Among the issues set down for determination were the issue whether or not the payment resulting from the death of the deceased was an insurance compensation or pension benefit, and

whether or not the insurance compensation or pension benefit formed part of the estate of the deceased. To my mind, having familiarised myself generally with the case from my reading of the record, it is these issues that hold the key to a proper determination as to whether the payments the Appellant was receiving formed part of her deceased husband's estate.

An insurance compensation may come with its own terms, and a pension benefit may also come with its own conditions. And, in my view, it is the terms or conditions attaching whatever payment the Appellant was receiving that would truly tell whether or not that payment formed part of the deceased's estate. Now, as noted above, in determining the question of capacity, the trial Court had available to it the testimonies of the parties and their witnesses as well as the exhibits tendered in the matter and the addresses of Counsel. To my mind, therefore, the trial Court had the means of determining the issue of capacity on the basis of the facts before it, rather than on the basis of an opinion which may not be educated.

I acknowledge that capacity is so fundamental in an action that when it is raised, it ought to be determined before the plaintiff is given the opportunity to be heard on the merits of his case. In a situation like the present one where there has been a full trial, capacity will still have to be determined before the plaintiff is heard on the merits. The practice in such a situation is to evaluate the evidence relating to capacity and to determine that issue on the basis of that evidence. If the determination is that there is want of capacity, the Court proceeds no further, and the plaintiff's action is dismissed. If, on the other hand, the decision is that the plaintiff

has capacity, the Court proceeds to review the entire evidence to determine the plaintiff's case on the merits.

Unfortunately, in the present case, the trial Court did not resort to the facts in determining the issue of capacity. Rather, it based itself on an opinion expressed by the Appellant in a setting where her full appreciation of the issues is doubtful. But it is said that appeals are by way of rehearing and in the case of ***Mamudu Wangara Vs. Gyato Wangara*** [1982-83] GLR 639, this Court, per Abban JA, as he then was, explained the concept to mean that the appellate court was virtually in the same position as if the hearing were the original hearing, and might review the whole case and not merely points as to which the appeal was brought. This means that in this judgment, this Court is in a position to do what, in our view, the trial Court ought to have done but failed to do. I will therefore proceed to evaluate the evidence on record relevant to the issue of capacity and decide that issue on the basis of facts.

While the Appellant claimed in her pleadings that the payments she was receiving were pension payments, the Respondents insisted that they were insurance compensation payments. It is however not in dispute that they were payments that were being made under Italian law. Under normal circumstances, therefore, it is by Italian law that their true nature and their implications in relation to the estate of a deceased person may be ascertained.

In his statement of defence, the 1st Respondent pleaded what he considered to be Italian law applicable in a situation where an insured person has died from injuries sustained by him while he

was in employment. He alleged that in such a situation, an insurance compensation was payable and the person entitled to receive the payment was the next-of-kin of the deceased. Italian law is, of course, foreign law and foreign law is an issue of fact to be proved by evidence. There is however no evidence on record in proof of the 1st Respondent's allegation. But as the Evidence Act, 1975 (NRCD 323) provides by its section 40, **"The law of a foreign country is presumed to be the same as the law of Ghana".** In the present case, therefore, the evidence on record will be looked at and their legal consequences or implications will be determined in accordance with our laws.

On the issue whether the payments that were being made were pension payments or insurance payments, details of an account said to have been opened at the Adum branch of Barclays Bank by the 2nd Respondent, using the name of the Appellant, have caught my attention. This would be the account which the Respondents stated in their statement of defence that the 1st Respondent had caused the 2nd Respondent to open in the name of the Appellant to enable the 2nd Respondent to receive the payments on behalf of the 1st Respondent, when the documents for the payments expired and the Appellant refused to provide money for their renewal.

The details appear in account statements found at page 369 to page 378 of the appeal record. Included in the details are payments made by INPS, described in full above in the pleadings of the Appellant as Institutio Nazionale Providenzo Sociale, through SWIFT over the period covered by the statement. And it is significant to note that all the said payments are described as

pension payments. Again, it is significant to note that in paragraph 58 of their statement of defence, the Respondents acknowledge INPS as the national institution through which the payments were being made.

Now, if the payments evidenced by the account statements at page 369 to page 378 of the appeal record have been described as pension payments, then since, as pleaded by the Respondents, they are payments made upon the renewal of the expired documents, it is reasonable to conclude that the payments made prior to the expiry of the documents were also pension payments.

At page 442 of the record of appeal, is an exhibit which I think also gives a clue as to the nature of the payments that were being received. It is an exhibit that came from the 1st Respondent, and having been admitted as an exhibit, it is assumed to be relevant to the matter in issue. The document does not say much in direct terms, but it seems to relate to the computation of annuities. And looking at it as a relevant document, I get the impression that the payments we are dealing with in the present case are in the nature of annuities, and that the annual salary of the employee serves as a basis for settling the annuity.

Now, an annuity is a fixed amount paid to a person each year or at other regular intervals. Among the definitions of **"annuity"** given by ***Black's Law Dictionary,*** 8th Edition, are: (a). **"An obligation to pay a stated sum, usually monthly or annually, to a stated recipient ..... These payments terminate upon the death of the designated beneficiary".** (b) **"A fixed sum of money**

payable periodically". (c). **"A right, often acquired under a life-insurance contract, to receive fixed payments periodically for a specified duration".** The dictionary also defines **"pension"** as **"a fixed sum paid regularly to a person (or to the person's beneficiaries), especially by an employer as a retirement benefit".**

From the definitions read from ***Black's Law Dictionary,*** (supra), the principles underlying **"annuities",** which the exhibit referred to above relates to, and **"pensions",** which the Appellant insists best describes the payments she had been receiving, are similar and in the context of this discussion, the two words are capable of being used interchangeably. But one thing is clear. The principles underlying **"annuities"** and **"pensions"** do not sync with **"compensation"** in the sense being used by the 1st Respondent herein. In the sense used by the 1st Respondent, **"compensation"** is a payment made as a remedy for loss suffered as a result of the death of a relative through a motor accident.

Where a company or other entity is liable to pay annuities or make pension payments to the dependants of a deceased employee, it may decide to take out an insurance policy to cover that liability. The involvement of an insurance company in making payments upon the death of an employee does not therefore, of itself, make the payments compensation payments. Indeed, as noted above from ***Black's Law Dictionary,*** an annuity may be payable under a life-insurance contract.

My perusal of the record of appeal in the present case has not disclosed anything to the contrary of what the documents at page 369 to page 378 and page 442 of the appeal record suggest. I find and hold therefore that the payments that were being made following the death of Ernest Owusu Baah were pension payments or payments in the nature of annuities, and not insurance compensation payments.

If the payments were pension payments, then it stands to reason that they were not payments due to Ernest Owusu Baah and they cannot be considered as monies belonging to Ernest Owusu Baah and therefore forming part of his estate. They can only be payments due to his dependants, and a point of significance is that the INPS, the national institution responsible for the payments, gave approval for the payments to start without demanding letters of administration. This, to my mind, is a strong indication that the payments were not part of the estate of the deceased. This is what the facts before the Court point to and it is contrary to the uneducated opinion drawn from the Appellant by Counsel for the Respondents which the trial Court unfortunately relied upon to dismiss the Appellant's action for lack of capacity.

Having reviewed the relevant evidence on record, I find and hold that the payments in issue herein were pension payments which did not form part of the estate of the late Ernest Owusu Baah. They were payments which the Appellant was entitled to by virtue of being a dependant of the deceased. If there were other persons who also claim to be entitled to receive part of the payments, it is up to them to establish their claims. No such clams can however

take away the Appellant's right to come to Court in pursuance of what she considers to be her right. In other words the Appellant has capacity to prosecute this action, and the order of the trial Court dated the 22nd of December, 2015, dismissing the action for lack of capacity is hereby set aside. Whether or not the Appellant is able to establish her claim is a completely different matter, and I now proceed to consider the merits of that claim.

As we noted at the beginning of this judgment, the Appellant is claiming the sum of $113,000.00 or its cedi equivalent against the Respondents jointly and severally, being money she claims to be entitled to, but which the Respondents are alleged to have fraudulently diverted into the 2nd Respondent's account number 1010243.

In support of her claim, the Appellant testified that the late Ernest Owusu Baah was her husband and he died in Italy while working there. She said when her husband died she was invited to Italy in respect of his pension but she was pregnant at the time and she could therefore not go. The Italian authorities therefore asked her to get somebody to represent her in Italy. The Appellant testified about various cheques she received through various banks in Ghana following her husband's death. She said those payments were pension payments received for her own benefit and the benefit of her children with her late husband. She tendered several documents as evidence of the payments she received.

The Appellant testified that the accounts through which the payments were being made were being changed from time to time

on the instructions of the paying institution and at a point in time, she had to open an account with the Prempeh II branch of Barclays Bank. She tendered an account statement from the Prempeh II branch of Barclays Bank as Exhibit E and stated that when that account was opened, the transfers from Italy ceased coming.

According to the Appellant, on one occasion when she went to the branch with the intention of withdrawing some money, she was surprised to be told by an employee of the bank that she had withdrawn money at the bank that very day. She said she became suspicious and reported the matter to the CID. She said her investigations revealed that the withdrawal she was told about had been made from an account at the branch which was in her name but bore the photograph of the 2nd Respondent. She said the withdrawals from the said account had gone on for four years and the sums withdrawn amounted to $130,000.00.

The Appellant denied having ever refused to renew the documents on the payments and said that every year, she went to the Police for a document to be made to confirm that she and her children were still alive. She tendered Exhibit F as an example of such documents. She also subpoened an official from Barclays Bank to tender statements on the account which the 2nd Defendant was said to have opened in the name of the Appellant, and through which she was withdrawing payments meant for her and her children. The statements were received in evidence as Exhibit H. The statements bear account number 1010243, the same number given in the indorsement on the writ of summons. The Appellant

denied the allegations on which the Respondents' counterclaim is based, and denied that the Respondents are entitled to the claims made under the counterclaim.

Even though the Appellant's claim was specifically for recovery of an amount belonging to her and her children said to have been diverted by the Respondents into the 2nd Respondent's account number1010243, the Respondents did not, in their cross-examination of the Appellant, challenge that part of her evidence which sought to prove the said claim. The Appellant's testimony that the 2nd Respondent had opened an account at Barclays Bank using her name (Appellant's name) but bearing the 2nd Respondent's photograph was not challenged, and the testimony that through the said account, an amount of $130,000.00 belonging to her and her children had been withdrawn by the Respondents was also not challenged. The cross-examination of the Appellant was largely focused on putting the case across that the payments that were being made were not pension payments but insurance compensation payments.

In my view, the Respondents not having challenged the Appellant's testimony that they had diverted a sum of $130,000.00 belonging to her and her children through an account opened at Barclays Bank by the 2nd Respondent in her (Appellant's) name, they are deemed to have admitted that claim. Indeed, while the 2nd Respondent was testifying in chief, the Appellant's allegation that the 2nd Respondent had used the Appellant's name and date of birth to open accounts at Barclays Bank was put to her for her reaction and when the Court asked whether the Respondents were

denying it, their lawyer responded that they were not. It seems to me in the circumstance that unless the Respondents are able to provide a legal justification for diverting the said amount, they will be liable to the Appellant for payment of the same.

In my opinion, a satisfactory justification must establish the Respondents' right to receive the amount as well as the legality of the means by which they received it. Regarding their right to receive the amount, I have taken particular note of the 1st Respondent's testimony that there are certain circumstances under Italian law where the successor of a deceased person becomes entitled to payment of an amount of money, and that his deceased brother died in such circumstances. Unfortunately, I do not find anywhere in the record of appeal, proof of the 1st Respondent's claim that his position as his deceased brother's successor makes him a beneficiary of the payments in issue.

The only document I have found on record that discloses beneficiaries is Exhibit 1, tendered by the 1st Respondent himself. In tendering it, the 1st Respondent indicated that it shows the names of the beneficiaries and, indeed, the names shown are Dwumfour Afua, Owusu Kwabena, Owusu Kwaku and Ama Serwah. These are the Appellant and her 3 children. Apart from Exhibit 1, there is no other document on record that mentions beneficiaries.

Apparently to establish the legality or propriety of the means by which she and the 1st Respondent diverted payments meant for the Appellant and her three children, the 2nd Respondent testified

that in 2007, the Appellant came to inform the 1st Respondent that the payments had ceased coming and the 1st Respondent explained to her that the payments were no longer coming because the documents relating thereto had not been renewed. The Appellant however refused to provide money for the renewal of the documents when she was asked so to do and the 1st Respondent was constrained to renew the documents at his own expense. The 2nd Respondent testified that having renewed the documents, the 1st Respondent opened a new account and asked his lawyer to make sure the payments were made through that account. With the new account, the payments were being received by the 1st Respondent through the 2nd Respondent.

The 1st Respondent made two attempts, while giving evidence in chief, to justify the method they used to receive the payments: the first was on 3rd March, 2015, and the 2nd was on 1st April, 2015. What I make of the justifications offered, which were contradictory in many places, is that the Appellant refused to provide money for renewal of the expired documents and in order not to allow the payments to terminate, he used a photocopy of the Appellant's passport to make a passport for the 2nd Respondent, which forged passport he used to renew the expired documents, and which same passport they used to open an account at Barclays Bank for the 2nd Respondent in the name of the Appellant for the purpose of receiving the fraudulently revived payments. These were done without the knowledge or consent of the Appellant and they were done in a situation where, as noted above, the Respondents are unable to establish a right to receipt of the payments.

I find and hold that the Respondents have failed to justify their receipt of the payments in issue and the Appellant is entitled to recover the amount involved from them. In the writ of summons, the Appellant stated the amount involved as $113,000.00. We note however, that in her testimony, she stated the amount as $130,000.00 and the Respondents did not deny or challenge it. May the Appellant be awarded judgment in an amount bigger than what has been indorsed on her writ of summons?

In ***Amakom Sawmill & Co. Vs. Mansah*** [1963] 1 GLR 368, the Supreme Court was faced with a situation where the trial judge had assessed damages at £G3,100, but felt obliged to enter judgment for £G3,000 because the respondents claimed £G3,000 on their writ. Akufo-Addo JSC, as he then was, took note of the practice in the country that in all money claims, whether they be for liquidated or unliquidated amounts. a specific figure must, for revenue purposes, be claimed. He however considered it **"such a pity that a plaintiff in the circumstances of this case should be awarded less damages than a court has found to be due, merely because of the technicality of having claimed a lesser figure on the writ".** In that case, to serve the ends of justice, Akufo-Addo resorted to Order 28, rule 12 of the old High Court Rules (LN. 140A) to amend the figure claimed to coincide with the amount to which, in his view, the plaintiff was entitled.

Order 28, rule 12 of LN. 140A is in the following words:

> ***"The Court or a Judge may at any time, and on such terms as to costs as the Court or Judge may think just,***

amend any defect or error in any proceedings and all necessary amendments may be made for the purpose of determining the real question or issue raised by or depending on the proceedings"

The provision in the current High Court Rules (CI. 47) analogous to Order 28, rule 12 of LN. 140A, quoted above, is Order 16, rule 7 (1), which is in the following words:

"7. (1) For the purpose of determining the real question in controversy between the parties or of correcting any defect or error in the proceedings, the Court may, at any stage of the proceedings either of its own motion or on the application of any party order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner as it may direct".

In substance, Order 28, rule 12 of LN. 140A and Order 16, rule 7 (1) of CI. 47 say the same thing and, indeed, in its unreported judgment in the case of ***Sempe Stool & Another Vs. Comfort Kwawu (Mrs.) & Others,*** dated the 18th of February, 2010, (Civil Appeal No. HI/121/05), this Court considered it appropriate, having regard to the circumstances of that case, to amend the statement of defence of the 1st defendant to enable her counterclaim for a declaration that she is the leasehold owner of the property in dispute.

I consider it appropriate in the present case to exercise the powers of the Court under Order 16, rule 7 (1) of CI. 47 to amend the indorsement on the Appellant's writ of summons, and I hereby do so by substituting the words **"the sum of one hundred and thirteen thousand United States Dollars ($113,000) or its cedi equivalent",** with the words **"the sum of one hundred and thirty thousand United States Dollars ($130,000) or its cedi equivalent".**

And having thus amended the writ of summons, I enter judgment for the Appellant against the Respondents jointly and severally for the sum of US$130,000.00 or its equivalent in cedi. I further order that the said sum shall attract interest from the 31st of December, 2007 to the date of this judgment, after which the post-judgment interest rate shall apply up to the date of final payment.

As we recall, in the judgment appealed from, the trial Court dismissed the Respondents' counterclaim for the reason that they had also not taken out letters of administration in respect of the estate of the late Ernest Owusu Baah. Having decided that the subject matter of the claim herein falls outside the estate of the deceased, I hereby set aside the order dismissing the Respondents' counterclaim for the same to be considered on the merits.

The claims made against the Appellant by the Respondents under their counterclaim have been set out above but may be repeated here. They are for the sum of $50,000.00, being an amount allegedly spent by the 1st Respondent in processing the claim on

behalf of the Appellant; the sum of $6,000.00, being in respect of the renewal of the documents on the alleged insurance claim for the benefit of the Appellant in the first two years; €15, 000.00 being in respect of the alleged renewal of the documents for the benefit of the Appellant; a third part of the sum of $117,600.00, being the 1st Respondent's alleged share of payments received by the Appellant as insurance compensation claim for 7 years which share the Appellant failed to pay to the 1st Respondent; and €30,000.00, being an amount used by the 1st Respondent to renew the alleged insurance claim documents for the benefit of the Appellant when payments ceased.

The claims are for expenditures allegedly incurred on behalf of the Appellant, and a share of payments due from the Appellant, by virtue of an agreement allegedly made with the Appellant. These are claims and allegations that have been denied by the Appellant and which the Respondents are therefore obliged to prove by credible evidence.

Reviewing the evidence, I find the 1st Respondent testifying about payment of the sum of $70,000.00 to a lawyer without providing any documentary support, I find him testifying about payment of $3,000.00 each year for the renewal of documents, also without any documentary support, and I find him stating that over a period of 5 years, he spent €15,000.00 on the renewal of documents. This, again, is without any documentary support. The agreement allegedly reached with the Appellant for the sharing of payments received, even though denied by the Appellant, is also not proved by credible evidence. A court will need to be cautious when

considering bare statements made by a witness, such as the 1st Respondent, who is capable of the type of deception by which a passport was made for the 2nd Respondent, using the particulars of the Appellant, and a bank account opened for the 2nd Respondent, again using the name, and other particulars of the Appellant.

On the merits, therefore, I find the Respondents' counterclaim unproved and I dismiss the same.

In conclusion, the Appellant's appeal succeeds and, as declared above, the judgment of the trial Court dismissing her action for lack of capacity is set aside. Judgment is entered for the Appellant on the merits in the terms stated above, and the counterclaim of the Respondents is dismissed on the merits.

{SGD}
K. N. ADUAMA OSEI
[JUSTICE OF APPEAL]
{PRESIDING}

I AGREE

{SGD}
SENYO DZAMEFE
[JUSTICE OF APPEAL]

I ALSO AGREE

{SGD}
MARGARET WELBOURNE (MRS.)
[JUSTICE OF APPEAL]

Counsel:

1. ***Dennis Kumah Kwakye for Plaintiff/Appellant, Frederick Kankam Boadu with him.***

2. ***Kwame Antwi Afriyie for Defendant/Respondent.***