

CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON WEDNESDAY, 7TH DECEMBER, 2022

SUIT NO. C1/2/18

OKWENA SAMPSON

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PLAINTIFF

VRS

1. ABUDU RAZAK

2. ESTHER QUAYE KUMAH

3. REGINA QUAYE KUMAH

DEFENDANTS

JUDGMENT

By an amended writ of summons dated the 17th day of May, 2019, the plaintiff sought the reliefs of

- (a) Declaration that plaintiff is the legal owner of plot No. RP/17/F.80B measuring 0.18 acre situated and lying at Community 17, Tema
- (b) Ejectment of defendant from and recovery of possession of the land subject matter of the suit.

The 2nd and 3rd defendants counterclaimed for;

- a) A declaration that plot No. RP/17/F.80B forms part of the estate of the late Enoch Quaye- Kumah
- b) A declaration that the purported sale of the said of land to the plaintiff is vitiated by fraud.
- c) An order of the court to set aside the sale of the plot to the plaintiff on grounds of fraud

- d) An order directed at the TDC development company Ltd. to remove the name of the plaintiff from its record as owner of the said plot and replace same with the name of Enoch Quaye Kumah.

The plaintiff contended that he is the legal owner of the disputed plot. That he acquired it sometime in January, 2017 from Mr. Ebenezer Quaye Kumah and upon the execution of the necessary transfer documents, the Tema Development Corporation transferred title from his vendor to him.

That the 1st defendant, despite being a squatter on the land has refused to give up vacant possession to him despite several warnings and notices to that effect.

The 1st defendant denied that the land belonged to plaintiff or plaintiff's vendor. His contention is that he was a caretaker of the land. That he was placed into occupation by the father of plaintiff's alleged vendor, Enoch Quaye Kumah.

That in order to stop trespassers from encroaching on the land, the late Enoch Quaye Kumah had asked his children led by the eldest, Esther Quaye Kumah to start construction on the land. That this construction started in 1995 and was completed when the defendant with the permission of the late Enoch Quaye Kumah roofed the structure and lived in it. That he has since lived in the property for twenty one (21) years.

That with the permission of the same Enoch Quaye Kumah, his brother constructed a kiosk on the land. That the plaintiff's vendor knows him very well and has knowledge that he is on the land. That the plaintiff's vendor is not the owner of the land and any purported document obtained from TDC was actuated by fraud. He particularized the

fraud. That he informed plaintiff that the land did not belong to his vendor whenever the plaintiff visited the land. He contended that the plaintiff is not a bonafide purchaser for value without notice of other interests in the land.

That the plaintiff's vendor had in an action instituted at the High Court on 19th June, 2016 sued his siblings for a declaration of title to the said land. Thus as at January, 2017 when the plaintiff was acquiring the land from his vendor, the said land was the subject matter of a pending court action. That the plaintiff and his vendor's actions are contemptuous of the High Court.

The 2nd and 3rd defendants in their statement of defence averred that until his death, the late Enoch Quaye Kumah had been in possession, management and control of the land. That the 1st defendant has been in occupation and possession of the said land for more than twenty one (21) years with the consent and knowledge of the late Enoch Quaye Kumah and his children including the plaintiff's vendor.

That the acquisition of the disputed land was tainted with fraud. They further contended that the plaintiff's vendor, deceitfully and fraudulently, took advantage of the advancement in age, failing eye sight and vulnerability of their late father to prepare documents in his name when he was tasked to see to the preparation of the documents in the name of Mr. Enoch Quaye Kumah. They provided the particulars of fraud.

2nd and 3rd defendants further averred that the land in dispute forms part of a vast land which belonged to their grandfather and the father of the late Enoch Quaye Kumah; Numo John Quaye Kumah. That same was used for farming during the lifetime of their grandfather and upon his death, their late father and some other relations fought to protect the land. That sometime in the 1990's when there was a serious attempt to

encroach on the land, their late father tasked the 2nd defendant to marshal resources and build on the land.

That 3rd defendant had a cadastral plan prepared and the land was plotted at the survey department. 3rd defendant thereafter suspended work on her own project at Okpoi Gonno and employed workers to start construction works in April 1995. That a chamber and hall was raised on the land and with the permission of their father, 1st defendant was made to live on the land as a caretaker. That the 1st defendant and his brother have since made a few additions to the land.

The plaintiff filed a reply and denied the claims of the defendants and in answer to the counterclaim of the 2nd and 3rd defendants, averred that they are not entitled to same.

The issues set down for trial are:

1. Whether or not the land in dispute is the bonafide property of Ebenezer Quaye Kumah or forms part of the estate of the late Enoch Quaye Kumah
2. Whether or not the plaintiff is the bonafide purchaser for value without notice of the land in dispute
3. Whether or not the land in dispute was fraudulently acquired by the plaintiff's vendor.

THE CASE OF THE PLAINTIFF

The case of plaintiff is that he had conducted a search at TDC Ltd to vouch the authenticity of EXHIBIT A series; documents which were given to him by his vendor. That upon verification by TDC, he agreed on terms with his vendor for the sale of the land to him. After this, his vendor applied to TDC for their consent to transfer his interest in the land to him and. He tendered same in evidence as EXHIBIT B.

Plaintiff continued that he paid the necessary transfer fees to the TDC and attached same as EXHIBIT C. That the TDC invited him and his vendor and they executed a deed of transfer into his name. He tendered same in evidence as EXHIBIT D. He further testified that since the transfer into his name, he has paid the necessary rates, taxes and liabilities to the TDC. He tendered some of the receipts in evidence as EXHIBIT E series.

PW1's EVIDENCE

PW1 testified as a member of the Nungua Traditional Council. His evidence is that in 2013, in his capacity as the Acting Nungua Mankralo and a member of the plot allocation committee of the Nungua Traditional Council, he endorsed an allocation of a plot to one Ebenezer Quaye Kumah.

Further that prior to the formation of the lands allocation committee of the Nungua stool, the land formed part of the Tema Acquisition area of the TDC company Ltd. That after negotiations between the Nungua Traditional Council and the Government, a part of the land were released to the Nungua stool to manage with the TDC in 1994. That prior to the acquisition of the land, natives of Nungua including the Enoch Quaye Kumah, the father of Ebenezer Quaye Kumah farmed on the land. That upon a request by the late father of Ebenezer Quaye Kumah, the Nungua Traditional Council issued an allocation to the said Ebenezer Quaye Kumah.

PW2' EVIDENCE

PW2 was the representative of the TDC Development Company. Her evidence is that upon an application by one Ebenezer Quaye Kumah to its office and which application was supported by an allocation from the Nungua Traditional Council, it regularized and confirmed the allocation to the said Ebenezer Quaye Kumah in November, 2016.

That in January 2017, the said Ebenezer Quaye Kumah applied to transfer his interest to plaintiff herein and same was accordingly effected. She tendered in evidence EXHIBIT F series.

PW3's EVIDENCE

PW3's evidence is that he is last born of eleven children of the late Enoch Quaye Kumah. That his father owned a vast piece of land during his lifetime some of which had been encroached on. Further that during the lifetime of his father, and specifically in 2013, he made a gift of the disputed land which was partially developed to him. He tendered in evidence EXHIBIT G as a deed of gift. Further that when his father later learnt that the mode of acquisition of Nungua lands was by an allocation by the Traditional Council, his father went to the said council to have the land allocated to him formally.

That his late father thereafter took him to the traditional council for the land to be allocated to him and same was done. That he later submitted the allocation to the TDC in his name and same was regularized and confirmed. That he was given a right of entry and he took possession of the land and paid property rates. He tendered in evidence EXHIBIT H series as some of the receipts.

He continued that sometime in January, 2017, he applied to the TDC to transfer his interest in the land to the plaintiff. That sometime in May, 2017, the 3rd defendant per a power of attorney donated to her by their most senior sibling, applied for letters of administration in respect of the estate of their late father and included the disputed land as part of the inventory of the estate of their deceased father. He tendered same in evidence as EXHIBIT J.

PW3 testified that when this came to his notice, he caused a writ of summons to be issued against the applicants of the LA. He tendered in evidence copies of the writ of summons and statement of claim as EXHIBIT K. He further tendered in evidence EXHIBIT L as the statement of defence of the defendants. That their family head intervened and so he discontinued the action by EXHIBIT M. Further that when the matter was called for settlement, the defendants refused to attend.

THE CASE OF THE 1ST DEFENDANT

The case of the 1st defendant is that sometime between 1997-1999, he was placed as a caretaker on the disputed land by the 2nd defendant. That she was then building on the land and needed a caretaker. That 2nd defendant fully constructed a one bedroom, kitchen and hall out of a foundation and he has since been living in same. That he has been in the said house and on the disputed land for over twenty one (21) years.

That sometime in 2013, some persons attempted to encroach the land. That he informed the 2nd defendant who came over with PW3 and the late Enoch Quaye Kumah. That the said Enoch Quaye Kumah told him that the land was his and he gave it to the 2nd defendant to develop for the benefit of his children.

That PW3 later came on the land and told him that the family wanted to develop the land into an estate. Later plaintiff kept visiting the land and upon enquiry, indicated that it was PW3 who had authorized him to do so. That PW3 told him that the plaintiff was there with respect to the estate building.

Later, plaintiff came to claim that he was the new owner of the land having acquired it from PW3. When he called PW3 in the presence of plaintiff, PW3 denied same. Later, PW3 came unto the land and told him he would give him a piece of land and erect a

building thereon for him. That he refused because it was the 2nd defendant who had put him on the land. He then informed the 2nd defendant.

He continued that the matter went to the police station and then to this court. That even though there was an order of injunction, plaintiff came to forcibly fence the land.

THE CASE OF 2ND DEFENDANT

2nd defendant repeated the claims in her statement of defence and added that when she heeded the encouragement of her father to come and build on the disputed land in order to prevent encroachment by the young men of Nungua, she had an original plan to build a three bedroom house.

That she had to resist attempts by the youth when she began construction and with the assistance of one of their sisters by name Margaret, she was able to raise the building and stopped after that. That she put the 1st defendant into occupation and he has since been on the land as her caretaker.

She continued that the land in dispute is now the remaining area of that land. That PW3 who is her brother returned from UK in 2010 and got to know about the disputed land. That PW3 took advantage of the frailty of their father, his challenging health condition and failing eye sight to get their father to release documents covering the land to him for the purpose of registration. That that was the last time they set eyes on the said documents.

Further that their father informed 3rd defendant of what happened and asked her to keep an eye on the land. He also gave a copy of the land documents to their sister by name Rosemary Anofe Acheampong. She tendered same in evidence as EXHIBIT 2.

That PW3 came for an amount of two thousand Ghana cedis (Ghs 2,000) from her in the name of their father ostensibly to register the lands. That she would frequently ask PW3 if the documents had been signed but unknown to them, he had fraudulently effected the transfer in his name by making fraudulent presentations to the Nungua Traditional Council and the TDC.

That PW3 knew he did not have the consent of their late father and that is why he only presented his application to TDC after the death of their father.

THE CASE OF 3RD DEFENDANT

3rd defendant's testimony is that their late father passed on 3rd October, 2013. On 8th October, 2013, PW3 came to tell her that since she was the one taking care of their late father until his demise, he would register their father's land at Lashibi in her name. That she refused the suggestion and told him the land belonged to their father and upon his demise to his children.

That her father had during his lifetime given the land to one of their younger sisters to develop but she refused as the land was bushy. Their father later told her that he had given it to the 2nd defendant to develop the area. That their father would occasionally ask him to caution PW3 to be mindful of asking for land documents to all his (their father's) properties.

That PW3 knew their father was frail and vulnerable and told him that he was handing the documents over to the Nungua elders to sign and that is how he got hold of same.

CONSIDERATION BY COURT

1. Whether or not the land in dispute is the bonafide property of Ebenezer Quaye Kumah or forms part of the estate of the late Enoch Quaye Kumah

The plaintiff in order to be entitled to any of his claims, has a duty to produce sufficient evidence of such quality, relevance and credibility that would establish on a balance of probabilities, the existence of his claim in the mind of the court. It is only when he has been able to discharge that burden, that the burden of proof would shift unto the defendant to lead sufficient evidence to avoid a ruling against him on the issue (s). See **Section 11 and 12 of the Evidence Act, 1975, Act 323.**

As the 2nd and 3rd defendants had counterclaimed, they bore the same burden of proof with regard to their claims as the plaintiff. See the case of **Hydrafoam Estates Ltd. v. Owusu (per lawful attorney) Okine [2013-2014] 2 SCGLR 1117**. Anin Yeboah JSC (as he then was) at holding 4 of the headnotes held that “*Counsel for the defendant erred in arguing that since the plaintiffs had no title to the disputed land, the defendant’s counterclaim ought to have been upheld by the Court of Appeal. At common law, a defendant was not bound to counterclaim against a plaintiff. Where a defendant had put in a counterclaim, it must be proved to the satisfaction of the court, because a counterclaim was an independent action*”. See also the case of **Fuseini v. Moro [2010-2012] 2 GLR 434, C.A.**

This burden of proof on both sides is on a preponderance of probabilities. Apau JSC, in delivering the decision of the Supreme Court held in **Ebusuapanyin James Boye Ferguson (Substituted by Afua Amerley) v. I. K. Mbeah & 2 Others, Civil Appeal No. J4/61/2017, dated 11th July 2018, S.C. (Unreported)** as follows: “*The standard of proof in civil cases, including land, is one on the preponderance of probabilities - {See sections 11 (4) and 12 of the Evidence Act, 1975, Act 323 and the decision of this Court in Adwubeng v. Domfeh [1996-97] SCGLR 660 at p. 662*”.

In the case of *Emmanuel Osei Amoako v. Stanford Edward Osei* [2016] DLSC 2830, the erudite Appau JSC speaking for the Supreme Court held: “It is trite learning that a bare assertion by a party of his pleadings in the witness box without more is no proof. Proof in law has been authoritatively defined as the establishment of facts by proper legal means. As the celebrated Ollenu, J (as he then was) stated in his judgment in the case of *Khoury and Another v Richter*, which he delivered on 8th December 1958 (unreported), on the question of proof, which he repeated in the case of *Majolagbe v Larbi & Anor* [1959] GLR 190 at 192; “where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true ...”. See also the cases of **International Rom Ltd. v. Vodafone Ghana Ltd. & Another** [2016] DLSC 2791.

It is trite that a party who sues for declaration must lead material and relevant evidence to establish his case before the court. In the case of *Kwesi v. Davies* [2006] 2 MLRG 50 @ 57, *Lartey JSC* held: “It is trite that this suit being essentially for a declaration of title, the plaintiff was bound to establish his root of title.” Also in *Ogbarmey Tetteh v. Ogbarmey Tetteh* [1993-94] 1 GLR 353, the Supreme Court held: “... In an action for declaration of title, a plaintiff who failed to establish the root of his title must fail because such default was fatal to his case.

It is a legal known that in a claim for declaration of title, a claimant must establish; as stated by Wood C. J. in her usual brilliant style in the case of *Mondial Veneer (Gh.) Limited v. Amuah Gyebi XV* [2011] 1 SCGLR 466: “A person asserting title to land and on

whom the burden of persuasion falls, must prove....the root of title, the mode of acquisition and various acts of possession exercised over the subject-matter of litigation". See also the case of Thomas Cobbinah Yaw Asiedu v. Isaac Kwofie [2018] DLCA 4916, per Agyemang J.A.

The undisputed facts of this case establishes both the plaintiff's , 2nd and 3rd defendant's root of title. From the evidence, the plaintiff's vendor, 2nd and 3rd defendant are siblings. They are part of the more than ten children of the late Enoch Quaye Kumah. Both plaintiff's vendor (PW3) and defendants gave the same testimony about the root of title to the disputed land.

The land in dispute forms part of a large tract of land that was reduced into farming by their grandfather; the late John Kwei Kumah. The land was for cattle rearing and also farming. After his death, their late father took over the land. Both their grandfather and father were natives of Nungua and as the land forms part of Nungua stool lands, their late grandfather had entered same and exercised a customary usufructuary interest in the land.

Their father had continued in that same right. There is also no dispute that persons started encroaching on the land and so their late father decided to protect the land. Whereas it is the case of the 2nd and 3rd defendants that their late father authorized the 2nd defendant as his first child to be the caretaker of the land and also protect it and to that effect she had built the structure on the land which has since been occupied by the 1st defendant, plaintiff's grantor insists that it was their late father who built the said structure but only caused the 2nd defendant to supervise same.

I do not believe PW3's evidence on this. This is because he admits that he was not in the country at the time of this incidence. Whereas the land was protected by the said

construction which began in April 1995, he only returned to Ghana from his sojourn abroad in 2010. He admits that he was not in Ghana and was not involved in the decision or actions taken to secure the land. Indeed, under cross examination, compared to the 3rd defendant, he appeared to have very limited knowledge about the disputed land.

The 2nd and 3rd defendants were present in the country and I found their evidence to be based on first hand knowledge of events. I found 3rd defendant to be a particularly credible witness. Also, learned counsel for the plaintiff in cross examining 3rd defendant at page 147 and 148 of the record of proceedings had asked her;

Q. *You have stated that you were in charge of development of the land in dispute.*

A. *Yes My Lord. On the 7th April 1995, I was working on my land at the Spintex road and my father called me to come to the land at Lashibi because the young men from the traditional council were forcibly taking the land. So I left my work and came over with my mothers and then we had to excavate and put on a block structure instead of the mud one on the site.*

Q. *You see, irrespective of what you have told the court, your father never gave up title to that land.*

A. *We all respect my father as being the overall boss of everything but I was in charge of the whole place.*

Q. *I know that you are the 1st daughter and you were in charge of your father's properties I know. But what I am saying is that irrespective of that, the property still belonged to your father.*

A. *My father was old so putting me in charge of the land to be the caretaker of it over everybody all of us, never did he mention one person that would take the land to be shared among all siblings!*

Cross examination serves several purposes; one of which is to put across a party's case. From the line of cross examination by learned counsel for the plaintiff, plaintiff was not disputing that it was 2nd defendant who had been made a caretaker of the property as the female first child of their late father and the eldest of his children within the jurisdiction.

Plaintiffs claim to the land is based on EXHIBIT A series. He is relying on a transfer allocation made to him by the TDC in July 2018 as proof of his ownership of the land. The defendants were impeaching these documents on grounds of fraud.

In the case of *Apollo Cinemas Estates (Gh.) Ltd v. Chief Registrar of Lands & Others [2003-05] 1 GLR 167*, Appau J.A. (As he then was) held: *"The fact of registration or the mere possession of a land Certificate raised a rebuttable but not a conclusive or irrebuttable presumption of the facts of ownership"*. I would now proceed to the evidence offered by the plaintiff himself and through his grantor, to prove the ownership of the land.

PW3 says that in 2013, two years prior to the death of their father, he gifted the disputed land to him by a deed of gift. He tendered same in evidence as EXHIBIT F. However, at the time of his evidence, the court already had in evidence EXHIBIT F and so this naturally became EXHIBIT G. The marking of his EXHIBITS thus became G, H, J, K and L .

By the deed in EXHIBIT G, the late Enoch Quaye Kumah gifted the disputed land to PW3 on the 18th day of October, 2013. There are two witnesses to the deed; one Nii Botwe Laryea II whom PW3 says is their head of family and one Benjamin Quaye Kumah who is a sibling to PW3, 2nd and 3rd defendants.

The 2nd and 3rd defendants dispute this gift and said until this court action, they were not aware of same. As the donor of the said gift is dead, it becomes the duty of the Court to critically analyze the evidence and find if it is probable. This is because the Courts generally treat claims made against dead persons with caution. In the case of *Kwame Bonsu and Others v. Kwame Kusi and Gifty Kusi Ampofowaa (2010) 26 GMJ 20 SC; Baffoe Bonnie JSC held at holding 2* that: “Judges have to look with suspicions when claims are made against deceased persons”. See also the case of *Ofori v. Star Assurance Co. Ltd. [2015] 83 GMJ 94*.

Per the said EXHIBIT G, aseda was performed by PW3 for the gift. Under cross examination by learned counsel for the defendants at page 124 and 125 of the record of proceedings, this is what had transpired:

Q. *Per paragraph 6, your father made a deed of gift which you have exhibited as Exhibit ‘F’*

A. *That is correct My Lord.*

Q. *Where did this deed of gift take place?*

A. *In my father’s residence in the presence of our family head and one other sibling.*

Q. *So I believe this is when the GHC1,000 and our cattle was handed over in appreciation.*

A. *That is not correct. The GHC1,000.00 my father already had it because he was managing most of my properties whilst away so a lot of my money he keeps it. The cattle, we have it in our cattle ranch in Katamanso so it was agreed upon in that meeting.*

Q. *So it was agreed that your order of appreciation would be without the physical acknowledgement of the items offered in appreciation. Is that what you are saying?*

A. *That is not what it is. Obviously the cattlemen cannot be brought to Nungua so it was picked, and chosen by my father, the money was mentioned in the presence of the family head and that was it.*

From PW3's evidence, the land had been gifted to him in accordance with custom by his late father. Customary law gift is an acceptable means of transfer of title to land. However, in order for it to be valid, certain conditions must be proven.

The Court of Appeal per Ayebi J.A. in the case of **Jacqueline Asabre & Anor. v. Johnson Aboagye Asim [2017] 109 G.M.J. 206** and held at page 236 as follows: *"The broad essentials of a valid gift in customary law are that (1) there must be a clear intention on the part of the donor to make a gift, (ii) publicity must be given to the gift and (iii) the donee must accept the gift by himself giving thanks-offering or aseda, or by enjoying the gift. As noted in Abdul Rahman v. Baba Ladi, Civil App. No. J4/36/2013, dated 27th July 2013 unreported, the most important element of a customary gift that runs through decided cases is that the 'gift must be offered and accepted and must be witnessed by somebody else other than the donor and the donee. The need for a third party as a witness is important because when the gift is challenged, it will not be sufficient to state barely that the gift was made; the claimant has to go on to show the occasion, if any, on which the gift was made, the date, the time, if possible, the venue and most importantly, in whose presence it was made"*.

From the evidence of PW3 himself, although EXHIBIT G indicates that aseda was performed, that did not happen. EXHIBIT G is his own document. Although generally, the courts prefer documentary evidence to inconsistent oral evidence, such documentary evidence must first be proven to be authentic. See the case **Nana Asiamah Aboagye v. Abusuapanyin Kwaku Apau Asiam [2018] DLSC 2486**. PW3 had by his own evidence, denounced the contents of EXHIBIT G. Again, as the 2nd and 3rd defendants were challenging this gift, it behoved on the plaintiff to prove same; particularly the element of publicity.

An essential witness would have been any of the said witnesses to the gift. This is particularly so as 2nd defendant had answered that one of the said witnesses to the said deed of gift, their brother by name Benjamin did not come to the house or do anything with the old man. That a person who does not do anything with his father would be called upon to be a witness to such a deed of gift by his father in the absence of cogent evidence, is a claim that would raise many an eyebrow.

On the requirement of publicity, PW2 whose evidence I found credible and relevant, had indicated that the late Enoch Quaye Kumah had more than eleven children. PW3 is the youngest of these children. Out of these children, the evidence on record and to which PW3 admits is that 2nd defendant as the eldest daughter, was made the caretaker of their father's property during his lifetime. With regard to the disputed land, PW3 had answered under cross examination at page 124 of the record of proceedings that:

Q. *And what were you told.*

A. *That my elder sister who supervised the construction in conjunction with my father was the one*

Q. *I suggest to you that your father to prevent further encroachment asked 2nd defendant to commence building in the land to avoid the encroachment that was taking place. I suggest to you.*

A. *That is not correct. Per what my father told me. She was only asked to supervise not for her to commence construction on it.*

Still under cross examination by learned counsel for defendants, PW3 had answered;

Q. *And is it not correct that it was your father who permitted the 2nd defendant to put the 1st defendant on the land. To prevent further encroachment on the land.*

A. *As previously notified, the 1st defendant herein found his way into the land then later on, the 2nd defendant who supervised the work of my father saw the need to regularize his stay there. My father never got involved.*

Q. *I suggest to you that your father did not get involved because he had clearly given the land to your sister the 2nd defendant who commenced construction on the land and put 1st defendant into occupation of the structure.*

A. *That is not correct My Lord.*

One would expect that for someone who had been the caretaker of the land from 1995, and who had full authority to put someone into occupation and possession for more than fifteen years prior to this deed of gift, for the purposes of publicity, 2nd defendant would have been made aware of the decision by their late father to gift the property to PW3 preferably before the gift and if not so, definitely after the gift and certainly during the lifetime of their father. This is particularly so as the 2nd defendant was the eldest child of her father within the country and PW3 was the last child.

Again, the presence and knowledge of 3rd defendant who had been the one taking care of their late father in his old age would also have been preferable. This is particularly so because their late father was quite aged as at the time of the alleged gift. At page 124 of the record of proceedings, PW3 had confirmed the *advanced age of his father*.

Q. *On your return to Ghana, I believe your father was well advanced in age. Is that correct?*

A. *That is correct.*

This advanced age was put across as 93 years as at the time of their father's death. PW3 had not disputed same but stated that he knew his father was well over 80 years. That being the case, as at the time of this supposed gift, their late father must have been about 91 years old. By virtue of his advancement in age, the element of publicity to as

many of his children as possible was essential. This is because from the undisputed evidence of the defendants, until this issue of a gift had been mentioned in court, they had all been under the impression, created by their late father, that the disputed land was for all his children.

Thus the making of this gift should have been done such that the children particularly those who were elder to PW3 and who were around and involved in the affairs of their late father would be aware of same. That a distant son was the one made a witness to this raises eyebrows. There was no explanation given as to why the signatories to EXHIBIT G could not testify on the said gift.

Although PW3 had under cross examination mentioned that prior to the death of his father, 2nd defendant was aware of this gift, when 2nd defendant was in the box and not only denying the claim of PW3 but denouncing him as someone whom their own father was wary of with regard to his interests in his properties, she was not challenged in any manner. I take notice of the fact that defendants had filed their witness statements before leave was granted for PW3's witness statements to be filed. PW3 was initially not one of the witnesses for the plaintiff even though he was available and had been present in court for some of the proceedings. Thus their evidence as to his character could not be deemed as an attempt to discredit any evidence which he was to proffer. It was based on what they knew about him.

In the case of *Akunsah v. Botchway & Jei River Farm Ltd.* [2011] 1 SCGLR 288 at 296, Aryeetey JSC explained of the requirements of gift thus: "... *The only condition is that it should not be done in secret. It should be witnessed by others, preferably by members of the immediate family of the donor who are not entitled to question his decision provided they have no interest in the property which he intends to give away. It does not end there. The*

*beneficiary of the gift expresses his acceptance and gratitude for the gift by payment of aseda in any form depending on the circumstances of each case” See also **Comfort Darko v. Julian Darko [2016] 97 GMJ 153 @ 166-167, C.A. and Nana Akua Ampomah II v. Adu Yeboah & Another (2014) 69 GMJ 137 @ 150, per Irene JA.***

Although learned counsel for the plaintiff in his cross examination of the 2nd defendant had tried to put across a case that she was at loggerheads with her father prior to his death and it was on his death bed that they had been reconciled, 2nd defendant had denied it vehemently and I found her denial to be true. 3rd defendant as confirmed by PW3 was also the one who took care of their late father in his old age. He had admitted that he offered the property to the 2nd defendant because of how well she had taken care of their old man. At page 130 of the record of proceedings, PW3 had answered;

Q. On the passing of your father in October 2015, you mentioned to the 2nd defendant that you would give the land in issue to her and she responded that the land does not belong to you is that not correct. Indeed, it does not belong to any of you.

A. That is not correct My Lord. I remember telling her that I would give her that land.

Q. Indeed, you would give her that land because she had taken care of your father whilst he was ill.

A. That is correct. For a single reason that because I know I own that land. Hence the reason why I offered to give her that land for the role she played in looking after my dad in the latter days of his life.

That 2nd and 3rd defendants were the best placed persons to have been in the know about any purported gift by their late father to anyone including PW3 is not in doubt. It appears PW3 was the only one who knew about this gift. That the 2nd and 3rd defendants

had not been made aware of such a gift by either their late father during his lifetime to PW3 is evident from the fact that when PW3 purported to gift the land to the 2nd defendant in appreciation for how well she had taken care of their father before his death, she had told him that the land did not belong to him. Indeed, one would reasonably have expected that at this point, PW3 would have answered the 3rd defendant by making it known to her that their father had gifted him the land. He did no such thing.

The fact that a gift was supposedly made two years prior to the death of their father, over a property that he had already entrusted into the care of the 2nd defendant who had exercised acts of control over same, and their father, who was being taken care of by the 3rd defendant in his old age upto the time of his death did not mention this to the 3rd defendant or his eldest child, the 2nd defendant both of whom had the capacity to question his decision raises eyebrows.

Counsel for the defendants had sought to find out if PW3 had introduced himself to the 1st defendant as the new owner of the land. PW3 had answered;

Q. As the landlord of the land and the structure, did you inform the 1st defendant that you were now the owner of the land before 3rd October 2015 the day your father died.

A. My Lord, the 1st defendant who is just a caretaker is aware that the land belongs to me since 2013 and he does recognize me as the owner of the land and anytime property rates or anything at all to do with that property, he sees the need to inform me or call me to come and do what I ought to do so he is very much aware before my father's demise. I did not inform him.

Q. So when you say that you took possession you did not exercise any physical entry into the land before 3rd October, 2015.

A. That is not correct because in 2013, when my father took me to the land, he was aware that I was under no obligation to tell him that the property in question and the land has been given to me because to the best of my knowledge, these are family related issues.

PW3's answers were evasive at best. Clearly, his father had not introduced him to 1st defendant who had been in occupation of the land since 1997 or thereabouts as the new owner of the land after the said deed of gift in 2013. According to the 1st and 2nd defendant, the deceased father of PW3 and 2nd defendant came unto the disputed land in 2013 with both PW3 and 2nd defendant. This was after some persons had tried to encroach on the land once again and 1st defendant informed the 2nd defendant who came unto the land with her father and PW3. That was the 1st time their father was meeting with 1st defendant.

If indeed the land had been gifted to PW3, that visit presented a fine opportunity for their late father to announce to both the 1st and 2nd defendants that he had gifted the land to PW3 and that henceforth PW3 should be the one that 1st defendant deals with. Their father had instead informed 1st defendant that the land belonged to him and he had given it to 2nd defendant for the benefit of all his children. Again, if indeed the land had been given to PW3, one would have expected that he would protest such a representation by his father in the presence of 2nd and 1st defendant.

The circumstances of this gift are shrouded in so much secrecy that it appears that even if it occurred, it was just between PW3 and their late father; an old man whom all of them admit was not in the best of conditions age wise even as at 1995 for which reason

he had made the 2nd defendant a caretaker of his lands. If he was in a fragile state in 1995 due to old age, then unless there is evidence to the contrary, in 2013, eighteen years thereafter, he would be in a worse state than he was in 1995.

The lack of publicity associated with this supposed gift, coupled with the non-performance of aseda makes it an invalid customary gift. Accordingly, I hereby find that the said land was not gifted to PW3 by their late father prior to his death.

PW3 also relies on an allocation made by his late father to him as his source of title. The said allocation was tendered in evidence as EXHIBIT A. PW2 testified to this allocation on behalf of the plaintiff. I found him to be a truthful witness who had relevant knowledge of the deceased and about the subject matter. Under cross examination by learned counsel for the defendants at page 44 to 46 of the record of proceedings, he had answered;

Q. And you know Mr. Enoch Quaye Kumah as a native of Nungua. Is that correct.

A. That is so. I know him as a native and as someone who resides in Nungua. He is also a leader of the community. Since 1971, I have known him as a senior leader of the Presbyterian Church and he is also my brother in law.

Q. So you would agree with me that as a native of Nungua, Mr. Enoch Quaye Kumah owns lands in Nungua.

A. That is so.

Q. And this land that was owned by Mr. Enoch Quaye Kumah, can you tell us how he came by it.

A. That is so. I can tell the court. Before I got to know him, I know that he owned a parcel of land at Lashibi and farmed on same. On 11 February 1994, the Nungua Council had conflict for a very long time over the lands we came into an agreement with T.D.C. that

they should give us part of the lands at Lashibi. Thus in 11th February 1994, part of the lands were given to the Nungua traditional council that is community 16 and 17. After the land was released to us, all natives of Nungua who lived at Lashibi and were farming there and those who also wanted lands at Lashibi came to see the council. Enoch Quaye Kumah came to see us and because we know him as a leader of the town, we accorded him a lot of respect and advised him that due to his age he should bring one of his children so that we could go and inspect the land. He did so and so the inspection team of which I was not part due to the fact that I was the chairman went to inspect the land. They reported back to say that there was nothing on the land even though it was a farm land and people have taken over vast of the land. We told him to come to us with two of his children so that we could execute an allocation form in the name of the children so that the children would come to own the land. He agreed and we gave him two weeks to return. He returned with only one person and we told him that that was not the proper thing to do and that he should come with two of his children. He in turn told us that his children had no issue. As we had immense respect for him, we did not argue with him and so we executed all the documents in the name of the one child he brought. We again gave him two weeks to return for the documents. He came with his son by name Odiko. We handed the allocation form to him and he allocated it and right in our presence he presented it to his son. He thanked us immensely and asked permission to leave which we granted.

Q. So from what you have said, Mr. Enoch Quaye Kumah intended for the land to be held as family land for his children. Is that correct.

A. It is for him and so if he is no more per our tradition it is for the children.

Q. You would also agree with me that even though, you require at least two persons when allocating the land, you granted Mr. Enoch Quaye Kumah his request.

A. *That is so. He told us that we should execute it in one child's name as his children did not have any issue with the child he brought. We usually respect his wishes and so we did as he said and executed it in the name of one child on behalf of all the children.*

Also at page 47 of the record of proceedings, still under cross examination by learned counsel for the defendant, PW2 had answered;

Q. *Again from what you said Mr. Enoch Quaye Kumah agreed for the land to be given to all the children. Is that correct.*

A. *That is so. He said it should be in Odiko's name and that all the other sibling did not have an issue with that. That the land was for all the children.*

Q. *Do you know the children of Mr. Enoch Quaye Kumah?*

A. *He has many children. They are Eleven (11) in number and I know most of them.*

Q. *Although Mr. Enoch Quaye Kumah did not anticipate any challenges with grant of the land, we are in court today because Mr. Ebenezer Quaye Kumah has sold the land on his own to the plaintiff, what do you have to say to that.*

A. *Saying anything about it would be a bit difficult because Mr. Quaye Kumah was a respectable adult and so all that he told us was what we did for him and so if today one child decides on his own without the other children to sell the land, I do not know what to say if it had happened that someone else who was not a part of their family or from Nungua had sold the land, then I could say something.*

His evidence speaks for itself. Even though he was in Court to testify in support of the plaintiff and by necessary implication, the allocation to PW3, he had testified that the allocation made to PW3 was intended for all purposes to be for the children. He had insisted on the fact that the deceased Enoch Quaye Kumah was advanced in age and

had indicated that his other children did not have any issue with the allocation being made in the name of PW3.

His evidence is that the land was for the children. That contradicts the case of the plaintiff and his vendor and is rather in support of the claim of the defendants. The case of *Atadi v. Ladzekpo [1981] GLR 218* held that... “whenever the testimony of a party on a critical issue is in conflict with that of his witness on that issue, it is not open to the trial court to gloss over the conflict”.

Again, where a witness for an opposing side corroborates the evidence of the other party, the court cannot gloss over such evidence. It must accord it its full weight in gold for the other party. The court is mandated to accept the corroborated evidence. See the case of *Tornado Enterprises Ltd and Another v. Chou Sen lim [2007-8] SCGLR 125*.

In the case of *Soonboon Seo v. Gateway Worship Centre [2009] SCGLR 278*, Sophia Akuffo JSC (as she then was) in reading the decision of the Supreme Court held (relying on the case of *Saaka v. Dahali [1984-86] 2GLR 774* in which Taylor JSC had quoted Halsbury’s Laws of England (3rd ed) Vol. 14 para 1155) that “a constructive trust arises when, although there is no express trust affecting the specific property, equity considers that the legal owner should be treated as a trustee for another. This happens for instance, when one who is already a trustee takes advantage of his position to obtain a new legal interest in the property as where a trustee of a leasehold takes a new lease in his own name. The rule applies where a person although not an express trustee is in a fiduciary position”.

Consequently, I hereby find that PW3 holds the allocation from the Nungua Traditional Council as a constructive trustee. The allocation is for himself and the other children of

his late father. It was not meant for his sole benefit. That he had it registered in his name by TDC does not take away the fact that it is a trust property. As a constructive trustee, he had a fiduciary duty to act at all times in the best interest of himself and his siblings and not solely in his own interest. I would now deal with the regularization by TDC.

PW3 as plaintiff's grantor further relies on a regularization or confirmation of allocation by TDC to him as his source of title. As the TDC were subpoenaed to testify about their procedures for allocation of land. According to PW2, the process involves a visit to the land prior to the allocation or regularization process being processed. By the end of cross examination, it was evident on the face of the record that TDC had not followed due process in allocating the land to PW3.

At page 98 to 100 of the record of proceedings, under cross examination by learned counsel for the defendants, she had answered;

Q. You said there is a Site Plan inspection before the transfer. Is that correct.

A. No. the Site inspection was before processing of the allocation from the Nungua Traditional Council.

Q. What is the purpose of a Site inspection?

A. It is to appraise T.D.C. of the site situation at that time.

Q. Why do you need to know the Site situation?

A. We want to be sure that the allocatee knows the exact plot which has been allocated to him/her.

Q. Is it not also to ascertain whether there is a structure on the land.

A. *That is also part of it but where there is a structure, we want to know who is in occupation of the structure.*

Q. *Are you also interested in who put up the structure?*

A. *Yes, we are.*

Q. *Why are you interested in who put up the structures and who is occupying it?*

A. *It is an attempt to be sure that an allocation has been made to the right person.*

Q. *So if you find out that the structure was not put up by the allocatee what would you do.*

A. *We write to the Nungua Traditional Council informing them of our findings. We also ask them to resolve the issue and formerly notify us of the resolution. After that, we put a hold on the processing of a particular allocation.*

Q. *Can you clarify? What issue is do you want the Nungua Traditional Council to resolve in such a situation.*

A. *The issue of the party an allocation has been made to as against the party who has put a structure on the plot.*

Q. *Now look at your Folio 5. Can you read the last comment?*

A. *The minutes is addressed to the estate Manager for Housing and it reads "Please file referred for site plan, the plot has been developed into a single bedroom residential property and occupied by a caretaker of the allocatee. The plot at the time of site plan was not walled. Filed referred for site plan to enable us process further.*

Q. *Now as you said, the site report is to determine what is actually on the ground. This minute is saying that there was a caretaker in the property. Am I correct?*

A. *Yes.*

Q. *Is it not normal practice for T.D.C. in such situations when there is a caretaker in the property to interview the caretaker in the property to find out who put the caretaker in the property?*

A. *Yes, it is.*

Q. *And the essence of that interview is to confirm that the allocatee was the one who put the caretaker in that property. Is that not correct.*

A. *That is correct.*

Q. *From your file, is there any evidence that the caretaker was interviewed?*

A. *The report did not expressly state so. No, from the file, it does not state any such interview.*

Q. *You would agree with me that from a site report, it is normally very exhaustive in situations where you are regularizing allocations from either the body or an institution.*

A. *My Lord, No. It is not. The site report must include certain elements such as who developed the plot or the situation of the site at the time. Other matters may be left to the discretion of the officer.*

Q. *So in this particular case, is there any evidence from the file on site report as to who actually developed the structure on the land?*

A. *The information indicates that the allocatee developed it.*

Q. *Then read where it states so.*

A. *My Lord, it is not stated here that he developed it. It states that it has been developed into a one bedroom property occupied by a caretaker of the allocatee.*

Further at page 107 and 108 of the record of proceedings, PW2 had answered under cross examination;

Q. *So in this particular case, after having satisfied yourself with that information, the only other information which informed your confirmation of the allocation was the site report.*

A. *Yes My Lord.*

Q. *And from your evidence, it was to determine who put up the structure if there was a structure. Is that correct.*

A. *Yes My Lord.*

Q. *The other was if there was a caretaker on the land, who put the caretaker there as in this case.*

A. *Yes My Lord.*

Q. *You agree with me that if these two (2) matters are misrepresented to T.D.C. it would lead you to the wrong allocation. You would agree with me.*

A. *Yes My Lord. It is possible.*

Q. *In fact in this particular case we are talking about in court, the structure on the land was not put up by the allocatee and if that had come to your knowledge, you would agree with me that T.D.C. would have withheld the allocation to confirm who actually put up the structure.*

A. *Yes My Lord.*

Q. *And if the information had also come to your notice that the caretaker on the property was not put there by the allocatee, you would also have withheld making an offer to the allocatee. Is that not correct.*

A. *Yes My Lord.*

Prior to this at page 100 to 101 of the proceedings, she had answered;

Q. *From your experience, there are lots of allocation by the Nungua Traditional Council which have created challenges for T.D.C. is that not the case.*

A. *That is correct.*

Q. *Either because it has been allocated to more than one person.*

A. *Yes.*

Q. *Or it has been allocated to someone who did not put up a structure on the land.*

A. *Yes.*

Q. *And in all such circumstances T.D.C. put the allocation on hold to make sure there is an investigation. To confirm who should actually be on the land. Is that not correct.*

A. *That is correct.*

Q. *And even in certain circumstances where T.D.C. has allocated, it also withdraws the allocations after it finds out the information about the double allocation or allocations to persons who have not constructed.*

A. *Yes. That is so.*

Q. *And this is so because even though the Nungua Traditional Council recommend somebody to be allocated the plot, T.D.C. as the head lessor of the land has the power to actually do offer and withdrawals of allocations. Is that not correct.*

A. *Yes.*

In this court, PW3 had made it clear that he did not put 1st defendant into occupation of the structure on the disputed land. He says that 1st defendant entered unto the land himself and later 2nd defendant regularized his stay on the land. Although I have found that this is not so and the 1st defendant was put into occupation by the 2nd defendant

with the consent and concurrence of the late Enoch Quaye Kumah, even if PW3 believed his version of facts, it means that he knew very well that he did not put 1st defendant into occupation of the structure.

At the time he returned from his sojourn abroad in 2010, 1st defendant had been in occupation of the land for about fifteen (15) years. Yet, PW3, had falsely represented to the TDC that he put the 1st defendant into occupation of the disputed land.

By his misrepresentation, PW2; being the TDC Company Limited had gone ahead to process an allocation or regularization in his name and he had thus gained an advantage. Had he made the truthful representation that he neither built the structure nor put the 1st defendant into occupation, per the evidence of PW2, the processing would have come to a halt in order to allow for investigations. He had by his misrepresentation obtained a gain which he would otherwise not have had he been truthful. He can thus not rely on that allocation for any purpose in this court.

It appears that that was not the only misrepresentation PW3 had made to the TDC. From the records, per EXHIBIT A series, particularly EXHIBIT A1 the details he provided as particulars to the TDC shows that in paragraph D, he had denied having a house and/or a plot in any community in Tema. Yet, per his writ of summons which he tendered in as EXHIBIT K, he was laying claim to a “partially developed land at Lashibi (plot number F8B, Community 17, Tema or Hse # 11, Yakubu street, Tema”.

As his father died in October 2015 and his claim is that his father had given him that property before his death, it stands to say that as the date of applying to the TDC for the plot to be regularized in his name on 23rd December, 2015 (EXHIBIT A5) and the date of

presenting the particulars to TDC on 4th January, 2016, he knew himself to own that property.

Yet, he had given false information in EXHIBIT A1 and then proceeded in paragraph E to “*certify that the information was correct and that should any of the information prove to be wrong, the corporation reserves the right to resent (rescind) any contract that might have been entered as a result of this application*”.

Based on his misrepresentation, PW2 (TDC) had per EXHIBIT A3, A8 and A7, confirmed his allocation, made him an offer of a 60 year lease to the disputed land and also granted him a right of entry to the land with effect from 1st December, 2016.

On issue one, from my analysis, I cannot resolve that the land in issue belongs to the plaintiff or his vendor. It rather forms part of the estate of the late Enoch Quaye Kumah.

2. Whether or not the plaintiff is the bonafide purchaser for value without notice of the land in dispute

This is an equitable doctrine on which a purchaser may rely on for relief in Court. The case of *Dr. Ansong & Another v. Pastor Manu and Another [2013] GMJ 86* held that generally a person is said to be a bonafide purchaser for value without notice when he gives valuable consideration for a legal title or right in property and at the time of the sale, he was not actually aware of any pre existing adverse or equitable interest in the property, and did not also have constructive or imputed notice of any such interest. Such a person takes the interest acquired by him free of the pre existing adverse or equitable interest. The protection afforded under the law to a bonafide purchaser

without value is a complete one. The onus lies on the one making that defence to lead evidence to prove same. See case of *Duodu v. Benewaah* [2012] 2 SCGLR 1306.

In proving this, the plaintiff must show that he acted in good faith throughout the process leading to his acquisition of the land. One of the factors that show good faith is due diligence. This is because equity does not aid the indolent.

It is elementary that a purchaser of land must carry out the necessary due diligence before making a purchase. In doing so, he is under an obligation to investigate any actual or constructive acts of possession over the land. This was the decision in the oft cited case of *Ussher v. Darko* [1977] 1 GLR 476.

Also the case of *Kwanko II v. Lebanon Society* [2014] 70 GMJ 118 at page 127 Dzamefe J.A. held as follows: “It is trite law that the buyer must always beware. The law is clear, *caveat emptor*. It is the duty of any diligent and serious purchaser of landed property to conduct a search on ownership and title of the property before entering into any contract for purchase. We are not oblivious of the law about a bonafide purchaser of property for value without notice. The difference however is that if after all diligent search, the buyer had no knowledge about any encumbrances, then he can seek refuge before equity as a buyer for value without notice.”

In the case of *Rosina Aryee v. Shell Ghana Ltd and Fraga Oil*, [2015] GHASC 102 (Civil Appeal No, J4/3/2015, delivered on the 22nd of October, 2015,) Benin JSC reading the decision of the Supreme Court held that with land acquisition, the duty to conduct both formal and informal searches could not be taken for granted.

The case of the plaintiff is that he is a bonafide purchaser for value without notice. That he conducted a search at the Tema Development Corporation prior to his purchase of

the land and the search showed that the land indeed belonged to his grantor. In order for a party to be successful on this plea, he must lead evidence to indicate that he conducted himself diligently as expected of any purchaser of land. That he diligently conducted a search into the title of his vendor. The search must be both formal and informal.

A visit to the land prior to purchase is an essential part of this due diligence. Conducting a search with the appropriate authorities to ascertain whether your vendor is indeed the owner is as important as a visit to the land. Where one visits the land and finds other persons in possession, he is under an obligation to find out from them if indeed his vendor is the owner and the one who placed them into possession.

The plaintiff under cross examination by learned counsel for the defendants at page 55 and 57 of the record of proceedings had answered;

Q: *You went on further to make enquiries regarding his land that you were interested in. Is that correct?*

A: *Yes, I did enquiries.*

Q: *And these enquiries include a visit to the land.*

A: *It is correct my lord.*

Q: *What did you see when you visited the land.*

A: *My lord I have one estate agent which his name is Mr. Fred. I told him that I am looking for a residential plot to put up my building. He said he would look for one. So 2017 January, he came to my house in the morning and said that he has one plot at community 17 and he has a T.D.C document. I told him that I was interested as I did not want to buy*

land that did not have government papers. He said okay, that he would take me to the land. So he took me where the land was located at community 17 around the washing base. I told him that it is nice and is in a good place. I saw a structure on the land and I asked him.

Q: This structure that you saw on the land, it was not completed.

A: The structure is like a one bedroom structure which I think somebody is in it. So I asked the agent who is in the structure and he said it is a squatter who the owner placed in it.

Q: So this structure, can you describe it.

A: I did not go inside. I was standing outside. It is a one bedroom with a roof on it. For me it is not a proper structure. I have not gone inside before and so I do not know how many bedrooms are inside...

Q: Did you ever met the squatter that you alleged.

A: When I met him was when I was putting up my fence wall.

Q: So I suggest to you that you have made your enquiries and visited the land and not met the squatter. I suggest to you that you did meet the squatter.

A: Yes. I met the squatter when I was putting up the fence wall.

Q: I am suggesting to you that before you put up your fence wall, you did meet the squatter.

A: I did not meet him my lord.

Q: How many times during the enquiries did you go on the land?

A: I went there once.

Q: Have you seen the 1st defendant before?

A: I have seen him.

Q: *Can you tell this honorable court the times in relation to your enquiry and the institution of this suit, how many times you saw the 1st defendant.*

A: *Actually, after the time that I met him during the fence wall construction, I have been seeing him anytime I visit the site.*

Q: *Can you tell us if the 1st defendant was the one living in the structure.*

A: *I do not know if he is the one but that day that I am putting up the structure, he told me that he is the one staying there.*

Q: *Can you tell us when you started putting up the structure that is the fence wall.*

A: *That was last year. Middle of last year or so.*

Q: *On the one occasion that you claim you visited the land, who did you ask about the structure as to who owns the structure on the land.*

A: *I did not ask anybody after the agent told me that it is a T.D.C document and it is a squatter who is staying there.*

Q: *This said squatter, did the agent tell you he was the owner?*

A: *No.*

Q: *I am suggesting to you that in everything about the validity of the title, you failed to enquire who the real owner of the land was.*

A: *My lord, I think with T.D.C, they are a well-established organization and so I went there with a copy the agent gave me. I presented it to them, they opened their system and told me that what I am having is exactly what is on the system. Because I believed them, I went back to the agent and he took me to the owner.*

Q: *Did you ever meet the 1st defendant on the land.*

A: *My lord, to be honest with you, I did not know any of them even the vendor who sold the land to him, I did not know him.*

Then at page 58 and 59 of the record of proceedings, plaintiff had answered;

Q: *Have you ever spoken to the 1st defendant before this trial.*

A: *Yes my lord.*

Q: *How many times have you spoken to the 1st defendant?*

A: *Let us say twice*

Q: *When was this?*

A: *The first day we were putting up the fence wall, he came with some gang of people with arms trying to bring me down. He wanted to kill me. Even he wanted to kill me as one of the guys he came with was holding a gun so that day was full of threat and exchange of words. The second time was after one month or two months. I called him on phone and told him that I had the documents covering the land and so I was coming to take possession. That he should go to the man who sold it to me if he had any problems. That he should tell the man who put him there.*

Q: *You have just told this honorable court "that he should tell the man who put him there" who told you it was the man who put him there.*

A: *I am a stranger and so I believe that whoever put a person there is the one who he should go to. Nobody told me that it was the man who put him there.*

I have reproduced the evidence in extenso because it speaks for itself. The plaintiff purchased the land in 2017 from PW3. Per his own admission, he did not conduct any diligent search prior to the purchase. Even if I am to believe his claim that he conducted a search with the TDC, he admits that he visited the land once, saw a structure on it,

was told by his agent that it is a squatter who lived in same and yet, he did not deem it diligent to speak to whoever that squatter was and conduct any investigations before purchasing the land.

The only time he met the said squatter whom he admits is the 1st defendant was when he tried to construct a fence around the land in 2017. Further at page 62 and 63 of the record of proceedings, plaintiff had answered;

Q: *You mentioned on the last adjourned date that you have seen the 1st defendant twice. One was before the construction of the fence wall and the other one by phone. Is that correct?*

A: *Yes my lord.*

Q: *Can you tell this honorable court the time when you first saw the 1st defendant?*

A: *My lord, after paying for the land, I did not go there. It was when the transfer was done that I called him on phone that I would be coming there to take possession and so if he has any issues, he should meet the person that put him there, that is, the vendor.*

Q: *Can you be precise about the time?*

A: *Actually, before I saw him, the vendor is the one who took me there telling him that I would be coming to take possession. That is the first day. I did not even speak to him.*

Q: *Where exactly did this take place?*

A: *That was sometime in 2017 when the transfer was done. I cannot remember.*

Q: *You are saying sometime in 2017 when the transfer was done was when you first saw the 1st defendant. Is that correct?*

A: *Yes my lord. It is the vendor that took me there and by then I had paid.*

The inconsistencies in plaintiff's answers as to when he first met the 1st defendant is quite glaring. On one hand, he only met him for the first time when he went onto the land to construct his fence wall and on the other, he met him when PW3 took him unto

the land after the transfer had been effected into his name to introduce him as the new owner of the land.

The 1st defendant from the abundance of evidence on record has been in occupation and possession of the land in issue since 1997. The plaintiff's vendor did not dispute this. Indeed, the 1st defendant was in possession even before the plaintiff's vendor returned to the Country from his sojourn in the United Kingdom. At the time of PW3's return in 2010, 1st defendant had been on the land for well over a decade. At the time of plaintiff's acquisition in 2017, 1st defendant had been on the land for almost twenty (20) years.

That was a long possession and it was incumbent on the plaintiff not to take the agent's word for it but to conduct his own investigations into the matter by at the least speaking to the 1st defendant. There is a plethora of authorities on the duty on a purchaser of land to enquire from the occupants themselves and not only the vendor.

In the *Rosina Aryee case* (*supra*) the Supreme court further had this to say "an intending purchaser must enquire from the occupants of the land he intends to purchase, their authority for staying on the land.....it is equally his duty as a prudent purchaser to find out who must have erected the structure there."

In the case of *Kwame Osei v. Mrs. Janet Darko & 2 Ors., Civil App. No. J4/29/2017, dated 31st January 2018, S.C. (Unreported), Dotse JSC* held: "Based upon the above principle, I am of the respectful opinion that, since the 1st defendant was in absolute possession and occupation of the disputed property the Plaintiff ought to have investigated the presence of the 1st Defendant before proceeding to purchase the property. The 1st Defendant must be deemed to be in actual possession of the disputed property."

The plaintiff saw clear signs of occupation on the land. He saw a one bedroom structure on the land. He did not only see the structure but was informed that someone lived in it. He chose not to conduct any investigation. He did not even attempt to speak to the person he referred to as a "squatter".

It behoved on him to find out who had constructed the structure on the land and who had put the "squatter" into occupation and possession. That he failed to do this means he cannot be placed in the same category as a bonafide purchaser as he did not conduct the necessary due diligence required of a purchaser.

Plaintiff had indicated that he was a stranger as he is not a Ghanaian. The duty of a purchaser of land to conduct due diligence is not limited to only citizens or natives of the land. It is beholden on all purchasers of land within Ghana. Even on this, the fact that per EXHIBIT I which is the receipt issued to him by PW3, his vendor, his vendor indemnified him against "any family disputes is indicative that he was aware of the possibility of any such claims. That he decided to ignore same was a decision he took at his own peril.

In the case of *Kusi & Kusi v. Bonsu [2010] SCGLR 60* held that "Any person desirous of acquiring property ought to properly investigate the root of title of his vendor. In the instant case, there was no evidence of such prudent search conducted by the defendants. In their own pleadings they had asserted that they only inspected the title deeds of the assignor coupled with the permit for construction and were satisfied. The record did not show that they even sought professional advice before entering into the transaction. In the view of the majority of the court, the steps they claimed they took were not adequate steps of a prudent purchaser of that particular property."

The Supreme Court had earlier held in the case of *Brown v. Quashigah* (2003-2004) SCGLR 930 that: “Purchasers of land who ignore signs of possession by a party other than their vendor on the land, do so at their own risk”. See also the case of *Adu-Sarkodie v. Karam & Sons Ltd.* [1975] 1 GLR 411, *Aboagye J.* Similarly, in the case of *Osumanu v. Osumanu and Another* (1995-96) 1 GLR 672, the Court of Appeal decided at holding (1): “An intending purchaser of property was put on his inquiry to make such investigations as to title as would enable him to rely on the plea of bona fide purchaser for value without notice. If he failed to make such inquiries, he acted at his own peril if subsequent events disclosed the existence of a valid challenge to the title he acquired.”

Consequently, I hereby hold that the plaintiff is not entitled to the equitable protection of a bonafide purchaser for value without notice as he had actual notice of the presence of 1st defendant on the land and did not conduct any investigations into his stay there.

3. Whether or not the land in dispute was fraudulently acquired by the plaintiff's vendor

On this issue, the defendants had pleaded and particularized fraud against the plaintiff and his vendor; PW3. In the case of *Mass Projects Ltd. (No.2) v. Standard Chartered Bank & Yoo Mart Ltd. (No.2)* [2013-2014] 1 SCGLR 309, the apex Court held at holding 4: “Because fraud vitiates every conduct, an allegation of fraud, if proven and sustained would wipe and sweep away everything in its trail as if the thing had never existed.” See also the case of *Apea v. Asamoah* (2003-04) SC GLR 226 at page 243.

Dordzie J.A. (As she then was) recently explained it brilliantly in the case of *Abukari Umar & Mohammed Hafiz v. National Health Insurance Authority (NHIA)* [2018]

DLCA 4408 as follows: “*Fraud is a crime, and statute clearly defines the degree of proof of same in both civil and criminal matters. Section 13 (1) of the Evidence Act, 1975 NRCD 323 provides ‘In a civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond reasonable doubt’*”. See also the cases of *Fenuku v. John Teye [2001-2002] SCGLR at page 985; Thomas Tata Atanley Kofigah and Another v. Sophia Obuobi and 3 Others [2018] DLCA 4692 and Janet Tagoe v. Alfred Nii Tetteh [2016] 98 G.M.J. 125 at pages 147-148.*

PW3 had sat in court during the testimony of plaintiff. Indeed, at a point, plaintiff upon being asked about his vendor pointed at PW3. At the time, there was no indication that PW3 would testify in this case. There was also no mention of a deed of gift executed by PW3’s late father. Plaintiff had never mentioned same as part of his root of title.

PW2 had testified as to the allocation process at TDC and counsel for the defendant had under cross examination created several gaping loopholes in the process leading to the issuance of EXHIBIT A3: the confirmation of allocation to PW3. PW2 had tendered in evidence the whole folio it has in its possession for PW3’s allocation. Nowhere had PW3 mentioned a gift of land.

Under cross examination, PW3 gave an impression of a rude witness who was mostly evasive and vituperative. I take his evidence with a cup rather than pinch of salt. He was a most incredible witness. A court is entitled to disbelieve a witness if his demeanour and attitude in the witness box show that he is not telling the truth. See *Osei v. Republic (2009) 24 MLRG 203 @ 214, per Piesare J.A.*

PW3 had tendered in evidence EXHIBIT K as evidence of the action he took against four of his siblings when they by exhibit J applied for letters of administration with regard to the estate of his late father and included property which belonged to him. He took out the writ of summons in June 2017 claiming for a declaration of title.

In his statement of claim, he had indicated at paragraph 13 that “he is the owner of the properties, having acquired all before their late father died to the knowledge of the defendants and all the other siblings”. (emphasis mine). Although the said statement of claim is a pleading and does not constitute evidence, it is on the basis of a party’s pleadings that he mounts evidence to prove the claim he has pleaded to. See the case of *Hammond v. Odoi [1982-83] 2 GLR 1235*.

Again, it is PW3 who had tendered this document in this court and so its contents are deemed to be relevant to him and to this case. Although he had averred that prior to the death of his father, defendants therein which included 2nd and 3rd defendants herein and all his other siblings knew about same, in this court, under cross examination by learned counsel for the defendants, he had been asked at page 130 of the record of proceedings;

Q. *So after the 21st October, 2013 did you inform any of your siblings of this deed of gift that is Exhibit F.?*

A. *My Lord, some of them know about it, including one of my other brothers*

Q. *And what is his name please.*

A. *Benjamin Quaye Kumah who is an elder brother, Regina Quaye Kumah also knows about it.*

PW3's story had changed from all his other (ten) siblings knowing about this to now saying it was only two of his siblings who knew of same. Again, in paragraph 14 of EXHIBIT K, PW3 being the plaintiff therein had claimed that he exercised exclusive possession of the properties which include the disputed property. In this court, it is evident that he has never exercised possession over the land. Indeed, as plaintiff rightly indicated, he is in this court because 1st defendant has refused to yield up possession to him.

I have also gone through the statement of defence filed by 1st and 3rd defendants therein who are the 2nd and 3rd defendants herein. That is EXHIBIT L. Their story as contained in the pleadings, unlike PW3 is the same as what they have pleaded and testified to in this court.

Furthermore, according to plaintiff, PW3 advised him sometime in April 2017 to take a court action to recover possession of the land. That according to PW3, as he had transferred his interest to him, he was now the owner of the land. Yet, per EXHIBIT K, PW3 after giving this advice and knowing that he had divested himself of any interest in the disputed property to the plaintiff, still went ahead to take out an action against his siblings and sought for declaration of title in the disputed property to himself. Nowhere in his statement of claim, had PW3 averred that he had divested his title to the plaintiff or any other person herein.

PW3 had also tendered in evidence a document from the Lands Commission as part of his EXHIBIT J. It is dated the 27th day of December, 2017. PW3 had applied to the Lands Commission for stamping (landed inspection case) and the nature of the instrument he presented was "gifts".

One would wonder why he had not sought to do this since 2013 when the said gift was made to him and when his father as alive and only waited to do this after he had taken out an action against his siblings and the plaintiff had also taken out this action. Again, since he had transferred his interest to the plaintiff and received valuable consideration in respect of same as far as January 30th, 2017 (per EXHIBIT A), on what basis was he still actively laying claim to the land in December, 2017? The plaintiff took out this action in October, 2017.

PW3 was representing himself as the owner of the disputed land to the Lands Commission in December, 2017 when he had per EXHIBIT B and B1, in January 2017, applied to another statutory body, the TDC for transfer of his interest to plaintiff and had indicated in paragraph 3 of EXHIBIT B1 that he had relinquished his right, title and interest of the property to the plaintiff and the TDC had accordingly transferred the title to plaintiff in July, 2017.

Again, according to PW3, he had abandoned EXHIBIT K because their head of family intervened in the matter for an amicable settlement. Although he indicated that he had attached the said discontinuance, it is nowhere in his exhibits on record. He says when he discontinued the action and they came to settle, the defendants did not turn up. 3rd defendant denied this. According to her under cross examination by learned counsel for the plaintiff, the matter was referred to ADR. However, PW3 was insulting all of them at the ADR and so the matter was to be taken back to where it came from.

Between PW3 and 3rd defendant, I found 3rd defendant to be much more credible. She testified based on what she knew, answered questions without prevarication and was not evasive under cross examination. She gave a good account of herself. Again, I believe her evidence that PW3 was insulting them at the said ADR because even in this

court, PW3 made it a point to speak quite disdainfully and rudely of his siblings, particularly 3rd defendant. He even extended this to counsel for the defendants and continued on that train even after plaintiff's counsel had advised him that his answers were for the consumption of the court.

Again, one striking feature of this allocation by the Nungua Traditional Council is the fact that per EXHIBIT A, it was executed on the 21st day of October, 2013, three days after EXHIBIT J, the deed of gift was supposedly executed. According to PW3 in paragraph 6 and 7 of his evidence in chief, his father executed the deed of gift to him and it was thereafter that he (his late father) learnt that the mode of acquisition of the Nungua stool land was by allocation by the Traditional Council. That his father then went to have the land allocated to him formally.

Learned counsel for the defendants in cross examining PW3 had asked at page 126 of the record of proceedings

Q. So you had a deed of gift on the 18th October, 2013, when did your father realize that the mode of acquisition as you rightly say in paragraph 7 of Nungua Stool lands was by allocation from the traditional council.

A. It was around the same time when the land was picked.

Q. So this would be the 4th October, 2013.

A. I cannot say for certain the date you are mentioning.

Further at page 127 of the record of proceedings, learned counsel for the defendants had asked:

- Q. *So why then would your father choose to execute a deed of gift on the 18th October 2013 and have land allocated to you on 21st October 2013, two days in to or in between?*
- A. *If my memory would serve me right My Lord. I think I did mention that the surveyor went to the site I believe in two weeks prior to the date on the site plan so it was not a day or two that the Site plan was granted.*
- Q. *My question is the date the plan of land 21st October 2013 is the date on which that print out was generated.*
- A. *It is possible My Lord.*
- Q. *So I am suggesting to you that these events surrounding the allocation of land were done by taking advantage of the vulnerable state of your aged father.*
- A. *That is not correct My Lord. And I can say on authority that that is the assertion which is being created by my siblings and I strongly believe counsel is also heading on that tangent.*

PW3's answers to these questions were evasive. The evidence on record is that the late Enoch Quaye Kumah was not only a native of Nungua lands, but had been instrumental in the processes leading to Government releasing part of the lands back to the Nungua people. PW2 had testified about him in great reverence and indicated how the Nungua traditional council revered him as a leader of the community. The late Enoch Quaye Kumah was indeed present at the ceremony in which the Government released the lands to the Nungua people and was part of those who had "fought" the Government over a long time for the release of the lands.

PW2 goes on to say that after the lands were released in 1994, the Nungua traditional council after extensive notice to its people, began the process of allocation to its natives. PW3 as the vendor of plaintiff wants this Court to believe that his late father who had been part of the struggle for the release of the lands, had after the release of the land in

1994, not heard of the announcements and notices for the allocation of lands by the Nungua traditional council and he also had no knowledge of the issuance of the allocation papers by the said traditional council from 1996. That it was only in 2013, seventeen (17) years after that fact of allocation procedure, after Enoch Quaye Kumah had supposedly executed a deed of gift to PW3, that he became aware of the appropriate mode of acquisition of Nungua lands. It is difficult for reasonable men to believe the claim of PW3.

Aside this, under cross examination by learned counsel for the defendants, it was evident the 18th July, 2013 was a Friday and that would afortiori mean that the 21st was a Monday. Thus the two days between the instruments fell on a weekend. When this was put to PW3, he indicated that the process of allocation began two weeks or so before the allocation. The question here is, if his father had intended to have the land allocated to him and had begun the process by making a surveyor take the measurement and preparing same in the name of PW3, then why did he execute a deed of gift and observe aseda when he knew that the allocation to PW3 would be sufficient proof that PW3 owned the land?

The case of 2nd and 3rd defendant is that PW3 took undue advantage of the old age of their father, his challenging health complications and his failing eye sight and made him believe that he was taking the documents for registration. According to 3rd defendant PW3 had even come to her for money to that effect. Both 2nd and 3rd defendant also testified about how their father was wary of PW3 and his constant enquiries and requests for land documents and had tasked them to be wary of his actions.

That even after their father had given PW3 a copy of his documents for registration, he still did not trust PW3 and so had not only told his children but also handed a copy of the said document to one of his children. 2nd defendant had maintained her evidence about the questionable character of PW3 under cross examination. No serious attempt was made to discredit their evidence. As I have found both of them to be credible witnesses, I believe their evidence.

What learned counsel had challenged was the authenticity of EXHIBIT 2A; an indenture executed in May, 1995 between the Nungua stool and the late Enoch Quaye Kumah. The challenge was on the basis that the mode of acquisition of the land was by an allocation by the Nungua traditional council and not an indenture.

PW2's evidence is that this process of allocation had begun in 1996, two years after the lands were released in 1994. EXHIBIT 2 was prepared in May, 1995 before the procedure of allocation commenced in 1996. That means it was prepared in the grey period between the time the Government releases lands to the Nungua stool and the time that the Nungua stool and the TDC decided on the means of acquisition of the said lands. In the circumstance, I would hasten with great caution and not declare that this document is null and void.

The authenticity of EXHIBIT 2 is not in doubt. It is its effect for the purpose of registration at TDC that is in issue. I find that I believe the evidence from the 2nd and 3rd defendants that it is due to this; the assurance that he could regularize the documents at the Nungua Traditional Council that PW3 had taken advantage of his then frail father and by misrepresentations to his siblings, managed to get his father to release the documents to him.

Again, although PW3 acquired EXHIBIT G and A in 2013, he held on to them and only began the regularization process at the TDC in and around late December 2015 and early 2016. What is strange about this is that even though his father had lived on for about two years after supposedly executing the deed of gift and getting the land allocated to PW3, PW3 had not taken any steps for almost three years.

Then, immediately his father died, within five days, he offered land to 3rd defendant and most importantly within two months of his father's death, he began the registration process. Why the need to hold on for that long and why the sudden haste to regularize it after his father's death?

Another issue that stands out is the fact that even though it is the 2nd defendant who had placed the 1st defendant on the land with the consent of her father, when the 1st defendant was refusing to vacate the land, PW3 never informed 2nd defendant and/or asked her to ensure that 1st defendant vacates the land. As 1st defendant was on the land at 2nd defendant and their late father's behest, if the land had now been granted to PW3, the natural thing to do would be to notify 2nd defendant and demand that she moves the 1st defendant and her structure off the land in order to allow for vacant possession.

Even if for any reason she was not contacted at the beginning, immediately the 1st defendant refused to quit, one would have expected that PW3 as plaintiff's vendor fall on 2nd defendant to ensure that the land became vacant. No such thing was done. PW3 admits that he rather went to offer the 1st defendant a piece of land and some money and also promised to assist him build a house on the new land. This was without the knowledge of 2nd defendant. If at all, those promises should have been routed through the 2nd defendant or with her full knowledge of same as she had placed 1st defendant on the land.

1st defendant had lived on the land without payment of rent for about twenty (20) years when the plaintiff sought to take possession of same. Why offer him such a juicy package of a piece of land at another place, money and the promise to assist him build when you had not put him into occupation, he had lived there for rent free all those years and when you were not the one who put him in occupation? The nature of the package offered to 1st defendant by PW3 and the mode of offer (secrecy surrounding the said offer) clothes it more with the garb of an enticement rather than a compensation to 1st defendant.

All these pieces of evidence, on their own may not lead to proof beyond reasonable doubt. However, when put together and particularly coupled with the fact of PW3's misrepresentation to PW2 which led to the regularization or confirmation of allocation of the land to him and which he subsequently sold to plaintiff after two months all point to one thing, that PW3 was fraudulent in his dealings.

The circumstantial evidence coupled with the direct evidence of his misrepresentation both to plaintiff and to the TDC provide evidence that leads to proof beyond reasonable doubt of PW3's fraud. I accordingly find that PW3 was fraudulent in his acquisition of the land.

It is common knowledge that fraud goes to the root of every transaction. **Brobbey JSC** held in *Apea v. Asamoah (2003-04) SC GLR 226 @ 243* that an allegation of fraud goes to the root of every transaction ... and so does a forged document or a document obtained by fraud pass no right.

According to the case of Modern Signs Ltd. (1996-97) SC GLR 224 @ 253-254, Hayfron Benjamin JSC held at page 255 thus: "No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

The allocation or regularization of the disputed land by TDC to the plaintiff was acquired by fraud. That fraud cannot be made to stand. Consequently, the said allocation is hereby cancelled and the TDC is hereby ordered to expunge the name of PW3 from its records. As plaintiff's title is hinged fully on that allocation and I have found that he was not a bonafide purchaser for value without notice, plaintiff's title must fail. After a careful consideration of the evidence on record, I find that the plaintiff is not entitled to his claim. I accordingly dismiss same *limine*.

The transfer of the disputed land by PW3 to plaintiff is hereby set aside. The allocation to the plaintiff by TDC is hereby cancelled and the TDC is ordered to expunge his name from their records. The 2nd and 3rd defendants had in their counterclaim sought for a declaration that plot No. RP/17/F.80B forms part of the estate of the late Enoch Quaye-Kumah. Their late father had intended to give the property to his children by a constructive trust in the name of PW3. As PW3 had by his fraudulent actions defeated the purpose of that trust, I find that it is only equitable that the property be returned to the estate of the late Enoch Quaye Kumah. I consequently so order. The defendants succeed on the entirety of their claims.

In awarding costs, I am mindful of the provisions in *order 74 of the High Court Civil Procedure Rules. C.1 47 particularly rule 2*. The 3rd defendant prays for costs of twenty thousand Ghana cedis (Ghs 20,000). Counsel for the plaintiff has left it to the court to decide. Taking into consideration the number of adjournments as regards the travel

costs of the defendants who are three in number and the filing fees of the defendants, costs of four thousand Ghana Cedis each (Ghs 4,000) is hereby awarded to each of the defendants. The total cost is thus twelve thousand Ghana cedis (Ghs 12,000). I would not award any legal costs on the basis that the defendants are under obligation to bear the costs of prosecuting their own counterclaim.

(SGD)

**H/H BERTHA ANIAGYEI (MS)
(CIRCUIT COURT JUDGE)**

GODFRED ROGER KWAME AYEH FOR THE PLAINTIFF

SOLOMON KOFI ADDO FOR RICHARD AKPOKAVIE FOR THE DEFENDANTS