IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA

CORAM: - SENYO DZAMEFE, JA (PRESIDING)

MERLEY WOOD, JA

ERIC BAAH, JA

Civil Appeal

Suit No: H1/177/22

16TH February, 2023

EBENEZER AMARTEY - PLAINTIFF/RESPONDENT

VRS.

1. **DANIEL PINTO - DEFENDANT/APPELLANT**

2. **JOYCE ARTHUR**

JUDGMENT

DZAMEFE, JA

The plaintiff issued a writ for the following claims;-

1. Declaration of title to all that piece of land described in paragraph 4 of the statement of claim.

2. Recovery of possession

3. Perpetual injunction restraining the defendants, their agents, assigns, privies and workmen from interfering with the plaintiff's peaceful enjoyment of his property.

Plaintiff, a businessman resident in Ashiaman, avered in his statement of claim that he acquired a plot of land in the year 2006 from the Ashiaman Divisional Council (ADC) for the construction of stores. Plaintiff averred he shares boundary with the defendants. That he is in the process of regularising his grant with the Tema Development Corporation (TDC) after the Tema Traditional Council (TTC) issued him with a confirmation of the allocation of the said parcel of land to him.

Plaintiff averred further that the land in issue forms part of lands allocated to the Tema Traditional Council by the Tema Development Corporation (TDC). He said he took possession of the property and heaped stones and blocks there on.

It is his case that the defendant laid claim to his property and went ahead to report to both the Ashiaman Divisional Council and Tema Traditional Council. Both authorities demarcated the property for both of them and advised them to remain within their respective boundaries.

Plaintiff said he commenced construction on the land but the defendants attacked him and had to report to police. He said the defendants have trespassed onto his property and have placed containers thereon and mounted sheds on a portion. That the defendants have also started construction on his land and laying adverse claim to same hence this writ for his claims against the defendant.

DEFENCE AND COUNTERCLAIM

The defendants in their statement of defence averred that they are the administrators of the estate of Okoe Pinto; deceased, who was their late father and they have documents to that effect. They averred the land the subject matter of this suit forms part of the estate of their late father. That the land is TDC land numbered Ash/T/E-172. The defendants averred further that their father built a wooden house of the land and resided therein till his demise and after his demise his children with the defendants inclusive as well as his widows continued to reside in the said wooden house till date.

The defendant's aver also that their late father had documents covering the land and regularly paid ground rent to TDC since 1960 and still continue to pay same till date. Their mothers, now widows of their deceased father, sell food on the undeveloped side of the land and still do till date. Their sister since 2001 had placed a container on a

portion of the land selling foodstuff in same till date. They say they also pay property rate in respect of the wooden house built by their father over 40 years to the Ashiaman Municipal Assembly till date.

It is their case that it was the plaintiff who rather trespassed onto their land and was warded off by their respective mothers and siblings of the defendant's.

The plaintiffs are therefore not entitled to their claim. The defendants counterclaimed for the flowing

1. A declaration that the land in issue as described in the counterclaim forms part of the estate of Okoe Pinto (deceased).

2. General damages for trespass.

3. Perpetual Injunction restraining the plaintiff and his servants, workmen, privies and assigns from dealing in any manner with defendants' land the subject matter of this suit.

REPLY

The plaintiff in reply to the defence and counterclaim stated that the wooden structure referred to by the defendant's share boundary with the plaintiffs land and that the widow of the deceased trespassed onto his land when they sell their food items.

Plaintiff aver that in the meeting they had with the Tema Traditional Council, the council rather informed the defendants' to vacate plaintiff's land and give vacant

possession of same to him within a week. The defendant agreed to vacate the land but later changed his mind.

ISSUES SET DOWN FOR TRIAL

1. Whether or not the plaintiff in or about the year 2006 acquired the parcel of land in dispute from the Ashiaman Divisional Council.
2. Whether or not plaintiff's land shares boundary with the defendants land.
3. Whether or not the plaintiff is in the process of regularizing this grant with the Tema Development Corporation.
4. Whether or not the plaintiff took possession of the property and heaped stones and blocks on the property when he acquired the land in dispute.
5. Whether or not the plaintiff is entitled to his claims.
6. Whether or not the defendants are entitled to their counterclaim.
7. Any other issue that may arise from the pleadings.

ADDITIONAL ISSUES

1. Whether or not the plaintiff is in the process of regularizing this grant with the Tema Development Corporation.

2. Whether or not the defendants' mother has been selling kenkey and porridge on the undeveloped portion of the property No. ASH/T/E-172 during the lifetime of Okoe Pinto and still continue to sell same up to date.

3. The Whether or not there are documents covering the land in dispute which forms part of Okoe Pinto's Estate.

4. Whether or not the defendants pay ground rent to Tema Development Corporation (TDC).

5. Whether or not the land the subject matter of this suit falls within State acquired land known as TDC acquisition land.

6. Whether or not the land in dispute forms part of the estate of Okoe Pinto.

7. Any other issues arising from the pleadings.

JUDGMENT

1. The court held as a fact that the area of land granted to the defendant's father is the same area he placed his six room wooden structure – **[page of 346 ROA].**

2. The court also held that the defendants have woefully failed to establish the identity and limits of the land [page 348 of ROA] by giving varying land sizes as well as multiple site plans in respect of the land in dispute.

3. The court held further that the land the defendants have annexed to stack firewood, sell kenkey and porridge, placed container to sell foodstuff, vegetables and spices does not form part of the defendants' father land - **[page 352 of ROA].**

4. The court found as a fact that the defendants have encroached upon the plaintiffs' land as all the witness testified that plaintiffs' land shares boundary with the wooden structure belonging to the defendants' father – **[page 356 of ROA]**

5. That the Defendants could not adduce sufficient evidence to establish the title over the disputed land on the balance of preponderance of probabilities and their claim fails – [**page 357 of ROA]**

The defendants dissatisfied with the judgment launched this appeal.

GROUNDS OF APPEAL

1. The judgment is totally against the weight of evidence on record.

2. The learned trial judge erred in relying on a document (lease) made in favour of the plaintiff in the heat of litigation in declaring title in favour of the plaintiff.

3. The learned trial judge's holding that the area of land granted to the defendants' father is the same area he placed his six room wooden structure is not supported by the evidence on record.

4. The learned trial judge erred when she held that the land that the defendants' stack wood, sell kenkey, porridge, placed container to sell foodstuffs, vegetables and spices does not form part of the defendants' father's land.

5. The learned trial judge erred in refusing and or dismissing the defendants' counterclaim.

6. Cost of Gh¢18,000 awarded against the defendant is excessive and harsh.

7. Further or other grounds of appeal shall be filed upon receipt of a certified true cop of the proceedings.

SUBMISSIONS

Ground II

The learned trial judge erred in relying on a document (lease) made in favour of the plaintiff in the heat of litigation in declaring title in favour of the plaintiff

Counsel submit that the plaintiff/respondent issued this writ against the defendant/ appellant on 27th January, 2017. During the pendency on the case, the plaintiff/ respondent was granted a lease by the Ashiaman Divisional Council. As to whether the Ashiaman Divisional Council which is a creature of the statute owns the subject land and clothed with capacity to convey same to the plaintiff is an issue altogether. Counsel said this lease (Exhibit A) was executed on 22nd February 2017 when the plaintiff issued this writ on 27th January 2017. The plaintiff's site plan was approved by the Director of Survey on 6th November, 2018, a year after the writ was issued (exhibit A1). These facts were not denied by the plaintiff/respondent.

It is his submission that the law is well settled that conveyance pendent lite has on it the badge of fraud.

- **CHELLERAMS SONS (GH) LTD VRS HALABI [1953] 1 GLR 214**

Counsel submits further that the plaintiffs' lease exhibit 'A' is not registered and therefore confers no legal right on the plaintiff. In support of this assertion, counsel

referred this court to the case of **SASU BAMFO VRS SINTIM [2012] 1 SCGLR 136** where the apex court held as follows;-

> *"It was evident, on the fact of exhibit 'A', that it was not registered as required by Section 24 (1) of Land Registry Act, 1962 (Act 122), consequently, ipso facto, the same was ineffective to create legal rights or liabilities or to have any legal validity whatsoever. No legal rights can arise from unregistered document affecting land.*

See also

(i) Asare vrs Brobbey [1971] 2 GLR 331

(ii) Lamptey vrs Hammond [1987/8]

Counsel opined that since the plaintiffs lease was not registered in accordance with the Land Title Registry Act (1962) (Act 122) no title was conferred on the plaintiff/ respondent and consequently, the learned trial judge erred in declaring title in favour of the plaintiff/respondent. Counsel said the plaintiffs lease, exhibit 'A' is therefore invalid and cannot form the basis of a judicial decision in a court of law.

Counsel ended saying the Ashiaman Divisional Council is a creature of statute and has no lands to give out. They cannot give out what they do not have.

Counsel for the respondent in response submit that the respondent tendered exhibits 'B', 'C' and 'D' to confirm the allocation of the land to him from Tema Traditional Council. That the respondent tendered all those documents in support of his claim to ownership of the parcel of land in dispute. Counsel said the dates thereon show that those documents were executed prior to the plaintiffs instituting the action at the trial court. Counsel submits that all documents tendered as exhibit 2 series by the

defendants/appellants are in relation to the land upon which the said Oko Pinto had put up the wooden structure and does not extend to the land the subject matter in this suit.

Counsel submits that the parcel of land over which the appellants have a license only cover the parcel of land on which the wooden structure is erected since the license was granted in relation to a parcel of land over which a licensee put up a structure. It is their contention therefore that the area of land granted to the defendant's father is the same area he placed his six room wooden structure.

Looking at the evidence before us, exhibit 'A' is the plaintiff/respondents Deed of lease dated 22nd February 2017. The trial judge in her judgment referred to Exhibit 'A' copiously and described the land as stated therein as *"All that piece or parcel of land …. containing an approximate area of 0.03 acres or 0.01 hectare … bounded on the North East, measuring a total distance of 22.44 feet more or less. Bounded on the South Wet measuring 24.12 feet, more or less and bounded on the North West, by road measuring the total distance of 49.63 feet more or less..."*

The trial judge in the judgment said that the plaintiff traces his root of title to Ashiaman Divisional Council (ADC) because his land forms part of the lands allocated to the Tema Traditional Council (TTC) by the Tema Development Council (TDC). That he was issued documentation by the Ashiaman Divisional Council (ADC) that includes a confirmation of the allocation of the land and he is in the process of regularsing his grant with TDC. Under cross examination the plaintiff stated that he has seen a document from the TDC releasing the land to the Tema Traditional Council (TTC) and Ashiaman falls within Tema Traditional Council. The trial judge also found that **"The disputed land consists of where the defendants have deposited firewood, red container etc" – [page 353 of ROA]**

Dealing with this assertion, the trial judge disputed same and went on to hold that the defendants have woefully failed to establish the identity and limits of the land they are claiming by giving varying land sizes as well as multiple site plans in respect of the land in dispute – **[page 348 of ROA].**

This finding made by the trial judge is wrong. There was no issue about the identity of the land in dispute. Both parties were ad idem about the land in dispute. The issue was about ownership and also size of their respective land. The following can be gleaned from their various pleadings. While the plaintiff allege that their lands are different from each other and that they share boundaries, the defendant's case is that it is just one same plot of land in issue. That it is one plot of land and all belonging to them but that they had developed a portion of it and that the plaintiff/respondent was trying to capture the undeveloped portion thereof. There is therefore no issue about the identity of the land. The law is well established about identity of land in land litigation that the sizes need not be mathematically precise. Once the parties agree on the land physically, that was enough. It is admitted that the courts may refuse to declare title in any claim for land when the land cannot or has not been clearly identified. But as a matter of fact, the contention that a party must prove the identity of the land in a land suit with certainty to enable a court to decree title does not mean mathematical identity or precision. See **Jass Co. Ltd & Anor vrrs Appau & Anor [2009] SCGLR 2645.**

The trial judge erred in holding that because there was some variation in the sizes on the appellants' documents they could not establish the identity of the land in issue. To go further if two parties are litigating over the same plot of land, once one party identifies it then there was no further obligation on the other and the identity of the land was no longer an issue for the court unless the other party disagrees or disputes it.

Exhibit 'A', is the plaintiff/respondent's lease. The plaintiff/respondent filed this writ on 27th January, 2017. Exhibit "A" which forms the basis of his claim, that is the root of his title was dated 22nd February 2017. Clearly it was prepared during the pendency of the suit. The site plan the plaintiff/respondent tendered was approved on 6th November, 2018. Meaning the site plan attached to exhibit 'A' was not approved. Counsel for the appellant referred this court and rightly so to the settled law that *"conveyance pedente lite has on it the badge for fraud"* see Chellerams (supra).

It is also significant to note that the same exhibit in issue has not been registered. The law is clear that any document concerning land must be registered else it confers no legal right to the holder. A land document that was not registered as required by Section 24(1) of the Land Registry Act, 1962 (Act 122) was ineffective to create any legal rights or liabilities or to have any legal validity whatsoever. Therefore, no legal rights can arise from such unregistered documents affecting land.

See

1. **Asare vrs Brobbey (supra)**
2. **Lamptey vrs Hammond (supra)**
3. **Hammond vrs Odoi [1982/3] GLRD 129 SC**

From the evidence before this court, the plaintiff/respondents' exhibit 'A', the lease, is not registered in accordance with the requirement of the Land Registry Act and therefore cannot confer any legal right on him. The trial judge erred in relying on the unregistered document to grant his relief as owner of the land in dispute. Exhibit "A" is invalid and cannot form the basis of a judicial decision in a court of law. That ground of appeal succeeds.

GROUND 1, 3, 4 & 5

Ground I

The judgment is totally against the weight of evidence led at the trial.

Counsel for the appellants submit that the appellant's late father Oko Pinto acquired the subject land from TDC in the early 1960's. The said subject land is known in the records of TDC as property number ASH/T/E-172. It is their assertion that the land falls within the State acquired land known as TDC acquisition land and the lager tract of the said State acquired land is under the management and control of the TDC. Counsel said this piece of evidence was corroborated by the plaintiffs own witness, Nii Armah Samponu (PW2). In cross examination the witness was asked;-

Q - …And that the said entire compulsorily acquired land is under the management and control of TDC

A - that is so but there are certain privileges we enjoy as allodical owners of the land.

Counsel submit that from the evidence and cross examination of DW1 and DW2, it is abundantly clear that they have been in possession of the disputed land for over 60 years and they begat their children there. It is their case that the defendants' and their family members have been in possession of the disputed land at all material times and this is amply supported by Exhibit "3A", "3B", "3C", "3D", "3E" and "3F". Counsel said the evidence of DW1 and DW2 that they lived on the land or over 60 years and were selling kenkey and porridge thereon was corroborated by the answers of the surveyor's under cross examination. The surveyor in cross examination said;-

Q - Apart from the container shop, you will agree with me that

members of the defendants' family were selling goods on the disputed portion of the land.

A - Yes, they were selling food items on the disputed portion

of the land

Q - And you will also agree with me that the defendants and

their family members own properties sch as firewood and other things on the disputed portion of the land

A - Yes, wood serves as fuel for their cooking and other needs

on the disputed land

Q - It is true that from the Court's own survey report exhibit

CW1, the disputed portion of the land forms part and parcel of the land shown by the defendants as well as the defendants' site plan

A - Yes, it is correct

Q - It is true, is it not, that the disputed land is covered by the defendants' site plan, which you used and same is patently evident in the composite pan exhibit CW1

A - Yes

DW2 tendered exhibit6, an old photograph of her preparing kenkey then as a young maiden. She also tendered exhibits 5B, 6C, and 6D to substantiate the fact that they have long been in possession of the disputed land – **[Page 459,460,461 and 462 of ROA]**

It is also the case of the appellants that their father Oko Pinto built a wooden house on a portion of the land. The appellants continue to pay property rates to Ashiaman Municipal Assembly per exhibits 4A, 4B, 4C, 4D, 4E, 4F, 4G, 4H, and 4K – **[page 132-142 ROA].**

Their deceased father also in his lifetime paid ground rent to TDC in respect of the subject land known as property No.ASH/T/E/172, and simply known as E-172. They tendered such receipts as exhibit 2 series – See page 113-124 ROA. The fact that the land is known as plot E172 has been patently stated in the site plan dated 10/11/2015 prepared by TDC in the deceased Oko Pinto's name. DW3 the TDC official who was subpoenaed tendered same into evidence as exhibit 7H – **[page 474 ROA]** Counsel submit that is ample documentary evidence on record with regard to the plot number as well as the wooden structure.

In **Akuffo Addo vrs Catheline [1992] 1 GLR 377** the Supreme Court observed that whenever an appeal is based on the omnibus ground that the judgment is against the

weight of the evidence, the appellate court has jurisdiction to examine the totality of the evidence on record properly before it and come to its own conclusions.

Thus when an appellant complains that the judgment is against the weight of evidence, he is implying that there are pieces of evidence on record which if applied properly or correctly, could have changed the decision in his favour of certain pieces of evidence have been wrongly applied against him. It behoves on the appellant to demonstrate the lapses in the judgment being appealed against. See **Djin vrs Musah Baako [2007-2008] 1 SCGLR 686 at 687 per holding 4.**

The authorities abound that where an appellant contends that the judgment is against the weight of evidence, it is incumbent of the appellate court to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced to satisfy itself of the balance of probabilities whether the conclusions reached by the court and for that matter the Court below are supported by the evidence. See **Tuakwa vrs Bosom [2001-2002] SCGLR 61**.

Again with regard to the omnibus ground of appeal, in Owusu-**Domena vrs Amoa [2015-2016] 1 SCGLR 790 at 799**, Benin JSC succinctly sated the principle as follows;-

> *"…. The sole ground of appeal that the judgment is against the weight of evidence, throws up the case for a fresh consideration of all the facts and law by the appellate court. We are aware of this court's decision in* ***Tuakwa vrs Bosom [2001-2002] SCGLR 61*** *on what the court is expected to do when the ground of appeal is that the judgment is against the weight of evidence. The decision in Tuakwa vrs Bosom, has erroneously been cited as laying down the law that, when an appeal is based on the ground that the judgment is against the weight of evidence, then, only matters of fact may be addressed upon. Sometimes, a decision on facts depends on what the law is on the point or issue.*

And even the process of finding out whether a party has discharged the burden of persuasion of producing evidence is a matter of law. Thus when the appeal is based on the omnibus ground that the judgment is against the weight of evidence, both factual and legal arguments could be made where the legal arguments would help advance or facilitate a determination of the factual matters. This court's decision in ***Attorney-General vrs Faroe Atlantic Co. Ltd [2005-2006] SCGLR 271 at 306 per Georgina Wood JSC*** *(as she then was) cited by counsel for the respondent, is apt on this point".*

The law is that for a party to succeed in an action for declaration of title to land, recovery of possession and for injunction the plaintiff must establish by positive evidence the following:

i. Identity of the land

ii. Root of title

iii. Mode of acquisition

iv. Various acts of possession exercised over the land

See **Nyikplokpo vrs. Agbedotor [1987/8] I GLR 165 SC**.

NEMO DAT QUOD NON HABET

While the plaintiff/respondent said the land belong to the Tema Traditional Council, the appellant said Tema Development Corporation.

The plaintiff and his two witnesses assert that the land in issue was granted them by TDC, which they also granted to the plaintiff. Their evidence before the court was that TDC released some of its land to the Tema Traditional Council. This assertion was however not established with any evidence. The law is clear that he who alleges must

establish especially when the opponent denies the assertion. The appellant's case is that their deceased father acquired the land direct from TDC which assertion was confirmed by DW3 the officer subpoenaed from TDC. With this bare denial by the appellant, the onus shifted onto the plaintiff to lead positive and cogent evidence to establish his claim which he failed to do. No allocation letter from TDC was tendered into evidence nor any officer from TDC called to confirm that assertion. It was left hanging in the air and therefore a mere assertion without any corroboration.

Tema Divisional Council is creature of statute as counsel for the appellant submitted and therefore has its mandate. As to whether they own land and can grant lease was not established before the trial court. It was incumbent on them to establish they have that mandate conferred on them by law. This they failed to do. Also they failed to establish their assertion that TDC gave them a portion of TDC land to sell.

Traditional Councils do not own land which they can grant unless there is evidence on record that they acquired same and can dispose off same. It is clear that, TDC own all Tema and surrounding lands including all of Ashiaman where the land the subject matter is situated. TDC is therefore the bonafide owner of all the Ashiaman lands. DW3 confirmed that TDC granted the lease to the appellant's father and that the land was within the TDC acquisition area. This assertion was not disputed and therefore there was no further obligation on the appellant to establish same. The onus as I said earlier shifted onto the plaintiff/respondent to lead evidence to controvert the appellant's assertion of the ownership of the land. See **Memuna Amondy vrs Kofi Antwi [2006] 3 MLG 183 CA**.

The law is established that one cannot give out what he does not have. The Tema Traditional Council and Ashiaman Divisional Council could not establish that the land

is theirs and so can grant same to the plaintiff/respondent. The grant was therefore null and void and the trial judge erred in holding that it was valid.

The plaintiff in civil cases is required to produce sufficient evidence to make out his claim on a preponderance of probabilities as defined in **Section 12(2) of the Evidence Act 1975 (NRCD 323).** In assessing the balance of probabilities all the evidence, be it that of the plaintiff or the defendant must be considered and the party in whose favour the balance tilts is the person whose case is the most probable of the rival versions and is deserving of a favourable verdict. **Takoradi Flour Mills vrs Samir Faris [2005/6] SCGLR 882.**

In cases for declaration of title to land, the burden of proof is always on the plaintiff to satisfy the court on a balance of probability. Where defendant has not filed a counterclaim and the plaintiff has not been able to make out a sufficient case against the defendant then the plaintiffs' claims would be dismissed. Wherever a defendant also files a counterclaim, like in the instant appeal, then same standard of burden of proof would be used in evaluating and assessing the case of the defendant, just as it was used to evaluate and assess the case of the plaintiff against the defendant. – **Jass Co. Ltd vrs Appau (Supra).**

In an action for declaration of title to land, the plaintiff has a duty to prove his method of acquisition conclusively by admissible evidence. In the instant appeal however the plaintiff failed to conclusively prove his acquisition. In the first place he could not establish that his grantors have title to the land so granted to him. He also never registered any documents given him as required by law to have any legal title conferred on him.

The trial judge erred in law when she relied on the unregistered exhibit "A" to give judgment in favour of the plaintiff. Aside that the plaintiff could not establish his root of title conclusively to deserve a ruling in his favour.

We hold that ground of appeal succeeds and the declaration of title to the plaintiff/ respondent is hereby set aside as not established.

Ground 3

The learned trial judge's holding that the area of land granted to the defendant father is the same area he placed his six room wooden structure is not supported by the evidence on record.

The trial High Court Judge on the issue delivered herself thus;-

> *"The court holds as a fact that the area of land granted to the defendants' father is the same area he placed his six roomed wooden structure. That was why the number is in respect of the wooden structure and not in respect of a plot of land"*

With all due respect to the trial judge, this finding is wrong. From the evidence before the court, the land given Oko Pinto by TDC is known as plot E-172 and this is confirmed in the site plan tendered by DW3, the officer from TDC. Pinto built a six room wooden structure on this E172 land the structure is numbered E/50. The defendants paid property rates to Ashaiman Municipal Assembly. It is significant to state that property rates does not go to TDC but to the Assembly hence the numbering differences. Ground rents go to TDC while property rates go to the Assembly and this is a notorious fact. This was confirmed by DW3 in his evidence to the court. He told the court TDC gave the whole land E172 to Oko Pinto and the wooden structure was built on a portion of the land. They did not given just the portion covered by the wooden structure but

the whole plot known as E172. The TDC site plan dated 10/11/2015 prepared by TDC for Oko Pinto patently stated so.

The CW1, the Surveyor in his evidence to the court affirmed the fact that the disputed portion of the land forms part and parcel of the land shown by the appellants on the ground as well as their site plan – **[page 310 & 311 ROA].**

The import of all these pieces of evidence is that the land granted to the defendants' father Oko Pinto, E172 is one whole plot of land upon which he built the six room wooden structure. The undeveloped portion of same, the wives used to sell kenkey and porridge. The Surveyor confirmed the defendants' site plan covered the whole land and not just the portion of the wooden structure. The respondent can therefore not be right to claim that TDC gave only the portion covered by the wooden structure to the appellants. This assertion of his was denied by the defendants/appellants as well as the DW3 and CW1. The respondent led no further evidence to debunk these assertions by the appellants and the other two witnesses.

Long Possession:

From the evidence before us which is not controverted, the appellant's father acquired this land from TDC in the 1960's. They lived on this land and DW1 testified that they lived on that land for over 60 years. She also begat her children on the land. They also testified that they sold kenkey and porridge on the land and these assertions were not controverted by the plaintiff.

DW3 even tendered pictures of her preparing kenkey, then as a young maiden on the land. There is no contrary evidence led by the plaintiff to controvert these assertions of long possession of the land in issue.

Overt Acts of Ownership:

The appellants led evidence to the fact that they have been on this land for over 60 years and exercised overt acts of ownership over same. Their father built a wooden structure on the land and they lived there all their lives. They sold stuff on the land since their maidenhood. They heaped firewood on the land for frying fish. They averred that when they saw the plaintiff trespassing unto same they resisted it by pursuing him out of the land. This was confirmed by the plaintiff's own witness PW1, Nii Gamu Amui I. In cross-examination he said:-

Q: ***It is true, isn't it that when the defendants noticed that their land was being trespassed upon by the plaintiff, they fiercely resisted the plaintiff from trespassing unto their land?***

A: ***That is where they make a living so it is not surprising that when someone comes on the land they resisted the fellow. – [Page 237 ROA]***

The above admission exposed the falsity of the plaintiff's claim that at the time he bought the land the defendants were not preparing kenkey and porridge on the land, selling same to people and also selling other goods on the land. By saying *"that* is *where they make a living"* confirms their assertion that they sell their foodstuff there.

The law is clear that where the witness for a party's evidence supports the assertion of the other party, that other party's evidence must be believed and preferred to the party whose witness supported the other. The law is that where the evidence of a party corroborated the evidence of an opposing party, that party's evidence ought to be believed by the court.

See;

i. **In Re Taayen & Assago Stools Kumanin II (Subt.) by Oppan v. Anin [1998/9] SCGLR 399 & 423**

ii. **In Re Asere Stool (etc) [2005/6] SCGLR 637.**

iii. **Manu vrs Nsiah [2005/6] SCGLR 25**

Such confirmatory evidence from the plaintiff's own witness plaintiff's in support of the defendants' version renders the defendants' version preferable to that of the plaintiff's version.

Has The Plaintiff Established His Claim As Required By Law?

It is pertinent to note that the plaintiff in his writ claimed for *"declaration of title to all that piece of land described in paragraph 4 of the Statement of Claim, Recovery of Possession and Perpetual Injunction restraining the defendant etc from interfering with his peaceful enjoyment of his property."*

The defendant in his defence and counterclaim claimed for a declaration that the land in issue forms part of the Estate of the deceased Oko Pinto, general damages and perpetual injunction, to restrain the plaintiff, etc from dealing in any manner with defendants' land, the subject matter of this suit. Defendants never asked for recovery of possession because they are already in long possession.

The law is that when a plaintiff sued for declaration of title to land, the burden of proof is always on that plaintiff to satisfy the court on a balance of probability. Where the defendant has not counterclaimed and the plaintiff has not been able to make out a sufficient case against the defendant then the plaintiff's claims would be dismissed. Whenever a defendant also files a counterclaim then same standard of burden of proof would be used in evaluating and assessing the case of the defendant, just as it was used to evaluate and assess the case of the plaintiff against the defendant.

- See **Jass Co. Ltd. v. Appau [2009] SCGLR 265.**

In the instant appeal, the defendants' though they counterclaimed, did not do so for recovery of possession of the land in issue. Their counterclaim was for the court to declare that the land in issue forms part of the estate of their father.

They are therefore not under the same obligation as the plaintiffs who sued from declaration of title and recovery of possession. Unlike the plaintiff's, the defendants are not under any obligation to lead any proof on a balance of probabilities, though it is desirable, that the land is for their deceased father. The standard in both claims differ with a bigger burden of proof on the plaintiff who is alleging the land the subject matter in his property. As said earlier, the plaintiff in an action for declaration of title to land has a duty to prove his method of acquisition conclusively by admissible evidence. – **Essah v. Boadu [2006] MLRG 323 (CA).**

In assessing the balance of probability, all the evidence be it that of the plaintiff or the defendant, must be considered and the party in whose favour the balance tilts is the person whose case is more probable of the rival versions and is deserving of a favourable verdict. – See **Takoradi Flour Mills (supra)**

Section 11 (4) & 12 of the Evidence Act 1975 (NRCD 323) have clearly provided that the standard of proof in all civil action has proof by preponderance of probabilities with no exception made. Except otherwise provided by law and until it is shifted, a party has the burden of persuasion as to each fact the existence of which is essential to the claim or defence he is asserting.

i. ***Osae & Ors. v. Adjeifio & Anor [2008] 4 GML 149***

ii. ***Adwubeng v. Domfeh [1996/7] SCGLR 660***

The general principle of the law is that it is the duty of a plaintiff to prove his case that is, he must prove what he alleges. In other words, it is the party who raises in his pleadings on issue essential to the success of his case who assures the burden of proving it. The burden only shifts to the defence to lead sufficient evidence to tip the scales in his favour when on a particular issue the plaintiff leads some evidence to prove his claim. If the defendant succeeds in doing this he wins. If not, he loses on that particular issue.

- **Bank of West Africa v. Ackon [1963] 1 GLR 176**

Proof in law is simply the establishment of facts by proper legal means. When the party's averments are denied by the other party, he does not go into the box to repeat his averments on oath but to prove by producing other evidence of facts and circumstances for which the court can be satisfied that what the party avers is true.

Survey:

The trial High Court ordered a Survey to be carried out for a composite plan to be drawn. Both parties were ordered to show their land to the court appointed survey

(CW1) and also to tender their site plans to him for the assignment. Both parties duly complied and gave their respective survey instructions.

From the legend on the composite plan tendered by the surveyor, the land shown by the plaintiffs as their land per his site plan covers all of plot E172. The defendants' site plan also covers the whole plot. The area in dispute forms part of the defendants' land. It also shows that the defendants' container is on the disputed area. It is also of significance to know that, according to the surveyor, the land shown by the plaintiff is smaller than the size of land on his site plan. However, the size of land shown by the defendant is same as on his site plan. Plaintiff's site plan covers the portion of the six room wooden structure.

The plaintiff's case is that he shared boundaries with the defendants' and that the undeveloped portion of the land where the defendants sell foodstuff in his land. From the composite plan his assertion that he shared boundaries with the defendants could not be true because the land on his site plan is the same size as that of the defendants. The land plaintiff showed the surveyor physically a just the tail end of the land in issue where the defendants container is meanwhile his site plan covers the whole land.

With that his assertion that he shared boundary with the defendants cannot be true. The defendants' site plan and the land they showed the surveyor physically matches while that of the plaintiff does not. The land size shown by the plaintiff on the ground physically is about a third of what is on his site plan. That of the defendant however matched what is on their site plan. The plaintiff's assertion that he shared boundaries with the defendants cannot therefore be true because his site plan covers the whole land E172. The size of land on his site plan covers all the land in issue and so could not be sharing boundaries with the defendants. The defendants' story is a better version in the

circumstances than the plaintiff's. This, DW3 confirmed that the TDC gave the whole plot E172 to the defendants' father Oko Pinto and not just where the wooden structure is as alleged by the plaintiff. The evidence of the surveyor (CW1) corroborated the evidence of DW1, 2 & 3. The law emphasizes on the importance of reliance on survey plans to effectively determine land disputes because composite plans present pictorial evidence of the situation as if the court had moved to the locus-in-quo.

See (1) **Seidu Mishammed vrs Saanbaye Kangbere [2012] SCGLR**

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(2). **Tetteh & Anor vrs Hayford [2012] 2 SCGLR 417.**

On this issue on the preponderance of probabilities, the court preferred the defendants' story to that of the plaintiff's as the truth and therefore plaintiff fails on that issue.

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

- See ***Mondial Veneer (Gh.) Ltd. v. Amissah Gyebu XV [2011] SCGLR 466***

A plaintiff in a civil case must win on the strength of his own case and never on the weakness of the defendant's case. – **Ricketts v. Addo [1975] 2 GLR 158.**

It is also very significant to note that the plaintiff's lease was granted him in February, 2017, a month after he instituted this writ. The lease was therefore self-serving and such documents are frowned upon by the court and smacks of fraud. Strictly speaking therefore, at the time the plaintiff instituted this action he lacked the necessary capacity to do so. It was therefore wrong for the plaintiff to state that the defendants were laying adverse claim to his property when he had no legal right to the land in issue.

Ashiaman important issue to note is whether the Ashaiman Divisional Council, a statutory body can grant TDC land to the plaintiff. Do they have that authority to grant land in the TDC acquisition area to the plaintiff? All lands within the TDC acquisition area including Ashaiman are under the authority of TDC and they are the only recognized authority to grant such lands. The land in dispute falls within Ashaiman and as such under the authority of TDC. It is only TDC that can alienate same and no other person or authority.

Another Divisional Council do not own Ashaiman lands and therefore cannot grant same to anyone including the plaintiff. One cannot give out what he doesn't have. The alleged grant to the plaintiff by the ADC is therefore null and void and of no legal effect because it was done without authority. The ADC is not clothed with any authority to dispose off or give out TDC land to anybody.

We are of the view that the trial High Court in its judgment had taken into account matters which were irrelevant in law. For example, giving weight to Exhibit 'A', an unregistered document concerning land into consideration as transferring legal title unto the plaintiff.

The court also excluded matters which were critically necessary for consideration like the composite plan tendered by the court appointed surveyor. We are not oblivious of the fact that the court was not bound by it but would have served as a guide or aid the court to arrive at the right decision.

The conclusions the court arrived at would not have been same if it has properly instructed itself.

Finally, the decision of the court were not proper inferences drawn from for the facts before it.

See **Agyemang-Boateng v. Ofori & Yeboah [2010] SCGLR 861**

Based on the above we hold that the trial Judge erred in entering judgment for the plaintiff for declaration of the title to the land in dispute and recovery of possession of same.

We set aside that judgment and enter judgment for the defendants for their reliefs.

Appeal upheld.

SGD

SENYO DZAMEFE

(JUSTICE OF APPEAL)

SGD

I AGREE

MERLEY WOOD

(JUSTICE OF APPEAL)

SGD

I ALSO AGREE

ERIC BAAH

(JUSTICE OF APPEAL)

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