IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA AD. 2023

CORAM:

POKU-ACHEAMPONG J. A. PRESIDING

ARYENE, J. A.

ASARE-BOTWE, J. A.

SUIT NO.: H1/76/2023

DATE: 30TH MARCH, 2023

RISS HENRY OKAIKWEI : PLAINTIFF /APPELLANT

VRS

MADAM ROSINA ATTOH KOIKOR KONUAH : DEFENDANT / RESPONDENT

J U D G M E N T

POKU-ACHEAMPONG, J.A.:

This is a land case in which both the Plaintiff/Appellant and the Defendant / Respondent are seeking a declaration of title to the disputed land.

By an amended writ of summons and amended statement of Claim dated 21st August 2015 the Plaintiff sought the following reliefs against the 1st Defendant/Respondent and two other Defendants at the High Court:

a. Declaration of title.

b. An order for recovery of possession
c. Damages for Trespass
d. Perpetual Injunction to restrain the Defendants, their agents, privies, aassigns or servants from continual interference with the Plaintiff's land
e. An order to cancel certificate no GA 28256 in the Land Title Registry in the name of the 2nd and 3rd Defendants and to replace the name of the Plaintiff's late mother (Mabel A. Laryea).
f. Cost.

By an amended Statement of Defence and Counterclaim filed on behalf of the 1st Defendant on 20/12/18 pursuant to leave granted by the High Court on 7th December 2018, the 1st Defendant sought the following reliefs:

1. Declaration of title.
2. Perpetual Injunction restraining the Plaintiff and his successors in title and the 2nd & 3rd Defendants and their privies from in anyway interfering with the 1st Defendant's ownership, possession and quiet enjoyment of her property.
3. Damages for trespass
4. An order for the expunging from the register of the Lands Commission any records therein in favour of the Plaintiff, 2nd & 3rd Defendants or their grantees.
5. An order for the cancellation forthwith of the Lands Certificate granted to the 2nd & 3rd Defendants.
6. Any other reliefs found due.

Issues were set down based on the application for directions filed by Plaintiff and additional issues filed by the 1st Defendant. The court then directed both parties to file their survey instructions and witness statements as well as pretrial check lists.

In this opinion, for reasons of convenience, the parties shall retain their designations in the trial court. Thus the Plaintiff/Appellant shall be referred to as the Plaintiff and the 1st Defendant/Respondent as the 1st Defendant.

Plaintiff's Case:

Plaintiff's case is that in 1973 his late mother Mabel A. Laryea took a lease from Nii Lartey Kwashie Ahiaku IV Head and Lawful representative of Ahiaku family of Kwashieman, Odorkor/
Tsuim, Accra for a lease of 99 years.

Plaintiff claims, that he is the customary successor of his late mother Mabel A Laryea and made a declaration to that effect in Exhibit "A".

Plaintiff avers that his mother was in undisturbed possession of the land until she died on 18/6/2006. In 2008 Plaintiff claims that they realized that some people had put up illegal wooden structures on the land, under the licence of the 1st Defendant, without the consent of the Plaintiff's family.

Plaintiff further claims that he noticed that the disputed land had been registered in the names of 2nd and 3rd Defendants in 2004 and a certificate issued to them by the Land Title Registry.

Plaintiff avers that as at 2004 the grantor of the 2nd & 3rd Defendants had no capacity to grant or dispose of any land at Odorkor Tsuim. The power to do so had shifted to the late Samuel Okaikwei Tawiah as Head and Lawful representative of the late Gbawe Tawiah Family of Odorkor Tsuim, Accra in 2002.

According to Plaintiff upon the death of his mother's caretaker in 2007 the 1st Defendant moved to settle on the land in 2007 without the consent of the family.

The Plaintiff alleges that the 1st Defendant perpetrated fraud on his late mother. Plaintiff claimed that because there is no site plan attached to the 1956 title deeds of the 1st Defendant her grant is fraudulent, irregular, defective and void. In his reply to the 1st Defendant's counterclaim Plaintiff contended that the 1st Defendant's land was far away from the disputed land.

1st Defendant's Counterclaim:

In her Amended Statement of Defence and Counterclaim the 1st Defendant states that she acquired her freehold interest in the disputed land in 1956 and registered her interest in the land in the same year 1956. She tendered in evidence Exhibit 1 a copy of the Deed of Indenture.

1st Defendant explained that she acquired her land by purchase from one Mr. John Emmanuel Vanderpuye. Her grantor Mr. J. E. Vanderpuye had his interest registered at the Deed's Registry as No 537/43.

She acquired freehold interest in the land in 1956 evidenced by an indenture dated 4th April 1956.

In her amended Statement of Defence and Counterclaim the 1st Defendant challenged the capacity of Plaintiff to bring the action. She averred that if Plaintiff's mother acquired the land in 1973 then she must be deemed to have acquired same with knowledge of Defendant's ownership and physical possession of same as 1st Defendant had acquired the freehold interest in the Land per an indenture dated 4th April 1956, which was duly registered with the Deed's Registry as Deeds Registry No 1754/1956.

1st Defendant averred that she was placed in physical possession of the land and she caused the land to be fenced on all sides and had structures built on same. The land was also occupied by her Licensees at all material times up to date.

1st Defendant finally alleged fraud against Plaintiff and provided the particulars of fraud.

She claimed that the Composite Plan and Affidavit she was made to depose to were both obtained by fraud. 1st Defendant claims she never appeared before any Commissioner for Oaths to swear to an affidavit.

The 1st Defendant then counterclaimed as indicated supra.

Judgment of Trial Court:

The Trial Judge ruled in favour of the 1st Defendant and concluded his Judgment as follows:

> *"On the totality of the evidence before the court therefore and on the preponderance of the probabilities the Plaintiff could not prove his case against the 1st Defendant and his case is accordingly dismissed.*
>
> *Conversely the 1st Defendant was able to prove her counterclaim and I accordingly enter judgment for the 1st Defendant on her counterclaim against the Plaintiff, the 2nd and 3rd Defendants and grant her all the reliefs she seeks."*

Notice of Appeal

Aggrieved and dissatisfied with the judgment of 12/4/2022 the Plaintiff filed a Notice of Appeal on 19th May 2022 with the following as the grounds of appeal:

i. The Trial Judge erred in law when he waived the invalid Solicitor's licence to practise of 1st Defendant's Counsel.
ii. The Judgment is against the weight of evidence.
iii. The Trial Judge erred in law when he wrongly held fraud against Plaintiff/Appellant and rather failed to comment on the fraud levelled against the 1st Defendant/Respondent.

iv. The Trial Judge erred in Law when he ignored to comment on the survey report dated 11th December 2017 in favour of Plaintiff/Appellant and rather created an avenue for the 1st Defendant/Respondent that her land and Plaintiff's land fall on the same geographical location; when there is overwhelming evidence that 1st Defendant's land is far away from the disputed land.

v. The Trial Judge erred in Law, when he held that 1st Defendant pleaded the Limitation Act in her pleadings.

vi. The awarded (sic) of damages of GH¢50,000.00 against the Plaintiff/Appellant was excessive.

Relief Sought from the Court

The relief the Appellant is seeking from this Honourable Court is as follows:

> *"The decision of the trial court declaring judgment in favour of the 1st Defendant/Respondent over the land situate and being at Odorkor-Tsuim or North-Odorkor Accra and the damages of GH¢50,000.00 against the Plaintiff/Appellant, be set aside and Judgment entered in favour of Plaintiff/Appellant."*

Ground 1

The trial Judge erred in law, when he waived the invalid solicitor's license to practise of 1st Defendant's Counsel.

In his 32 page written submission the Appellant's Counsel devoted about 12 pages to the issue of 1st Defendant Counsel's lack of a valid Solicitor's licence and its effects.

Counsel's first contention on this ground is that the issue of a nullity of proceedings can be raised at any stage of a trial and even at the appellate court level and at any time. He contends further that illegality overrides all pleadings.

These observations are in respect of the position counsel has taken that the 1st Counsel of the Defendant, the Late Nathaniel Myers lacked capacity to enter Appearance for 1st Defendant because he had no valid solicitor's licence to practise at the time.

The Record of Appeal shows that Counsel Nathaniel Myers entered appearance dated 26th March 2015 (see Page 6 of ROA) with his Solicitor's licence No.: GAR 0922/2014 which had expired at the end of December 2014, and this could not be used for the 2015 year.

The issue of a nullity of proceedings is a question of law which goes to the root of the case and should be considered by the Trial Court at any stage it is raised whether it is raised during cross examination or in a written address by Counsel for his client. The court he argued cannot ignore it.

In support of this contention Counsel for Appellant cited the case of ***Fatal Vrs Wooley [2013-2014] SCGLR 1070*** (per Wood CJ), to the effect that ***"if a crucial issue is left out, but it emanates from the trial either from the pleadings or the evidence the court cannot refuse to address it simply because it was not included in the agreed issues."***

Aligned to this issue of lack of a valid Licence of the 1st Defendant's original Counsel Plaintiff's Counsel raised the issue of two other lawyers of 1st Defendant who improperly filed processes for the 1st Defendant.

Counsel stated that Zuta Plahar of PSK Associates with license no GAR 19200/18 in July 2018 filed Notice of Appointment of Solicitor whilst on 31st October 2018 Dick Kwami Anyadi Esq with Solicitor's Licence No GAR 15080/18 filed Notice of Appointment of Solicitor to represent 1st Defendant.

All these were done, according to Counsel for Plaintiff/Appellant, when the original Lawyer Myers was alive and was effectively participating in the matter until he passed away on 12th January, 2020.

Thus the processes filed by Anyadi Esq, were filed in breach of Order 75 rule 3 (b).

Plaintiff's Counsel argues that Anyadi should have served a copy of his appointment as solicitor on the previous lawyer Myers who at the time was the substantive lawyer for the 1st Defendant.

Counsel in support of this contention cited the case of ***Tengey vs. Doe [1962] 1 GLR 361*** in which case the court explained the role of lawyers in the service of court processes.

On the basis of this authority, counsel concluded that Anyadi Esq. had no legal capacity to file the processes he filed in the case as there is a clear breach of Order 75 rule 3(b) of C. I. 47.

On the issue of the invalid Solicitors licence, Counsel referred to the Legal Profession Act, Act 32 Section 8 which provides as follows:

> *"A person other than the Attorney General; or an officer of the Attorney General's Department shall not practice as a solicitor unless that person has in respect of that practice valid annual solicitors' license issued by the General Legal Council duly stamped and in the form set out in the second schedule of the Act."*

Counsel then cited the cases of ***Korboe Vrs Amosa and Akufo Addo Vrs Quashie Idun*** on decisions on the provision. In "K*orboe vs. Amosa (unreported) Suit No. J4/56/2016 dated (21st April, 2016)."*

the apex court held inter alia that;

> ***"A lawyer without a valid licence to practice cannot practice law nor prepare any process. A litigant who fails to verify the legal capacity of his lawyer cannot claim miscarriage of justice because the writ endorsed by an unlicensed practitioner is without legal effect."***

Also in the case of ***Akufo Addo vs. Quashie Idun [1968] GLR 667*** the court held as follows:

> ***"A lawyer cannot practise without a valid solicitors' licence issued for the current year of practice and that any document signed or filed by the lawyer in contravention of Section 8 (1) of Act 32 and L. I. 613 is invalid, incompetent, null and void."***

Counsel argued that a breach of ***Section 8 of Act 32*** is a breach of statute regulating the legal profession and cannot be condoned. It is an illegality which should not be countenanced by the courts. Counsel cited the case of ***Network Computer Systems Ltd. vs. Intelsat Global Sales & Marketing Ltd. [2012] 1 SCGLR 218 at 230*** in support of his contention as follows:

> ***"A court cannot shut its eyes to the violation of a statute as that would be very contrary to its raison d'etre."***

It must be noted that there was no written submission filed on behalf of the Respondent, the 1st Defendant, in this appeal. However in a riposte to the above arguments, Counsel for 1st Defendant at the trial court put up the following arguments in his written address to the trial court which appears in the ROA from page 290 -304 and will be helpful in our decision making on this ground.

In paragraph 1.7 page 3 of the written address (page 292 of ROA) Counsel states that when lawyer Myers filed a statement of defence on behalf of the 1st Defendant on 15th May, 2015, he had obtained a valid solicitor's licence which he quoted on the process filed as *"Licence No. GAR 12262/15 (see page 9 of ROA).*

Thus the process cannot be deemed null and void for lack of a lawyer's practice licence. All subsequent processes filed on behalf of the 1st Defendant were done by her lawyers who

had valid and current licences which numbers they quoted on the processes filed, as shown in the Record of Appeal (ROA).

The Record of Appeal shows that at the time Lawyer Myers filed the defence and counterclaim in the year 2015 he possessed a valid practice licence i.e. – Licence No. GAR 12262/15.

In dealing with this issue, the learned Trial Judge's findings should also be taken on board. The trial Judge rightly observed that the Appellant's Counsel brought in the issue of invalid license too late in the day thus pulling a surprise on the 1st Defendant. This is against the rules as provided in High Court (Civil Procedure) Rules, 2004 (*C. I. 47) Order 11 rule 8 1(b).*

Again, instead of amending his pleadings to incorporate the new facts that came out of the cross-examination, Counsel waited until the time he was filing his written address and attached the search result from the General Legal Council on the Licence to the address.

The general practice is that pieces of evidence are not added to written addresses when they are being submitted. To do so amounts to an attempt to introduce fresh evidence through the written submission which is not allowed. See the case of ***Kwabena Aboagye vrs the Controller & Accountant General & Anor [2012] SCGLR 538 or Civil Appeal No. J4/31/2011 dated 14th March 2012.***

The Trial Judge was thus right in describing the Appellant counsel's approach as a blow below the belt.

The K*orboe vs. Amosa* decision was a 4 – 3 majority decision which had some of the seasoned Judges of the apex court at the time dealing with the matter. The outcome indicates that the instances where processes filed by counsel who have no licence on behalf of clients should be declared a nullity should be the clearest of cases.

In instances where there are doubts as in this case i.e. Myers had a valid licence when filing a statement of defence. Zuta Plahar & Anyadi both had licences when filing the subsequent pleadings the Korboe & Amosa & Akufo Addo vs. Quashie-Idun cases cannot be applied in such circumstances.

Again, Counsel for Appellant who is seeking his pound of flesh has not fully complied with the rules and has breached some of the rules like attaching evidence, i.e. the General Legal Council search report, to a written address.

This is a court of law, a court of equity and a court of justice and he who comes to equity must come with clean hands.

The Counsel for 1st Defendant may have breached the rules in Order 75 3(b) in his handling of the Appointment of a Solicitor but that is an irregularity. It is a breach that can be remedied by the Algate authority.

See the Algate case [2007 – 2008] SCGLR 1041

We agree with the trial Judge in his observation as follows:

> *"Respecting the Notice of Appointment of Solicitor filed by Anyadi Esq he ought to have filed Notice of Change of Solicitor as he was taking over from another lawyer. However, such a breach does not go to jurisdiction and it is only a breach of the rules and not of a statute, to do substantial justice to the 1st Defendant, I will seek refuge under Ex Parte Algate [2007-2008] SCGLR 1041 and hold that this breach is curable under Order 81 of C. I. 47"*

Again, we will like to refer to the case of ***Nana Ampofo Kyei Baffour vs. Jusmoh Construction & Ors. Civil Appeal No. J4/51/2016 dated 14/6/2017*** which is a new development on the Korboe vrs Amosa case.

The apex court presided over by Akuffo, JSC (as she then was) (Coram: Akuffo/Ansah/Adinyira/Dotse/Yeboah) in a unanimous decision delivered by Adinyira JSC

reflected on its own decision in the Korboe Vrs Amosa case and suggested law reform as a means of averting injustice to helpless and hapless litigants like the 1st Defendant. Hear the apex court Justices on the matter:

> *"We recall our jurisprudence in cases such as Henry Nuertey Korboe Vrs Francis Amosa Civil Appeal No J4/56/2016 SC delivered on 21st April 2016 (Unreported) where we held in effect that a lawyer without a valid solicitor's licence for any particular year, as required by Section 8(1) of Act 32, cannot practise as a lawyer in any court or prepare any process as a Solicitor within the particular period of non-compliance and that any process originated by such a Solicitor is a nullity.*
>
> *This clearly may seem to be an injustice to the litigant and the solution does not lie in expecting a litigant to verify beforehand the credentials and legal capacity of his lawyer and of his chambers, to perform the services he is engaged to undertake.*
>
> *Objections taken to non-compliance with section 8(1) of Act 32 keep cropping up which cause delay in the delivery of justice. Perhaps it is about time for the Rules Committee to make amendments to Order 2 rules 5(1)(b) and 7 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47) on endorsement and issue of writ respectively."*

The court went on to recommend that in the interim a practice direction may be issued for the Bar and the Registrars to follow until such time that the Rules Committee amends the rules.

This is a clear indication that a determination that Counsel filed a process when he had no valid license should not be taken lightly because of the serious consequences it has on the litigant. We therefore conclude that the Trial Judge did not err in law when he waived the alleged invalid solicitor's licence to practise of 1st Defendant's original Counsel.

Ground '1' of the appeal therefore has no merit and fails.

Before tackling Ground '2', we will like to deal with the issue of the capacity of the Plaintiff which was one of the additional issues at the trial court.

It is trite law that when a party's capacity to initiate an action is called into question this must first be determined by the court as he/she cannot be given a hearing on the merits of the case even if his/her case is cast in iron.

In ***Asante Appiah vs. Amponsah @ Mensah [2009] SCGLR 90 at 75, Brobbey JSC,*** as he then was, stated as follows:

> ***"The relevant rule applicable to the instant case is that where the capacity of a person to sue is challenged he must first establish it before his case can be considered on its merits."***

In his writ of summons and statement of claim Plaintiff clearly indicated that he was suing as the customary successor of his late mother Madam Mabel A. Laryea. This was duly endorsed on the writ of summons as required.

In ***Kwaku vs. Serwaa & Ors. [1992-94] 1 GLR 241 at 250*** the court stated that:

> ***"It is trite that issue of capacity or locus standi is a point of law which can be raised at any stage, of the trial and even after judgment."***

The position of the law is that a customary successor or any person who can show that he has interest in the estate of a deceased person where the deceased died intestate does not need to procure Letters of Administration in order to initiate an action aimed at protecting such an interest.

See the cases of **Dotwaah *vs. Afriyie [1965] GLR 257*** *and* **In Re Appau (deceased) Appau vs. Ocansey [1963] 1 GLR 146** cited by the trial Judge in his judgment.

Second Ground of Appeal

We will now go on to discuss the second ground of appeal which happens to be the omnibus ground of appeal that the judgment is against the weight of evidence.

It is trite law that when a person puts forward the omnibus ground of appeal what he is claiming is that certain important facts have been overlooked which if given due consideration by the Trial Judge would have tilted the decision in his favour. It also means that the Trial Court was wrong in the findings and conclusions it had come to in view of the evidence adduced at the trial and the relevant law.

The duty of an Appellate court, such as ours, when the omnibus ground is put forward is to thoroughly review both the documentary and oral evidence adduced at the Court below and make a determination as to whether the Judge was right in his decision given the available evidence and the law.

See Tuakwa Vrs Bosom [2001-2002] SCGLR 61 and

Djin Vrs Musa Baako [2007-2008] SCGLR 686

Owusu-Domena vrs Amoah [2005-2006] SC GLR 790

In **Otoo and Another vs. Dwamena [2018-2019] 1 GLR 23** Pwamang JSC noted at page 28 as follows:

> ***"In this final appeal by the first Defendant, the sole ground of appeal is that the judgment is against the weight of the evidence. This ground of appeal is an invitation to the Court to comb through the record that was placed before the lower Court and decide for ourselves whether, having regard to the evidence and the law relevant for a determination of the case, the lower Court was right in its findings and conclusions."***

In **Ampomah vs Volta River Authority [1989-1990] 2 GLR 28** the view was also expressed that:

> ***"Where (as in the instant case) an Appellant charged that the judgment of the court below was against the weight of the evidence, there was a presumption that the judgment of the court below on the facts was correct. The Appellant in such a case therefore assumed the burden of showing from the evidence on record that the judgment was indeed against the weight of the evidence."***

In **Olivia Anim vs. William Dzandzi (Unreported) Civil Appeal No. J4/10/2018** dated 6th June 2019, the Supreme Court held that:

> ***"Where an appeal is based on the ground that the judgment is against the weight of evidence, the Appellant implies that there were certain pieces of evidence on record which if applied in his favour could have changed the decision in his favour or pieces of evidence were wrongly applied against him. The onus is on such an Appellant to clearly and properly demonstrate to the appellate Court the lapses in the judgment being appealed against."***

In his written submissions Counsel for Plaintiff outlines the issues below as the issues the trial Judge failed to give due consideration to in this judgment:

1. The Trial Judge failed to comment on the survey report
2. The Trial Judge erred in law when he charged the Plaintiff against whom 1st Defendant had leveled a charge of fraud to have failed to call 1st Defendant's son to testify on behalf of him the Plaintiff.
3. The Trial Judge failed to look at the Plaintiff's allegation of fraud levelled against the 1st Defendant.
4. The Trial Judge accused the Plaintiff of being the grantor of 2nd and 3rd Defendants when there was no evidence to that effect.

In ***Adwubeng Vrs Domfeh [1996-99] SCGLR 660 at 662,*** the Supreme Court held that in all civil actions the standard of proof is on the preponderance of the probabilities or the balance of the probabilities.

It is also trite law that in a claim for a declaration of title to land the Plaintiff or a counterclaimant must prove:

1. Root of title
2. Mode of acquisition of the land in dispute
3. Recent acts of possession in respect of or relating to the disputed land.

See: ***Mondial Veneer (Gh) Ltd Vrs Amuah Gyebu XV, Civil Appeal No J4/31/2010 dated 11th August, 2010.***

Since both parties sought a declaration of title to the land we need to determine which of them was able to satisfy the above mentioned conditions.

As the Plaintiff the initial burden of proof was cast on him and the Plaintiff traced his root of title to his mother Mabel A. Laryea. His mother, he averred, acquired a lease of the land in 1973 from Nii Lartey Kwashie Ahiaku family of Kwashieman. Plaintiff tendered in evidence Exhibit B to support his claim.

According to the Plaintiff his mother took possession of the land in 1973 and put one Tetteh now deceased and Joseph Botchway, the Plaintiff's cousin unto the land.

The Plaintiff further testified that the 1st Defendant obtained her grant in 1956 and she, 1st Defendant traces her root of title to the land to John Emmanuel Vanderpuye who acquired his interest by a deed of Indenture dated 13/12/1943 and executed between John Emmanuel Vanderpuye and John Thomas Lartey Lardi and 2 others.

Thus per his evidence Plaintiff himself admits that 1st Defendant's grant predates that of his mother by many years. Plaintiff's argument however is that a comparison of the signatures

on the 13th December 1943 Indenture (Exhibit D) and the latter signature i.e. the signature on the 1956 Indenture shows that the latter signature was forged and having been obtained through forgery, same was fraudulent.

The Plaintiff contends further that in so far as the 1943 indenture has no site plan attached to it, same is void, irregular and defective. In the cross-examination of Plaintiff by 1st Defendant's counsel the following transpired (see page 184 of the ROA)

Q: You told the court that your mother purchased this land in 1973?

A: Yes.

Q: You have seen from the 1st Defendant's indenture that she purchased this land in 1956?

A: That is true, but are (sic) land is different from the disputed land.

Q: You heard the 1st Defendant testify before this court that having purchased the land in 1956 she was immediately placed in physical possession of the land?

A: That is false.

Q: And she had remained in occupation of this land to this day in belief that the land in dispute was the land genuinely sold to her by the owners thereof?

A: That is false. The 1st Defendant entered into the land in 2008.

Thus as indicated above, the issue of 1st Defendant's grant predating that of the Plaintiff is clearly admitted by Plaintiff as shown in these excerpts of the cross-examination. What therefore remains to be determined among other things is if the 1st Defendant's land is the same land in dispute or a different one, as claimed by the Plaintiff.

Plaintiff avers that his mother was placed in possession of her plot of land and remained in undisturbed possession of same until her death on 18th June, 2006 after which the land devolved on him by custom as her customary successor.

It is our position that Plaintiff failed to prove his root of title by failing to lead credible evidence that the land was validly vested in his mother at her death.

Plaintiff tendered in evidence two indentures Exhibit 'B' and 'B1'. Neither of these key documents could have ever validly transferred the vendor's or lessor's title if any to Mabel A. Laryea. Exhibit 'B', which was executed between Mabel A. Laryea and Nii Lartey Kwashie Ahiaku IV dated 25th July, 1973 is unstamped and unregistered. The Stamp Duty Act 2005 (Act 689) Section 32 (6) provides that an instrument executed in Ghana *"must not be given in evidence or be available for any purpose unless it is stamped".*

See the Supreme Court case of ***General Emmanuel Erskine & Anor Vrs Victoria Okpoti & Anor, J4/23/2016 dated 6th June 2018.***

Exhibit 'B1' also suffers a similar limitation, that is it is not registered although it is stamped.

See Section 24 (1) of the Land Registry Act, 1962 Act 122 (although this legislation is repealed by the Land Act, 2020 (Act 1036) Section 282 (2) has a saving provision for it to cover acts done under it).

In contrast to the above, we will now examine the root of title of the 1st Defendant. In tracing her root of title, the 1st Defendant indicates in her amended Witness Statement that she acquired a freehold interest in the land in 1956 and her ownership of the land is evidenced by an indenture dated 4th April, 1956. She registered same at the Deeds Registry as Deeds Registry No. 1754/1956 and tendered same as Exhibit '1'.

According to 1st Defendant, immediately after acquisition her grantors placed her in vacant possession. Before her acquisition, the land was completely vacant and she proceeded to fence same and erected temporary structures thereon.

Per paragraphs 7 & 8 of her statement of defence and counterclaim, the 1st Defendant pleaded as follows:-

> 7. *Again, she was forthwith placed in physical possession of her land which she caused to be fenced on all sides and also had structures built on same which have been at all material times occupied by her licensees up to this day.*
>
> 8. *Paragraph 6 is vehemently denied as a piece of blatant falsehood in view of 1st Defendant's registered title and her physical possession and enjoyment of her land, per her fence wall, structures and the unchallenged occupancy of the land from the date of acquisition thereof in 1956 up to this day."*

1st Defendant testified to her physical possession of the land by the

a. *Planting of fruit trees, i.e. mangoes and pears*
b. *Fencing of lands on all sides with sandcrete blocks*
c. *Gating of fence wall*
d. *Old container kiosks placed on the land occupied by her licensees*
e. *Presence of licensees to date on the land.*

The evidence of DW2 Rose Amissah also largely corroborated the evidence of the 1st Defendant relative to the fact that she and her husband, being licensees of the 1st Defendant lived on the property for several years.

The following took place between the Plaintiff's counsel and DW2 during cross examination of DW 2.

Q. I am putting it to you that as at 2008, you were never on this property?

A. *Not correct we lived on the property long before 2008.*

Q. So if you were there before 2008, can you tell the court when you really came to that land?

A. I cannot recollect the date but what I know is that one of my grandchildren was born on the land when we moved there and he is now 16 years.

Also the ROA pages 132 – 134 show pictures or provide evidence in the form of photos of the physical state of the land and 1st Defendant's effective possession of the land and presence thereon.

The evidence of 1st Defendant's physical possession of the land is abundant and overwhelming and the trial Judge was right in declaring title in her favour.

Counsel for Plaintiff referred to the following cases as authorities on the issue of declaration of title as follows:

Ogbarmey-Tetteh vs. Ogbarmey-Tetteh [1993-1994] 1 GLR 353;

> ***"In an action for a declaration of title, a Plaintiff who failed to establish the root of his title must fail because such default was fatal to his case."***

In ***Yaa Kwasi vs. Arhin Davis [2007-2008] 1 SCGLR 580-584,*** the court stated that:

> ***"Since the Plaintiff in this appeal sued for not only a declaration of title but also damages for trespass and order for perpetual injunction he assumed the onerous***

burden of proof of title to the disputed land by the preponderance of the probabilities required by Sections 11(1) and (4) and 12 of the Evidence Decree, 1975 or else risk the prospect of losing the case."

Counsel is right in his reference to the authorities as the position of the law but his client has failed to prove his root of title to enable him successfully rely on these authorities. ***See Ackah vrs Pergah Transport Ltd and Ors (2010) SCGLR 728.***

Section 48(7) of the Evidence Act [1975] (NRCD 323) states that *"the things a person possesses are presumed to be owned by that person".*

In the recent case of ***Elizabeth Osei v. Madam Alice Efia Korang [2013] 58 GMJ SC at page 26 Ansah JSC*** stated as follows:

"Now in law, possession is nine points of the law and a Plaintiff in possession has good title against the whole world except one with a better title. It is the law that possession is prime facie evidence of the right to possession/ownership, and being good against the whole world except the true owner, he cannot be ousted from it."

In respect of the result of the composite plan drawn by the Survey Department on the Orders of the trial court which suggest that per her indenture the land sold or purported to have been sold to 1st Defendant by her grantors is located very far away from the land in dispute we agree with the finding of the trial Judge that, that cannot be true given the overwhelming evidence available in the case including, inter alia, the undoubted acts of possession by the 1st Defendant.

The trial Judge was therefore right in not placing much probative value on that document and the evidence of the CW1.

We are firm in our conclusion that the second ground of appeal the omnibus ground has not been made out by the Plaintiff and therefore fails.

Assuming without admitting that all processes filed by the 1st Defendant/Respondent were a nullity, and therefore the Notice of Appearance filed by the late lawyer Myers was a nullity, the position of the law on declaration of title cases still remains that even where a defendant makes no appearance in such an action, the plaintiff ought to enter the witness box, give evidence and pursue the case and win same on the strength of his case.

A case in point is Hydrafoam Estates vrs Moi Ashong [2012] 49 GMJ 144 C. A. [at page 1611], where the Court of Appeal per Acquaye, J.A. stated as follows:

> *"the law is that in an action for declaration of title when there is a default of appearance the plaintiff can obtain an interlocutory judgment in default of appearance, enter the witness box and give evidence of his title before he can obtain final judgment for declaration of title". Thus the plaintiff can only be granted his reliefs based on the merits of his case, thus the merits of his case ought to still be considered by the court in granting or not granting the reliefs he seeks".*

In this case even on the strength of the plaintiff/appellant's own case he fails to prove his case on a balance of probabilities for the reasons cited above, particularly because he has not been able to prove a better title to the long possession held by the 1st defendant, as well as prove fraud beyond reasonable doubt regarding the land title certificate on the 1st defendant which he even admits predates his.

Ground 3

The Trial Judge erred in law when he wrongly held fraud against Plaintiff/Appellant and rather failed to comment on the fraud levelled against the 1st Defendant/Respondent.

Counsel for Plaintiff in arguing this ground restates the Plaintiff's position that the 1st Defendant's land is different from Plaintiff's family land and the land in dispute in this matter.

He continued that 1st Defendant ought to know that her alleged land was far away from the disputed land but was using her 1956 grant to snatch Plaintiff's family land at all cost.

Counsel contends that by the composite plan marked as Exhibit CW1 at pages 335-358 of the Record of Appeal the 1st Defendant's land is far away from the disputed land.

In paragraph 12 of Plaintiff's amended reply to the 1st Defendant's amended defence/counterclaim dated 20/12/2018 Plaintiff pleaded fraud against the 1st Defendant and particularized same. See pages 24-25 of the ROA for the particulars.

The 1st Defendant equally pleaded fraud against the Plaintiff in her amended Defence and Counterclaim dated 20th December 2018 and particularized same in paragraph 16 (i – ix).

In ***Dzotope Vrs Harhomene III 1987 2 GLR 681 CA*** fraud was defined as follows:

> *"Fraud in all cases is an implied wilful act on the part of anyone whereby another was sought to be deprived by illegal or inequitable means of what he was entitled to."*

Order 11 rule 8 of High Court (Civil Procedure) Rules, 2004 C.I. 47 subtitled "matters to be specifically pleaded" provides as follows:

> *"A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any limitation provision, fraud or any fact showing illegality.*

It is trite law that fraud must be pleaded, particularized and proven.

Also Section 13(1) of the Evidence Act, NRCD 323 provides as follows:

"13(1) In any civil or criminal action the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond reasonable doubt."

In the case of ***Fenuku vrs John Teye*** (cited by Plaintiff's Counsel) (2001-2002) SCGLR 985 (cited by Plaintiff's Counsel) it was held in holding 5 as follows:

"The law regarding proof of forgery or any allegation of criminal act in civil trial was governed by section 13(1) of the Evidence decree 1975 NRCD 323 which provided that the burden of persuasion required proof beyond reasonable doubt."

It is our position that neither the Plaintiff nor 1st Defendant was able in the course of the trial at the court below to lead any cogent evidence to prove beyond reasonable doubt the allegation of fraud which each pleaded and particularized as indicated supra.

We are unable to accept the Trial Judge's finding and holding that the allegation of fraud was proven beyond reasonable doubt by the 1st Defendant against the Plaintiff and that the Plaintiff perpetrated fraud on the 1st Defendant.

We will support and agree with the finding that the 1st Defendant's land is not distinct and different from the Plaintiff's land and that it is the same land the parties are contesting.

We will however not stretch it to the point of saying that the allegation of fraud has been proven beyond reasonable doubt by 1st Defendant against the Plaintiff.

It is also a bit unfair to hold it against the 1st Plaintiff that he was unable to call the 1st Defendant's son James Akwei Konua to help rebut the allegation of fraud against him the Plaintiff. The 1st Defendant who pleaded fraud and the mother also equally had the obligation to call her biological son to testify that Plaintiff had used him or prevailed upon him to perform those alleged dastardly acts against her own mother.

It is our considered opinion that Plaintiff Counsel has a good point here. That notwithstanding, our position on the matter is that none of the parties was able to prove the charge of fraud against the other beyond reasonable doubt as required by law.

The appeal can properly and fully be decided on the other grounds and not on the issue of fraud.

See also ***Kangbere Vrs Mohammed [2012] 51 GMJ 173 SC at page 198 per Dotse JSC.***

Ground 4

The Trial Judge erred in Law when he ignored to comment on the survey report dated 11th December, 2017 in favour of Plaintiff/Appellant but rather created an avenue for the 1st Defendant/Respondent that her land and Plaintiff's land fall on the same geographical location when there is overwhelming evidence that 1st Defendant's land is far away from the disputed land.

This ground is a bit of a narrative and repetitive and appears to be violating Rule 8 (5) of CI 19. We will however accept same but firmly indicate that the last portion of it on the 1st Defendant's land being different has been dealt with and rejected and we will not spend any more time on it.

In respect of the first part, of the Trial Judge not commenting on the survey report we think the Trial Judge considered it but did not place much store on it in arriving at his decision. We quote excerpts from the judgment to prove this.

At page 18 of the judgment (page 325 of the ROA) the Learned Trial Judge observed as follows:

> *"The plaintiff relies on the report from the Court-appointed Surveyor, CW1 and the alleged affidavit of the 1st Defendant (which she, the 1st Defendant claims to be fraudulent), to say that the two lands fall in different places. But with due deference to learned counsel for the*

Plaintiff, I did not get that sense from his own evidence-in-chief as well as the evidence of the court-appointed surveyor whose evidence unfortunately and totally out of procedure was tendered through the 1st Defendant without objection. However, this court then ordered the said surveyor to appear for him to be cross-examined by the parties/their lawyers.

If one closely examines the evidence of the Plaintiff himself, particularly as gleaned from paragraphs 15-18 of his Evidence-in-Chief, then the only conclusion one can draw is that the Plaintiff was not challenging the fact that the land he is claiming and the one the 1st Defendant is claiming is one and the same.

In the cross-examination of the 1st Defendant by counsel for the Plaintiff on 1st march, 2021, respecting the location and/or the identity of the land, the following exchanges took place:

Q: I am putting it to you that Exhibit 1 and the site plan thereof do not represent the land in dispute?

A: It is the document that was given to me that I have brought to court. This is what I have had all these years, there is no other document.

Then on 3rd march, 2021 during the further cross-examination of the 1st Defendant by the Plaintiff's Counsel, these exchanges took place:

Q: And the land you claim to have is far away from the subject-matter of this dispute?

A: No.

Q: And that your own son has been shown where your land really lies?

A: No if they took my son anywhere and showed him any land, then that is not my land; my land is the land in dispute.

Q: And that it was as a result of the surveyor's report that your son was then taken and shown the real land that belongs to you.

A: No, no surveyor came to me; it was the Plaintiff who came to me and told me that they had found my land. But I said that what they had supposedly found was not my land. They brought me a paper to sign. At that time, I was sick in bed so they brought the said document and I also signed.

The above shows that the Plaintiff's claim that the Trial Judge did not comment on the survey report is wrong.

Opinions of expert witnesses are not binding on Judges and that is the position of the Law. The learned author S.A. Brobbey in his book Essentials of the Ghana Law of Evidence (2014 edition) at page 339 states as follows:

> *"The established rule is that experts give evidence and do not decide cases. The evidence given by the expert is only a prima facie case and should not be considered as deciding the issue for the court. The evidence is not binding on the Judges."*

See the cases of:

Agyekum & Ors Vs Tackie & Brown (substituted by) Adjindah & Ors [2005-2006] SCGLR 851 holding 2.

Fenuku Vrs John Teye (2001-2002) SCGLR 985 holding 6.

As stated in the Agyekum case supra we can say that the learned Trial Judge was justified in concluding that on the evidence the land of the 1st Defendant was the same land the Plaintiff was claiming or was the land in dispute, on the balance of the probabilities.

There is therefore no merit in this ground of appeal and it is dismissed.

Ground 5

The Trial Judge erred in the law when he held that 1st Defendant pleaded the Limitation Act in her pleadings.

Counsel for Plaintiff's contention is that nowhere in the pleadings did the 1st Defendant plead the Limitation Act and she can therefore not resort to same for the court to rely on the said Act in arriving at a decision. Counsel argues that 1st Defendant's occupation/stay on the disputed land has not accrued the 12 year period as required by law.

Based on Plaintiff's Counsel's computation the 1st Defendant entered into the Plaintiff's land sometime on 7th December, 2006 and the suit commenced in 2015 so this gives you 9 years not the required 12 years.

Is this the evidence in the ROA and is Counsel's contention right?

It is true that the 1st Defendant did not specifically plead the defence of limitation. She however made reference to the fact that she had exercised acts of possession over the land since 1956 (not 2006 as claimed by Counsel for Plaintiff) per paragraph 8 of her Amended Statement of Defence and Counterclaim. It arose from the effect of her pleadings and was sufficiently clear for the court to base a decision on it. The 1st Defendant has been in active possession for more than 12 years.

From the facts in this matter the 1st Defendant's presence and activities on the disputed land amount to adverse possession. There was no evidence of any challenge by Plaintiff's mother to the exercise of the right of ownership by the 1st Defendant in respect of the land. On the basis of the above Section 10 of Limitation Act 1972 NRCD 54 can be invoked.

From the facts of this matter 1st Defendant is in our view entitled to the protection of the Limitation Act, 1972 (NRCD 54) The Plaintiff's mother and Plaintiff are estopped by Section 10 of the Act from now challenging 1st Defendant's possession and ownership of the disputed land.

Thus this ground of appeal has not been made out and it is dismissed.

We have taken note of the authorities cited by Plaintiff/Appellant's Counsel on the matter as follows:

Jerigoji vrs Issah (1989-1990) 2GLR 502 holding 1 and

Bassil vrs Kabbar & Anor (1966) GRL 102 at 105 SC per Apaloo JSC

The Bassil case in our view supports the decision of the Trial Judge as it states that:

> (*1)... "But if he intended to rely on it, he is obliged by the mandatory provisions of Order 19 rule 16 either to plead it specifically or to plead such facts as would evince an intention to rely on it."*

It is our finding and we hold that 1st Defendant has satisfied the condition by pleading facts that evince an intention to rely on the defence of Limitation as indicated above.

Ground 6

The award of damages of GH¢50,000 against the Plaintiff/Appellant was excessive.

In the case of ***Vaughan Williams Vrs Oppong 2005 (84) GMJ 171 Adinyira JSC (as she then was) stated as follows at page 175:***

> *"Evidence of possession is essential in a claim for trespass and recovery of possession. There must however be clear and cogent evidence in support and not mere assertion."*

Trespass to land occurs when a person intentionally enters someone's property without permission, which encroaches on the owner's privacy or property interest.

The tort of trespass to land is committed simply by entering upon, remaining upon or placing or projecting any object on the land that is in the possession of another without lawful justification.

In Seraphim Vrs Amua Sekyi 1962 IGLR 328 Holding 1 Ollennu J stated that:

> ***"A person in possession of land can successfully maintain an action in trespass against the whole world, except the true owner".***

Also in ***Ebusuapanyin Akuma Mensah vrs Nana Atta Komfo II (2015) 39 GMJ 80*** the court stated as follows:

> ***"As with all forms of trespass, there must be directness, the Plaintiff must prove direct invasion of the Defendant on his land for action of trespass to succeed."***

The 1st Defendant in her pleadings (defence and counterclaim) and evidence clearly stated that she has been in undisturbed possession of the land in dispute. She did not lead an iota of evidence to prove that Plaintiff had trespassed onto the land.

In view of this it is difficult to understand the basis for granting her general damages of ¢50,000 when there is no evidence of trespass.

In paragraph 8 of her Amended Statement of Defence and Counterclaim the 1st Defendant pleads as follows:

> ***"Paragraph 6 is vehemently denied as a piece of blatant falsehood in view of 1st Defendant's registered title and her physical possession and enjoyment of her land per her fence wall, structures and the unchallenged occupancy of the land from the date of acquisition thereof in 1956 up to this day."***

In view of the above the Trial Judge erred in awarding the sum of ¢50,000 as general damages for trespass to the 1st Defendant when there is no evidence of trespass.

Ground vi of the appeal therefore succeeds and we set aside the said award.

Conclusion:

The appeal fails on all the grounds except ground vi.

The judgment of the Trial Court dated 12th April 2022 is hereby affirmed subject to the variation in respect of the general damages.

Costs of GH¢10,000.00 to Defendant/Respondent.

(SGD)

ALEX B. POKU-ACHEAMPONG

(JUSTICE OF THE COURT OF APPEAL)

(SGD)

I agree, **NOVISI AFUA ARYENE (MRS)**

(JUSTICE OF THE COURT OF APPEAL)

(SGD)

I also agree, **AFIA SERWAH ASARE-BOTWE (MRS)**

(JUSTICE OF THE COURT OF APPEAL)

COUNSEL:

1. Joseph Kwaku Gyimah for Plaintiff /Appellant
2. Dyck Anyadi for Defendant /Respondent