

**PARTIES TO AN ACTION
AND
REPRESENTATIVE PROCEEDINGS**

OVERVIEW

- Classes of parties
 - Representative actions

PARTIES

Overriding objective of Rules

“[is] ... to ... ensure that as far as possible, all matters in *dispute between parties* may be *completely, effectively* and *finally* determined and *multiplicity of proceedings* concerning any of such matters *avoided*.”

Order 1 r 2

PARTIES

Overriding objective of Rules

This is to ensure avoidance of delay or embarrassment and, if possible, that all disputes are settled once and for all

PARTIES

Overriding objective of Rules

In view of overriding objective, it is essential to have only parties whose presence is necessary for the resolution of all the issues in dispute in the action before the court

PARTIES

Types of persons

Two types of persons - natural and juristic/artificial

"...Coke classified "persons" into two main categories:

"Persons are of two sorts, persons naturally created by God ... and persons incorporate or politique created by the policy of men (and therefore they are called bodies politique); and these be of two sorts, viz. either sole or aggregate of many." *Bilson v Apaloo* [1981] GLR 15, SC ⁶ per Anin JSC at p 48

PARTIES

Types of persons

Natural persons are of 2 types

- Natural person with full capacity
- Natural person under disability

Natural person with full capacity

PARTIES

Natural person with full capacity

Natural persons with full capacity are persons who are naturally capable of assuming obligation and exercising rights

PARTIES

Natural person with full capacity

Natural persons with full capacity can sue and be sued

Such persons must litigate in their own true name

Attorney-General v Levandowsky & BASE Group [1971] 2 GLR 58 at 66

Natural person under disability

PARTIES

Natural person under disability

Meaning

“For the purposes of judicial proceedings under these Rules a person with disability means a *person under the age of eighteen years* or a *person who is certified by a medical officer to be incapable of managing and administering his or her property and affairs by reason of mental disorder or infirmity of mind.*”

Order 5 r 1(1)

PARTIES

Natural person under disability

Two types of disability

(a) by reason of age, that is, under 18 years of age

(b) by reason of mental disorder or infirmity of mind

Order 5 r 1(1)

PARTIES

Natural person under disability

Effect of disability

A person under disability is incapable of bringing or defending an action without the assistance of another person, who is not under disability, called "next friend" or "guardian *ad litem*"

Order 5 r 1(3)

PARTIES

Natural person under disability

Effect of disability

The object of person under disability acting by next friend or guardian *ad litem* is to supplement lack of capacity

The next friend or guardian *ad litem* cannot act in person but must act by lawyer

Order 5 r 1(4)

PARTIES

Appointment of next friend or guardian *ad litem* before proceedings begin

Unless provided by the Rules, no order is necessary for the appointment of a guardian *ad litem* or next friend

Order 5 r 2(1)

PARTIES

Appointment of next friend or guardian *ad litem* after proceedings begun

If, during an action, a person is claimed to be with disability, the court, if it considers it necessary, may order a medical examination of the person

Order 5 r 1(2)

PARTIES

Appointment of next friend or guardian *ad litem* after proceedings begun

In case of doubt or dispute whether a person is under disability, the court may inquire into the question of disability and make the necessary orders

Order 5 r 2(3)

PARTIES

Appointment of next friend or guardian *ad litem*

Documents to be filed

Except where the next friend or guardian *ad litem* was appointed by the court, a person's name shall not be used as next friend or guardian *ad litem*, unless

- (a) he has given his written consent to be filed in registry of court; and
- (b) the lawyer has given a certificate that in his belief or to his knowledge his client is under disability and the next friend or guardian *ad litem* is proper person to act as such

Order 5 r 2(2)

PARTIES

Appointment of next friend or guardian *ad litem*

Documents to be filed

The consent of the proposed next friend or guardian *ad litem* is pre-requisite to the commencement of action by him

Order 5 r 2(2)

PARTIES

Appointment of next friend or guardian *ad litem*

Documents to be filed

Failure to file consent before use of name is an irregularity, which can be cured

PARTIES

Appointment of next friend or guardian *ad litem*

Failure to file consent before use of name is an irregularity

In *Quaiko v Mobil Oil (Ghana) Ltd* [1977] 1 GLR 461, the plaintiff sued per next friend. No consent filed prior to commencement of action. 2nd Defendant entered unconditional appearance and filed defence. Consent filed after application for directions taken. 2nd defendant applied to strike out action. 2nd defendant held to have waived irregularity

PARTIES

Appointment of next friend or guardian *ad litem*

Failure to file consent before use of name is an irregularity

In *First Ghana Building Society v Addy* [1982-83] GLR 1089, the plaintiff sued as next friend of a person under disability to set aside a sale of the latter's house sold in execution. He relied on an unsigned document from family of person under disability as authority for him to act as next friend. The Building Society filed its defence to the action and thereafter applied to strike out the action as unauthorised. It was explained that failure to file written authorisation to act as guardian ad litem was an irregularity that could be waived.

PARTIES

Change of next friend or guardian *ad litem*

Next friend or guardian *ad litem* to act unless changed by court

Once a next friend or guardian *ad litem* is appointed, no other person can act as next friend or guardian *ad litem* in the proceedings unless substituted by court

Order 5 r 2(4)

PARTIES

Change of next friend or guardian *ad litem*

Next friend or guardian *ad litem* to act unless changed by court

The court may, for good cause, remove and substitute next friend or *guardian ad litem*

Order 5 r 2(5)

PARTIES

Change of next friend or guardian *ad litem*

Next friend or guardian *ad litem* to act unless changed by court

Where next friend or guardian *ad litem* is unable to act by reason of death or otherwise, the court will appoint a substitute to continue proceedings

Order 5 r 2(6)

PARTIES

Natural person under disability

Next friend or guardian *ad litem* to act unless changed by court

Whilst the next friend or guardian *at litem* does not need an order of the court before he is appointed, he cannot, without the order of court cease to act as next friend

Harrison v Harrison 49 ER 526; *Melling v Melling* 56 ER 702

PARTIES

Who may be next friend or guardian *ad litem*

Court may appoint guardian *ad litem*

Sections 18 and 19 Courts Act (Act 459) grant the High Court power, upon an application, to appoint a person as the guardian of a person under disability

Section does not state qualification requirements

PARTIES

Who may be next friend or guardian *ad litem*

“A person within the jurisdiction not being under a personal incapacity to sue, and not being an accounting party, and not having an interest adverse to the person under disability, and not connected with the defendants might be a next friend. The court actually expected a next friend to be a substantial person; and, as in the case of a guardian ad litem, it was desirable that he should be a relation, connected to, or a friend of the family and not a mere volunteer...”

First Ghana Building Society v Addy [1982-83] GLR 1089

PARTIES

Who may be next friend or guardian *ad litem*

- Next friend must not have interest adverse to person under disability
- Must be within the jurisdiction
- An infant or person under mental disability is not qualified
- Must be a person of substance

PARTIES

Who may be next friend or guardian *ad litem*

- Parents - *Nartey v Nartey* (1953) 14 WACA 295; *Bonney v Bonney* [1989-90] 2 GLR 602
- Close relations
- Family friend or
- Any person appointed by court

PARTIES

Next friend or guardian *ad litem*

Position and power

Person under disability is proper party to the action, not his next friend or guardian *ad litem*

Kumakye v Ghana Water and Sewerage Corporation [1977] 2 GLR 257

PARTIES

Next friend or guardian *ad litem*

Position and power

The next friend or guardian at litem is an “officer of the court to take all the measures for the benefit of the infant in the litigation in which he appears as next friend.” per Bowen LJ, *Rhodes v Swithenbank* (1889) 22 QBD 577 at 579

PARTIES

Next friend or guardian *ad litem*

Position and power

The next friend or guardian *at litem* is not *dominus litus* and represents the person under disability in a limited sense, in that he has the conduct of the action in his hands

PARTIES

Next friend or guardian *ad litem*

Position and power

A compromise, settlement or payment and or acceptance of payment into court by the next friend without the approval of the court is invalid

Or 5 r 8

PARTIES

Title of action by a person under disability

Name of person under disability must appear in title

“Kofi Mensah, a minor, by Araba Stamp, his mother and next friend v Omnibus Services Authority”

PARTIES

Title of action by a person under disability

Name of person under disability must appear in title

“Mugu Yaro v Moro Zabrama, (a minor, by Alhaji Dogo, his guardian *ad litem*)”

TERMINATION OF AGE DISABILITY

PARTIES

Minor becoming of age during proceedings

No step to be taken by next friend or guardian *ad litem*

The next friend ought to not take a step in the action after the minor attains the age of 18 years.

Brown v Weatherhead (1844) 4 Hare 122, 67 ER 586

PARTIES

Minor becoming of age during proceedings

Former minor to notify court of becoming of age

When a minor attains the age of 18 years before judgment, he/she is required to file a notice, to be served on other party, that he/she has now attained the age of 18 years

Order 5 r 3(1)

PARTIES

Minor becoming of age during proceedings

Former minor to adopt or repudiate proceedings

The minor, upon attaining 18 years, has the option of either adopting the proceedings or with leave of court, repudiating the proceedings.

Order 5 r 3(2)

PARTIES

Minor becoming of age during proceedings

Former minor to adopt or repudiate proceedings

Where he proposes to adopt the proceedings, he must file a notice that he adopts the proceedings

PARTIES

Minor becoming of age during proceedings

Former minor to adopt or repudiate proceedings

Where he does not intend to adopt the proceedings, he must apply for leave to repudiate the proceedings

PARTIES

Minor becoming of age during proceedings

Effect of adoption or repudiation of proceedings

Where proceedings are adopted, action will continue as if the minor had been an adult all throughout the proceedings

PARTIES

Minor becoming of age during proceedings

Effect of adoption or repudiation of proceedings

Where the court grants leave for the minor to repudiate the proceedings, it will relate back to when commencement of the action, except that which was sanctioned by the court when it granted leave.

Dunn v Dunn (1855) 7 DM & G 25, 3 Drew
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PARTIES

Minor becoming of age during proceedings

Title of action to be amended where proceedings adopted

Kofi Mensah, (late a minor, but now of full age) v Omnibus Services Authority

or

Mugu Yaro v Moro Zabrama, (late a minor, but now of full age)

MENTAL DISABILITY AFTER PROCEEDINGS BEGUN

PARTIES

Mental disability after proceedings begun

No step to be taken by next friend or guardian ad litem

If during proceedings a lawyer becomes aware of his client's mental disability the lawyer ought not take a step in the proceedings except steps necessary for the appointment of a next friend or guardian *ad litem*.

Order 5 r 4(1)

PARTIES

Mental disability after proceedings begun

Documents to be filed

The lawyer must file a notice of the mental disability of his client, to be served on the other party. The notice must state the date on which party suffered the mental disability

Order 5 r 4(1) & (2)

PARTIES

Mental disability after proceedings begun

Application for appointment of next friend or guardian *ad litem*

Lawyer who filed the notice of disability must apply within 7 days of filing the notice for the appointment of a next friend or guardian *ad litem*

Order 5 r 4(3)

PARTIES

Mental disability after proceedings begun

Default by plaintiff under disability's lawyer

If lawyer for plaintiff under disability defaults in filing or serving the notice or in applying for appointment of next friend or guardian *ad litem*, the defendant may apply to dismiss plaintiff's action.

The court may, thereupon, dismiss the action or appoint next friend or guardian *ad litem*

Order 5 r 4(4)

PARTIES

Mental disability after proceedings begun

Personal liability for cost for default by plaintiff under disability's lawyer

Lawyer for plaintiff under disability who, upon becoming aware of disability, defaults in filing and serving a notice of disability or in applying for appointment of a next friend or guardian ad litem, will be personally liable to pay costs incurred by defendant for proceedings taken in suit without next friend or guardian *ad litem* after disability occurred.

Order 5 r 4(4)

PARTIES

Mental disability after proceedings begun

Default by defendant under disability's lawyer

If the lawyer for a defendant under disability defaults in filing or serving notice or applying for appointment of next friend or guardian *ad litem*, plaintiff may apply to court to appoint next friend or guardian *ad litem*

Order 5 r 4(5)

PARTIES

Mental disability after proceedings begun

Personal liability for cost for default by defendant under disability's lawyer

A lawyer for a defendant under disability who, upon becoming aware of disability, fails to apply for appointment of next friend or guardian *ad litem* will be personally liable to pay costs incurred by the plaintiff for proceedings taken in suit without next friend or guardian *ad litem* after disability of defendant occurred.

Order 5 r 4(4)

PARTIES

Natural person under disability

Limitation of actions

Because of lack of capacity, time does not run against a person under disability until the person ceases to be under disability

Section 16, Limitation Act, 1972, (NRCD 54); *Kumakye v Ghana Water & Sewerage Corp* [1977] 2 GLR 257

JURISTIC PERSONS

PARTIES

Juristic/artificial person

Action may be brought by or against an artificial person which has legal personality

The legal personality may be created by statute, common law or under customary law

Aquatic Biology Institute v Abokuma
[1978] GLR 72

PARTIES

Juristic/artificial person

Action may be brought by or against an artificial person which has legal personality

A non-juristic persons may have the power to sue or be sued because the enactment setting up or regulating it makes it possible for them to sue and be sued

Asiedu-Addo v Comptroller of Customs & Excise and others [1981] GLR 505

PARTIES

Juristic/artificial person

Juristic/artificial persons are corporations

Corporations may be

- aggregate or
- sole

PARTIES

Juristic/artificial person

“A corporation aggregate is an incorporated group of co-existing persons and has several members at a time, e.g. a limited liability company consisting of all shareholders; while a corporation sole is an incorporated series of successive persons which has only one member at a time, e.g. the sovereign and certain office holders so named by statute.”

Bilson v Apaloo [1981] GLR 15, SC *per* Anin JSC at p 48

COMPANIES

PARTIES

Companies

Corporation aggregate

Has full capacity to carry on or undertake any business or activity or enter into any transaction

Section 18, Companies Act, (Act 992)

PARTIES

Companies

They must sue and be sued in full registered name, including suffixes

Unless otherwise provided in an enactment, a company cannot initiate or continue proceedings except by a lawyer

Order 4 r 1(2)

PARTIES

Companies

Change of company name *pendente lite*
not to affect right or obligations of
company

Title of the suit to be changed for the
proceedings to continue in the new name

Section 21(14), Companies Act (Act
992)

PARTIES

Companies

Non-resident company may sue in Ghana

Kimon Compania Naviera SARP v Volta Lines Ltd [1973] 1 GLR 140

Non-resident company may, subject to provisions of Or 8 r 3 be sued in Ghana

FIRMS OR PARTNERSHIPS

PARTIES

Firm or partnership

Partnership, meaning

The association of two or more individuals, but not more than twenty, (excluding companies) carrying on business jointly for the purpose of making profits

S 1(1) & 2(2) Incorporated Private Partnership Act (Act 152)

PARTIES

Firm or partnership

Corporate personality of firm/partnership

Upon registration, the firm/partnership

- becomes a corporate body with full capacity, distinct from the partners
- its corporate existence continues notwithstanding change in membership
- can sue and be sued in firm's name, distinct from partners

S 10(1),(2) & (3), Act 152

PARTIES

Firm or partnership

Nature of liability

Notwithstanding firm being a corporate body, every partner

- is liable without limitation for the debts and obligations of the firm
- is entitled, subject to any express agreement to the contrary, to indemnity from firm for payments made or personal liabilities incurred in ordinary and proper conduct of firm's business or about anything necessarily done for the preservation of the firm's business or property; and

PARTIES

Firm or partnership

Nature of liability

- who pays more than his share of a partnership debt is entitled to contribution from co-partners in terms of partnership agreement
 - S 10(3) & 33(2), Act 152

PARTIES

Firm or partnership

Duration of liability

- Each partner is jointly and severally liable for all debts and obligation incurred by the firm whilst a partner
S 14, Act 152.
- A new partner is not liable for debts incurred prior to becoming a partner
S 15(1), Act 152

PARTIES

Firm or partnership

Duration of liability

- A retired partner remains liable for debts and obligations incurred before his retirement
- A retiring partner may be liable for subsequent debts if no proper notice of dissolution has been given to creditors

Section 15(2) & (4), Act 152

PARTIES

Firm or partnership

Actions by or against partners and firm

Partners may sue or be sued in the name of the firm under which they carried on business when the cause of action accrued

Order 6 r 1

S A Turqui v Dahabieh [1987-88] 2 GLR 486, CA; *Musalem Enterprise v Mensah* [1989-90] 1 GLR 368

PARTIES

Firm or partnership

Actions by or against partners and firm

Buga, Jojo & Kusa, a firm of accountants, became indebted to Kofi in the sum of ₦1,000. Kusa retires and Mane joins the firm in place of Kusa. The name of the firm is changed to Buga, Jojo & Mane.

PARTIES

Firm or partnership

Actions by or against partners and firm

An action by Kofi to recover the debt from the partners of must be against Buga, Jojo & Kusa, as partners of the firm, since Mane, who joined the firm later, is not a debtor to Kofi

PARTIES

Firm or partnership

**Actions by or against partners
and firm**

**Partnership must be registered
in order to maintain an action
to enforce rights of the firm
arising out of a contract**

Section 7(1)(b), Act 152

PARTIES

Firm or partnership

Actions by or against partners and firm

Name of the firm under which partners carried on business when the cause of action accrued may be used even if the partnership has been dissolved or the partnership business ceased.

Re Wenham [1900] 2 QB 698

PARTIES

Firm or partnership

Actions by or against partners and firm

Only name of a firm which was carrying on business within Ghana at the time cause of action accrued may be used.

Order 6 r 1

*Attorney-General v Levandowsky &
BASE Group* [1971] 2 GLR 58

PARTIES

Actions by or against partners and firm

Disclosure of plaintiff partner's name – upon defendant's request

Where a defendant is sued in the name of a firm, he may request the firm to disclose, by a written statement, the names and places of residence of all the partners in the plaintiff's firm when the cause of action accrued

Order 6 r 2(1)

PARTIES

Actions by or against partners and firm

Disclosure of plaintiff partners' name –
upon defendant's request

Where the partners names are
disclosed, the action to proceed in name
of firm as if all partners were the named
plaintiffs to the action

Order 6 r 2(2)

PARTIES

Actions by or against partners and firm

Disclosure of plaintiff partners' name – by court order

Where the firm or their lawyer default in disclosing the names and addresses of the partners, the court may order the firm or their lawyer to provide the particulars, verified on oath or as otherwise may be directed by the court. Alternatively, the court may stay action in the name of the firm upon terms

Order 6 r 2(1)

PARTIES

Actions by or against partners and firm

Disclosure of defendant partner's name – upon plaintiff's request

Where a defendant is sued in the firm's name, the plaintiff may request the defendant firm to disclose, by written statement, the names and places of residence of all the partners in the defendant's firm when the cause of action accrued

Order 6 r 2(3)

PARTIES

Actions by or against partners and firm

Disclosure of defendant partners' name
– upon plaintiff's request

Where the defendant's partners names are disclosed, the action is to proceed in name of defendant's firm but as if all defendant's partners were the named defendants to the action

Order 6 r 2(2), (3)

PARTIES

Actions by or against partners and firm

Disclosure of defendant partners' name –
by court order

Where the defendant firm or their lawyer default in disclosing the names and addresses of the partners, the court may order the firm or their lawyer to provide the particulars, verified on oath or as otherwise may be directed by the court.⁸⁴

Order 6 r 2(1), (3)

PARTIES

Actions by or against partners and firm

Disclosure of partner's name

Plaintiff suing a firm may by notice require the firm to provide a written statement of the names and places of residence of all the partners when the cause of action accrued

Order 6 r 2(3)

PARTIES

Actions by or against partners and firm

The fact of a party being a partnership must be disclosed in title by adding “(a firm)” after its name

Kofi Ansah v Buga & Partners, (A ⁸⁶
firm)

SOLE PROPRIETORSHIP

PARTIES

Business name of sole proprietor

Person trading under business name is

an individual carrying on business within Ghana under a business name other than his own surname

Section 4(1)(a)(i), Registration of Business Names Act (Act 151)

PARTIES

Business name of sole proprietor

Person trading under business name is

a trader who previously did business in his true name but changed the name

Section 4(1)(a)(ii) (Act 151)

PARTIES

Business name of sole proprietor

Person trading under business name is

a company carrying on business in Ghana under a business name that does not consist of its corporate name

Section 4(1)(b) (Act 151)

PARTIES

Business name of sole proprietor

Person trading under business name

Such person is required to register within
14 days of commencement of business

Section 4(1)(b), Act 151

Registration is renewable annually

Section 5A, Act 151

PARTIES

Business name of sole proprietor

Person trading under business name

Registration of business name does not incorporate business as a legal entity. The registered business name is separate from sole proprietor

Barclays Bank of Ghana Ltd v Lartey
[1978] GLR 282

PARTIES

Business name of sole proprietor

Person trading under business name

Registered business name has no legal status whether as an individual person or a corporate person

GIHOC v Vincenta Publications [1971] 2
GLR 24

PARTIES

Actions against person carrying on business in another name

A person carrying on business in a name or style other than his own name may be sued as a defendant in that name and style as if it were the name of a firm

Order 6 r 8

John Smith v Kaaklo Enterprise

PARTIES

Actions against person carrying on business in another name

Action against person carrying on business in another name to be treated as if sole proprietor is a partner and business name were a firm name

Order 6 r 8

PARTIES

Actions against person carrying on business
in another name

Action is essentially against sole
proprietor, just as action against firm is
essentially against partners

Order 6 r 8

PARTIES

Actions by sole proprietor/business name

A person carrying on business in a name or style other than his own cannot sue in the business name. He must sue in his true name

John Mensah Sarbah, (trading as Jaguar Motors) v Paul Sam

PARTIES

Actions by sole proprietor/business name

A person carrying on business in a name or style other than his own cannot sue in the business name. He must sue in his true name

PARTIES

Actions by sole proprietor/business name

GIHOC v Vincenta Publications [1971] 2 GLR 24. Vincent Alisa Onuku trading under the firm name and style of Vincenta Publications issued a writ in the name of Vincent Publications. Action dismissed

PARTIES

Actions by sole proprietor/business name

A person carrying on business in a name or style other than his own cannot sue in the business name. He must sue in his true name

PARTIES

Actions by sole proprietor/business name

S A Turqui v Dahabieh [1987-88] 2 GLR 486, CA – Nasib Dahabieh, carrying on business under the name and style “Technical Trading Co.” issued a writ in his name and Technical Trading Co as plaintiffs. Technical Trading Co struck out as a party

GOVERNMENT

PARTIES

Government

Claims against Government

Article 293(1)

Where a person has a claim against the Government, that claim may be enforced as of right by proceedings taken against the Government for that purpose *without the grant of a fiat* or the use of the process *known as petition of right.*

PARTIES

Claims against Government

Fiat and petition of right at common law

At common law, the State or Government was personified in the monarch

Monarch or Government, not be sued in any civil or criminal proceedings

PARTIES

Claims against Government

Fiat and petition of right at common law

Courts belonged to the monarch, and he was the supreme lord of his courts

Judges of the courts administered justice on his behalf between the monarch's subjects

PARTIES

Claims against Government

Fiat and petition of right at common law

Monarch also enjoyed various immunities and privileges including immunity from liability for damages for torts committed by servants

PARTIES

Claims against Government

Fiat and petition of right at common law

Courts could therefore not exercise jurisdiction over the monarch for damages for torts committed by his servants

PARTIES

Claims against Government

Fiat and petition of right at common law

If a subject's property came into the monarch's or his servant's possession without legal right, the subject could not sue the monarch as of right

Claimant required royal *fiat* or consent of the monarch before suing

PARTIES

Claims against Government

Fiat and petition of right at common law

The *fiat* was at the discretion of the monarch

If he granted the *fiat*, the petition was then indorsed with "*fiat justitia*" ("let justice be done") and then referred to the courts to do justice

PARTIES

Claims against Government

Fiat and petition of right at common law

It was only when a *fiat* was granted that the courts could have jurisdiction to hear the claimant's case against the monarch

PARTIES

Claims against Government

Fiat and petition of right at common law

Prior to 1947, when the State Proceedings Act was passed, the only way a monarch could be sued was by a fiat or petition of right

PARTIES

Claims against Government

Fiat and petition of right in Ghana

In 1877 the Petitions of Right Ordinance, (Cap 18) was enacted in Gold Coast

“to make provision relating to *suits by and against* the Government, as to the costs thereof”.

PARTIES

Claims against Government

Fiat and petition of right in Ghana

Claims by Government of Gold Coast against any private person shall be brought by Attorney General or any officer authorised by him, as of right

Section 3, Cap 18

PARTIES

Claims against Government

Fiat and petition of right in Ghana

Claims against Government of Gold Coast, being of the same nature as claims which may be preferred against the Crown in England by petition, ... or plea of right, may, with the consent of the Attorney General be preferred... by the claimant against the Attorney General or such other officer he may designate from time to time for that purpose

Section 4, Cap 18

PARTIES

Claims against Government

Fiat and petition of right in Ghana

Plaintiff suing the government does not issue a writ of summons but commenced his action by filing a statement of claim with a copy for service on the Attorney General or such other officer designated by the Attorney General for that purpose.

Section 5, Cap 18

PARTIES

Claims against Government

Fiat and petition of right in Ghana

The Registrar will then transmit a copy of the statement of claim. If the Attorney General decides to grant his *fiat*, then he shall return the statement of claim to the court with his *fiat* endorsed on it and the claim shall be dealt with in the court in which the statement of claim was filed.

Section 5, Cap 18

PARTIES

Claims against Government

Fiat and petition of right in Ghana

In 1960 Ghana attained Republican status

Cap 18 applied until 1961 when it was repealed by State Proceedings Act, (Act 51)

PARTIES

Claims against Government

Fiat and petition of right in Ghana

Section 1(1), Act 51 retained
requirement of fiat

“No action shall be brought against the Republic without the *fiat* of the Attorney General”

PARTIES

Claims against Government

Fiat and petition of right in Ghana

1969 requirement of obtaining a fiat before bringing an action against the Republic abolished by State Proceedings (Amendment) Decree, (NLCD 352)

PARTIES

Claims against Government

Fiat and petition of right in Ghana

Section 1(1), Act 51 of substituted with

“Subject to the provisions of this Act, an action may be brought against the Republic without the *fiat* of the Attorney General if the cause of such action arises on or after the 1st day of May, 1969”

PARTIES

Claims against Government

Fiat and petition of right in Ghana

Section 1(1), Act 51 enabled proceedings to be taken against the Republic as may be taken against any citizen of the Republic

PARTIES

Claims against Government

Fiat and petition of right in Ghana

Article 293, 1992 Constitution

- (a) maintains abolition of requirement of *fiat* and petition of right; and
- (b) placed Government in same position as private citizen of full age and capacity in respect of civil proceedings

PARTIES

Claims against Government

State Proceedings Act, 1998 (Act 555)
passed to

“provide for proceedings against
Republic in conformity with the
Constitution and for related matters”
Long title, Act 555

PARTIES

Claims against Government

State Proceedings Act

Section 1 of Act 555 re-enacts article 293 of Constitution but uses "Republic" instead of "Government"

PARTIES

Claims against Government

Section 1, State Proceedings Act

“Where a person has a claim against the *Republic*, the claim may be enforced *as of right* by proceedings taken against the Republic for that purpose *without the grant of a fiat* or the use of the process *known as petition of right.*”

PARTIES

Government

Claims against Government

Section 46 Interpretation Act, 2009 (Act 792) defines "Government" used in an enactment as "any authority by which the executive authority of the Republic is exercised."

PARTIES

Claims against Government

Extent of liability in contract – s 2, Act 555

Government liable in respect of

- (a) claims arising out of any contract with the State;
- (b) claims for liquidated or unliquidated damages in cases not arising in tort; and
- (c) claims for the recovery of taxes or duties wrongly paid or over-paid

as if it were a private person of full age and capacity

PARTIES

Claims against Government

Extent of liability in torts – article 293(2)(a), s 3(1) Act 555

Government liable for

- (a) torts committed by its employees and agents in the course of their employment,
- (b) breach of common law duty or any other law, owed by employer to an employee or agent; and
- (c) is subject to common law duties owed by an occupier of premises to persons entering onto the premises, such as the rule in *Rylands v Fletcher* etc

as if it were a private person of full age and capacity

PARTIES

Claims against Government

State Proceedings Act, 1998 (Act 555) –
definitions – s 26

“agent” in relation to Republic includes
independent contractor employed by Republic

“employee” in relation to the Republic includes
a public officer, a member of the Armed Forces,
but not an employee of a public corporation set
up for commercial purpose

PARTIES

Claims against Government

Extent of liability in torts– article 293(3), s3(2), Act 555

Government shall not to be vicariously liable unless the act or omission would, apart from article 293(2)(a), have given rise to a cause of action in tort against that employee or his estate

Thus, Government will not be liable if the employee or agent would not have been liable

PARTIES

Claims against Government

Extent of liability in torts – article 293(4), s 3(3), Act 555

Where Government and its officer are jointly bound by a statutory duty with another person, in case of a breach of that statutory duty, Government shall be jointly liable as if it were a private person of full age and capacity

PARTIES

Claims against Government

Extent of liability in torts – article 293(5), s 3(4), Act 555

Where functions are imposed or conferred on an officer of Government by a rule of common law or statute and the officer, commits a tort in the performance of or purporting to to perform those functions, the liability of the Government shall be what they would have been if the function had been conferred or imposed solely by virtue of instructions lawfully given by the Government

PARTIES

Claims against Government

Extent of liability – independent contractors – s 24, Act 555

Government would be liable for the torts of its independent contractor if committed in circumstance which would render a private employer liable

PARTIES

Claims against Government

Exclusion of liability – article 293(6)(a), s 4(a), Act 555

Government will not be liable for torts committed by a person performing or purporting to perform a judicial function, vested in that person

PARTIES

Claims against Government

Exclusion of liability – article 293(6)(b)(i), s 4(b)(i), Act 555

Government liability is limited only to act or omission of officer appointed directly or indirectly by Government and who was at the material time, paid in respect of his duties as an officer of the Government wholly out of public funds or out of monies approved by Parliament

PARTIES

Claims against Government

Exclusion of liability – article
293(6)(b)(ii), s 4(b)(ii), Act 555

Government will not to be liable for act or omission of officer unless that officer was, at the material time, holding office in respect of which the Public Services Commission certifies that the holder of that office would normally be so paid

PARTIES

Claims against Government

Indemnity & Contribution – article 293(7)(b), s 5, Act 555

If Government is liable by virtue of article 293 and Act 555, the rules relating to indemnity and contribution shall be enforceable

(a) against the Government by its employee, acting in the proper execution of his duties, in respect of the liability or by any other person in respect of the liability to which that person is subject; and

PARTIES

Claims against Government

Indemnity & Contribution – article 293(7)(b), s 5, Act 555

If Government is liable by virtue of article 293 and Act 555, the rules relating to indemnity and contribution shall be enforceable

(b) by the Government against any person other than an employee of the Government in respect of the liability to which it is subject, as if the Government were a private person of full age and capacity.

PARTIES

Claims against Government

Who to sue and be sued – article 88(5)

The Attorney General shall be responsible for the institution and conduct of all civil cases on behalf of the *State*; and all civil proceedings against the State shall be instituted against the Attorney General as defendant

PARTIES

Claims against Government

Who to sue and be sued – article 88(5)

Article 293 uses “Government”

Article 88(5) uses “State”

PARTIES

Claims against Government

Meaning of "State" – Memorandum to Interpretation Act

Preamble to Constitution, 1992 expression "Republic of Ghana" used.

Article 4, expression "Sovereign State of Ghana" used with reference "unitary republic".

PARTIES

Claims against Government

Meaning of “State” – Memorandum to Interpretation Act

Articles 20 and 94(2)(d), “Council of State” not the “Council of the Republic”.

Chapter Six of Constitution, on Directive Principles of State Policy “State” used throughout, not Republic

PARTIES

Claims against Government

Meaning of “State” – Memorandum to Interpretation Act

Constitution, overall, uses *State* more than *Republic*. However, popular usage prefers *Republic* as the legal entity and not State ...”

PARTIES

Claims against Government

Meaning of "State" – Memorandum to Interpretation Act

"State" means the unitary Republic of Ghana", though article 57 refers to "a President of the Republic of Ghana", whilst article 63(3) uses the expression "President of Ghana".

PARTIES

Claims against Government

Attorney General to represent State in all civil proceedings

Attorney-General and no one else should be named as the defendant in all civil proceedings against the State.

Republic v High Court, Accra; ex parte Attorney-General (Delta Foods Case)
[1998-99] SCGLR 595

PARTIES

Claims against Government

Attorney General to represent State in all civil proceedings

Where Chief Justice is sued in respect of the performance of his official acts, Attorney General was proper defendant

Tsikata v Chief Justice & Attorney General [2001-2002] SCGLR 437

PARTIES

Claims against Government

Who to sue and be sued – article 88(5)

Constitutionally-established independent bodies can sue and be sued on their own relating to their functions *per counsel of their choice...*

Amegatcher v Attorney-General (No 1)

[2012] 1 SCGLR 679

PARTIES

Claims against Government

Notice of civil proceedings – s 10, Act 555

30 days written notice of intention to commence civil proceedings against Government to be given to Attorney General

PARTIES

Claims against Government

Notice of civil proceedings – ss 10, Act 555

Notice to state name, address of claimant, cause of action and relief sought

PARTIES

Claims against Government

Notice of action *in rem* – s 19, Act 555

Proceedings *in rem*, arrest, detain or sell ship, aircraft, cargo or any other property of the Government or to give to any person a lien on aircraft cargo or other property shall not be filed unless 30 days prior written notice given to Attorney General

PARTIES

Claims against Government

**Notice of civil proceedings – exceptions -
s 20, Act 555**

**Notice requirement does not apply to
actions under articles 2, 33 and 130 of
Constitution**

PARTIES

Claims against Government

Notice of civil proceedings – default - s 20, Act 555

In default of service notice, action not to be dismissed, but adjourned for plaintiff to give notice

PARTIES

Claims against Government

Notice of civil proceedings – default - s 20, Act 555

Failure to give notice does not render proceedings a nullity

Webb Builders Ltd v Tolon Kumbungu Assembly & another (Unreported judgment, CA, 28 January 2016, Suit No. H1/09/2015)

THE FAMILY

PARTIES

The Family

Legal nature of the family

It is a corporation aggregate made up of several members who are related genealogically at the same time

Has perpetual succession, in that the death of a member does not change the existence, rights and liabilities

PARTIES

The Family

Legal nature of the family

Although it is unincorporated, it is recognised in law as a person

PARTIES

The Family

Legal nature of the family

Section 46, Interpretation Act 2009 (Act 792)

“In an enactment, the expression “person” includes a body corporate, whether corporation aggregate or corporation sole and an unincorporated body of persons as well as an individual;”¹⁵⁷

PARTIES

The Family

Claims by or against the family

Proper person to sue and be sued

General customary law rule is that head of family is the only and proper person to sue and be sued in respect of family property

PARTIES

Claims by or against the family

Head of family only person to sue and be sued

“[the head of family] *alone* can sue and be sued, as the representative of the family, respecting claims on the family possessions, and he is as much the guardian and representative for all purposes of the family...”

Fanti Customary Laws, Sarbah at 37

PARTIES

Claims by or against the family

Head of family only person to sue and be sued

Courts recognised the customary law rule that the head of family is the only proper person to sue and be sued in respect of family property

PARTIES

Claims by or against the family

Head of family only person to sue and be sued

...the Courts of this country have always recognized the right of the leading female member of the family to sue and be sued in respect of family property in the absence of any male head..."

Araba Tsetsewa v Acquah (1941) 7
WACA 216, at 217

PARTIES

Claims by or against the family

Head of family only person to sue and be sued

In *Mahmudu v Zenuah* (1934) 2 WACA 172, although the court considered “the rule of native customary law to the effect that only the head of family can sue on its behalf” to be contrary to justice, equity and good conscience and which the courts did not have the right to observe and enforce the observance, under section 19 of the Supreme Court Ordinance, it nonetheless recognised it as a rule the customary law.

PARTIES

Claims by or against the family

Head of family only person to sue and be sued

"...I am not seeking in this judgment to decide that anyone other than the Head of the family could obtain from the Court a declaration of title to a judgment for recovery of possession of, or a judgment for damages for trespass on, family land. Having said that, I think I have said enough to show that this judgment makes no real inroad into what I conceive to be the real meaning of the native customary law that only the Head of the family can sue in regard to family land.

Mahmudu v Zenuah (1934) 2 WACA 172, at 175 per
Graham Paul J

PARTIES

Claims by or against the family

Customary rule, not strictly applied by courts

Courts did not strictly apply rule that only head of family can sue and be sued in respect of family property

- *Koran v Dokyi* (1941) 7 WACA 78
- *Mahmudu v Zenuah* () 2 WACA

PARTIES

Claims by or against the family

Customary rule, not strictly applied by courts

In *Koran v Dokyi* (1941) 7 WACA 78, a person who was not the head of family sued successfully to recover property sold in execution of judgment obtained against a member of the family for his personal debt. On appeal to WACA, appellant challenged capacity of plaintiff, to sue to recover family property. WACA rejected the challenge to plaintiff's capacity.

PARTIES

Claims by or against the family

Customary rule, not strictly applied by courts

“The appellants’ case before this Court, shortly put, is that the plaintiff is not the Head of the Family and that where, as admittedly here, family property has been wrongly sold under Writ of *Fi. Fa.* ...no member of the family except the Head of the Family may take action in Court against the purchasers claiming a declaration that the property is family property and not liable to be sold for the debt in question and for recovery of possession for and on behalf of the family.

PARTIES

Claims by or against the family

Customary rule, not strictly applied by courts

It has been recognised by the Courts of the Gold Coast that, as a general rule, only the Head of a Family can sue as representative of the family for the recovery of family land. This Court recognised the existence of such a general rule in its judgment in the case of *Alfa Mahmudu v. Zenuah* (2 W.A.C.A. at page 175)

PARTIES

Claims by or against the family

Customary rule, not strictly applied by courts

In the present case, however, Yaw Mante, Linguist to the Adontenhene of Akyem Abuakwa, in reply to the question put to him by the second defendant "In case any property belonging to the family is lost, is the plaintiff the proper person to claim it for the family?" said "Plaintiff has the right to dispute for it." Also Opanin Kwasi Asaku, a former occupant of the Ekoona Stool, whose evidence was taken on commission, deposed that "each member of our family has a legitimate right to dispute for the properties in dispute."

PARTIES

Claims by or against the family

Customary rule, not strictly applied by courts

The Tribunal after stating that it was satisfied that the plaintiff, an elderly woman of the family, had a direct material interest in the properties belonging to that line of the family, held that according to native custom plaintiff could properly bring the action. Although the Tribunal did not base its judgment on it, the Tribunal had before it the plaintiff's uncontradicted statement that she was verbally empowered by the occupant of the Ekoona Stool to represent the family and bring this action.

PARTIES

Claims by or against the family

Customary rule, not strictly applied by courts

Major Gosling, ...in the course of his judgment on appeal, said that he accepted the custom as laid down in the judgment of the Tribunal that the plaintiff had the right to sue and went on to say It "seems to me that no one is better qualified to define Akim Abuakwa native custom than the Omanhene and his Councillors."

We agree with that observation."

PARTIES

Claims by or against the family

Court lists exceptions to rule

In Kwan v Nyieni [1959] GLR 67, the rule was restated thus:

“The conclusions we have come to, upon careful consideration of the judgments in [*Mahmudu v Zenuah* and *Koran v Dokyi*] and other judicial decisions on the native custom in this regard, are as follows:

- (1) as a general rule the head of a family, as representative of the family, is the proper person to institute suits for the recovery of family land;

PARTIES

Claims by or against the family

Court lists exceptions to rule

(2) to this general rule there are exceptions in certain special circumstances, such as:

(i) where the family property is in danger of being lost to the family, and it is shown that the head (either out of personal interest, or otherwise) will not make a move to save or preserve it; or

PARTIES

Claims by or against the family

Court lists exceptions to rule

- (ii) where, owing to a division in the family, the head and some of the principal members will not take any step; or
- (iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole.

PARTIES

Claims by or against the family

Court lists exceptions to rule

In any such special circumstances, the Court will entertain an action by *any member of the family*, either *upon proof that he has been authorised by other members of the family to sue*, or *upon proof of necessity*, provided that the Court is satisfied that the action is instituted in order to preserve the family character of the property."

PARTIES

Claims by or against the family

Extension of exceptions by Supreme Court

In *In Re Ashalley Botwe Lands; Adjetey Agbosu v Kotey* [2003 - 2004] SCGLR 420
Supreme Court held that rule in *Kwan v Nyieni* not inflexible and that non-head of family did not have to prove failure of head of family to act before non head of family can sue.

PARTIES

Claims by or against the family

Extension of exceptions by Supreme Court

“With regard to this ground, one of the main points urged on behalf of the first defendant is that additionally, the plaintiffs failed to prove that they had authority to sue, that is to say, that there was at that time a family head who, for good cause, had refused to act and further that their own inaction would have led to disastrous consequences for the family.

PARTIES

Claims by or against the family

Extension of exceptions by Supreme Court

In my view, the Court of Appeal's claim that the plaintiffs were obligated to prove these additional requirements, namely, that there was a head of family who was refusing to take action to preserve the family property also is clearly untenable. The court based its decision on the rule in *Kwan v Nyieni* [1959] GLR 67, CA...

PARTIES

Claims by or against the family

Extension of exceptions by Supreme Court

Plainly, nothing in this passage can be read as establishing an intractable rule of law that an action instituted by a non-head of family, specifically ordinary members of the family, can only succeed upon proof that there was a head of family who was deliberately for one reason or the other refusing to act to save the property without having to prove that there is a head of family refusing to act. Therefore actions brought by ordinary members of the family do not

PARTIES

Claims by or against the family

Extension of exceptions by Supreme Court

succeed only upon proof that there is a head of family who is apathetic. Even so, the Court of Appeal (per van Lare Ag CJ) identified only two broad special circumstances under which the general rule that only the head could sue, would not apply. These are: first, where the member of the family has been authorized by members of the family to sue; or, second, upon proof of necessity to sue." per Wood JSC at p 432

PARTIES

Claims by or against the family

Further extension of exceptions by Supreme Court

Effect of decision in *In Re Ashalley Botwe Lands* is that ordinary member of family may in special circumstances bring action on behalf of family without having to prove that there was a head of family who had failed to act to protect family property. Such special circumstances include where member of family has been authorised by the family to sue or that it was necessary for the ordinary member to sue.

PARTIES

Claims by or against the family

Proper person to sue and be sued

Order 4 r 9(2) & (3)

(2) The head of a family in accordance with customary law may sue and be sued on behalf of or as representing the family.

(3) *If for any good reason the head of a family is unable to act or if the head of a family refuses or fails to take action to protect the interest of the family* any member of the family may subject to this rule sue on behalf of the family.

PARTIES

Claims by or against the family

Proper person to sue and be sued

Order 4 r 9(2) & (3) is a codification of rule in *Kwan v Nyieni* and extension in *Re Ashalley Botwe Lands; Adjetey Agbosu v Kotey*

PARTIES

Claims by or against the family

Action by person not head of family

Where person other than head of family sues, he must serve a copy of the writ of summons on head of family

Order 4 r 9(4)

Head of family need not be party to the action

PARTIES

Claims by or against the family

Action by person not head of family

Head of family may within 3 days of service of writ, apply to

(a) object to writ; or

(b) be substituted or joined as plaintiff
Order 4 r 9(5)

PARTIES

Claims by or against the family

Action by person not head of family

Where head of family not protecting family property in action brought against him in that capacity, any member of family may apply to be joined to or be substituted for head of as defendant

Order 4 r 9(6)

PARTIES

Claims by or against the family

Action by person not head of family

Application under 4 r 9(5) and (6) to be by motion with affidavit verifying identity of applicant and grounds for application

Order 4 r 9(7)

PARTIES

Claims by or against the family

Action by or against head of family

Indorsement of capacity of head of family

Description in a representative action in the title of suit that the defendant is head of family, without indorsing in writ and statement of claim that he is being sued on behalf of family is not fatal

Ofori v Danso [1968] GLR 20

THE STOOL/SKIN

PARTIES

Stool/Skin

Nature of the Stool/Skin

Stool is recognised as a corporation sole

It has perpetual succession

Has capacity to sue and be sued in respect of stool/skin property

PARTIES

Nature of the Stool/Skin

Stool is a corporation sole and has perpetual succession

“...since the conception of the Stool that is and has always been accepted in the Courts of this Colony is that it is an entity which never dies, a corporation sole like the Crown, and that while the occupants of the Stool may come and go the Stool goes on for ever.”

Quarm v Yankah II (1930) 1 WACA 80

PARTIES

Nature of the Stool/Skin

Stool has legal personality separate from the families that make up the stool family

“...a stool has a legal personality quite distinct from the individual (including the stool occupant) and the various branch families that make up the wider or the ancestral family that is the stool family.”

Boateng alias Beyeden v Adjei [1963] 1 GLR 285 at 289, SC

PARTIES

Nature of the Stool/Skin

Stool can sue and be sued but the name of the occupant

"...now a stool institutes or defends a suit in the name of the occupant."

Ofori Atta II v Boateng (1957) 3 WALR
38

PARTIES

Claims by or against the Stool/Skin

Person to sue or be sued

The occupant of a stool or skin or, where the stool or skin is vacant, the regent or caretaker of that stool or skin may sue and be sued on behalf of or as representing the stool or skin

Order 4 r 9(1)

PARTIES

Claims by or against the Stool/Skin

Nature of action by occupant or regent

Action by occupant or regent is a representative action

Representative capacity to be endorsed on writ of summons

PARTIES

Claims by or against the Stool/Skin

Exceptions in *Kwan v Nyieni* may in appropriate circumstances apply in relation to Stool/Skin

“I find in this appeal that the three exceptions to the *Kwan v Nyieni*...rule may fruitfully be pressed into service to clothe the plaintiffs with capacity.”

Owusu v Agyei [1991] 2 GLR 493 at 505,
SC

UNINCORPORATED VOLUNTARY ASSOCIATIONS

PARTIES

Unincorporated voluntary associations

Claims by or against unincorporated associations

No legal existence apart from its members

Cannot sue or be sued

A member or some members may sue as a representative of the group

PARTIES

Claims by or against unincorporated associations

No legal existence apart from its members

“An unincorporated association, like a members’ club, ... has no legal existence apart from the members from time to time of which it is composed, and a distinction is drawn between the association’s property and the separate property of the members.”

Ghana Muslims Representative Council v Salifu [1975] 2 GLR 246, CA at 256

PARTIES

Claims by or against unincorporated associations

Cannot sue or be sued but may do so through members

“In law, a voluntary association is a sum of individuals, without any collective capacity to sue or be sued as such. But all the members may join to sue as plaintiffs...”

Ghana Muslims Representative Council v Salifu [1975] 2 GLR 246, CA at 256

PARTIES

Claims by or against unincorporated associations

Cannot sue or be sued but may do so through members

Action by or against members of voluntary association may be brought in a representative action under Order 4 r 11

PARTIES

Claims by or against unincorporated associations

Cannot sue or be sued but may do so through members

Action by or against unincorporated association in its name is a nullity

- *London Association of Protection of Trade v Greenland Ltd* [1916] 2 AC 15 at 38-39
- *Ghana Muslims Representative Council v Salifu* [1975] 2 GLR 246, CA

PARTIES

Claims by or against unincorporated associations

Representative proceedings against unincorporated associations

Order 4 r 11.

(1) Where numerous persons have the same interest in any proceedings, other than proceedings mentioned in rule 13 of this Order, the proceedings may be commenced, and unless the Court otherwise orders, continued by or against any one or more of them as representing all or as representing some of them.

PARTIES

Claims by or against unincorporated associations

Registration under Trustees (Incorporation) Act, 1962 (Act 106)

On the grant of the certificate, the trustees

(a) shall become a body corporate by the name described in the certificate, and...

(c) shall have power to sue and be sued in the corporate name, ...

s 1(4)

PARTIES

Claims by or against unincorporated associations

Effect of registration under Trustees (Incorporation) Act, 1962 (Act 106)

Certificate of incorporation vests in the body corporate the land, of any nature and tenure belonging to or held by a person in trust for that body or association

s 2

PARTIES

Claims by or against unincorporated associations

Who may sue or be sued where Trustees incorporated

Where trustees of unincorporated association have registered under Act 106, trustees have capacity to sue and be sued in the corporate name in respect of property of the association vested in them

REPRESENTATIVE PROCEEDINGS

PARTIES

REPRESENTATIVE PROCEEDINGS

Nature

Where two or more persons have the same interest in a cause of action or property, one or more of those persons may sue or be sued, on behalf of or for the benefit of all.

PARTIES

REPRESENTATIVE PROCEEDINGS

History of representative proceedings

Under Chancery Court practice, all persons belonging to an unincorporated group interested in subject matter of the proceedings were to be named as parties to proceedings, to ensure finality to all matters in dispute

PARTIES

REPRESENTATIVE PROCEEDINGS

History of representative proceedings

Over time difficulties in having large numbers take part in proceedings became clear

The practice of having all such persons in one suit became inconvenient as "such persons 'never could come to justice'"

PARTIES

REPRESENTATIVE PROCEEDINGS

History of representative proceedings

“Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy.”

per Lord Macnaghten in *Duke of Bedford v Ellis* [1901] A.C. 1, HL at p 8

PARTIES

REPRESENTATIVE PROCEEDINGS

History of representative proceedings

Chancery Court practice was eventually relaxed to allow one or more of the persons interested in the matter in suit to sue as a representative of the group

PARTIES

REPRESENTATIVE PROCEEDINGS

History of representative proceedings

“But when the parties were so numerous that you never could ‘come at justice,’ to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent...” per Lord Macnaghten in *Duke of Bedford v Ellis* [1901] A.C. 1, HL at p 8

PARTIES

REPRESENTATIVE PROCEEDINGS

History of representative proceedings

By the relaxed rule, a body of persons having a common interest in a subject-matter may, when that interest is threatened or has been violated, be represented by one or more on behalf of the whole.

PARTIES

REPRESENTATIVE PROCEEDINGS

History of representative proceedings

"...the rule of the Court of Chancery, ... to have been this, that where one multitude of persons were interested in a right, and another multitude of persons interested in contesting that right, and that right was a general right—and it was utterly impossible to try the question of the existence of the right between the two multitudes on account of their number—some individuals out of the one multitude might be selected to represent one set of claimants, and another set of persons to represent the parties resisting the claim, and the right might be finally decided as between all parties in a suit so constituted."

Commissioners of Sewers of the City of London v Gellatly
(1876) 3 Ch D 610 at 615

PARTIES

REPRESENTATIVE PROCEEDINGS

Objective of the relaxed rule

To make it possible to bring action against unincorporated aggregates of persons

London Association of Protection of Trade v Greenland Ltd [1916] 2 AC 15 at 30

PARTIES

REPRESENTATIVE PROCEEDINGS

Common law rule codified in Order 4 r 11(1)

Where numerous persons have the same interest in any proceedings, one or more may sue or be sued or may be authorised by the Court to defend on behalf of, or for the benefit of, all.

PARTIES

REPRESENTATIVE PROCEEDINGS

Control of representative action after action begun

After a representative action has begun, the Court may, at any stage, on the application of the plaintiff, and on such terms, as it thinks fit, appoint any one or more of the defendants or other persons to represent all the defendants or some of the defendants. ²¹⁷

Order 4 r 11(2)

PARTIES

REPRESENTATIVE PROCEEDINGS

Requirements of representative proceedings – “same interest”

It is an essential condition of a representative action that the persons who are to be represented and the person or persons representing them must have the same interest in the proceedings

Akoto II v Kavege [1984-86] GLR 365,
CA

PARTIES

REPRESENTATIVE PROCEEDINGS

Requirements of representative proceedings
– “same interest”

To meet this condition, all members of the alleged class should have a common interest, and all should have a common grievance and that relief is in its nature beneficial to all

Banahene v Hima [1963] 1 GLR 323, SC ²¹⁹

Akoto II v Kavege [1984-86] GLR 365, CA.

PARTIES

REPRESENTATIVE PROCEEDINGS

Requirements of representative proceedings
– “same interest”

“Given a common interest and a common grievance, a representative suit was in order if the relief was in its nature beneficial to all whom the plaintiff proposed to represent.”

Ghana Muslims Representative Council v Salifu [1975] 2 GLR 246, CA, applying *Bedford v Ellis* [1901] AC 1

PARTIES

REPRESENTATIVE PROCEEDINGS

No leave required by representative to commence representative proceedings

Representative(s) do not need leave of court before suing as plaintiff nor do they leave to sue defendants in a representative action

PARTIES

REPRESENTATIVE PROCEEDINGS

Form of the representative proceedings

Class of persons sought to be represented must be clearly defined in writ and statement of claim

PARTIES

REPRESENTATIVE PROCEEDINGS

Members must be clearly and precisely identified

An action in which the plaintiff claimed to represent “some of” members of a class without defining which members was held not maintainable

Markt & Co Ltd v Knight S S Co. Ltd

[1910] 2 KB 1021

PARTIES

REPRESENTATIVE PROCEEDINGS

Form of the representative proceedings

Representatives are actual parties

Representative(s) parties are actual parties to proceedings, but not members of the group for whose benefit representative parties are acting

Ventorious v Montain [1990] 3 All ER 157

PARTIES

REPRESENTATIVE PROCEEDINGS

Form of the representative proceedings

Representatives are actual parties

If one person sues as a representative, he is the sole plaintiff and will be in control of the proceedings until judgment.

Where several persons sue as representative, they are *dominus litis*, but they must act together

PARTIES

REPRESENTATIVE PROCEEDINGS

Nature of representative proceedings

Judgment in representative proceedings binding on all members represented in proceedings

Non-parties will not be responsible for cost or the ordinary liabilities of litigants in respect of discoveries etc

Commissioner of Sewers v Gallatty & Medicine Hat Land Co. Ltd (1876) 3 Ch 610
at 615

PARTIES

REPRESENTATIVE PROCEEDINGS

Enforcement of judgment in
representative proceedings

Judgment may not be enforced against a
member not named in the proceedings
except with permission of court

Order 4 r 11(4)

PARTIES

REPRESENTATIVE PROCEEDINGS

Enforcement of judgment in
representative proceedings

Application for permission to enforce
judgment against non-party to be served
personally on such person

Order 4 r 11(5)

PARTIES

REPRESENTATIVE PROCEEDINGS

Enforcement of judgment in representative proceedings

Person not a party may resist enforcement of judgment against him on grounds of circumstances peculiar to him

Order 4 r 11(6)

PARTIES

REPRESENTATIVE PROCEEDINGS

Enforcement of judgment in representative proceedings

Court to determine application for permission to enforce judgment against person not party to representative proceedings in same manner it determines issues

Order 4 r 11(7)