

IN THE CIRCUIT COURT 3 HELD AT ACCRA ON THURSDAY THE 24<sup>TH</sup> DAY OF NOVEMBER, 2022 A. D. BEFORE HER HONOUR SUSANA EDUFUL (MRS.), CIRCUIT COURT JUDGE

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SUIT NO. C1/126/08

MADAM NAOMI AYORKOR DSANE

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PLAINTIFF

VS.

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MR. TAGOE

DEFENDANT

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### JUDGMENT

The Plaintiff filed a Writ of Summons and a Statement of Claim on January 9 2008, claim against the Defendant the following reliefs:

- a) Recovery of Possession
- b) Damages and Trespass
- c) An order for perpetual injunction restraining the Defendant his agents, work people, customary successors and all claiming tittle through him for interfering with the Plaintiff's land.

The Defendant filed an amended Statement of Defence and Counterclaim on September 29 2021 seeking the following reliefs;

1. Declaration of title to all that price of land lying at Odorkor Accra covering an approximate area of land 0.963 acre and bounded on the North by 210 feet more or less on the South by 210 feet more or less on the South by 210 feet more or less on the East by Asere Stool proposed road measuring 200 feet more or less on the West by the properties of John A. Q. Tagoe and Asere Stool measuring 299 feet more or less.
2. Perpetual injunction restraining Plaintiff, her agents, servants, Labourers and land guards from entering Defendant's said land and in any way from interfering with Defendant's quiet enjoyment of the land.

Plaintiff also filed a reply to the amended defence and counterclaim of the Defendant on November 26, 2021.

Both Counsel for the parties have filed their address on the subject matter for determination. This court has perused it and considered it in this judgement.

### **THE PLAINTIFFS' CASE**

The Plaintiff's case is that she is the owner of the said land which she has described as "All that piece or parcel of land situated and being at North Odokor, Accra Containing an approximate area of 0.15 acre more or less and bounded at the North East by the Vendors land measuring 100 feet more or less on the South East by Vendors and measuring 90 feet more or less on the South West by the Vendors

land measuring 78 feet more or less which said piece or parcel of land is more particularly delineated on the plan attached hereto". That the said land was obtained by a grant from Nii Nikoi Olai Amuatia IV in September 2, 1978 with the consent and concurrence from the principal members of the said Asare Stool whose consent and concurrence are necessary for a valid grant. The Plaintiff performed all the requisite custom for the customary the grant. Whilst the Plaintiff was in possession of the land some people trespassed the same land, so the Plaintiff file a cased against them under Suit No, L548/99 and the Plaintiff obtained interlocutory Judgment against all the Defendants. The Defendant trespassed the same land whilst she was in possession hence the present action. The Plaintiff denied the defence and counterclaim of the Defendant and stated that the Defendant fraudulently commenced development on the Plaintiffs land when he knew his land was lying somewhere else distinct from the Plaintiff's land and also falsely represented that his deed of conveyance dated November 2, 1959 covers the land in disput.

### **THE PLAINTIFFS EVIDENCE**

The Plaintiff testified through his attorney William Aki Davis. He tendered exhibit A which is the power of attorney given to him to testify in this matter. The Plaintiffs evidence is that she is the owner of the land in issue as described. She acquired the lease for the land in issue from the Asere Stool Acting per Nii Nikoi Olai Amuatia IV on September 2, 1978 and registered it at the Lands Registry as

4697/1079 and therefore tendered the said indenture in evidence as exhibit B. According to the Plaintiff's Attorney whilst on the land some people trespassed on the land and she sued the said people in court. Judgment was given in the said suit, Madam Ayorkor Dsane v Madam Okailey Aryee & 2ors. This was tendered in evidence as exhibit C. The entry of Judgment filed was also tendered in evidence as exhibit D. Later the Defendant herein also trespassed the Plaintiffs land and commenced development the Defendant continued development despite the Plaintiffs warning and the pendency of this suit against him.

The court ordered a surveyor to survey the land in issue and report the outcome to court. the Composite Plan prepared by the surveyor was tendered in evidence by the Plaintiff and the Surveyor. The Plaintiff has stated that according to the survey work the Defendant land as described is located far away from the Plaintiff's land and prayed that the court that she be granted her reliefs endorsed on her writ of summons and statement of claim filed.

### **THE CASE OF THE DEFENDANT**

The case of the Defendant is that the Plaintiff are not entitled to her claim. Defendant stated that he was gifted the land in issue lying at Odorkor by his donor Nii Akramah II Asere Mantse of Accra with the consent and concurrence the elders. The Defendants donated customary drinks of 25 pounds which his donor acknowledged receipt. The Defendant caused an indenture grant thereto, to be

stamped as AC/9250/89 and same registered at the Lands Registry as No. 5591/1995 and 32000/821 to that effect.

### **DEFENDANT'S EVIDENCE**

According to the evidence of the Defendant, he is the owner of the land. He stated that he does not know the Plaintiff. According to the Defendant the Plaintiff's land is not the same as that of the Defendant. The Defendant further stated that he has possessed the land in issue since 1959. The Defendant told the court that he acquired the land from the late Nii Akrama II, Asere Mantse through a customary grant by way of a gift. The said gift was in pursuant to the good service which the Defendant rendered to the Asere Stool and in consideration the Defendant gave 25,000 pounds to the Asere Stool. This grant was evidence by a subsequent deed of conveyance which was tendered in evidence and therefore was accepted and mark as exhibit 1 series. Defendant also exhibited photographs of a building enclosed in a fence wall constructed on the land about 30 years ago as exhibit 2 series. The Defendant indicated to the court that he had been in quiet possession of the land for a period of about 49 years.

### **THE EVIDENCE OF THE COURT EXPERT**

The Courts expert was Alhassan Nantognah. He lives at Oyarifa. He is Surveyor from Lands Commission. According to the Witness, he

received Hearing Notice to come and testify in court. He indicated to the court that he was called and assigned by the lands officers of the Lands Commission to undertake the survey work for the determination of a dispute of land between Madam Naomi Ayorkor Dsane and Mr. Tagoe. The assignment contained all the necessary details. After looking through the file, I noticed that the Defendant's Surveyor instruction was not put together with Defendant's site plan, so he drew the attention of his immediate boss who made attempt to get in touch with the Defendant but he was not unsuccessful. A letter was therefore written to the court to seek the court's attention and direction. The court gave direction to proceed with the survey work without the Defendant. According to the Court Expert he went to the site with my team of Surveyors to carry out the survey on the site. The Plaintiff was made to show her land on ground which we surveyed. The details around the parcel was also surveyed. The Defendant's site plan was also surveyed. The two (2) site plans together with the survey on ground was used to produce the composite plan of the land in issue. This was tendered in court and accepted and marked as exhibit CE1and CE2.

The Plaintiff had no questions for the witness during cross - examination.

**When the Witness was cross-examined by Counsel for the Defendant the following ensued**

Q. You did not work with the survey instruction filed by the Defendant.

A. The Defendant did not submit survey instruction per my knowledge.

Q. Do you have a copy of the order?

A. Yes.

Q. How did you receive the order?

A. As the officer of the commission, the order was within a file which was assigned to me.

Q. Do you have a copy of that file?

A. Yes.

Q. What date was the order of the court received at the Lands Commission?

A. It was received on 20/1/2020.

Q. The letter from the court to Lands Commission, was there any document attached thereto?

A. There is an attachment.

Q. What document is attached?

A. Surveyor's instruction pursuant to the order of the court.

Q. Who filed the survey instruction?

A. It is the Solicitor for the Plaintiff.

Q. Do you have survey instruction of the Defendant?

A. I said no.

Q. Apart from the survey instruction by the Plaintiff, is there any document that Plaintiff presented?

A. Yes.

Q. What are they?

A. Site Plan and indenture of the parties.

- Q. By what means did you try severally to reach the Defendant?
- A. By calling the Defendant.
- Q. Is the telephone number of the Defendant recorded in the file?
- A. No, I have only one number Mr. Duah.
- Q. Did you find out from Mr. Duah if he knows the Defendant?
- A. No.
- Q. I put it to you that it is false when you said your boss severally tried to reach the Defendant because there is no contact number.
- A. I did not do the calling but I wrote to the court to help us get in touch with the Defendant which is in evidence.
- Q. When did you write to the court?
- A. I cannot remember but it was written to the court.
- Q. Was it signed by you or your boss?
- A. It was signed by my boss.
- Q. Do you have a copy in the file you are holding?
- A. No.
- Q. I am putting it to you that if indeed that letter was written, you would have had a copy on the file.
- A. We don't do it that way.
- Q. You said you were given a copy of the indenture of the Defendant, not so?
- A. Yes.
- Q. That indenture had site plan in it, not so?
- A. Yes, a very doubtful site plan.
- Q. That document was done in 1959, not so?
- A. Yes, but we don't deal with indentures.



Q. That site plan in the indenture was embossed with a Lands Registry mark.

A. Yes.

Q. It has registration number 5591/85, not so?

A. Yes.

Q. The land edged had a dimension of 210 ft x 200ft.

A. Yes.

Q. It also showed on both sides the boundary owners of the land, not so?

A. I saw some inscription, I don't know whether they are the boundary owners.

Q. What are the inscriptions?

A. I saw the name to the left John A. Q. Tagoe (Vendor Property) to the right I saw vendors property.

Q. When did you became a Surveyor?

A. I became a Surveyor in 1998 but a professional member in 2009.

Q. In 1959, what instrument was used in surveying?

A. I was not born then, what I read was that they were using chain and compass predominantly.

Q. So the site plan in 1959 as exhibited in the indenture of the Defendant cannot be said to be deceitful.

A. A quick glance at the site plan indicates there are so many defects which can never be said to be a correct site plan.

Q. From your quick glance, can you tell the court which instrument was used to do this site plan in 1959?

A. It was done by a compass carried out by an unqualified person i.e. a quack Surveyor.

Q. Who prepared this 1959 site plan?

A. It was prepared by unknown surveyor.

Q. When were you born?

A. 1972.

Q. So you know all surveyor's before you were born.

A. Any qualified surveyor who prepared site plan will endorse his name but this site plan has nothing on it.

Q. You have no basis to describe a site plan received at Lands Registry to be deceitful.

A. Even though it was compass used in the work, we have a checklist that will determine that any site plan prepared by qualified Surveyor should meet irrespective of when it was done. Some of the defects on the site plan was not referenced to any known deacon.

1. Surveyors Landmark implemented by Surveyors.

2. The compass has its own assured error.

3. Compass variation which should be indicated.

4. The coordinates used was local coordinates.

5. The plan was not referenced to any grid line. The North, Magnetic North or Grid North.

The outcome of such a plan is that a land would be shown to you physically on the ground but its actual location on paper when you set out (demarcate), it's on ground, it is likely to fall in the sea.

Q. Have you seen the arrow, what does it represent?

A. North.

- Q. Do you see grid longitude and latitude?
- A. No, we don't show longitude and latitude on the site plan.
- Q. What does it show?
- A. The numbers are grid lines not latitude and longitude.
- Q. You went on physical inspection on the land, not so?
- A. Yes.
- Q. There was a building on the land, did you see it?
- A. Yes.
- Q. The Plaintiff did not build that building.
- A. I was not there to determine who owns that property.
- Q. Where is the survey instruction filed by the Plaintiff?
- A. I have it on file.
- Q. Apart from the building, what else did you see there?
- A. I saw a tree inside the house.
- Q. Did you not see wall around the house?
- A. Yes, there was a wall.
- Q. So at the time of carrying out the survey, the area was built up, not so?
- A. Yes.
- Q. The local grids can be converted to national grids, not so?
- A. Yes.

## ISSUES FOR DETERMINATION

**On 5/11/2020, the Plaintiffs filed and set the issue for trial as;**

**Whether or not the land in dispute being claimed by the Plaintiff is distinct from the land claimed by the Defendant as revealed by the survey report.**

The duty therefore fell on the Plaintiff to adduce sufficient evidence to establish that indeed she is entitled to the reliefs she seeks.

**In Bisi and Others v. Tabiri alias Asare (1987 - 88) 1 GLR 360** it was held that “the standard of proof required of a plaintiff in a civil action is to lead evidence as will tilt in his favour the balance of probability on the particular issues”. **In Duah v Yorkwa [1993-94] 1 GLR 217, Brobbey JA**, as he then was held that it is the plaintiff who has the duty or obligation to lead evidence in order to forestall a ruling being made against him.

**Section 12 of the Evidence Act, 1975, NRCD 323** provides that proof must be by a preponderance of probabilities. That section defines “preponderance of probabilities” as denoting “a certain degree of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.”

This position was confirmed by the Supreme Court in the case of **Adwubeng v Domfeh [1997-98] 1 GLR 282** that the standard of proof in all civil actions, without exception, was proof by a preponderance of probabilities.

Both Counsel have filed their address on the issue the Plaintiff. This court has taken their submissions into consideration in coming up with this judgment.

**In Asante – Appiah V Ampona Alais Mansah [2009] SCGLR page 90** the court held “the law is well established that where a party’s claim is for possession and perpetual injunction he puts his title in issue. He thereafter assumes the onus of proving his title by a preponderance of probabilities. Like any party who claims declaration of title to land”

The Defendant who has a counterclaim in a civil action bore a similar onus of proof cast on a Plaintiff to establish his title. In the case of **Birimpong V Bawuah 1994-1995 GBR 837** where the supreme Court held “it is well settled principle that a counterclaiming defendant is in the same position as a Plaintiff with respect to his counterclaim and undertake the same burden with respect thereto”

see also **Yeboah V Ahele 2012 44 GMJ 37 CA**

**In Dennis Dominick Adjei’s book on Land Law, Practice and Conveyancing In Ghana At Page 106** It was stated “the burden of proof is always on the Plaintiff to prove positively by a balance of the probability that the identity of his land is certain and there is no doubt about it. A Defendant who has a counterclaim has the same responsibility as a Plaintiff and he would be expected to discharge the same burden of proof in order to succeed in his claim. Where the Plaintiff fails to prove the identity of his land his action fails but would

not suggest that title would be decreed in favour of the Defendant. On the other hand, where the Defendant, where the defendant has a counterclaim, he should be able to prove the identity of his land because the dismissal of the Plaintiff's case would not automatically confer title on him until he has been able to prove title to his land without any doubt".

In the case of **Mondial Veneer (Gh) Ltd V Amua Gyebu XV [2011] I SCGLR 466** it was held as follows:

"In land litigation, even where living witnesses, directly involved in the transaction, had been produced in court as witnesses, the law would require the person asserting title and on who bore the burden of persuasion ... to prove the root of title, mode of acquisition and various acts of possession exercised over the disputed land. It was only where the party had succeeded in establishing those facts, on the balance of probabilities, that the party will be entitled to the claim."

Be that as it may, the onus is on the plaintiffs to establish that they are indeed entitled to the reliefs sought. In the Supreme Court case of **Darko V. Affrim And Others [1966] GLR 36-42 Per Ollennu,**

**Akainyah And Bruce-Lyle JJ.S.C.**, the court at holding (2) held: "(2) In a claim for a declaration of title, damages for trespass and recovery of possession, a plaintiff could not succeed without clear proof of the identity of the land to which the court should hold him entitled..."

**Nyikplorkpo V Agbedotor 1987-88 1GLR 165 at 171 Aban JA** as he then was held "that succeed in an action for the Declaration of

title to land, injunction and recovery of possession, the Plaintiff must establish by positive evidence the identity and the limits of the land he claims.”

The court ordered a surveyor to survey the land and report the outcome of the survey work to court. The summary of the report is as follows;

1. The land shown to the surveyor on the ground by Madam Naomi Ayorkor Dsane the Plaintiff is edged Red
2. The land on the site plan of Madam Naomi Ayorkor Dsane is edged Blue
3. The Land on the site plan of Mr. Tagoe is edged Green
4. Mr. Tagoe was not available to show his land on the ground.

The surveyor was presented with the indenture of both parties which has inculcated in it, the site plan parties and this was the site plan used by the surveyor. The Graphic and Pictorial examination of the composite site plan attached to the report exhibit CE2 shows that the location where the Plaintiff’s site plan points to is found between the grid line of 1169000 E and 1170000 E and on line 336000 N. That of the Defendant’s site plan which is the same as is in his indenture show that his site is located between the grid of 1170000 E and 1171000E and on the line 342000 N.

I refer to the case of **Abed Nortey v African Insistute of Journalism 2014 77 GMJ 1SC** the Supreme Court held that “the

Respondents led sufficient evidence to clearly identify their land which accorded with their pleadings”.

Also the case of **Anane v Donkor (1965) GLR 188 at p 192** provides 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 re-litigating the same issues in respect of the identical subject matter, but it cannot so operate unless the subject matter thereof is clearly identified. For these reasons, a claim for declaration of title or an order for injunction must always fail if the plaintiff fails to establish positively the identity of the land to which he claims title with the land the subject matter of the suit.”

**See : CHANTEL v. KOI [2011] 29 GMJ 20 CA**

The authorities are legion to the extent that to succeed in an action for declaration of title to land, injunction and recovery of title such as this, the plaintiff or claimant has to prove with certainty the boundaries of the land claimed, how much he bought the land, the



price he paid for and the documentary proof establishing his title.

The Plaintiff must establish by positive evidence the land he claims.

The same burden is cast on the Defendant herein as is cast on the Plaintiff on the determination of declaration to land.

I must emphasise that the identity of the land in issue by the parties is very paramount in determining the dispute in this suit. The graphic and pictorial view shows that the location of the parties site as determined by their site plan in the survey report are far from each other.

The area pointed to by Plaintiff which is the area in dispute in this case more or less coincidence with that of Plaintiff's site plan as indicated in the surveyor's report. That being the case, if each party goes for the land where their site plan depicts there would be no conflict and in this situation (case) that is what the court thinks best must be done. The Plaintiff has been able to identify that the land in issue is the land he obtained grant for. If the identity of the Defendant's site plan does not point to the site in dispute then no matter what is done on it, occupied or possessed, it cannot amount to ownership of the land as claimed.

The Defendants evidence raises issue of adverse possession. According to the Defendant he occupied the land for about 49 years without disturbance or adverse claim by anybody. What did the Defendant use to demonstrate that he occupied the land for the past

49 years as claimed? The Defendant tendered exhibit 2 series to demonstrate that he has occupied the land for the past 49 years. These are photographs of building constructed on the land in issue. These photographs do not show the number of years the building has been on the land. The Plaintiff in his evidence told the court that he has been in possession of the land in issued and it not true as the Defendant wants the court to believe that he has been on the said land for about 49 years without disturbance. The Plaintiff further stated that he has been in possession since the land was acquired from the Asere Stool. He tendered exhibit B Series. The court has examined the land as described in the writ of summons filed in this suit dated January 9, 2008 and that on exhibit C series which is writ of summon and statement of claim filed on November 5, 1999 where the Plaintiff took an action against some trespasser to prove that the Defendant was not in occupation of the land at the time otherwise he would have done same against the Defendant. It was only when the defendant entered the land and started construction that he warned the Defendant to leave the land as she is the owner but the Defendant did not heed to the warning hence the filing of the present suit to claim her land.

The court is very convinced that the Plaintiff is the owner of the land in issue on the weight of the balance of probability. It is therefore the opinion that location of the land in issue as indicated by the plaintiff's site plan is for the Plaintiff.

The Defendant is found to have indeed trespassed on the Plaintiffs land. General Damages therefore lie against the Defendants. The Plaintiff accordingly succeeds on his reliefs claimed. The Defendant's counter claim is dismissed

## **DECISION**

I hold that the Plaintiffs action must succeed for all the reliefs sought;

- i. I grant a Declaration of title to all that piece or parcel of land more particularly described in writ of summons and the Statement of Claim of the Plaintiff.
- ii. I order the Plaintiff to recover possession of the Land in issue as described in the Plaintiff's reliefs filed.
- iii. General Damages of Fifty Thousand Ghana Cedis (GH¢50,000) against the Defendant as he has trespassed on the Plaintiffs land.
- iv. Costs of Ten Thousand Ghana Cedis (GH¢10,000) ordered against each of the Defendant.

## **LEGAL REPRESENTATION**

- 1. KWAME FOSU – GYEABOUR FOR THE PLAINTIFF**
- 2. ADJEI LARTEY FOR THE DEFENDANT**

**H/H SUSANA EDUFUL (MRS)  
(CIRCUIT COURT JUDGE)**