IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA – GHANA

AD – 2022

CORAM: B. F. ACKAH-YENSU, JA (PRESIDING)

JENNIFER DODOO., JA

R. ADJEI FRIMPONG, JA

CIVIL APPEAL NO.: H1/150/2020

DATED: 16TH JUNE, 2022

VICTORIA MANSAH ATTACHIE - PLAINTIFFS/

& 4 ORS. APPELLANTS

VRS

WISDOM KOJO ATTACHIE & 3 ORS. - DEFENDANTS/

RESPONDENTS

JUDGMENT

ACKAH-YENSU, JA

INTRODUCTION

The fundamental issue for determination in this appeal appears to revolve around the question as to who are the beneficiaries of a portion of land being disputed by the parties herein. This parcel of land includes an area where a toilet structure has been constructed. If the evidence proves that the disputed portion of land belongs to the Plaintiffs/Appellants then the judgment of the trial court under attack would have to be set aside. On the other hand, if the disputed land is proved to have been gifted to the Defendants/Respondents, as found by the trial court, the said judgment would have to be affirmed.

BACKGROUND FACTS

The Plaintiffs/Appellant (hereinafter referred to as the "*Appellants*") commenced a suit at the Circuit Court on 16th March, 2015 which was subsequently amended on 9th March, 2016, against the Defendants/Respondents (hereinafter referred to as "*Respondents*") for the following reliefs:

> *"a. Declaration that the activities of the defendants on plaintiffs' portion of land given to them intervivos amounts to trespass.*

b. *Damages for trespass.*

c. *Recovery of possession of any portion of plaintiffs' land trespassed unto.*

d. *Perpetual Injunction restraining the defendants, their agents, assigns, and workmen from ever interfering with plaintiffs' enjoyment of their portions of land".*

The undisputed facts of this case are that Alfred Kwasi Attachie who died on 16/01/1990 had two (2) wives, namely Akua Amuzu (4th Respondent) who had six (6) children (the 1st to 3rd Defendants included) with him; and Akosiwaa Agbodzi who also had six (6) children with him (5 of whom are the Appellants). The deceased in his lifetime was the owner of H/No. 16/12 which is located at East Teshie, Accra. The late Alfred Kwasi Attachie also owned a second house at Ashaiman where Appellants lived until they reached adulthood and moved out with the exception of 1st Appellant who is still resident there. Alfred Kwasi Attachie, during his lifetime, shared his two houses between his two sets of children by giving the Teshie house, house in dispute before the trial court, to 4th Defendant and her children and the Ashaiman house to Appellants' mother and the children he had with her.

The Appellants' case as per their pleadings is that the Respondents had constructed a toilet structure on land belonging to the Appellants. Appellants wanted to develop their portion by erecting a

partitioning fence wall but the Respondent allegedly demolished the wall. An attempt by the family head to set the boundary between the two sides was rejected by the Respondents.

The Respondents resisted the Appellants' claim and in their Amended Defence and Counterclaim contended that the late Alfred Kwasi Attachie shared the houses by giving the house at Ashaiman to the Appellants and their mother exclusively, and the house at Teshie Nungua Estate to the 4th Respondent (wife) and her six children by the late Attachie. He however also gave a defined portion of compound or space at the back of the building at the Teshie Nungua Estate house to his 2nd wife (Akossiwa Agbodzi). According to the Respondents, the exact portion is unambiguously known by the Parties and the boundary on the left side of the building is indicated by a tree which the late Attachie planted. The portion given to Akossiwa Agbodzi was a 50ft by 50ft land space.

The late Alfred Kwasi Attachie also gave one room to Blewushi and her siblings, out of the four (4) rooms in the Teshie Nungua house and the space at the back of that room. The Respondents contended further that their late father used a tree as the boundary between (Respondents) portion and the Appellants' portion and that a toilet constructed by their late father is on the portion of the Respondents' portion.

The Respondents consequently counter-claimed for the following reliefs:

"1. A Confirmatory Order that only 50 by 50 land space had been given to Madam Akossiwaa Agbodzi and her children (The Plaintiffs) in the Teshie House (H/No. 16/12, Teshie) which is situate at the back of the house.

2. *An order directing a surveyor to mark out the 50 by 50 feet land space with concrete pillar boundary gifted to the Plaintiffs and their mother and a further Order of recovery of possession of all trespassed land beyond the said 50 by 50 feet and accompanying demolishing Orders.*

3. *Damages for trespass and losses and inconvenience suffered.*

4. *Perpetual Injunction restraining and restricting Madam Akossiwaa and her children namely 1. Dzigbordi Kwaku Attachie also called Lawrence Attachie; 2. Patient Attachie; 3. Blewushie Attachie; 4. Victoria Mensah Attachie; 5. Dela Attachie and 6. Mawulawoe Attachie, whether by themselves or their children, successors, beneficiaries, assigns and any other persons or entity claiming through any of them to the 50 by 50 feet land space given to them by the parties' late father Alfred Kwesi Attachie as part of his give intervivos.*

5. *Cost including Solicitors fees on full indemnity basis.*

At the end of the trial at the Circuit Court, judgment was entered in favour of the Respondents for all the reliefs in their counter-claim.

It is against the said judgment that the instant appeal has been brought seeking a reversal of the decision of the trial court. The Appellants set out four (4) grounds of appeal as follows:

"a. That the judgment is against the weight of evidence.

b. That the trial court unjustly limited the plaintiffs/appellants to 50 feet by 50 feet behind the house when evidence showed they were entitled to all the land at the back.

c. The trial court failed to properly consider the case of plaintiffs.

d. Award of costs of GH¢8,000.00 in an estate matter is harsh when the parties are siblings".

THE APPEAL

We note that although the Appellants have set out complaints against specific findings per grounds (a), (b) and (c), all the grounds set out are cumulatively a core complaint about the evaluation of the evidence by the learned trial Judge which compositely gives rise to an allegation that the judgment is against the weight of the evidence adduced; i.e. the omnibus ground. For this reason, in our consideration of the issues on appeal, we will subsume grounds (b) and (c) under the first ground (a); that the judgment is against the weight of evidence, and then consider ground (d) on its own.

We have by the omnibus ground been invited (being in much the same position as the trial court regarding the evidence led) to evaluate the evidence and arrive at our own conclusions. This is in line with our jurisdiction under Rule 8(1) of the Court of Appeal Rules C.I. 19. This position has been brilliantly expounded by the apex Court speaking through Dotse, JSC in the unreported case of **Solomon Tackie & Bannerman v John Nettey (Subst. by Bibi Ayimey); J4/44/2019** delivered on 24th March, 2021 at page 23 as follows:

> *"When a ground of appeal like the instant, formulated on the basis that "the judgment is against the weight of evidence" have to do are the following:*
>
> *i. Consider the case as one of re-hearing. This means an evaluation of the entire record of appeal.*
>
> *ii. Consider the reliefs claimed by the plaintiff and if there is a counterclaim by the Defendant, that must equally be considered.*
>
> *iii. Consider and evaluate the evidence led by the parties and their witnesses in support of their respective cases especially the cross-examination as this is the evidence that is now elicited from the parties and their witnesses after the tendering of the witness statements.*
>
> *iv. An evaluation of the documents tendered during the trial of the case and how they affect the case.*

v. *An evaluation of the application of the facts of the case vis-à-vis the laws applied by the trial court and the intermediate appeal court.*

vi. *A duty to evaluate whether the trial court ….. correctly or wrongly applied the evidence adduced during the trial.*

vii. *The burden ….. to carefully comb the record of appeal and ensure that both in terms of substantive law and procedural rules, the judgment appealed against can stand the test of time. In other words, that the judgment can be supported having regard to the record of appeal. The above criteria are by no means exhaustive, but only service as a guide to appellate courts such as the task facing us today".*

To aid the Court in arriving at a determination, an appellant has a duty to point out these pieces of evidence which, in their view, had they been evaluated properly by the trial court, ought to have led the court to a conclusion different from what was arrived at.

As aforesaid, the Appellants herein sued the Respondents at the Circuit Court for trespass amongst others. It is common knowledge that trespass is the tort of intentionally entering unto land, remaining on land, placing or projecting any object upon land of another person, without lawful justification.

Trespass to land is actionable per se. Anyone in possession of land may maintain an action against any intruder who makes an unauthorized entry. Any unlawful interference with land or building in possession of another is actionable. Therefore to succeed, the plaintiff must show that he is in possession of the land. Even a person in wrongful possession can bring an action for trespass against anyone who unlawfully enters the land except the true owner or anyone acting in the authority of the owner. It is a hackneyed principle that possession is a form of ownership confirming rights to the thing under possession. Therefore the law protects even wrongful possession against all except one with the better title to the land. The burden is on the plaintiff to prove that he was in *de facto* possession of the land at the relevant time. See **Wuta-Ofei v Danquah [1961] 3 All ER 596.**

Counsel for the Respondents has argued that the Appellants did not describe the dimensions and/or boundary landmark of the portion of land given to them in the subject house, hence they cannot seek to establish a case of trespass. This, he argues, *"puts the Appellants' case in serious shambles as their case had no leg to stand on as evidence on record failed to establish the defined description of the supposed land space the Plaintiffs/Appellants are claiming is in dispute".*

Trespass, it is trite, is a wrong against possession and not title. The failure to establish the identity of the land in dispute with mathematical precision was therefore not fatal to the Appellants' case. Again, the instant matter is not a boundary dispute, nonetheless, there cannot be trespass in a case in which it is alleged that the disputed land is occupied by two separate parties when there is no, as it were, *"border crossing"*. So, one may ask, what was the exact land in dispute, and was it properly and clearly identified?

The Appellants alleged that the Respondents had built a toilet facility on the land belonging to them; the very portion the Appellants attempted to erect a fence wall. From the record, there is no description by the Appellants of the portion of land or the dimension of the land they claim is in dispute.

The Respondents, on the other hand, led evidence to the effect that their father planted an almond tree which served as a defining boundary between the portion belonging to the Appellants and that of the Respondents. This the Appellants did not dispute. The testimony of Gladys Attachie (3rd Respondent) was as follows:

> *"6. The Teshie house is made up of four Chamber and Halls which our dad built by himself such that the frontage of the house has a bigger compound space whiles the back of the house has a smaller space which is approximately 64 by 96 feet. There are also spaces to the left (measuring about 20 feet) and to right side (measuring about 4 feet) of the main*

building (i.e. the 4 chamber and halls). On the left side of the building is located an old toilet built at the instructions of our late father which all of us in the Teshie house used for a number of years before the sharing took place. Behind the toilet leading backwards towards the back of the house on the left side is a fully grown almond tree planted by our late father. I wish to tender in evidence the site plan of the land and a sketch of the structures on the land as exhibits 1 and 2".

It appears to us that the land in question is not in dispute. And the position of the law is that in proving ownership there is no strict requirement to prove the identity of the land if it is not in dispute. See **In Re Ashalley Botwe: Adjetey Agbosu & Ors. v Kotey & Ors. [2003-2004] 1 SCGLR 420**. The Parties herein were *ad idem* as to the specific house in dispute. As already stated, the Appellants brought the instant action against the Respondents as siblings and children of the late Alfred Kwasi Attachie, claiming to be the beneficial owners of *"land behind the Gunu House inclusive of the 50 by 50 feet that was given to Blewushie Attachie (3rd Appellant) and their late mother, Madam Akossiwa Agbodzi by their late father, Mr. Alfred Kwasi Attachie*".

The Appellants' case appears to turn on Exhibit "B" (page 112 of Record of Appeal) which reads as follows:

“

A. K. Attachie

Gunu House

Teshie House

06-3-79

Blewushie Attachie

13 Adama Block

Bubuashie

I have today allocated the room and the land behind the house to you Blewushie Affi; your two sisters and their brothers, you have to collect the key he is still holding from the maternal brother you are at liberty to visit the house, make repairs and develop the land.

Yours faithfully,

Akwasi Attachie father 6-3-79”

The Respondents also tendered in evidence, Exhibits “3” and “4”. Exhibit “3A” also reads as follows:

“

Gunu House

Eask Fakorhi

Teshie Estate Zongo

12-04-86

Attn: Dzigbordzi Kwaku Attachie for sisters and bothers

Take note that the space behind the above house 50 feet by 50 feet is allocated to your mother, Madam Kworsiwor Agbodzi Attachie. You are to see to it that a house is built on this plot for her.

This is in addition to my letter No. 55 dated 01/01/80 to your mother and another letter No. 21 dated 08/08/83 to Miss Blewusi Afi Attachie about the house at Ashaiman

……
……

(Sgd.)

12/01/86

Teshie-Estate Zongo

Copy to Miss Abui Aku Attachie for Brothers and Sisters".

Exhibit "4", is a letter dated 22/04/1986 written by 2nd Plaintiff on behalf of his maternal siblings and their mother acknowledging receipt of Exhibit "3A" and the one in respect of the Ashaiman property. Exhibit 4 reads as follows:

"

4 EAST FAKORHI

TESHIE-ESTATE ZONGO

ACCRA

22-4-86

ATTENTION

ACKNOWLEDGMENT

MR. ALFRED KWASI ATTACHIE

I, the undersigned, DZIGBORDI KWAKU ATTACHIE have on my own behalf and on behalf of my mother, Akosua Agbodzi, sisters and brother received and acknowledged the send letters, documents with respect to the space behind the Gunu House by 50 feet at Teshie-Estates Zongo Accra together with the Ashaiman House No. JJA 239 on TDC Plot No. D. 191B allocated to my mother.

I, on behalf of my mother and sisters and brothers have promised to put the said space behind the Gunu House and the Ashaiman House into maximum use to the benefits of our children, grandchildren and great grandchildren.

Your effort and contributions has been appreciated.

DZIGBORDI K. ATTACHIE

On behalf of my mother Akosua Agbodzi, Sisters and Brothers.

1. *Akosua Agbodzi*
2. *Patience Attachie*
3. *Blewusi Attachie*
4. *Mansa Attachie*
5. *Dela Attachie*
6. *Mawulawoe Attachie".*

It is thus clear that the portion of the disputed land measuring 50 feet by 50 feet was allocated to the Appellants' mother, Madam Akosiwaa Agbodzi Attachie. It was the evidence of the 1st Appellant (Victoria Mensah Attachie), and also the submission of Counsel for

the Appellants that the Respondents had deliberately constructed their toilet on this portion of the land and had prevented the 1st Appellant from developing the said portion by erecting a partitioning fence wall and by entering that portion of land without lawful authority and demolished the Appellants' structures which culminated in the institution of the instant action.

Also, it was evident at the trial that there was an issue as to who owns other portions of the land beyond the 50 feet which was gifted to Appellants' mother Madam Akosiwaa Agbodzi Attachie. This is what transpired when the 3rd Respondent (Gladys Attachie) was cross-examined:

"Q. Beyond the 50 feet, is there space there?

A. Yes

Q. That space opens up unto a street.

A. No

Q. So who is that portion for beyond the 5o feet

A. I cannot tell

Q. Can Plaintiffs wall their portion of the property.

A. Yes".

Although the contents of Exhibit "B" indicated that a room and the land behind the house had been allocated to 4th Appellant and her

siblings, there was no indication as to which property was being referred to. It gave further instructions that a key had to be collected from a maternal brother whose name was not disclosed. It is for these reasons that the learned trial Judge posited that the said exhibit was rather vague.

From the records, 1st Respondent admitted that Exhibit "B" was authored by their father. That, one of the four (4) chamber and hall units as well as the land behind it was given to 4th Appellant and her maternal siblings who are the Appellants in this case. He also admitted that their father gifted 50ft by 50ft of the land behind the said house to the Appellants' mother. 2nd Respondent also admitted that he had seen Exhibit "B" before. He however denied that their father in addition to giving one room in the house also gifted the whole of the land at the back of the house to Appellants and their mother. His testimony was that only 50ft by 50ft of land at the back of the house was given to her.

The learned trial Judge also stated in her judgment that even though Exhibit "3" mentioned that certain plots of land had been allocated to the two mothers of the parties, it was not specific as to which of them was given which portion of the land. We however disagree with the trial court because it is clear to us that the house being referred to was the Gunu House at Teshie Estate Zongo. The address of the author of the letter was stated as **"Gunu House, East Fakorhi, Teshie Estate Zongo"**. And it was stated in the letter as follows:

*"Take note that the space behind the **above** house 50ft by 50ft is allocated to your mother, Madam Korsiwor Agbodzi Attachie. You are to see to it that a house is built on this plot for her. This is in addition to my letter No. 58 dated 01/01/80 to your mother and another letter No. 21 dated 08/08/83 to Miss Blewusi Afi Attachie about the house at Ashaiman …"* Clearly, the ***"above house"*** can be none other than the Gunu House.

After painstakingly perusing the Record of Appeal, we have arrived at our own findings as follows: That the Exhibit "B" which the Appellant relied on to prove their case is dated 06/03/79. Exhibit "3A" dated 12/04/86 clearly indicated that Appellants' mother was given 50ft by 50ft of the portion of land at the back of Gunu House. This was brought to the attention of 2nd Appellant and his maternal siblings; 2nd Appellant was to see to it that a house had been constructed on the allotted space for their mother. Exhibit "4" dated 22/04/86 is also a letter written by 2nd Appellant to his father acknowledging with thanks the gift of the 50ft by 50ft land behind the Gunu House and the Ashaiman house to their mother.

Clearly, if Exhibit "B" is proof the Appellants' case that the whole of the land behind the Gunu House was gifted to them by their father, it is unlikely that he would subsequently, in Exhibit "3A", gift 50ft by 50ft of the same land to the mother of the Appellants. In our view, the Appellants did not lead sufficient evidence to prove that the whole of the disputed land was gifted to them.

From the totality of the evidence on record therefore, it is apparent to us that only 50ft by 50ft of the land behind the Gunu House was gifted by the late Alfred Kwasi Attachie to Madam Akorsiwaa Agbodzi (mother of the Appellants). Also, one chamber and hall unit of the said house and the portion of land behind it was given to the 4th Appellant and her other maternal siblings.

We are therefore in agreement with the learned trial Judge when she found that: "*The court finds that it is more probable that not that 50 by 50 feet of the portion of land behind Gunu House was granted to the mother of the Plaintiffs and her children. As well as one chamber and hall unit in the main house and the portion of land behind that unit".*

Regarding the location of the toilet structure, the case of the Appellants is that the Respondents had constructed the structure on their portion of the land. The Appellants merely alleged that the toilet was built after their father died without substantiating same. The Respondents, on the other hand, contended that the toilet structure was constructed by their father when the Gunu House was built and it was this toilet facility that they had used over the years. They contended further that they grew up from infancy to adulthood at the Gunu house and that was the toilet facility they had used till date.

Furthermore, while the Appellants claimed that the toilet structure was at the back of the house, the Respondents claimed that it was rather at the side of the house. It was for this reason that the Appellants requested at the trial that the Court visit the *locus in quo*. This request was refused by the trial court. The Appellants hence complain that the trial court did not adequately consider the case of the Appellants. It is however the settled law that the court is under no obligation to visit the *locus* before making a determination in any matter; it is at the discretion of the court to do so.

It is not imperative for a trial court to visit the *locus in quo. A*lthough it may be highly desirable, it is not fatal. The trial Judge is deemed to be in control of proceedings at the trial and determines the dispute on the basis of what he has identified as the key issues. By virtue of Order 32 of C.I. 42, the trial court has control of the entire proceeding and decides the proper and necessary steps to be taken to effectually and completely determine the matter. The trial Judge can therefore decide that visiting the *locus* is not a necessary step in the proceedings. It was therefore incumbent on the Appellants to demonstrate a lack of evaluation or appreciation of the evidence on record which has resulted from the failure to visit the *locus* and which has consequently resulted in the miscarriage of justice; see Sections 5 and 6 of the Evidence Act.

As aforesaid, the Appellants alleged that the toilet structure fell within the portion of the land that belongs to them. The

Respondents, on the other hand, urged the court to hold that the said toilet structure was located within the Respondents' portion of the land, and tendered in evidence a drawing showing the different dimensions and locations of various structures on the land. The trial Judge, upon examining the said Exhibit "2", opined that the location of the toilet structure was at the left side of the main building and not the back of the house.

We accept the trial court's conclusion that; *"The evidence adduced does not indicate the toilet facility is located within the Plaintiffs' portion of the land. It is therefore more probable rather than not that it is located within the portion of land that belongs to Defendants. The court therefore finds that the toilet facility is located on the portion of the land that belongs to Defendants".*

Consequently, we cannot fault the finding of the trial court that the Respondents cannot be held liable for trespassing onto the Appellants' portion of the disputed land. Grounds "a", "b" and "c" accordingly fail and are hereby dismissed.

The Appellants have also complained about the award of cost of GH ¢8,000.00 as harsh in an estate matter and also considering the fact that the parties are siblings.

The law is very explicit, that the award of costs is at the discretion of the court. The principle of law is that even though the award of costs is an exercise of discretion by the Court, yet where the exercise of the discretion is not based on sound principles of law, an appellate court is entitled to interfere with such exercise of discretion. This principle has been enunciated in a long line of legal authority, including **Owusu v Owusu Ansah [2007-2008] 2 SCGLR 870 @ 871 H2; Sappor v Wigtap Ltd. [2007-2008] 1 SCGLR 676; Kyenkyenhen v Adu [2003-2003] 1 SCGLR 142**.

In **Sappor v Wigtap Ltd**. (supra) Georgina Wood JSC (as she then was) reiterated this position thus: *"The principles clearly enunciated ….. are that an appellate court would interfere with the exercise of discretion where the court below applied wrong principles, or the conclusion reached would work manifest injustice or even that the discretion was exercised on wrong or inadequate material"*. The discretion was thus bound to be arbitrary, capricious and uninformed.

In the instant case, we cannot find anything on record to justify how the trial court exercised its discretion in awarding the sum of GH ¢8,000.00 in an estate matter. We are of the opinion that the trial Judge ought to have placed on record the basis on which she exercised her discretion. It is common knowledge that the nature of the action would influence the quantum of costs awarded. And so if it is a matter regarding oil and gas, maritime or mining sector, etc.

where the parties may have to rely on experts, then it would be understandable that the costs may be high; but not in an estate matter as in the instant case.

In our opinion therefore there is sufficient reason for us to reduce the costs awarded by the trial court, and we do so by reducing the said amount by 50%.

We cannot end this delivery without commenting on the ground of appeal that: "*Award of GH¢8,000.00 in an estate matter when the parties are siblings*". It is interesting that the Appellants knowing that they and the Respondents are siblings yet thought it expedient to sue them in court. From the letters written by their late father and tendered in evidence, one gets the impression that their late father (Alfred Kwasi Attachie) was a fastidous and peaceful person who loved all his children and wanted the best for them. It is unfortunate therefore that this dispute has arisen between the children. As 3rd Respondent stated in her testimony: *"We all lived peacefully in our respectful beneficial portions without any problems for four years until our father died in 1990 and we continued to live on our respective portions peacefully all these years until couple of years when the 1st Plaintiff caused the almond tree which served as the boundary reference point to be cut down and removed without our consent and authority to our surprise but we did not say anything. Thereafter, the 1st Plaintiff had gone beyond the 50 by 50 feet again them and started constructing building extension …."*

It is our prayer that the parties go back to living peacefully as siblings.

CONCLUSION

In conclusion, grounds (a), (b) and (c) on which this appeal was anchored having been dismissed, the appeal fails in substance. Save therefore our variation of the order for costs from GH¢8,000.00 to GH¢4,000.00, the appeal is dismissed.

(SGD.)

BARBARA ACKAH-YENSU

(JUSTICE OF APPEAL)

JENNIFER DODOO, J.A., I agree ***(SGD.)***

JENNIFER DODOO

(JUSTICE OF APPEAL)

R. ADJEI FRIMPONG, J. A., I also agree ***(SGD.)***

R. ADJEI FRIMPONG

(JUSTICE OF APPEAL)

COUNSEL:

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CHARLES HABIA FOR DEFENDANTS/RESPONDENTS