

**IN THE CIRCUIT COURT ONE HELD AT ACCRA ON TUESDAY, 2<sup>ND</sup> DAY  
OF MAY, 2023 BEFORE HER HONOUR, AFIA OWUSUAA APPIAH (MRS)  
THE CIRCUIT COURT JUDGE.**

**SUIT NO: C1/14/2019**

**GLADYS BEATRICE VAN GILS OTENG  
CORNELIUS JOOSSTRAAT 79 POST CODE 4827  
LR BREDA NEDERLAND  
SUING PER HER LAWFUL ATTORNEY  
ESTHER FOSUAA C59 MALLAM-NEW GBAWE ,  
ACCRA**

**PLAINTIFF**

**VRS**

**1. KUCHE DAMENYA  
2. FRANKLIN ATTA**

**DEFENDANTS**

**JUDGEMENT**

The Plaintiff herein acting per her attorney on the 20<sup>th</sup> of June 2019 filed at the registry of this Court against the Defendants a Writ of Summons and Statement of Claim. Writ of Summons and Statement of Claim, the Plaintiffs claimed against the Defendants jointly and severally for:

- a. A declaration of title to the land described in paragraph 8 of the statement of claim. (for better appreciation of the claim, description of the land per paragraph 8 of the statement of claim reads “, all that piece and parcel of land situate and lying and being at Abehenease near Accra, and bounded on the North by lessors property measuring 100 feet or more or less on the east by lessors property measuring 80 feet more or less on the south by lessors property measuring 100 feet more or less on the west by a proposed road measuring 80 feet more or less and containing an approximate area of 0.18 acre*
- b. Recovery of possession.*

- c. *Perpetual injunction restraining the defendants their assigns, privies and all those claiming through them.*
- d. *Cost.*

Plaintiff after several failed attempts to serve Defendants personally with the writ of summons, with the leave of court granted 7/10/2019. Upon Defendants failing to enter appearance and or file defence to the action of plaintiff, Plaintiff counsel on 16/9/2020 filed an affidavit of service in compliance with order 10 rule 6 of the High Court Procedure Rules and served same on the Defendants through substituted service once more with leave of court granted on 11/2/2021. Defendants subsequently entered appearance on the 28/4/2021 and with court leave granted on 27/05/21 filed their defence to the action on 14/06/21.

Plaintiff's case per the statement of claim is that she acquired the land in dispute in 2001 from Nii Teequay Ansah family the allodial owners. She averred that she exercised overt acts of possession by putting a kiosk on the land. She averred that her attention was drawn to the trespass acts of Defendants and averse claim of the land. All efforts to get the Defendants abate their trespass acts have proved futile. She therefore prayed the court for the reliefs endorsed on the writ of summons.

Defendants per their statement of defence filed on 14/6/2021 denied the claims of Plaintiff and contended that sometime in 2016, 2<sup>nd</sup> Defendant and one Eric K. Nartey acquired their land from Kotey Nii Quaye who was the head and lawful representative of Naa Ama Asor Family of Abehenease acting with the consent and concurrence of the principal members of the family. Defendants also contended that all the lands situate, lying and being at Abehenease which shares boundary with towns like Amasaman, Opah, Odumase, Fiise and Achiaman including the subject matter land were founded and are owned by their grantor's ancestor called Naa Ama Asor. They contended that the Court of Appeal in suit titled NII OTOE DIN III VS KOTey NEEQUAYE & 8 ORS (CIVIL APPEAL NO has confirmed the ownership of Abehenease lands with approximate area of 1,335.82 acres. H1/42/2011 DATED 31/03/3011 to be owned by their

grantors, which said judgment, has been drawn and entered. They contended that their grantors granted portions of their land to tenants farmers for farming and also granted portions to individuals who have built on the land. Defendant s averred that upon being show their boundaries of their land, they conducted a search at the lands commission, which disclosed that their grantor had obtained judgement. They contended that they started developing the land b completed a single room and erected a two bedroom self-contained house which had been constructed to lentil level and placed a caretaker in the single room to oversee the land. They stated that the Amasaman police conducted a search and showed that the land was affected by the judgement of their grantors' family, Naa Ama Asor family. Defendants described their land as all that piece or parcel of land situate at Abehenease containing an approximate area of 0.15 acre and bounded on the North by Naa Ama Asor family land measuring 83.4 feet on the south by Naa Ama Asor family land measuring 84.7 feet on the east by Naa Ama Asor family land measuring 77.6 feet on the west by a proposed road measuring 74.7 feet. They therefore counter-claimed against the Plaintiff as follows;

- a. declaration of title to all that piece of land situate at Abehenease containing an approximate area of 0.15 acre and bounded on the North by Naa Ama Asor family land measuring 83.4 feet on the south by Naa Ama Asor family land measuring 84.7 feet on the east by Naa Ama Asor family land measuring 77.6 feet on the west by a proposed road measuring 74.7 feet
- b. an order of perpetual injunction restraining the plaintiff, her agents, servants, workmen, personal representatives and assigns from dealing with the land the property of defendants in any manner whatsoever pending the final determination of this action.

Parties after the filing of the applications for directions failed to appear before the court for its adoption. The court on 21/7/2022 struck out the matter for want of prosecution. Plaintiff per an application on notice served on Defendants through their counsel prayed the court for re-listment of the matter. Defendants were once again served through their counsel but they failed to appear and no affidavit in opposition was filed against the application for re- listment. Same was accordingly granted on 10/10/2022

and matter adjourned for Defendants to be served with hearing notices for the next court sitting.

On 17/11/2022, application for directions was taken in the absence of Defendants or their counsel who despite the service of the processes and hearing notice were absent.

The following issues were set down as issues for trial.

- i. whether or not Plaintiff's grantor has capacity to alienate the land to her
- ii. whether or not plaintiff is entitled to her claim.
- iii. Any other issues that may arise from the pleadings.

Court ordered the filing of witness statements by both parties and further ordered the service of hearing notice and court notes of the day on the Defence. Per affidavit of service deposed to by Ibrahim Mensah a bailiff of the Circuit Court dated 27/1/2023, Defendant counsel was served with a copy of the witness statement of Plaintiff's attorney, Pre-trial checklist, court notes and hearing notice on 26/01/2022. Defendants and or their counsel failed to appear on the return date. Matter was adjourned and leave granted Plaintiff attorney to file a supplementary witness statement and further ordered for hearing notice to be served on the defence. Per Certificate of Service and affidavit of service endorsed by the bailiff mention supra disclosed that Defendants counsel was served with a copy of the supplementary witness statement of Plaintiff attorney on the 20/2/2023 together with hearing notice for hearing on 21/2/2023.

On the 21/2/2023, the court heard the evidence of Plaintiff Attorney but adjourned the matter to 23/3/2022 to enable Defendants appear and subject her to cross-examination.

On 16/03/2023, hearing notice for the court sitting on 23/3/2023 was served on counsel for Defendants through his secretary Irene Lamptey but they yet again neither Defendants nor Counsel for failed appeared on the said date. The court accordingly discharged Plaintiff's attorney and adjourned the matter for judgment. It is trite learning that where a court has taken a decision without due regard to a party who was absent at a trial because he was unaware of the hearing date that decision is a nullity for lack of jurisdiction on the part of the court. See **Barclays Bank v Ghana Cable Co. [2002-03] SCGLR 1** and **Vasque v Quarshie [1968] GLR 62**. However, where the party

affected was sufficiently aware of the hearing date or was sufficiently offered the opportunity to appear but he refused or failed to avail himself (as evident in this case) the court was entitled to proceed and to determine the case on the basis of the evidence adduced at the trial. See *In re West Coast Dyeing Ind. Ltd; Adams v Tandoh* [1987-88] 2 GLR 561.

Case of Plaintiff was accordingly heard in the wilful and intentional absence of Defendant and matter adjourned for judgment today. Per the record, hearing notices have been served on counsel for Defendants on 14/4/2023 and 27/4/2023 but they have again failed to appear. The court shall therefore proceed to deliver its judgment in the absence of Defendants.

It is to be noted that, the failure of the Defendant to appear at trial to cross examine the Plaintiff on the evidence or challenge same either in cross examination or by contrary evidence did not exonerate the Plaintiff from proving their case as required by law.

The Standard of proof in civil case such as the present action is proof on the preponderance of probabilities. Section 12(2) of Act 323 defines preponderance of probabilities as *“Preponderance of the probabilities” means that degree of certainty 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.* In the case of **ADWUBENG V DOMFEH (1997-98) 1 GLR 282** it was held per holding 3 as follows: *“...And sections 11(4) and 12 of NRCD 323 clearly provided that the standard of proof in all civil actions, without exception, was proof by a preponderance of probabilities...”*. And in Section 14 of the Evidence Act, it is provided that *“except as provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting”*. As stated in the case of **FAIBI VS. STATE HOTELS LTD [1968] GLR 411**, the onus in law lay on the party who would lose if no evidence were led in the case and where some evidence were led, it lay on the one who would lose if no further evidence were led.

Plaintiff's attorney testified on behalf of Plaintiff. According to her, plaintiff acquired the land in dispute in 2001 from Nii Teequay Ansah family the allodial owners and was

given lease documents some of which has been duly registered under the Land title registry. She then exercised overt acts of possession on the land by putting a kiosk same. She averred that when her attention was drawn to the trespass acts of first Defendants she reported the matter to the Amasaman Police station where she was prosecuted. 2<sup>nd</sup> Defendant had afterwards gone unto the land making an adverse claim to the land. All efforts to get the Defendants abate their trespass acts had proved futile. She therefore prayed the court for the reliefs endorsed on the writ of summons. Copies of the land certificate dated 21<sup>st</sup> day of January, 2019, authority note addressed to Director Land registration division, Accra, Bio data page of the passport of Beatrice Van Gils and power of attorney are in evidence as exhibit A, B, d and D respectively.

In a claim for declaration of the land, there are euphoria of evidence by the supreme court that establishes that the party making the claim must prove root of title, mode of acquisition and various acts of possession exercised over the disputed land. In the case of **ABBEY & OTHERS V ANTWI [2010] SCGLR 17** at holding 2, held that in an action for declaration of title to land, the Plaintiff must prove, on the preponderance of probabilities, acquisition either by purchase or traditional evidence or clear and positive acts of unchallenged and sustained possession or substantial use of the disputed land. Aside the fact of acquisition, a Plaintiff or claimant is required to prove the boundaries and identity of the land that he is claiming. In the recent unreported case of **YEHANS INTERNATIONAL LD V MARTEY TSURU FAMILY & 1 OR. UNREPORTED CIVIL APPEAL J4/34/2018 DELIVERED ON 24/10/2018**, The Supreme court speaking through Adinyira JSC stated “ it is settled and trite law that a person claiming title has to prove i) his root of title, ii) mode of acquisition iii) various acts of possession exercised over

the disputed land. See *Mondial Veneer (GH) Ltd v Amuah Gyebu XV* [2011] 1SCGLR 466. This can be proved either by traditional evidence or by overt acts

of ownership in respect of the land in dispute. A party who relies on a derivatory title must prove the title of his grantor, *Awuku v Tetteh* [2011] 1SCGLR 366. Further to prove ownership through possession, the possession must be long, peaceful and uninterrupted. See the case of *Akoto v Kavege* [1984-86] 2GLR 365.”

Exhibit A discloses that on 17/7/2001 ADDOTEI OFORI, HEAD and lawful representative of the Nii Teiko Ansah family of Abenease near Accra leased all that piece of land situate at all that piece and parcel of land situate and lying and being at Abehenease near Accra, and bounded on the North by lessors property measuring 100 feet or more or less on the east by lessors property measuring 80 feet more or less on the south by lessors property measuring 100 feet more or less on the west by a proposed road measuring 80 feet more or less and containing an approximate area of 0.18 acre to Plaintiff herein for a period of 99 years and indenture executed by the parties. It further discloses that Plaintiff caused the indenture to be registered at the Land Valuation Division of the Lands Commission Accra on the 15/12/2015. Same is duly registered by Plaintiff at the Lands Commission and a Certificate of title duly issued to her in respect of the land. Plaintiff’s evidence of exercising passion over the land by putting up a kiosk on the land after purchase is not challenged.

The court therefore finds the claim of plaintiff proved on the balance of probabilities. Accordingly, judgment is entered in favour of Plaintiff against Defendants as prayed for on her writ of summons and they are as follows;

- a. A declaration of title to the land described as all that piece and parcel of land situate and lying and being at Abehenease near Accra, and bounded on the North by lessors property measuring 100 feet or more or less on the east by



lessors property measuring 80 feet more or less on the south by lessors property measuring 100 feet more or less on the west by a proposed road measuring 80 feet more or less and containing an approximate area of 0.18 acre

- b. Recovery of possession.
- c. Defendants their assigns, privies and all those claiming through them are perpetual injunction restrained from the land described in reliefs (a) supra.
- d. Cost of GHc10,000.00 awarded in favour of Plaintiff against Defendants herein.

**PLAINTIFF PRESENT**

**DEFENDANTS ABSENT**

**MR ISAAC AIDOO FOR PLAINTIFF PRESENT**

**(SGD)**

**H/H AFIA OWUSUAA APPIAH (MRS)**

**(CIRCUIT COURT JUDGE)**