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GH¢ 10000 Money/Postal Order No. *0101513*

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the sum of: *One hundred*

Ghana Cedis and *Ghana pesewas on account of*

Ernst & Young

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Signed: _____

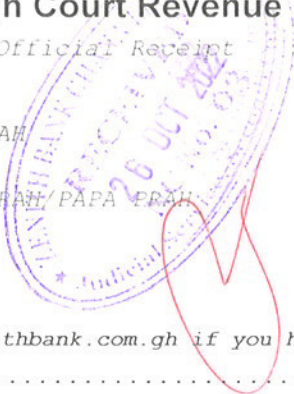


High Court Revenue

Official Receipt

Court Name: H/C
Case Title: AYAMGA Y AKOLGO VS PAPA PRAH
Processing Officer: EBEN
Description: AYAMGA Y AKOLGO VS PAPA PRAH/PAPA PRAH

Date: Wednesday, October 26, 2022
Account No.: 60101640
Transaction ID: 13260108
Amount Paid: GHS 100



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Vide GCR No. 0101513
26-10-22

IN THE HIGH COURT, SEKONDI HELD ON TUESDAY,
THE 25TH DAY OF OCTOBER, 2022 BEFORE HIS
LORDSHIP JUSTICE DR. RICHMOND OSEI-HWERE J.

SUIT NO: E2/74/18

AYAMGA YAKUBU AKOLGO

..... PLAINTIFF

VRS

- 1. PAPA PRAH @ BLACK EAGLE
- 2. EBUSUAPANYIN KWESI BEDIAKO
- 3. BRAM RODENBURG

.... 3RD DEFENDANT

J U D G M E N T

The Plaintiff originally commenced an action against the 1st Defendant, Papa Prah on 26th September, 2018 claiming the following reliefs:

- 1. *An Order of recovery of the property from the Defendant to Plaintiff.*
- 2. *An Order to the Ahanta West District Police Commander of Agona Ahanta to Assist Plaintiff evict Defendant from the property.*
- 3. *Perpetual injunction restraining the Defendant from interfering with Plaintiff's possession of the property.*

The 2nd Defendant was subsequently joined to the suit on 29th January, 2019. Per the Amended Writ and Statement of Claim filed on 29/01/19, there was no amendment to the reliefs sought.

CERTIFIED TRUE COPY
 REGISTRAR
 HIGH COURT SEKONDI

By an application for joinder, Bram Rodenburg through his lawful attorney Georgina Ama Eghan a.k.a. Mrs. Georgina Rodenburg applied to join the action as 3rd Defendant. Consequently, on 16th October, 2019 Bram Rodenburg acting per his lawful attorney was joined to the suit as 3rd Defendant.

Pursuant to the 19th October, 2019 Order of Joinder, Plaintiff filed an Amended Writ of Summons on 26th October, 2019 claiming the following reliefs:

- 1. An Order of recovery of property from 1st and 2nd Defendants to Plaintiff.*
- 2. An Order to the Ahanta West District Police Commander of Agona to assist the Plaintiff evict 1st and 2nd Defendants from the property.*
- 3. Perpetual injunction restraining Defendants from interfering with Plaintiff's possession of the property.*

THE PLAINTIFF'S CASE

The Plaintiff's case is that he purchased a property located at Number 2 Celestine Street, Busua from one Bram Rodenburg, a Dutchman who was resident in Ghana up until about 2013. That the purchase is evidenced by a deed of assignment dated October 9, 2015. The said Deed was duly registered with the Lands Commission. Plaintiff's case is that by the terms of the deed, Bram Rodenburg has assigned the remainder of his interest (46 years) to the Plaintiff. That Bram Rodenburg negotiated, signed, and executed the deed of assignment through his lawful attorney, Madam Evelyn K. Laryea. It

is also the case of the Plaintiff that Madam Evelyn Laryea's authority to negotiate, sign, and execute the deed of assignment for and on behalf of Bram Rodenburg is evidenced by a power of attorney which was duly given to her by Bram Rodenburg and dated January 1, 2014.

Plaintiff avers that Bram Rodenburg is not the allodial title holder of the property in dispute. That Bram purchased his leasehold interest in the land on which the property stands (the "Headlease) from the Aduabun Anona family of Busua in the Ahanta West District in the Western Region. This Headlease is evidence by Exhibit D – a Deed dated November 5, 2011. Exhibit D was tendered in evidence through the Plaintiff during cross-examination. That the Headlease was executed on behalf of the Aduabun Anona family by the 1st Defendant, the 2nd Defendant (as Head of family) and one Obaahema Nyiwae Balle.

Plaintiff further states that somewhere along the line, after Bram Rodenburg had left Ghana for his country, the Netherlands, ostensibly for good, the 1st Defendant and the 2nd Defendant entered the Property under undisclosed circumstances and claimed to be the caretaker of it. Plaintiff says that upon his purchase from Bram Rodenburg, he approached the 1st Defendant and 2nd Defendant and required them to vacate the Property, explaining to them that he is the new owner of it. That the 1st and 2nd Defendants, refused to vacate the property; whereupon the he brought the present action to, primarily recover possession and retrain the 1st Defendant and the

2nd Defendant from interfering with his right to quiet enjoyment of the of the property.

3RD DEFENDANT'S CASE

3rd Defendant's case is simply that he had never engaged anyone to sell his property or had engaged any one as his Attorney to sell his property on his behalf and that any purported sale is fraudulent as having been done without his knowledge and consent. Consequently, the 3rd Defendant acting per his Attorney Counterclaimed against the Plaintiff and 1st and 2nd Defendants as follows:

- i. *Declaration that the purported obtainment of an assignment of 3rd Defendant's property is fraudulent.*
- ii. *An Order setting aside the said Assignment.*
- iii. *An Order ejecting the 1st and 2nd Defendants from 3rd Defendant's property, Celestine Street, No.2 Busua.*

1ST AND 2ND DEFENDANTS

1st and 2nd Defendants originally filed a defence and disputed Plaintiff's claim. It was their case that the property reverted back to them when Bram Rodenburg returned to his home base in the Netherlands. However, in the cause of the proceedings – at a time when 1st Defendant was cross examining the Plaintiff – they (1st and 2nd Defendants) entered into terms of settlement with the Plaintiff. Consequently, Plaintiff's reliefs against them were discontinued. They remained in the case, as the 3rd Defendant had a counterclaim

against them. On 7th April, 2022 1st and 2nd Defendants announced to the court that they do not wish to contest 3rd Defendant's counterclaim against them. This move constitutes an admission of the counterclaim.

It is apparent from the foregoing that the litigation has now been whittled down to a dispute between the Plaintiff and the 3rd Defendant.

ISSUES SET DOWN FOR TRIAL

On 27/02/2020, the Court differently constituted adopted the following issues as issues for trial:

1. Whether or not the 3rd Defendant executed a Power of Attorney for Evelyn Korklu Laryea to assign his interest in the property in dispute?
2. Whether or not the alleged change in ownership of his property to the Plaintiff smacks of fraud?
3. Whether or not the Plaintiff is entitled to his reliefs sought?
4. Whether or not 3rd Defendant is entitled to his Counterclaim?

On 7th April, 2022 the court ordered counsel for the Plaintiff and 3rd Defendant to file their written addresses/submissions within twenty-one (21) days. Counsel for the Plaintiff complied with the twenty-one (21) day timeline. After a legal wrangling resulting from 3rd Defendant attorney's application to re-open her case – which was

dismissed; counsel for the 3rd Defendant finally filed his written address on 2nd August, 2022.

Counsel for 3rd Defendant's address led to a reply by Plaintiff himself. On 11th August, 2022 Plaintiff filed a document titled: REPLY TO ADDRESS OF 3RD DEFENDANT BY PLAINTIFF. Beside the incredible personal attack which Plaintiff directed at 3rd Defendant's lawyer, the reply was a rehash of Plaintiff's case which had already been articulated by his lawyer. It must be noted that a trial lawyer has the apparent, if not the actual authority to bind his client in matters involving the management of the litigation and this includes filing written address on behalf of his client. Therefore, a client cannot side step his lawyer and file a supplementary written address when there is no notice before the court that he has dispensed with the services of the lawyer. In the instant case, insofar as the Plaintiff has not dispensed with the services of his lawyer, the 11th August, 2022 process is irregular, as it is contrary to the rules of procedure and practice. I would therefore disregard the process filed by the Plaintiff in this judgment.

CAPACITY OF 3RD DEFENDANT'S ATTORNEY

In his written address, counsel for the Plaintiff has raised the issue of capacity of Georgina Eghan to join the suit and testify on behalf of Bram Rodenburg. Ordinarily, capacity of a party must be dealt with before evidence is taken. The court has held that there is no point going through a full trial only to conclude that a party has no capacity to institute an action or as it were to participate in a trial.

See *Alpha Musa v Dr. Francis Asante Appiagyei*, Civil Appeal No. J4/32/2017 (delivered on 2nd May, 2018).

In the case of *Nii Tetteh Kpobi Tsuru v Agri Cattle & Ors* (Civil Appeal No: J4/15/2019), the Supreme Court succinctly dealt with the contention relating to capacity in the following words:

“The law is trite that capacity is a fundamental and crucial matter that affects the very root of a suit and for that matter, it can be raised at any time even after judgment on appeal. The issue is so fundamental that when it is raised at an early stage of the proceedings a court mindful of doing justice ought to determine that issue before further proceedings are taken to determine the merits of the case. Thus, a Plaintiff whose capacity is challenged needs to adduce credible evidence at the earliest opportunity to satisfy the court that it had the requisite capacity to invoke the jurisdiction of the court. If this is not done, the entire proceedings founded on an action by a Plaintiff without capacity would be nullified should the fact of non-capacity be proved.”

It is my considered opinion that this dictum is applicable to a party who joins a suit as a defendant, particularly if the party is also a counter-claimant. In the instant case, Plaintiff never challenged the capacity of Madam Georgina Ama Eghan to join the suit on behalf of Bram Rodenburg and to testify on Bram’s behalf in his pleadings. Plaintiff’s lawyer, however, found it necessary to raise the issue of capacity in his address to the court. This is understandable because

Plaintiff was unrepresented during the pleadings stage. He only appointed his lawyer at the tail end of the trial when Madam Georgina Ama Eghan was about to start her testimony. Since the issue of capacity can be raised at any time even after judgment, it is within the purview of the court to decide the issue once it is raised in a written address. In view of this, the judgment will first focus on the capacity of Madam Georgina Ama Eghan (i.e. whether Georgina Eghan is a true and proper attorney to Bram Rodenburg) before venturing into the validity of the sale.

Counsel for the Plaintiff attacked the capacity of Madam Georgina Ama Eghan on two fronts: 1. that the Power of Attorney which Madam Georgina Ama Eghan is relying on is incomplete and irregular; and 2. that the Power of Attorney contained the donation of power to “litigate” but discloses no donation of the power to “testify” in the stead of the alleged donor.

Before I proceed to examine Plaintiff’s concerns vis-à-vis the capacity of Madam Georgina Eghan, I shall highlight key aspects of the legal regime relating to Power of Attorney in Ghana, particularly the essential features of a valid power of attorney. Indeed, the validity of a Power of Attorney is at the heart of this dispute since it is also 3rd Defendant’s claim that the Power of Attorney which was used to sell his property is invalid, as it was fraudulently procured.

The Law Relating to Power of Attorney

In *Hussey v. Edah* [1992-1993] 4 GBR 1703 at 1714, Hayfron-Benjamin JSC defined Power of Attorney as:

“a formal document by which one person, usually called the principal or donor diverts to another, usually called the attorney or donee, authority to represent him or act in his stead or for certain purposes spelt out in the document.”

Also, in *Dzanku v Afalenu and Anor [1968] GLR 792 to 794*, Kingsley Nyinah J (as he then was) defined power of attorney as follows:

“It is described as a formal document whereby one empowers another to stand in his stead or represent him for certain specific purposes. It may either be a special power, or else a general power. In the case of the latter, the general power, the person unto whom the power is given, the donee, becomes invested with full power to do such periodic acts as carrying on a business or collecting debts belonging to the donor of the power. Where the power is special, however, the donor of the power confines the donee to the doing of certain specified acts.”

In the **Encyclopedia of Forms and Precedents 5th edition vol 31 at page 495**, the book gives an introduction on Powers of Attorney where it says:

“A power of attorney is a ‘formal arrangement’ by which one person (the donor) gives another person (the attorney) authority to act on his behalf and in his name. It is a type of agency, and the law relating to powers of attorney forms part of the general law of agency.”

Indeed, a principal agent-relationship is established under a power of attorney, where the agent is empowered to act on behalf of the principal within the boundaries of the instrument. The terms of engagement are expressed within the content of the Power of Attorney.

A power of attorney shall contain the names, addresses and identities of the parties, its duration, reason for delegating the power and a statement that the donor agrees to ratify all acts performed by the donee within the scope of the Power of Attorney. See *Republic vrs High Court (Commercial Division), Ex parte; Nana Owusu Afriyie, Dr. Kwame Addo Kufour and First Atlantic Bank Limited (Interested Party), Civil Motion No J5/33/2021 (delivered on 26th May, 2021)*. The requirement of ratification is necessary because there are times when the donee will have to take additional action to be able to achieve the stated task. In the case of *Gordon v Essien* [1992] 1 GLR 232-241, the court held that if a person is given the right to do something, that right should extend to any additional thing necessary for the effective execution of that right.

By section 1 of the Powers of Attorney Act, 1998 (Act 549), an instrument creating a power of attorney shall be signed by the donor of the power, or a person authorised by him in the presence of the donor. Also, where the instrument is signed by the donor of the power one witness shall be present and shall attest the instrument. However, where the instrument is signed by a person authorised by

the donor, two witnesses shall be present and shall attest the instrument.

It is also the position of the law that Power of Attorney should be attested by Commissioner for Oaths or Notary Public. The previous position of the law was that the Commissioner for Oaths or Notary Public is separate from a witness and cannot be a substitute for a witness as held by Kanyoke JA in *Muhammed Sani Bellow v. Joseph Asumadu Nyarko, Civil Appeal H1/63/2011 (delivered on 9th June, 2011) p. 86 at 98* and Brobbey JSC in *Asante-Appiah v. Amponsah alias Mansah [2009] SCGLR 90 at page 94*. The Supreme Court speaking through Pwamang JSC in the case of *Luca & Anor v. Samir & Ors (J4 49 of 2020) [2021] GHASC 4 (21 April 2021)* reviewed its previous position of the law when it held that:

“In our view, a power of attorney constituted by a statutory declaration attested by a commissioner for oaths or Notary Public has more gravitas than one stated on a paper signed by the donor and attested by a witness without an oath so it cannot be right and just to hold such a power of attorney invalid.”

Thus, the current position of the law is that a Commissioner for Oaths or Notary Public can act as a witness to the instrument (power of attorney) beside its authentication or attestation role.

Another essential feature of a power of attorney is that if it is to be used abroad or if it is prepared abroad, it must be authenticated by a notary public. In *Fidelity Bank Ghana Limited v. Anita Asare & Ors, Suit No. BFS/69/16 (delivered on 28th March, 2018)* the

High Court per Mensah-Homiah J (as she then was) held that since the power of attorney was executed abroad by the three named persons to be used in Ghana it ought to have been notarized by a person other than the named witnesses. The court relied on the decision of the Supreme Court in *Asante-Appiah v. Amponsah [2009] SCGLR 90*. The relevance of this dictum is that a power of attorney executed abroad must be notarized abroad by a notary public before it can be used in Ghana.

Is the Power of Attorney donated to Georgina Eghan incomplete and irregular?

Counsel for the Plaintiff argued forcefully that Exhibit 1, the Power of Attorney donated to Georgina Ama Hagan lacks basic legal validity. This is because in the body of the power of attorney is the statement that “A copy of the passports of the person mentioned in this writing are signed and attached”. Counsel submitted further that at the foot of the first page of Exhibit 1 is a list of annexures, namely, (1) Picture Villa, (2) Passport 1 Bram Rodenburg, (3) Passport 2 Georgina Eghan, and (4) Oath of Proof. That the four listed annexures are attached to give and be used as confirmation of Exhibit 1’s authenticity and validity. Counsel argued that Exhibit 1 is an incomplete document since out of the four aforementioned annexures, only one – the Oath of Proof is attached to it. Counsel relied on the Nigerian case of *Vivien Folayemi Asana v First Bank of Nigeria Ltd (unreported Suit No. NICN/LA/184/2016) dated October 9, 2018* and the Privy Council decision in *Cyril Waugh*

(Reasons) v The King [1950] AC 203 and invited the court not to place reliance on the incomplete document in Exhibit 1 since the completeness of a document goes to the question of authenticity. That, the missing annexures make Exhibit 1 incomplete, unauthentic and consequently invalid. Counsel contended that being invalid, Exhibit 1 could not grant Madam Georgina Eghan *locus standi* or capacity to exercise Bram Rodenburg's power as his attorney. Counsel has therefore prayed the court to adjudge and hold that Madam Georgina Ama Eghan lacks capacity to represent Bram Rodenburg in the present suit.

A document can be said to be incomplete if the missing parts of the document affect the validity of the document. The Law Insider dictionary, for instance, defines incomplete document as "Incomplete Document means a document that has not been signed where a signature line is provided or where other obvious blanks appear in the document or that lacks a notarial certificate". See <https://www.lawinsider.com/dictionary/incomplete-document>.

. In the Indian case of *Narayanaswamy v. Madanlal*, AIR 1982 Kant 227, ILR 1982 KAR 238, it was held that where in a printed pronote form all the particulars were filled up but the interest column was left blank it was not an incomplete document under section 20 of the negotiable instruments act entitling the promisee to fill it up since Section 80 made a specific provision that in such a case interest at 6% per annum was payable.

To ascertain whether in the absence of the said annexures, Exhibit 1 can be described as an incomplete document; we need to look at the contents of the document. Exhibit 1 is the power of attorney donated to Madam Georgina Ama Eghan by Bram Rodenburg and it reads:

“POWER OF ATTORNEY

I, BRAM RODENBURG BORN ON 22 APRIL 1948 IN HAREN, THE NETHERLANDS RESIDING AT REGIMENTSLAAN 10, 9471MEZUIDLAREN, THE NETHERLANDS, (hereinafter referred as the “the vendor”) hereby appoint MS. GEORGINA RODENBURG-EGHAN A.K.A GEORGINA EGHAN BORN ON 20 APRIL 1963 RESIDING AT PTF 39 EFFIA, EAST FLJAI, POSTAL ADDRESS 28 M/C. TAKORADI {hereinafter referred to as the “Attorney”} as my representative for the sale and purchase of all that piece or parcel of land and dwelling house lying and situate at Busua in the Ahanta West District of the Western Region in the Republic of Ghana measuring two plots with GPS coordinates 4°48’04.4” N 1° 56’20.8” W {4.801212,-1.939100}

The Attorney, acting individually, is further authorized to carry out all the acts and deeds necessary and on my behalf, for the purpose of selling the said parcel and land, including but not restricted to the following:

1. To represent the vendor in all negotiation with possible purchasers with respect to the parcel of land.

2. To recover all documentation concerning the parcel of land and commence registration of same with the Lands commission.
3. To litigate on the vendors behalf all suits in respect of the piece or parcel of land.
4. And, I do hereby give to the said Attorney, general power and authority to do, execute and perform and furnish for me and in name, all those things which shall be expedient and necessary, which and said Attorney shall judge expedient and necessary in and about or concerning the rights hereby conferred, or any of them, HEREBY RATIFYING and confirming all and whatever the said Attorney shall do or cause to be done, about or concerning this instruments and any part thereof.

This Power of Attorney is issued by me, Bram Rodenburg for the purpose of effecting the sale of my property situated at Busia. A copy of the passports of the persons mentioned in this writing are signed and attached.

IN WITNESS HEREOF, the Power of Attorney has been duly executed in this 5th Day of July, 2019.

By...SGD.....

In the presence of

1, the undersigned Mr Gea Haak, civil law notary. Residing at Zuidlaren hereby

declare that the signature of Mr B. Rodenburg is seen for legalization by me Mr Gea Haak on this day the 5th of July, 2019.

AFFIXED SEAL OF G. HAAK

Annex:

1. Picture Villa
2. Passport 1 Bram Rodenburg
3. Passport 2 Georgina Eghan
4. Oath of Proof

It is obvious from the contents of Exhibit 1 that the Power of Attorney donated by Bram Rodenburg to Madam Georgina Ama Eghan satisfied the legal requirements of a valid power of attorney within the meaning of the Powers of Attorney Act, 1998 (Act 549). The document contains the names of the donor and the donee; addresses of the donor and donee; and the subject of the authority or reasons for delegating the power. It also contains a statement that the donor shall ratify all acts performed by the donee which are within the scope of the power of attorney. The document was duly signed by Bram Rodenburg (the donor) in the presence of Mr. Gea Haak, a civil law notary who also appended his signature. Mr. Gea Haak also acted as the notary public. The role of the notary public is very important in the circumstance, as the document was executed in the Netherland.

This is in line with the dictum of the Supreme Court in the Luca case (supra).

It is my considered opinion that inclusion of the list of annexures captured at the foot of the first page of the power of attorney (Exhibit 1) is not a prerequisite to the validity of a power of attorney. I daresay that the annexures are superfluous since they do not add to the validity of the document. The document passes muster as a valid power of attorney even in the absence of the stated annexures. So far as a notary public has attested to the authenticity of the document the annexures are not necessary.

Ordinarily, once the list of annexures has been stated, the documents ought to be attached to satisfy the form. I am, however, not oblivious of the fact that in law the battle between form and substance has been a long standing one. In this battle – whether in procedural rules or application of substantive law – substance has triumphed over form. At worst the power of attorney could be described as defective so long as those annexures were not attached when the same was tendered in evidence. It is, however, axiomatic to state that a defective document cannot be discarded if the defect does not affect the substance of the document. The result is that the instant Power of Attorney (Exhibit 1) cannot be described as an incomplete document since the missing parts of the document do not affect the validity of the document. The power of attorney was validly granted. Consequently, I hold that Madam Georgina Ama Eghan had the capacity to represent Bram Rodenburg in this suit.

Does the power to litigate include power to testify?

Counsel for the Plaintiff has submitted that there is a material difference between the power to litigate for and on behalf of a person and the power to testify to a particular state of fact in the litigation in the stead of the person. That the power to litigate entails the power to have the capacity to commence the action and be a party to the action. Counsel further submitted that even though it may entail the power to testify generally in support of the case, the power to litigate does not include the power to testify to a particular state of facts in the stead of the donor of the power. According to counsel the capacity to testify as a witness in a case is personal and that by Section 60(1) of the Evidence Act, it requires that the knowledge to testify as a witness be personal and not delegated. Thus, Georgina Ama Eghan was not qualified to testify on behalf of Bram Rodenburg.

In response to Counsel for the Plaintiff's submission, Counsel for the 3rd Respondent stated at page 12 of his address that:

"The Plaintiff would want this Court to believe that the 3rd Defendant Attorney's Power of Attorney is irregular because it did not contain power to "testify" but to "litigate". This is highly untenable as power to "litigate" include among others testifying on behalf of the Attorney. Indeed, to litigate is "the process of carrying on a lawsuit" which will include testifying. See page 1017 of Black's Law Dictionary ..."

The Black's Law Dictionary 6th edition defines litigation as:

“A lawsuit. Legal action, including all proceedings therein. Contest in a court of law for the purpose of enforcing a right or seeking a remedy. A judicial contest, a judicial controversy, a suit at law.”

The Black’s law dictionary also defines the term “litigate” as follows:

“To dispute or contend in form of law; to settle a dispute or seek relief in a court of law; to carry on a lawsuit. To bring into or engage in litigation; the act of carrying on a suit in a law court; a judicial contest; hence, any controversy that must be decided upon evidence in a court of law. To make the subject of a lawsuit; to contest in law; to prosecute or defend by pleadings, **evidence** and debate in a court ...” [Emphasis mine]

Litigation entails leading evidence to establish your case. Testifying in court is an essential part of litigation. Thus, the power to litigate involves the power to testify.

In the instant case, by paragraph 3 of the Power of Attorney, the lawful attorney, Madam Georgina Ama Eghan was given the power to litigate on behalf of the principal (Bram Rodenburg) in respect of suits relating to the piece or parcel of land (i.e. the property in dispute). This power entails the power to testify on behalf of Bram Rodenburg.

When a person acts as the attorney of another, he stands in the stead of the second named person (principal). His act becomes the act of the principal provided the said act falls within the authority

conferred on him under the power of attorney. In litigation, a lawful attorney steps into the shoes of a disputing party. He acts as the voice of the party. An attorney is not a witness inter se of the disputing party. He can, however, testify on behalf of the party if the Power of Attorney requires him to do so. It is, therefore, a party's (principal's) own doing if his lawful attorney has limited information on the subject matter of the dispute. So long as the power of attorney remains valid, a lawful attorney has the capacity to mount the witness box and testify on behalf of his principal. That is exactly what Madam Georgina Ama Eghan did on behalf of Bram Rodenburg. Thus, the allegation that she had no personal knowledge of some of the matters in issue and as such incompetent to testify is untenable.

I now turn my attention to the main issue which is at the heart of this case. This borders on the validity of the power of attorney allegedly donated to Evelyn Korklu Laryea to sell the property in dispute. Related to this issue is whether the assignment of the subject property to the Plaintiff is fraudulent. Resolution of these issues hold the key to the determination of the suit.

VALIDITY OF EVELYN K. LARYEA'S POWER OF ATTORNEY

3rd Defendant is claiming that he never donated a power of attorney to Madam Evelyn Korklu Laryea authorizing her to sell the property on his behalf. In his statement of defence, 3rd Defendant alleged fraud in the following terms:

10. The 3rd Defendant in response to paragraph 14 of the Amended Statement of Claim avers that any change in

ownership of his property to the Plaintiff was done by fraud as he has not at any point in time assigned his interest in the property to the Plaintiff was done by fraud as he has not at any point in time assigned his interest in the property to the Plaintiff or authorized anyone to do so.

Particulars of Fraud

- i. Surreptitiously and without 3rd Defendant's knowledge and consent obtaining an assignment of 3rd Defendant's property.*

In a civil action, an allegation that a crime has been committed must be proved beyond reasonable doubt. This rule is encapsulated under section 13 (1) of NRCD 323 which provides:

Section 13--Proof of Crime.

(1) In any civil or criminal action the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt.

In *Fenuku v John-Teye* [2001-2002] SCGLR 985, it was held (in holding 5) that:

“The law regarding proof of forgery or any allegation of a criminal act in a civil trial was governed by section 13(1) of Evidence Decree, 1975 (NRCD 323), which provided that the burden of persuasion required proof beyond reasonable doubt.”

Thus, the evidence led in proof of criminal allegation in a civil trial must be such that the court should be able to convict on that

crime if it were trying it in criminal proceedings. The ultimate condition to the application of this rule is that the allegation of crime should be a fact in issue. 3rd Defendant was therefore required to lead evidence to establish the allegation of fraud beyond reasonable doubt.

3rd Defendant's attorney told the court that 3rd Defendant never executed any power of attorney to Evelyn Korklu Laryea as alleged. That any change in ownership of 3rd Defendant's property to the Plaintiff was done by fraud as he has not at any point in time assigned his interest in the property to the Plaintiff or authorized anyone to do so. It is also 3rd Defendant's case that because of the romantic relationship which he had with Madam Laryea, the latter had in her possession some documents of his including a photocopy of the particulars section of his passport and that she lifted his signature and superimposed it on the purported power of attorney.

Plaintiff insists that the Power of Attorney (Exhibit A) was validly donated to Madam Evelyn Laryea and that empowered her to sell the property to him. Under cross examination, Plaintiff explained the process leading to the execution of the power of attorney allegedly donated to Madam Evelyn K. Laryea. The following transpired under cross examination on:

"Q. You will agree with me that the 2nd page is a scanned document as against 1st page?

A. My lord this Power of Attorney was drafted here in Ghana and it was emailed to 3rd Defendant i.e. Bram Rodenburg

in Netherlands and my lord it was drafted in Ghana by Sheila Abayie-Buckman, a Director of Public Relation who is my mate and forwarded to Evelyn. Evelyn then forwarded it to Bram Rodenburg in Netherlands for his signature. After signing it was sent through an email and Evelyn then executed it through Notary Public in Accra Achimota and duly paid stamp fees which is indicated on the Power of Attorney and it is valid as a Power of Attorney.

...

Q. So you will agree with me that Bram Rodenburg was not in Ghana to execute this Power of Attorney before a Notary Public?

A. My lord yes. My lord there is no requirement that the Donor must execute in Ghana while in abroad."

Plaintiff's testimony on the Power of Attorney was consistent with his evidence in chief. Madam Evelyn Korklu Laryea also corroborated Plaintiff's evidence on the mode of execution of her Power of Attorney (Exhibit A) when she testified as PW1. These pieces of evidence are clearly at odds with the role of Notary Public in the attestation of documents.

The Black's Law Dictionary 9th Edition at page 1161 defines a Notary Public as:

"A person authorized by a state to administer oaths, certify documents, attest to the authenticity of signatures ..."

in Netherlands and my lord it was drafted in Ghana by Sheila Abayie-Buckman, a Director of Public Relation who is my mate and forwarded to Evelyn. Evelyn then forwarded it to Bram Rodenburg in Netherlands for his signature. After signing it was sent through an email and Evelyn then executed it through Notary Public in Accra Achimota and duly paid stamp fees which is indicated on the Power of Attorney and it is valid as a Power of Attorney.

...

Q. So you will agree with me that Bram Rodenburg was not in Ghana to execute this Power of Attorney before a Notary Public?

A. My lord yes. My lord there is no requirement that the Donor must execute in Ghana while in abroad."

Plaintiff's testimony on the Power of Attorney was consistent with his evidence in chief. Madam Evelyn Korklu Laryea also corroborated Plaintiff's evidence on the mode of execution of her Power of Attorney (Exhibit A) when she testified as PW1. These pieces of evidence are clearly at odds with the role of Notary Public in the attestation of documents.

The Black's Law Dictionary 9th Edition at page 1161 defines a Notary Public as:

"A person authorized by a state to administer oaths, certify documents, attest to the authenticity of signatures ..."

Benjamin F. Rex in “The Notaries Manual 1 at 1 – 2 (JF1. Macmillan ed. 6th ed 1913) states:

“The notary public or notary, is an official known in nearly all civilized countries ... In modern times, their more characteristic duty is to attest the genuineness of any deeds or writings, in order to render same available as evidence of the facts contained therein.”

In Saul Litvinoff’s, 5 Louisiana Civil Law Treatise: The Law of Obligations 296-297) 2d ed. 2001, the author opined as follows:

“... a notary is a public official who serves as a public witness of facts transacted by private parties ...”

The above authorities on notary public were cited by counsel for the 3rd Defendant and the court find them useful, as they spell out the role of notary public in the execution of power of attorney. A notary public can only attest to the authenticity of a power of attorney if the document is executed before him. This explains why our courts have held in a plethora of authorities including *Fidelity Bank Ghana Limited v. Anita Asare & Ors (supra)*, *Asante-Appiah v. Amponsah (supra)* and *Luca & Anor v. Samir & Ors (supra)* that a power of attorney executed abroad must be notarized abroad by a notary public before it can be used in Ghana.

By Plaintiff’s own showing, the purported power of attorney was executed abroad but same was notarised in Achimota, Accra by a notary public. This process is not just an irregularity but a nullity as

it goes to the root of the validity of the document. On the face of the document, the notary public indicated that the power of attorney was executed in his presence. The following words appear at the end of page 2 of the Power of Attorney (Exhibit A):

“Certificate of due execution before a Notary Public

I, (name stated) duly authorized and sworn and practicing in Accra in the Republic of Ghana, do hereby certify that the persons named in the Power of Attorney duly executed this Power of Attorney to which the certificate is attached.

IN TESTIMONY whereof I have hereunto subscribed my name and affixed seal of office this ... day of 16-03-2014.

BEFORE ME

NOTARY PUBLIC

(AFFIXED SEAL)”

This declaration made by the Notary Public is false and therein lies the fraud. Since fraud vitiates all, the palpably false declaration has nullified the legal effect of the entire document.

Wood JA (as she then was) in *Good Shepherd Mission v Sykes & Ors [1997-88] 1 GLR 978-99 CA* defined what constitutes fraud and cited two distinguished English textbook writers, D. L. McDonnell and J.G. Monroe in their book *Kerr on Fraud and Mistake* (7th ed) and defined fraud as follows:

“Fraud in the contemplation of a civil court of justice may be said to include properly all acts, omissions, and concealment which involve a breach of legal or equitable duty trust or confidence, justly reposed, and are injurious to another or by which an undue or unconscient advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered as fraud. Fraud in all cases implies a wilful act on the part of anyone whereby another is sought to be deprived, by illegal or inequitable means of what is entitled to.”

The false declaration made by the notary public is on all fours with a fraudulent act calculated to present the power of attorney as an authentic document. Meanwhile, the notary public never witnessed the purported execution and so cannot authenticate same.

Plaintiff is a senior police officer and a lawyer. Unfortunately, he failed to exercise due diligence before entering into the transaction for the purchase of 3rd Defendant’s property. By Plaintiff’s own showing he knew about the execution process relating to the power of attorney, he however shut his eyes to the obvious anomaly associated with the process and the document itself.

From the evidence on record, 3rd Defendant has established beyond reasonable doubt that the power of attorney was fraudulently procured. The fraudulent nature of the document is apparent on the face of the document particularly the false declaration made by the notary public. Consequently, I hold that the purported Power of

Attorney (Exhibit A) relied upon by Madam Evelyn Korklu Laryea in the transaction for the sale of the property is void. Madam Laryea had no authority to sell the property.

ASSIGNMENT OF THE PROPERTY TO PLAINTIFF

In *Frimpong v. Nyarko* [1998-99] SCGLR 734 at 743, Acquah JSC (as he then was) stated succinctly thus:

“Fraud is well-known, vitiates everything, and when a court of law in the course of its proceedings, has cause to believe that fraud was committed, it is duty bound to quash whatever has been done on the strength of that fraud.”

Flowing from the conclusion that the Power of Attorney was fraudulently procured and that Bram Rodenburg did not execute a Power of Attorney for Madam Evelyn Korklu Laryea to assign his interest in the property in dispute, the assignment made in favour of the Plaintiff is void.

For the foregoing reasons, Plaintiff’s action fails. 3rd Defendant’s counterclaim succeeds.

Consequently, the Deed of Assignment dated 9th October, 2015 registered with the Lands Commission in the name of the Plaintiff bearing Deed Number 4411 and Land Title Register Serial Number 1029/17 is a nullity and same is set aside.

The Lands Commission is therefore ordered to strike out the name of the Plaintiff from the deeds register.

Costs of GH¢8,000.00 awarded against the Plaintiff for the 3rd Defendant.

{SGD}

DR. RICHMOND OSEI-HWERE

JUSTICE OF THE HIGH COURT

CERTIFIED TRUE COPY

REGISTRAR
HIGH COURT SEKONDI

COUNSEL:

1. DR. JUSTICE SREM-SAI FOR THE PLAINTIFF
2. CONSTANTINE M. KUDZEDZI ESQ. FOR 3RD DEFENDANT