

**IN THE SUPERIOR COURT OF JUDICATURE  
IN THE COURT OF APPEAL  
ACCRA**

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CORAM: - S. DZAMEFE, JA (PRESIDING)

AMMA A. GAISIE, (MRS) JA

OBENG-MANU JNR, JA

*Civil Appeal*

*Suit No: H1/161/2020*

*10<sup>th</sup> December, 2020*

**EMMANUEL ANANE - 1<sup>ST</sup> DEFENDANT/APPELLANT**

**VRS.**

**1. NII JOSEPH TORGBOR OBODAI II**

**- PLAINTIFF/RESPONDENT**

**2. JOHN APPIAH - 2<sup>ND</sup> DEFENDANT/RESPONDENT**

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## JUDGMENT

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### DZAMEFE, JA

This is an appeal against the judgment of the High Court Accra dated the 15<sup>th</sup> day of February, 2018.

The 1<sup>st</sup> defendant/appellant will be referred to simply as the appellant though out and the plaintiff and 2<sup>nd</sup> defendant simply as the respondents.

The plaintiff/respondent Nii Joseph Torgbor Obodai I issued this writ against the defendants for the following reliefs; -

- a. Recovery of possession of all that land situate, lying and being at Ogbojo, Accra containing approximately area of 2.20 hectare (5.44 acres) more or less being parcel No. 2909 block 7, as delineated n Registry Map No. 019/069/1995 in the Land Title Registry.
- b. Special and general damages for trespass.
- c. An order cancelling Land Certificate N. TD.7931, Volume 019, Folio 3861 issued by mistake to the defendant.
- d. An order of perpetual injunction to restrain the defendant, his agents, privies, assigns and servants from entering unto or in any way disturbing the plaintiff and members of his families possession of that portion of his land.

e. Cost including legal fees.

The plaintiff is the Ogbojo Mantse and the head and lawful representative of the Anahor and Dzirase families of Ogbojo and brings this action for himself and on behalf of the said family.

The plaintiff in his statement of claim averred that the Anahor and Dzirase families are owners of a large tract of land situate, lying and being at Ogbojo in the Greater Accra Region, which is the subject matter of this action. This land he said forms part of his ancestral family lands acquired through conquest and from time immemorial exercised various acts of ownership including validly granting portions for valuable consideration and have at all material times been in possession of the said land. Their ownership of this land was confirmed by a Supreme Court judgment dated 24<sup>th</sup> March 2010 in the case of Nii Ago Sai & Others vrs. Nii Kpobi Tretteh Tsuru III [2010] SCGLR 762. Plaintiff averred that this case before the Supreme Court was commenced by his late father Nii Jonathan Ephraim Sai Obodai and upon his death on 28<sup>th</sup> July 1997, he the plaintiff herein was substituted for him and he conducted the case till the Supreme Court delivered the final judgment aforesaid.

It is his case that they have been in quiet and undisturbed possession of the land until recently when it came to their notice that some unauthorized persons have allegedly sold portions of the land to the 1<sup>st</sup> defendant herein who has since gone onto the land to commit various acts of trespass. These acts they reported to the Madina police. Plaintiff says upon further enquires, it came to his attention that the 1<sup>st</sup> defendant has gone ahead and registered a part of their larger tract of land measuring about 5.44 acres and with Land Title Certificate number TD 7931.

The plaintiff denied ever granting the said land to the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendants' acquisition of the said Land Title Certificate over his land was fraudulent. In the particulars, plaintiff said the 1<sup>st</sup> defendant fraudulently registered land belonging to his family in his name without recourse to him nor the principal members of his family. Secondly the purported acquisition of the land by the 1<sup>st</sup> defendant from his late father leading to the issuance of the land certificate in his favour was fraudulent as his father had died on 28<sup>th</sup> July 1997, long before the purported grant was made to the defendant in November 2012. Therefore, that land certificate could only have been issued in error or by mistake because of the fraud perpetrated by the 1<sup>st</sup> defendant herein. It is plaintiff's claim that unless by an order of the court, the defendant will not desist from further acts of trespass and construction on plaintiff's land hence this action.

### Defence

The 1<sup>st</sup> defendant in his statement of defense averred that he has been in possession of the land in dispute at all material times. Defendant states that he acquired the land on 13<sup>th</sup> November, 2012 from Brock Housing Company Limited which company also acquired the land from Nii Ago Sai Family, which is plaintiff's family acting through the appropriate persons including one Seth Nii Sai. Defendant states that the title deeds (indenture) were drawn directly from plaintiff's family in his name in order to allow him pursue the registration of the land straight away. The 1<sup>st</sup> defendant said he did this because Brock had not registered their interest in the land with the appropriate land registration authorities and to wait for them to do so will delay the transfer from Brock to him.

1<sup>st</sup> defendant said further that Brock Limited was in possession of the land at the time the Nii Ago Sai family leased the land to him, which possession continued until Brock gave vacant possession of the land to him – [page 22 ROA]

The 1<sup>st</sup> defendant said prior to the acquisition of the land, he conducted a search at the Lands Commission which revealed the Nii Ago Sai Family were the owners of the land. Further, prior to the acquisition, he was shown a receipt of due payment for the land from plaintiff's family issued to Brock Company Limited showing that the land had originally been leased to Brock, which later leased to him.

Defendant says it came to his notice that the commencement part of the title deed bears the plaintiffs' father's name as the representative of the Nii Ago Sai Family. The 1<sup>st</sup> defendant avers that the plaintiff had not brought this action in good faith because he had engaged in double sale of the land by leasing it to another person and when he plaintiff encountered him on the land, that caused him to issue the instant writ. It is his defence that the plaintiffs not entitled to any of the reliefs endorsed on the writ of summons and statement to claim.

The plaintiff's in his reply to the defence said there has never been any transaction between him and the 1<sup>st</sup> defendant nor Brock Housing Company and still maintains that he has been in possession of the land in dispute from time immemorial. Plaintiff maintains the 1<sup>st</sup> defendant never acquired any land from him and that the land in dispute was acquired through fraudulent means by the 1<sup>st</sup> defendant from his alleged grantors – [page 49 ROA]

## **ISSUES FOR TRIAL**

- a. Whether or not the plaintiff's family are the rightful owners in possession of the land the subject matter in dispute.
- b. Whether or not the defendant's grantor had the capacity to alienate the land in dispute to the defendant.
- c. Whether or not the defendant has trespassed unto plaintiff's family land.

d. Whether or not the defendants Land Title Certificate was procured by fraud.

e. Whether or not the plaintiff is entitled to his claim against the defendant.

On 17<sup>th</sup> May 2016, one John F. Appiah, filed a motion on notice for joinder as a defendant to the suit. In his affidavit in support of his motion, the applicant averred that he purchased the land from the plaintiff's family represented by one Nii Torgbor Obodai. That he is reliably informed that the plaintiff has sold portions of the land to the 1<sup>st</sup> defendant herein. That, the sale was done without his consent and on his blind side. He prayed the court to join the suit to enable the court to have the opportunity to completely adjudicate this matter once and for all and also to avoid a multiplicity of suits. This application was granted on the 7<sup>th</sup> of June 2016 and the applicant made the 2<sup>nd</sup> defendant. In his statement of defence and counterclaim, he averred that he became the owner of the land in dispute by virtue of an indenture dated 15<sup>th</sup> March 1999 and made between Ephraim Jonathan E. Sai Obodai family of Ogbojo of one part and John F. Appiah (2<sup>nd</sup> defendant) of the other part – **[page 348 ROA]**

2<sup>nd</sup> defendant averred that after the acquisition of the land, he exercised various acts of ownership over the lands by clearing the land, putting pillars on the boundaries of the said land and submitting the indenture for first registration.

2<sup>nd</sup> defendant states that the land was acquired from the plaintiff's family and the indenture dated 11<sup>th</sup> March 1999 as well as site plan were signed by Nii Torgbor Obodai, the plaintiff herein, Regent of Ogbojo and was witnessed by one Daniel Sai Ago and Anang Awudzaka – **[page 348 ROA]**. He said prior to the purchase, he conducted a search at the Lands Commission which revealed that the Ago Sai family of (Anahor and

Dzirase of Ogbojo) headed by the Ephraim J. E. Sai Obodai family were the owners of the land at Ogbojo.

He claimed the plaintiff and his family perpetrated fraud on him and listed the particulars as follows;-

- a. The plaintiff family in this action deliberately and fraudulently prepared documents in the name of Ephraim J. E. Sai Obodai as the head of the Ago Sai family whose name has been plotted at the Lands Commission when they knew that the said Ephraim J.E. Obodai was dead.
- b. The plaintiff perpetrated fraud on 1<sup>st</sup> and 2<sup>nd</sup> defendants as well as other innocent purchasers of land by signing land document prepared in the name of Ephraim J. E. Sai Obodai (Deceased) by the same Ago Sai Obodai family of Ogbojo at a time when plaintiff was aware that the said Ephraim J. E. Sai Obodai was dead.
- c. The plaintiff impersonated the said Ephraim J. E. Sai Obodai by signing Land documents in his name when he knew that the said Ephraim J. E. Sai Obodai was deceased. By so doing, making innocent purchasers of land part with money for the land.
- d. The plaintiff herein claiming to be Ephraim J. E. Sai Obodai and selling the same land multiple times t different person when he knew or ought to have known that he had disposed of the interest of the Ago Sai family of Ogbojo in the said land to the 2<sup>nd</sup> defendant.

It is the 2<sup>nd</sup> defendant's case that the plaintiff has brought this action in bad faith and should therefore not be allowed to benefit from his own wrong especially when the plaintiff has engage in multiple sale of the same land to two other persons and only brought the instant action when his purchaser found the 1<sup>st</sup> defendant on the land. That the plaintiff is not entitled to any of the reliefs endorsed on the writ of summons and statement of claim.

2<sup>nd</sup> defendant counterclaimed for the following; -

- a. Declaration of title to all that piece of land situate and lying at Ogbojo, Accra containing an approximate area of 10.26 acres or 1.63 hectares more or less and bounded on the North by proposed road measuring 460 feet more or less, on the East by lessor's land measuring 10.20 feet more or less, or the South by lessor's land measuring 430 feet more or less on the West by proposed road measuring 98.9 feet more or less which piece of land is more particularly delineated on the plan attached hereto and thereon shewn edged pink, to have and to hold the same unto and to the use of the lessee for the term of ninety nine (99) years from the 11<sup>th</sup> of March 1999 yielding and paying therefore during the said term of yearly rent.
- b. Recovery of possession for the land described in relief (a) above.
- c. An order of perpetual injunction not restring the plaintiff family, their agents, privies, assigns and servants from entering unto the land or in any way disturbing the 2<sup>nd</sup> defendant from developing the land.
- d. General and social damages for trespass.



- e. Damages for fraud.
- f. Cost of this action including legal fees.

### **Additional Issues**

1. Whether or not the plaintiff and or plaintiff's family in this action, deliberately and fraudulently, prepared documents in the name of Ephraim J. E. Sai Obodai as the Head of the Ago Sai Family whose name has been plotted at the Lands Commission when they knew that the said Ephraim J. E. Sai was dead.
2. Whether or not the plaintiff impersonated the said Ephraim J. E. Sai Obodai by signing land documents in this name when he knew that the said Ephraim J. E. Sai Obodai was dead.
3. Whether or not the plaintiff had engaged in multiple sale of the same land to two other persons.
4. Whether or not the action commenced by the plaintiff was brought in bad faith.
5. Whether or not the title Deeds of 2<sup>nd</sup> Defendant were drawn directly from directly from plaintiff's family in 2<sup>nd</sup> defendant's name.
6. Whether or not the 2<sup>nd</sup> defendant is entitled to his counterclaim for declaration.

7. That this honourable court should order both parties to this suit to submit their respective site plans for a composite plan to be drawn in respect of the land in dispute.
8. Any other issues raised by the pleadings.

The 1<sup>st</sup> defendant in his amended witness statement averred that prior to the acquisition of the land he conducted a search at the Lands Commission which revealed that the Ago Sai family headed by Ephraim J. E. Sai Obodai as the owners of the land. The search also revealed that the said Ephraim J. E. Sai Obodai had transferred the family interest in the land to one John F. Appiah but at the time of his acquisition, he was made to believe that John F. Appiah has agreed for the title documents to be drawn in his name.

That by a deed of assignment dated 30<sup>th</sup> day of November 2012, the land in dispute was assigned to him for a term of 99 years by the family. The deed was witnessed by Samuel Obodai Sai of La-Accra one of the principal members of the Nii Ago Sai family – **[page 361 ROA]**.

2<sup>nd</sup> defendant, John F. Appiah in his witness statement averred that in the year 1995, one Richard Asaimah and the plaintiff family represented by Nii Torgbor Obodai (Plaintiff) entered into an agreement for the sale of ten point –two six acres (10.26) of land at Ogbojo at the cost of Gh¢48,000. According to the 2<sup>nd</sup> defendant, Richard Asaimah could not take advantage of the offer so in 2005, he informed him about the offer. He 2<sup>nd</sup> defendant was interested in the offer and so Asaimah acted for him dealing with the family to complete the transaction. It is his case that at all material times, he 2<sup>nd</sup>

defendant never dealt with plaintiff family personally but through Richard Asaimah – [page 383 ROA].

The said Richard Asaimah collected an extra Gh¢9000 as “signing fee” which he paid to the plaintiff’s family. Plaintiff averred that an indenture and a site plan were signed for him by Nii Torgbor Obodai, plaintiff herein, then the regent of Ogbojo and witnessed by one Daniel Sai Ago and Anang Awudzaka – exhibit “1”. He then proceeded to register the land which was eventually plotted at the Lands Commission in his name in the year 2005.

He said unknown to him, the plaintiff’s family sold the same land 10.26 acres to the 1<sup>st</sup> defendant without his knowledge and consent.

2<sup>nd</sup> defendant said also that the plaintiff family in this action deliberately and fraudulently prepared documents in the name of Ephraim J. E. Sai Obodai the head of the Ago Sai family whose name has been plotted at Lands Commission when they knew the said Ephraim J. E. Sai Obodai was dead.

It is his contention that having acquired the land in dispute from the plaintiff’s family and the plaintiff having signed the indenture on behalf of the plaintiff family, the plaintiff or his family had no interest in the land to transfer. Plaintiff is therefore not entitled to the reliefs sought as endorsed on the writ of summons and the court should rather grant the relief endorsed on his counterclaim.

## **JUDGMENT**

The trial judge after full trial yoked all the 11 issues for trial into three broad issues

1. Whether or not the subject matter belongs to the plaintiff’s family.

2. Whether or not the defendant's fraudulently acquired the disputed land or the plaintiff fraudulently sold same to them.
3. Whether or not the plaintiff is entitled to his claim or the defendants are entitled to their counterclaim.

For the first issue the court held that the land in dispute belongs to the plaintiff's family – **[page 506 ROA]**.

On the second issue the trial court held that the defendants failed to demonstrate to his satisfaction that the plaintiff perpetrated any fraud on them for which reason the court believed the plaintiffs' story that he never granted the subject matter to the defendants. The trial court held that assuming the defendants acquired the subject matter in dispute at all, same was not granted to them by the plaintiff's family the owners of the land and that whoever granted same to them had no authority to have granted same to them. The court said there is evidence before it that at the time the 1<sup>st</sup> defendant claimed to have acquired the subject matter in 2012 the father of the plaintiff was deceased for which reason he could not have granted the subject matter to the 1<sup>st</sup> defendant - **[page 510-511 ROA]**. The court held that the plaintiff was able to demonstrate that his family never granted the subject matter to any of the defendants – **[page 513 ROA]**.

The trial court held further that the defendants cannot be shielded by the plea of purchaser for value without notice since they both failed to lead evidence that they exercised due diligence before acquiring the land. The trial court also held that the documents registered by the 1<sup>st</sup> defendant as a lease was a nullity as it passed nothing to him and the Land Title Certificate issued him on the basis of that registered lease was also of no effect. The court ordered the Land Certificate to be cancelled as it is of no legal effect. The trial court is of the view that the land in issue was not granted to the

defendants by the plaintiff family and same leaves them without title to enable them register same in their names for which reason the court declared the registration by the defendants as null and void. The trial court gave judgment to the plaintiff since he was able to demonstrate that he is entitled to the reliefs endorsed against the defendant's and in contrast dismissed the 2<sup>nd</sup> defendants counter claimed as not proved.

The 1<sup>st</sup> defendant's dissatisfied with the judgment filed this instant appeal.

## **GROUND OF APPEAL**

The appeal is against the whole judgment.

### Grounds

1. The judgment is against the weight of evidence.
2. That further grounds of appeal shall be filed upon receipt of the record of appeal.
3. That the learned judge misconstrued the issues in the case and as a result proceeded to consider issues which did not address the real issues in controversy between the parties.
4. That the learned trial judge erred when he held that the 1<sup>st</sup> defendant was not a bona fide purchaser for value without notice on grounds of failure to tender Search Report when indeed he said Search Report conducted by the 1<sup>st</sup> defendant had been tendered in evidence as exhibit "4".
5. That the learned trial judge erred in law when he ordered for the cancellation of the 1<sup>st</sup> defendant's Land Title Certificate Number TD 7931, when no evidence

was led to establish that the 1<sup>st</sup> defendant had knowledge of fraud or mistake in the acquisition of his Land Title Certificate.

The 2<sup>nd</sup> defendant also filed two grounds of appeal; -

- i. That the judgment is against the weight of evidence.
- ii. That the trial judge erred when he held that the 2<sup>nd</sup> defendant did not call his agent, one Richard Asiamah, to give evidence with regards to the execution of the indenture as he was a material witness

## **SUBMISSION**

### GROUND 2

Counsel for the appellant started by arguing ground 2: That the learned trial judge misconstrued the issues in the case and as a result proceeded to consider issues which did not address the real issues in controversy between the parties.

Counsel submits that by Order 32 of the High Court (Civil Procedure) Rules 2004 C. I. 47, at the close of pleadings in every action to which Order 32 applies, the rules direct that an application for directions shall be made to enable the court consider the preparations for trial which include the court distilling from the pleadings, issues which require resolution by the court. Counsel submits that where issues are set down for trial at the application for directions stage, each of the settled issues must be distinctively resolved by the court to ensure that the real controversies between the parties are effectively and effectually resolved. Counsel referred this court to the Supreme Court case of *WILLIAM ASHITEY ARMAH VRS HYDRAFOAM ETATES (GH) LTD. CIVIL APPEAL NO. J4/33/2013 dated 28<sup>th</sup> May 2014.*

Counsel further submit that in the instant appeal the trial court had eleven (11) issues set down and adopted for trial. The trial judge however reduced the 11 issues into three broad issues as stated earlier in the judgment.

It is his contention that the learned trial judge misconstrued the issues in the case and as a result proceeded to consider issues which did not address the real issues in controversy between the parties. Counsel gave an example that the question as to *“whether or not the subject matter belongs to the plaintiff family”* was not an issue in the case. Again as the second issue of *“whether or not the defendants fraudulently acquired the disputed land or the plaintiff fraudulently sold same to them”*. Counsel contends that even though the court set this issue particular down by itself, a careful perusal of the entire judgment he delivered reveals no determination was made by him on the issue. It is counsel’s submission that if the trial judge had rightly set the issues down and same had been adequately considered by him, the result would have led to the dismissal of the plaintiffs claim as lacking merit and having been brought in bad faith. Counsel opined *“the misconstruing of the issues by the trial judge it is submitted have resulted in miscarriage of justice i.e. the granting of plaintiff’s reliefs when same ought not to have been granted”*.

Counsel submits further that the bone of contention between the parties in the case was who can alienate Ogbojo lands and not the misconceived issue by the judge as to who owns the land. He said the ownership of Ogbojo lands was not in dispute, rather who can sign documents to alienate Ogbojo lands.

Another crucial and central issue which required consideration is *“whether the plaintiff has transferred their interest in the land in dispute either to the 1<sup>st</sup> or 2<sup>nd</sup> defendant”*. Counsel submits that, the plaintiff herein claiming to be the chief of Ogbojo after the demise of his father executed the indenture of the 2<sup>nd</sup> defendant herein and must not

be allowed to run away from his actions. By the execution of the indenture for the 2<sup>nd</sup> defendant, the plaintiff has no interest in the land and therefore cannot maintain an action against the 1<sup>st</sup> defendant.

Counsel for the respondent in answer to this ground of appeal submits that it is the well settled rule that all judicial discretions must be exercised judicially, that is according to reason and justice and not according to sentiment and sensibility. Counsel referred this court to the case of **Guardian Assurance Company Limited vrs Agbematu [1964] GLR 234-238**.

Counsel submits that the trial judge in the exercise of his discriminatory powers must ensure that justice was achieved as far as is practically possible. These powers like all judicial discretions are to be exercised within certain adopted and recognized principles and practices. It is his contention that, the breakdown of issues or placing these eleven (11) issues under three (3) main issues is necessary to identify the issues in controversy and make a decision of the court intelligible. This approach by the learned trial High Court Judge did not misconstrue the issues in the case nor did injustice to the appellants in any way.

Order 32, High Court (Civil Procedure) Rules 2004, C.I.47 is “Application for Direction”.

Purpose of application; -

Ord 32 (1) states; -

1. In every section to which this rule applies, an application for directions shall be made to enable the court consider the preparations for trial, so that
  - a. all matters which have not already been dealt, may so far as possible, be dealt with and



- b. directions may be given as to the future course of the action as appear best to secure the just, expeditious and inexpensive disposal of it.

We are of the view that essence of the order is to cheapen the cost of litigation in two ways; first, by reducing the number of interlocutory applications and secondly, by providing a stock-taking process before the action comes to trial, so that the parties shall not incur unnecessary expense at the trial e.g. by calling witnesses to prove facts which could be proved by production of a document or which, although formally in issue upon the pleadings are not seriously contested and might, with a little encouragement, be admitted. See Odgers on Civil Court Actions, Sweet & Maxwell, 24<sup>th</sup> Edition page 330.

In civil procedure, after pleadings are ended, the parties notify the trial court the issues or matters they intend the court to resolve for them. In simple terms it is called the issues for trial. This is done at the summons for directions stage. Normally it is the plaintiff in civil suits who brings up the issues for trial unless the defendant has a counter claim. When the plaintiff's fails to do so the defendant can do so or even ask the court to strike out the case. Our High Court (Civil Procedure) Rules 2004 C.I. 47 Ord 32 regulates this procedure.

The trial judge as the one in charge of the trial has the inherent jurisdiction to use his discretion to direct what be done at that stage. In fact, Order 32, shows that the object of the summons for directions was a general stocktaking of the case by the judge and of course the parties with the object of arriving at the essentials of the dispute and arranging proof of the necessary facts in the shortest and cheapest manner. The judge has the discretion to limit or direct the issues that be set down for trial. He exercises this discretion fairly and judicially to enable speedy trials, effective and effectual

disposition of cases at minimum costs. If after the pleadings, a party raises an issue for trial, but the issue could easily be resolved by the tendering of a document, discoveries, inspections of properties, admission of facts etc or by the explanation by the other party in his pleadings, the judge had the power to cancel such issues as unnecessary.

In the instant appeal, at the summons for directions stage, in all eleven issues were set down for trial by the parties. Indeed, in the judgment the trial judge mentioned the 11 issues but decided, and rightly so, to reduce all into 3 broad issues which he thinks will effectually and effectively determine the matter. He supported his stand by referring to the Nigeria Supreme Court case of **Elajaja vrs Olugbo [2007] 6 SC (pt) pp 36** where the Supreme Court held; -

*“That from the record of appeal, it was obvious that what the court of appeal did was to consider together a number of issues, instead of looking at each issue distinctly and pronouncing upon them separately which approach is perfectly in order”.*

The trial judge went on to say *“I shall also address other issues that may crop up in this judgment if any within the context of the broad issues raised”* – **[see page 506 ROA]**

This procedure of reducing several issues into a common ground is not new to our practice. Even the omnibus ground of *“judgment against weight of evidence”* is sometimes preferred when it will effectively and effectually deal with all issues in the appeal.

At the application for directions stage, the plaintiff set down five issues for trial. The appellants herein who was the only defendant then never objected to any of those five issues – **[see page 50 ROA]**. After the 2<sup>nd</sup> defendant’s joinder, and because of his counterclaim set down six further issues for trial making it eleven – **[see page 353 ROA]**.

Looking carefully at the 11 issues set down by the plaintiff, issue 'a' is whether or not the plaintiffs family are the rightful owners in possession of the land the subject matter in dispute.

Issue '2', 3 & 11 as set down by the 2<sup>nd</sup> defendant after his joinder were whether or not the defendant's grantor had the capacity to alienate the land in dispute to the defendant, whether or not the defendant has trespassed unto the plaintiff's family land and whether or not the 2<sup>nd</sup> defendant is entitled to his counterclaim for declaration of title to the land situate and lying at Ogbojo, Accra.

All these issues border around ownership of the land in issue. We do not see anything wrong with the trial judge's decision to find out who is the true owner of the land. This is to because without that determination of ownership, those issues cannot be resolved.

Issue '4' is whether or not the defendants Land Title Certificate was procured by fraud just as issues 6,7,8 and 9 hinges on fraud. To resolve those five issues on fraud together, the trial judge put up one broad issue *"whether or not the defendants fraudulently acquired the disputed land or the plaintiff fraudulently sold same to them"*. In fact this ground aptly covered those five issues raised by the plaintiff and the 2<sup>nd</sup> defendant.

Lastly, plaintiff's claim is for recovery of possession of the land in dispute measuring 5.44 acres and perpetual injunction to restrain the defendant, his agents, privies assign and servants from entering the land, cancellation of defendants Land Certificate No. TD7931 and special and general damages for trespass. Issue 11, from the 2<sup>nd</sup> defendant is his counterclaim for declaration of title to the same land in issue situate and lying at Ogbojo. For these issues the trial judge lumped all it into one issue as *"whether or not the plaintiff is entitled to his claim or the defendant to this counterclaim"*.

There was absolutely, nothing wrong with what the trial judge did. In fact, he rather deserves commendation for being able to reduce the issues into 3 broad issues for effective determination of the suit. After all the three broad areas he crafted effectively covered all the eleven issues set down for trial. The judge by that never misconstrued the issues as set down. Order 32 (supra) coupled with effective case management practices gave him support and power for what he did and was thus right. We do not think by reducing the eleven issues to three broad issues, he erred in any way nor did this occasion any form of miscarriage of justice to the parties. That ground of appeal lacks merit and same is dismissed.

### **GROUND 3**

The learned trial judge erred when he held that the 1<sup>st</sup> defendant was not a bona fide purchaser for value without notice on grounds of failure to tender search report when indeed the said search conducted by the 1<sup>st</sup> defendant had been tendered in evidence as exhibit 4.

Counsel for the appellant argued that the trial judge in the judgment mentioned that both defendants in their defence put up the defence of purchasers for value without notice. The judge after reviewing the authorities on the law held *“it is important to be reminded that the plea of bona fide purchaser for value without notice, if established constitutes an absolute defence and for that reason, the onus is firmly on the party who resorts to it establish it convincingly”- [page 515 ROA]*

Counsel submits that the trial judge held that for a purchaser of land to be considered to have made his acquisition in good faith or to have conducted himself as a prudent purchaser must have acted honestly in making the acquisition. It must be evident from his conduct that he honestly and reasonably believes in the validity of his title and failure to conduct official searches at the lands commission would undermine any claim

on his part that he reasonably believed in the validity of his title – [page 515 ROA]. Counsel states that the judge erred in holding that the appellant failed to tender a search report from the Lands Commission when in fact they did tender same into evidence as exhibit '4'. This was tendered into evidence on the 15<sup>th</sup> day of January, 2018. Counsel submits, that holding of fact by the trial judge was erroneous and can be overturned by the appellate court. He stated the circumstances upon which an appellate court will set aside findings of fact by a trial court. He referred this court to the case of **Koglex Ltd (No2) vrs Field [2000] SC GLR 175** as follows; -

- a. Where the said findings of the trial court are clearly unsupported by evidence on record or where the reasons in support of the findings are unsatisfactory.
- b. Improper application of a principle of evidence or where the trial court has failed to draw an irresistible conclusion from the record.
- c. Where the findings are based on a wrong proposition of law; see **Robins vrs National Trust Co. Ltd. [1927] A.C. 515**, wherein it was held that where the finding is so based on an erroneous proposition of law that if that proposition is corrected the finding will disappear.
- d. Where the finding is inconsistent with crucial documentary evidence on record ..... and every appellate court has a duty to make its own independent examination of the record of proceedings.

It is his submission that the findings by the trial judge that 1<sup>st</sup> defendant failed to tender a search report from the Lands Commission to enable him rely on the defence of purchaser for value without notice is not supported by the evidence on record.

Counsel submits that the contents for that exhibit clearly showed that Ephraim J. E. Sai Obodai was head of Ago Sai family of Ogbojo and indeed the said Ephraim was the right person to alienate Ogbojo lands.

Counsel said the indenture attached to 1<sup>st</sup> defendants Lands Title Certificate also showed that the 1<sup>st</sup> defendant got the land from the said Ephraim of Ago Sai family. It is obvious that the content of the search report exhibit '4' were ignored by the trial judge in his judgment thereby leading to the erroneous conclusion he reached. Counsel invited this court to set aside this findings of fact by the trial judge and declare the 1st defendant as a bona fide purchaser for value without notice.

Counsel for the respondent in opposing this ground of appeal submit that it is trite learning that any person desirous of acquiring property ought to properly investigate the root title of his vendor. However, in this instant appeal there is no evidence of such prudent search conducted by the appellant. Counsel submits further that the appellant as a purchaser took no steps to ascertain who the owner of the property in dispute was before acquiring same. If indeed he did, would have known that it belonged to the plaintiff family and would have acquired it directly from them. It is his submission that the appellant was not a bone fide purchaser for value without notice as evidence placed before the trial court were more than adequate to reject the plea of such a purchaser.

The law describes a purchaser as a bona fide purchaser for value without notice when that person purchased or acquires land in good faith without knowing of someone's prior equitable interest in the land and has valid defence in land law. It is one of the equitable doctrines meant to protect people who genuinely purchase land in good faith and it later turns out that the ownership of the land was not vested in his grantor at the time he acquired the land.

A person who acquires property through purchase for valuable consideration and not in the form of a gift, without notice whether actual, constructive, or imputed of adverse title is said to be a bona fide purchaser for value without notice. A bona fide purchaser for value without notice is not bound by another's equitable interest in the property which he did not have actual, constructive or imputed notice of as all diligent searches and inspections by him did not reveal the said beneficial interests of the said person. A purchaser of that kind cannot lose his interest as a result of fraud perpetrated by his transferor – see **Land Law, Practice and Conveyancing in Ghana 2<sup>nd</sup> Edition Dennis Dominic Adjei – [Page 195]**.

It is trite that a purchaser who buys a property without making reasonable enquiries or one who comes to know that his transferor holds the property in trust or advancement for a beneficial owner or a purchaser who would have detected the fraud of his transferor if he was diligent or prudent cannot plead bona fide purchaser for value without notice as a defence.

The law is settled that a person who puts up a defence of bona fide purchaser for value without notice of any adverse interest has the burden to prove same and where such a defence succeeds it would constitute an absolute, unqualified and unanswerable defence. Therefore, such a person must act in good faith and at least must produce a search certificate conducted at the Lands Commission - see **Hydrafoam Estates Gh. Ltd vs. Owusu per lawful attorney Okine & Ors. [2013-14] 2 SCGLR 1 117**.

To recap the facts briefly as to the appellant's purchase of the land in dispute, the case of the appellant is that he decided to build real estates for sale and so sought a suitable land for the project. Later, he found a suitable land which he purchased from Brock Housing Company Ltd. which according to him had earlier acquired same from the Nii Ago Sai family, which is the plaintiff's family. He said prior to buying the land, Brock

showed him a receipt evidencing the purchase of the land by them from the plaintiff's family. – Exhibit 'A1'.

He said since Brock did not register their interest in the land, the plaintiff's family drew title deeds directly for him to enable him register the land. Appellant's evidence is that prior to the acquisition he had conducted a search at the Lands Commission which revealed Ago Sai family headed by Ephraim J. E. Sai Obodai are the owners of the land. The search also revealed that the said Ephraim J. E. Sai Obodai had transferred the family interest in the land to one John F. Appiah but at the time of his acquisition, was made to believe by Brock that John F. Appiah has agreed for the title documents to be drawn in his name.

Exhibit 4, the search report from the Lands Commission tendered by the appellant himself revealed that the land belongs to the plaintiff's family and secondly the plaintiff had granted its interest in the land to one John F. Appiah. He said Brock showed him a receipt of payment made to the plaintiff's family for the land and also assured him that the said John F. Appiah has agreed his interest be compromised. We think with these information, the appellant has actual and constructive notice that the land is encumbered and or must have constructive notice of same and be alert. The obvious thing a prudent and diligent buyer will do is to trace the plaintiff's family to ascertain the truth in Brocks claim that they indeed purchased the land from the plaintiff's family. Secondly, he must trace John F. Appiah to ascertain the truth in the allegation that he was ready to relinquish his interest in the land. This is what we think a prudent and diligent purchaser for value will do as due diligence. You cannot purchase a big plot of 5.44 acres without knowing the real owners of the land and also overlook encumbrances on the land as revealed to him by his search at the Lands Commission per Exhibit "4".



Mere belief of what Brock told him was not enough due diligence for him, to have the defence of an innocent purchaser for value without notice. In the instant case, the appellant had notice of the encumbrance but decided to believe what someone allegedly told him about the encumbrance and by that failure to do more due diligence he took a risk for which he lost.

The trial judge was thus right in holding that he was not entitled to the defence of an innocent purchaser for value without notice. Furthermore, John Appiah himself applied to join the suit as a 2<sup>nd</sup> defendant, meaning he never relinquished his interest in the land as the appellant claimed he was told. In fact, he even failed to lead any credible and admissible evidence to that effect that John Appiah allegedly relinquished his interest in the land by failing to call Brock to corroborate his story. The mere fact of tendering a search report was not enough due diligence in the circumstances of the case to qualify as an innocent purchaser for value without notice.

To qualify as a bonafide purchaser for value without notice the purchaser was bound to inquire into the title of his vendor and would be affected with notice of what appeared in the title if he did not inquire – see *Basare vs. Sakyi* [1987/8] 1 GLR 313, SC.

The search report he tendered as exhibit '4' never mentioned Brock as having any interest in the land which they can transfer to him.

The general principle of equity was that a purchaser was deemed to have notice of all that a reasonably prudent purchaser would have discovered. Thus, where the purchaser had actual notice that the property was in some way encumbered, he would be held to have had constructive notice of all that he would have discovered if he had investigated the encumbrance - see *Boateng vrs Dwinfour* [1979] GLR 361. We think even if the trial judge said he failed to tender a search report which in fact he did, never

absolved the appellant from doing more due diligence to qualify as an innocent purchaser for value without notice.

Since appeals are by way of rehearing, the appellate court has the power to go into the case, analyse all the facts and documents to come to its own conclusion, which could be different for the trial courts. We can make our own inferences from the facts of the case. See *Koglex Ltd (supra)*

The appellant's case is that he bought the land from Brock and not directly from the plaintiff's family. Secondly, Brock informed him of the interest of one John F. Appiah in the land. The search he conducted at Lands Commission is that the land is for the plaintiff's family and that the family had transferred its interest in the land to John F. Appiah. By these, the appellant had notice of two other parties whose interest was in the land he was purchasing; Brock and John F. Appiah. He told the court the plaintiff's family drew a direct title deed for him to enable him register his land. This assertion the plaintiffs denied saying they do not know him and had no land transaction with him and if anyone did with him was fraudulent. Appellant did admit in cross-examination that he never met the plaintiff before except in the court. The law is that he who alleges must assert especially if the opponent denies his allegation. The authorities abound that a person who makes an averment or assertion which is denied by his opponent has the burden to establish that his averment or assertion is true and he does not discharge his burden unless he leads admissible and credible evidence from which the fact or facts he asserts can be properly and safely inferred. Failure to which the assertion is not true – See *Memuna Amoudy vrs. Kofi Antwi [2006] 8 MLG 185 CA*.

In the instant appeal, the plaintiffs denied ever selling land to the appellant as he asserted, and therefore the burden shifted unto him to lead admissible and credible

evidence to establish his assertion. You do not just go to the box to repeat your averments on oath but to lead admissible, credible and cogent evidence to establish your assertion, failure to do so the assertion is not true. The appellant failed to lead any further credible and admissible evidence by failing to call any witness to corroborate his claim.

We wonder why the appellant failed to call Brock as a witness to the transaction. He also failed to call any of the two alleged witnesses Annang and Awudzaka who witnessed the title deeds prepared for him by the family. It is trite law that failure to call material witnesses to confirm one's case in court is fatal to the party's case. By this failure to call those material witnesses, we are at a loss whether in fact the plaintiffs family sold any land to Brock Company which they also sold to the appellant. Whether they did prepare any title deed to the appellant too is uncertain because he called nobody to corroborate same. When a party fails to call a material witness whose evidence will help or assist the court to arrive at a very good decision, it denies the court that opportunity and it is fatal to his case.

The general principle of law is that it is the duty of a party to prove his case, that is he must prove what he alleges. In other words, it is the party who raises in his pleadings an issue essential to the success of his case who assumes the burden of proving it. The burden only shifts to the defence to lead sufficient evidence to tip the scales in his favour when on a particular issue the plaintiff leads some evidence to prove his claim. If the defendant succeeds in doing this, he wins, if not, he loses on that particular issue – see;

- i. Bank of West Africa vrs Ackum [1963] 1 GLR 176.*
- ii. Ababioh vrs. Akwasi III [1994/5] GBR 777*

In the instant appeal, the defendant (appellant) failed to lead sufficient evidence to tip the scales in his favour that plaintiff sold the land to him. The standard of proof in civil actions is proof by preponderance of probabilities. By the statutory provisions of the *Evidence Act [1975] (NRCD 323)*, the burden of producing evidence in any given case is not fixed but shifts from party to party at various stages of the trial, depending on the issues asserted and or denied – see *In Re Ashalley Botwe Land, Adjetey Agbosu & Ors. vrs. Kotey & or [2003-4] 1 SCGLR 444*.

In the instant appeal, the burden shifted unto the appellant but which he failed to satisfy. This ground of appeal lacks merit and same is dismissed.

**Ground 4:**

*That the learned trial Judge erred in law when he ordered for the cancellation of the 1<sup>st</sup> defendant's Land Title Certificate Number TD 7931 when no evidence was led to establish that the 1<sup>st</sup> defendant had knowledge of fraud or mistake in the acquisition of his Land Title Certificate.*

One of the plaintiff's reliefs is for *"an order cancelling Land Certificate No. TD 7931 Vol. 019, Folio 3861 issued by mistake to the defendant."*

The trial Judge in his judgment held that the land in dispute was not granted to the appellant by the plaintiff's family and so they had no title to register for which reason he declared the registration of the land by the appellant as null and void. The court held *"that the plaintiff was able to demonstrate that he is entitled to the reliefs he is seeking against the defendant for which reason I accordingly enter judgment for him for all reliefs. – [page 518 ROA].*

Counsel for the appellant in arguing this ground of appeal submits that the Judge held so on the grounds of the failure of the appellant to call the witnesses to his indenture. The trial court said that it is trite law that where a grantee's purchaser's title is put in issue, the best person to prove his title is his grantor, seller or the donor from whom he or she traces his root of title to the said land. – see *Hayfron v. Egyir* [1984-6] 1 GLR 570. Counsel contends that fraud vitiates everything which means that a land document procured by fraud can be vitiated. However, when it comes to Land Title Certificate, the document cannot be vitiated by the mere proof of fraud but a party must go a step further by showing that the certificate was not procured in good faith because the purchaser of the land had knowledge of the fraud or substantially contributed to the fraud. This is because it is provided in Section 122 of the Land Title Registration Law [1986] (PNDCL 152).

#### ***Section 122 – Rectification by court***

- (1) Subject to subsection (2) of this section, the Court may in its discretion, order the rectification of the land register by directing that any registration be cancelled or amended where it is satisfied that such registration has been obtained, made or committed by fraud or mistake.
  
- (2) The register shall not be rectified so as to affect the title of a proprietor who has acquired any land or interest in land for valuable consideration unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought or had himself caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

Counsel contends that the respondent failed to establish that the appellant had knowledge of any omission, fraud or mistake in consequence of which the rectification is sought or had personally caused the omission, fraud or mistake or substantially contributed to it by an act, a neglect or default to warrant the cancellation of the appellants Land Title Certificate.

Counsel for the respondent in his response submits that the land certificate in question was issued based on a lease supposedly executed in the year 2012 by the respondents' head of family who was proven to have died in 1997. That this document was supposedly executed by him fifteen years after his death. Counsel said that the plaintiff's family vehemently denied the claim that the document was executed by the deceased man and insisted it was fraudulently executed making the certificate a product of fraud. Counsel said further that the appellant failed to call the Managing Director of Brock Ltd. to defend the representation he had made to him regarding the execution of the document by the deceased family head. Appellant himself also failed to prove that the grant was made by the plaintiff's family. Counsel submits that in the instant appeal the element of fraud had been established and the trial High Court was right to order rectification of the land register by removing the appellants name from it.

The plaintiff in his amended statement of claim filed on the 22<sup>nd</sup> day of June, 2016 denied ever granting the land in dispute to the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant's acquisition of this Land Certificate over plaintiff's land was therefore tainted with fraud. The plaintiff gave the particulars of fraud as follows:

- i. The defendant fraudulently registered land belonging to the plaintiff's family in his name without recourse to the plaintiff nor the principal members of his family.*

- ii. *The purported acquisition of the land by the defendant from the plaintiff's father leading to the issuance of the Land Certificate in the defendant's favour was fraudulent as the plaintiff's father had died on 25<sup>th</sup> day of July, 1997 long before the purported grant was made to the defendant in November, 2012.*

The plaintiff tendered the obituary notice of his father's death in 1997 into evidence and accepted without any objection. The defendant himself did admit he does not know the plaintiff nor the father who allegedly sold the land to him. The first time he met the plaintiff was in court. Simply put, how can someone who died in 1997 and not controverted or denied sign a document for the defendant in 2012?

The defence of the 1<sup>st</sup> defendant is that the plaintiff's family played a trick by not changing their deceased fathers' name at the Lands Commission and use same to dupe innocent buyers like him. This explanation is neither here nor there because in cross examination the plaintiff said he used to sign as Regent when the father was aged and incapacitated. That when the father passed on in 1997, and he was installed the substantive chief in 1999, he changed the signature to his. This piece of evidence was not controverted in cross-examination. Plaintiff therefore said that document prepared in 2012 should be signed by him and not his deceased father who died in 1997. Like the trial High Court asked, why did the appellant fail to call Brock or those who witnessed the indenture upon which the Land Title Certificate was issued to his rescue since they were material witnesses to his case? That failure to call them was wrong and fatal to his case.

We think the trial judge exercised his discretion fairly by ordering the rectification of the Register by ordering the cancellation of the appellants Land Title Certificate as obtained either fraudulently or by mistake due to appellants own neglect and act. That ground of appeal is dismissed.

## GROUND 1

*That the judgment was against weight of evidence.*

Counsel for the appellant submits that an appellant who complains that a judgment is against the weight of evidence is saying that there are certain pieces of evidence on record which operated in his favour but were not applied to his case or even when applied, the facts and the law were not properly applied to his case. That in such situations this court was entitled to look at the entire record to arrive at a decision. He referred this court to the case of **Fay Int. Ltd. v. Habib George Beany & another [2016] b92 GMJ 42 at 59.**

To illustrate this in the instant appeal he said the trial court concluded that the 1<sup>st</sup> defendant/appellant was not a bona fide purchaser for value court notice because he failed to tender a search report he claimed to have conducted, when in fact he did tender same as Exhibit 4. That holding therefore was not supported by the evidence on the record and so invites this court to set aside that holding.

Secondly, as required under *Section 122 (2) of PNDCL 152*, the register shall not be rectified unless such proprietor had knowledge of the omission, fraud or mistaken or substantially contributed to it by his act, neglect or default. Counsel argued that the plaintiff failed to establish these against the appellant and so this court must set aside that finding of fact made by the trial court. Counsel submit further that the trial judge clearly misconstrued the issues in the case and as a result proceeded to consider issues which did not address the real issues in controversy between the parties.

Counsel for the respondents in response submit that the trial judge after the trial delivered himself thus,



*“per my analysis as above discussed, it is my candid view that looking at the totality of the evidence led, I hold that the Plaintiff was able to demonstrate that he is entitled to the reliefs he is seeking against the Defendants for such reason, I accordingly enter judgment for him for all his reliefs.”*

Counsel submits that there is no dispute as to the respondent family’s title as the allodial owners of the land in dispute. Respondent tendered Exhibit “B”, a copy of his late father’s obituary, Nii Jonathan Ephraim Sai Obodai who died on 28<sup>th</sup> July 1997 and Exhibit “C”, a copy of the obituary of Daniel Ago Sai who died on 14<sup>th</sup> June, 2004. Counsel said Exhibit “D” is the appellants Land Title Certificate No. TD 7931 Vol. 019 Folio 3861 based on a lease supposedly dated 30<sup>th</sup> November, 2012 but executed on behalf of the respondent family by the two deceased people mentioned above who died on 28<sup>th</sup> July, 1997 and 14<sup>th</sup> June 2004 respectively.

Counsel contends that from the facts of the case, the appellant admitted in cross-examination he never met any of the two deceased men who allegedly executed his lease but relying on what the Managing Director of Brock told him. The Managing Director of Brock Ltd. therefore becomes a principal witness for his case but he never called him to give evidence in support of the claim for which reason his claim must fail. That ground of appeal must fail.

An appeal is by way of re-hearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial court is against the weight of evidence. In such a case, it is incumbent upon the appellate court in a civil case, to analyze the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at the decision, so as to satisfy itself, that, on the preponderance of the probabilities, the judgment of the trial Judge are reasonably and amply supported by the evidence – see *Tuakwa v. Bossom* [2001-2] SCGLR 61

The authorities abound that where an appellant (as in the instant case) complains that a judgment is against the weight of evidence, he is implying that there were certain pieces of evidence on record, which if applied in his favour could have changed the decision in his favour or certain pieces of evidence have been wrongfully 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. – *see Djin vs. Musah Baako [2007/8] 1 SCGLR 686 at 691.*

The 2<sup>nd</sup> defendant/appellant also filed this ground as one of his grounds of appeal, though I do not see any submission from him in his appeal. Albeit, I shall recap briefly the case of 2<sup>nd</sup> defendant then give a final decision on this ground of appeal by both appellants. The 2<sup>nd</sup> defendant's case is that he purchased this land in dispute from the plaintiffs through one Richard Asiamah, whether as an agent or a friend. An indenture was prepared for him which he tendered into evidence between him and Ephraim Jonathan Sai Obodia. This indenture is Exhibit "J" FAI. See page 348 of Record of Appeal. The 2<sup>nd</sup> defendant alleged fraud against the plaintiff and particularized same – see page 348 of record of appeal. He also counterclaimed for the following reliefs:

- a. *Declaration of title to all that piece of land situate and lying at Ogbojo, Accra containing an approximate area of 10.26 acres or 1.63 hectares more or less and bounded on the North by proposed road measuring 460 feet more or less, on the East by lessor's land measuring 10.20 feet more or less, on the South by lessor's land measuring 430 feet more or less of the West by proposed road measuring 98.9 feet more or less which piece of land is more particularly delineated on the plan attached thereto and thereon shewn edged pink, to have and to hold the same unto and to the use of the lessee for the term of ninety nine (99) years from the 11<sup>th</sup> of March 1999 Yielding and paying therefor during the said term of yearly rent.*

- b. *Recovery of possession for the land described in relief (a) above.*
- c. *An order of perpetual injunction to restrain the plaintiff family, their agents, privies, assigns and servants from entering unto the land or in any way disturbing the 2<sup>nd</sup> defendant from developing the land.*
- d. *General and special damages for trespass*
- e. *Damages for fraud*
- f. *Cost of this action including legal fees*

The witness statement of the 2<sup>nd</sup> appellant is that he bought the land through one Richard Asiamah, the land was plotted in 2005 but unknown to him the Plaintiff had sold the same land to the 1<sup>st</sup> Defendant. His case is that Nii Torgbor Obodai represented the Anahor/Dzirase families of Ogbojo to execute the indenture for him, signed on 11/3/99, signed by the plaintiff and witnessed by Daniel Sai Ago & Anang Awadzaka. The plaintiff however denied this strongly saying they never sold land to him even though his name appears at Lands Commission that plaintiffs have transferred interest in the land in dispute to him and that they do not know how he got his name there. It is trite learning that when a party's title to land is challenged in a suit like in the instant case, the first thing to do is to join his grantor to the suit to defend his title.

In this case however, the 2<sup>nd</sup> appellant woefully failed to call Richard Asiamah through whom he bought the land, who then became his material witness to come testify for him. He also failed to call any of the two members of the grantor's family who allegedly witnessed the transfer, that is Daniel Sai Ago or Anang Awudzaka. There is

no evidence before the court that those three people were dead and could not be traced after all efforts to do so.

In an action for a declaration of title to land, the plaintiff must prove, on the preponderance of probabilities, acquisition either by purchase or traditional evidence or clear and positive acts of unchallenged and sustained possession or substantial user of the disputed land - See *Abbey & Other vs. Antwi [2010] GLR 17*.

When the 2<sup>nd</sup> defendant applied and joined the case, all documents and processes filed were served on him as by law and procedure. 1<sup>st</sup> defendant alleged that Brock told him that he 2<sup>nd</sup> defendant has agreed that his interest in the land can be transferred to the 1<sup>st</sup> defendant. In the trial, the 2<sup>nd</sup> defendant never raised this issue as to whether it is true or false. He never pleaded anything to that effect nor questioned 1<sup>st</sup> defendant in cross-examination about it.

Since he counterclaimed, he assumed the burden of persuasion and proof as a plaintiff. In law, proof simply means convincing the court or jury that a fact that is alleged is true and this is the purpose of the provisions on burden of proof as contained in *Sections 10, 11 (1) and (4) of the Evidence Act, 1975 (NRCD 323)*.

The law is well settled that where the evidence led by a party is not challenged by his opponent in cross-examination and the opponent does not tender evidence to the contrary, the facts deposed to in that evidence are deemed to have been admitted by the opponent and must be accepted by the trial court.

For the 2<sup>nd</sup> appellant not challenging Brock on that assertion that he has agreed his interest in the land, if he had any, could be transferred coupled with not calling any of the two witnesses, the trial court was right in its determination that he failed to prove

his counterclaim. Failure to call those three material witnesses was fatal to his claim and must fail.

In the same vein, 1<sup>st</sup> defendant/appellant also fell into a similar trap by failing to call the Managing Director of Brock who allegedly sold the land in dispute to him in the face of the denial by his opponent and coupled with his admission that he does not know the plaintiff except in court. The owner of the land you claim as yours says he never sold same to you nor had any transaction with you about the land, yet you fail to call the one who allegedly sold the land to you. Plaintiff further established those who allegedly signed and executed the title deed for you died several years before the date of execution and so could not have signed those documents for you. This is factual.

From the evidence before us, the trial Judge was right in holding against the two defendants and we shall not disturb his findings since they are supported by the evidence on record before him.

On the totality of the evidence before this court, we are of the firm view that the whole appeal lacks merit and same is dismissed in its entirety and the judgment of the trial High court is hereby affirmed.

SGD

**SENYO DZAMEFE**

(JUSTICE OF APPEAL)

I agree

SGD  
**AMMA A. GAISIE, (MRS)**  
(JUSTICE OF APPEAL)

I also agree

SGD  
**OBENG-MANU JNR**  
(JUSTICE OF APPEAL)

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