IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA. A. D. 2022

CORAM:

ACKAH-YENSU J. A. (PRESIDING)

BAFFOUR J.A.

ARYENE J.A

SUIT NO H1/118/2020

17TH FEBRUARY, 2022

DR. JOHNSON CUDJOE LEE AGBODO (SUING PER HIS LAWFUL ATTORNEY, CHARLES TETTEGAH DEKU) — **PLAINTIFF/RESPONDENT**

VRS

1. **COMFORT BAMFO**
2. **SAMUEL BAMFO**
3. **ERIC MENSAH DARPOH**

— **DEFENDANTS/APPELLANTS**

JUDGMENT

Baffour J.A:

Introduction:

At the heart of the controversy between the parties to this appeal is a wrangling over the ownership of a 12.99 acres of land as described in the schedule to the writ of summons at Dawhenya in the Dangbe West District of the Greater Accra Region. Whilst the trial Judge found the evidence of the Plaintiff/Respondent to be credible as having lawfully acquired the land from the legitimate head of family of the Arden Darpoh family of Dawhenya, the acclaimed owners of the land, it dismissed the case of the 1st, 2nd and 5th Defendants/

Appellants. It further held that 5th Defendant could not have lawfully granted to 1st and 2nd Defendants/Appellants the land as 5th Defendant/Appellant was not clothed with the requisite capacity as head of family of Arden Darpoh family. This appeal by the 1st, 2nd and 5th Defendants/Appellants is a throw down of the gauntlet to the court to test the correctness of the decision of the learned trial Judge. The 1st, 2nd and 5th Defendants/ Appellants would be referred to simply as Appellants whilst Plaintiff/Respondent as Respondent, unless the context otherwise admits that they be referred to by the designations that they bore at the trial court as Plaintiff and Defendants.

The Plaintiff's Case

By a further amended writ and statement of claim, Respondent sought for declaration of title, recovery of possession, perpetual injunction, damages for trespass among other reliefs. It was his case that in 2006 he acquired through his sister the land in dispute from the Arden family acting per its lawful head Nene Kweku Darpoh I to establish a hospital in Ghana. That a lease was duly executed after which he proceeded to register same with a title certificate having been issued to him by the Land Title Registry. He contended that he took effective possession of the land and walled round the property and also constructed a single room with a caretaker placed to take charge of the land. Respondent further stated that despite all these overt acts of possession, Appellants forcefully entered the land and commenced what he termed as "haphazard residential building" on the land and forced the caretaker out of the land. Respondent also denied any claim that the 5th Appellant was the head of family of Arden Darpoh family as he purchased an empty land with nobody having had a prior grant. That any claim to the land by Appellants was through the Osuwem family and they only made a volte face when they realized that the Osuwem family had lost a case against the Darpoh family at the Court of Appeal and the Supreme Court.

1st and 2nd Appellants Case

1st and 2nd Appellants filed a joint statement of defence whilst the 5th Defendant filed a separate one. In their joint statements of defence, 1st and 2nd Appellants claimed to have acquired the land from 5th Appellant in November 2002, who they emphatically asserted as the head of Arden Darpoh family. That whilst on the land they realized attempts by some

people to wall around the land which they found out to be persons from the Osuwem family. It was the case of the 1st and 2nd Appellants that they were compelled to renegotiate a second purchase of the land from the Osuwem family only for the judgment of the Osuwem family obtained at the High Court to be overturned on appeal. That they have completed payment of the purchase price of the land to Arden Darpoh family acting per its legitimate head, being the 5th Appellant. To 1st and 2nd Appellants the Respondent did not acquire the land from the legitimate head and representative of the Arden Darpoh family and the principal elders but from persons who had no right to alienate Arden Darpoh family land.

It was further the case of the 1st and 2nd Appellants that they have also granted subleases to third parties who have constructed buildings and are living in them. And that the persons who purported to have sold the land to Respondent were one Lizzy, Bombay and Mustapha who managed to procure the signature of Nene Kweku Darpoh I, chief of Dawhenya, to sign the indenture they prepared. These Appellants were emphatic that Dawhenya lands being family lands, the chief of Dawhenya had no capacity to have alienated same to the Respondents. And any such grant by the chief of Dawhenya could not have conferred any title on the Respondent.

5th Defendant's Case

5th Appellant met the claim of the Respondent with a counter claim of his own wherein he sought for declaration that any registration or purported registration of the disputed land in the name of the Respondent is null and void and an order directed at the Land Title Registry to expunge any record of registration in respect the res litiga. 5th Appellant asseverated that he was the head of family of Arden Darpoh family for which the sister of Respondent and one Mustapha, Lizzy and Bombay came to see him and his principal elders for the land. That the Respondent failed to complete or acquire the land from the family through him. Further, that the three persons managed to secure the signature of Nene Kweku Darpoh I, who signed without due diligence and maintained that Dawhenya lands are by customary law since time immemorial family lands but not stool lands, and by that reason, ipso facto, the chief of Dawhenya had no capacity to have alienated any family land

to the Respondent. That being the legitimate head of family of Arden Darpoh family, the 1st and 2nd Appellants have lawfully acquired the land from him and his principal elders.

After a trial in which five witnesses including the attorney for the Respondent testified, 2nd Appellant also testified and called Joseph Quainor to testify on his behalf. 5th Appellant who had asserted in the pleadings was the head of family of Arden Darpoh family also testified and called four witnesses to testify on his behalf. The trial concluded with the evidence of the court's appointed surveyor, William Korley Schal. In a judgment of the trial court, it decreed title in the Respondent by granting virtually all the reliefs Respondent sought.

Infuriated by the decision of the trial court, Appellants have stated a number of grounds of appeal in their amended notice of appeal filed on the 20th of December, 2021. The grounds are as follows:

a. The judgment is against the weight of evidence.
b. The learned trial Judge erred in law in holding that the witness statements of the Plaintiff's attorney and witnesses having defects in the drafting of the statement of truth would not be fatal to their case and the defect ought to have been raised at the case management conference, thereby occasioning a grave miscarriage of justice.

Particulars

i. That Rule 3C of Order 38 of C.I. 87 captioned "statement of truth" states that "a witness statement shall be verified by a statement of truth.

ii. What is purporting to be the "statement of truth" on witness statements of the Plaintiff's attorney and witnesses does not amount to a statement of truth, thus rendering same as without a statement of truth.

iii. That a witness statement without a statement of truth is defective, invalid

and null and void, and once a nullity, it can be raised at any time and even in the addresses but not only at the case management conference.

C. The Court erred by not adequately or duly considering the Defendants case and thus failed to consider the 5th Defendant's counterclaim and to pronounce or rule on the reliefs in the counterclaim.

D. The Court erred in holding that the 5th Defendant traces his lineage through his matrilineal lineage and cannot therefore rightfully head the Arden Darpoh family of Marmah Kanor Wiem.

E. The learned trial judge erred in law by giving judgment in favour of the Plaintiff when the original writ of summons and statement of claim filed by the Plaintiff on 19-11-12 was nullity.

Particulars

i. That the original writ that initiated the action filed on 19-11-12 was against "The Trespassers" as Defendants, who are non-existent persons or who did not exist as juristic entities and thus rendering the original writ of summons and statement of claim a nullity.

ii. That all subsequent amendments taken on the writ and the Plaintiff's claim cannot stand.

F. The learned trial judge erred in law by giving judgment against the 1st and 2nd Defendants who are not proper parties before the court.

Particulars

i. That the amended writ of summons and statement of claim filed on 23-1-13

by the Plaintiff to suo motu join the 1st and 2nd Defendants without any application for joinder under Order 4 Rule 5 of C.I. 47, is null and void and 1st and 2nd Defendants are not proper parties before the court.

ii. That the right to join a party to a suit after the writ is issued is preserve of the court and a party cannot arrogate to itself that right and join a party without an order of the court.

RESOLUTION OF THE GROUNDS OF APPEAL

Appellants have raised a mixture of technical and substantive grounds of appeal. It is my view that grounds (b), (e) and (f) are purely technical grounds of appeal that has nothing to do with the merits of the appeal. If an appraisal of those grounds are found to be meritorious, there would be no need to even evaluate the other three grounds of appeal as the chips may be allowed to fall where they may. I deem it necessary that I take the above three grounds of appeal raising technical grounds, graditem ad seriatim, before the other grounds of appeal that bothers on the substance of the appeal, if it becomes necessary that I should delve into the grounds that deal with substance.

GROUNDS (E) AND (F)

Not intending to deal with the grounds of appeal in the order in which they appear to have been stated by the Appellants, as I deem the raising of the grounds of appeal in grounds (e) and (f) to be so fundamental, it is necessary that they should be tackled first. For the ground (e) asserts the nullity of the writ upon which the judgment has been founded. This according to counsel for the Appellants is due to the fact that the writ originally issued on the 19th of November, 2012 was against "Trespassers", who are non-existent entities and such egregiously bad process could not have been cured by any subsequent amendment effected without leave of the court. And in that sense the 1st and 2nd Appellants could not be said to be proper persons whom judgment could lawfully have been taken against them. Arguing this ground of appeal in his written submission, it has been the contention of the counsel for Appellants that the original writ was against "Trespassers" and it was only when 1st and 2nd appellants entered conditional appearance challenging their description that the

writ was amended suo moto to replace the "Trespassers" as defendants. It is the submission of Appellants that in as much as the original writ that initiated the action was against "Trespassers" as defendants who are non-existent as juristic entities, the writ was rendered void and could not have been cured by an amendment founded on a nullity. To Appellants, the writ was against a non-juristic entities and no amendment could have saved such hopelessly irredeemable bad process. Counsel relies on a number of authorities including **Nii Kpobi Tsuru (sub by Nii Obodai IV v Agric Cattle & Others**, Suit No J4/15/2019 an unreported judgment delivered on the 18th of March, 2020; **Mosi v Begyina (1963) 1 GLR 337**; **Ofori v Star Assurance Co Ltd (2015-2016) 1 SCGLR 339**; **Noas Holding v Ghana Commercial Bank (2005-2006) SCGLR 407**.

As the Appellants have raised a germane issue of capacity of the persons that were dragged to court, even though same was not raised at the court below, we cannot gloss over it but must address it before any examination of the merits of the suit can be delved into. Marful Sau JSC reiterated this principle in the **Nii Kpobi Tsuru** case supra when he noted that:

> "The law is trite that capacity is a fundamental and crucial matter that affects the very root of a suit and for that matter, it can be raised at any time even after judgment on appeal. The issue is so fundamental that when it is raised at an early stage of the proceedings a court mindful of doing justice ought to determine that issue before further proceedings are taken to determine the merits of the case".

The March, 2020 decision of the Supreme Court in **Nii Kpobi Tsuru** must be placed in its proper context. The writ was issued on 16th May, 2008 with La Traditional Council as Plaintiff. The writ was amended and La Divisional Council replaced La Traditional Council as Plaintiff. There was a later amendment that replaced the La Divisional Council with Nii Kpobi Tsuru for the La Stool as plaintiff. It was in that respect that the appellants before the Supreme Court raised a preliminary issue for the first time that the La Traditional Council that issued the writ was not a legal personality and unknown to the law and could not have commenced an action and any subsequent amendment was a nullity. From the

nature of the Nii Kpobi Tsuru case when the issue of the capacity of the La Traditional Council was raised for the first time, the plaintiff in that case completely avoided the challenge by suo moto amending the writ to substitute itself with La Divisional Council, by tacitly conceding that the wrong and a non-existent entity had come to the court not clothed with capacity. La Traditional Council should have discontinued the action and commenced an action in the name of the juristic entity with the requisite capacity. Is that the same in this case that Appellants thinks is on all fours with their case?

I do not think so. At page 6 of the record of appeal, the Notice of Entry of Conditional Appearance of 1st and 2nd Appellants stated as follows:

> "TAKE NOTICE that Comfort Bamfo and Samuel Bamfo whom (sic) have been wrongly described as Trespassers in the above suit have on this 23rd day of November, 2012 entered conditional appearance to the suit through their lawyer Prosper Xorla Nyahe Esq…"

Based on this conditional appearance, the Respondent amended the writ to reflect the names of these two who complained that they were not "Trespassers" by revealing their real identities, if those names were hitherto unknown to the Respondent. And with that the necessary motion that ought to have followed within two weeks after the conditional appearance never saw the light of day as the Appellants appeared to have been satisfied that the right thing had been done by the Respondents. From the tenor of their own words, a party having been wrongly described, it should be noted, is not the same as a party bereft of juristic personality or a party lacking the requisite capacity to have been dragged to court. The existence of a party as a juristic person even if wrongly described is not and cannot be tantamount to the party wrongly described as non-existent as Appellants seeks to urge the court. The 1st and 2nd Appellants originally unknown to Respondents and being exasperated that his land had been encroached upon with development taking place incognito and devising an ingenious way to sue such persons who were acting under cover of darkness when such persons shows up by giving their true identity, would not require that the action be discontinued for a fresh suit to be filed. In my view, the attempt by

Appellants to place its case within the peculiar circumstances of the case of Nii Kpobi Tsuru and others cannot hold water as they are dissimilar.

I reckon Appellants even though did not state it in their written submission but appear to rely on cases such as **Borlabi v Mahama [2008-2009] 2 GLR 400** where the court ruled that an action against a "Trespasser" cannot be maintained. Even if it had not been the peculiar circumstances of this case as explained supra, the Appellants would still not be entitled to record a technical knockout win over the Respondent on the claim of the writ having been issued against a non-juristic entity. Why? One may now refer to section 12(4) of the Land Act, 2020, Act 1036 that states that a person with interest in land may take an application for an interlocutory injunction against a "Trespasser" on a land even though the name of the "Trespasser" is unknown. It is trite that such an action for interlocutory injunction in land matters cannot be maintained unless there is a writ that forms the basis of such interlocutory application to invoke the jurisdiction of the High Court. It is true that Acts of Parliament are prospective in its application but not retrospective and one cannot apply the provisions of the Land Act, 2020, Act 1036 that post-dated the institution of the action in this case. This is based on the constitutional principle and rule against retroactivity of legislation under article 107(b) of the Constitution.

But that is not so in this case. For even though section 12(4) of Act 1036 is embodied in substantive legislation but that provision mainly deals with matters of procedure. And it is the rule that no one has an inherent right in procedure and indeed procedural rules as well as rules of evidence and declaratory Acts are part of the few exceptions to the rule against retroactivity of legislation. In that sense as section 12(4) of Act 1036 spells out procedure against a "Trespasser" and given the point that procedural rules may be applicable in a retroactivity manner, this becomes another point besides the distinction I have drawn between the **Nii Kpobi Tsuru** case and this one, for the dismissal of this preliminary legal objection. And more so when a closer examination of article 107(b) of the Constitution is taken, retroactive effect of legislations appear only to be confined to laws promulgated that adversely affect the personal rights and liberties of a person or impose burden, obligation or liability. Section 12(4) of Act 1036 does not adversely affect personal rights and liberties

neither does it impose liabilities or obligations. It rather enhances the scope and operations of the enforcement of these personal liberties with respect to protection of one's right to property ownership. The issue of non-existent juristic entity being pushed, accordingly, fails and I dismiss same.

On ground (f) it has been contended that judgment was delivered by the trial court against persons who were not proper parties before the court. Giving particulars to this ground of appeal, Appellants claim that the Respondent on his own amended the writ to add the Appellants when Respondent should have filed a motion for joinder. As counsel correctly quoted the relevant rule under Order 4 rule 5(2)(a) (b) of the High Court (Civil Procedure) Rules, 2004, C.I. 47 on joinder and which said rule states as follows:

"(2) At any stage of proceedings the Court may on such terms as it thinks just either of its own motion or on application

(a) order any person who has been improperly or unnecessarily made a party or who for any reason is no longer a party or a necessary party to cease to be a party;

(b) order any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the proceedings are effectively and completely determined and adjudicated upon to be added as a party.

It is my view that the above rule is inapplicable to the circumstances of this case as the facts of this case did not require an application for joinder to necessitate a thesis by the Appellants' counsel on the need for the court to ensure compliance with the rules of court. As it is hackneyed in our local parlance that "a proverb knows its owner", Appellants per their own conditional appearance entered claimed that the description of them as "Trespassers" was wrong. That they had not trespassed for them to have been so described and gave their correct names. In that scenario, the persons that admit to have wrongly been described needed not to have been joined to the suit but a call for an amendment under Order 16 Rule 1 of the rules of the High Court to correctly reflect their names was in order. For indeed the Rule 1 of Order 16, C. I. 47 allows for the writ to be

amended once without leave of the court by a plaintiff. By their notice of appearance, where there was an admission that they had wrongly been described, is binding on the Appellants and they could not seek to tacitly amend that conditional appearance as such a notice of appearance cannot be amended without leave under Rule 2 of Order 16. The amendment effected was the proper procedure and a call on the court to declare the action a nullity is misplaced. I dismiss ground (f) of the ground of appeal.

GROUND (b) OF THE GROUNDS OF APPEAL

The third in the trilogy of the preliminary legal points of law contained in the grounds of appeal hinges on the fact that the witness statement of the attorney of the Respondent contained defect in the drafting of the statement of truth and same could not have passed as statement of truth. To appellants, there was a defect to the extent that the "Statement of Truth" captured in the witness statements of Respondent's witnesses failed to state the phrase "true to the best of my knowledge" and same not captured rendered it a nullity. For Appellants believe they have the right to raise it anytime, but not only limited to the case management stage. To Appellant by the rules of court, a statement of truth ought to be verified by affidavit and same is missing in all the witness statements of the Appellant witnesses. To think that witness statement of witnesses ought to be rejected or expunged by a court not because it did not have the statement of truth but more shockingly that the said statements of truth did not contain the magic phrase "true to the best of my knowledge", as counsel for Appellant is urging us is nothing but a vain attempt to make fetish of words and build fortresses out of words. There is nothing in the witness statements that makes it a nullity.

All the witnesses who gave the witness statements took an oath to tell the truth and they all admitted their witness statements to be their evidence in chief in the witness box. Having taken an oath to be truthful on pain of perjury consistent with the Oaths Act, 1972, NRCD 6, and having acclaimed the witness statements as truthful in the witness box, wherein lies this claim that certain magical words or phrase has not been used and therefore those witness statements and evidence is a nullity? What is being urged on the court is not even closer to an irregularity for the court to invoke its powers under Order 81

of C. I. 47 to cure it. This ground of appeal is nothing but frivolous and totally devoid of any scintilla of merit. I similarly dismiss same just like grounds (e) and (f).

GROUNDS (a)(c) AND (d)

Having dealt with and dismissed all the preliminary grounds of appeal, the stage is set for evaluation of the grounds of appeal that touches on the substance of the appeal. The ground (a) is the omnibus ground of appeal that the judgment was against the weight of evidence. The ground (c) that complains that the trial court did not adequately consider the case of the Appellants and failed to rule on the counter claim of 5th Appellant can be said not to be substantially different from ground (a). Ground (d) that questions a finding of the trial court on lineage of 5th Appellant can also conveniently be dealt with under the umbrage ground (a) that the judgment of the learned trial Judge was against the weight of evidence. The essence of the ground (a) of the appeal under which can be taken grounds (c) and (d) is a task bestowed on us to review the entire evidence on record to determine whether the trial Judge made the right determination by taking into consideration material evidence on record or that she failed to take account of matters that she ought to have adverted her mind to by dealing with irrelevant matters on record. For basically the Appellants are making the argument that on a consideration of the totality of the evidence, there are pieces of evidence applied against the appellants which have been wrongly so applied and there are pieces of evidence on record that ought to have been applied in favour of the Appellants to turn the decision in their favour. See **Ayeh & Akakpo v. Ayaa Idrissu 2010 SCGLR 891 @ 894; Bonney vrs. Bonney (1992-93) 2 GBR 779, SC**

Notwithstanding the tediously wordy submission of counsel for Appellants, from the nature of the pleadings, issues for trial, the witness statements as well as the evidence adduced, the appeal in respect of the grounds (a)(c) and (d) appears to revolve around a limited compass as to who was able to prove the legitimate head of family of the Arden Darpoh family of Dawhenya. This is so because as the trial Judge rightly found in her judgment at page 316 of the volume II of the record of appeal that "all the parties admit that the land in dispute is family land". And indeed this is based on authoritative writings from Pogucki on Dangbe land ownership as well as Jackson Report to the effect that among the Dangbe

people, land belongs to families but not stools. And as it is acclaimed that the rightful person(s) to alienate family land is the head of family and his principal elders, a proof by evidence by any of the parties as to who was the rightful head of family to have led a valid alienation would effectively settle the dispute between the parties. For the principle that has stood the test of time for decades now is that for a valid alienation of family land just as stool land, it must be done with the consent of the head of family and principal members, the same way a stool land could also be alienated by the occupant of the stool with the consent and concurrence of the principal members of the family. See **Adjei v Asantewah & Anor [1961] GLR 629**; Sir Dennis Adjei's work "**Land Law, Practice and Conveyancing in Ghana, 3rd Ed. @ page 50**.

Review of the record shows that there were rival claimants to the headship of the Arden Darpoh family. Whilst Respondent asserted Pw4, Nene Kweku Darpoh I as head of family, 1st and 2nd Appellants claimed 5th Defendant as head of family and indeed the 5th Defendant himself asserted so. So the one that the evidence demonstrate as having proven the head of the Arden Darpoh family, should be enough to win the contest. Respondent stated that it acquired the land from the Arden Darpoh family in 2006 in their further amended statement of claim at page 97 of the record of appeal. This was denied by the 1st and 2nd Appellants in their amended statement of defence at page 87 of the record of appeal. They asserted that they also acquired the land from the Arden Darpoh family through its legitimate head, being Eric Mensah Darpoh, the 5th Defendant and that the Respondent failed to acquire the land from the rightful head of family. In fact, the 1st and 2nd Appellants proceeded to further state at paragraph 10 of the amended statement of defence that Nene Kweku Darpoh I was only the chief of Dawhenya and did not have any capacity to alienate family land of Arden Darpoh family. The statement of defence of 5th Defendant solidified his position with the 1st and 2nd Appellants by claiming that he was the legitimate head to alienate Arden Darpoh family land. He emphasized that Dawhenya lands being family land, Nene Kweku Darpoh I had no power to alienate a family land as the lands are not stool lands.

Given how the pleadings were poised, the learned trial Judge was once again spot on when

she found at page 316 of the record of appeal, in her judgment, that what was left for her to determine was the matters regarding the statuses of the respective grantors of the parties. An examination of the evidence at trial should reveal who acquired the land from the rightful head of Arden Darpoh family. The Attorney for the Respondent, Charles Tettega Deku, in his evidence minced no words in stating that he dealt with Nene Kweku Darpoh I as head of family and his principal elders. That the indenture which was tendered as Exh "C" was signed by the said head of family and subsequently registered as Exh "D". For the Respondent, though the strongest evidence on its behalf was provided by Pw4, Nene Kweku Darpoh I, who noted that his position as head of family was not in doubt and his cross examination revealed him as the legitimate head of family. And counsel for Appellants faced with the unimpeachable evidence that Pw4 was the head of Arden Darpoh family, quickly shifted the goal post by stating that the 5th defendant was not the head of family of Arden Darpoh but rather head of Maama Kanoh house. See page 129 of the record. This was the first time that the name of such a house had popped up. If the 5th Defendant was not the head of Arden Darpoh family but the head of a certain house within the Darpoh family, why did the Appellants not state that in their pleadings but stoutly maintained that 5th defendant was the head of Arden darpoh family in all their pleadings?

And beyond this when 2nd Appellant came under cross examination he also maintained that 5th Defendant was the head of Arden Darpoh family but not Nene Kweku Darpoh I. So also under cross examination, Dw1 for the 2nd Appellant, Joseph Quainor admitted at page 177 of the record of appeal, that Nene Kweku Darpoh I was not the head of family. Dw3 for the 5th Defendant, Comfort Meeley Maamah also was emphatic that Nene Kweku Darpoh I, Pw4 was not the head of family but only a chief of Dawhenya. It is in the face of such denials that 5th Defendant in the box made such a startling revelation that he was not the head of family of Arden Darpoh but rather Maamah Kanoh Wiem. Counsel for Respondent correctly hammered this point at page 181 of the Volume II of the record of appeal as follows:

Q: "So your statement in paragraph 4 of your statement of defence filed on the 28th of February, 2018 to the extent that you are the head of family of the Arden Darpoh family is

false, not so?

A: I am not the head of family of Arden Darpoh family. I am the head of family of Maamah Kanor Wiem"

Guided by the principle underscored by Baffoe Bonnie JSC in the case of **Opanin Nantwi Ababio v Pastor Nana Edusei J4/19/2014 dated 14th March, 2018** @page 13 that:

> "In effect the pleadings in a case form the basis of the respective case each party indicates it will establish by relevant evidence at the trial in order to prove a cause of action or to show that the other party does not have a cause of action. That being the case, the evidence led at a trial must have the function or purpose of establishing the case that has been set out in the pleadings. **If the evidence that is led is at variance with the pleadings, it cannot be held that the party has proved the case set out in his pleadings**". [emphasis mine]

Surely the evidence in chief together with the pleadings of the Appellants wherein they had denied all along the headship of Nene Kweku Darpoh I over Arden Darpoh family only for 5th defendant to be cross examined and beat a retreat is nothing but a classic case of the pleadings of the appellants having been at variance with the evidence they led in court. It is in that respect that the trial Judge found that the claim of a headship over a Maamah Kanor Wiem only came up at the later stages of the trial. And on that score the Appellants could not be said to have proved their case. On the contrary, the Respondent who led cogent evidence to show that he acquired the land from Arden Darpoh family through its uncontested head of family, Nene Kweku Darpoh I has clearly proved its case.

It is being contended in this court that 5th defendant is rather the head of a smaller family within the Arden Darpoh family and that it is this Maamah Kanor family that has farmed on the land with the right to alienate same. Evidence even though not pleaded but not objected to is admissible in evidence. For this flow from the principle stated under section 5 of the Evidence Act, 1975, NRCD 323 that where evidence inadmissible on the basis that it

has not been pleaded is not objected to and admitted into evidence, a court is bound to consider same in its judgment. See **Edward Nassar Co Ltd v. McVroom [1996-97] SCLR 468. Scanship (Gh) Ltd v. Effasco Ltd (2001-2002); Kwame Siisi v Prophet J. K. Boateng J4/24/2011 dated 7th May, 2014.**

Nonetheless, in determining a suit as to which of the rival claimants has proved its case before the court, justice to the respective cases of the parties cannot be said to have been done, if a court does not set its eyes on the pleadings, the issues that came out of the pleadings for trial and which of the parties proved and satisfied the court that it has proved by enough evidence to convince the court that the issues arising out of the pleadings ought to be settled in his favour. With this mind, the necessity to embark upon a wild goose chase as to which smaller family within the Arden Darpoh family was entitled to the alienate the land did not arise as an issue for determination at all. Why? Because from the pleadings of all the parties, they were all ad idem that the head of family of Arden Darpoh was the one who was entitled to alienate the family land. It was only when the Appellants saw the intended witness statements of Respondents especially that of Pw4, Nene Kweku Darpoh I that the goal post was shifted by appellants and his witnesses by mentioning a smaller family of Maamah Kanor.

If all along the Appellants knew that it was the head of family of Maamah Kanor Wiem that had the right to alienate that piece of land, how come this material fact was ignored and not pleaded? How come appellants throughout the pleadings claimed that Pw4 was only the chief of Dawhenya and had no capacity to intermeddle in the family land of Arden Darpoh family only for them to take cover when they could not respond to the strong evidence of headship of Pw4 in evidence that he was indeed the true head of family of Arden Darpoh. To swallow the claim of the Appellants that it is a smaller family within Arden Darpoh called Maamah Kanor as the one that was entitled to alienate the land is tantamount to a student in an examination whose preferred questions he studied failed to drop and decides to set his own questions and provide his own answers. Ownership of the res litiga vested in Maamah Kanor was never a question known by the court from the pleadings for an answer to have been provided by the court. It was an expedition that

Appellants alone chose to embark upon.

Matching the pleadings of the parties and taking into consideration the issues for which the court was called upon to make a determination, it is my view that this court would be taking its eyes off the ball of the germane issues, if it allowed itself to be dragged into niceties of which family within Arden Darpoh could make an alienation, when same had never and was not an issue before the court. Again, an umbrage under the cover of cases like **Atto v Amissah (1970) CC 73** may not be applicable. That case dealt with self-acquired property versus family property and as to who had the right of alienation of self-acquired property. What is stake before us is a family property of Arden Darpoh but not a self-acquired property. Even though members of the family who had been given specific land could alienate with the consent and concurrence of the head of family and principal elders but it ought to be seen that such a property cannot be deemed as self-acquired. For if it was self-acquired, then in the first place consent of head of family would not even be needed for its alienation.

IS 5TH DEFENDANT DESCENDED THROUGH THE MATRILINEAL LINE TO THE ARDEN DARPOH FAMILY?

The further findings of the learned trial Judge at page 318 of Volume II of the record of appeal has also come under a barrage of attack. That finding was to the effect that Dw1 and Dw2 for 5th Defendant undermined, though unwittingly, the case of 5th Defendant by asserting that the 5th Defendant is a member of the family through his matrilineal line. Was that finding borne out of the record? Dawhenya people belong to the Dangbe ethnic group and membership of the family is traced through the male line but not female. And if the evidence bears witness that it is the mother of 5th Defendant who is a member of the Arden Darpoh family, then he cannot be a member of that family let alone stake any claim to be the headship of that family.

Dw1, Comfort Korkor Kao, who claimed to have testified for 5th Defendant and asserted herself as a member of the Arden Darpoh family stated in her witness statement that 5th Defendant was her nephew as 5th Defendant's mother was her sister. See paragraphs 2 and

3 of the witness statement at page 260 of Volume I of the record of appeal. If Dw1 was a member of the family and this was not contested and 5th defendant was her sister's son, then obviously 5th defendant traces his lineage to Arden Darpoh through his mother but not father. Also in the witness statement of Comfort Meeley Marmah she also claimed that 5th defendant is the son of her auntie and they are first cousins. This witness being a member of the Arden Darpoh family and having an auntie who is the mother of 5th defendant confirms 5th defendant as descended from the Arden Darpoh family matrilineal. Counsel for Appellants instead of dealing with these pieces of evidence from page 65 of his logorrhea submission, chose to completely ignore these evidence from his own witnesses.

If by the word "family" within the context of our Ghanaian society has been defined in the case of **Oppong Kofi v Awulae Attibrukusu III [2011] SCGLR 176** to mean "members who hail from the same family root" and who is a member of a family has beautifully been set out in the unreported High Court decision of Anthony Yeboah J (as he then was) in **Agyekum v Salormey Suit No BFA 47/2014** that:

> "children of the male members of matrilineal families do not belong to their fathers' families, children of female members of patrilineal families do not belong to their mothers' families. It follows obviously that children of female members of matrilineal families belongs to their mothers' families and children of male members of patrilineal families belongs to their fathers' families …"

With the evidence on record from 5th Defendant's own witnesses and with the benefit of hindsight of the authorities on who belongs to either a patrilineal or matrilineal family in Ghana, and with the people of Dawhenya being Dangbe people and patrilineal for that matter, if it is true that 5th defendant descended from Arden Darpoh family through his mother then he may not be a member of the family. I must admit that there is a contrary evidence though that 5th defendant is a member for the Arden Darpoh family. But this evidence was elicited not through the Appellants but rather came from Pw4 in his letter he authored as Exh "ED 3". In that document found at page 255 of Volume 1 of record of appeal, Pw4 writes that 5th defendant together with Alex Anang Darpoh and Martey Kojo

are all brothers from one family being Numo Abatsor Darpoh and Numo Marmah Kanor family. In the face of such seemingly conflicting evidence where 5th defendant's own witnesses claim that 5th defendant was descended from his mother's line in the family whilst Pw4 assert that Numo Abartsor is the father of 5th defendant and that would make 5th defendant a member of the family, which evidence is more credible? I am tempted to have reliance on the evidence of Pw4 more than 5th defendant's own witnesses. This is because Pw4 has been found out from the evidence to be the head of the family and his evidence carries more weight than Dw1 and Dw4 for 5th defendant. And indeed it is not strange for 5th defendant to trace his lineage on both patrilineal and matrilineal lines to the same family and in that sense the testimonies of 5th Defendant's own witnesses may not have given the full picture. The finding of the trial Judge that 5th defendant was not a member of the Arden Darpoh family could not have been right. Save for this ground which succeeds and may not help the cause of the Appellants much, I find no merit in this appeal.

It has also been urged on us that Appellants have constructed structures and are living on them on portions of the land, as to say if one builds on a land that is not his own, a court was precluded from decreeing title in the person entitled to same. The seven (7) acres that Appellants claim to have hurriedly developed would not emotionally compel the court from dispensing justice.

Conclusion

I will affirm the decision of the learned trial Judge save on only one of the reliefs granted by the court below: that is relief (d) that Respondent asked for an order of demolition. A look at Order 43 of the High Court (Civil Procedure) Rules, 2004, C. I. 47 does not make an order of demolition, one of the modes of execution. And an order for demolition is alien to the courts as one of the modes of execution of a judgment under the rules of court. Indeed by a Circular dated the 31st of May, 2021 signed by the Lord Chief Justice on orders for demolition issued by trial courts, it noted as follows:

"The office of the honourable Chief Justice attention has been drawn to a creeping

practice or procedure by some trial courts ordering the demolition of immovable properties either as an independent relief or when granting leave for a writ of possession to enforce judgment for recovery of possession. Enforcement of execution of judgments is regulated by Orders 43, 44 and 45 of the High Court (Civil Procedure) Rules, C. I. 47 of 2004. These rules do not provide for demolition as one of the methods of enforcement of enforcing judgments … Trial Magistrates, Judges/ Justices are requested to comply strictly with the above rules of court and avoid granting orders not sanctioned by the rules of court such as orders of demolition"

This Circular is self-explanatory. It is left for a successful party who has secured, among others, an order of recovery of possession, to have recourse to one of the modes of execution to enforce the judgment obtained. We accordingly set aside the grant of relief (d) by the learned trial Judge.

Save for refusal of relief (d) of the endorsement on the writ by this court and the finding that the 5th Defendant is descended from the matrilineal line of Arden Darpoh family, the appeal is dismissed as unmeritorious. Cost of Gh¢ 5,000.00 is awarded in favour of the Respondent against the Appellants.

(Sgd)
Eric K. Baffour, Esq.
(Justice of Appeal)

(Sgd)
Barbara F. Ackah-Yensu, JA
(Justice of Appeal)

(Sgd)

Novisi A. Aryene, JA

(Justice of Appeal)

Representations:

E. K. Vordoagu, Esq for Plaintiff/Respondent present

James Enu, Esq. for 1st, 2nd and 5th Defendants/Respondents present