IN THE CIRCUIT COURT OF GHANA HELD AT SOGAKOPE ON MONDAY, 2ND OCTOBER, 2023 BEFORE HIS HONOUR ISAAC ADDO, THE CIRCUIT COURT JUDGE

SUIT NO.: LS 20/92

KWAOVI TSAMENYI (DEC'D)
SUBST'D BY MOSES KUMEDZRO ASISEH (DEC'D) SUBST'D BY VINCENT KWASI ASISEH (DEC'D) SUBST'D BY HENRY ASISEH

KWASI GODZO (DEC'D) SUBST'D BY MICHAEL GODZO
ALL OF BATTOR

PLAINTIFFS

VRS

1. LOTSU AKLIKU (DEC'D)
2. FRANCIS LAWOE
3. KWASIVI AGUDEY (DEC'D)
4. AWUKU AKLIKU
5. KWABLAVI ANUKLU AGLEBE
6. AVAFIA BEKE III (DE'CD) SUBST'D BY TOGBE AGIDI BEKE IV
ALL OF BATTOR

DEFENDANTS

PARTIES:	PLAINTIFFS PRESENT
	2ND & 6TH DEFENDANTS PRESENT
	4TH DEFENDANT BUT REPRESENTED BY TOGBE TOKPO
	5TH DEFENDANT BUT REPRESENTED BY TOGBE BEKE
COUNSEL:	ALEX OWIREDU DANKWA, ESQ. FOR THE PLAINTIFFS PRESENT DAN KOFI AGGEY, ESQ. FOR THE DEFENDANTS PRESENT

JUGDMENT

This case concerns a long-standing land dispute that has a checkered history. In the course of the litigation, the 1st Plaintiff died and he was substituted by Moses Kumedzro. The substitute also died and was substituted by Vincent Kwasi Asiseh who also died and got substituted by Henry Asiseh. The 2nd Plaintiff (Kwasi Godzo) died and was substituted by Michael Godzo. On the part of the Defendants, the 1st Defendant (Lotsu Akliku) and 3rd Defendant (Kwasivi Agudey) died without substitution. The 6th Defendant (Avafia Beke III) started giving his Evidence-In-Chief on the 28th January, 2008 but died and was substituted by the 6th Defendant (Togbe Agidi Beke IV) who gave the evidence. It is unfortunate and sad how most of the original parties in this case (especially the original Plaintiffs and the 1st Defendant) did not live to see judgement being delivered on this day. I am also mindful of the fact that the losing party in this case would have the right to appeal against the judgement of this Court at the Court of Appeal, and to the Supreme Court and even on Review. Notwithstanding this, it is the humble prayer of this Court that this case would have a final resting place after this judgement.

The phrase "Justice delayed is justice denied" is often used to emphasize the importance of timely and efficient delivery of justice. When a legal system fails to provide justice in a timely manner, it can lead to frustration, loss of faith in the system, and even further injustice.

Order 37 Rule 2 of CI 47 provides:

"*It is the duty of the parties, their lawyers and the Court to avoid all unnecessary adjournments and other delays, and to ensure that causes or matters are disposed of as speedily as the justice of the case permits*."

It is therefore the bounden duty of the Court, Lawyers and Parties and it behooves us to ensure expeditious trial of all cases. I must admit that, in respect of this case, this Court, the Lawyers and Parties are to be blamed for this long delay. Without prejudice to the Defendants and their lawyer, the Plaintiffs' current lawyer must be commended for pushing very hard for the completion of this case.

The Plaintiffs commenced this action by a Writ of Summons and Statement of Claim issued at the Registry of this Court on the 26th March, 1992 seeking the following reliefs jointly and severally against the Defendants:

1. A Declaration of Title to that piece or parcel of land popularly known and called ASISEH FAMILY land with the ASISEVE CREEK thereon situate, lying and being at BATTOR and bounded as follows:

   On the East by AVLOLO property, On the West by TSIMORNUOR's property, On the North by Volta River, On the South by the BOTIE FAMILY property.
2. Recovery of possession.
3. ¢2,000,000.00 General damages for unlawful trespass.
4. ¢100,000.00 being the value of maize unlawfully harvested from the Plaintiffs' said land.
5. Perpetual Injunction restraining the Defendants, their agents, workmen, servants, privies and assigns from further acts of trespass unlawfully to the Plaintiffs' ASISEH FAMILY land/CREEK.

On the 7th April, 1992, the Defendants entered Appearance through their lawyer and filed a joint Statement of Defence for the Defendants, signed by their lawyer on the 29th April, 1992.

THE CASE OF THE PLAINTIFFS

The Plaintiffs are members of the KORNORKUKOR CLAN OF BATTOR. The Defendants are all farmers and members of the GBLEVIEAWO CLAN of LASIVENU-BATTOR. The Plaintiffs state that the land the subject matter of dispute is only a portion a larger tract of land founded several years ago by their ancestor, KORNORKU, a hunter. Plaintiffs state that their ancestor exercised right of ownership over the land by planting palm trees thereon till his death leaving behind two issues namely Avu and GBORMEKATSAKPOR. The Plaintiffs state that their said ancestor's KORNORKU land was shared out between his two said sons. That their grandfather, GBORMEKATSAKPOR went into possession of his shared out portion of his father's land and continued to plant palm trees, maize and cassava on the disputed land. GBORMEKATSAKPOR was succeeded by his son, ASISEH. Upon his father's death they continued to plant more palm trees, cassava and maize on the disputed land. ASISEH was also succeeded by his son, SAMUEL KWASI ASISEH upon his death and again he also built a farm cottage and continued to plant more palm trees, cassava and maize on the land. The 1st Plaintiff was duly appointed the Head of Family and the customary successor of SAMUEL KOFI ASISEH upon his death. The Plaintiffs state that the land the subject matter of dispute is popularly known and called the ASISEH FAMILY land together with a creek called ASISEVE CREEK situate, lying and being at Battor and bounded on the East by AVLOLO's property; On the West by TSIMORNOURS property; On the North by the Volta River; and on the South by BOTIE FAMILY property. In the year 1960, the 1st Defendant together with others unlawfully trespassed onto the disputed land and the ASISEVE CREEK and were found liable by the Tongu Local Court Division '2', Battor. That the Defendants are estopped per rem judicatam from disputing their ownership and title to the

same disputed land. Sometime in 1992, the Defendants despite that judgement again unlawfully trespassed onto their agent/relative farms on the disputed land and harvested maize valued at ¢100,000 without their prior knowledge and consent.

THE CASE OF THE DEFENDANTS

The Defendants state that the 1st and 2nd Plaintiffs are not the Head and Elder of the ASISEH FAMILY of Battor and also not members of the Kornorkuhor Clan of Battor to which the ASISEH FAMILY belongs. That the Plaintiffs lack the legal capacity to institute this action. The Defendants state that Battor lands were founded by TOGBE AVU and not Kornorku and that Togbe Avu gave a portion of the land he founded to AMEGA KPE the great grandfather/ancestor of the Defendants as an absolute gift. The Defendants state that Togbe Avu was older than Kornorku and it was Togbe Avu who founded the land. That except for some scattered palm trees in some people's farms, there are no palm plantation in Battor. It is the case of the Defendants that Amega Kpe, their ancestor immediately after the said gift took possession and went into occupation of the land given to him and founded on his said portion, a township known as "DAGBA" which later became BATTOR. The people of Battor are up to this day known as "DAGBAWO" and that after Amega Kpe's death successive generations of GBLEVIEWO being descendants of the said Amega Kpe have occupied the land and exercised various acts of control and authority over it by cultivating portions, building houses on other portions and giving grants of portions out to others. The Defendants further state that Asiseh's father or step father was known as ALIWE and that the ASISEH's are maternal nephews of the Defendants, their great grand ancestor having married Amega Kpe's grand-daughter who was popularly known at her

time as 'ASUMANA" from the Gblevie Clan. That, as a result of this marriage, a portion of their land was given by the Gblevie clan to Asiseh to cultivate to feed the Gblevie's daughter Asumana and her children with Asiseh and that that piece of land has remained in the possession of the Asiseh family to this day. Apart from the said portion, the rest of their land has remained under their control, possession and cultivation as descendants of Amega Kpe. According to the Defendants, the disputed land is known and called "AKLAMADOR", a name taken from the creek in the area and that it is bounded: On one side by Mepe township; On another side by the Aklamador Creek; On the third side by the Volta River; and On the fourth side by the property of the Ete Clan of Battor. The Defendants state that the land the subject matter of the 1960 suit is very different from the piece of land now in dispute and therefore the Defendants are not estopped by any judgement. That it was rather the Plaintiffs and their privies who trespassed onto the Defendants' land and the Defendants recovered the same from him, after which the defendants said Adza Kwasi unlawfully harvested corn from him, after which incident the Defendants reported the matter to the CDR, Battor who after thorough investigations into the matter found Adza Kwasi liable and ordered him to refund to the Defendants the value of the corn he illegally and unlawfully harvested in addition to some incidental expenses incurred by the Defendants. The Defendants set up the following counterclaim jointly and severally against the Plaintiffs:

(a) An Order that the Plaintiffs' suit be struck off with costs for lack of legal capacity to institute their action.

(b) Declaration of Title to all that piece or parcel of land known as and called "AKLAMADOR" including the creek which gave the land its name, which piece of land is bounded as described in paragraph 13 of the Statement of Defence.

(c) ¢2,000,000.00 (Two Million Cedis) being General Damages for trespass.

(d) Perpetual Injunction restraining the Plaintiffs, their workmen, agents, grantees and/or privies from committing any further acts of trespass in respect of the said land and creek.

After the close of pleadings, this Court differently constituted on the 12th August, 1992 adopted all the Issues and Additional Issues filed by the parties and set them down for trial. The issues filed by the Plaintiffs on the 22nd June, 1992 are:

i. Whether the Plaintiffs are entitled to all the reliefs claimed.

ii. Whether or not the Plaintiffs are the current Head and Principal Elder respectively of the ASISEH FAMILY of Battor.

iii. Whether the Plaintiffs are paternal members of the KORNOKU HOR CLAN of Battor.

iv. Whether all the Battor lands inclusive of the disputed portion were founded by the Plaintiffs ancestor called KORNOKU, a hunter.

v. Whether the said KORNOKU had two sons called GBORMEKATSAKPOR and AVU.

vi. Whether the Plaintiffs are descendants of GBORMEKATSAKPOR.

vii. Whether KORNU's lands were shared out among his two sons GBORMEKATSAKPOR and AVU.

viii. Whether the land in disputed is a portion of the Plaintiffs' ancestor GBORMEKATSAKPOR's share.

ix. Whether ASISEH and his son SAMUEL ASISEH succeeded previously to GBORMEKATSAKPOR's share inclusive the disputed land.

x. Whether there is a creek attached to the disputed land called ASISEVE CREEK.

xi. Whether the Plaintiffs have a judgement against the Defendants' ancestors and privies in 1960 from the Tongu Local Court Division '2' Battor.

xii. Whether the Defendants are estopped per rem judicatam by virtue of the 1960 judgement from laying any further claim to the disputed land.

xiii. Whether the disputed land was an absolute gift by Togbe AVU to the Defendants' ancestor, AMEGA KPE.

xiv. Whether Togbe Avu rather founded all the Battor lands and not his father KORNOKU.

xv. Whether the Defendants and their ancestors are mere strangers from ADA.

xvi. Whether the Defendants are Stranger Tenants on BORTI's land which shares a boundary with the Plaintiffs.

xvii. Any other issues arising out of the pleadings.

The Additional Issues filed by the Defendants on the 3rd August, 1992 are:

i. Whether or not the piece of land in dispute in the present suit is known as "AKLAMADOR" or "ASISEH FAMILY LAND"

ii. Whether or not the Plaintiffs own any land(s) in Battor.

iii. Whether or not the Defendant own any land(s) in Battor.

iv. Whether or not the Defendants are entitled to the reliefs claimed.

v. Whether or not the Plaintiffs have legal capacity and/or authority to institute this present suit.

BURDEN OF PROOF

The general rule in civil cases is that all facts in issue or relevant to the issue in a given case must be proved, in other words, he who avers must prove. The party who in his pleadings or his writ raises issues essential to the success of his case assumes the onus of proof. The standard of proof in a civil case is proof by a preponderance of probabilities. This standard of proof has been reiterated by the Supreme Court in the case of *Adwubeng vrs Domfeh* [1997-98] 1 GLR 282 where it was held that:

"*sections 11(4) and 12 of NRCD 323 clearly provide that the standard of proof in all civil actions is proof by a preponderance of probabilities, no exceptions are made*."

For ease of reference, I will reproduce the aforementioned sections of the Evidence Act, 1975 (NRCD 323) below:

Section 11 – Burden of Producing Evidence Defined

4. *In other circumstances, the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of a fact was more probable than its non-existence.*

Section 12 – Proof by a Preponderance of the Probabilities

1. *Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.*
2. *'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.*

The above principle was succinctly stated by the Supreme Court in the case of *Ebusuapanyin Yaa Kwesi vrs Arhin Davis & Anor*, CIVIL APPEAL NO J4/10/2004, where it was held that a plaintiff making a claim assumed that onerous burden of proof by the preponderance of the probabilities as required under sections 11 and 12 of the Evidence Decree, 1975 (N.R.C.D. 323), or else risked the prospect of losing his case. See also *Ababio vrs Akwasi* IV [1994-95] GBR 774, *Zabrama vrs Segbedzi* [1991] 2 GLR 222 @ 224.

The Defendant equally has a counterclaim against the Plaintiff. Order 12 rule 1 of the High Court (Civil Procedure) Rules, 2004 (CI 47) provides that:

"*A defendant who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in an action in respect of any matter, whenever and however arising, may, instead of bringing a separate action, make a counterclaim in respect of that matter*."

In the case of *Nortey (No.2) vrs African Institute of Journalism & Communication & Others* (No.2) [2013-14] 1 SCGLR 703, the Supreme Court stated as follows:
"*Without any doubt, a defendant who files a counterclaim assumes the same burden as a plaintiff in the substantive action if he/she is to succeed. This is because a counterclaim is a distinct and separate action on its own which must also be proved according to the same standard of proof prescribed by sections* 11 and 14 of NRCD 323."

EVALUATION AND ANALYSIS OF THE EVIDENCE

A total of 22 issues have been set down for trial by the Court in this case. However, the court will first of all consider issue (v) of the Additional Issues filed by the Defendants and Issues (xi) and (xii) of the Plaintiffs' issues together, and thereafter

decide whether or not to resolve the outstanding 19 issues set down for trial or set down other issues emanating from the pleadings.

Whether or not the Plaintiffs have legal capacity and/or authority to institute this present suit

The Defendants' counsel has raised the serious contention that the Plaintiffs' lack the requisite capacity to prosecute the claim by reason of a failure to endorse on the Writ of Summons and Statement of Claim their capacities as required by law.

The settled rule of law is that the capacity of a party to mount an action may be challenged at any time, and even on appeal. The case, *Yorkwa vrs Duah* [1992-93] GBR 278 CA illustrates the principle that where a person's capacity to initiate an action was in issue it is no answer to give him a hearing on its merits even if he had a cast-iron case. It is therefore incumbent on this Court to address this all-important issue regarding the capacity of the Plaintiffs before proceeding further to consider the other issues I have decided to resolve in this judgement.

The Defendants' counsel with quite an amount of force has submitted in his written address at page 3 that the Plaintiffs failed to endorse their Writ of Summons and the accompanying Statement of Claim to reflect that they were suing for themselves and for and on behalf of the members of the Asiseh Family. That what they stated after describing themselves respectively as "Head of ASISEH FAMILY of Battor" and "Elder of the ASISEH FAMILY of Battor" was "**For themselves as Head and Customary Successors of the ASISEH FAMILY of Battor**".

I refer to the case of *Susan Bandoh vrs Dr. Mrs. Maxwell Apeagyei-Gyamfi and Anor, Civil Appeal* No. J4/16/2016, 6th June, 2019, where the Supreme Court in a unanimous decision through Justice Marful-Sau JSC stated as follows:

"*I have examined appellant's writ of summons and statement of claim and I hold the view that the issue raised on appellant's capacity is far- fetched and an afterthought. It is clear that no such indorsement as to capacity appears on the writ of summons. However, at paragraph 1 of the statement of claim, appellant pleaded as follows*: -

'1. *Plaintiff is the personal representative of Dr. Evelyn Vanderpuye (deceased), beneficiary owner of the land the subject matter of the suit and brings this action on her own behalf and on behalf of the children of the said Dr. Evelyn Vanderpuye*'.

The Supreme Court went further to state:

"*From the above pleading, appellant made it clear that she was bringing the action in her capacity* ***as the personal representative of the deceased mother and also on her own behalf and that of the children of the deceased mother****. The capacity of the Appellant was thus clear from the Statement of Claim but not on the writ of summons. Having furnished the requisite capacity in the statement of claim, the defect on the writ of summons is thus cured. In Hydrafoam Estates Gh. Ltd. v. Owusu (per lawful Attorney) Okine and Others {2013-2014} 2 SCGLR 1117, this court held that defects in a writ of summons could be cured by reading the writ together with the accompanying statement of claim. Indeed, under Order 82 of the High Court (Civil Procedure) Rules, 2004, CI 47 a writ is defined as including a writ of summons and a statement of claim, it is therefore right to read a writ and a statement of claim together in order to achieve the objective of the Civil Procedure Rules, CI 47 as provided under* Order 1 rule 1 (2)." (Emphasis mine).

In this instant case, the only endorsement on the Writ of Summons and Statement of Claim as well as the other pleadings is:

1. **KWAOVI TSAMENYI**
   (Head of the ASISEH FAMILY
   of Battor)

2. **KWASI GODZO**
   (Elder of the ASISEH FAMILY of Battor)
   For themselves as Head and Customary Successors
   of the ASISEH FAMILY of Battor

A Writ is a formal document by which the Chief Justice informs the Defendant that an action has been commenced against him by a named Plaintiff and commands the Defendant to cause an appearance to be entered within eight days if the Defendant wants to dispute the Plaintiff's claim, otherwise judgement will be given against him in his absence without further recourse to him. Notwithstanding the absence of the phrase **"<u>suing for themselves and on behalf of ASISEH FAMILY</u>"**, once the Writ is issued by the named Plaintiffs, it means the said Plaintiffs are suing the Defendants. When the Defendants' lawyer cross examined the 1st Plaintiff on the 15th October, 1992, the 1st Plaintiff confirmed to the Court that he was representing the ASISEH FAMILY. The following is part of what transpired:

Q. You claim to be representing the Asiseh Family?

A. Yes, and I say that Kornoku gave birth to Asiseh.

On further cross examination by the Defendants' counsel on the 4th March, 1993, the 1st Plaintiff still confirmed that he was the Head of the Asiseh Family. See below:

Q. You are not the Head of Asiseh family as you are alleging?

A. I am the head.

In the Evidence-In-Chief of PW1 given to the Court on the 29th June, 1995, the witness also corroborated the testimony of the 1st Plaintiff that the 1st Plaintiff was the Head of the Asiseh Family with the 2nd Plaintiff being his assistant. The Defendants have stated that the Plaintiffs do not belong to the **ASISEH FAMILY** of Battor. It is not in dispute that the Defendants are not from the **ASISEH FAMILY**. The same Defendants have also failed to provide a contrary evidence to that effect. More so, they have not called any Principal Member or a Member of the **ASISEH FAMILY** to corroborate their story to this Court.

The first relief of the Plaintiff is for a declaration of title to the **ASISEH FAMILY land** (Emphasis mine), and not their personal or individual parcels of land. So, in the humble view of this Court, the Plaintiffs initiated this action for themselves in their respective capacities as the Head and Elder of the Asiseh Family respectively, and on behalf of the Asiseh Family. This defect on the failure of the Plaintiffs to fully endorse their representative capacities on the Writ of Summons has been cured by pleadings and the evidence adduced at the trial. In the circumstances, I hold that the Plaintiffs had the requisite capacities to institute this action in this Court against the Defendants.

Whether the Plaintiffs have a judgement against the Defendants' ancestors and privies in 1960 from the Tongu Local Court Division '2' Battor

AND

Whether the Defendants are estopped per rem judicatam by virtue of the 1960 judgement from laying any further claim to the disputed land

In this instant case, the Plaintiffs put their case forward by way of giving evidence through the 1st Plaintiff (Kwaovi Tsamenyi) and three other witnesses as PW1 (Dike Dike Hegbati), PW2 (Togbe Buti) and PW3 (Kwaokuma Nutoegba). On the other hand, the Defendants also stated their case through the 4th Defendant (Togbe Beker Agidi IV) and three (3) other witnesses namely DW1 (Togbe Tokpo III), DW2 (Tsiami Apedo Vortuame) and DW3 (Samuel Ahuble).

Plaintiffs tendered in evidence, a 1960 Judgement of the Tongu Local Court Division '2' and stated that the Judgement was against the Defendants' ancestors and privies. This was admitted in evidence without objection by the Defendants' counsel and marked as Exhibit 'A'. The following is what transpired at the time of tendering the 1960 Judgement:

"……. *In the case at Battor, Torgbui Beke was a co-defendant and he is a relative of the present defendants especially 1st defendant Lotsu Akliku and 6th defendant, Avafia Beke III. Judgement was given against the defendants in the case at Battor. Kwasi Agbedamu and Torgbui Beke are deceased. The Plaintiffs in the Battor case were myself (Kwaovi Tsamenyi) and Samuel Kwasi Asiseh now deceased. I have the judgement in the Battor case to show. It is dated 29th November, 1960. I want to tender the judgement in evidence. By Counsel for Defendants: I have no objection even though it is a photocopy.*

By Court: The photocopy of the judgement of Tongu Local Court Division 2 dated 29th November, 1960 is admitted in evidence and marked Exhibit A."

However, in his written address at page 13, the Defendants' counsel stated:

"*Your Honour, the 4th reason why the Plaintiffs should not benefit from a Relief of Estoppel per rem judicatam based on Exhibit "A" is that the veracity of that Exhibit has been put in serious doubt. The Exhibit is a photocopy and the Defendants have strenuously protested its genuineness. Indeed the Defendants have told the Court that MR F P K AVADETSI who was purported to have delivered the Judgment contained in Exhibit "A" was not among the Panelists' who sat on the case. The 1st Plaintiff who gave evidence on behalf of the Plaintiffs was a Party in the case in Exhibit "A" and being a Party he ought to have had a copy of the original Judgment and not a photocopy; so where is the original*?"

Surprisingly, the Defendants' counsel did not raise these issues at the trial. Exhibit 'A' clearly described the identity and boundaries of the land contrary to the submission by the Defendants' lawyer in his written address that the Plaintiffs failed to describe the disputed land. In the Exhibit 'A' suit, the Presiding Magistrate visited locus and inspected the land. This is what is contained in Exhibit 'A' at page 3:

"*At the **inspection**, defendants tried to extend their allotted property across the creek to the South bank. This undoubtedly was done with a view to gaining title to the creek* ……" (Emphasis mine)

The Defendants did not deny the existence or the authenticity of Exhibit 'A' in their pleadings but however stated that the land the subject matter of the 1960 suit was very different from the disputed land. This is what the Defendants stated at paragraph 14 of the Statement of Defence:

"*Paragraphs 13 and 14 of the Plaintiffs' Statement of Claim are denied. In answer to the said paragraphs Defendants say that the land the subject matter of the 1960 suit is very different from the piece of land now in dispute and therefore the Defendants are not estopped by any judgement*."

Even under cross examination, the Defendants' counsel suggested to the witness that there was an earlier suit in which Mr. Avadetsi presided. So, what is the nature of this suit that Mr. Avadetsi presided that learned counsel for the Defendants is referring to? For the avoidance of doubt, I reproduce part of the cross examination of PW1 by the Defendants' counsel on the 29th June, 1995 as follows:

Q. Were you around when the earlier case was contested?

A. Yes.

Q. I suggest to you that you were not at home, you were sojourning.

A. No. I was at home during the litigation.

Q. Who was the Chairman of the panel at the Native Court at Battor?

A. Togbe Dzekle.

Q. I put it to you that Mr. Avadetsi presided over the case.

A. He was one of the panel members.

Q. Can you remember that other panel members?

A. I did not attend any of the hearing and I cannot tell the other panel members.

Q. This is because you were then not at home.

A. I was at home. **(Emphasis mine)**

It is therefore very surprising to hear the Defendants' counsel now argue in his written address that Exhibit 'A' is a photocopy when he did not object to it. On the

face of Exhibit 'A', it is obvious that it was Mr. F. P. K. Avadetsi who presided over the 1960 suit. The Title of the 1960 suit is as follows:

IN THE MATTER OF: -

1. SAMUEL KWASI ASISEH	**-----**	**PLAINTIFF**
2. KWAOVI TSAMENYI	**-----**	**CO-PLAINTIFF**
VRS		
1. LOTSU AKLIKU	**-----**	**DEFENDANT**
2. KWAO DORBORKWE KPEY		
3. AVAFIA E. A. BERKAI	**-----**	**CO-**
DEFENDANTS		
4. KWESI AGBEDANGU		

The first paragraph of Exhibit 'A' (1960 Judgement) described the land. I reproduce same below:

"*In this case, the principal plaintiff claims against the principal defendant the Right Title of ownership to the Asiseve creek and its surrounding lands the boundaries of which are defined as follows: - On the East by the property of Avlolo, West by Tsimornuors, South by Botie family property and on the North by the Volta River*."

The endorsement on the Writ of Summons in this instant case has the same description of land in Exhibit 'A'. Judgement was entered for the Plaintiffs in the Exhibit 'A' suit as follows:

"*On the weight of such evidences – oral, documentary and* ***on the spot inspection****, I am satisfied that plaintiffs have established their title to the land, and I accordingly enter*

judgement for the plaintiffs with costs to be taxed against the defendants." (Emphasis mine)

The Plaintiffs specifically pleaded estoppel per rem judicatam at paragraph 14 of the Statement of Claim. See below:

"*Plaintiffs therefore say that the Defendants are estopped per rem judicatam from now disputing their ownership and title to the same disputed land*."

Estoppel per rem judicatam is a rule of evidence whereby a party or his privy is precluded from disputing in any subsequent proceedings, matters which had earlier been adjudicated upon previously by a Court of competent jurisdiction between him and his opponent. In the case of *Gariba Dintie vrs Kanton IV* [2008] 2 GMJ 168 SC (at pages 178-179), Justice Ansah JSC laid out the law on what a party who relies on an earlier judgement as estoppel per rem judicatam has to establish as follows:

(a) That there has already been a judicial decision by a court or tribunal of competent jurisdiction.
(b) That the decision is final.
(c) That the same question as that sought to be in issue by the plea is respect of which the estoppel is claimed was decided in the earlier proceedings.
(d) That the case was between the same parties or their privies as the parties between whom the question is now sought to be put in issue. For a judgement to operate as estoppel, it must be clear, unambiguous, and should determine finally the issues between the parties. See *Sasu vrs Amua-Sakyi* [2003-2004] 2 SCGLR 742.

As explained by Acquah JSC (as he then was) in *Re Sekyedumase Stool; Nyame v. Kese @ Konto* [1998-99] SCGLR 476, the Supreme Court held as follows:

"……. *the plea of res judicata is never a technical plea. It is part of our received law by which a final judgement rendered by a judicial tribunal of competent jurisdiction on the merits, is conclusive as to the rights of the parties and their privies and as to them constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action*."

Exhibit 'A' has not been appealed against and has not been set aside by any court or tribunal of competent jurisdiction. It therefore stands to reason that the 1960 Judgement is a final judgement.

Justice Ansah JSC in the case of *Agbeshie & Anor. vrs Amorkor and Anor* [2009] SC GLR 594 held that the doctrine of estoppel does not operate only against the actual parties involved in the previous suit, but it goes beyond that to include their privies, which term include anyone who has a legal interest of privity in any action, matter, or property by blood, in representation, such as an executor or an administrator of an intestate person; etc.

In this case, the original 1st Plaintiff (Kwaovi Tsamenyi) was the 2nd Plaintiff in the Exhibit 'A' Judgement. The original 1st Defendant (Lotsu Akliku) was the same original 1st Defendant in this case. The 4th Defendant in this case (Togbe Agidi Beker IV) succeeded the original 6th Defendant (Avafia Beke III) in this case, who happened to be the 3rd Defendant in the Exhibit 'A' Judgement. It is also established that the now 4th Defendant (Togbe Agidi Beker IV) is highly connected

to the Defendants in the Exhibit 'A' Judgement. The following is part of what transpired when the 4th Defendant was cross examined by the Plaintiffs' lawyer on the 7th July, 2022 as follows:

Q. The 1st Defendant in Exhibit 'A' is the same 1st Defendant in this case initially.

A. Yes, My Lord

Q. Which of the Defendants in this case did you succeed?

A. The 6th Defendant in this case.

Q. So you are highly connected to the Defendants in the 1960 Judgement (Exhibit 'A'). Not so.?

A. Yes, My Lord.

Q. I suggest to you that this land issue has already been determined

by a court.

A. It is not true. The original case in 1960 talked about a criminal case. It was a criminal case. Asisseh lived in Atimpoku then. He came to fish in the creek without a permit. So Lotsu Akliku was in charge of the creeks, reported the issue on behalf of Togbe Borku Agiti. So, the Police came in.

Q. Is Exhibit 'A' a criminal judgement or a civil judgement?

A. It is not a criminal judgement. I understand after the reporting, the issue was referred back to the Traditional Council. Panels were formed to which Avadetsi was not on the panel. That is why I said Exhibit 'A' is fraud. The original one is there. **(Emphasis mine)**

From the answers provided by the 4th Defendant under cross examination, he seems to suggest that Exhibit 'A' was fraudulently obtained. The Defendants also called the Acting Registrar of the Battor Traditional Council as DW3 to testify in this case. According to DW3, the Traditional Council was established in 2018, and he was the Secretary of the Stool from the year 2015. DW3 also told the Court that

he was not aware of the Court mentioned in Exhibit 'A'. That from the records available, F.P.K. Avadetsi never served as a panelist in any trial in Battor in 1960. What DW3 produced to the Court as Exhibit 3 are proceedings in a matter between Samuel K. Asiseh and Another vrs Lotsu Akliku and Others. The last proceedings recorded in Exhibit '3' was on the 10th June, 1960. Proceedings ended at where the 3rd Co-defendant (Avafia Emmanuel Awurta Berkai II) who testified for himself and on behalf of the other Defendants ended his Evidence-In-Chief, and the Plaintiffs started their cross examination and asked only one question, which answer was not captured at page 381 which happens to be the last page of the purported proceedings given to the Court. The said proceedings at page 381 of Exhibit '3' are not signed indicating that it is incomplete. DW3 also failed to attach any decision reached in that purported case in Exhibit '3'.

It is also not in dispute that Judgement of Exhibit 'A' was delivered on the 29th November, 1960. What is surprising is the fact that from the Statement of Defence filed by the Defendants on the 29th April, 1992, nowhere did they allege fraud in respect in Exhibit 'A'. Under section 13 (1) of NRCD 323, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond reasonable doubt. In the case of *Fenuku & Another vrs John Teye and Another* [2001-02] SCGLR 985, the Court held that the law regarding proof of forgery or any allegation of a criminal act in a civil trial was governed by section 13(1) of the Evidence Act, 1975 (NRCD 323) which provided that the burden of persuasion required proof beyond reasonable doubt. Even if fraud is uncovered during trial, Kpegah JSC in the case of *The Republic v. High Court, Accra; Ex parte Godfred Aryeetey* [2006] 1 GMLR 136 stated:

"…*The proponent must not only distinctly specify the alleged fraud but also strictly prove same because it is not permissible to infer fraud from general situations or facts*".

To add to their case, the Defendants' counsel again in his written address submitted that the Defendants filed witness statement for one of the children of Mr. Avadetsi as one of their witnesses to testify for them but the Plaintiffs reached out to him to dissuade him from coming to testify and he withdrew his Witness Statement. What happened in Court on the 17th April, 2023 was that the Defendants' counsel withdrew the said Witness Statement of Godwin Kwabla Avadetsi, and same was struck out as withdrawn. The Defendants were given another opportunity to file another Witness Statement to replace the struck out one within 7 days but this was filed three months later on the 17th July, 2023. This issue raised by the Defendants' counsel in his written address did not come up during the trial and the Court is at a loss why this appeared in the written address of the Defendants' lawyer. Is it a way to win the sympathy of the Court? Such a practice would not be countenanced by the Court. It is not a good practice.

The Court finds that apart from the Defendants not being able to meet the standard set under section 13(1) of NRCD 323, the nature of the evidence in respect of Exhibit 'A' is a departure from the pleadings filed. In the Statement of Defence which was filed about thirty years ago, there was no inkling as to the fraudulent nature of the 1960 Judgement. However, in the course of the trial, the Defendants made valiant but unproductive efforts to impress upon the court that Exhibit 'A' was fraudulently obtained. With this defence which I regard as an afterthought, one may even argue that, that evidence was a departure from the nature of the defence filed and by law as pointed out in the Court of Appeal case of *Appiah vrs Takyi* [1982-83] 1 GLR 1, I am impelled, as a matter of rule, to prefer the case of the Plaintiffs to that of the Defendants having regard to the consistency in the pleadings and the evidence of the Plaintiffs as against the departure from the

defence filed in respect of these two (2) issues under consideration now. Following from the above analysis, I hold that Exhibit 'A' is a final judgement against the ancestors and privies of the Defendants. Accordingly, the Defendants are estopped from laying any further claim to the disputed land.

The Plaintiffs' lawyer in his written address also set out the issue of estoppel as his ISSUE C and came to the same conclusion reached by this Court.

Having resolved issues 11 and 12, there will be no need wasting time to resolve the outstanding 19 issues save to glean from the pleadings, any other issues emanating therein. In the case of *Fatal vrs Wolley* [2013-2014] 2 SCGLR 1070, Wood CJ stated at holding 2 as follows:

"*It is sound learning that courts are not tied down to only issues identified and agreed upon by the parties at pre-trial. Thus, if in the course of the hearing, an agreed issue is clearly found to be irrelevant, moot or even not germane to the action under trial, there is no duty cast on the court to receive evidence and adjudicate on it. The converse is equally true. If a crucial issue is left out, but emanates at trial from either the pleadings or the evidence, the court cannot refuse to address it on ground that it is not included in the agreed issues*". See also the cases of *Mrs. Vincentia Mensah & Another vrs Numo Adjei Kwanko* II [2017] DLSC 2601 and *William Ashitey Armah vrs Hydrafoam Estate (Gh.) Ltd*. [2014] DLSC 3000.

Relying on the principle in the Fatal case, I shall now proceed to set up the following issues that are borne out of the pleadings.

Special Damages

The authorities are clear on proof of special damages in a civil suit. In the case of *Chahin & Sons vrs Epope Printing Press* [1963] 1 GLR 163-173, the Supreme Court held per holding 5 that where special damages are claimed it is not enough for the plaintiffs to write down the particulars, they have to prove them. Also, in *Aschkar & Another vrs Hardy & Another* [1963]1GLR 303-307, the court held that to show that they have suffered any damage the plaintiffs had to lead evidence and that they had successfully done to merit judgement being given in their favour. Another case of particular importance is the case of *Ankomah v. City Investment Co. Ltd* [2012] 2 SCGLR 1123, where the Plaintiff claimed special and general damages. The Supreme Court held that special damages must be proved and proved strictly. The court went ahead and explained what is required in a proof of special damages and the consequences following from the failure by a claimant to satisfy the said requirements as follows:

"……. *A successful proof of a special damage involves basically proof of the subject matter of the special damage, and then proof of the value claimed for that subject matter. Now these two-fold requirements may boil down to two, three or four steps depending on the nature of the claim. For example, where someone claims as special damage the sum of ¢10,000 as being the value of his damaged watch, this will involve the claimant in proving first, that the defendant did indeed destroy his watch; and secondly, that the value of the damage watch is ¢10,000. Again where the claim for special damage is ¢10,000 being cost of repairs for a damaged watch, the claimant has to prove first that the defendant did damage his watch; secondly, that the claimant did repair the said damaged watch; and thirdly, that the repairs cost him ¢10,000……".*

In this instant case, the Plaintiffs did not lead a single evidence on this issue. As submitted by the Defendants' counsel in his written address, the Plaintiffs have

also not led any evidence during the trial to suggest that they were the ones who planted the maize in question. The Plaintiffs are therefore not entitled to Special damages.

General Damages for Trespass

Both parties have pleaded the issue of trespass and are seeking a relief of General Damages for Trespass against each other. As I have held above, the Defendants are estopped from claiming ownership of the disputed land as described in Exhibit 'A' and endorsed on the Writ of Summons issued by the Plaintiffs. It follows that the Defendants will not be entitled to be awarded General damages for trespass.

The Plaintiffs claim that the Defendants committed acts of trespass on their parcel of land. Whenever trespass is alleged, there must always be a positive and direct act. In the case of *Ebusuapanyin Akuma Mensah vrs Nana Atta Komfo* II [2015] 39 GMJ at page 80**,** the Court of Appeal, per Barbara Ackah-Yensu J.A. (as she then was) held that:

"*As with all forms of trespass, there must be directness; the plaintiff must prove direct invasion of the defendant on his land for a claim of trespass to succeed ……***"**

The exact act of trespass committed by the Defendants has been stated at paragraph 15 of the Statement of Claim. It reads:

"15. Plaintiffs say that sometime in January, 1992, the Defendants despite that judgement again unlawfully trespassed onto their agent/relative's farm on the disputed land and harvested maize valued at ¢100,000.00 without their prior knowledge and consent.

"16. Plaintiffs say that the Defendants even issued a written Warning Letter to their relative and agent ADZA KWASI dated 6th June, 1991 stopping him from farming on the disputed land ……..."

On this issue, the Defendants' counsel clearly pointed out that the said maize was allegedly planted by Adza Kwasi who is an adult and can take any legal action against whoever harvested his maize to pursue his rights. More so, the Court has not been told whether the said Adza Kwasi is a member of the Asiseh Family. He was also not called as a witness to testify in the case. Accordingly, the Plaintiffs are not entitled to General damages for trespass.

CONCLUSION:

Consequently, I dismiss the counterclaim of the Defendants in its entirety.

On the other hand, I grant the Plaintiffs' reliefs (1), (2) and (5) as follows:

a. A Declaration of Title to that piece or parcel of land popularly known and called ASISEH FAMILY land with the ASISEVE CREEK thereon situate, lying and being at BATTOR and bounded as follows:

   On the East by AVLOLO property, On the West by TSIMORNUOR's property, On the North by Volta River, On the South by the BOTIE FAMILY property.

b. Recovery of possession of the parcel of land described in (a) above.
c. An order of Perpetual Injunction restraining the Defendants, their agents, workmen, servants, privies and assigns from having anything whatsoever to do with the land described in (a) above.
d. In assessing costs of this case, I have considered the length this case has travelled. The parties have been duly represented by lawyers in this case

from its inception to this day of judgement. The Court also considered the industry exhibited by the current lawyer of the Plaintiffs. In the circumstances, I award cost of GH¢30,000.00 against the Defendants jointly and severally.

…….

ISAAC ADDO

CIRCUIT JUDGE

2ND OCTOBER, 2023