IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA, A.D 2023

CORAM: ***A.B. POKU-ACHEAMPONG, JA (PRESIDING)***

N.A. ARYENE (MRS.), JA

A.S. ASARE-BOTWE (MRS.), JA.

SUIT NO. H1/64/20

DATE: 30TH MARCH, 2023

1. E.F.A SACKEY]
2. A.A. SACKEY] ……PLAINTIFFS/APPELLANTS
3. QUARCOOPOME SACKEY]
4. F.S.B JACOBSON]
5. J. NII ADJIRI HANSEN SACKEY]

VRS

1. J. M. LARKAI]
2. MR. ABU]
3. STANEY OWUSU]…DEFENDANTS/RESPONDENTS
4. PETER]

5. W.O. OFORI]
6. LAMPTEY]
7. EMMANUEL KUMAH]
8. JUSTICE AYAA CUDJOE]

JUDGMENT

AFIA SERWAH ASARE-BOTWE (MRS.), JA

This is an appeal from the decision of the High Court, Accra brought for and on behalf of the Plaintiffs/Appellants (hereafter referred to as the Plaintiffs) herein on grounds set out per a Notice of Appeal contained at pages 398 to 401 of the Record of Appeal (ROA) and filed on the 12th of March, 2013 viz;

GROUNDS OF APPEAL

i. That the Judgment is against the weight of evidence.
ii. The learned trial Judge erred when he held that the Plaintiffs did not prove the title of their grantor.
iii. The learned trial Judge and misdirected himself by inventing suppositions that the late "James Hanson Sackey acquired his wealth after 1906 when he became an auctioneer".

iv. The learned trial Judge erred by ignoring the documentary evidence that the late James Hansen Sackey acquired a lot of property as a merchant by 1906.

v. The learned trial Judge erred by ignoring all the documentary and judicial evidence of title of the late James Hansen Sackey to the land in dispute.

vi. That the learned trial Judge erred in law by ignoring the fact that the Hansen Sackey Family had been in possession of the land in dispute for over 100 years. That the learned trial Judge erred in purporting to overrule the Judgments of Superior Courts and Courts of Co-ordinate jurisdiction.

vii. That the learned trial Judge erred and misdirected himself by importing judgments obtained by the defendants against 3rd parties in connection with lands nowhere near the land in dispute particularly Dome, Police Training School and Ghana Telecom School as justification for the Titlehood [sic] of the Defendants.

viii. The learned trial judge erred in law by endorsing fraud by the 2nd Defendant in acquisition of the land thereby purporting to overrule the act of fraud determined upon by a High Court and admitted by the 2nd Defendant.

ix. That further grounds a [sic] Appeal will be filed upon receipt of a certified true copy of the Record of Proceeds [sic].

THE BACKGROUND OF THE CASE

The record shows at page 1 of the ROA that the Plaintiffs issued a writ of summons with an accompanying statement of claim on the 30th of December 2005 which was eventually and finally amended and endorsed with the following reliefs;

i. Declaration [sic] to all that piece or parcel of land described in the schedule hereto.

ii. Damages for trespass.

iii. An order for perpetual injunction retraining [sic] the defendants whether by themselves their servants and/or agents or whatsoever from entering the land and occupying it or carrying on building activities on it in anyway interfering with Plaintiff's use and enjoyment of the land.

iv. Recovery of possession.

The schedule referred to:

ALL THAT PIECE OR PARCEL OF LAND situate and lying between mile 6 and 7 of Accra-Nsawam Road and are immediately after the Achimota Junction from Accra towards Nsawam. The plots are bounded on the north by Tetteh Kojo's and Johnson's plots at the Valley and on the West by Korle Stool land and on the East by OLD DOME Road (formerly known as Kwabenya Road) and covered by indenture No. 138/20 published in Government Gazette No. 77 dated Saturday, 30th October, 1920 and the area covered by indenture 61/27 Gazetted in 1927.

THE ANTECEDENTS OF THE CASE

The entire case of the Plaintiffs as set out in their pleadings made up of their amended statement of claim at pages 138 to 142 (and repeated at pages 143 to 147) of the ROA and Reply and Defence to Counterclaim at pages 155 to 159 is to the effect that the late James Hansen-Sackey was a grantee of the Onamrokor family and the Gbese Clan in exchange for the late Hansen Sackey releasing land in James Town and Amamo to the Onamrokor family and Gbese Clan.

The Plaintiffs say that they are the beneficiaries of the estate of the late James Hansen Sackey who left a will dated 1920 and probate thereof taken in 1926. The Plaintiffs claim that the land in dispute, described supra, is what was devised to them in the said will.

Further, it had been the case of the Plaintiffs that after the land became the property of the late James Hansen-Sackey that there were various acts of ownership he exercised on his Achimota lands by;

- Mortgaging the land through his wife Selina Beatrice Quartey in 1906 and he himself in 1905
- Selling part to Lawyer Peter Awoonor Renner in 1915
- Registration in Gazette Notice in on 30th October, 1920 and 1906.

Furthermore, the Plaintiffs say that the land has been the subject-matter of various Judgments and the holding of their land has been acknowledged by past Heads of the Onamroko-Adain family including the late Dr. C.E. Reindorf and Paul Ayittey Tetteh.

At the end of a trial, the Court dismissed the claim of the Plaintiffs in the following terms;

a) The Onamrokor Adain family is declared title to the land in dispute which falls within Dome lands.
b) That the 2nd Defendant [in reference to Mr. Abu since per the record, the original 1st defendant died during the pendency of the suit] is a right grantee of the Onamrokor Adain family.
c) Recovery of possession by the Onamrokor Adain family of the whole land being claimed by the Plaintiffs except those they have given out.
d) An order of perpetual injunction restraining the Plaintiffs, their assigns, servants, agents, and whosoever from interfering with the family's and their grantees' ownership of the land in dispute.
e) General damages of GH¢50,000

The 2nd and Co-Defendants are awarded costs of GH¢10,000

The 1st and 2nd Defendants traversed the claims of the Plaintiff insisting that the land being claimed belonged to the Onamrokor Adain Family and counterclaimed as follows;

a) Declaration of title to the land in dispute.
b) Damages for trespass
c) An order for perpetual injunction restraining the Plaintiffs whether by themselves, their servants and agents or whosoever from entering [sic] with the family's ownership of the land in dispute.
d) Costs

As stated supra, in the course of the pendency of the action, the 1st Defendant passed on and was never substituted, thereby changing the positioning of the respective Defendants.

The Co-Defendant, Justice Ayaa Cudjoe, appearing for himself and the Onamrokor - Adain Family also denied the claims of the Plaintiffs and counterclaimed as follows;

a. Declaration that the occupation of the land in dispute by the benefactor of the Plaintiffs was by a customary grant of licence and therefore he has no right to devise the said land by will to his descendants.
b. Declaration that by the alleged device of the Benefactor of the Plaintiffs by his will, he has fraudulently claimed what he did not have and by so doing giving a wrong notion to the Plaintiffs herein that they can challenge the legal title of the family.
c. Declaration that the challenge of the title of the family by the Plaintiffs legally warrants forfeiture of their licence on the land by the family under customary law.
d. Declaration that the 3rd Defendant herein is a rightful grantee of the owner family.

e. A reiteration of the declaration of the judgment of Justice Ayebi that the 1st and 2nd Defendants be restrained from holding themselves as Head and Assistant Head of the Onamroko-Adain family.
f. Recovery of possession of the whole land being claimed by the Plaintiffs as devised to them by the will of their deceased father.
g. Perpetual injunction against the Plaintiffs, their assigns, agents and all those who claim title through them from by any means claiming any part of the said land.
h. Reiteration of the perpetual injunction against the 1st and 2nd Defendants from holding themselves as Head and Assistant Head of the Onamrokor-Adain family.
i. General damages
j. Costs

ON APPEALS GENERALLY AND THE DUTY OF THIS COURT:

The duty of this court in regard to the instant appeal was clearly stated in the case of **BAKANA LTD. v. OSEI [2014] 77 G.M.J 76 (CA).**

The court held that since an appeal is by way of rehearing, it is for the Appellate court to comprehensively 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, so as to satisfy itself that on a preponderance pf probabilities, the judgement of the trial judge is reasonably or amply supported by the evidence on record.

In **OTOO AND ANOTHER v. 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 v. 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."***

See also **NORTEY (NO.2) v. AFRICAN INSTITUTE OF JOURNALISM AND COMMUNICATION & OTHERS (NO.2) [2013-2014] 1 SCGLR 703**

It is therefore a misapprehension and a misstatement of the law for counsel for the Appellant to state, citing the case of **OPPONG v. ANARFI [2011] 1 SCGLR 556** that

where there is an appeal on the ground that the Judgment is against the weight of the evidence, there is the presumption that the Judgment of the trial court "is not correct on the facts."

The law as stated by the Supreme Court in the **OPPONG v. ANARFI** case was that;

"Even though it is ordinarily within province of the trial court to evaluate the veracity or otherwise of a witness, it is incumbent upon an appellant court in such a case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on the preponderance of the probabilities, the conclusions of the trial Judge are reasonable or amply supported by the evidence."

The Appellate Court is also entitled to make up its own mind on the facts and to draw inferences from them to the same extent as the trial Court. See **PRAKA v. KETEWA (1964) GLR 423 at 426, SC**. In **BONNEY v. BONNEY (1992-93) Part II GBR 779 at 787**, Aikins JSC however cautioned that, despite an appeal being a rehearing, entitling the Appellate Court to make up its own mind on the facts and draw inferences from them, under no circumstances should an Appellate Court interfere with the findings of facts made by the trial Court except where they are clearly shown to be wrong, or that the Court did not take all the circumstances and evidence into account, or had misapprehended certain pieces of evidence or drawn wrong inferences without any evidence to support them, or has not taken proper advantage of having seen and heard the witnesses.

See also;

- **SIMMONDS v. TRASSACO ESTATE DEVELOPMENT CO. (2010-2012) 1GLR 293 CA,** and
- **ACHORO v. AKANFELA (1996-97) SCGLR 209** at holding (2) in the headnotes.

In the circumstances, the grounds of appeal will be assessed or evaluated in the light of the entire evidence before the Court and a determination made as to whether the appeal is meritorious or not.

A careful look at the grounds of appeal would reveal that the first ground is the main one going to the root of the matter of whether or not the Judgment of the Court below was justified given the evidence adduced before it. In other words, was the Judgment against the weight of the evidence or not?

All the other grounds canvassed would be details or bases for the issue of whether or not the Judgment was against the weight of the evidence. They would therefore be ancillary to the first ground. The approach would therefore be to assess the first ground of appeal after which it will be determined if any or all of the others would require further discussion.

ON GROUND ONE:

i. **That the Judgment is against the weight of evidence**.

The question to be determined is whether the evidence led by the Plaintiffs/Appellants was sufficient to sustain their claim for declaration of title to the (or any) land in dispute, recovery of possession, damages for trespass and perpetual injunction.

The Court is expected to assess the evidence led by the Plaintiffs in the light of well-settled principles set out below.

ON THE IDENTITY OF THE LAND

The point of discussing the issue of the identity of the land is relevant because the law requires that a person who claims that his grantor or predecessor-in-title owns a larger tract of land which the land in dispute forms part of does not per se establish title without further proof.

It was held in the case of **MRS VIVIAN AKU-BROWN DANQUAH v. SAMUEL LANQUAYE ODARTEY (Suit No. J4/4/2016 dated 29/6/2016 (cited on ghalii.org as J4/4/2016) [2016] GHASC 64 (29 June 2016) that;**

"It is settled law that a party who claims for declaration of title to land, injunction and possession must clearly identify the land. The rationale for this rule has been explained by Ollenu JSC in the case of **Anane v Donkor [1965] GLR 188.** At page 192 of the report the eminent jurist said as follows:

"Where a court grants declaration of title to land or makes an order for injunction in respect of land, the land the subject of that declaration should be clearly identified so that an order for possession can be executed without difficulty and also if the order for injunction is violated the person in contempt can be punished. If the boundaries of such land are not clearly established, a judgment or order of the court will be in vain. Again, a judgment for declaration of title to land should operate as res judicata to prevent the parties relitigating the same issue in respect of the identical subject matter but it cannot so operate unless the subject matter thereof is clearly identified."

From the decision in **Anane v. Donkor** supra, the relevant question to be answered in this case is whether the Plaintiffs adduced evidence to establish clearly the identity of the land they claimed such that if declaration of title, injunction and possession were granted, the reliefs will refer to an identifiable land?"

In the candid view of this Court, the land being claimed by the Plaintiffs is difficult to identify per the claim as well as the evidence adduced before the Court below.

The first difficulty stems from the description of the land as set out in the claim. The schedule to the statement of claim, which is supposed to be the description of the land, is in the following terms;

"ALL THAT PIECE OR PARCEL OF LAND situate and lying between mile 6 and 7 of Accra-Nsawam Road and are immediately after the Achimota Junction from Accra towards Nsawam. The plots are bounded on the north by Tetteh Kojo's and Johnson's plots at the Valley and on the West by Korle Stool land and on the East by OLD DOME Road (formerly known as Kwabenya Road) and covered by indenture No. 138/20 published in Government Gazette No. 77 dated Saturday, 30th October, 1920 and the area covered by indenture 61/27 Gazetted in 1927."

This description hardly qualifies as one positively identifying any land. The description has no geographical bearings, and has nothing indicating the size and location of the land allegedly owned by the Plaintiffs.

We acknowledge that the description quoted above is almost identical in material particular to the wording in the "Disclaimer" issued by Dr. Carl Reindorf dated 9th November, 1964 and put in evidence as **Exhibit G.** That document, it must be noted, is not a conveyance and is entitled "TO WHOM IT MAY AND DOTH CONCERN".

The recital in the document is produced verbatim hereunder;

TO WHOM IT MAY AND DOTH CONCERN

…the undersigned Doctor Carl E. Reindorf of Tesano Accra do hereby declare and affirm that have trespassed on the plots described below and have sold the said plots by mistake to other people. The plots belong to and are the property of the late James Hansen Sackey who was a licensed Auctioneer of Accra. The said plots lie *between mile 6 (six) and mile 7 (seven) of Accra-Nsawam Road and are immediately after the Achimota Junction from Accra towards Nsawam.* I also do hereby declare and affirm that the said plots *are bounded on the north by Tetteh*

Kojo's and Johnson's plots at the Valley and on the West by Korle Stool land and on the East by Old Dome Road (formerly known as Kwabenya Road). **I do hereby agree to reconvey the plots mentioned back to Joseph Quao Sackey the sole executor of the said will of James Hansen Sackey.**

Clearly, the above is little to go on by way of establishing the identity of the land. What does it mean for one to describe land as for instance, "*lying between mile 6 and 7 of Accra-Nsawam Road and are immediately after the Achimota Junction from Accra towards Nsawam. The plots are bounded on the north by Tetteh Kojo's and Johnson's plots at the Valley and on the West by Korle Stool land and on the East by OLD DOME Road (formerly known as Kwabenya Road)"?*

How does such a description identify the location of the land in dispute and its size, if it does exist at all?

Yet another matter which was raised in the court below regarding the identity of the land and the evidence put forward by the plaintiff relates to the plan or sketch of the land.

In the first place, there is a copy of a Plan of Land in evidence described as J. Hansen-Sackey's Land (which looks **triangular in shape**) **(Exhibit CC)** bounded by what is marked as VALLEY (2000 feet on that side), KWABENYAN ROAD (750 feet and 2000 feet on that side), and AKIM ROAD (2475 on that side). There are no grid lines on that document which would assist in pointing to any location in Achimota or indeed, anywhere else, and in the middle of the triangular-shaped land is the inscription "The Plan referred to in the foregoing indenture".

The second site plan is found at page 422 of the ROA also headed PLAN SHOWING LATE J. HANSEN SACKEY'S LAND SITUATE AT ACHIMOTA. That one is **square in shape** bounded by KORLEY STOOL LAND on three sides (1000 feet on each side) and NSAWAM ROAD (also measuring 1000 feet). That land has been endorsed with what would appear to be a Deed Registry or some other official number No. 61/1929.

There is however no explanation in the entire evidence before the Court for the inconsistencies in the shapes and sizes of both site plans even though they are supposed to be referable to the same land.

The law is well-known that "proof lies upon him who affirms, not on him who denies, since by the nature of things, he who denies a fact cannot produce proof."

Please see; **ESSENTIALS OF *THE GHANA LAW OF EVIDENCE*; *Brobbey S.A at page 31***

Thus, the burden was on the Plaintiffs to prove that the late James Hansen Sackey not only owned land somewhere in Achimota, but further that the land was at the specific place that the Plaintiffs are claiming, which is the land in dispute.

This evidential burden is not discharged by merely entering the witness box and repeating claims or averments on oath, but by offering positive proof of the claims.

See: **IN RE WA NA ISSAH BUKARI (SUBST. BY MAHAMA BUKARI & ANOR) v. MAHAMA BAYONG & ORS [2013-2014] 2 SCGLR 1590.**

The authorities are also legion that once put forward, the Court is to assess the cases put forward by the parties and see whether they are each in conformity with the law and the evidence.

Thus, in the case of **CHANTEL v. KOI [2011] 29 GMJ 20 CA,** it was held that at page 51 of the Report that one important principle that should guide the tribunal of fact in determining the credibility of witnesses is the need to test the story of the witness as to its consistency with the probabilities that surround the currently existing conditions. In short, the test is whether the story of the witness is in harmony with the preponderance of probabilities which a practical and informed person would recognise as reasonable in those conditions.

See also **NTIRI &ANOR v. ESSIEN &ANOR [2001-2002] SCGLR 451**, in which it was held that it is the trial court which determines the credibility of a witness. These include, the demeanour of the witness, the substance of his testimony, the existence or non-existence of any fact testified to by the witness etc.

See also:

- **TAMAKLOE & PARTNERS UNLTD. v. GIHOC DISTELLERIES CO. LTD (SC) per Amegatcher JSC (Civil Appeal No. J4/70/2018 dated 3/7/2019 (available on the online portal dennislawgh as [2019] DLSC 6580;**
- **AYEH & AKAKPO v. AYAA IDDRISU [2010] SCGLR 891 @ Holding 5;**
- **AKUFO-ADDO v. CATHELINE [1992] 1 GLR 377**
- **ASAMOAH v. SETORDZI [1987-88] 1 GLR 67;**

In other words, do the stories of the witnesses (or the parties, as the case may be) make sense in the circumstances? Would the evidence offered actually prove the case being put forward before the court as a whole?

In the **TAMAKLOE & PARTNERS UNLTD case** (cited supra), for instance, although minutes of a meeting had been offered in evidence to corroborate the fact alleged by the Plaintiff that terms of service offered had been reached, a study of the minutes revealed that no such terms had been reached.

It is not for nothing, in our opinion, that the Plaintiffs insist that the late Dr. Carl Reindorf acknowledged their ownership of some land, though vaguely described, in Achimota. This is because the Plaintiffs tacitly admit that the Onamrokor Adain family were the allodial owners it owned the land and, in such circumstances, it would be a purported previous acknowledgement of their title to the land by a previous Head of the family that would authenticate their claim.

We are of the view that the finding of the Judge (at page 15 of the Judgment) in the Court below that the Plaintiffs were unable to prove the identity of the land in dispute was valid and sustainable. This is because clearly, an assessment of the evidence would show that it does nothing to prove the existence of the disputed land belonging to the late James Hansen Sackey and which he may have devised to his beneficiaries.

ON THE ROOT OF TITLE

Yet another matter that the Judgment is the Court below is being impugned for is whether or not the Court erred in holding that the Plaintiffs had been able to prove their root of title and whether the Court found that the Plaintiffs traced their root of title to the will of the late James Hansen Sackey.

The Court states at page 12 of the Judgment;

"In this case, the Plaintiffs have failed to establish the root of title to the land they claim belonged to James Hansen Sackey. Merely devising a particular property in a person's Will, will not turn that property to be the property of the Testator."

The Court continues at page 15;

"In this case apart from the Plaintiffs failure to prove how James Hansen Sackey came by the land, they have not been able to prove the identity of the land…."

The Court concluded that the Plaintiffs had not been able to prove the root of title, or in layman's terms, evidence of how the Testator came to have what the Plaintiffs say was a valid entitlement to the land after finding or resolving that;

- There was no evidence that James Hansen Sackey previously owned any land at James Town in 1891 which he exchanged with the larger Onomrokor Family for land at Achimota.
- That there was even no evidence of James Hansen Sackey having been in the kind of employment that would enable him acquire the land that he later

allegedly exchanged, especially when from the Plaintiffs' own showing, James Hansen Sackey *"started in business for himself as an auctioneer in 1906…"*

- That there was no reasonableness in the proposition that the land was that was supposedly exchanged was for the purpose of General Cemetery by the Colonial Government when the government could equally have compulsorily acquired the land without the lager Onamrokor family having to exchange land with the late James Hansen Sackey.
- That apart from the inconsistency in the oral history adduced by the Plaintiffs' witness, the documentary evidence produced by the Plaintiffs did not corroborate the assertion of any exchange of land having been made for the eventual use of land previously acquired by James Hansen Sackey as a public cemetery.
- That the evidence adduced was at variance with the pleadings regarding land at Knutsford Avenue which was exchanged for land at Achimota, and further that there was no evidence to support a grant by the Onamrokor Gbese and Korle We having had land to grant to the late James Hansen Sackey.
- Further, on the pleadings being departed from, that the Plaintiffs pleaded the acquisition of land in 1891 only to lead evidence of an acquisition in 1918.
- That there was no evidence to corroborate the claim of James Hansen Sackey and his beneficiaries having been in possession of the land for over 100 years.
- That the statutory declaration of Joseph Quao Sackey of 6th April, 1977 in which the declarant indicated that James Hansen Sackey's land was in extent 77.206 acres (Exhibit BB) cannot be relied upon as being sufficient evidence of the holding of the late James Hansen Sackey as per the decision in **RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU & OTHERS v. KOTEY & OTHERS [2003-2004] SCGLR 420 @ 452** it was held that statutory declarations per se are self-serving documents and have no probative value where the facts therein contained are challenged.

- That there was evidence on record that the Onamroko Adain family still claimed the land even as at 17th October, 1994 and served the public notice to ignore an advertisement by the Korle Wulomo and Gbese Mantse to recognise them as owners of Achimota lands, and prior to that there had been a warning to Gbese Mantse per Exhibit 7, dated 29th July, 1959.
- That the decisions of the High Court being relied upon (Exhibits Y and LL) were in respect of actions in which the Defendants or the Onamrokor Adain family were not involved, but which generally involved the Will of the late James Hansen Sackey.

In the case of **KOFI ANIM v. BERNICE AKIWUMI [2013] 60 GMJ 61**, it was held that in an action for declaration of title to land, proof of ownership must be established by evidence of acquisition either by purchase or traditional evidence; or clear and positive acts of unchallenged and sustained possession or substantial user of the disputed land.

See also the following;

- **NYIKPLORKPO v. AGBEDOTOR [1987-88] 1 GLR 65 @P. 171**
- **ASANTE APPIAH v. AMPONSAH [2009] SCGLR 90**
- **ABBEY @ ORS v. ANTWI [[2010] SCGLR 17**
- **SAANBAYE BASILDE KANGBEREE v. ALHAJI SEIDU MOHAMMED [2012] 51 GMJ 173, SC**

Further, another matter that needs discussing is on the nature and import of Traditional or historical Evidence as set out in the case **of NANA ASIAMAH ABOAGYE v. ABUSUAPANYIN KWAKU APAU ASIAM (SC) (Civil Appeal No. J4/10/2016 dated 24TH OCTOBER, 2018.**

(Available on the online portal www.ghalii.org as GHASC 70)

In that case, the principle was discussed that per the ratio in **ADJEIBI-KOJO v. BONSIE [1957] WLR 1223** that in a situation where a court is faced with conflicting traditional evidence and there is little to choose between the stories of the parties, the law is that the court is required to evaluate the conflicting traditional evidence against undisputed evidence of events and acts of ownership **in living memory adduced before the court** and opt for the version of the traditional evidence that is consistent with the undisputed evidence.

That case further confirmed the rule the settled principle of the law of evidence that where oral evidence conflicts with documentary evidence which is authentic, then the documentary evidence ought to be preferred over and above the oral evidence.

See also the Judgment of His Lordship Pwamang JSC in the case of **MRS VIVIAN AKU-BROWN DANQUAH v. SAMUEL LANQUAYE ODARTTEY SC, Civil Appeal No. J4/4/2016 dated 29th June, 2016 (reported on the online portal, ghalii.org as [2016] GHASC 64)** in which he re-stated the law regarding evidence based on traditional history, citing the case of **Adjeibi-Kojo v. Bonsie viz;**

"So, where the traditional history conflicts, the court is required to examine the evidence and consider acts of ownership and possession of the disputed land by each of the parties and their ***grantees within living memory in the form of farming, building and other activities which are consistent with title to the land****. We shall therefore review the evidence led at the trial and consider the acts of possession and ownership by each of the parties."*

(Emphasis mine)

In relation to the case itself, the learned Justice continued;

Unfortunately, the defendant's testimony did not refer to any acts of possession by his family in living memory. He did not even allege that the grantees he testified about ever took possession of the land on account of the documents he tendered neither did he call any of them to testify on his behalf. If this case were to be resolved only on the question of who first made

documentary grants of the land to third parties, then the plaintiff is better placed than defendant. Exhibit "D" shows a recorded documentary grant by plaintiff family in 1973 even before defendant's Statutory Declaration made in 1974. From the evidence on record it was only Parakuo Estates Ltd who tried to take possession during the pendency of this case and plaintiffs applied and joined them to the suit. They subsequently withdrew from the case and undertook to attorn tenancy to whoever is declared owner of the land by the court."

A similar situation exists in this case when one pays close attention to the evidence adduced in this suit. Even though the Plaintiffs claimed that they and their predecessors-in-title had been in possession of the land for over a hundred years, there was nothing on record to corroborate their claim in the light of recent history. They were unable to produce their neighbours or any grantees of the Hansen Sackey family.

To conclude on the matter of root of title, we conclude that the learned Judge rightly held that the Plaintiffs (the Appellants herein) had been unable to prove the title of the late James Hansen Sackey to the land in dispute and further that the Plaintiffs had been unable to satisfactorily prove the identity of the land they were laying claim to.

ON RES JUDICATA

The matter of res judicata will be discussed in the light of the matter of whether or not the Judge in the Court below ignored previous judicial decisions.

There are several decisions that this Court will rely on to determine whether or not the doctrine of res judicata will be applicable in this case.

It was held in the case of **POKU v. FRIMPONG [1972] 1 GLR 230** that estoppel deriving from a judgment is of two kinds, namely, cause of action estoppel and issue estoppel. Where a plea of estoppel per rem judicatam is pleaded it is necessary for a

trial judge, in order to avoid confusion, to decide first the nature of the estoppel raised.

The estoppel pleaded in the instant case was cause of action estoppel. Where a party relies on such estoppel, the onus of establishing the identity of the subject-matter of the previous suit with that of the second suit lies on him. The onus is discharged by first producing in evidence the record of the pleadings and judgment in the earlier suit. If by comparing the earlier pleadings and judgment with the pleadings before the trial court, he satisfies the trial court of the possibility of the two causes of action being identical, he will then proceed to give positive evidence of identity.

See also: KARIYAVOLOUS v. OSEI [1982-83] 1 GLR 658 @ Holding 1.

In the case of **IN RE KWABENG STOOL; KARIKARI v. ABABIO [2001-2002] SCGLR 515,** it was held that if an action is brought and **the merits of the questions are determined between the parties**, and a final judgment is obtained by either, the parties are precluded, and cannot canvas the same question again in another action.

This Court will therefore assess the evidence of the Judgments being offered in the light of what is before it and make a determination one way or the other as to whether it goes to prove the claim of the Plaintiff and in turn the Counterclaim of the Defendant. The little dilemma though, is that apart from the Judgments themselves, neither the pleadings nor the proceedings are available to make the reliance on them complete. That notwithstanding, the weight to be given to the Judgments will also be determined by the actual evidence on record before this Court.

In the case of **MRS. AGNES AHADZI & PIONEER MALL LTD. v. BOYE SOWAH, NII NORTEY ADJEIFIO & NUMO ADJEI KWANKO II (Suit No. J4/33/2018 dated 21/3/2019) (reported on the online portal *dennislawgh* as [2018] DLSC 6208,** the Court, speaking through His Lordship Pwamang JSC stated at pages 6-7 of the online Judgment;

So the three conditions for invoking issue estoppel are that;

1. *The same issue must have been decided in the earlier case;*
2. *The judicial decision in the earlier case must have been final; and*
3. *The parties in the current case must be the same parties in the earlier case or their privies.*

The Judgments that were put before the Court below are;

1. **A.A. ALLOTEY & ANOR v. SAMUEL Q. SACKEY (Suit No.335/50 - Judgment dated 15th March, 1951)** (at page 450 of the ROA) in which the Defendant, a son of the late James Mensah Sackey, had Judgment entered in his favour against the Plaintiff who was a grantee of the executor of the will of the late James Mensah Sackey. According to the Plaintiff in that case, the land he bought, therein described as Plot Nos. 22 and 23 were supposed to have been sold off to settle a debt owed by the testator. The Court found the claim to be without merit. One would find that the parties were not proxies or privies of the parties in this case, and further that the land being dealt with are not the same. In those circumstances, res judicata would clearly be inapplicable.
2. **E.F.A SACKEY & 5 ORS v. JAMES GEORGE HANSEN SACKEY & 3 ORS (SUIT No. 39/2004) (1542/92**) dated 28th November, 2008. The case involves the beneficiaries of the late James Hansen Sackey essentially disagreeing among themselves regarding the dealings with the land which was supposed to be an inheritance for all of them, but which some had annexed to themselves to the exclusion of the others. It had nothing to do with the Onamrokor Adain family or any of its members. The Onamrokor Adain family was not a party to that suit. In that regard, res judicata would be inapplicable.
3. The discussion on res judicata will be concluded with an assessment of the evidential value of the decision in the case of **THE REGISTERED**

TRUSTEES OF THE CATHOLIC CHURCH ACHIMOTA, ACCRA v. BUILDAF LTD. & ORS (SC) (Civil Appeal No. J4/30/2014) dated 25TH June, 2015.

To understand the import and relevance of that case (or the lack thereof) to this one, one must set out a brief of what it was about.

That case related to land gifted to the Plaintiff/Respondents in that case, by one Mrs. Naa Oyo Ofosu Quartey, who had obtained same from Mrs. Freda Hansen Sackey, whose own deed of conveyance had been registered as **1060/40.** It turned out that the said Mrs. Freda Hansen inherited the land through the husband's estate. The said husband obtained it by purchase **in 1926 from Ayibonte and Tetteh Quaye who were said to be the Gbese Manche and Korle Wulomo respectively.** The said Gbese Manche and Korle Wulomo belonged to the wider Onamrokor family of which the Appellants' grantors, the Onamrokor-Adain family is also a part the Appellants the Onamrokor-Adain family obtained the entire land described as Dome land of which Achimota land is an integral part by customary gift from the same Gbese Manche and Korle Wulomo in the 1860's.

Even though the parties in this case seem to trace their respective roots of title to the same parties in the Registered Trustees of the Catholic Church case, one would find that that case and the instant one, from the pleadings in this one, relate to different lands, or at best one can say that the evidence led to corroborate the claims in this case can be classified as weak.

In this case, the Plaintiffs allege that the land they hold became the property of the late James Hansen Sackey by way of an exchange of his originally held land at James Town. It was this land that the Plaintiffs say was the subject-matter of the will of James Hansen Sackey. In the **Registered Trustees of the Catholic Church case,** the land in dispute was gifted to the late husband of Mrs. Freda Hansen.

Further, this suit relates to land acquired by the late James Hansen Sackey **in or about 1891** whilst that of the Registered Trustees of the Catholic Church relates to land acquired **in 1926.** The registration numbers of the lands in both suits as set out in the pleadings are also different. The deed of conveyance for Mr. Freda Hansen's land (the subject-matter of the Registered Trustees of the Catholic Church case, was registered as **1060/40**. In the case of the land attributed to the late James Hansen Sackey, the Plaintiffs state per their amended claim that the land measuring 1000ft by 1000ft was added to "the original acquisition at Achimota and legally consummated by his Executors in indenture **No. 61/27 and Gazetted in 1927."**

It is worth noting that at no point have the Plaintiffs claimed that all Achimota lands belonged to the late James Hansen Sackey. They are laying claim to a specific part of Achimota land which has been found supra to be difficult to identify.

The situation is not helped by the fact that the late James Hansen Sackey's will contained no description of the land he was devising to his beneficiaries. In relation to land or property at Achimota, the entire paragraph 11 of the Will states;

"I give and devise my messuage or dwelling house situate at Achimota in the Accra District, together with the pleasure grounds lands, gardens, out-buildings and appurtenances thereunto belonging or therewith usually held or enjoyed, and also all that piece of land with Palm Trees thereon situate at Bodomase, Brekuso in the Akuampem District of the Colony aforesaid unto and to the use of all and every my children born or to be born, and shall be living at my decease, and to the child or children of such of them as shall then be dead leaving child or children living at my decease, or born in due time afterwards."

No other reference is made to land or property situate or being at Achimota or even its environs. All other properties which are the subject of the other paragraphs are situated at Tudu, Station Road and Adabraka

In those circumstances, considering that the decision of the **Supreme Court in the Registered Trustees of the Catholic Church Case** relates to a specific part of Achimota and which grant to the victors in that case had different antecedents, we hold that the Judge in the Court below was right in not relying on that Judgment since the land the subject-matter of that Judgment is distinct from the land being claimed in the instant suit.

ON THE COUNTERCLAIM OF THE DEFENDANTS

In the case of **GBEDEMAH v. AWOONOR-WILLIAMS (1970) CC 12 (ALSO G&G 438**), the Supreme Court of Ghana held that once made, a counterclaim proceeds as an independent action.

By that measure, it goes without saying that the Defendants would also assume the burden of proving their counterclaim on a balance of probabilities in the same way that the Plaintiff had to prove his claim.

The Court has noted the fact of the burden of proof where there a counterclaim as well as that of the Plaintiff. In the circumstances of this case, both parties had an equal burden to prove their respective claims on a balance of probabilities. It was not enough for the Defendants to challenge the claim of the Plaintiff without putting forward positive evidence of their claims.

In the case of **JOHN DRAMANI MAHAMA v. ELECTORAL COMMISSION** (**Suit No. J1/5/2021 dated 4th March, 2021 and reported on the online portal ghalii.org as [2021] GHASC 12,** the Supreme Court, relying on **Ackah v. Pergah Transport case** reiterated the need for a party who makes a claim to adduce evidence to support it.

In this case, one would note that the Co-Defendant and other Defendants had a more cogent presentation of their evidence in support of their claim to the land. As stated in the preceding paragraphs, the Plaintiffs themselves tacitly admit the title of the

Onamrokor Adain family to the wider area and that is why in their pleadings and the evidence they led, they state that the previous Head of the Onamrokor Adain family had acknowledged the title of the Hansen Sackeys by way of the Disclaimer and which we have discussed in dealing with the identity of the land at length and will not rehash.

In **FORI v. AYIREBI [1966] GLR 627, SC,** it was held at Holding 6 of the headnotes that;

> ***"When a party had made an averment and that averment was not denied, no issue was joined and no evidence need be led on that averment. Similarly, when a party had given evidence of a material fact and was not cross-examined upon, he need not call further evidence of that fact."***
>
> (See also:
>
> - **TAKORADI FLOUR MILLS v. SAMIR FARIS [2005-2006] SCGLR 882)**
> - **ASHANTI GOLDFIELDS CO. LTD. v. WESTCHESTER RESOURCES LTD. [2013] 56 GMJ 84 CA,**
> - **HAMMOND v. AMUAH [1991] 1 GLR 89 @ 91).**

In the circumstances of this suit, then, the matter of the Onamrokor Adain family's original entitlement to the land at Achimota was not seriously contested. What was in issue was whether the Plaintiffs had been able to demonstrate how their predecessor-in-title, the late James Hansen Sackey came by the land which they claim, if at all. That, the Court below found, as we also do, that the Plaintiffs were unable to demonstrate same to the satisfaction of the Court by the evidence.

In the circumstances, we hold that the Counterclaim was properly upheld and the consequential orders properly made.

CONCLUSION:

In assessing and dealing with the first ground of appeal it is quite clear that all the other grounds have been covered, thereby making it unnecessary to set out the other grounds of appeal and deal with them individually.

After having thoroughly considered this appeal, we find same to be unmeritorious and it is accordingly dismissed.

The Judgment of the High Court is affirmed in its entirety.

Cost of GH¢20,000.00 awarded in favour of the 1st Defendant/Respondent.

SGD

A.S. ASARE-BOTWE (MRS.)

(JUSTICE OF APPEAL)

SGD

A.B. Poku-Acheampong, J.A. - I agree **A.B. POKU-ACHEAMPONG**

(JUSTICE OF APPEAL)

SGD

N.A. Aryene (Mrs.), J.A. - I also agree **N.A. ARYENE (MRS.)**

(JUSTICE OF APPEAL)

COUNSEL:

- **KWABENA KUNADU YIADOM FOR PLAINTIFFS/APPELLANTS**

- **GLORIA GBOGBO FOR 1ST DEFENDANT/RESPONDENT**