

IN THE SUPERIOR COURT OF JUDICATURE  
IN THE COURT OF APPEAL  
ACCRA – GHANA  
A.D. 2013

.....

**CORAM:** OWUSU M., J.A. (PRESIDING)  
ACQUAYE, J.A.  
LOVELACE-JOHNSON, J.A.

Suit No: H1/179/2011

November 7, 2013

**Fred Robert Coleman**

..... *Plaintiff/Appellant*

*Vrs.*

1. **Joe Tripollen**
2. **Mr. Boateng**
3. **Mr. Danso** (subt. By Kwasi Ofori)
4. **Mr. Ebenezer**
5. **Mr. Odonkor**

..... *Defendants/Respondents*

.....

**JUDGMENT**

.....

**MARIAMA OWUSU, J.A:**

This is an appeal which turns principally on the assessment of the weight of the evidence adduced at the trial High Court and the point of law that, the trial Judge awarded the defendants, a relief not sought by them. The plaintiff's action was dismissed by the trial court. He is before us for redress.

**The facts of the case:**

The plaintiff by his writ of summons claims the following reliefs against the defendants:

1. *Declaration of title to all that large tract of land situate and being at Ankwa Dobro near Nsawam in the Eastern Region and known as the property of Madam Agoe bounded on the North by Quarcoopome's land, on the South by Baddoo's land on the East by a road to Nsawam, on the West by the Anfran stream measuring 2300 feet on the North, 3250 feet on the South, 135 feet on the East and 1150 feet on the West respectively.*
2. *Recovery of possession from the defendants' plaintiff's land.*
3. *General and Special Damages.*
4. *Perpetual Injunction restraining defendants, their agents, servants, workmen, assigns and successors in title from interfering in any way whatsoever with the land in dispute.*

In the statement of claim that accompanied plaintiff's writ of summons, the latter averred that, he is the Head of Family of Madam Agoe of Ankwa Dobro. He averred

further that, during the life time of Madam Agoe, the latter purchased the disputed land from one Baddoo. The plaintiff continued that, the purchase was evidence by an indenture dated 29-12-1908 which was duly registered and stamped as No. 54/09. It is the case of the plaintiff that, his grandmother Madam Agoe died in 1931. Upon her death, his son Christian Amonu Coleman who is plaintiff's father first managed the land in disputed. His aunt took over the management of the said land until she died and the land has devolved upon him. The plaintiff averred that, since the death of his grandmother, he and other members of the family have enjoyed undisturbed possession of the disputed land and they even have their cemetery on the land. He has granted portions of this land to prospective developers. According to plaintiff when the 1<sup>st</sup> defendant was made acting chief, he together with 2<sup>nd</sup> to 5<sup>th</sup> defendants have unlawfully entered portion of his family land and indiscriminately selling and winning sand, claiming the land covered by the Indenture belongs to them. All efforts to get the defendants to cease their trespass have proved futile hence this action.

The defendants denied the plaintiff's claim and put him to strict proof of the averments contained in his statement of claim. In particular, the defendants averred that, the land being claimed by the plaintiff is part of Ankwa Dobro Stool Land and the land belongs to the Akuapems. They further averred that, at no time did their family grant any portion of its land to Baddoo to alienate to the said Madam Agoe. The defendants continued that, portions of their Family land were granted to people as licensees to cultivate. In respect to the cemetery on the land, the defendants' averred that, they got to know that the plaintiff and others were surreptitiously burying corpses at night on a portion of the Ankwa Dobro Stool Land and 1<sup>st</sup> defendant stopped such burials. On the issue of sand winning, 1<sup>st</sup> defendant averred that, he was approached by the Unit Committee Members of the Area to permit them win sand from the stool land for development of the Town. The defendants concluded that, the plaintiff is not entitled to his claims.

At the trial, the plaintiff testified and called three witnesses. The 1<sup>st</sup> and 2<sup>nd</sup> defendants each testified. At the end of the trial, plaintiff's claims were dismissed as not proved. In his judgment, the trial judge held as follows:

*"From the above, this court is of the firm opinion that, the plaintiff has not be (sic) able to prove his title to the land in dispute and this court cannot declare him the owner.*

*On the contrary, the defendants have proved that their ancestors settled and farmed the land in dispute. They have also given the boundaries of the land without any challenge from the plaintiff. Also defendants have proved through the 2<sup>nd</sup> defendant who is Abusuapanin of Aduana Abrade Family of Ankwa Dobro that the land in dispute is a family land and cannot be alienated by any individual be that person a chief or what. The old cottage which 2<sup>nd</sup> defendant's Uncle constructed on the land is clear sign of possession by the defendant's family.*

*Exhibit A was not prepared with the consent and concurrence of the defendants' family elders or principal members and can therefore not convey any interest in Aduana Abrade Family Land to any third party i.e. Madam Agoe.*

*Exhibit A has not been registered to convey title to plaintiff's grandmother. The Exhibit was only stamped as a first step towards registration. The document had also not been certified before it was tendered. Worse of all there was no traditional or historical evidence cogent enough to abate flaws in the document. PW3, may be was called to improve the weakness in Exhibit A, but did not succeed in his bid. The sale of the land by Baddoo of Accra to Madam Agoe is null and void, because a man from Accra cannot sell Ankwa Dobro land.*

*This court therefore declares:*

- 1. Defendants as owners of the land in dispute situate, lying and at Ankwa Dobro near Nsawam.*

2. *Recovery of possession from plaintiff or any one claiming through the plaintiff.*
3. *Damages for trespass in the sum of GH¢5,000.00.*
4. *Perpetual Injunction restraining the plaintiff, his agents, servants, workmen, assigns and successors in title from interfering in any way whatsoever with the land in dispute.*
5. *Costs of GH¢1,000.00 to defendants”.*

It is this judgment that is on appeal before us.

### **Grounds of Appeal**

- a. *The judgment is against the weight of evidence adduced at the trial.*
- b. *The learned trial judge erred in law in awarding the defendants, a relief not sought by the Defendants.*

*Additional grounds of appeal will be filed when the Plaintiff/Appellant receives the record of appeal.*

### **Relief Sought**

The setting aside of the said whole judgment and its consequential orders for the Plaintiff/Appellant in this Court and the Court below and the dismissal outright of the Defendants whole action with costs as a misconceived action.

At this stage let me put it on record that the plaintiff did not file additional ground of appeal as indicated in his Notice of Appeal. Also in this appeal, the plaintiff/appellant would be referred to simply as appellant and the 1<sup>st</sup> to 5<sup>th</sup> defendants/respondents as 1<sup>st</sup> to 5<sup>th</sup> respondents.

In arguing the appeal, counsel for the appellant on ground one;

**The judgment is against the weight of evidence.**

He referred to Exhibit A, the Indenture and the portion of the judgment in which the trial judge has held that the said Exhibit has not been registered to convey title to the appellant and his family but it was only stamped as a first step towards registration. Counsel submitted that, this assertion is erroneous as the document was not only stamped but was registered as far back as 1909 with the registration number 54/09 and that was the form of registration in the early 1900s. Furthermore, when the appellant testified that the land was registered in 1909, this piece of evidence was neither challenged in cross examination nor in the defence. The implication being that the fact of registration was not an issue or in controversy. Secondly, Exhibit A was registered before the promulgation of the Lands Registration Ordinance, CAP 133 (1951 Rev.) and the Land Registry Act, 1962 [Act 122]. Counsel therefore submitted that, the respondents and their predecessors having failed to challenge the appellant and his family's registered interest on the land for the past hundred [100] years, they are estopped by acquiescence from doing so now. On this point alone according to counsel for the appellant, the trial judge erred in law and in fact and this court should set this judgment aside. He cited the cases of **COLEMAN VS. SHANG [1959] GLR 390 CA** and **VANDERPUYE VS. GOLIGHTLY [1965] GLR, 453** in support of his assertion.

Still on ground one, counsel for the appellant referred to the appellant's long undisputed possession of the land and submitted that, the trial judge has held that;

*"Whether the plaintiff's long undisputed possession of the land had ripened into a title".*

Counsel continued that, the trial judge in his judgment has held that the appellant does not know how the land was acquired by his vendor who sold it to the former's grandmother. He submitted that, the trial judge in his judgment conceded that the appellant and his family have been in long undisputed possession of the land in dispute. Appellant's grandmother acquired it for valuable consideration by the payment of £45. Secondly the respondents did not rebut this evidence. PW3 in his

evidence confirmed the fact that the disputed land was purchased from Nana Baddoo who was a chief of Ankwa Dobro. But more importantly the appellant's evidence showed that he and his family were not only farming on the land but had also alienated portions of the land in dispute to strangers without any hindrance from the respondents and their predecessors. For example, the grant of portions of the land in dispute, to prospective developers including a poultry farmer, in the 1980s.

He referred to section 10 [1], [2] and [6] of the Limitation Act, 1972 (NRCD) 54. He concluded on this point that, having sat by whilst the appellant and his family exercised acts of possession on their land for almost a 100 years, the respondents' title if any has been extinguished. From the forgoing, the appellant had led substantial evidence in support of the acquisition and by section 24 [2] and section 48 [2] of NRCD 323, the evidential burden shifted to the respondents to lead sufficient evidence to rebut the assertion of the appellant that they granted the appellant and his family only license to cultivate the land. This, the respondents have failed to discharge as the latter were unable to show that the appellant and his family had ever paid any tribute to them.

Still on improper evaluation of evidence, counsel for the appellant touched on the appellant's boundary owners. He referred to the trial judge's assertion that, the appellant and his witnesses were not able to describe the boundaries of the land in dispute and that this is fatal to his case. Counsel submitted that, this assertion is wrong as the appellant and his witnesses were able to describe the boundaries of the land in dispute. In any case he argued, having tendered the requisite site plan in evidence, the evidence as to the boundaries of the land in dispute must collectively be deemed adequate.

On the issue of the appellant's capacity as head of his family to initiate this suit, counsel for the appellant referred to the judgment where the trial judge has held that there is no evidence on record that Madam Agoe hailed from Ankwa Dobro near Nsawam. Since the appellant in his evidence said he is a Ga from Osu and the Gas are patrilineal, and

since females don't originate families at Osu, he lacked capacity to initiate the instant suit. Counsel submitted that the trial judge misconstrued the evidence before him. He referred to pages 15 to 20 of the Record of Appeal and submitted that, the import of the appellant's evidence is that, the land subject matter of this suit was acquired by his father's mother. After the death of his grandmother his father succeeded her and took possession of the land until his death.

After the death of his father, his Aunt who comes after his father took charge of the land until she died. After her death, the appellant, the eldest member of the family is now the head of family. Counsel submitted that, by the appellant's narration supra, and going by the fact that Gas as a people or tribe inherit paternally, the latter is rightfully claiming his inheritance that originates paternally. Secondly, the appellant's evidence as head of his family was corroborated in every material particular by PW1, the second eldest member of family. Counsel concluded on the appellant's capacity that, the latter never said he was an Akwapem, or that Madam Agoe was Akwapem. He cited the cases of **DOTWAAH VS. AFRIYIE [1965] GLR 257, SC**, and **AKRONG VS. BULLEY [1965] GLR 469** to buttress his point.

On the second ground of appeal;

*Awarding the defendants/respondents reliefs not sought for:*

On this ground, counsel for the appellants, referred to the respondents statement of defence as amended on 15-5-07. He submitted that the respondents never put in a counterclaim or sought any relief. Therefore by awarding the respondents reliefs not sought for, the trial judge erred.

Based on the above submissions, he invited us to allow the appeal and set aside the trial judge's judgment.

In answer to the appellant's submissions, counsel for the respondents on ground one of the grounds of appeal referred to the appellant's capacity to initiate the instant suit and

submitted that, this issue is extremely fundamental as it goes to the root of the case. He referred to the writ of summons where the appellant states that he is “suing as Head of Family of Madam Agoe’s Family of Ankwa Dobro”. Counsel continued that, by the evidence of the appellant on record, Madam Agoe through whom he traces his root of title is a Ga from Osu, a community where inheritance is patrilineal. He submitted that, the appellant could not lead sufficient evidence to prove the capacity in which he brought the action and the family of which he alleges to be the head. Counsel for the respondents quoted portion of the cross examination of the appellant below;

*Q. Mr. Coleman, I am putting it to you that so long as Ga succession is patrilineal you are a member of the Coleman Family only patrilineal.*

*A. Yes my Lord, I am the Head of Family at my mother side.*

From the above answer, counsel for the respondents submitted that Madam Agoe hails from the Adokwei We of Osu, by the evidence of the appellant, there is no family called Madam Agoe Family and therefore it will be incorrect for him to say that he is the head of a family which in his own evidence does not exist. Counsel cited the case of **KOWUS MOTORS VS. CHECKPOINT GH. LTD. [2009] G.M.J. pages 3 -4** and submitted that, it is trite Law that an action commenced in the name of a Non-existent person is a nullity. Similarly, a plaintiff who lacks capacity must fail in his action no matter the strength of his case. Consequently, the appellant lacked the capacity to sue and his action must fail. Counsel for the respondent therefore invited us to dismiss the appeal as the appellant’s action was rightly dismissed.

As stated in the intro to this judgment, the two grounds of appeal are the improper evaluation of the evidence on record and the trial judge awarding a relief not sought for to the respondents.

We will start with the second ground of appeal and that is;

*“The learned trial Judge erred in law in awarding the Defendants, a relief not sought by the Defendants”.*

From the record of appeal, the respondents’ statement of defence appears at pages 17-18. The respondents denied appellant’s claim and put him to strict proof of the averments contained therein. The respondents did not put in a counterclaim. To have “declared the respondents as the owners of the land in dispute, lying and at Ankwa Dobro, recovery of possession, Damages for trespass in the sum of GH¢5,000.00 and perpetual injunction restraining the appellant, his agents, assigns, servants workmen and successors in title from interfering in any way whatsoever with the land in dispute”, the trial judge erred in law. Consequently, we would set aside these awards.

This brings us to the first ground of appeal and that is;

*“The judgment is against the weight of evidence adduced at the trial.”*

In the judgment in contention before us, the trial judge dismissed the appellant’s claim based on five main grounds. They are;

1. *The appellant lacked the requisite capacity to initiate the instant action.*
2. *The appellant’s Indenture Exhibit A was not registered.*
3. *The appellant could not describe his boundaries or show positively the identity of his land.*
4. *The appellant was not able to proof his root of title.*
5. *The land the subject matter of this suit being stool land can only be alienated by the elders of the stool.*

On the issue of capacity, it has been held that where the capacity of a person to sue is challenged, he has to establish it before his case is considered on its merits. See the case of **ASANTE-APPIAH VS. AMPONSAH ALIAS MANSAH [2009] SCGLR 90, 92 holding [2]** where their Lordships held as follows;

*“Where the capacity of a person to sue is challenged, he has to establish it before his case can be considered on its merits.....”*

In this case even though the appellant’s capacity was not made an issue at the application for directions stage, he was challenged when he testified in court. In his evidence the appellant said;

*“Q. Do you know one Madam Agoe?*

*A. Yes my Lord, she was my grandmother. My father’s mother.*

*Further on the appellant continued his evidence as follows;*

*Q. Now tell the court how you came by this land.*

*A. How I came by this land is that, it was my grandmother who bought this land. After the death of my grandmother, my father succeeded her. My father took possession of the land until his death. So my aunt who comes after my father took charge of the land until she died. After her death I am now the eldest member of the family.*

*Q. Apart from being the oldest member of the family, do you hold any position in the family?*

*A. I am the head of family.*

*PW1, Joseph Baka Coleman the brother of the appellant also in his evidence had this to say;*

*Q. What about Madam Agoe.*

*A. She is my grandmother.*

*Q. What do you mean, if you say Madam Agoe is my grandmother? Is she your mother’s mother or your father’s mother?*

A. *My father's mother.*

Clearly from the evidence of the appellant and PW1 quoted supra, the appellant established the capacity in which he instituted this action.

It is true that counsel for the respondents in cross examination established that the Gas from Osu are patrilineal. What he failed to tell the court is whether a female Ga who acquired property cannot be inherited by her children. In the instant case the appellant has established that the disputed land came into the possession of his father, and after the death of his father and aunt, the disputed land has come into his possession as the eldest son. He also said he is the only surviving family of Madam Agoe. Going by the decision in **COLEMAN VS. SHANG [1959] GLR, 390, 393;**

*“That by the customary law of Osu [as a Ga-Adangbe community], succession is patrilineal, and all children, however born, are entitled to share equally in the father's estate.....”*

The appellant established his capacity to initiate the suit. Consequently, it would be unjust to non suit the appellant just because he described himself as head of Madam Agoe's family. The appellant per paragraphs 5, 7 and 8 had described the capacity in which he instituted this action as well as testified to that effect. See the case of **OBENG VS. ASSEMBLIES OF GOD CHURCH, GHANA [2010] SCGLR, 300, 305,** where their Lordships held in holding [5] that,

*“..... And since the courts existed to do substantial justice, it would be manifestly unjust to non-suit plaintiff church because they added the words “Executive Presbytery” to their name on the writ of summons. Courts must strive to prevent and avoid ambush litigation by resorting and looking more at the substance than the form. On the facts, once the plaintiff church had been registered as a corporate entity under the Religious Bodies [Registration] Law,*

*1989 [PNDCL 221], the plaintiff church could not be denied the capacity which they already had”.*

Relating the case cited supra to the case under consideration, from the evidence on record, the appellant has shown that, the disputed property came to his father after the death of the latter’s mother. After the death of the plaintiff’s father and aunt, the property has come to him, and he is the eldest member of the father’s children. This piece of evidence was corroborated in every material particular by PW1 a member of the appellant’s family. The appellant thus established his capacity, and we so hold.

This brings us to the non registration of Exhibit A, the appellant’s Indenture.

In the judgment, the trial judge held that Exhibit A was not registered to convey title to the appellant’s grandmother. This conclusion by the trial judge is wrong. We say so because the document was executed on 29-12-1908. This was long before the **Land Registry Act, 1962 [Act 122]** came into existence. Therefore the non-registration of the Indenture would not affect its admissibility in terms of section 24 of the Land Registration Act, Act 122.

This brings us to the issue of identity of the appellant’s land. In his judgment, the trial judge came to the conclusion that, the appellant and his witnesses were unable to establish concisely the boundaries of the disputed land. His reason being that, whilst the appellant said his land shares boundary with one Vanderpuye, one Sackey, the Anfran River then Mr. Baddoo, PW3 said the land shares boundaries with one Kwakukpome Family and Mr. Nartey. Secondly, these features are at Variance with what is on Exhibit A. He held among other things as follows;

*“These contradictions make this court unable to know the precise area that the plaintiff is seeking declaration for. Again plaintiff has not called a single boundary owner to come and give evidence in support of his case”.*

With all due respect to the trial judge, the appellant positively identified his land. Exhibit A which was tendered without objection gave the boundaries of the disputed land as follows; Quarcoopome's land, Baddoo's land, Road to Nsawam and the Afran Stream. It also gave the dimensions on the East, West, North and South. The boundaries and dimensions were repeated in paragraph 5 of the appellant's statement of claim. In his evidence, the appellant gave his boundary as follows.

*"Q. Now can you tell the honourable court the boundary owners of this land?"*

*A. Yes my lord, I can tell the court one Vanderpuye, one Sackey; the Afran River and then Mr. Baddoo.*

*Q. Now do you know one Kwakukpome?"*

*A. Yes my lord. I know Kwakukpome.*

*Q. How is he related to this land?"*

*A. We share boundary with him".*

When PW1, the appellant's brother mounted the witness box, this is what he said in respect of the adjoining boundary owners.

*"Q. You are saying our land, can you tell the court where this land is and who the boundary owners are.*

*A. My lord we share boundaries with one Kwakukpome and Mr. Nartey.*

*Q. Do you by chance know one Sackey?"*

*A. That Kwakukpome is a family to Sackey.*

*Q. So he is part of the Kwakukpome.*

*A. Yes my lord.*

*Q. What about Vanderpuye.*

*A. He belongs to the same family of Kwakukpome”.*

This witness also said the land is situated on Afran Stream near Dobro.

From the evidence of the appellant and his brother PW1, in respect of the boundaries of the disputed land, there are no contradictions. The appellant therefore clearly and positively identified his land.

The trial judge also came to the conclusion that the appellant was not able to prove his root of title. This assertion cannot be correct. PW3, Nana Kwadwo DUODO 11 who was the chief of Ankwa Dobro from 1994 to 2002 testified and said the appellant’s grandmother bought the disputed land from his predecessor Nana Ampadu who was a chief of Ankwa Dobro. This witness said he did not challenge appellant’s occupation of the land in dispute because all the chiefs before him knew the former’s grandmother bought the land. He went on to say that he was a secretary at the palace of Ankwa Dobro before he became chief and documents there indicate that the disputed land was sold to Madam Agoe, the appellant’s grandmother. Exhibit A, the Indenture is dated 29-12-1908, over hundred years now. Clearly, the respondents are estopped by leaches and acquiescence from challenging the appellant’s family title.

The appellant’s family has been in possession of the disputed land for all these years. For instance, PW2, Mr. Brandford Akuamoah testified that he purchased a piece of land from the appellant and has constructed structures for poultry farm since 1996. This witness also said the appellant’s family has a cemetery on the disputed land. The respondents acknowledged the presence of this cemetery on the land but say they got to know the appellant and others were surreptitiously burying corpses at night on a portion of the land and 1<sup>st</sup> respondent stopped such burials. PW2 also said the appellant even showed him the tomb of his grandmother. Madam Agoe according to the appellant died sometime in 1931. Therefore the respondents’ assertion that the

appellant was burying dead people in the night flies in the face of this established fact. All these pieces of evidence on record go to buttress appellant's family long possession on the disputed land until sometime in 2005 when the family's possession was disturbed by the respondents' trespass on to the land and the destruction of the formers pillars on the land. The respondents' also demarcated and sold portions of the disputed land as well as winning sand on the land. The adverse possession of the land by the appellant's family for over hundred [100] years conferred upon them possessory title by reason of the provisions in **section 10 of the Limitation Act, 1972 [NRCD 54]**. See also the case of **KLU VS. KONADU APRAKU [2009] SCGLR 741, 743**.

All these pieces of evidence on record were not properly evaluated and or were wrongly applied against the appellant. The appellant's ground one of his grounds of appeal has been made out. See the case of **OPPONG KOFI & Others vs. ATTIBRUKUSU 111 [2011] 1 SCGLR 176, holding [1]** where their Lordships held as follows;

*"It would be expected that the Court of Appeal, in allowing the appeal by the plaintiff from the judgment of the High Court in favour of the defendants, would have dealt adequately with the sole ground of appeal by the plaintiff, namely, that "the judgment was against the weight of evidence." Essentially, the effect of that ground of appeal, was to invite the Court of Appeal to review the whole of the evidence, documentary and oral,, adduced at the trial and come out with a pronouncement on the weight of evidence in support of the judgment of the trial court or otherwise. Where findings were based on established facts, the appellate court was in the same position as the trial court to draw its own inferences from the established facts."*

Relating the case cited supra to the case under consideration, we have come to the conclusion that, the pieces of evidence on record numerated above, if applied in favour of the appellant would have changed the decision in his favour.

As to the trial Judge's comment that a man from Accra cannot sell Ankwa Dobro land, the least said about it, the better.

It is for these reasons that we would allow the appeal and set aside the judgment of the trial court, together with the consequential orders.

Judgment is therefore entered in favour of the appellant for the following;

- 1. Declaration of title to all that piece and parcel of land situate and being at Ankwa Dobro near Nsawam in the Eastern Region and known as the property of Madam Agoe bounded on the North by Quarcoopome's land, on the South by Mr. Baddoo's land, on the East by a road to Nsawam, on the West by the Anfran stream measuring 2300 feet on the North, 3250 feet on the South, 135 feet on the East, and 1150 feet on the West respectively.*
- 2. Recovery of possession of the said land from the respondents.*
- 3. Recovery of GH¢200.00 special damages from respondents.*
- 4. The appellant is entitled to recover GH¢3,000.00 general damages from the respondents.*
- 5. Perpetual Injunction restraining the respondents, their agents, servants, workmen, assigns and successors in title from interfering in anyway whatsoever with the land in dispute.*

The appellant will have the cost of this proceedings assessed at GH¢2,000.00 against the respondents.

Appeal allowed accordingly.

(Sgd.)  
MARIAMA OWUSU  
[JUSTICE OF APPEAL]

*Acquaye, J. A*      *I agree*      (Sgd.)  
K. A. ACQUAYE  
[JUSTICE O..F APPEAL]

*Lovelace-Johnson*      *I also agree*      (Sgd.)  
A. LOVELACE-JOHNSON  
[JUSTICE OF APPEAL]

**COUNSEL:**

- ◆ *Gifty A. Addo (Mrs.) for Plaintiff/Appellant*
- ◆ *Mr. Yaw Oppong for Defendants/Respondents*