

IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2024

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

CIVIL APPEAL
NO. J4/49/2023

28TH FEBRUARY, 2024

1 . NANA SARFO KANTANKA
(HEAD OF OYOKO FAMILY OF
WIAMOASI, ASHANTI)

2 . PAUL OPPONG

PLAINTIFFS/APPELLANTS/
APPELLANTS

VS.

1 . TAKYI MENSAH
2 . DIANA NYAMEKYE

DEFENDANTS/RESPONDENTS/
RESPONDENTS

JUDGMENT

LOVELACE-JOHNSON JSC:

The designation of the parties at the High Court will be maintained in this appeal. The Plaintiff, suing for himself and as head of the Oyoko family of Wiamoase and one other claimed the following reliefs against the defendants, in their capacity as the Administrators of the estate of Kwasi Takyi(deceased).

- i. Declaration that House No. Plot 1 Block 1, New Tafo (Krofofrom) which was formerly numbered plot 24 Block VI, New Tafo, Kumasi is the property of the Oyoko Family of Wiemoase, and not the personal property of the late Kwasi Takyi, a member of the Oyoko Family aforesaid.
- ii. Declaration that a farmland at a place known and called AKWADWOA at Wiemoase on Wiemoase Stool Land is the property of the Oyoko Family of Wiemoase
- iii. Declaration that a cocoa farm at Tarkwa in the Western Region of Ghana sharing boundaries with the properties of the following people; Op. Kwame Tawiah, Op. Fobri, Madam Gyamfuwaa, and Madam Afua Serwaa (widow of the late Kwasi Takyi) is the property of the Oyoko Family of Wiemoase.
- iv. Perpetual Injunction restraining the defendants from denying the title and interest of the Oyoko Family of Wiemoase in the disputed properties, and also restraining them personally, their assigns, agents, workers, labourers etc from dealing in anyway, directly and indirectly with the said peoperties.
- v. Declaration that the 1st plaintiff herein as the overall head of the Oyoko Family of Wiemoase assisted by the 2nd plaintiff who is a direct nephew of the late Kwasi Takyi are the proper persons to deal with and manage the said House No Plot 1, Block 1, New Tafo (Krofofrom) Kumasi and the other properties herein stated on behalf of the Oyoko Family of Wiemoase.
- vi. Such further orders or order as the honourable Court may see fit.

The defendants denied these claims and counterclaimed as follows:

1. Damages for trespass
2. Declaration of title to all that house No. Plot 1 Block 1 New Tafo (Krofofrom) which was formerly numbered Plot 24 Block VI, New Tafo, Kumasi.
3. Declaration of title to the cocoa farm at Nkwatoo at Wiemoase under the Wiemoase Stool and bounded by the properties of Kofi Okoh, Adwoa Nsiah, Kwabena Owusu, and Kwasi Oppong is the property of the defendants.

4. Declaration of title to the cocoa farm at Tarkwa in the Western Region of Ghana bounded by the properties of Kwame Tawiah, Op. Fobi, Madam Gyamfua, and Kwabena Agyei is the property of the defendants,
5. Perpetual Injunction,
6. An order for Account for the rent received in respect of the aforesaid house, and the proceeds from the cocoa farms.

The brief facts of the case are that the plaintiffs claim the properties the subject matter of dispute belonged to a member of their family, one Kwabena Essah (deceased) and upon whose death Kwasi Takyi, the father of the defendants took over those properties as successor, which had as a result become the family property of the Oyoko family of Wiemoase.

The defendants on the other hand claim that with the exception of the cocoa farm at Akwadwoa at Wiemoase, the properties belong to the late Kwasi Takyi personally. They say that Kwabena Essah gifted the land upon which the house in dispute stands to Kwasi Takyi (with the condition that his name be maintained on the documents on the land to perpetuate his memory so to speak) because having no children of his own or a sister, he took the said Kwasi Takyi as a son. Kwasi Takyi, it is contended put up the house on the land from his own resources. It is further contended that he also personally cultivated the cocoa farm plaintiffs are claiming in their fourth relief.

It was the attempt to obtain Letters of Administration over these properties by the defendants which led to the plaintiffs issuing the present writ. At the end of the hearing, the trial court dismissed all but the plaintiffs' second relief and granted all of the defendants' counterclaim. Being dissatisfied with this the plaintiffs appealed against the judgment to the court of appeal. That court dismissed the said appeal on all the grounds filed and affirmed the judgment of the trial high court.

It is the judgment of the court of appeal which is before this court, once again at the instance of the still aggrieved plaintiffs'.

Their grounds of appeal are as follows

- i. That the judgment of the Court of Appeal dated 28th July 2022 is against the weight of evidence on record
- ii. That the Court of Appeal misdirected itself on the facts and the evidence on record when it held that the evidence of DW1 was not seriously challenged under cross examination and more credible and reliable than the evidence of the Plaintiffs/Appellants/Appellants.
- iii. That the Court of Appeal erred when it relied on the long possession of the disputed house by the late Kwasi Takyi and the evidence of DW1 to hold that the house in dispute was gifted to the late Kwasi Takyi by the late Essah and therefore part of his estate.
- iv. That the damages awarded in favour of the Defendants/Respondents/Respondents cannot be supported by the evidence adduced and same was too excessive
- v. Further grounds of Appeal shall be filed upon the receipt of a copy of the judgment.

The relief sought from this court is an order setting aside the judgment of the court of appeal and entry of judgment for the plaintiffs.

Regarding the last mentioned ground of appeal, no such further grounds had been filed at the time of hearing the appeal.

It is clear that all the grounds filed can be discussed under the first to wit that the judgment in question is against the weight of evidence on record.

How do the plaintiffs go about discharging the burden imposed on them in an appeal on such a ground?

The burden is especially onerous seeing that the two lower courts made concurrent findings of fact so plaintiffs have to clearly demonstrate that the judgments of these lower courts are wrong. See **Achoro v Akanfela [1996-97] SCGLR 209 @ 214** where this court stated as follows

"Now in an appeal against findings of fact to a second appellate court like this court, where the lower appellate court had concurred in the findings of the trial court, especially in a dispute, the subject matter of which is peculiarly within the bosom of the two lower courts or tribunals, this court will not interfere with the concurrent findings of the lower courts unless it is established with absolute clearness that some blunder or error resulting in a miscarriage of justice, is apparent in the way in which the lower tribunals dealt with the facts."

This burden has been stated in many cases as one requiring an appellant to first pinpoint the alleged lapses in a judgment and secondly to show that these lapses are made up of a failure to apply certain pieces of evidence in his favour or that some pieces of evidence were wrongly applied or wrong inferences were drawn from the evidence led or indeed that some inferences were not drawn from any evidence on record at all.

More importantly an appellant has to show that but for these lapses judgment would have been given in his favour. This court's pronouncement in **Djin v Musa [2007-2008] 1 SCGLR 686** sums it up aptly as follows

*"....where an appellant complains that judgment is against the weight of evidence, then he is implying that there were certain pieces of evidence on the record which if applied in his favour **could** have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against"*

I would replace the word COULD in the above to the expression "*would on the balance of probabilities.....*" that being the required standard of proof in a civil matter.

A finding based on a wrong proposition of the law also warrants a complaint that a judgment is against the weight of evidence and so justifies an interference with the said finding in the process of rehearing the matter on appeal. See **Koglex Ltd (No 2) v Field [2000] SCGLR 175 @ 177.**

What findings of fact made by the high court were concurred in by the court of appeal?

The court of appeal made a finding regarding the plaintiffs relief (a) to the effect that the evidence of DW1 was in consonance with the essential elements of a valid gift at customary law thus confirming the finding of the trial court that the land upon which House No. Plot 1, Block 1, New Tafo (Krofofrom) stands was customarily gifted to the late Takyi who provided the required customary aseda which was accepted in the presence of witnesses and so became his personal property.

In respect of relief (c) the court of appeal found that the plaintiffs did not lead any evidence to support their position that the farms claimed, though originally belonging to the late Takyi were gifted to the larger family by him. This finding also supports the finding of the trial court at page 321 of volume 2 of the record of appeal (ROA) that no such gift was made by the late Takyi.

As required in a rehearing, we proceed to analyse all the evidence led and in the light of the complaints of the plaintiffs, satisfy ourselves that the conclusions arrived at by the court of appeal are, on the balance of probabilities, borne out by this evidence.

Counsel for the plaintiffs states at page 8 of his statement of case, the lapses he sees in the judgment. In sum these are that 1. Contrary to the findings of the court of appeal, the defendants failed to prove that house numbered Plot No 1, Block 1, New Tafo (Krofofrom) was gifted to the late Kwasi Takyi.

2. The evidence of DW1 was inconsistent, was seriously challenged in cross examination and was not more credible and reliable than that of the plaintiffs as stated by the court.
3. The court of appeal erred in basing its finding that the house was gifted to the said Takyi on his long possession of it and finally
4. That, the defendants failed to discharge their burden of proof on the balance of probabilities that there was a change in ownership of the plot of land from Kwabena Essah to Kwasi Takyi.

To quote counsel, "certain pieces of evidence on record have been wrongly applied against the Plaintiffs by the Courts below".

What reasons were given by the court of appeal for its findings earlier stated and are they supported by the evidence on record? As stated earlier, Counsel for the plaintiffs complains about inconsistencies in the evidence of DW1 and contends that the evidence of the plaintiffs on the matter of the house was more reliable than hers. Counsel also notes that DW1, Kwasi Takyi's wife testified that she was not present when the plot was gifted but took part in the aseda and acceptance ceremony with other family members

The trial court which heard the parties noted that of all the witnesses it was DW1 the wife of the late Kwasi Takyi who testified directly to what she personally saw and knew about the history of the house in dispute. All the other witnesses including even 1st defendant only recounted what they had been told. The plaintiffs only made bare denials and the trial court was satisfied that "*no credible alternative version of the beginning of the building was provided by them*". See page 201 of the record of appeal (ROA).

The trial court reminded itself of the need to test the traditional evidence given by the contesting parties against recent events. He was satisfied that it was only DW1 the wife of the late Takyi who was able to describe "*in detail and in specific terms the*

nature of the plot at the time of the death of the late Essah, the beginning of the building from foundation level, the names of the workers and their assistants.....the names of the tenants and the number of rooms they rented from the late Takyi and to what use the rooms were put" See page 202 of the ROA

The plaintiffs proffered no such evidence in support of their position that it was Kwabena Essah who put up the building on the land. DW1 further testified about the customary gift and aseda offered for the gift and its acceptance. A perusal of the cross examination of DW1 from page 81 to page 112 of the ROA does not show counsel for the plaintiffs actually disputing the witness's claim that the land was gifted to Takyi by Kwabena Essah. The nearest he got to that issue was the 3rd question he asked on page 99 as follows

Q. You have also told this court that Opanin Essah gifted the land on which the disputed house is situated to you and Opanin Kwasi Takyi

A. That is correct

Q. So in effect you are telling this court that the plot of land and house on it belongs to the two of you

A. Yes, I built it with him. At the time Opanin Essah had died

Q. Before his death, did Opanin Takyi give you a portion of the disputed house as your own

A. I was not given a portion because the house belongs to myself and Opanin Kwasi Takyi and he told me that if he died first the house belongs to me and my children. And if I also died first it belongs to him and our children. That is why he did not make any Will

Q. I am putting it to you that Opanin Kwasi Takyi never said what you have told this court.

A. *What I have said is the truth. I toiled with my husband to put up the disputed house*

The court of appeal was right in its position that DW1's evidence on the gift was not seriously challenged in cross examination. DW1 also gave the reason for the failure to change the name on the documents covering the land and house as the fulfilment of a condition by Essah that his name be perpetuated that way since he had no children or sister. This reason, accepted by the trial court renders the several documents tendered by the plaintiffs in the name of Kwabena Essah of little weight on the issue of the ownership of the land and the building thereon and does not help the case of the plaintiffs in any way.

The trial court in the light of this and other evidence preferred, rightly in our considered opinion, the version of events on the history of the house in dispute put forward by the defendants as supported by the evidence of DW1, the wife of the late Takyi, to that of the plaintiffs. Without more, counsel for the plaintiff's comment that DW1 is the mother of the 1st defendant, while fact, does not remove from the veracity of her evidence. Notwithstanding this relationship, the trial court which was in the best position to decide the issue of credibility preferred her evidence. See the case of **Atadi Ladzekpo [1981] GLR 218** cited by counsel for the defendants where the court stated in part as follows

"...where the only eye witness account of an event was provided by a relation of the party calling such an eye witness, the guideline to credibility or otherwise of the witness was not based solely on the relationship but also on all facts surrounding the case, otherwise a great deal of injustice would be caused"

We are of the opinion that the defendants discharged the burden of proving the gift and aseda on the balance of probabilities and the court of appeal was right in coming to the same conclusion.

In concurring in the position of the trial court on this matter, the court of appeal was not unmindful of the possibility of minor or immaterial inconsistencies in the evidence of a witness whose evidence is preferred. After referring to the case of **Effisah v Ansah [2005-2006] SCGLR 943** @960, the court of appeal was satisfied that whatever inconsistencies there were in DW1's evidence, they were minor and did not remove from the weight of the evidence led on behalf of the defendants and found that having witnessed the events herself unlike the witnesses of the plaintiffs, a court of law should be inclined to lean favourably towards her testimony rather than that of the 2nd plaintiff regarding the gifting of the land and the construction of the building thereon.

It is to be borne in mind that for an inconsistency to affect a finding of fact it must be shown that a contrary finding based on such inconsistency would have inured to the benefit of the party alleging it to the extent of changing the outcome of the case in their favour. Counsel for the plaintiffs makes reference to the following bit of cross examination to say that defendants concede that Takyi succeeded a Essah in contradiction of paragraph 6 of their statement of defence.

Question by counsel to 2nd plaintiff in cross examination. Kwasi Takyi succeeded Essah, not so?

Answer by 2nd plaintiff. That is correct.

This one inconsistency in cross examination cannot override the evidence of DW1 who is a real life witness of events relating to the properties the subject matter in dispute. In any case, even if it is proved that Takyi succeeded Essah, that by itself alone would not be proof of the plaintiffs ownership of the disputed properties in the light of the defendants denial of plaintiffs' claim and and the former's counterclaim. The plaintiffs needed to provide satisfactory proof of their claim on the balance of probabilities and the position of the two lower courts was that they did not do so. We agree.

Reference is also made to the testimony by DW1 that Essah introduced Takyi to a neighbor Nana Sei as his nephew. Counsel for plaintiffs says that this means Takyi

succeeded Essah upon his death. It means no such thing. It is trite that being a nephew in the English sense does not automatically mean one can inherit under the Akan matrilineal system.

We find the position of the court of appeal on this issue supported both by the evidence and law and not affected by the above complaints in the statement of case of counsel for plaintiffs and will not disturb same.

Plaintiffs also contend that the court of appeal based its finding that the property was gifted to Kwasi Takyi on his long possession of the house. That is incorrect. The trial court after holding that the land on which the property stood had been gifted to Kwasi Takyi stated at page 205 of the ROA as follows

"I have already upheld the version of the defendants and coupled with the overwhelming evidence from both sides that the late Takyi has held exclusive possession and enjoyment of rights of ownership including personal occupation with his wives and children, and giving out rooms and stores for rent without accounting to any member of the family for well over 50 years since the death of the purchaser.....inclines me to hold that the defendants are entitled to the house as part of the estate of the late Takyi....."

It is in support of this finding that the court of appeal held that Kwasi Takyi, having been in possession of the property for over sixty years, never having accounted to anybody for the rent of the about twenty eight rooms therein, and further that only two family members having lived there with his permission for two years, on the balance of probabilities, the defendants case that Kwasi Takyi personally acquired the property is more probable than the plaintiffs position that it is a family house.

This evidence of his possession was in line with paragraphs 13 and 14 of the defendants statement of defence and counterclaim which state as follows

13. *The defendants say that the building Akwasi Takyi erected contained about 28 rooms out of which he and his wife and children occupied 8 rooms while the*

remaining 20 rooms were rented out to tenants and Akwasi Takyi for over a period of sixty (60) years until his death in 2012 collected rent and without accounting to any member of his family.

14. *The defendants say further that apart from Yaw Poku, a cousin of Akwasi Takyi who was permitted to live in the house briefly but was later ejected by Akwasi Takyi, none of his family members have ever lived in the said house.*

These pleadings on long possession, having been proved by the evidence led, the said evidence was rightfully used as one of the pieces of evidence supporting the defendants counterclaim.

Further, it is clear that Kwasi Takyi's long possession was only **one** of the factors which tilted the balance of probabilities in favour of the defendants.

The plaintiffs complain that the damages awarded by the trial court are not supported by the evidence on record. The award of damages is an exercise of discretion by a trial court and will only be interfered with by an appellate court if

"the judge acted on some wrong principles of law; or that the amount awarded was so extremely high or so small as to make it...an entirely erroneous estimate of the damage to which the plaintiff is entitled" **Standard Chartered Bank (Ghana) Ltd v Nelson [1998-99] SCGLR 810**

This was a case cited and considered by the court of appeal in refusing to interfere with the amount awarded as damages by the trial court on the plaintiffs' ground that it is excessive and not supported by the evidence adduced at the trial.

The defendants made a claim for damages for trespass. The record is replete with the plaintiffs interfering with the properties of Kwasi Takyi after his death. They took over the house in dispute, collected rents from tenants staying in it and also received proceeds from farms belonging to him. The award of damages is certainly supported by the evidence on record of the trespass by the plaintiffs and an award in general

damages by the trial court was in order. Was it excessive? The plaintiffs have provided no evidence that it was so and since an appeal against the size of an award in damages amounts to an appeal against the exercise of the discretion of the trial court, the court of appeal was right in refusing to interfere with the award in question without good reason such as the amount awarded in favour of the defendants being so extremely high as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the defendants are entitled. **Flint v Lovell [1936] 1 KB 360**

We likewise refuse to interfere with the damages awarded for the same reasons and confirm it.

As stated earlier in this judgment, all the other grounds of appeal were subsumed under the omnibus ground of appeal and have been dealt with.

In conclusion, all the grounds of appeal having failed as being devoid of merit, the appeal is dismissed and the judgment of the court of appeal is accordingly affirmed.

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

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

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