IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA – GHANA AD – 2023

Coram: - *M. Welbourne (Mrs), J.A. (Presiding)*

Kyei Baffour, J.A.

Anku-Tsede (Mrs.), J.A.

Suit No. H1/161/2021

Date: 30th March 2023

1. **Stephen Mensah** == **Defendants/Appellants**
2. **Maxwell Kwesi Owusu**

Vrs

Michael Obeng Addo == **Plaintiff/Respondent**

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JUDGMENT

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WELBOURNE, J.A

By his Writ of Summons and Statement of Claim filed on the 13th day of February, 2017, the Plaintiff claimed against the Defendants as follows:

a. A declaration of title to and recovery of possession of the land in dispute situate lying and being at Yellow House Street, South Ofankor, Accra.

b. A declaration that the Defendants' Title Deed, Indentures and any other documents in possession of the Defendants in connection with this land in dispute, if any, are not genuine.

c. An order cancelling and revoking all documents, Title Deeds, Indentures and other transactions on the said land which have been made in favour of the Defendants, their agents, heirs, successors and assigns.

d. Ejectment of the Defendants, their agents, assigns, heirs and executors from the land in dispute.

e. Demolition of any structure or structures built on the said land in dispute by the Defendants, their agents, assigns heirs and executors.

f. Perpetual injunction restraining the Defendants, their agents, assigns heirs and executors from interfering with the quite enjoyment of the land in dispute by the Plaintiff.

g. Damages for trespass.

h. Costs.

The case of the Plaintiff as stated in his Statement of Claim is that he acquired a plot of land from Nii Amarkai III, Dzasetse and acting Asere Mantse with the consent concurrence of the principal elders of the said Asere Stool in 1992. The Indenture on the land was however given to him on the 12th day of October, 2005. Plaintiff describes the land as situate, lying and being at South Ofankor, Accra, and covering an approximate area of 0.16 acre more or less and bounded on the North by a proposed road measuring 70 feet or more, on the East bounded by Lessor's land 100 feet more or less and on the West measuring 100 feet more or less by Lessor's land and given to him to hold for a period of 99 years commencing from the 12th day of October, 2005.

Plaintiff states that after acquiring the land, he went into possession and occupation by building a foundation of three bedrooms on the land but the said foundation was destroyed three (3) times by the 1st Defendant on 4th February, 2005, 23rd October, 2005 and 31st October, 2013 and also stole or destroyed one (1) trip of chippings, three thousand (3,000) cements blocks and one (1) trip of sand which Plaintiff had put on the land. 1st Defendant then claimed ownership of the land and put the 2nd Defendant on the land by constructing a single room with a surrounding wall on the land. The 2nd Defendant is therefore in physical possession of the land. Plaintiff further avers that after these illegal acts, he reported the matter to the police but nothing happened. He also caused his lawyer to write to the 1st Defendant on 4th November, 2013 to desist from the trespass to his land but Defendant refused to heed and found that the land does not belong to the Defendants.

The 1st Defendant on his part per his statements of defence and counterclaim avers that he is the owner of all that land situate, lying and being at North Akweteyman/Tantra Hill, Accra covering an approximately area of 0.16 acre more or less and bounded in the North by a proposed land measuring 69.3 feet more or less, on the South by lessor's

land measuring 69.4 feet more or less, on the East by lessor's land measuring 102.6 feet more or less and on the West by lessor's land measuring 101.5 feet more or less. Defendant says he acquired this land from Mr. Kwesi Aggrey in or around the year 2007 and that the fence wall around the property was constructed by the said Mr. Aggrey. After completing all procedures for the acquisition of the land, 1st Defendant avers that he was handed an indenture in respect of the land by Mr. Kwesi Aggrey who had received same from Colonel (Rtd) Tetteh Doi Addy, head and lawful representative of the Abola Piam We Family of Accra. He then took possession of the land by constructing a structure on the land which he asked 2nd Defendant to occupy as a caretaker.

Defendant also states that he executed a lease on 12th September, 2013 in respect of the land with Nii Armakai III Dzasetse and Acting Asere Mantse of H/No. D 702 Bannerman Road, Accra to confirm his title over the land in dispute. Defendant also states that Plaintiff's report to the police did not yield any results because the police concluded upon investigation that the Plaintiff's claim could not succeed. Defendants therefore counterclaimed as follows:

a. Declaration of title to the land.

b. Recovery of possession of the said land.

c. Special and general damages for trespass.

d. Perpetual injunction restraining the Plaintiff, his assigns, representatives, agents, workers and servants from dealing with the land the subject matter of this suit.

e. Costs including legal costs.

The issues set down for trial were:

a. Whether or not the land in dispute belongs to the Plaintiff.

b. Whether or not the Defendants have trespassed on the land in dispute.

c. Whether or not the Plaintiff is entitled to the reliefs being sought.

d. Any other issues arising out of the pleadings.

Additional issues

1. Whether or not the land in dispute was granted to the Plaintiff and the 1st Defendant by Nii Amarkai III Dzasetse and Acting Asere Mantse of H/No. D.702 Bannerman Road, Accra.

2. Whether or not the 1st Defendant acquired the land in dispute in the year 2007 and occupied same before the Plaintiff acquired it from his grantor.

3. Whether or not the structures and the heap of cement blocks on the land in question belong to the Plaintiff.

4. Whether or not the Defendants destroyed the property of the Plaintiff on the land.

5. Whether or not the Defendants are entitled to their counterclaim.

6. Any other issues arising from the pleadings.

After the trial, the trial judge delivered the judgment inter alia as follows:

"*In conclusion, the court grants the claims of the Plaintiff as follows:*

a. A declaration of title to and recovery of possession of the land in dispute situate lying and being at Yellow House Street, south Ofankor, Accra.

b. *A declaration that the 1st Defendant's indenture (exhibit 2) and (exhibit 1) which is in the possession of the 1st Defendant in connection with this land in dispute, are not valid.*

c. *An order cancelling and revoking the indentures in respect of the land in dispute which are in the possession of the 1st Defendant namely exhibit 1 and exhibit 2.*

d. *Ejectment of the Defendants, their agents, assigns, heirs and executors from the land in dispute.*

e. *Demolition of any structures built on the said land in dispute by the Defendants, their agents, assigns, heirs and executors.*

f. *Perpetual injection restraining the Defendants, their agents, assigns, heirs and executors from interfering with the quite enjoyment of the land in dispute by the Plaintiff.*

g. *Damages of GH₵5,000.00 is awarded against the Defendants for trespassing unto the land in dispute.*

Finally, as the 1st Defendant received no valid title from anyone, his counterclaim is dismissed with costs of GH₵8,000.00 awarded against the Defendants in favour of the Plaintiff."

GROUNDS OF APPEAL

i. The judgment is against the weight of evidence.

ii. Further grounds of appeal will be filed on the receipt of the judgment.

Analysis

The law is settled, that an appeal such as the instant is by way of rehearing. Rule 8(1) of the Rules of this Court, provides that an appeal to this court shall be by way of rehearing and shall be brought by a notice of appeal. The court thus, sits in the seat of the trial court, comb the entire record and right all wrongs committed by the trial court

in the hearing of the suit. This obligation, however, must, be preceded with a demonstration by the Appellant, particularly where he urges the ominibus ground of appeal that the judgment is against the weight of evidence on record, the errors committed by the trial court in the evaluation of the evidence on record.

The law is further that, an appellate court must be slow to disturb the findings of facts made by a trial court. The wisdom is that, it is the trial judge that had physical contact with witnesses whiles testifying to be able to properly evaluate their demeanour. However, this role of trial courts is not sacrosanct. As an appellate court, where there are glaring errors committed by a Trial Court in the evaluation of the evidence at the trial is obliged to reverse such erroneous analysis. See cases such as **KOGLEX LTD. VS. FIELD [1999-2000] 2GLR 437; ANCHORO VS. AKANFELA [1996-97] SCGLR 209.** These yardsticks shall guide us in the consideration of the appeal before us. In the case of **SYLVIA GREGORY VS. NANA KWESI TANDOH IV [2010] SCGLR 971**, the Supreme Court summarized the circumstances that will trigger an appellate court to set side findings of facts made by a trial court as follows:

(i) *Where from the record the findings of fact by the trial Court are clearly not supported by the evidence on record and the reasons in support of the findings are unsatisfactory.*

(ii) *Where the findings of fact by the trial Court can be seen from the record to be either perverse or inconsistent with the totality of the evidence led by the witnesses and the surrounding circumstances of the entire evidence on record.*

(iii) *Where the findings of fact made by the trial Court are consistently inconsistent with important documentary evidence on record.*

See also the case of ***Republic vrs High Court (General Jurisdiction 6); Ex -parte Attorney-General (Exton Cubic-Interested Party) 2020 DLSC 8755, where the Supreme Court per Anin-Yeboah JSC (as he then was)*** restated the principle as follows:

> *"Appeal is an application to a higher appellate court to correct an error which may be legal or factual. In Ghana all civil appeals are by way of rehearing and the appellate court may subject the whole record to review and may even make new findings of fact in deciding the appeal"*

The rule and the practice is that the appellate court is enjoined by law to comb through the entire evidence on record and make its own assessment of the case just as the trial court.

These legal yardsticks shall guide us in resolving the instant appeal. As at the hearing of the appeal, no other grounds had been filed so we shall proceed to deal with the sole ground of appeal namely:

a. The judgment is against the weight of evidence.

When an Appellant anchors his appeal on the omnibus ground of appeal, what the Appellant is simply saying, is that, the trial court failed to properly evaluate the evidence led at the trial and thus, misdirected itself in the findings made.

By pleading the omnibus ground of appeal, an Appellant assumes the burden to point out the areas and or pieces of evidence and analysis done by the trial court which, he complains to have been wrongly evaluated. An appellate court such as the instance, from such demonstration will then assume the duty to engage in an independent revaluation to satisfy itself, whether the findings of facts per the evidence adduced at the trial can be sustained. Where the conclusions reached, are clearly unsupportable by

the evidence and thus lead to a miscarriage of justice, an appellate court must reverse such findings.

In **Djin vrs Musa Baako [2007-2008] 1 SCGLR 686,** the Supreme Court held in holding 1 of the Report that:

> *"Where as in the instant case, an Appellant complains that a judgment is against the weight of evidence, he is implying that there were certain pieces of evidence on the record which, if applied in his favour, could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an Appellant to clear and properly demonstrate to the appellate court the lapses in the judgment being appealed against."*

However, the thrust of the Appellants case is that the land in dispute was acquired and later released by the State and for that matter the mutual grantor did not have capacity to grant the land to the Plaintiff.

In the instant case, the Plaintiff Respondent acquired a piece or parcel of land situate and lying at Tantra Hill sometimes referred to as south Ofankor from the Asere Stool represented by Nii Amarkai III acting Dzasetse of Asere in 1992. An indenture was however executed by the said Nii Amarkai III witnessing the transaction on 12th October, 2005.

The Plaintiff took possession of the land and constructed a foundation for a three-bedroom house on the land in 1995, 2005 and 2013. But in each of these times the foundations were destroyed by the 2nd Defendant on the instruction of the 1st Defendant.

The further submission of the Plaintiff was that in addition, upon trespassing on the Plaintiff's land the Defendants with impunity stole and used his 3000 sandcrete blocks

to construct a single bedroom house and commenced a fence wall around the property in dispute. And on all these occasions, the Plaintiff made complaints to the Police as well as notices from the Plaintiff lawyers to no avail.

The 1st Defendant on the other hand claimed he acquired the land in dispute in 2007 from one Kwesi Aggrey, who got his grant from Abola Piam (Tunmah We) one principal stool of the Ga Mashie area. Whilst the 2nd Defendant claimed he was a resident and the caretaker on the land in dispute for the 1st Defendant.

It must be noted here that the 1st Defendant alleged grantor Kwesi Aggrey did not execute any document for the 1st Defendant as a sublease or assignment. In effect, what the 1st Defendant has is the document in the name of Kwesi Aggrey which he obtained from Abola Piam We.

The court gave judgment for the Plaintiff on 31st July, 2019 for the reliefs as claimed as stated earlier.

Sections 11 (1) and (4) of the Evidence Act 1975 (NRCD 323) states at follows:

> *"1. For the purposes of this decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.*
>
> *4. In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence."*

Flowing from the above, it is therefore the cardinal duty of a party to produce sufficient evidence to prove the existence of any allegation contained in his or her pleading through exhibits and other materials as part of the witness statement and not just to take the witness box and re-state what he/she has in the pleadings without any proof.

The Appellants Counsel in his submissions stated that when the 1st Defendant tried to register the documents on the land at the Lands Commission, he was told that the land belonged to the Government of Ghana and in view of that he could not register the documents. According to the Defendants, some families from Accra petitioned the government and the land indenture was released to them. The 1st Defendant stated that those who possess land in the area formed an association to represent the interest of the members in matters concerning the land and that he is a member of the association.

According to the 1st Defendant, he executed a lease agreement in respect of the land in dispute on 12th September 2013 with Nii Dzasetse and acting Asere Mantse of H/No. D 702 Bannerman Road, Accra to confirm his title over the land in dispute.

The issue is whether in 1992 or 2005, the Asere Stool was vested with the right to grant any land to the Plaintiff or that the Abola Piam family also had any right to grant any land to the 1st Defendant's predecessor in title, one Kwesi Aggrey, who could then grant the same to the 1st Defendant.

It is the case of the Plaintiff that he constructed the foundation of a house and a fence wall, as well as building materials on the land in dispute. And, it is the case of the 1st Defendant that he fenced the land in dispute, built a house on a part thereof, and placed the 2nd Defendant on the land as a caretaker.

The 1st Defendant only restated his assertion in the pleadings when he mounted the witness box on 25th February 2015. This can be found at page135 of the record of appeal as follows:

Q. did your grantor ever give you assignment?

A. No the lands at South Odorkor has a very serious issue even presently…. The land belongs to the Government. It is public land.

Q. So as you sit here there is no document to prove that you got a land from your grantor?

A. I have a document to prove ownership. This came about when the land owners in the area realized that they could not register their lands with Land Commission therefore had to form an association through which with the help of the Member of Parliament in the area to resolve the issue with the Government and part of their agreement was that the association and the present chief by name Nii Armah Kwei III help to issue new indentures and through the association I got the indenture to show ownership.

Section 25(1) of the Evidence act 1975 (NRCD 323) states as follows:

> *"Except as otherwise provided by law, including the rules of equity, the facts recited in a written document are conclusively presumed to the true as between the parties to the instrument, or their successors in interest."*

It is significant to note that the Narrative Recitals in the Plaintiff's document dated 12th October, 2005 (page 96 of ROA) and the Narrative Recitals contained in the Defendants documents dated 12th September, 2013 (page 84 of ROA) all from Nii Amarkai III Dzasetse of the Asere Stool are all the same.

In all these recitals, there is no mention or indication that the land in dispute forms part of State land or had ever been acquired by the State and ever returned as was claimed by the Appellants.

It is Respondent's case that the claim of the Appellants that the Government once acquired the land and later returned it and therefore the mutual grantor Nii Amarkai III

had no capacity to make a grant at the time be executed the document for the Plaintiff/ Respondent is not only false but very disingenuous.

The Supreme Court in the case of **Amuzu vrs Oklika [1997-98] 1 GLR 118** was very clear on the effect of "notice" on land transactions be it constructive or formal. Thus a purchaser of land cannot ignore a "blinking red light" on the land that someone else other than his vendor is in possession hence "cannot be allowed to benefit from or take advantage of is tainted conduct".

In the instant case, the Defendants were well aware of the Plaintiff's claim and possession of the land. The 1st Defendant further intimated under cross-examination on 25th February, 2019 (page 137 of ROA) that he acted as a mediator between his alleged grantor and the Plaintiff as far back as 1995 in the following exchange:

Q: Did you inform the association or Nii Amarkai that there is a dispute on the land.

A: No, because at that time there was no dispute on the land.

Q: Did you inform the association and Nii Amarkai that Nii Amarkai had already signed an indenture for the Plaintiff.

A: No, because in 1995 there was an issue between Mr. Aggrey and Mr. Obeng in respect of the double sale of the same plot of land and I came personally to resolve the issue.

The cross-examination continue the following day 26th of February, 2019 (page 139 of ROA) as follows:

Q: Did your grantor ever disclose to you that he had a problem with the Plaintiff over the land.

A: Yes.

Q: And that was when.

A: That was in 1995.

Q: So you were aware of the problem on the land when you bought it from your grantor.

A: No. When I bought the land in 2007 the double sale issue between Mr. Aggrey and Mr. Obeng had been resolved and I was the mediator in that matter.

Clearly then the Appellant was aware that the land was encumbered from 1995. In the case of E**lizabeth Osei v Alice Efua Korang [2013] 50 GM) 26**, the Supreme Court held as follows:

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

Also in the case of Samuel Oblie vrs Tetteh Lancaster; Suit No: J4/29/2015 a judgment of the Supreme Court delivered through Appau JSC on the 15th March, 2016 stated that "the law is that possession is ninety-nine percent of the law."

In Bandoh vrs Dr. Mrs. Maxwell Apeagyei- Gyamfi and Alex Gyimah [2019] DLSC 6502 at Page 11; the court held that:

"Notice does not mean only notice of registration of the title but also notice of possession by the first purchase, grantee or lessee or their agent as the case may be. That is why an intending purchaser must make reasonable enquiries in respect of the property he seeks to acquire. This involves legal searches at the land registry, ***but more critically it***

involves a physical inspection of the land to ensure it is free from encumbrances".

In Mary Larley Nunoo vrs Manase Ataglo Suit No: J4/73/2018; the Supreme Court stated through Dordzie JSC on the 28 July, 2018. As follows: The court held that:

"There was ample evidence of possession on the land at the time of Defendant's acquisition, it had been well established by a number of decided cases that where a purchaser of land had the opportunity of seeing evidence of possession no matter how slight on any part of the land he intended to purchase but he fails to investigate the authority behind the adverse possession he is fixed with notice of the adverse possessor".

The Appellant also confirmed his actions on the land in dispute when asked whether he got vacant land from his grantor in 2007.

A: No when I bought the land in 2007, my grantor had taken possession of the site and had one room which was occupied by a caretaker Kwesi Owusu, the 2nd Defendant and there was also a fence wall.

He further obtained a new site plan and permit from the Ga Central Municipal Assembly and put up two separate bedroom structures on the land, one of which is up to lintel level. **(See page 139 of the record of Appeal).**

We agree with the trial judge that assuming they had common grantors, the Respondent's document Exhibit "A" was granted first in time that is on **12th October, 2005,** while the Appellant's Exhibit "2" was granted on **12th September, 2013.**

As both documents are unregistered, the equities are equal and the first in time prevails. The case of **Ayekpa vrs Sackey Mensah [1984-86] 1 GLR 172** where this court held that: *"The Defendants equitable title was earlier in time and as against the Plaintiff he was the owner of the plot of building in dispute."*

Also in the case of **Amuzu vrs Oklika [1997-98] GLR 118** it was held that*:*

> *"when, however parties hold equitable titles, the maxim in equity is that the first in time will prevail."*

In any case, the inconsistences in the Appellant's case and the evidence cannot be glossed over.

The evidence on record indicates the Appellant's Exhibit "1" was signed by the Abola Piam Family and not the Asere Stool. Although he claimed that the Asere Stool granted him the land.

When he was questioned that the Abola Piam and Asere Stool are distinct and separate Stools he couldn't give a definite answer. The Stool land could only be alienated, validly by the execution of a chief acting with the consent and concurrence of the principal elders of the Stool.

I have perused the record and I do not find that the Col. (Rtd.) John Tetteh D. Addy acted under the authority of the Asere Stool.

The *nemo dat quod habet* maxim applies in this case especially as the Asere Stool first alienated the land in dispute to the Respondent on 12th October, 2005 (Exhibit 'A') then later the Asere Stool purported to alienate the same Stool land to the 1st Defendant/ Appellant on 12th September, 2013 interestingly, the Stool was gaining notoriety in double sale of land as was the case of **Tetteh and anor vrs Hayford (substituted by) Larbi and Decker [2012] 1 SCGLR 417-431** where the court held as follows:

> *"On application of the nemo dat quod non habet maxim, the Asere Stool, having divested interest in the land in favour of the original Defendant long ago in 1974, had nothing*

with regard to the diverted land to convey again; and so any purported sale of the already divested land subsequently made to the Plaintiff, is null and void."

From the foregoing, the Appellant was not able to prove its title to his land in dispute. I find the Respondent's claim more credible than the Appellant on the preponderance of probabilities, the Appellant's conduct throughout the record was reprehensible, and bordering on fraud.

The trial judge cannot be faulted for his evaluation of the evidence before him and his conclusions drawn.

Enforcement of judgments or execution is regulated by Orders 43, 44 and 45 of CI 47, of 2004. These rules do not provide for demolition as one of the methods of enforcement of judgments. It is left to a successful party who has secured among others an order of recovery of possession to have recourse to one of the modes of execution to enforce the judgment obtained.

The appeal is therefore dismissed in its entirety with the exception of relief (e) as without merit and the decision of the High Court dated 31st July, 2020 is affirmed.

Cost of GH Ten Thousand Ghana cedis (GH₵10,000.00) in favour of the Plaintiff/ Respondent against the Defendants/Appellants.

(SGD)

MARGARET WELBOURNE (MRS.)

(JUSTICE OF APPEAL)

(SGD)

I AGREE ERIC KYEI BAFFOUR

(JUSTICE OF APPEAL)

(SGD)

I ALSO AGREE PROF. OLIVIA ANKU-TSEDE (MRS.)

(JUSTICE OF APPEAL)

COUNSEL:

- GEORGE ESHUN FOR DEFENDANTS/APPELLANTS
- AKROFI KUMOJI FOR PLAINTIFF/RESPONDENT