IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA

CORAM: - SENYO DZAMEFE, J.A, (PRESIDING)

MERLEY WOOD, J.A

ERIC BAAH, J.A

Civil Appeal

Suit No: H1/09/20

28th April, 2022

NENE TEI DJAHENE KORABO IV - PLAINTIFF/APPELLANT

VRS.

1. MANKRALO TETTEH LAMIIYOR
2. NENE ADZATEY MLIKITI
3. CHIEF AGBOZA II — DEFENDANTS/RESPONDENTS
4. ASAFOATSE OKOFO BADU IV
5. ASAFOATSE TETE ADIBOR

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JUDGMENT

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DZAMEFE, JA

The plaintiff/appellant, referred to as the plaintiff issued this writ against the defendant/respondents, also referred to as the defendants for the following claims;-

a. Declaration of title to all that piece or parcel of land particularly described at paragraph 3 of the statement of claim.

b. Recovery of possession of the area designated to defendants as cemetery.

c. Perpetual injunction restraining the defendants, their servants, workmen, assigns etc. from burying dead bodies at the site designated for burial near the Jorpa stream.

The plaintiff in his statement of claim averred that he is the head of the Manya Clan of Jorpanya of Shai State and bring this action for himself and on behalf of the Manya Clan of the Shai State.

He described the land in issue at paragraph 3 of his statement of claim thus;-"*Manya clan of Jorpanya are the owners of a large tract of Land situate at Jorpanya (Manya) and is approximately 3020.118 acres or 1222.2 hectares and is bounded in the North by Kordiabe Land measuring 1111.7ft more or less, in the North East measuring 3824.6 feet more or less, in the East measuring 6824.6 feet more or less, in the South East measuring 13275 feet more or less in the South West measuring 4714.4ft more or less*".

Plaintiff averred that the Manya Clan shares common boundaries with Doryumu by the Otchreme stream which flows into the Jorpa River from the Shai Hills, onto the eastern side, covered by the Game and Wild Life Reserves, on the side of the road.

It is his claim that the Manya Clan permitted the defendant and his Lekpeje division to bury their dead at an area demarcated for burial near the Jorpa River which is within the area described above. According to the plaintiff it has become impossible to continue to bury dead bodies there because the Jorpa River, when it overflows its banks erodes the soil as well as decayed bodies into the said river which is also the source of drinking water for the people downstream. Plaintiffs said the Environmental Health Authorities have warned the Manya Clan to desist from further burying dead bodies at the area since the practice was injurious to the health of the community.

The plaintiff avers further that the Lekpedje division of Kordiabe have been warned to stop burying their dead at the said site but they have refused to heed to the numerous warnings and are using force to bury their deceased at the area leading to confrontation and threatens the peace in the area.

Plaintiff said there has been a meeting held at the District Assembly Dodowa in the presence of the District Chief Executive – (DCE) BNI Boss, District Commander, Ghana Police Dodowa & the Mankralo of Kordiabe where the defendants have been advised to stop their activities on the said land but the defendants and his people have been adamant claiming the area to be theirs.

Plaintiff avers that the defendants and their people have other places where they can bury their dead but are refusing to do so and that the defendant as the Head of the Lekpeje division and his people will not stop their act of burying the dead over the Jorpa River unless restrained by the High Court, hence the plaintiffs' claims as per the writ of summons.

The 1st defendant in his statement of defence and counterclaim denied that plaintiff is the head of any clan anywhere in the Shai State nor is he recognized in any leadership position in the Shai State. That the substantive head of the Lekpeje division is not him but one Nene Ode Appeo II, who is the Lekpeje Mantse and the proper person to defend this action.

1st defendant avers that the alleged Manya Clan owns no land within the Lekpeje Division of Mla –Shai. That despite the plaintiffs' several unlawful attempts to trespass onto Lekpeje land he has been resisted strenuously by the Lekpeje people.

The 1st defendant denied paragraphs 5, 6, 7 and 8 of the plaintiffs statement of claim as false saying the people of Lekpeje division have at all times since the 18th Century buried their dead in the cemetery near Jorpanya up to date and continue lawfully to do so. In addition, every year, ancestral rituals are carried out in remembrance of their dead ancestors and to their deity "Mla Ghau" god as well as the Se-Hills (Yokumi).

It is the 1st defendant's case that they planted their deity "Mla Ghau" at Jorpanya sometime around 1896 when they descended from the Shai Hills. The reason for planning their deity behind the Jorpa River was because it was taboo from Mla Ghau god to cross any river. Further, that after planting the deity at Jorpanya they employed a few Manya people to act as "guards" for the deity since most of the Lekpeje people settled across the river to Kordiabe and beyond.

It is the 1st defendant's case that all the lands including the land being claimed by the plaintiff as described in paragraph 3 of his statement of claim falls within the land belonging to the Lekpeje people of the Lekpeje division of Mla Ghau of Kordiabe. This land he said stretches from Hiowe Doryumu to the South running to Osudoku bordered by the Osudoku people by the Abotia hill, to the North East and stretching further to the Lorlorvo Hills to the East, on the North by the Akorle Dor stream running to the North

West by the Akwapim Hills and covering an approximate area of 35,000 acres more or less.

The 1st defendant said it is never true anybody including the DCE and all those the plaintiff mentioned as restraining the Lekpeje people from burying their dead.

The 1st defendant counterclaimed for the following;-

a. Declaration of title to all that piece of land particularly described in paragraph 10 of defendant's statements of defence hereof as belonging to the Lekpedje Division of Mla-Shai.

b. A further declaration that the cemetery located near Jorpanya is the ancestral burial place of the Lekpedje Division of Mla-Shai and forms part of the larger parcel.

REPLY

The plaintiff in reply to the 1st defendant's defence and counterclaim averred he is a gazetted Chief of Manya Clan of Shai State. He was enstooled on 1st October 1998 and gazetted as a chief of Manya clan of Shai State on 2nd November 2004 – **[page 11 of ROA].** He denied the 1st defendants claim that one Nene Ode Appeo is the chief of Lekpeje and the rightful person to sue or defend this suit saying that man is not a gazzetted chief and therefore cannot defend the present action. That for health reasons the people of Manya had stopped burying their dead in the cemetery in issue and had always resisted the defendants from burying the dead at the said cemetery.

Plaintiff denied any deity called "Mla Ghau" planted near the Jorpa River but rather their deity called "Nadu". The shrine near Jorpa River is called Nadu shrine because Nadu does not cross rivers. Plaintiff denied all the claims by the 1st defendant in his counterclaim.

Additional Issues – The 1st defendant filed the following additional issues;-

1. Whether or not the people of the Lekpedje Clan Division of Mla, Shai are owners of a large parcel of land from Hiowe Doryumu to the South running to Osudoku to the order of Abotia Hills, to the North East and stretching to the Lorlorvo Hills to the East and to the North by the Akorle Dor Stream and to the North west by the Akwapim Hills covering an approximate area of 35,000 Acre.

2. Whether or not the Lekpedje Division of Mla Shai have since the 18th century buried their dead in their cemetery at Jorpanya.

3. Whether or not the Lekpedje Division of Mla Shai have since the 18th century buried their dead in their cemetery at Jorpanya.

4. Whether or not the land at Jorpanya of which the cemetery is a part forms part of the Lekpedje Lands.

5. Whether or not the Manya people have any claim to the Jorpanya lands including the ancestral cemetery of the Lekpedje Division of Mla Shai.

In course of the trial, the 1st defendant passed on and was substituted by Odeopeo Martey Kodje Ahwa IV as granted by the court presided over by Justice Nana Gyamera Tawiah

of blessed memory - **[page 37 ROA].** The substitute said he is the commercial head of all the 7 clans in the Lekpedje Division of Shai – **[page 35 ROA].**

In the plaintiffs testimony to the court he tendered the gazette notification of him being the Chief of Manya which was admitted into evidence without objection and marked as exhibit 'A' – **[page 19 ROA].**

He testified to the effect that the land he described in paragraph 3 of his statement claim belong to the people of Manya. He said they share common boundaries in the North with Kordiabe, the Jorpanya River. From South they share boundaries with Doryemo, the Otchreme stream. From the East with Game and Wildlife and from the West, with Doryumu – **[page 19 ROA]**

Plaintiff also tendered his site plan covering the land he is claiming and was admitted into evidence without objection as exhibit 'B'. He said because of health reasons the people of Manya have stopped burying at the old cemetery and now have a new cemetery but the defendants still came to bury their dead at the old cemetery. He said this act of the defendants always create arguments and conflicts between them and so urged the court to intercede. These conflicts led to a meeting between both parties and the District Assembly before the DCE where they were all stopped from burying in the old cemetery. He said despite this intervention, the defendants still bury their dead there. He tendered the minutes of that meeting with the DCE and was admitted into evidence without objection as exhibit 'C'.

In cross examination the plaintiff denied counsel's suggestion that the defendants challenged him several times about ownership of the lands in issue. Also that the cemetery in issue belong to the Manya people but the Lekpedje people also bury their dead there. That the previous year they attempted it and they stopped them.

The plaintiff said he performs annual rituals on the land as the Chief of Manya and he invites the 1st defendant to attend which he honours and there are photographs of him to show. He also told the court Manya is a clan with seven families and named the various heads. He said Manya is part of Dodowa and he celebrates his festival in Dodowa, Jorpanya and Manya. The plaintiff said it is never true, the chief of Yokuyono Nene Narh Pedi Wayo ever confronted him on land belonging to the Lekpedje.

On the 4th June 2009, Nene Adzatey Mlikiti, Chief Agbozo II, Asaoatse Okofo Badu IV and Asafoatse Tee Adibor, all of Doryumu, filed a motion on notice for joinder to the suit. In their affidavit in support of their application they averred that the land the subject matter of the instant suit belongs to their great grandfathers and therefore must be joined to protect the interest of their people. They averred that the part of the lands described by both plaintiff and defendant belongs to them, the Lanimo Stool.

That they will submit both historical and documentary evidence to show that the land being claimed does not belong to both parties to this suit but rather the applicants. They prayed they be joined to allow them proof their title and interest in the land the subject matter of the dispute and also to avoid a multiplicity of suits [**page 45-46 ROA]**. The application was granted by Her ladyship Elizabeth Ankomah (Mrs) on 16th November, 2009 and ordered all processes so far filed be served on the applicant. By that the title was amended to read;-

NENE TEI DJAHENE KORABO IV - PLAINTIFFS
Suing as the Head of Manya clan
of Jorpanya of Shai state

VRS

1. **ODEOPEO MARTEY KODJOE AHWA IV - 1ST DEFENDANT**

Unnumbered House, Kordiabe, Mla Shai

2. **NENE ADZATEY MLIKITI – 2ND DEFENDANT**
3. **CHIEF AGBOZO II – 3RD DEFENDANT**
4. **ASAFOATSE OKOFO BADU IV - 4TH DEFENDANT**
5. **ASAFOATSE TETE ADIBOR - 5TH DEFENDANT**

(All of Doryumu)

Plaintiff in course of the trial filed a motion on notice for interlocutory Injunction restraining the defendants from burying the deceased 1st defendant in the cemetery in issue in the suit. In his affidavit in support he averred that the Environmental Health Authority had warned the Manya clan to desist from further burials at the cemetery in dispute since the practice in injurious to the health of the community along the Jorpe River downstream. – [**page 49-50 ROA]**

The defendants opposed the application saying they have no plans of burying the 1st defendant there and even if at all it is their Royal Cemetery and the plaintiff without any authorization from any state institution cannot stop them from burying there.

The trial judge her ladyship Avril Anin Yeboah (as she then was) ordered the plaintiff/applicant to supply the court with documentary evidence that the Environmental Health Authority has warned against burying dead bodies at the cemetery – **[page 77 ROA]**

The judge ruled *"I am satisfied that the present application should be refused"* dated 24th March, 2010 – **[page 79 of ROA]**

The plaintiff dissatisfied with this ruling filed a motion for stay of Execution and Review under Order 42 of C.I.47 dated 21st March 2010 – **[page 80 ROA].**

In his affidavit in support he averred he could not supply the court with the Environmental Health Authority report because it was then not made available to him. Based on that the application was disallowed. He pleaded that the said report had been made available to him by the Dangbe West District Assembly which he annexed as exhibit "NKI" to his affidavit. He prayed that was sufficient ground for review of the court's ruling and stay of execution of its decision of 24th March 2010 – **[page 81-84 ROA]**

The court ruled on 7th June 2010 dismissing the motion saying that exhibit "NKI" came from the wrong authority – **[page 94 ROA]**

On 24th March 2011, the court granted the 1st defendant leave to amend his statement of defence and counterclaim – **[page 110-118 ROA]** 2-5th defendant as well amended their defence **[page 123 -4 ROA].**

The plaintiff was recalled for further examination after the court granted the amendments and he said Kordiabe Township (Lekpedje) came to existence in 1924, Doryumu was found in 1908 and Manya Jorpanya came into existence in 1890, so they were first on the land. Again he said his predecessor Korabo Kuma II who led the Manya from the Shai Hills was gazetted in 1890 at Manya Jorpanya – **[page 139 ROA]**. He said in 1890 Korabo Kumah II was installed as the Manya Chief and after 45 years he died and succeeded by Aboanor Susumianu, after him Tei Kisser Korabo III was installed. He plaintiff was installed 14 years ago after Korabo the III. So he plaintiff is the 4th Chief of the Manya people after descending from the Shai Hills - **[page 139 ROA].**

The plaintiff denied the burial of some listed chiefs form Lekpedje at the cemetery in issue saying they were all buried in their cemetery in Kordiabe. He said the Shai State has 3 divisions. Hiowe in the North with Doryumu and Dodowa as the main town, then Lekpedje in the middle with Kordiabe and Dodowa as their main towns and in the South is Hiowe with Agomeda and Dodowa as their main towns. The plaintiff's denied

counsel's assertion that their god, Nadu was planted near the Jorpa river for convenience but not that the land belong to Manya people saying 'gods' cannot be placed on somebody else land. They are planted on their own land. He said further that on their descent from the Shai Hills they settled with their god Nadu at where they are now while the Lekpedje in descending went further to Apatse and Ologotsowe, while the Hiowe people went to Adomanya. The Manya's stayed where they are now since the descent. The plaintiff explained that chiefs from different areas come together to form divisions and so divisions do not own lands, it is families that own lands.

Nene Tetteh Sasor V, a clan Chief of Lekpedje testifies who testifies as a witness for the plaintiff in his testimony said he knows the plaintiff as the Chief of Manya Jorpanya. He knows the 1st defendant, also 2nd defendant but not as a chief, 3rd defendant he knows but not 4th defendant.

He said the people of Manya Jorpanya were the first group of the Shai's to descend from the Shai Hills with their shrine Nadu. He said they descended in 1890. On their descent because Nadu does not cross rivers, it was planted near the Jorpa as their priest directed.

He told that court after the Manya's descended from the Hills in 1890, they the Lekpedje were still on the hills till 1892 when they also descended and some of them went to Agomeda and some to Apese. They (Lekpedje) were facing water problems at Agomeda so in 1924 they had to come back to Kordiabe. The Kordiabe Township was established by Nene Ahwa in 1924.

He said "***when we descended the hills and came to Agomeda because we don't have a place to perform our customs we always come to Manya's Jorpanya to perform our customs and tradition like dipo and the rest***" – [page 186 ROA]

He said Nene Ahwa gave land to all divisions in Lekpedje and his division share boundaries with the plaintiff at Jorpa.

Ask in Evidence-in-Chief;-

Q - Now the 1st defendant and the group where you come from are saying that the land the Manya Jorpanya people are occupying is theirs. What have you got to say about that?

A - My lord, if they said the land belongs to them it is not true and even if they should say the one the land belongs to, I will say it belongs to me because I share boundaries with him.

Q - The 1st defendant is also saying that the land extend to the Otchreme stream

A - My lord, it is not true

Q - The 2nd and 5th defendants are also saying that, that land belongs to them. What have you got to say?

A - My lord, it is not true the people of Manya and Doryumu share boundaries with the Otchreme river

Q - So you want to tell the court that the Jorpanya land starts from the Jorpa river and extend to Otchreme river.

A - Yes my lord that is so – **[page 186-7 ROA]**

In answer to a question from counsel for the 2nd to 5th defendants the plaintiff told the court Doryumu came into existence in the your 1908, Kordiabe in 1924 but Jorpanya came into existence in 1890 and so were there before all others came.

The plaintiff said it is not true that Doryumu and Lekpedje share a common boundary with the Otchreme because Manya is between the two streams long before they came. They settled between the two streams because their shrine Nadu does not cross rivers. He added that in the descent from the Shai Hills, Doryumu people took their shrine to Adumanya while Kordiabe took theirs to Olokotsewe Agomeda.

About the grant to the Twin Hills Farms, the plaintiff said it was not granted by the Doryumu people but the Shai Traditional Council that granted it to them and his predecessor also signed the grant at the Traditional Council level as a witness – **[page 199 ROA]**. Plaintiff said the grant expired and they the Manya's took the land back. The grantee pleaded to re-new but they have refused to do so.

The plaintiff told the court the Jorpanya lands belong to the Manya's to everybody's knowledge and and that every year they celebrate their annual festival there and also perform their customary rites there to the knowledge of everybody. That he as chief has celebrated his festival annually for the past 15 years.

Eric Agyene Nageh aged 82 years testified for the plaintiff and said he is an elder at Manya Jorpanya and that the plaintiff is their chief. The witness repeated in every material the evidence of the plaintiff as to the settlement history of the Manya's and their deity Nadu – **[page 217 ROA]**. He said it was his father Nene Korabo II who led the Manya's from the Shai Hills to their present settlement in 1892. Meanwhile the deity "Nadu" was earlier planted in 1890 before the final descent in 1892. He said it is not true the Lekpedje people say the Otchreme stream is the boundary between them and the people of Doryumu because before you go to Otchreme steam you have to cross the Jorpa

river. That they share common boundary with the people of Doryumu but not Lekpedje people – **[page 218 ROA].**

He denied defence counsel's suggestion that the cemetery in issue belongs to the Lekpedje people and that is where they bury their royals saying even Nene Ghartey Ahwoa was not buried there but in his house. That his father Nene Karbo II was buried in Jorpanya and not Dodowa as counsel is suggesting.

About their annual festival which is celebrated in Manya, the witness said it has been there even before the plaintiff was enstooled and that it is never true anybody protested against the celebration. He dared counsel to prove same – [page 235 ROA]

A Fulani man Ibrahim Suba testified for the plaintiffs that his parents came to settle in Manya in 1960 and were given land by plaintiffs to farm and rear animals and they have been there till date. That they pay royalty of a cow each year during the celebration of their festival – **[page 251]**. He also mentioned some other people who took lands from the plaintiffs, for example Kwei Nungua, Gbevo Wamano at Nungua and an Ewe man. That since 1960, nobody ever challenged then about their stay there – **[page 251 ROA].** He said he was born at Manya. The father died three (3) years ago and he continued living there, farming, rearing cattle and still paying royalty to the plaintiffs to date.

Defendants Case

<u>Defendants Attorney (Page 257 ROA)</u>

The attorney said he knows the plaintiff was a 'war head' or Asafoatse but not as a chief. That plaintiff is from Manya. He said the cemetery in issue is for the Lekpedje people, it is called 'Mamprobi', where their chiefs are buried. That was the place Nartey Obia was buried. The witness said he knows the other defendants and share boundaries with them. They are from the Hiome Clan – **[page 266 ROA]**. He said while on the Hills, the Hueim

and the Manya people were on the Kro, towards the Krobo area. The witness testified that after the installation of the plaintiff, he came to him to show him the boundaries of Hwiewa and Heium – **[page 267 ROA].** So he and one Padinawuyo took him to Lolovor and showed him the boundaries. The witness admit in his evidence-in-chief that the Nadu shrine is located at Manya Joapanya but the land is for Lekpedje.

Asked by his lead counsel, how the shrine came to be located there, he said;-

> "*My lord the Nadu priest's mother comes from Lekpedje and Manya people descended from the hills leaving the Nadu priest. When the people of Lekpedje were descending down the hills because the Nadu priest is their partner they came together with him with the Nadu clan or gate. The name of the Priest's mother is Naki Adorsaa and her brother is Nattey Obia and so when they descended they descended together with the people of Lekpedie and the brother*".

Asked:-

Q - So where did the Lekpedje people stop and where did they

stay

A - My lord when the people of Lekpedje descended they went

to settle at Jorpanya because that was where Numo Nartey Obaa was staying.

Q - This Numo Nartey Obaa who was he and what was his

position in Lekpedje division.

A - My lord he is the Asafotse or the war lord of Lekpedje

The Attorney did admit the cemetery in issue is located at Manya Jorpanya – **[page 271 ROA].** He said after the death of the Nartey Obia, the Lekpedje people left where they were to Kordiabe but reserved the cemetery as a Royal cemetery from their chiefs.

In his evidence he denied the plaintiffs claim that the Manya people descended the Shai Hills in 1890 and the "Lekpedje' in 1892. Led by his counsel:-

Q - In the evidence of the plaintiff he says that the Manya

people descended in 1890 before the Lekpedje people descended in 1892. What is your response to that?

A - My lord it is not true.

The attorney then tendered in a Supreme Court judgment dated 1913 to support this claim – exhibit '2'. Based on that exhibit '2', counsel asked him;-

Q - That exhibit '2' traced the leadership of the Lekpedge

people from King Awal I: from the time of the descent

in 1892, you are aware?

A - Yes, my lord what the document says is the truth **[page**

273 ROA]

Counsel led the attorney on the issue of where the plaintiff came from and he said this;-

Q - He (plaintiff) in this court says unlike what exhibit 'A' says

that he is from Dodowa, he says, he is from Manya Jorpanya, what do you say to that.

A - My lord they often come from Dodowa to Manya so he is a

Manya man, the plaintiffs is from Manya because they often come to Dodowa to Manya so he is from Manya.

The attorney did admit that concerning burials in the disputed cemetery the Lekpedje and the Manya's had a meeting as the plaintiff alleged and tendered minutes of that meeting as exhibit 'C'. That was for the burial of one Asafotse Tutuabu. The witness said it is true they met over it – **[page 275 of ROA]**. The witness did admit the plaintiffs have their own land so if he is claiming theirs then he (plaintiff) is a thief. - **[page 276 of ROA].**

In cross examination the witness told the court he is 87 years old and that for all these 87 years the people of Manya had been at their current settlement – **[page 280 ROA]**. He also did admit he knows that the Nadu shrine is located at Manya and was brought there by some people of Manya – **[page 280 ROA]** Asked in cross examination;-

Q - And you know this Nadu shrine has been located at

Manya since 1890

A - That was what they said

Q - Who Said?

A - Our forefathers

Q - But that Kordiabe was founded in 1924

A - I was born in Kordiabe. If you say it was founded in 1924,

that is so – **[page 281 of ROA]**

When confronted in cross examination that a Lekpedje chief testified is the case to the effect that what he the defendant is saying is not true he said his own chief was not

truthful to the court – **[page 282 of ROA].** He did admit the Manya people have their own lands different from theirs. He however went on to say the predecessors of the plaintiff always seek permission from the people of Lekpedje before they make any grants of land to anyone, though it was verbal and not documented – **[page 282 of ROA]**

Cross examination 2nd -5th Defendants

The witness in cross examination denied counsel for the 2nd defendant – 5th defendant's suggestion that the plaintiff's ancestors signed all leases made by the 1st defendants to lessees like Abel Miden Ranch Farms, Twin Hills Farm and to one Lawyer Sylvester Bayeteh, saying that their ancestors and elders have never told them so **– [page 286 ROA]**

Asafotse Tetteh Oteley V, testified as a witness to the 1st defendants. He said he is the Asafotse of Lekpedje and part of the elders in Lekpedje. He said Jorpanya is within Lekpedje – **[page 289 of ROA]**. His narration about the descent from the Shai Hills is that the Lekpedji were led down by one Asafoatse Biantey and the son Nartey Obaa who were hunters, who came to hunt and farm. He again said "King Angua I was the one who descended from the Hill first and then later he led them to descend down the hills. This was done by a gun shot and the name of that gun is Oplem" – **[page 290 of ROA]**

That they descended in 1892. He said it is the Shai Clan that permitted the Manya's to settle at Jorpanya and not the Lekpedje. Also, Jorpanya existed before their descent. He tendered the site plan belonging to the Shai Clan as exhibit '4'. The site plan says their land measures 7,568.37 acres and that the Jorpanya lands (plaintiff's lands) falls within their site plan (exhibit 4) meaning all of the plaintiffs land falls within their lands – **[page 294 of ROA]**. He said they could not register their site plan because at the Land Title Registry they were told the plaintiff has surveyed the same land already. He tendered exhibit '5' & '6' to that effect (Exhibits not found in the ROA).

The defendants tendered pictures of some tombs. Though the pictures shown are tombs they had no inscriptions of the particular cemetery and to this counsel raised on objection, the court overruled same and admitted them into evidence. In fact nothing on those two exhibits (obituary posts) in the record of appeal has any indication as to the cemetery or its location– see [**pages 467 & 468 of ROA]**

The witness testified that the plaintiffs are from Dodowa and have no land in the area in dispute. He denied PW3 (Fulani men's) testimony that the plaintiffs father gave them land to settle, rear animals and farm. He said they share boundaries in the South with the Hiowe people, who are the 2nd to 5th Defendants in the instant suit. That they share boundary on Lekpedje and Otchreme – [**page 299 of ROA]**

In cross examination by counsel for the plaintiff, he told the court there is no place called Manya Jorpanya, they have Jorpanya – [**page 300 of ROA]**

The witness did admit the Manya's brought their (Nadu) diety or shrine to Jorpanya and that is where they perform the dipo custom but they also perform dipo custom at Jorpanya. Yet he denied that Nene Korabo Kuma II brought the Nadu shrine from the Shai Hills to Jorpanya – **[page 300-1 of ROA]**

The witness said in cross examination;-

Q - I put it to you that the Nadu shrine was brought to this land in 1890 at the time nobody was there.

A - My lord that is not true, our ancestors were there – **[page 301 of ROA]**

On the cemetery in issue and where Nene Tetteh Laminor was buried, counsel asked the witness;-

Q - I put it to you that Nene Tetteh Laminor that you claim to have been buried at the cemetery in dispute was in fact buried at Kordiabe and can be seen from the obituary you tendered.

A - I have already told the court that is the place we bury royals and we call the whole place Kordiabe because it is within the Lekpedje land – **[page 304 of ROA]**

He admit Kordiabe was founded in 1924 by Nene Awah I. Asked;-

Q - And so at 1924 the people of Manya were in their Settlement.

A - At that time we were also living at Manya Jorpanya. We lived in Jopanya and that is when we performed our dipo rites. Nene Nartey Osa and Nana Adidi lived there. In 1925 we moved to Kordiabe. The settlement stated however in 1924 and we moved in 1925.

Q - I put it you that before 1924 the Lekpedje were at their ancestral home Ologotsane , Abomanya and Apese and nowhere near Kordiabe.

A - Yes, they lived in those various settlements and some also lived in Jorpanya. So it was after Kordiabe was founded that we all moved to Kordiabe.

Emmanuel Tekpetey Agbeze also testified for the 1st defendant. He lives at Kordiabe and said he is the National Chairman of Ghana National Association for Farmers and

Fishermen. He said the Manya people used to be under the Lekpedje but now under Hiome. He gave a very different stay about the Nadu deity. He said the whole Shai state worshiped one deity called "Mmrakpewu" watched over and protected by one hunter called Kissi. This Kissi brought along with him his own deity called Nadu and so Nadu deity belongs to Nene Kissi. He again said, the owner of Nadu, Kissi died before the decent so one Ogbodjotse Teye brought the deity Nadu down to Jorpanya – **[page 311 of ROA]**

The witness testified that the royal cemetery called 'mamprobi' has been there for over 200 years – **[page 312 of ROA]**. That is where they bury their royals.

Led in his evidence-in-chief by his counsel;-

Q - So the plaintiff in this case you are saying that they are from Lekpedje, is that correct.

A - Yes my lord

Q - And the defendant they said who are they?

A - My lord they defendants are those who Nene Tsetso Ahawa Brought them onto the land, some are from Ada – **[page 315 of ROA]**

The witness admit that Manya people (plaintiff's people) have land. He said *"My lord I am not saying the Manya people do not to have land but where they are is not their land so if they want to form a town for settlement they should see the owners of the land to give them place but they should not claim all the land for a settlement because where they are does not belong the them*– **[page 318 of ROA]**

In cross examination by counsel for the plaintiff, the witness said:-

Q - I put it to you that when they Manya people descended from the Hills there was nobody in the land that they occupied

A - My lord we were performing Dipo rites on the lands so many years before the Shai's descended for the Hills.

Q - The Dipo customs perform by which people

A - My lord it is the Shai's

Q - I am putting it to you that the dipo customs is perform by the people of Manya, it is only them that perform the dipo custom.

A - My lord the Manya people are from Krobo area. The Manya people perform Krobo dipo rite, we the Shai people also perform the Shai dipo rite. So if the plaintiff is now performing a Krobo dipo rite from the Shai land then he is doing the wrong thing.

Q - I am putting it to you that all the people of Shai and they (defendants)come to Manya to perform the dipo rite before the Nadu shrine, I am putting it to you.

A - My lord it is not true.

Q - I put it you that as you speak now the "Mla-Ghau' is at Kordiabe

A - Yes, it is at Kordiabe but not the "Mla Ghau" deity itself. It's the thing that govern it that we brought to Kordiabe. The deity itself is on the Hills – **[page 327 of ROA].**

Q - I put it you that when Lekpedje descended from the hills they did not come anywhere near their present location as you assert but rather went to Apese and Ologotsame.

A - Its true. Where they descended from the hills they all went to the various places you mentioned and some also stayed in Jorpanya. At that time Kordiabe was not formed. It was later in 1924 that it was formed **– [page 328 of ROA]**

One Numo Akasi also testified for the 1st defendant. The plaintiff objected to this because he was always seated in the court room during the trial. Even though this is true the court over ruled the objection and allowed him to testify – **[page 332 of ROA]**

He said he lives at Dodowa Manya and a farmer. He and the plaintiff are from Manya. He said they all descended from the Hills but they the Manya's were servants of the Lekpedje. They are under the Lekpedje and serve them. He said the cemetery in issue is the royal cemetery for the Lekpedje – **[page 334 of ROA]**

He said the plaintiff is not the Asafoatse of Manya nor its head but rather one Bromatesa Korabor IV, living at Suhum Ayokokye. He said further that plaintiff is not a chief, he was never installed as such. He does not even know where the stool is – **[page 336 of ROA]**

Led in his evidence-in-chief;-

Q - So what would you say finally to his claim or.
all his claims that he is the proper custodian of your Clan, and then he celebrate festivals and it is recognize etc. what would you say?

A - My lord I don't know what he is doing at Jorpanya. Me I
don't recognize it or I don't see it as a festival he is celebrating, that is one, and secondly, he is not a Chief which I know because we have a Chief in Manya.

In cross examination he denied counsel for the plaintiff's suggestion that because the plaintiff protested against he and DW2 Tekpetey selling 500 acres of Manya lands to one Kleg Daniels, he is in court to testify against him. He also denied the fact they collected money from the said Kleg but could not deliver the land to him and plaintiff took he and DW2 to the court in Accra specifically, Cocoa Affairs Court 8, and that court asked them to refund the money to Kleg – **[page 338 of ROA]**

In cross examination he was asked who the plaintiff is, he said this;-

Q - Do you know plaintiff in this case has been gazzetted as a
Chief?

A - My lord you can buy it with money so I am telling the court
that he bought it –**[page 339 of ROA].**

He said he does not recognize the plaintiff as a chief so during one of their festivals, the "Magayan" festival, he the witness removed his head gear and he was later dragged to court. Asked further;-

Q - So it means that you bear a personal grudge against the plaintiff

A - My lord, I don't have any personal grudge with him. I do that because he is not a chief and he is calling himself a chief – **[page 340 of ROA]**

Lomo Wahija who also testified for the 1st defendants said he is a former living at Jorpanya. He knows the plaintiff as the Asafoatse. He said one Otenge from the Siasi Lekpedje clan gave land to his grandfather and they have been on that land since.

Abednega Tei @ Tei Numo Nyge also testified for the 1st defendant. He said he is a retired educationist and secretary to the Mla Lekpedje Division of the Shai State. He said Manya is a sub-clan to Hiome Division of the Shai State. That clan is separate from the Lekpedje division which is also another division. He said Wahijya was given land at Jorpanya by the Lekpedje's including the Siasi when they were leaving the place to rear animals and look after the Manya lands. He said the Mla Lekpedjes gave the land the Manya's settled on after the descent out of magnanimity. – **[page 347 of ROA]**

In cross examination he was asked in;-

Q - I put it you when the people of Mla Lekpedje descended they didn't go anywhere near where they Manya people are living now.

A - It's not correct

Q - The Mla Lekpedje people settled at Ologotsame and Abomanya

A - This is not correct – **[page 348 of ROA]**

The witness denied that Nene Tsetse Awar was buried in his home at Kordiabe and said though the obituary poster of Nene Laminor said he was buried at a cemetery in Kordiabe it is not true – **[page 350 of ROA]**

On the 24th February 2015, the court notes indicate *"cross examination of 2nd defendant by counsel for the plaintiff and 2nd defendant reminded of his former oath".* Meanwhile the records do not show 2nd defendants evidence in chief – **[page 352 ROA].**

In cross examination 2nd defendant did admit that when the Doryumu people descended the Hills, they settled at Abumanya Amovape and Apese area. That present Doryumu was established in 1908. Asked in cross examination;-

Q - Jorpanya was established 18 years before Doryormu

A - The year is correct but Jorpanye was not a town. It was a village

Q - Do you say you are the chief of Doryumu

A - Yes

Q - Do you attend Traditional Council Meeting

A - Yes, I go to the Traditional Council as land overseer – **[page 354 of ROA]**

The 2nd defendant admit his enstoolment was challenged and the case went to the court and injunction placed on him which he flouted by granting land and was cited for contempt and jailed for 7 days. He said that the substantive case has not yet been decided.

The plaintiff as well as 1st defendant filed address but I do not see any for the 2nd -5th defendants. May be they did not because they made no counterclaim.

JUDGMENT

The learned trial High Court Judge in her judgment asked a question "The question now is who is the owner of the disputed land at Jorpanya"? The court said both parties have called witnesses from opposing families to corroborate their claims.

The trial judge said "from the evidence on record, and in respect of the Jorpanya land, I am inclined to believe the defendants' assertion is more probable than that of the plaintiff for the following reasons;-

In summary that;-

i. Exhibit 'A' tendered by the plaintiff states that the plaintiff is a senior Asafoatse and also a chief. That they are two distinct positions. Also that plaintiff's town or village is Dodowa while his evidence says he hails from Manya.

ii. That the principle is that to successfully maintain an action for declaration of title to land, the boundaries of the land being claimed must be proved with certainty. A person seeking a declaration of title to land must establish by positive evidence the identity and limits of the land he claims. That in the face of the defendants denial off plaintiffs alleged boundaries, the court expected plaintiff to call any of the other boundary owners. This he failed to do. I therefore find that the plaintiff failed to establish the boundaries of the land his family is claiming title over

iii. That the evidence before the court are conflicting historical evidence and the law is settled that where in a land suit the evidence as to title to the disputed land was traditional and conflicting, the smart guide was to test such evidence in the light of recent acts to see which was preferable.

The court said *"indeed possession is nine points of the law and a plaintiff in possession has a god title against the whole world except one with a better title*". Per my findings of fact, the 1st defendant seems to have a better title, having proved recent acts on the disputed land. In my view 1st defendant and his Lekpedje Division have proved title to the land in dispute on a balance of probabilities. The balance tilts in favour of the defendants.

On issue 7 as to "***whether or not the plaintiff is entitled to his reliefs***" the trial court held "*on the totality of the evidence before me, the Manya clan may have possessory and usser rights over the disputed land but to the recognition of the Lekpedje Divisions ownership of same* –**[page 424-430 of ROA]**

<u>On Issues 4 & 8</u>

Issue 4 - *Whether or not the people of Lekpedje Division of Mla Shai are the owners of a larger parcel of land from the Hiowe Doryumu to the South running to Osudoku bordered by the Osudoku people by the Abotia Hill, to the North – East and stretching further to the Lorlovo Hills to the East on the North by the Akorle Dor stream running to the North West by the Akwapim Hills and covering less or more*.

Issue 8 - *Whether or not the 1st defendant is entitled to his counter-claim.*

On issue "8" especially as to whether the 1st defendant is entitled to his counterclaim, the trial just delivered herself thus; - "*<u>1st defendant seems to have counterclaim (SIC) for a larger tract of the land outside the Jorpanya land, the land in dispute. He however failed to establish his claim over the larger tract of land. In light of the aforesaid, the defendants have failed to prove their claim in part</u>*". (Emphasis mine)

The court continued, *"The plaintiff on whom the burden of persuasion falls have failed to prove his mode of acquisition of the subject matter. Accordingly his claim for a declaration of title fails and is hereby dismissed. From the aforesaid, the 1st defendant succeeds in part on his counterclaim.*

The court declares that the disputed area where the cemetery lies is owned by the Lekpedje Division" – **[page 432 of ROA]**

With all due respect to the learned High court judge even before we go into the grounds for this instant appeal, I wish to state that she got the legal principles she mentioned in the judgment right but the question is if she related those principles correctly to the evidence led and adduced in the trial before her.

Secondly I think the learned trial judge forgot that where in a civil case the defendant counterclaimed, he also assumes the same burden of proof as the plaintiff for his claims. She rightly referred to Section 11(4) of NRCD 323 in her judgment that the burden of producing evidence is discharged when a party produces sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.

The plaintiff dissatisfied with this judgment launched this appeal on the following grounds;-

1. The decision of the court is against the weight of the evidence adduced before the court.

2. The judgment of the court dated the 4th day of January, 2020 is a nullity based on the fact that the 3rd defendant, Chief Agboza II died about three(3) years ago but has not been substituted or strike out of the suit before the court proceedings to deliver the judgment.

3. The leaned trial judge erred in holding that the plaintiff fails to establish the Manya Clan title to the dispute land.

4. The court erred in holding that though the Manya Clan have possessory and user rights over the dispute land; the same is subject to the recognition of the ownership of Lekpedje Division.

5. The court erred in holding that, the defendants have failed to prove their claim in part without indicating the part that the defendant have failed to prove and the one they have proved.

6. The court erred in holding that the plaintiff failed to prove his mode of acquisition of the land, the subject matter in spite of the clear evidence on recodes that the Manya Clan were part of the Shai's who descended from the hill and could not move further because their dirty/god, Nadu, does not cross a river and had to settled at Manya Jorpanya because Okyreme River enters or joins with the Jorpa river.

7. The court erred in holding that the disputed area where the cemetery lies is owned by the Lekpedje division in the absence of proof with certainty the boundaries where the cemetery lies.

8. Additional grounds may be filed when the record of appeal is ready.

GROUND I

The decision of the court is against the weight of the evidence address before the court

SUBMISSION

Counsel for the plaintiff/appellant herein in his submission said this ground of appeal implies that the judgment appealed cannot be supported by the weight of the evidence adduced by the successful party which the trial court either wrongly accepted or the inference drawn or conclusion reached based on the accepted evidence cannot be justified. That the appellate court is therefore being empowered and invited to re-examine the entire record to ascertain whether the trial court's decision is supported by the evidence adduced at the trial or not.

As counsel for the plaintiffs rightly submitted it is incumbent upon the appellate court, in civil matters such as this, to analyze the entire record of appeal, take into consideration the entire testimonies and all the documentary evidence adduced at the trial before arriving at its decision. This is to satisfy the court, that on the preponderance of probabilities, its conclusion is reasonably and amply supported by the evidence. In effect, the appellate court is to ensure that the trial court arrives at its decision after proper evaluation of the evidence adduced at the trial.

Counsel for the plaintiff submits that the trial judge set herself on the right path when she stated at pages 9 and 10 of the judgment, the principle of law regarding the onus of proof of title to land in a civil case such as this that, it is trite that the legal burden of proof will generally lie on a party asserting the affirmative be it a plaintiff or a defendant. The burden of providing evidence as well as the burden of persuasion on providing all facts essential to any claim lies on whoever is making the claim. As in this case, the onus is on the plaintiff to prove his case and this same burden is also on the 1st defendant who has filed a counter-claim. Judicial authorities were cited in the judgment in support of the law which we are perfectly in agreement with.

Having regards to the totality of the evidence before the court, we humbly submit that the court erred in its conclusion at page 21 of the judgment which is in the record of appeal at page 433 that, the plaintiff on whom the burden falls has failed to prove his mode of acquisition of the subject matter. Accordingly, his claim for declaration of title fails and is hereby dismissed. The reasons for our submission are not far-fetched and are below stated.

In the first place, the court at page 3 of the judgment in excerpt stated that *"as to how this large track of land was acquired, the plaintiff testified that their ancestors, the Manya clan thus Jorpanya ancestors, descended from the Shai Hills in 1890 and settled at their present location between the Jorpa river and the Otchreme river with their god or deity called Nadu which does not cross rivers as a result the ancestors of Manya clan had to settled between the Jorpa river and the Otchreme stream*". There was corroborative evidence from the plaintiff witnesses as well as the defendant's evidence on record.

It follows that, the fact that ancestors of the Manya Clan descended from the Shai Hills in 1890 and settled at Manya Jorpanya was not controverted by the defendants in any manner whatsoever. Further, the existence of the Nadu shrine at Jorpanya attesting to the circumstances that led the ancestors of the Manya Clan descending to settle at Jorpanya with their deity, Nadu has not been challenged but corroborated in the defence filed and the evidence given by both parties. That is the Nadu deity does not cross river hence the settlement between the Jorpa and Otchreme rivers since moving further from the Hills would mean the deity crossing rivers have not been challenged or controverted.

Counsel submit further that the law is clear that if a party makes an averment which is not denied, evidence need not be led in proof of that averment. The plaintiff need not prove the descent of Manya clan and settlement with the deity or god, Nadu at Jorpanya on the disputed land. Therefore the only issue segment is whether or not the Manya clan

descended from the Shai Hills or Kobo Hill in 1890 and whether the settlement at Jorpanya with their deity Nadu was with permission or consent of Lekpeje division and based on conditions not to install a chief or bury the dead there. The plaintiff need not prove the descent of Manya clan and settlement with the deity or god, Nadu.

In the case of **Asare vrs Donkor and Serwah II [1962] 2 GLR 176**, the position of the law was amplified that *"where a party makes an averment and that averment is not denied, no issue is joined and no evidence need be led on that averment. Similarly, when a party has given evidence of a material fact and is not cross-examined upon it, he need not call further evidence of that fact. The rationale for this is simply that no one has obligation to prove the obvious or what is not challenged"*. See also the case of **Adjetey Agbosu & 5 Ors vrs. Ebenezer Nikoi Kotey & 2 Others [2006] 2 MLRG III S.C. & Quargraine vrs Adams [1981] GLR 599**.

Counsel submits that the trial court only had to consider whether or not the settlement of the Manya Clan of Jorpanya in 1890 with their deity Nadu was with the permission or consent of the Lekedje division based on conditions not to install a chief or bury the dead by which they were the licensees of the Lekedje Division.

Counsel said the trial court in its analysis on this issue was totally wrong and thereby arrived at an erroneous, and very flawed conclusion unsupported by the evidence that *"the Manya clan have been in possession of the disputed land but long possession by a licensee with provision of allodial owner would not confer ownership"* resulting with a very comprehensive miscarriage of justice.

It is trite learning that in civil cases, the general rule is that the party who asserts or alleges a particular fact essential to the success of his or her case bears or assumes the burden of proof to be discharged on the preponderance of probabilities. This position took its root from a latin maxim: ***ei incubi probation, qui deceit, none quit negate*** thus the proof lies

upon he who asserts or affirms, not upon he who denies as stated by the court below at pages 9 and 10 of the judgment under consideration.

In the case of **Majolagbe vrs Larbi [1959] GLR 190 & Zabrama vrs Segbedzi [1991] GLR 221**, the cumulative holding in the two cases cited above are that where a party's averment is denied by his opponent, he or she has the burden of proof to establish that the averment or assertion is true by leading admissible evidence from which the fact he or she asserts can properly or safely be inferred. It is not enough for the party to mount the witness box to repeat those averments on oath.

It therefore means that the defendants in law specifically by section 12 of the Evidence Act, 195 (NRCD 323) and the decided cases assumed the burden of prove of the observably conspired and schemed assertion contained in their respective amended defences that the settlement of the Manya Clan at Jorpanya in 1890 was with permission or consent of Lekpeje division based on conditions not to install a chief or bury the dead there. That the settlement of the Manya Clan at Jorpanya in 1890 was with permission or consent of Lekpeje division based on conditions not to install a chief or bury the dead in any manner whatsoever.

Counsel states that the defendants woefully failed to proof that the settlement of the Manya Clan of Jorpanya in 1890 was with the permission or consent of Lekepedje division based on those conditions. He said further that the evidence of Nene Tetteh Sasso V, a chief and head of the Magbiem Clan of Lekepedji division (defendants) corroborated the plaintiffs' evidence at the trial High Court. Just as the testimonies of the other witnesses of the plaintiff, there is clear evidence led by the plaintiff on record that the plaintiff has proven that the Manya Clans mode of acquisition of the land at Jorpanya was by settlement of the forebears on the said land with their deity, Nadu to be entitled to declaration of title to the land. These makes the finding of the court below that the

plaintiff on which the burden falls has failed to prove his mode of acquisition of the subject matter as unfounded and unsupported by the evidence on record. The plaintiff's evidence was corroborated by the witnesses some of them, chiefs and heads of clan of the Lekpedji division of Kordiabe (defendants).

Counsel for the respondent in answer to this ground of appeal submits that the principle is that under this ground of appeal, the appellate court at should re-examine the entire record and treat the appeal as a rehearing. Counsel submit that the pleadings and evidence of the plaintiff also admitted that 1st defendant had absolute control of the land on which the cemetery was situate which shows that the Lekpedji division i.e. the 1st respondent have been burrying their royals in the cemetery continuously until the date of the writ.

Counsel said "*In fact this is the reason why the plaintiff sued to restrain them and that cements the long possession and control of the 1st defendant in this case to the cemetery. If the 1st respondent did not have absolute control and possession, the plaintiff would not have sued to restrain them*".

Counsel referred this court in the case of **Abakah Effina Family vrs Mbibado Effina Family [1959] GLR 62 CA.** Which said "*where a defendant has been is long possession and occupation of land he is entitled to the protection the law against all who cannot affirmatively prove a better title*".

Counsel submits that in this instant appeal a lot of traditional evidence was led by both parties, however the traditional evidence tested against recent acts is what has been held by our court's to be the smartest test in evaluating same. He cited some cases like –

(i) **Adwuabeng vrs Domfeh [1996/7] SCGLR 660 at 671.**

(ii) **Ebu vrs Ababio [1956] 2 WALR55**

(iii) **In Re Adjancote Acquisition, Klu vrs Agyemang II [1982/3] GLR 852**

(iv) **Achoro vrs Akanfela [1996/7] SCGLR 209**

Counsel contends that the case of the 1st defendant on the balance of probabilities is more credible than that of the appellant. The appellant's case on this ground must therefore be dismissed.

2nd, 4th & 5th Defendant/Respondents

In course of the trial, the 3rd defendant chief Agbozo passed on but there is no evidence on record whether he was substituted or the parties agreed to continue without the substitution.

It is trite learning that if a party to a civil suit dies at any stage before judgment is entered. He should be substituted by his executor or his personal representative. The trial should be stopped until the substitution has been made. Proceedings or judgment concerning the dead party before the substitution are void.

See **Ebusuapanyin Kwa Nana vrs Ebusuapanyiin Kwme Appea, SC, 29th January 1997, unreported**.

The law is that on the death of a defendant in a civil suit, a duty is cast on counsel appearing for the defendant, not only to inform the court about the death of his client but also to inform the court the particulars of the legal representation of his deceased client.

Ord 4 (r) 6 (1) of C.I.47 states:-

(1) Where a party dies or becomes bankrupt but the cause of action survives the action shall not abate by reason of the death or bankruptcy.

Be it as it may, the 3rd defendant was not substituted as I said earlier.

Counsel for the 2nd, 4th and 5th defendant in his response to this ground of appeal said same that an appellate court as a rehearing court is to rehear an appeal as if the rehearing was the original case, review the whole case by analyzing the entire record of appeal, taking into account the testimonies and all documentary evidence adduced at the trial before arriving at a decision, to satisfy itself that on a preponderance of probabilities, the judgment of the trial judge is reasonable or amply supported by the evidence on record.

Counsel submit that at the trial it emerged conclusively in favour of the 1st defendant, that 1st defendant was able to establish by cogent evidence, the cemetery was established by the 1st defendants ancestors and has been in existence since ancient times.

He said from the pleadings and the evidence of the plaintiff, he admitted that 1st defendant had absolute control of the land on which the cemetery was situated.

Counsel said they aligned their submissions with all the authorities cited by the 1st defendant/respondent herein. He submitted further *"However, my lords, in our solidarity with the 1st defendant, we would in brief make a strong case for the 1st defendant/respondent"*. That it is their contention that the case of the 1st defendant/respondent on the balance of probabilities is more credible than that of the appellant. The appellant's case on this ground must therefore be dismissed.

To comment on the submission of counsel for the 2nd, 4th and 5th defendants even before delving into the grounds of appeal, we find it difficult to know his stand in this case. This is so because in his motion for joinder he pleaded in paragraph "10" that they will lead documentary and oral evidence in the trial to show that the land in dispute does not belong to either the plaintiff nor the defendant. Strangely after the joinder he changes his case by aligning himself with the 1st defendant.

As counsel on all sides rightly submitted an appeal is by way of rehearing and this has been confirmed by statute as in Rule 8(1) of the Court of Appeal Rules 1997 C.I.19 which states;-

(1)An appeal to this court shall be by way of rehearing and shall be brought by a notice of appeal.

Counsel on all sides have stated copiously what this omnibus ground of appeal meant.

However, as stated earlier it is incumbent on the party appealing the judgment to demonstrate the lapses complained of in the judgment appealed – **Djin vrs Musah Baako (2007/8) SCGLR 686**

The plaintiff claimed in the lower court for the following reliefs;-

i. Declaration of title,
ii. Recovery of possession,
iii. Perpetual injunction restraining the defendants etc. burying deceased bodies a t the designated area for burial near the Jorpa stream.

The facts briefly are that the plaintiff said he is the chief of the Manya clan settled at Manya Jorpanya. He is Nene Tei Djahene Korabo IV, installed and gazzetted in 1998. He tendered his gazette notification which was admitted into evidence without objection as exhibit "A".

There were some challenges by the defendants as to the capacity of the plaintiff. Whether he is chief or Asafoatse. The trial judge in deciding this said the two are distinct positions. Secondly that in the exhibit tendered, exhibit 'A' the plaintiffs' town or village is stated as Dodowa and not Manya and since the law states where oral and written evidence conflict, the court must lean favourably towards the written, the court declared that that plaintiff hails from Dodowa. The trial judge after this went on to say "*Indeed both Manya*

and Dodowa are from the same division, the Hiome division and according to the plaintiff, Manya is part of Dodowa but there are different families".

Since capacity of parties goes to the root of the case we must resolve that first.

With all due respect to the learned judge, official documents are deemed correct until proven otherwise. There is a presumption of official duties as per Section 37 of the Evidence Act, 1975 (NRCD 323). It reads *"it is presumed that an official duty has been regularly performed"*. Thus unless there was a strong evidence to the contrary such a presumption would be upheld – see **Seidu vrs Sannbaye Kangberee [2012] SC GLR 1182 H6.** Exhibit 'A' the gazette notification states the plaintiff is the chief of Manya. There is no challenge about that from any quarter. Even if there is must be so done with credible evidence and not by pleadings and repeating same on oath in the box. There is no official evidence from the Regional House of Chiefs nor the Shai Traditional Council that the plaintiff is not the chief of Manya. The plaintiff explained to the court as to why Dodowa was mentioned in the gazzette. He said since that is their major town and secondly his predecessor used that address he also used same. I think that explanation is enough to clear that issue. After all the authorities at the house of chiefs both, Traditional and Regional must have checked all these before issuing the gazette certifying the plaintiff as the chief of Manya. There is therefore nothing wrong with the capacity of the plaintiff. The judge herself confirmed in the judgment that both Manya and Dodowa are from the same Hiome division and that Manya is part of Dodowa. If she admitted this then there is no problem with the town on the gazette. The trial judge was thus wrong to find as a fact that what the plaintiff said orally in his testimony is different from his documentary evidence, the gazette. There is therefore no issue about the capacity of the plaintiff. He is the gazzetted chief of Manya.

In every action, and at every stage thereof, any objection to the admissibility of evidence by a party affected thereby shall be made at the time the evidence in offered – See Section 6 (1) of the Evidence Decree, 1975 (NRCD 323). If a party failed as required by Section 6(1) to object to the admission of evidence which in his view, ought not to be led, he would be precluded by Section 6(1) to complain on appeal or review about the admission of that evidence unless the admission has occasioned a substantial miscarriage of justice.

See **Edmond Nasser & Co. Ltd vrs Mc Vroom & Anor [1996/7] SCGLR 468**

Before delving into the ground of appeal, I wish to state that it is unfortunate the learned trial judge misled herself by not considering the fact that the 1st defendants counterclaimed in their defence. For a counterclaim the court should treat proof of that claim in the same way as would treat a claim on the writ of summons. A counterclaim is governed by the same rules of pleading as a statement of claim and the reply to it by the same rules as a defence. A counterclaim must always claim relief against the plaintiff.

The law is trite that when the defendant in a civil suit counterclaimed, for the purposes of his claim, he becomes a plaintiff for that claim and assumes the same burden of proof as the plaintiff has. The law is that a counterclaim is a cross-action and the defendant counterclaimant was deemed a plaintiff – see **Nii Kpobi Tetteh Tsuru III etc vrs Agric Cattle [2020] DLSC 8742.**

The 1st defendant counterclaimed for the following reliefs;-

a. Declaration of title to all that piece of land particularly described in paragraph 10 of defendants statements of defence thereof as belonging to the Lekpedje Division of Mla-Shai.

b. A further declaration that the cemetery located near Jorpanya is the ancestral burial place of the Lekpedje division of Mla-Shai and forms part of the large parcel of land belonging to them.

As would be demonstrated later in this judgment the trial learned High Court judge placed all the burden of proof on the plaintiff alone and none on the 1st defendant who counterclaimed in his defence.

Again with regards to the 2nd, 3rd, 4th and 5th defendants who were joined to the suit, it is interesting to note that in their affidavit in support of the joinder, deposed to by 2nd defendant, Nene Adzatey Mlikiti, Chief of Doryumu, paragraph 10 states;-

(10). That the applicants will submit both historical and documentary evidence to show that the land being claimed does not belong to both parties to this suite but rather the applicants.

(12).Wherefore the applicants pray that this application be granted to allow than to proof their title and interest in the land the subject matter in dispute **–[page 46 of ROA]**

The 2nd to 5th defendant's case is that the land in issue does not belong to either the plaintiff nor the 1st defendant and they will prove that it is their land. However, it is interesting to note that in their response to this ground to appeal counsel said they align themselves to the strong submission made by counsel for the 1st defendant that the land is for the 1st defendant. Am therefore at a lost as to their stand in the case. Of course they never counterclaimed.

I am sure they were joined because of their claim in their affidavit in support of their application for joinder that the land is theirs and not for the plaintiff nor the defendant. None of the 2nd -5th defendants testified in the trial to establish this claim of theirs. Some

of their amended pleadings were same words ditto dito with the 1st defendant's pleadings. They never also filed any address in the trial court.

Delving into the ground of appeal itself, I agree with counsel on both sides that an appeal is by way of re-hearing and this omnibus ground demands the appellate court to go through the whole evidence on record, the exhibits and annexures to re analyse the whole case to see if the decision of the trial court is supported by the evidence on record. See (i) **Tuakwa v. Bosom (2001-2002) SCGLR 61. (ii) Oppong Kofi & Ors vrs Abibrukusu III [2011] 1 SC GLR 176.**

Both parties claim for declaration of title to the land as well as the cemetery in issue. They have both become plaintiffs in one way or the other so far as their claims are concerned. The law is that a plaintiff in a civil case is required to produce sufficient evidence to make out his claim on a preponderance of probabilities as defined in Section 12(2) of the Evidence Act, 1975 (NRCD) 323. In assessing the balance of probabilities all the evidence, be it that of the plaintiff or the defendant must be considered and the party in whose favour the balance tilts is the person whose case is the most probable of the rival versions and is deserving of a favourable verdict. See – **Takoradi Flour Mills vrs Samir Faris [2005/6] SCGLR 882.**

What is meant by "*Preponderance of probabilities?*"

Section 11(4) and 12 of the Evidence Act, 1975 (NRCD) 323 has clearly provided that the standard of proof in all civil actions has proof by preponderance of probabilities with no exceptions made.

Adwubeng vrs Dumfeh [1996/7] SCGLR 660

Proof, is the evidence which satisfies the court as to the truth of a fact. Generally the burden of proof lies on the party who asserts the truth of the issue in dispute. If that

party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption. In all civil cases, the court makes its decision on the "balance of probabilities"

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 of which the assertion is not true. See **Memuna Amoudy vrs Kofi Antwi [2006] 3 MLG 183 CA**

Generally, proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, example, by producing documents, description of things, reference to other facts, instances or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath or having it repeated on oath by his witness, he proves it by producing other evidence of facts and circumstances from which the court be satisfied that what he averred is true. **See Danso Dapaah vrs Falcon Crest Investment Ltd & 4 Ors [2015] 89 GMJ 148 @ 172 per Dzamefe JA**.

In law proof simply means convincing the court or jury a fact that is alleged is true. This is the purpose of the provisions on burden of proof contained in Section 10, 11(1) and (4) of the Evidence Act, 2975 (NRCD) 323.

See also

1. **Khoury & Anor vrs Richter [1958] WACA**
2. **Majolagbe vrs Larbi & Ors [1959] GLR 190 at 192**

Finally on proof, the general principle of law is that it is the duty of a plaintiff 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.

This 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.

(i) Bank of West Africa vrs Ackum [1963] 1 GLR 176

(ii) In Re Ashalley Botwe Lands etc [2003/4] 1 SC GLR 444.

We must not forget that a mere assertion by a party or his witness does not amount to proof. See **T. K. Serberh & Co. Ltd vrs Mensah [2005/6] SCGLR 341**

Coming to the instant appeal, both parties seek the relief of declaration of title to the land in issue.

The plaintiff in his statement of claim paragraph 3 mentioned the identity and size of his land approximately 3020.118 acres. He also mentioned his boundaries. The 1st defendant in his defence and counterclaim, paragraph 10, mentioned the identity and size of his land approximately 35,000 acres. The 1st defendant in his statement of defence averred in same paragraph 10 that *"defendant will also show that all the lands including the land being claimed by the plaintiff and more particularly described in paragraph 3 of their statement of claim falls within land belonging to the Lekpedje people of the Lekpedje Division of Mla-Shai of Kordiabe"* (emphasis mine)

This simply means the land the 1st defendant is claiming as belonging to them, the Lekpedje Division, includes the whole of the land plaintiff is claiming including Manya Jorpanya Township and the cemetery in issue. Both parties relied on ancient and traditional history to establish their various claims. The law states clearly that the most satisfactory method of testing traditional history is by examining it in light of such more recent acts as can be established by evidence in order to establish which of the two conflicting statements of tradition is more probably correct. Where there is a conflict of traditional history one side or the other must be mistaken, yet both may be honest in their beliefs, for honest mistakes may occur is the course of transmission of the traditions down the generations. In such circumstances and particularly where courts below have differed, an appellate court must review the evidence and draw their own inferences from the established facts. The demeanour of the witness before the trial court is little guide to the truth.

The Supreme Court recently stated that *"it is well settled that where in a land suit, the evidence as to the title to the disputed land was traditional and conflicting (as in the instant appeal), the surest guide was to test such evidence in the light of recent acts to see which was preferable."*

See: (i) ***Ago Sai & Ors. vrs. Kpobi Tetteh Tsuru III [2010] SCGLR 762***

(iii) Adjei Kojo vrs. Bonsie & Anor. 3 WALR 257

In such situations the court is to examine the evidence of both parties with undisturbed overt acts of long possession or occupation in respect of the land. In measuring the success of a case in which traditional evidence is adduced, the courts are the use the evidence of living or recent memory to satisfy itself that a party has been able to prove his case by a preponderance of the probabilities. The most important duty of the court is

to relate the evidence proffered against the evidence of recent or living memory. The law is settled that acts in living or recent memory such as overt acts of ownership and possession over the disputed property takes precedence over traditional history – (i) **In Re Taahyen Oppon vrs Anim [1998/9] SCGLR 339, (ii) Land Law, Practice and Conveyancing in Ghana – Dennis Adjei JA – 3rd Edition page 218**

The plaintiffs' story about their title to the land in dispute is that in 1890, their forefathers living on the Shai Hills on hearing the threat of the colonial masters' intention to move them from the Hills decided to descend earlier before the ultimatum. They did so with their deity called "Nadu". This deity does not cross rivers so on their descent it was planted near river Jorpa and so was in between river Jorpa & Otchreme river because it could not cross those two-rivers.

Then in 1892, the order came and they all descended to Jorpanya. Their clan is called Manya so when they got to Jorpa, they called the settlement Manya Jorpanya. The 1st defendant and the 2nd to 5th defendants never denied his story of the descent in 1892.

The 1st defendants story is that when they descended in 1892, they came with their deity called "Mla-Ghau" together with "Nadu". According to the 1st defendant, the Manya's left the deity Nadu behind so when the priest of Mla Ghau was coming down, he came accompanied by the caretaker priest of "Nadu". That because Nadu deity which is not for them, does not cross rivers, and they and the Manya's are brothers they allowed them to plant Nadu and Mla Ghau at Jorpa. That they engaged some Manya's who were around to take care of their Mla-Ghau while they continued their journey to Ologotse and Apese. That after sometime, they were facing drinking water problems and so moved from their settlement and established Kordiabe in 1924. This piece of evidence was same as the plaintiff narrated in his evidence and was corroborated by the 1st defendant.

In brief, these are the stories of the plaintiff and 1st defendant.

Certain questions come to mind. In the first place, why will the Manya's leave their deity Nadu behind on the Hills such that it was the defendants who brought it down. Again, when the defendant said they planted the plaintiffs Nadu near Jorpa river, where it is because it does not cross rivers, one wonders how they knew that fact. The 1st defendant also said in his testimony that on reaching Jorpa river and planting the two deities, "*they engaged some Manya people living on the land to take care of the deity, Mla-Ghau*". If they were the first to get to that land as they are alleging, where did they get the Manya people living there to engage to take care of their deity? Again, why will they leave their deity behind under the care of other people and continue their journey? In the olden days, deities are the objects they worship and revered so much so why will the Lekpedje's leave their god behind and go to seek a place to settle without it?

On the contrary, the plaintiffs' story is that the Manya's knowing their deity Nadu does not cross rivers planted same between the two rivers and stayed there till today. All the 3 divisions of the Shai have their big towns, like the commercial town. Dodowa for the Hiome, Doryumu from the Hiowe and Kordiabe for the Lekpedje from the evidence on record. Of course due to commercial activities each division could visit or settle where they could do some commercial activity and not strictly restricted to their towns.

There is no challenge or dispute about the fact that Nadu belongs to the Manya's, and that it does not cross rivers and thirdly the Manya's are living where Nadu was planted since 1890. The law is clear that where an opponent supports the others case, the court should believe that testimony – **Achoro & Anor vrs Akanfela & Anor [1996/7] SCGLR 209 at 214.**

The case of the defendants is that they were at Jorpa before the Manya's came and because they are brothers, they allowed them to live on their land, as licenses to plant their deity there, farm there but on condition that they cannot install a Chief nor bury any dead body

there. I guess this was in 1892. Assuming this assertion is true, where were the Manya's expected to bury their deceased kinsmen? Throw them away or go to another settlement to bury them? This is difficult to believe, since they claim they are brothers.

However, there is evidence the Manya's were brought down the Hills by one Nene Kesse Korabo I together with Nadu. Two other Chiefs were installed and gazzetted before the plaintiff was installed and gazzetted as Nene Tei Djahene Korobo IV. For all these times, the Manya's were still on the alleged land given them by the Lekpedje's. What did the Lekpadje's do when the Manya's flouted the alleged condition of installing Chiefs? Why did they not take any action against them for all these years? What is the state of the law if a licencee flouts the conditions of his licence? The plaintiff in cross-examination said he was installed a Chief in 1998 and gazzetted thereafter. That he celebrates his annual festival and the 1st defendant attends and he had pictures of same.

This assertion by the plaintiff was not denied by the 1st defendant and so deemed admitted hence there was no need for the plaintiff to produce the photographs. Its trite law that when an opponent does not challenge an assertion by the other party, that party was deemed to admit the assertion and there was no obligation on the party alleging to lead any further evidence to establish his assertion – **Hammond vrs Amuah & Ors [1991] 1 GLR 89 SC**.

The defendants alleged that on some occasions they challenged the plaintiff for selling their lands which he claimed was for Manya. From that point there was the notice of adverse claim by the plaintiff of those lands assuming they belonged to the 1st defendant. From that point a cause of action accrued for them to sue the plaintiff for their lands but which they failed to do till the plaintiff herein sued them rather. Ignorantia lex non excusat in Latin is a phrase meaning *"ignorance of law is no excuse."*

The 1st defendant in his evidence also stated that the plaintiff on his installation as a Chief, which is contrary to the alleged conditions came to him to show him their boundaries. 1st defendant said he and one other named Padinawuyo took the plaintiff round to show him his boundaries. If by the defendants claim all the larger tract of land including what the plaintiff is claiming belongs to them and the plaintiff (Manya's) have no land there because they are licencees, why take him round showing him boundaries? Which boundaries were they showing him? This piece of evidence came from the 1st defendant himself.

Assuming the Manya's are licencees but their acts suggest adverse claim and for all these years the Lekpadje's did nothing then by their conduct, they are estopped from litigating them over the land. Unfortunately, in this case counsel for the plaintiff never pleaded limitation at the court below. Limitation is a Common Law right that must be pleaded. There is some controversy over this issue in our jurisprudence now as to whether it has to be pleaded at all cost. One school of thought which is gaining ground now is that even though it has to be pleaded because it is a common law right and defence even if not pleaded but the pleadings and evidence of the party evinces reliance on limitation, the court can allow it. Generally, the law is that a point of law arising on the record could be canvased in an appellate court even though it had not been raised in the court below if it involved a substantial point of law and would not require the adduction of further evidence. In other words, in any event the law seems to be now clearly established that a point of law arising on the record can be canvassed in an appellate court although it has not been raised in the court below. It is trite learning that our courts have construed that rule as being flexible and have held that a court of law can, on its own motion, raise a point of law that arises on the evidence in a case before it and apply same even if the parties fail to raise it. See **Dr. Tei & Anor vrs Messr CEIBA INT. [2018] DLSC 3301** per

Pwamang JSC. Limitation is a point of law and therefore falls within this exception, I hold. See ***Kwame vs. Serwah [1993/94] 1 GLR SC.***

In the recent case of ***Benjamin Johnson vs. Fati Williams reported in [2012] 43 GNJ 154,*** the Court of Appeal speaking through Ofoe, JA. held that ***"In exceptional cases, where the defence of limitation has not been pleaded, but the evidence is so clear, it can be invoked."***

Gbadegbe, JSC in the case of ***Opanin Yaw Boakye vs. Opanin Marfo reported in [2011] 35 GMJ 103 at 116*** held that a court cannot suo motu raise limitation defence. He however gave two exceptions which are:

i. Where it is raised on the pleading or

ii. It arises from the effect of the pleading.

The learned jurist said the defence of limitation in his view is a plea which except it is raised on the pleadings or arises from the effect of the pleadings, it ought not to be raised by a court on its own motion.

The question therefore is from the plaintiffs evidence, is it clear the defendants are estopped by the Limitation Act when they realized the plaintiffs are alleging adverse claim since according to them they are their licencees but claiming the lands are theirs. Are they estopped by their conduct in not asserting their right over the land if it is for them? The law is that a person shall not bring an action to recover land after the expiration of 12 years from the date on which the right of action accrued to the person bringing it or if it first accrued to a person through whom the first mentioned claims to that person. On the expiration of the period fixed by this Act, Limitation Act, 1972, Section 10, NRCD 54, for a person to bring an action to recover land, the title of the person to that land is extinguished. That even in respect of a license, license Estoppel may apply.

Tetteh Sasor, a Chief from Lekpedje who testified for the plaintiff corroborated in all material all that the plaintiff said. He is a Chief from Lekpadje but told the court that the Manya's descended first from the Hills with Nadu before they the Lekpedje came down in 1892. He testified to the effect that the land in issue belongs to the Manya's (plaintiffs) and not they, the Lekpedje's (defendants). His evidence was not at all shaken in cross-examination and he was very consistent in his answers. Why will a Chief from Lekpedje (defendants) division testify in favour of the plaintiffs against their own division? There was no reason established to suggest he had an agenda or an ulterior motive in doing so.

Unlike the Manya man, Akrasi, (DW3) who said he is a stool occupant and testified for the 1st defendant, one can clearly infer from his attitude and answers that he has a reason to testify against the plaintiff from his own Clan. First, he said he does not recognize the plaintiff as a Chief and once removed the plaintiff's headgear in public. This is an act of a stool occupant.

Secondly, there is evidence not challenged by him that he and (DW2) Tekpetey Agbeze sold some tract of Manya land to one Kleg Daniels and the plaintiff stopped the sale. Kleg took them to court and the court found them guilty and ordered them to refund the monies they collected for Daniels. This they could not do and the father's property was attached for the debt **[page 339 of ROA]**. That was the issue between the witness and the plaintiff. He was not a truthful witness at all and his evidence cannot be credible nor trusted. It is a clear case of bad blood between the witness and the plaintiff.

Declaration of Title:

Both parties as I observed earlier claimed for the relief of Declaration of Title to the various lands they are claiming. While the plaintiff claimed about 3,000 acres, the 1st defendant claimed about 35,000 acres. The burden of proof is always on the plaintiff to satisfy the court on a balance of probabilities in an action for a Declaration of Title to land.

Where the defendant has not counterclaimed and the plaintiff has not been able to make out a sufficient case against the defendant then the plaintiff's claims will be dismissed. Whenever a defendant also files a counterclaim then same standard or burden of proof would be used in evaluating and assessing the case of the defendant, just as it was used to evaluate and assess the case of the plaintiff against the defendant (as in the instant appeal).

To succeed in an action for a Declaration of Title to land, recovery of possession and for injunction, the plaintiff must establish by positive evidence the identity and limits of the land which he claimed. ***No court of justice could be expected to give a Declaration of Title or Recovery of Possession to a plaintiff in respect of an area whose boundaries were so uncertain*** (emphasis mine)

See: (i) ***Jass Co. Ltd. vs. Appau [2009] SC GLR 265***

(ii) Nyikplorkpo vs. Agbodo [1987/88] GLR 165

In land litigation, the law requires the person asserting title and on whom the burden of persuasion falls to prove the root of title, mode of acquisition and various acts of possession and ownership exercised over the subject matter of litigation. It is only where the party has succeeded in establishing these facts on a balance of probabilities that the party would be entitled to the claim.

- ***Mondial Venner (GH) Ltd. vs. Amuah Gyebu XV [2011] SC GLR 466***

Starting with the plaintiff, from the evidence on record, he testified as to prove his root of title saying the forefathers the Manya's descended from the Hills in 1890 and to find the land in issue. On finding the land, they planted their deity Nadu thereon before finally descending in 1892. He said because the deity Nadu does not cross rivers, it was planted in between two rivers Jorpa & Otcherme but nearer Jorpa river hence the name

Manya Jorpanya. He mentioned the Chief who led the Manya's down as Nene Kessi Krabo I. This piece of evidence was corroborated by 1st defendant when he said Nene Kessi Korabo was the priest of Nadu who accompanied the Lakpedjes on decent with Nadu. This confirms the plaintiff's assertion that Nene Korabo brought Nadu to its present position.

On the mode of acquisition, the plaintiff testified to the effect that after planting their deity there, they settled there to farm and till date they are still there. He said in course of time, due to commercial activities, Dodowa became a big town so some of the Manya's moved to settle there but they are still Manya people.

On various acts of possession exercised over the subject matter of litigation the plaintiff tendered a site plan covering the land he is claiming and this was not objected to and admitted into evidence as Exhibit 'A'. Asked in Evidence-in-Chief;

Q: Do you have any document in respect of this land to show to the court:

A: Yes, my Lord

Q: What do you have with you?

A: My Lord, I have a site plan covering the land

Counsel, no objection – tendered as Exhibit 'A'

The evidence before this court from the 1st defendant is that they also did a site plan but when they presented it to the lands Commission in 2010, when this case was in court, they were told the land had already been surveyed by the plaintiff. Surveys are not done clandestinely or in the night. Surveyors cut the forest, plant their poles as used to be or cadastral gadgets as at now. I do not believe no body from Lekpedje saw the plaintiff surveying this land. If the land is for the Lekpedje why did they not challenge or stop or

prevent him from carrying out the survey? Why will the Lekpedje's carry out their own survey after the case has started in court? The plaintiff issued this writ in 2008, testified in 2009 before the defendant's survey in 2010. Meaning that the time the defendants entered appearance to the suit, they had no site plan of the land they claim is theirs.

There is no challenge nor controversy about the fact that the plaintiff is in physical possession of Manya Jorpanya lands. He is the Chief there and carries himself out as such. He has an annual festival which he celebrates, which was not denied or challenged. He said 1st defendant himself patronizes the festival by attending same whenever it is celebrated and they have photographs of him. This is not denied. If it is true the Manya's are licencees as they alleged and the land given them on condition of not installing a Chief, why will 1st defendant patronize plaintiff as a Chief then.

There is copious evidence from the plaintiff and the 1st defendant and his witnesses that the plaintiff has been selling lands to people. Plaintiff admitted this and said the lands belong to them and he is the Chief so he and his elders had the right to alienate. A Fulani man Ibrahim Suba testified to that effect, that the plaintiffs gave the land to his grandfather so many years back in 1960, and they are still there farming and rearing cattle. This assertion was never challenged nor denied by the 1st defendant.

Plaintiff stopped Akrasi from selling lands belonging to Manya to Kleg Daniels, this went to court and the court ordered Akrasi to refund the money to the buyer. All these are overt acts of ownership by the plaintiff over the land he claims. We must not forget that the plaintiff in claiming only 3,000 acres while the 1st defendant is claiming 35,000 acres.

The defendants' evidence on root of title is that they descended the Hills in 1892 on the orders of the Colonial Masters with their deity Mla-Glau and planted same on the land in dispute. Unlike the Manya's who settled where their deity was planted, the Lakpedje's

according to the 1st defendant they left their deity behind at Jorpa ***"engaged some Manya's living there to take care of their deity Mla Glau and they journeyed further."***

This piece of evidence confirms the plaintiff and PW1's evidence that the Lekpedje's on descent never settled at Manya but went further to Ologotshe and Apese. Later when they started facing drinking water problems, they came back to establish Krodiabe in 1924. This was not denied, challenged nor controverted by the 1st defendant. That Krodiabe, their major town was founded in 1924. The 1st defendant said Nene Ahwa brought them down from the Hills. The plaintiffs however said that Nene was the overall Chief of the Shai's on the Hills. The Shai's have three divisions; Hiome, Hiowe and Lekpedje

The plaintiffs' case is that in Shai tradition, division do not own land but the clans within the divisions. This assertion was also not challenged by the defendants. The 1st defendant alleged that some lands were granted out by this Nene Ahwa and the plaintiffs forefathers signed the grant documents but the plaintiffs explained that those lands were given out by the Shai Traditional Council hence their forefathers signed as witnesses since they form part of the Council and it was not the case that the Lekpedje's sold their land and the Manya Chiefs consented and witnessed same for them. The question I ask is why will the Lekpedje's allow their "licencees" to witness their grants if in fact they are granting out their own lands?

Dw1 testified to the effect that the Lekpedjes brought Nadu deity down from the Hills to Jorpanya. That the Lekpedjes decended with one Netteh Obiaa. He again said Lekpedje settled where Nattey Obia was. If they descended with Nattey Obia from the Hills, how can they again settle where Obia was? Unless it is not true they descended together with Obia – **[page 270 of ROA**].

POSSESSION

As to possession, it is clear the defendants are not physically on the land the plaintiff is claiming. There is no evidence on record that the defendants are in possession of any of the 3,000 acres the plaintiff is claiming. The concept of ownership of land embraces possession of and title to land. An owner of land is a person who can show that he and those through whom he claims title have possessed the land for so long that there can be no reasonable probability of the existence of a superior adverse claim. In showing this, he may rely on documents of title or on his own possession. Except in cases where there is an incontestable documentary title, the person in possession has an advantage. If the plaintiff who sues for declaration of title is in possession, as in the instant case, he has an advantage. He can simply rely on his possession and he cannot be dislodged unless the defendant shows a better title that is a better right, to possession than the plaintiff. Indeed, a plaintiff in possession carries no greater burden of proof than a defendant. The law says if it is the plaintiff who is in possession, he simply remains in possession – See (i) **Asare vrs Apau II [1984/6] 1 GLR 599**. (ii) **Ghana Land Law & Conveyancing. 2nd Edition page 104 – BJ Da Rocha and C. H. K. Lodoh**. From the evidence on record, it is the plaintiff and not the defendants who are in physical occupation and possession of the land in dispute and as the law sates, have the advantage over the defendants.

The defendants allege they gave two grants to Twin Hill Farms and one Lawyer Abateye to farm on. This the plaintiffs denied saying it was the Shai Traditional Council that gave the grants. In the face of this denial, the defendants led no further evidence to prove their assertion but just left it at that. I said earlier if a party makes an assertion which is denied, he does not just repeat same on oath in the box but must lead further positive and credible evidence to establish same or else the assertion fails. The defendants called no witnesses to corroborate this assertion nor led any other evidence to establish same.

Unlike the plaintiff, the defendants never tendered any site plan to show the identity of the 35,000 acres of land they are claiming. Identity of land is very crucial for success in

the claim for a declaration of title to land for obvious reasons. Such that the court's order will not be vague but definite, the winner will not extend the land granted, also to serve as res judicata and for purposes of contempt. The defendants made no attempt to show the identity of the 35,000 acres except in their pleadings. The trial court ordered no survey for a composite plan to be prepared to know the limits of the lands so claimed. May be because the 1st defendants tendered no site plan

The plaintiffs' overt acts of ownership of the land in dispute are clear. His overt acts of ownership are so clear as detailed by the defendants themselves that he alienated a lot of the lands. The question is, what did they do to stop him from this adverse claim? In fact, as I said earlier, if counsel for the plaintiff had pleaded the defence of limitation, would have made this case easier for himself. But then, all the evidence and the pleadings evince the fact that the plaintiff intends to rely on the defence of limitation because the activities are tantamount to adverse claim.

The trial Judge is her judgment as to whether or not the plaintiff is entitled to his reliefs i.e. declaration of title, recovery of possession and perpetual injunction restraining the defendants, etc for burying dead bodies at the site designated for burial near the Jorpa stream delivered herself thus:-

> ***"On the totality of the evidence before me, the Manya Clan may have possessory and user rights over the disputed land but to the recognition of the Lakpedje Division's ownership of same"***

With all due respect to the learned trial Judge, where did she get that piece of evidence from? Definitely, this is not borne out of the evidence before her. The defendants alleged they gave their land at Jorpanya to the plaintiffs because they are brothers but on certain conditions. This was denied by the plaintiffs. In the face of that denial, the defendants led no further positive or credible evidence to establish their assertion except to repeat

same on oath. There is no positive evidence on record to show that indeed the defendants gave their land to the plaintiff's licensees conditionally apart from the pleadings. There is no proof of their assertion and same ought to fail and must fail. Is the trial judge saying the plaintiffs have possessory and user rights over the defendants 35,000 acres or the plaintiffs 3,000 acres? When she said disputed land, what size of land was she talking about? She ordered no survey that would have guided the court to know the extent and ownership of the lands in dispute.

The learned trial Judge erred in thinking the burden of proof to ownership of the land in dispute was on the plaintiff alone and forgetting that the defendants also counterclaimed. Both parties therefore assumed the burden of proof to establish their various claims. The defendants further failed miserably to establish anything as to their root of title, mode of acquisition and any overt acts of ownership not forgetting any evidence to establish the identity of their land. No site plan was tendered.

On the issue of whether the defendants is entitled to his counterclaim, the Judge delivered herself thus:-

> ***"1st defendant seems to have counterclaimed for a larger tract of land outside the Jorpanya land, the land in dispute. He however failed to establish his claim over the largest tract of land. In the light of the afore-said, the defendants have failed to prove their claim in part."***

This finding of the learned High Court Judge is very unfortunate, with all due respect to her. A counterclaimant is the same as a plaintiff for the relief counterclaimed. From the evidence on record, the defendant is claiming a larger tract of 35,000 acres which cover all of the Manya land and beyond. That is the fact and not "it seems" as she said.

She held that the 1st defendant could not establish his counterclaim and once that is her finding, then the counterclaim must fail. When she said that "defendants have failed to prove their claim in part", what exactly does she mean? Which part of the 35,000 acres did the 1st defendant prove? Once he failed to establish his claim, his counterclaim has failed. The 1st defendant tendered no site plan, called no boundary owner nor established the identity of his 35,000 acres. Which part of this 35,000 acres is the court saying he has established? He did not establish anything.

On the preponderance of probabilities, the standard for civil cases, the plaintiff's story is more probable and more convincing of the rival versions and so deserve to win the case. Moreover, he is the plaintiff in possession with his advantages as explained earlier in this judgment

INCONSISTENCIES AND CONTRADCITIONS IN THE DEFENDNTS CASE

Unlike the plaintiff's evidence there were a lot of inconsistencies and contradictions in the case of the defendants. In the first place, 2nd to 5th defendants said the land does not belong to the 1st defendant nor the plaintiff. Later, they aligned themselves with the 1st defendant. We wonder the role the 2nd to 5th defendants played in the whole trial. Their exhibit '2' tendered said it traced the leadership of Lekpedje people from King Awal I from the time of descent in 1892. This confirms the plaintiffs' story that the Lekpedje first descended in 1892 unlike the Manya who came with Nadu earlier in 1890. The principle of the law is that when the other party's witness corroborates the others assertion, the court must accept same as the truth and cannot gloss over same

While the defendants said the plaintiff is from Dodowa, the 1st defendant's Attorney in his evidence testified that plaintiff comes from Manya – **[page 274 of ROA].** While the 1st defendant testified that the Lekpedje descended the Hills with "Mla Ghau" in 1892, DW2 Emmanuel Tekpetey said the "Mla Ghau" was left behind on the Hills – **[page 327**

of ROA]. In the quest to revenge the plaintiffs stopping them from selling Manya lands to Kleg Daniels, the defendants called DW2 and DW3 as witnesses. Unfortunately, their testimonies contradicted each other. While the DW2 admitted the descent story of the Plaintiff, the DW3 denied all. The latter said they the Manya's were slaves and servants to the Defendants. While the 1st Defendant himself admitted the Plaintiff is the Chief of Manya and gazetted, DW3 denied same saying the plaintiff is not a chief nor gazetted and even if gazetted then he "bought" it – **[page 336 of ROA].**

The 2nd Defendant in his evidence admitted Jorpanya was established 18 years before Doryumu. This confirms the Plaintiff's story that Doryumu was established in 1924. Again the 2nd Defendant in his evidence in chief said he is a chief but in cross-examination when pinned to the wall that he is not a chief, changed his mouth that he attends Traditional Council meetings as a "land overseer" and not a chief. – **[page 354 of ROA].** DW1 in his evidence said on the descent of the Defendants, they came together with one Tetteh Obia. He again said after the descent they settled where Tetteh Obia was. How can they come with him and again settle where he was?

The Defendants' stories concerning the deity Nadu were different. While 1st Defendant admit the Plaintiff's descended with it, DW1 said they brought it down with their own "Mla Ghau". DW4 Lomo Wahigya introduced a new story altogether about "Nadu". He said the Nada deity was brought down by the Defendants led by one Otenge – **[page of ROA 342].** DW1 said a different story that the Lekpedje descended the Hill led by one Asafoatse Biantey and the son Nartey Obia. He again said all Shai's were led down by their King Ahwa I with a gun called "Oplem".

The 1st defendant again said the Plaintiffs are from Dodowa and have no land at all in the disputed area while the DW1 said they have their own land there. Defence witness

Emmanuel Tekpetey Agbeze, on the Nadu deity story introduced a very different piece of evidence totally contradictory to the defence case. That all the Shai's worship one god called "Mmrakpewu" which was watched over and protected by one hunter called Kissi. This Kissi brought along with him his one deity called Nadu so Nadu belongs to Nene Kissi. That Kissi died before the descent so one Ogbodjotse Teye brought Nadu to Jorpanya. This is totally different from the 1st defendant's own testimony – **[page 311 of ROA].** DW1 admit they the defendants perform the dipo rite at Jorpanya, DW2 denied same as not true – **[page 321 ROA].** DW4 and 2nd defendant contradicted each other as to where the Lekpedje settled first on descent – **[pages 345 & 354 ROA].** While defence witness Abednego Tei denied that Lekpedjes on descent settled at Ologotse and Apese in cross examination, 2nd defendant admitted same – **[pages 348/354].** These are some of the inconsistent and contradictory pieces of evidence from the defendants.

The law is that whenever the testimony of a party on a critical issue is in conflict with the testimony of his own witness on that issue, it is not open to the trial court to gloss over such a conflict and make a specific finding on that issue in favour of the party whose case contained the conflicting evidence. See **Atadi v Ladzekpo [1981] GLR 218 CA.**

The plaintiff tendered Exhibit 'C' about a meeting the Manya's had with the Lekpedje's over the cemetery in issue. This was admitted by the 1st defendant's Attorney in his testimony. This confirms the plaintiffs' allegation that they met to discuss the issue of burials at the cemetery at Jorpanya else what was the meeting for? The High Court held that since the plaintiff tendered no authority note from the EPA to stop burials in that cemetery the defendants could bury there. This is technically right but then do you need a note from EPA to see that river water overflows into the cemetery and washing the tombs away and this is hazardous to those downstream drinking from the same river?

This brings me to the issue of the cemetery in dispute.

The plaintiffs' claim is that on their descent from the Hills, they established their cemetery. When the Lekpedje later descended, they allowed them to bury their dead there. The defendants deny this saying that cemetery is their royal cemetery called "Mamprobi". One very important and obvious overt acts of ownership is the establishment of cemeteries on one's land.

The defendants in their attempt to establish that the cemetery in issue is their royal cemetery tendered pictures of tombs which surprisingly were admitted into evidence, despite the objections raised. A tomb on its own cannot tell the cemetery where it is located unless the picture is taken with the name of the cemetery showing, or together with some fixtures to identify the cemetery. The tomb alone does not show the cemetery unless it is a special one for example the military cemetery in Accra because of the peculiar nature of their tombs marked with crosses, but not an old cemetery in Manya Jorpanya. One wonders why the Lekpedje people will bury their royals at a different division from their own. Even if the cemetery is theirs why is it on somebody else settlement. It is quite strange that one division will bury their royals in the land of another division.

I guess this goes to buttress the plaintiffs' point that they offered them the chance to bury in their cemetery on their arrival. This is so because if the Manyas descended first in 1890 before the others in 1892 for the two year period some of the Manya's may have died and buried somewhere before the arrival of the defendants and so the plaintiff's must have a cemetery before the defendants arrived. The Lekpedje left their deity on Manya land, bury their royals on Manya land and perform their 'dipo' custom on Manya land and also perform other rituals at Manya land? All these are indications that the Manya's were there first before the Lekpedje came as the plaintiff alleged.

We said earlier that when both parties rely on traditional evidence and there are conflicts, you test the evidence by relating it to recent activities, e.g. overt acts of ownership and one is physical possession – ***Mireku vs. Yeboah [1992] 1 GLR 242***

There is no evidence on record that the Manya's went anywhere else upon descent but the same settlement at Jorpanya with their deity Nadu till date. From the evidence before the court, they are still where they were since the descent. The Lekpedje's have the history of going further the Jorpa steam to Ologotse and Apese and later coming back to Kadiabe. It is more probable that the Manya's own the land they settled on in the descent in 1890 and 1892. A witness testified to the effect that since his birth, 87 years ago, the Manya's have been on this land in dispute.

Physical Possession

From the evidence before the court, the plaintiffs have been in physical possession of the land described by the plaintiff in the trial since 1890/92 without disturbance and quiet enjoyment for all those years. This piece of evidence was not challenged by the defendants in anyway.

The law now allows even a squatter to be granted possessory title after 12 years of his being in adverse possession. And the act of possession must take precedence over mere traditional evidence.

i. ***Gihoc vs. Hannah Asi [2005-2006] SC GLR 458***
ii. ***Adusei vs. Acquah [1991] 1 GLR 13.***

Counsel for the plaintiff said for the defendants after 128 years stood by and allowed the plaintiffs', Manya Clan, suffer to incur expenditure in developing the entire land described. They are therefore deemed to have waived their right if any at all of which they deny. And in this case the Plaintiffs are not squatters.

The trial High Court Judge held that the Plaintiffs have possessory and user rights of the land in dispute. With all due respect to the learned Judge a possessory right is part of the interests or incidents that bundle into ownership or title. Indeed by ***Section 48 of the Evidence*** **Act**, a person in possession is presumed to be the owner of the thing possessed. When it is established in court that a party has been in such a possession, only the holder of the absolute title can oust him from such possession. In other words the one in possession of land in dispute is 9/10th the owner of the land until someone with a better title comes to claim same.

The law is that even the holder of the possessory right called the usufruct cannot be interfered with in his possession of the land even by the holder of the allodial title. In the instant case the Defendant could not even establish that they are the allodial title holders. In fact they never led any evidence to establish their root of title to the plaintiffs' land nor any acts of ownership thereon. They never established a single overt act of ownership of the Plaintiffs land.

See;

i. ***Subunor Agorvor V Mr J. K. Kwao & Anor [2019] DLSC 6259 – Gbedegbe JSC***

ii. ***Ebusuapayin Ekuma Mensah V Nana Atta Komfo II [2019] DLSC 6203 – Gbedegbe JSC***

The trial Judge concluded thus:-

> ***"The Plaintiff in whom the burden of persuasion falls have failed to prove his mode of acquisition of the subject matter. Accordingly his claim for a declaration of little fails and is hereby dismissed."*** ***"****From the aforesaid, 1st defendant succeed in part on his counterclaim. The court declares that the disputed area where the cemetery lies is owed by the Lekpedje Division"*. This is totally wrong. In the first place the Defendant counterclaimed so that finding that the burden of persuasion lies on the Plaintiff is wrong. The Defendant bore the same burden as the Plaintiff for his counterclaim. Secondly she held earlier that 1st defendant failed to prove his counterclaim and therefore it fails. With that holding what does she mean when she said the court declares that the disputed area where the cemetery lies is owned by the Lekpedje Division?

This finding is not borne out of the evidence on record. The cemetery area is within the 35,000 acres the 1st Defendant counterclaimed for but was not able to prove as the court held and if he could not prove this in court, as a fact held by the court, why grant him that area? From the evidence on record, as seen by this appellate court the first Defendant made no attempt, none at all to prove his mode of acquisition of the 35,000 acres he is claiming as against the Plaintiff who proved his. The Plaintiff proved how his forefathers acquired the land and settle there with their deity in 1890/92 and have lived there till today. There is no evidence as to the acreage out of the 35,000 acres that the first Defendant has been able to establish ownership to. When the Judge said the first Defendant failed to prove their claim "in part" what exactly does she mean? Which part of the 35,000 acres have they established from the trial as belonging to them? This conclusion by the learned trial judge is wrong and a fallacy and must not be allowed to stand.

In fact the first Defendant, has totally failed to establish their counterclaim, period. The cemetery is included in the 35, 000 acres they are claiming which they failed to establish. The court was therefore wrong in declaring that the cemetery in issue belongs to the 1st defendant.

In land litigation, the plaintiff succeeds on the on the strength of his case and not on the weakness of the defendant's case. In this instant case it is both ways because of the counterclaim.

i. Kodilinye vs. Odu [1935] 2 LACA 336

ii Rickets vs. Addo [1975] 2 GLR 158

For sake of argument, assuming the Plaintiff failed to establish his claim just as the defendant as held by the trial court itself then the next thing to look at is which of the parties is in physical possession since that party is 9/10th the owner. In this case it is the Plaintiff and definitely not the 1st Defendant. In that vein as well the Plaintiff has a better claim as the owner than the 1st Defendant who tendered nothing to establish his counterclaim nor led any positive nor credible evidence to establish a better title than the plaintiff. See - ***Peniana v Affram [1966] GLR 220.***

In totality the trial judge fell into grave error in misapplying the law on the burden of persuasion and preponderance of probabilities. That error must not be allowed to stand as will be a travesty and grave miscarriage of justice. This appeal succeeds and the judgment of the High Court is hereby set aside with all the consequential orders. We hold that the Plaintiff has been able to establish his claim on the preponderance of probabilities. His evidence is the most probable of the rival versions and we find as such in his favour for all his claims.

In conclusion we are of the view and hold as such that the findings of the trial High Court are unsupported by the evidence on record and that the reasons given in support of its findings are unsatisfactory. The trial court also misapplied the principles of evidence. Its findings are also based on wrong propositions of law. Finally the findings are inconsistent with very crucial documentary evidence on record such as the plaintiff's site plan, the minutes of the meetings on the cemetery in dispute and gazette notification. See **Dadzie II vrs Arthur & Ors [2017] GH SC 4 dated 26th January 2017**.

We think this omnibus ground of appeal has effectively covered all the other grounds filed.

This appeal is allowed and we declare title to all that piece or parcel of land particularly described in paragraph 3 of the Plaintiff's statement of claim to the Plaintiff/Appellant. He is also entitled to recovery of possession of the area designated as the cemetery.

We also grant him relief 3, for perpetual injunction restraining the Defendants, their servants, workmen, assigns, etc from burying dead bodies at the site designated for burial near the Jorpa stream.

We dismiss the 1st defendant's counterclaim as not proven.

SGD

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