WRITE-UP

THE DAWN OF A NEW ERA IN THE GRANT OF STAY OF EXECUTION IN NON EXECUTORY ORDERS: THE CASE OF OGYEADOM OBRANU KWESI ATTA VI

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THE DAWN OF A NEW ERA IN THE GRANT OF STAY OF EXECUTION IN NON EXECUTORY ORDERS: THE CASE OF OGYEADOM OBRANU KWESI ATTA VI

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Introduction

Save for patchy variations set out in a handful of cases in the last decade or so, the courts for more than three score years have been resolute in its refusal to grant stay of execution of orders, decrees, judgments and rulings of lower courts that are deemed not to be executable. Notwithstanding the palpable injustice occasioned to litigants who may have genuine appeals being pursued by such admirable fidelity to the law by Judges in refusing applications for stay of execution on the technical distinction of an order being appealed against as executable or non-executable, true substantial justice can be said to have been done in the case of **Ogyeadom Kwesi Atta VI v Ghana Telecomunications & Co Ltd & Anor** when the Supreme Court granted an application for stay of execution even though the substance of the appeal before the court was against a non-executable order of the Court of Appeal.

In this article, the writer scans the horizon of the legal landscape on the determination of cases regarding executory and non-executory orders culminating in the decision in the case of **Ogyeadom Obranu Kwesi Attah VI**, which decision has received further clarification and application in the case of **Tony Lithur v Nana Oye Lithur.** The article also explores attempts that were made over the years to avoid the harsh injustice due to the strict adherence to the rule that an order not being executable is not capable of being stayed with the emergence of an order for suspension of the orders of the court, injunction to stay execution as well as stay of proceedings of execution, all as palliatives in the face of apparent injustice to litigants. Finally, the article examines whether in the face of the new thinking to the effect that an order not being executable but if it has inherent inevitable executable consequences was now a subject of stay order in appropriate circumstances, the alternative reliefs of suspension of the lower courts orders, injunction to stay execution and stay of proceedings of execution that were developed can still be deemed to be apposite.

Executory and Non-Executory Orders

Execution simply means the act of carrying out or putting into effect an order of a court. It is the process of judicial enforcement of a judgment to ensure that the victorious party in court fully realizes the gains of the court victory. There are many enforcement procedures provided by the High Court (Civil Procedure) Rules, 2004, C. I 47. The form of execution

depends on the nature of the judgment secured in court; they however include writ of fieri facias, garnishee proceedings, a charging order, the appointment of a receiver, an order for committal, writ of sequestration. Besides, one can also speak of writ of possession, writ of delivery up, insolvency petition proceedings against individuals and petition to wind up of limited liability companies and body corporate entities. As the focus of this article is not about the forms of execution available to a successful party in court, the writer does not intend to discuss each of the forms of execution and when the necessity arises for a resort to any of the modes of execution. An attempt to discuss them has the potential to divert attention from the focus of this write up. What is meant by an executory order, decree or judgment is when the order or decision appealed against is capable of execution by resort to any of the forms of execution of a judgment. And if the order appealed against is not capable of being executed, then a stay of execution would not lie.

Whilst it is a right conferred on a losing party to apply for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant the relief, the events that might have occurred since the date of judgment to ground such an application for stay usually may be the filing of an appeal to test the correctness of the judgment. For the mere filing of an appeal alone and without more, cannot operate as a stay of execution. And in this regard the relevant rules of procedure of both the Supreme Court and the Court of Appeal that deal with the effect of an appeal on execution processes are worth quoting. Rule 20 of the Supreme Court Rules, 1996, C. I. 16 states as follows:

"A civil appeal shall not operate as a stay of execution or of proceedings under the judgment or decision appealed against except in so far as the Court or the court below may otherwise order".

A similar provision in the Court of Appeal Rules, being Rule 27 of C. I. 19 was amended to read that a civil appeal shall not operate as a stay of execution under the judgment or decision appealed against unless the court otherwise orders on an application made to the court by motion.

In a comprehensive manner, Order 51 of the High Court (Civil Procedure) Rules, 2004, C. I. 47 has also been amended by substitution for sub rule (1) of rule 9 that *"an appeal shall not operate as a stay of execution under the judgment or decision appealed against unless the court otherwise orders on an application made to the court".*
The net effect of the relevant provisions on the amendments to the High Court and Court of Appeal rules of procedures regulating actions in the Superior Courts are to the effect that one, the filing of appeal itself cannot stay execution of a judgment appealed against. Two, that for an appellant to hold in abeyance the execution processes whilst his appeal was pending, he

must file an application for stay of execution of the order or decree or the judgment. Finally, the previous existing regime of first filing the application before the trial court whose order, decree or judgment is the subject of appeal, was no longer the law. And therefore the corpus of law that developed and established in cases like **Republic v Court of Appeal, Accra, Ex Parte Sidi Ghassoub v Bibiani Wood Complex** may be good law but no longer relevant law. The law flowing from the revoked rule which is to the effect that when an appellant finds the need to apply for stay of execution of a judgment, same must first be made before the court of first instance that gave the order and upon refusal repeated at the appellate court. It had been the principle in the two cases last cited that when the trial court grant the stay but the terms of its compliance are onerous, it effectively amounts to a denial and the applicant is entitled to repeat the application before the appellate court.

Factors giving rise to a decision being declared as Non-Executable Order

What may give rise to a court concluding that the subject matter of appeal is incapable of stay could be any of the following: there may have been a judgment in default of appearance or defence against a defendant or there could have been a summary judgment taken against a defendant to a cause. Upon being served with entry of judgment or any execution process, such a defendant may wake up from his stupour and quickly apply to the trial court to set aside the order or the ruling. This may be due to the fact that the defendant may contest service of the relevant processes on him or the time to even appeal might have elapsed. When the court refuse to set aside its order, the appeal launched could only be against the refusal of the court to set aside its order but not the original order granting judgment to the victorious party to go into execution. There are also those category of situations where the appeal filed may be against a judgment delivered on merit but the order or decree may have been a declaratory judgment or may not have required the performance of a positive act on the part of any party. And yet on appeal a losing party may seek a stay of that judgment. It is within these contexts that the principles in the decisions discussed below have been framed.

Decided Cases on refusal to Stay Non Executable Orders

The first of the long line of cases was the decision in **Eboe v Eboe,** supra. Ollenu J. (as he then was) was clear in an application seeking to stay declaratory judgment to the effect that a defendant was vested with one half share of certain business interest and assets held by him when he held that *"the declaration that the defendant is a trustee does not require any person to do anything or abstain from doing anything, and there is no method for executing it"*. This ratio was followed a decade later in the case of **Standard Chartered Bank of West Africa v Boaitey,** a decision of Taylor J (as then was) even though it must be conceded that the learned Judge

did not specifically make reference to the earlier decision in the Eboe case. In a case where judgment had been entered for payment of money due to the Bank and application had been brought for installment payment which had been dismissed. By an appeal against the refusal to grant the motion for installment, the Registrar had relied on the now revoked Court of Appeal (Amendment) Rules, L.I. 618 to claim that because of the pendency of the appeal, execution processes had been suspended. The Bank applied that the appeal against the refusal to stay execution for installment payment should not operate as a stay of execution. Taylor J. agreeing with the submission noted that an appeal as intended by L.I. 618 only operated to stay execution if that which may be taken under the judgment or decision appealed against was one which has the effect of or involves an order to do or not to do something. He noted emphatically that:

"An appeal which operates as a stay of execution must be one in respect of a matter on which there is a right of appeal, and such right of appeal lies in respect of only a judgment, decree or order. The ruling refusing the application for a stay of execution and payment by instalments was neither a judgment nor a decree and it could not be an order too because an order did not include a refusal to make an order. That ruling was merely a decision which resolved an issue".

The courts did not slacken or repented in making any exception to this principle as a much more pronounced view of this was to be stated by Acquah JSC (as he then was) speaking for the Supreme Court in the case of **N. B. Landmark v Lakhiani.** A case where default judgment had been obtained for recovery of a shop at the Circuit Court. Application to set aside the default judgment was refused whereupon an appeal was launched against the refusal and was coupled with a motion for stay at the Circuit Court. The trial court refused the application for stay but the Court of Appeal granted it. Piqued by the grant of stay the plaintiff appealed to the Supreme Court which agreed with the plaintiff in reversing the Court of Appeal. Acquah JSC (as he then was) remarked as follows:

"[i]t is trite learning that an application for stay of execution, presupposes that the order or decision in respect of which the stay is sought is capable of being executed by any of the known processes of execution. If the order or decision is incapable of being executed, an application for stay of execution cannot be applied in respect of it… the judgment in respect of which the application for stay was sought, was one refusing to set aside a default judgment. How does one go into execution in respect of such a refusal order? The appeal was not in respect of the main judgment of 2 November 1998 which ordered the defendant to give up vacant possession of the premises. A stay of execution can of course be applied to stay the substantive judgment if an appeal had been filed against it and the relevant application for stay is filed".

Similar conclusion was reached in the case of **Appiah v Pastor Laryea-Adjei** which involved a sale of a parcel of land at McCarthy Hill in which the plaintiff obtained summary judgment for the refund of monies paid for the intended purchase of the land. Defendant subsequently filed a motion for stay of execution and payment by installment which was granted. The parties appear to have settled the matter but the defendant failed to abide by the terms which he filed a motion for variation of the terms but same was refused. Defendant then proceeded to file an appeal against the refusal to vary the terms which was granted by the Court of Appeal. Plaintiff then proceeded to the Supreme Court to reverse the order of the Court of Appeal. Akuffo JSC (as she then was) was not enthused by the decision of the Court of Appeal and stated as follows

"[w]here an order of a court is not capable of execution by any known process of the law, it is also not capable of execution by any known process of the law, it is also not capable of being stayed. In this case, however, the High Court did not even make an order. All that the Judge of the High Court did was to decline jurisdiction to deal with the application for variation of the terms of settlement, because he was functus officio. Thus legally, there was and is nothing to execute. Consequently, the Court of Appeal fell into grievous error when it granted the application for stay of execution pending appeal. More importantly the effective outcome of the Court of Appeal's decision was to grant to the defendant a stay of execution of the judgment debt, by the backdoor as it were, although, as matters stood, there was no valid application before it for that purpose. It is quite patent from the record that the defendant did not appeal and has never appealed against the summary judgment delivered by the High Court… That being the case there cannot be any valid basis for the Court of Appeal to grant any later application affecting or relating to the execution of the judgment debt".

Fidelity to this principle was further seen in a case such as **G.F.A. v Apaade Lodge Ltd** where the Supreme Court reiterated the need in exercising its jurisdiction to grant a stay only in respect of executable judgments or orders of a court from which the appeal emanated. And that in so far as the appeal pending was only in respect of a non-executable order, the Supreme Court had no jurisdiction to stay execution. Not too dissimilar conclusion had also been reached in other cases emanating from the same Supreme Court in following the same line of principle. It must however, be observed that at least two years before the cases of **G. F.A v Apaade Lodge** and **Anang v Sowah** were decided, majority had reached a contrary decision in the case of **N. D. K Financial Services v Yiadom Construction & Electrical Works.** In an appeal against the decision of the Court of Appeal in refusing to stay execution of a judgment of a High Court, by a majority decision of the apex court, Brobbey JSC invoked, for the first time, the principle of substantial justice in the following terms in granting the application:

"In considering the application for stay, the court should endeavour to do substantial justice. The court should consider the essence of the order more than the form in which it is couched. The most important point is what would happen if the order of the Court of Appeal were not to be obeyed by the party. If the consequences would be the same as refusing to obey the High Court order, and the High Court is executable, then it is my view

that the order in the repeat application before the Court of Appeal is equally executable. If it is executable, it is a proper application for consideration on the merits by this court when the application moves to this court from the Court of Appeal".

With a view to ensuring that substantial justice was achieved, what had been the hackneyed approach to examining executable and non-executable orders was abandoned and the majority determined the case based on the inevitable consequences of the refusal of the application as resulting in injustice. The majority accordingly felt the need to stay execution of the High Court judgment even though that was not directly the order or decision under appeal. As to whether the majority felt the need to depart from the previous decision was not clearly set out. The guiding principle for the Supreme Court to depart from its own previous decision was clearly set out in the case of **Republic v High Court, General Jurisdiction 5; Ex Parte Minister of Interior.** Benin JSC speaking for the court noted what it means for the Supreme Court to depart from its previous decision under article 129(3) of the Constitution that "*the existing law must be clearly stated and the point/s of departure must equally be clearly stated, without equivocation. Merely casting doubt or even criticizing an existing decision is not tantamount to departing therefrom*". Little wonder therefore, that notwithstanding the brilliant approach by the majority in the N.D. K case to breath fresh air into what had turned to be a stale approach in this beaten path of refusing to grant stay on the technical ground of an order being non-executable, subsequent cases before Ogyeadom decision had to delve into conjuring principles of suspension of orders, injunction and stay of proceedings of execution as a back door approach to stay execution.

Suspension of Judgments, Stay of Proceedings of Execution & Injunctions

With the majority decision in the case of **N. D. K v Yiadom Construction** not having gone far enough to clearly depart from the previous decisions, the notional principle of the distinction between executable and non-executable orders and the latter not being capable of stay continued in full force. It is within this milieu that the apex court developed the concept of suspension of orders and decrees and stay of proceedings of execution in particular in an effort to mitigate the palpable helplessness of litigants. Three of these cases where the Supreme Court discussed these principles and either granted or refused are worth discussing here. The first of these is **Merchant Bank Ghana Ltd v Similar Ways.** A case in which the defendant sought to set aside a judgment, entry of judgment at the High Court on the grounds of non-service of hearing. An appeal against the ruling followed by an application for stay of execution at the High Court was dismissed. The third step of another application for stay of execution at the Court of Appeal was withdrawn. It was then followed with an application for interlocutory injunction pending appeal. Same was dismissed which was then repeated at the Court of Appeal. The Court of Appeal also dismissed the application, compelling the defendant to move to the Supreme Court.

Atuguba JSC conceding that the rules of court cannot adequately conceive every situation that may arise pending the determination of an appeal and drawing on instances of interlocutory reliefs such as suspension of disciplinary sanctions imposed on a lawyer pending the determination of an appeal and suspension of execution pending the determination of a review; the court granted the application not to stay execution but to suspend the order in the following terms:

"All along, it is obvious that its [defendant's] applications and appeals do not relate to any executable order. That however does not mean that it has no interest in holding off the enforcement of the substantive judgment to which its processes relate. ***If a stay of execution cannot lie other remedies may lie. One of such remedies can be the suspension of the entry of judgment.*** *In that event the effect of the judgment itself is temporarily frozen and incidental processes such as execution can't fly not because execution thereof is stayed but that the life of the judgment itself is in coma. This measure will prevent the eventual success of the applicant's appeal being rendered nugatory. This measure will protect the applicant from being injured by the prima facie default of the trial court having delivered its judgment without notice to the applicant, pending the determination of its appeals".*

From the tenor of the decision, the necessity to maintain the distinction between a non-executable order and executable order was what conceived the creation of suspension of the orders of the trial court and gave birth to the freezing of execution processes. Refreshing as this approach appeared, it completely accepted as sacrosanct the rule not to grant stay in non-executable orders and hence the ingenuity to introduce the Trojan horse of suspension of the orders of the trial court through which the execution of an order or decree could be held in abeyance. When one thought the tide had begun to swing, the case of **Standard Chartered Bank (Ghana) Ltd v Western Hardwood** appears to have beaten the path of the hitherto settled principle that a non-executable order was incapable of being stayed. Atuguba JSC who was in the minority in the **N.D.K v Yiadom Construction** expressed in no uncertain terms that there was no future for the majority view in the N. D. K case. In fact, if the learned Judge had been a prophet, his prophecy would not have been fulfilled and would be branded as a false prophet today. The Supreme Court in proclaiming that the majority decision in NDK case cannot endure for long unequivocally departed from that decision. The court rather interpreted the word "proceedings" in rule 20(1) of C. I. 16 as referring to any steps that were required or were necessitated, by the judgment appealed from and granted a stay of proceedings of execution. It is very curious to observe that Atuguba JSC who authored this judgment on 20th May, 2009 appeared to have made a volte face in almost two years' time in the case of **Merchant Bank v Similar Ways** by granting the relief of suspension of the orders of the lower court. The court by invoking functional or purposive interpretation, interpreted the word *"proceedings"* in rule 20(1) as referring to any steps that were required or were necessitated, and not merely occasioned, by the judgment appealed from.

It was in the face of such murkier path chartered that the decision in the case of **Golden Beach Hotels (Ghana) Ltd. v Pack Plus International Ltd** came in an attempt to provide some clarity. The little ray of light provided in the window of a guise of suspension of the orders of a court chartered in the Merchant Bank case seems to have been slammed when the veritable Date-Bah JSC cautioned in the following terms:

"[w]e think that the court needs to spell out the boundaries between orders for stay of execution and orders for suspension of the orders of a court below or for stay of proceedings … There is a risk of this court descending into a morass of sophistry with applications for stay of execution formulated as applications for suspensions of the orders of the court below or applications for stay for stay of proceedings. Thus the preconditions for a successful application for an order for suspension of the order of a court below or for the stay of proceedings … need to be spelt out clearly and authoritatively, otherwise the received learning on executable and non-executable orders would be rendered irrelevant. Logically, the preconditions for triggering orders for suspension of lower courts and stay of stay of proceedings … have to be stricter and narrower than those for an ordinary application for stay of execution. Otherwise, this court is likely to wallow in a semantic morass".

The application before the Supreme Court was for an order for the suspension of the order of the Court of Appeal. It was the view of the court that that application was meant to circumvent the received learning that a court would not grant a stay in a non- executable order of a lower court. The insistence on the narrower factor that the court was at pains to stress was set out to be the necessity to avoid a situation of a successful party whose success on appeal has been rendered nugatory if execution was carried out as set out in the case of **Joseph v Jebeille** plus what the court described as an additional element of the need to prove exceptional circumstance. As to how the Supreme Court thought it was keeping the door narrower with the criteria of nugatory effect plus exceptional circumstances is not quite clear. For the need to demonstrate exceptional circumstance to merit grant of an application for stay or even suspension of the orders of a trial has long been the law. The narrower approach perhaps was good for emphasis but did not quite respectfully, in the opinion of the writer, set out a new criteria.

Another observation from the Golden Beach case that cannot also be glossed over is that whilst in the **Standard Chartered Bank v Western Hardwood** case, Atuguba JSC had expressly departed from the **N.D. K v Yiadom Construction c**ase, the Supreme Court affirmed and upheld the nugatory effect principle espoused in the **N.D. K v Yiadom Construction,** making it appear that the principle established in the latter case was still good law and had not been departed from or overruled in the **Standard Chartered Bank v Western Hardwood** case. In the face of such unclear and meandering paths drawn by the cases, the decision in the case of **Ogyeadom Obranu Kwesi Atta VI v Ghana Telecommunication** becomes one of the ground breaking decisions that marks a watershed in a

long wait for an answer to an old problem.

Ogyeadom Obranu Decision: Born Again of an Old Baby?

An enhanced panel of seven had to deal with an application for stay of execution of the judgment of the Court of Appeal which dismissed an appeal of the applicant from a decision of the High Court by which the High Court ordered it to pay to the respondent by way of damages USD 16,009,920.00. The respondent had succeeded in obtaining the said award as damages for unlawful encroachment on its land for erection of a telecommunication tower. An application for stay of execution to the Court of Appeal after the first had been dismissed by the High Court was granted on terms that required the applicant to pay thirty percent (30%) of the judgment debt to the respondent. This order was complied with. The appeal failed and the applicant further appealed to the Supreme Court. He followed up with a motion for stay which was granted on terms. Feeling aggrieved that the conditional grant amounted to a refusal, repeated the application before the Supreme Court. Opposing the application, the respondent contended as had hitherto been trite law that the grant of the application on terms by the Court of Appeal was not an executable order capable of stay.

Speaking for the court, Gbadegbe JSC was of the view that the previous cases had failed to take advantage of the powers conferred on the Supreme Court under article 129(4) to develop a rule that will avoid the hardships brought upon parties by the strict adherence to the dichotomy of an order or decree being the subject matter of stay only if it is executable. The court in its quest to ensure substantial justice examined the previous cases and drew from its powers to depart from the previous decisions. It was the opinion of the court that *"the ends of justice is better served even in cases where the judgment of the Court of Appeal is said to be merely executable by inquiring to an application for stay of execution on the merits. This is because in its absence, parties would be left without a remedy"*. I am tempted to think that the word "executable" was meant to be "non-executable" as that provides a better meaning within the context in which the learned Judge drew that conclusion.

What has been established by the Ogyeadom decision is the enthronement of the majority decision in the **N. D. K v Yiadom Construction** case which Atuguba JSC had predicted its demise in the Standard Chartered Bank case. The Supreme Court thought it fit that parties seeking justice before court ought not to be turned away on the notional principle of an appeal not being executable when it had ample powers under article 129(4) of the Constitution to do justice. What is now clear is that notwithstanding the departure of the Supreme Court from the previous decisions beginning with **Eboe v Eboe,** the ratio upon which its decision was hinged being article 129(4) which is peculiarly a power conferred on the Supreme Court; the Court of Appeal and the High Court even though bereft of such special power, the latter two courts can still exercise such function and powers in the grant of a stay of execution in non-executable orders. It is true that the decision was anchored on the special powers under article 129(4) of the Constitution, but in so far as the Supreme Court departed

from its previous decisions under article 129(3) of the Constitution, and by which all courts lower than the Supreme Court are bound to follow the decisions of the Supreme Court, the ratio distilled in the Ogyeadom case becomes the decision binding on all courts lower than the Supreme Court, it is submitted.

A casual reading of the concurrent but not dissenting opinion delivered by Pwamang JSC is likely to give the impression that Pwamang JSC was still of the view that a stay could not be granted in non-executable orders of a lower court. But it is doubtful whether that is what the learned Judge meant. First the learned Judge reasoned that exercising a power under article 129(4); such a power cannot be used to stay a non-executable order in the following words:

"I am of the firm view that it would be contrary to established basic and fundamental principles of law for the Supreme Court to purport to stay execution of the judgment of the Court of Appeal that does not contain an executable order. It will be a vacuous order and pointless for the court to make such order".

One must however be fair to the learned Judge as he agreed that the court has jurisdiction to entertain that application and make an order with a view to prevent its final judgment in the substantive appeal being rendered nugatory. That by virtue of Articles 131 and 129(4) of the Constitution and Or 43 R11 of C.I.47 the Supreme Court was imbued with the power to stay non-executable orders. If any semblance of doubt existed at all, same has been dispelled in the subsequent case of **Tony Lithur v Nana Oye Lithur**. First the court stressed that Ogyeadom case departed from the previous decisions. Second, it reiterated the point that it may stay execution of decisions which appear not to be executable, but in real terms achieve executable inevitabilities.

Is Suspension of Orders and Stay of Proceedings of Execution Necessary Any Longer?

With this in mind that in appropriate cases, non-executable orders are capable of stay if the failure would achieve inevitable executable consequences, the received learning distilled in cases like **Merchant Bank v Similar Ways** on suspension of the orders of the court to freeze execution processes and stay of proceedings of execution set out in the case of **Standard Chartered Bank v Western Hardwood Ltd** can be said to be now moot. For the concept of suspension of the execution processes and stay of proceedings of execution developed within the context of the court's helplessness to intervene in its reluctance to blur the distinction of executable and non-executable orders regardless of the consequences of failure to stay non-executable orders. Having affirmed that by virtue of article 129(4) of the Constitution, the Supreme Court is able to do justice by not being hampered by an order not being executable if its net effect is to result in execution and therefore capable of stay, any application in future for suspension of a non-executable order or for stay of proceedings or even for the court to be guided by a strict and narrower approach in such a grant can be said to be now otiose as an applicant before the Supreme Court need not go through the back door to achieve a stay

which is the ultimate desire; when such an applicant is allowed to use the front door by filing for stay of execution when the justice of the case demands so.

Conclusion

The writer therefore finds it apt to cite the following as a befitting epilogue, being the veritable words of our Lord Jesus Christ:

"No one sews a patch of unshrunk cloth on an old garment. Otherwise, the new piece will pull away from the old, making the tear worse. 22 And no one pours new wine into old wineskins. Otherwise, the wine will burst the skins, and both the wine and the wineskins will be ruined. No, they pour new wine into new wineskins.

One therefore hopes that the pouring of new wine of applications for grant of stay of execution in future would not be diluted with the old wineskin of suspension of orders and stay of proceedings of execution for any ruinous effect as orders coming from the courts. We cannot think anew and still cling to what is now old forms and traditions as well as the things that have fallen apart. Ogyeadom has made things new!!!