

Appellate courts review evidence but avoid disturbing supported findings | Courts assess traditional evidence by acts within living memory, not narration style | Unchallenged averments need no proof | Courts cannot substitute or accept inconsistent cases | Pleadings give fair notice to avoid injustice | Rotatory succession requires rigid historic pattern; mere sections don't imply rotation | Nomination defaults to head or queen mother absent rotation custom | Chief must be royal, validly nominated, and enstooled per custom.

IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: **OWUSU (MS.) JSC (PRESIDING)**
LOVELACE-JOHNSON (MS.) JSC
PROF. MENSA-BONSU (MRS.) JSC
ASIEDU JSC
KOOMSON JSC

CHIEFTANCY APPEAL
NO. J2/02/2021
22ND NOVEMBER, 2023

**1. SAMUEL QUAYE
(SUBSTITUTED BY SAMUEL
AKWEI ALLOTEY)**
2. ANUM QUAYE
3. JOHN YARTEY

**PLAINTIFFS/APPELLANTS/
RESPONDENTS/APPELLANTS**

VRS

1. OKU OKULEY
2. OKULEY NTREH
3. NAA ASHAMI
4. JOSEPH TETTEY

**DEFENDANTS//RESPONDENTS
APPELLANTS/RESPONDENTS**

JUDGMENT

ASIEDU JSC:

INTRODUCTION:

[1]. My lords, this appeal is against the judgment of the National House of Chiefs delivered on the 23rd May 2019. The Plaintiffs/Appellants/Respondents/Appellants (hereafter referred to as the 1st Plaintiffs) sued out a writ of summons with an

accompanying statement of claim on the 20th February 2007, against the Defendants/Respondents/Appellants/Respondents (hereafter referred to as the Defendants) before the Judicial Committee of the Ga Traditional Council for the reliefs of:

- (a). A declaration by the Ga Traditional Council that the 1st, 2nd, and 3rd Defendants by custom and tradition pertaining to Mayera Okuleman have no right to nominate, install or enstool the 4th Defendant as chief of Mayera Okuleman because the said 4th Defendant is not a member of the Okuley Kwao Royal family of Mayera Okuleman.
- (b). An order restraining the 4th Defendant from acting as the chief of Mayera Okuleman or in any way holding himself out as the chief of Mayera Okuleman.
- (c). Perpetual injunction restraining the 1st, 2nd, and 3rd Defendants. Their agents, servants, labourers and personal representatives and assigns from nominating, installing or enstooling the 4th Defendant as chief of Mayera Okuleman or doing anything whatsoever at Mayera Okuleman in connection with the enstoolment of 4th Defendant as chief of Mayera Okuleman pending the final determination of this action.

My lords, the Defendants also filed a statement of defence in which they counterclaimed against the 1st Plaintiffs for:

- (a). A declaration by the Ga Traditional Council that by customs and traditions the Defendants who are the customary kingmakers of the Mayera Okuleman in conjunction with the elders/ principal members of the Okuwe Royal House have observed and complied with all the laid down customs and traditional requirements of Mayera Okuleman before preparing to install Joseph Tettey as the next chief/Mantse of Mayera Okuleman.
- (b). An order restraining the 1st, 2nd and 3rd Plaintiffs from disturbing and or usurping the authority of the Defendants in the performance of their respective functions and office.
- (c). An order of perpetual injunction restraining the 1st, 2nd and 3rd Plaintiffs, their agents, personal representatives and assigns from nominating, installing or

enstooling any other person as chief of Mayera Okuleman pending final determination of this action.

[2]. JUDGMENT OF GA TRADITIONAL COUNCIL:

After the hearing of the matter, the Judicial Committee of the Ga Traditional Council found for the Defendants herein and proceeded to dismiss the claims filed by the within named 1st Plaintiffs and consequently entered judgments for the Defendants on their counterclaim as shown at pages 121 to 125 of the record of appeal (ROA).

[3]. JUDGMENT OF THE GARHC:

Dissatisfied with the judgment of the Judicial Committee of the Ga Traditional Council, the 1st Plaintiffs appealed to the Judicial Committee of the Greater Accra Regional House of Chiefs. After reviewing the evidence before the Ga Traditional Council, the Judicial Committee of the Greater Accra Regional House of Chiefs, on the 5th March 2015, set aside the judgment of the Ga Traditional Council and dismissed the counterclaim filed by the Defendants and then entered judgment in favour of the 1st Plaintiffs herein.

[4]. JUDGMENT OF THE NHC:

The judgment of the Judicial Committee of the Greater Accra Regional House of Chiefs did not go down well with the Defendants, so the Defendants lodged an appeal with the Judicial Committee of the National House of Chiefs. On the 23rd May 2019, the Judicial Committee of the National House of Chiefs rendered its judgment in favour of the Defendants and granted the counterclaim filed by the Defendants and consequently dismissed the 1st Plaintiffs' claim.

[5]. APPEAL TO THE SUPREME COURT:

Aggrieved by the judgment of the Judicial Committee of the National House of Chiefs, the within named 1st Plaintiffs, filed, with the leave of the Judicial Committee of the National House of Chiefs, the instant appeal on the 13th February 2020 for "an order setting aside the judgment of the Judicial Committee of the National House of Chiefs and restoring the judgment of the Judicial Committee of the Greater Accra Regional House of Chiefs. The reliefs sought by the 1st Plaintiffs is premised on three main grounds of appeal stated in the Amended Notice of Appeal filed with the leave of the

Court on the 9th November 2021. These are that:

- (i). The judgment is against the weight of evidence.
- (ii). The Judicial Committee of the National House of Chiefs erred in affirming the nomination and purported installation of the 4th Defendant following the affirmation of the absence of rotatory succession to the stool of Mayera Okuleman.
- (iii). The Judicial Committee of the National House of Chiefs erred in affirming the nomination and purported installation of the 4th Defendant who does not hail from the appropriate family and has no direct paternal or patrilineal linkage with the founder of Mayera.

[6]. FACTS:

My lords, the facts of this case are that one Okuley Kwao is reported to have founded the village of Mayera in the 1800s in the Greater Accra Region of Ghana where he settled with his wives and children and siblings. After his demise, his descendants continued to live in the village and controlled the land till the 1980s when a chief, Nii Okuley II was formally enstooled for the village. Nii Okuley II died in the year 2000. In 2005 or thereabout the Defendants, claiming that succession to the Mayera stool rotated among three families, purported to install or enstool one Joseph Tettey, a member of the Oku Kwashie family of Mayera. Claiming that the said Joseph Tettey does not hail from the Okuley Kwao Royal family of Mayera, the 1st Plaintiffs instituted the present action before the Ga Traditional Council for the reliefs indorsed on the writ of summons. The Defendants on the other hand, assert that there are fifteen (15) families at Mayera out of which three (3) constitute the royal families. The Defendants say that two of the royal families have had their turn in nominating and enstooling persons from those families as chiefs of Mayera and that it is now the turn of the Oku Kwashie family to nominate and enstool a member of their family as the chief of Mayera. The Defendants therefore contend that the nomination of Joseph Tettey, the 4th Defendant herein is in accord with the customary practices of Mayera and therefore the 1st Plaintiffs' action should be dismissed.

[7]. CONSIDERATION OF THE APPEAL:

It is important to stress the point that the Ga Traditional Council after hearing the

parties found in favour of the Defendants. However, on appeal to the Judicial Committee of the Greater Accra Regional House of Chiefs, the judgment delivered by the Ga Traditional Council was reversed and judgment entered in favour of the 1st Plaintiffs herein. On a further appeal to the Judicial Committee of the National House of Chiefs, the Judgment in favour of the 1st Plaintiffs was again reversed and judgment entered for the Defendants. It is clear therefore that the findings of fact among the three Judicial Committees are not concurrent. This court therefore reserves the right to examine the evidence adduced before the Ga Traditional Council and come to its own conclusion on the matter. Thus, in **Duodu vs Benewah [2012] 2 SCGLR 1306**, this court held that:

“It is well settled that; an appellate court is entirely at liberty to review the evidence on record and find out whether the evidence supported the findings made by the trial court. The appellate court must not disturb the findings of the trial court if they are supported by the evidence.... The Supreme Court’s duty as the final appellate court, is also to review the evidence on record to ascertain whether the findings were supported by the evidence on record, there being no concurrent findings of facts from the lower courts. And the duty of the Appellant is to demonstrate that the Court of Appeal was in error in reversing the findings of facts made by the trial judge.”

We propose to consider the three grounds of appeal together since they are interrelated and bothers essentially on factual matters.

[8]. THE FOUNDING OF MAYERA:

There is evidence given by the 1st Plaintiff, under cross examination, to the effect that Okuley Kwao was the person who founded the village of Mayera. See page 16 of the record. The 2nd Defendant also posed the following question to the 1st Plaintiff during cross examination:

“Q. I put it to you again that the first chief who created or founded Okuleman was given the stool name Okuley Apesew I and the same name was given to the second chief as Okuley Apesew II

A. The first chief was Okuley Kwao but his stool name is Apesew I so all of them were named as Nii Okuley Kwao Apesew I and Nii Okuley Kwao Apesew II.

Q. Once again I put it to you that Nii Okuley Kwao hails from a different house and Okuley Apesew is from another house.

A. It is not true. Nii Okuley Kwao I was the grandfather of Nii Okuley Apesew II”

At page 29 of the record, the following answers were given by the 1st Plaintiff to questions asked by the panel:

“Q. Okuley Apesew was he the first chief of Okuleman

1. No, but he founded the village”

In his evidence in chief, the 2nd Defendant, who testified for himself and the other Defendants stated at page 36 of the record that:

“The Old man who founded Mayera village was called Nii Okuley Apesew. He was from Obutu and came to settle in Accra. The then Gbese Mantse gave him a land to build. He built Oku We. He was a great hunter and he once got lost at a place near Mayera. Some hunters came to meet him and asked him what he was doing in the forest alone, he answered and said ‘mayera’ meaning I am lost. They showed him his way back home. He later came back to the place and bought a land at the place where he got lost, built a house and settled there. He brought along his siblings and children and they all lived on the land. Those he brought included his brothers and his only sister and their children as well as his own children”

From the evidence above, it is clear that the parties agree that the village or town called Mayera was founded by one Nii Okuley Apesew who was also known as Nii Okuley Kwao I or Okuley Apesew I.

[9]. THE BEGINNING OF CHIEFTAINCY IN MAYERA:

It has been submitted on behalf of the Plaintiffs herein that “the institution of chieftaincy in Mayera was established and commenced in the year 1982”. Counsel for the Plaintiffs also submitted that ‘there has only been one (1) installed chief, who is Nii Okuley Apesew II, with the full complements of his traditional officeholders”. In response, Counsel for the Defendants also submitted that the contention that Nii Okuley Apesew II was the first chief of Mayera is not supported by the evidence on record.

In order to resolve this conflict, there is the need to refer to the evidence given by the parties to the Ga Traditional Council.

The 1st Plaintiff started his testimony by stating that:

“I, Samuel Quaye, I am the head of Nii Okuley Kwao family. The case is that in 1982, Nii Ayitey Agbofu, the Gbese Mantse who just passed away and Nii Amasa came to Mayera Okuleman to inform the elders that there is the need to enstool a chief for the village and that they had come to seek for the approval of Dedetse Okae and Sabantse Okae and also to notify **Ataa Kwei Asuman, the then head of Okuley Kwao family** of the need to enstool a chief”. (emphasis added).

Under cross examination, the 1st Plaintiff answered some of the questions in relation to the 1st chief of Mayera Okuleman as follows: (See page16 of the ROA)

“Q. I put it to you that no Okuley Kwao had ever been enstooled in Mayera Okuleman as Mantse before.

A. Okuley Kwao was the one who created the village and he was the first chief.

Q. I put it to you again that the second chief was Okuley Apesew and not Okuley Kwao as you are saying.

A. Yes, he was called Okuley Apesew II.

Q. I put it to you again that the first chief who created or founded Okuleman was given the stool name Okuley Apesew I and the same name was given to the second chief as Okuley Apesew II.

A. The first chief was Okuley Kwao but his stool name was Apesew I so all of them were named as Nii Okuley Kwao Apesew I and Nii Okuley Kwao Apesew II”

From the answers given by the 1st Plaintiff to the questions which have been quoted above, the impression is created as though the person who founded the village known as Mayera was made a chief as understood both in ancient and modern times. However, the totality of the evidence on record does not suggest that the founder of Mayera was a chief or enstooled as a chief by the people with whom he settled at the village. This is because the evidence on record show that Nii Okuley Kwao also known

as Nii Okuley Apesew founded the village and settled there with his wives and children together with his siblings. This occurred in the 1800s and he could hardly be said to be a chief over his wives and children and siblings as it were. From the record, the 1st Plaintiff gave different answers to almost the same questions about whether the founder of Mayera Okuleman was a chief. The following questions and answers are very instructive:

“Q. I, Nii Okuley Ntreh, Shippi of Mayera Okuleman, want to remind you that in your statement, you mentioned that some people approached him for installation of a chief. I want to ask you, had there been any installation of a Mantse in Mayera Okuleman before 1982.

A. No

Q. I put it to you that earlier on you mentioned that the first chief installed for the village was Nii Okuley Apesew II. Is that true or false.

A. True”

At page 29 of the record, the panel also asked the 1st Plaintiff as follows:

“Q. Okuley Apesew is he the first chief of Okuleman

1. No but he founded the village”.

The answers given by the 1st Plaintiff to the questions quoted above points clearly to the fact that before 1982, no chief had been enstooled at Mayera Okuleman. When one compares the answers given by the 1st Plaintiff that Nii Okuley Kwao Apesew I, the founder of Mayera, was a chief with the answers given by the same 1st Plaintiff that the founder of the Mayera village was not a chief, one may be tempted to conclude that the 1st Plaintiff was inconsistent with his answers and therefore little weight should be accorded his evidence.

[10]. However, in matters involving oral historical tradition, it is not prudent to just pick on one answer and draw conclusions therefrom. In order to obtain a fair assessment of the issues in such matters and arrive at a conclusion which is just, one ought to take the evidence as a whole into consideration. In the words of Lord Denning in **Adjeibi Kojo vs Bonsie (1957) 3 WALR 257 at 260** it must:

“... be recognised that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred years or more ago.”

The case of **in re Taahyen & Asaago Stools; Kumanin II (substituted by) Oppon vs. Anin [1998-99] SCGLR 399** represent one of the best expositions of the mode of evaluating traditional evidence. This court observed, as stated in the headnote at 399, that:

“In assessing rival traditional evidence, the court must not allow itself to be carried away solely by the impressive manner in which one party narrated his version, and how coherent that version is; it must rather examine the events and acts within living memory established by the evidence, paying particular attention to undisputed acts of ownership and possession on record; and then see which version of the traditional evidence, whether coherent or incoherent, is rendered more probable by the established acts and events. The party whose traditional evidence such established acts and events support or render more probable must succeed unless there exists, on the record of proceedings, a very cogent reason to the contrary.”

In the instant matter, it is very significant to point out that the 2nd Defendant himself did not, in his evidence in chief, testify to the effect that, prior to the enstoolment of Nii Okuley Apesew II in the year 1982, Mayera had had a chief. After narrating how Nii Okuley Apesew founded Mayera and the sharing of the land among fifteen families due to the fact that the population of the village was ever growing, the 2nd Defendant gave evidence that:

“Several people took care of the land until 1980 when the then Gbese Mantse ordered the elders to install a chief. This information was passed through Nii Amasah Oseku. He invited us to his own palace at Amasaman to explain things and discussed how to go about things. During that time the then Wulomo, Numo Aryee II invited all the elders at Mayera to the Oku We in Accra. It was at that meeting that the necessary arrangements were made for an installation of a chief.”

This piece of evidence coming from the lips of the 2nd Defendant herein constitutes ample testimony that before 1980, when the Gbese Mantse came to the elders of Mayera and asked for the enstoolment of a chief in the village, no person had ever been installed as a chief of the Village known as Mayera. Indeed, the evidence of the 2nd Defendant as quoted above dovetails into the testimony given by the 1st Plaintiff to the effect that the 1st Chief of Mayera was Nii Okuley Apesew II who was enstooled in 1982 and died in the year 2000. It implies also that notwithstanding some of the answers given by the 1st Plaintiff, under cross examination, that Nii Okuley Apesew I was chief of Mayera, the 1st Plaintiff cannot be strictly held to that testimony and that the totality of the evidence show that the founder of the village was never a chief of Mayera.

[11]. In coming to their conclusion that Mayera had had more than one chief prior to the enstoolment of Nii Okuley Apesew II in 1982, the Judicial Committee of the National House of Chiefs referred to the testimonies given by the 1st Plaintiff herein under cross examination in which he prevaricated by saying that Mayera had had a chief in the person of Nii Okuley Apesew I and at other times saying that the Mayera had had no chief before the enstoolment of Nii Okuley Apesew II in 1982. Thus, the Judicial Committee did not apply a wholistic approach to the assessment of the evidence given by the parties at the trial. The Judicial Committee of the National House of Chiefs also failed to consider the evidence in chief of the 2nd Defendant quoted above in which the 2nd Defendant gave positive evidence to the effect that until 1980, Mayera had had only caretakers of its lands. Further, the Judicial Committee of the National House of Chiefs failed to consider the evidence on record to the effect that it was after the Gbese Mantse had prompted the elders of Mayera in and about 1980/1982 that steps were taken to enstool the first chief for Mayera. In effect, the Judicial Committee of the National House of Chiefs, failed to consider the totality of the evidence on record before arriving at the conclusion which it did. It is quite clear from the evidence on record that the reference to Nii Okuley Apesew as a chief of Mayera was not because he was ever enstooled as such by his family members at the time but because he was the acknowledged founder of the Mayera village. It stands to reason therefore that Nii Okuley Apesew I was not a chief in the proper sense and usage of the word.

A chief, according to Article 277 of the Constitution 1992 is:

“a person, who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queen mother in accordance with the relevant customary law and usage.”

Section 57(1) of the Chieftaincy Act, 2008, Act 759 repeats the definition of a chief as stated in the Constitution. It provides that:

“A chief is a person who, hailing from the appropriate family and lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queen mother in accordance with the relevant customary law and usage”.

Indeed, apart from stating that Nii Okuley Apesew was the founder of the village called Mayera, no evidence was given as to his nomination or selection and enstoolment as a chief. The only association of chieftaincy with the said Nii Okuley Apesew I is that he founded Mayera. Legally, that cannot be a basis for recognising Nii Okuley Apesew as the chief of Mayera especially when evidence exist to the effect that he was not a chief but a founder of Mayera village. Indeed, there is no concrete or credible evidence on record that Mayera had had a chief prior to the enstoolment of Nii Okuley Apesew II in the year 1982. The finding by the Judicial Committee of the National House of Chiefs that Mayera had, before 1982, had a chief is not supported by the whole gamut of the evidence placed before the Ga Traditional Council.

[12]. The narrative given by the 1st Plaintiff, before the Ga Traditional Council, in respect of the processes leading to the enstoolment of the first chief for Mayera is not completely and materially different from the evidence given by the 2nd Defendant. In his evidence in chief, the 1st Plaintiff stated that in 1982, the Gbese Mantse in the person of Nii Ayitey Agbofu and Nii Amasa came to Mayera and informed the elders of Mayera of the need to install a chief for Mayera. According to the Plaintiff, the Gbese Mantse and Nii Amasa stated that:

“They had come to seek for the approval of Dedetse Osae and Sabantse Okae and also to notify Ataa Kwei Asuman, [of] the then head of Okuley Kwao family of the need to enstool a chief. He told them that the family would meet and a reply will be sent to them. When the chosen date for the reply approached, he later presented a candidate for the Mantse and all other office bearers. Since

then there has been no case until the year 2000 when the chief died.”

The evidence of the 2nd Defendant on this issue has already been quoted above but for the purposes of emphasis it bears a repetition. The 2nd Defendant stated, among others, that:

“Several people took care of the land until 1980 when the then Gbese Mantse ordered the elders to install a chief. This information was passed through Nii Amasah Oseku. He invited us to his own palace at Amasaman to explain things and discussed how to go about things. During that time the then Wulomo, Numo Aryee II invited all the elders at Mayera to the Oku We in Accra. It was at that meeting that the necessary arrangements were made for an installation of a chief.”

At page 54 of the record, the 2nd Defendant testified that:

“The elders of Mayera with the Wulomo at the time, Adjei met and asked Mr. Sackey to give them a chief. [Mr Sackey] is a representative of Okuley Kwao family. They also asked Dedetse Osae to give them a queen mother. So Mr Sackey and Ataa Quaye (Kwei) Asuman brought the chief whiles Dedetse Osae brought the queen mother. They were all confined in a room and later out doored as Chief and Queen mother of Mayera.”

A common strand that runs through the evidence given by the 1st Plaintiff and that of the 2nd Defendant in respect of the processes leading to the installation or enstoolment of the chief of Mayera is that both parties agree that the initiative was made by the Gbese Mantse and Amasa Oseku. Again, the parties agree that the request for the nomination of a chief for Mayera was made to the head of family of Okuley Kwao family in the person of Ataa Kwei Asuman. Later, Ataa Kwei Asuman and Mr Sackey also a member of the Okuley Kwao family presented a candidate who was confined and subsequently out doored or enstooled as the chief of Mayera. The 2nd Defendant gave evidence to the effect that there were fifteen (15) families at Mayera. One crucial question to ask is why did the Gbese Mantse and Nii Amasah Oseku not contact any of the fifteen families other than the Okuley Kwao family to nominate a chief for the Mayera village? Only one reasonable and logical answer comes to mind. The evidence shows, quite clearly, that the Nii Okuley Kwao family is the family of the founder and

the progenitor of the village called Mayera and therefore if the village had grown to the extent that there was the need to enstool a chief thereat, no family was more qualified than the family of the person who founded the village.

[13]. At paragraphs 4 and 5 of the statement of claim, the Plaintiffs had pleaded as follows:

“4. The Plaintiffs say that by custom and tradition of Mayera Okuleman, it is the head of Nii Okuley Kwao Royal family and the principal elders of the said family that nominate a candidate when the Mayera Okuleman stool becomes vacant.

5. The Plaintiffs aver that by custom and tradition of Mayera Okuleman every Mantse must be a member of the of Nii Okuley Kwao Royal family”

In response, the Defendants denied the above pleading at paragraph 4 of their statement of defence and went ahead to aver at paragraphs 8, 9 and 10 as follows:

8. The Defendants say that it is an established custom and tradition at Mayera Okuleman that three (3) families out of the fifteen (15) families offer an appropriate and qualified candidate for installation as chief or Mantse of Mayera Okuleman whenever a vacancy occurred. These are Tettey Ogidigidi, Oku Kwashie and Okuley Quao families of Mayera Okuleman.

9. The Defendants say that the late chief of Mayera Okuleman, Nii Okuley Apesew (who died in 2000) hailed from Okuley Quao family who have had their turn to provide a chief for Mayera. That was done by 1st Plaintiff’s father, Ataa Quaye Asuman who was head of Nii Okuley Kwao family who provided the candidate, Nii Okuley Apesew II from their family to be installed the chief of Mayera.

10. The Defendants say that by the customs and traditions of Mayera Okuleman, it is now the turn of another candidate to be provided from the third Royal family namely, Oku Kwashie family to be considered by the entire fifteen (15) families of Mayera.

The above averments drew the line as to what each of the parties was required to prove at the trial in order to succeed on their case. The Plaintiffs were required to adduce cogent evidence to show that it is the head and principal members of the Nii

Okuley Kwao family of Mayera that bears the right of nominating a candidate for consideration for the position of a chief of Mayera and that by custom and tradition every Mantse must come from the Nii Okuley Kwao family of Mayera. On the contrary, the Defendants have a duty to adduce credible evidence to show that by the custom and practice of Mayera Okuleman, the position of a chief of Mayera rotates among the three families pleaded by them and that it is the turn of the Oko Kwashie family to bring a candidate for consideration as chief of Mayera Okuleman.

[14]. It is the view of this court that the averment by the Defendants to the effect that Nii Okuley Apesew II hailed from Okuley Kwao family and that the said Nii Okuley Apesew II was nominated by Ataa Quaye Asuman, the then head of the Okuley Kwao family and the father of the Plaintiff and was accepted and enstooled as the chief of Mayera Okuleman constitutes a confession to the pleadings by the Plaintiff, that the Nii Okuley Kwao family of Mayera Okuleman is a Royal family from which the chief of Mayera is nominated. It therefore behoves on the Defendants to prove the avoidance that there are other Royal Houses in Mayera Okuleman from which the chiefs of Mayera are nominated and enstooled as such in addition to the Nii Okuley Kwao Royal family. The Defendants' pleadings in this regard constitute a confession and avoidance. In this type of pleading, the defendant admits facts alleged in the statement of claim (confession) and then goes ahead to allude to facts which in effect negates the admission made (avoidance). The material facts by which the defendant intends to avoid the effect of the admission made must be pleaded subsequent to the admission. It then becomes the defendant's responsibility to prove the facts by which he avoids the admission at the trial.

The other effect of the Defendants' pleading as alluded to herein is that it absolves the Plaintiff from producing evidence to show that the Nii Okuley Kwao family is a Royal family and that candidates are nominated from the said Royal family to ascend the throne of Mayera Okuleman. This is so because, it is a rule of evidence that once a party's pleading was admitted by his opponent, that party needs not adduce evidence to prove that which had been admitted. Thus, in **FORI v. AYIREBI AND OTHERS [1966] GLR 627**, this court held that:

"When a party had made an averment and that averment was not denied, no issue was joined and no evidence need be led on that averment. Similarly, when

a party had given evidence of a material fact and was not cross-examined upon, he need not call further evidence of that fact.”

[15]. At page 55 of the record, the 2nd Defendant gave the following evidence with respect to the nomination of the 4th Defendant which sparked the instant dispute:

“All the 15 heads of family in Mayera met including the Plaintiff. After the meeting the Dzase and his elders went to Oku We and met the Oku We elders. During that meeting it was agreed that two out of the three Royal Houses have had their turn of nomination of a chief already remaining with one house which has not nominated a chief before. Therefore, Oku Kwashie’s house was to nominate a chief; so, Joseph Tetteh was given to us as the nominee.... Eleven out of the twelve houses at the meeting accepted the installation but one head in the person of the Plaintiff refused to accept the installation”

During the cross examination, the following questions relative to the issue of nomination from various houses was put to the 2nd Defendant. See page 69 of the record.

Q. In your statement you said since Mayera was founded two enstoolment have taken place and this is the third time. In the first two enstoolments, which houses made the enstoolment? Mention their names.

A. The first was Ogidigidi from Ogidigidi family, the second was Okuley Apesew II, from Okuley Kwao family and the third is from Okuley Kwashie family. His name is Okuley Apesew III. It is because of the third enstoolment why we are here.

Q. I put it to you that Ogidigidi was not a chief, he was just a guest to Okuley Kwao

A. Ogidigidi stool is there until now as evidence for us all.

Q. I put it to you that Ogidigidi stool is a fetish stool not a chief stool

A. I insist that he is a chief

Q. How many years did Ogidigidi sit on his stool as a chief

A. I don’t know

Q. Why did you enstool a chief without the consent of Okuley Kwao family

Please, we sent to Oku Kwashie house because that is the current ruling house.

Q. I put it to you that it is not true because chiefs are not nominated from any other house apart from Okuley Kwao house.

A. If we should go back to Okuley family, then we are infringing on the rights of installation of a chief in the Ga State because we never install a chief in succession from the same house.

Q. I put it to you that only Okuley Kwao house can provide a chief

A. That is not true, that is not a Ga custom

From the evidence given by the 2nd Defendant, there is no testimony with respect to the existence of any customary practice of rotation or nomination of candidates to occupy the Mayera stool from any other Royal house than the Nii Okuley Kwao royal family. There is also no cogent evidence that any person by name Ogidigidi from Tettey Ogidigidi family had ever occupied the Mayera stool. If it were true, the 2nd Defendant should have been able to give positive testimony as to the period within which the said Ogidigidi occupied the Mayera stool. The evidence on record is that until 1982, no chief had ever been enstooled at Mayera. Indeed, the village had its first chief upon the promptings of the Gbese Mantse and Nii Amasah Oseku in or around the year 1982. It was in 1982 that Nii Okuley Apesew II was enstooled as the first chief of Mayera Okuleman. This chief died in the year 2000 and it was the attempt to enstool a second chief from different family that sparked off the instant suit. It follows therefore that there could not be any custom and practice at Mayera of the nomination and Installation of chiefs from various families. There is no evidence on record as to when the alleged customary practice of nomination of candidates from various houses emerged. Thus, in the face of the 2nd Defendant's failure to give evidence in respect of Defendants' averment to the existence of "customs and traditions of Mayera Okuleman" with regard to nominating candidates to occupy the office of chief of Mayera from various houses, the 2nd Defendant, under cross examination, then sought refuge under the existence of a Ga custom which forbids the nomination of candidates for the chief of Mayera Okuleman from only one house. Indeed, it was never the case of the 2nd Defendant that there is a Ga custom which demands the nomination of candidates for

the Mayera chief from more than one house. In that respect, the Defendants committed a departure from their pleadings contrary to the principles laid down in the case of **DAM v. J. K. ADDO AND BROTHERS [1962] 2 GLR 200** that:

“A court must not substitute a case proprio motu, nor accept a case contrary to, or inconsistent with, that which the party himself puts forward, whether he be the plaintiff or the Defendant.” And that;

“The function of pleadings is to give fair notice of a case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a person on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.”

It follows therefore that the evidence given by the Plaintiffs is preferable to the evidence given by the 2nd Defendant which departed from the Defendants’ pleadings. See, **APPIAH v. TAKYI [1982-83] GLR 1**.

[16]. The fulcrum of the Defendants’ case rests on their averments that occupancy of the Mayera stool is by rotation and as a result it is the turn of the 4th Defendant and his family to occupy the Mayera stool. As stated above, the Defendant did not provide a scintilla of credible evidence in proof of this alleged customary practice of the people of Mayera Okuleman. In its judgment, the Judicial Committee of the National House of Chiefs found as a fact that there was no system of rotation for the selection or nomination of chiefs at Mayera from among certain families. At page 383 of the record, the Judicial Committee of the National House of Chiefs held that:

“We therefore accept and affirm that there is no reasonable system of rotation in selecting chiefs for Mayera; but Mayera has Kingmakers who know the dynamics of Mayera chieftaincy and went ahead and nominated the 4th Defendant for enstoolment as the chief of Mayera Okuleman”

In **DZASIMATU AND OTHERS v DOKOSI AND OTHERS [1993-94] 1 GLR 463**, this court held that:

“In order to establish a system of rotatory chieftaincy, all the houses or gates must be known and there must be in existence a rigid pattern of alternation which has been established from time immemorial.”

Again, in **ABABIO AND OTHERS v KARIKARI AND ANOTHER [2001-2002] 1 GLR 381**, the Supreme Court held that:

“The system of rotatory succession can only be declared if there is satisfactory evidence that that had been the custom of the people.”

And in **ESSILFIE AND ANOTHER v ANAFO VI AND ANOTHER [1993-94] 2 GLR 1** this court again held that:

“The mere facts of the existence in a stool family of two or more sections was no justification for holding that succession to the stool was rotatory. There had to be a clear custom or practice to that effect. In the absence of such a custom or practice, the right to nominate a candidate for enstoolment from any of the sections resided in the ebusuapanyin (the head of family) or the obaapanyin (the queen mother). Consequently, in the instant case, the fact that one EB from the plaintiffs’ section once occupied the stool was no basis for holding that succession to the Nkanfoa stool was rotatory. Since there was no evidence of such a custom, the chieftaincy tribunal of the National House of Chiefs was justified in dismissing that claim”.

[17]. The authorities are therefore clear that in the absence of credible evidence on record of customary practice of substantial origin that the ascendancy to a stool was based on a system of rotation between or among a number of families or gates, it cannot be decreed that any such system of rotation exists just because a party had alleged so. In the instant matter therefore, it did not lie within the powers of the Judicial Committee of the National House of Chiefs to say, notwithstanding the finding that there was no system of rotation in selecting chiefs for Mayera stool, that “Mayera has Kingmakers who know the dynamics of Mayera chieftaincy and went ahead and nominated the 4th Defendant for enstoolment as the chief of Mayera Okuleman”. The selection and nomination process are not based on the individual knowledge of the Kingmakers of the dynamics of the Mayera chieftaincy. The process is an objective one; based on the customary and traditional practices of the people of Mayera. Since chieftaincy came to Mayera in 1982, no person has ever been installed Chief of Mayera from any other family than the Nii Okuley Kwao family which is the family of the founder of the village of Mayera and the 4th Defendant who is acknowledged to be a member of the Oku Kwashie family cannot be said to hail “from the appropriate family

and lineage” as required by Article 277 of the 1992 Constitution. In **Addai (Yonso Bedomasi-Bretuo Abusuapanin) & Others vs. Yeboah-Kodie Asare II (Yonsohene & Benkumhene of Jamasi) & Others)** [2013-2014] 2 SCGLR 1264, this court pointed out that:

“Under the provisions in article 277 of the 1992 Constitution (re-enacted as section 27(1) of the Chieftaincy Act, 2008, Act 759), the essential ingredients and prerequisites of the definition of a chief were (i) the person must qualify to be a chief, i.e. he or she must hail from the appropriate family or lineage, i.e. the person must be a royal to start with; (ii) the person must have been nominated, elected, selected or enskinned or installed as a chief; and (iii) the person must have been taken through the ceremony of enstoolment, enskinment or installation as a chief according to the relevant customary practices.”

The evidence before this court, per the record of appeal, is to the effect that the 4th Defendant, Joseph Tetey as already stated, is a member of the Oku Kwashie family. The only person ever to be installed or enstooled as chief of Mayera in 1982 came from the Nii Okuley Kwao family. It follows therefore that Joseph Tetey who comes from the Oku Kwashie family is not from the appropriate family or lineage contrary to the provisions of the Constitution. The 4th Defendant is therefore not qualified to sit on the Mayera stool.

[18]. Indeed, the 4th Defendant’s claim to the Mayera stool is based on the alleged existence of a system of rotation to the occupancy of the Mayera stool. If no such system of rotation exists, as shown above, the Defendants’ claim including the 4th Defendant’s claim to the stool vanishes with the non-existent rotation. It follows that the endorsement of the nomination and the purported enstoolment of the 4th Defendant as the chief of Mayera by the Judicial Committee of the National House of Chiefs is not supported by the evidence on the customs and practices of the people of Mayera. In such circumstances, this court has always exercised its power to set aside such judgments. The judgment of the Judicial Committee of the National House of Chiefs delivered on the 23rd May 2019 is hereby set aside. We proceed to dismiss the counterclaim filed by the Defendants herein. We enter judgment in favour of the Plaintiffs forthwith and we declare that:

1. By custom and tradition pertaining to Mayera Okuleman, the Defendants herein have no right to nominate, install or enstool the 4th Defendant as chief of Mayera Okuleman.
2. The Nii Okuley Kwao Royal Family of Mayera Okuleman represented by the head of family is the rightful family to nominate, elect, select, install and or enstool a chief for Mayera Okuleman.
2. The 1st, 2nd, and 3rd Defendants, together with their agents, servants and personal representatives are hereby restrained from nominating, electing, selecting, or installing or enstooling the 4th Defendant as chief of Mayera Okuleman.
3. The 4th Defendant is hereby restrained from holding himself out as the chief of Mayera Okuleman.

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

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

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

PROF. H. J. A. N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

G. K. KOOMSON
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KROBEA ESQ. FOR THE DEFENDANTS/RESPONDENTS/APPELLANTS /
RESPONDENTS WITH HIM MITCHELL OSEI DONKOR.**