29-02-2024

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE HELD AT NKAWKAW – EASTERN REGION ON THURSDAY THE 29TH DAY OF FEBRUARY, 2024: BEFORE HER LADYSHIP JUSTICE CYNTHIA MARTINSON [MRS], HIGH COURT JUDGE

SUIT NO. C1/06/19

COMFORT ABENA FOSUA : PLAINTIFF

VRS.

NANA PINAMANG : DEFENDANT

PARTIES

Plaintiff's Attorney present.

Defendant Attorney present.

LEGAL REPRESENTATION

Hawahu Kassim Esq. holding brief for Frank Donkor for the Plaintiff now present.

Mr. Mathias Fred Adjei holding brief of Isaac Okyere Darko for the Defendant present.

JUDGEMENT

On the 5th of November 2018, Plaintiff herein issued a writ of summons in the Registry of this court against Defendant herein for the following reliefs:

[a] A declaration that her family holds usufruct interest in the land described in the writ of summons.

[b] An order for recovery of possession of all areas of land the Defendant has started building thereon.

[c] General Damages for trespass

[d] Perpetual injunction restraining the Defendant, his agents, servants, labourers, and privies from entering the land, the subject matter in dispute or interfering with the Plaintiff's family interest in the land.

The Defendant entered appearance on the 8th of November 2018 and subsequently filed his defence on the 10th of December 2018.

A Reply to the defence was also filed by the Plaintiff on the 10th of May 2019.

At the close of pleadings, the following issues were agreed on as the main issues for trial:

[a] Whether the land on which the Defendant is building belongs to the Plaintiff.

[b] Whether the Defendant can build on the Plaintiff's family land without the consent of the Plaintiff and members of her family.

[c] Whether the toilet facility and the bathrooms are very close to the plaintiff's family house.

[d] Whether the structures being built will affect access to the plaintiff's family house.

[e] Whether the Plaintiff is entitled to her claim or anything at all.

The Defendant did not file any additional issues and so the above issues were adopted on the 21st of June 2019 by this court differently constituted as the main issues for trial.

PLAINTIFF'S EVIDENCE

When the case came up for hearing the plaintiff testified through her Attorney Agnes Frimpong and called a witness.

The plaintiff's attorney gave testimony via her witness statement as follows: she lives at Adenta-Accra, and she is a petty trader. She said she knows the Plaintiff, who is her mother and the head of the Nana Yaa Akyaa family of Obomeng-Kwahu in the Eastern Region. She continued that she has the authority to testify on her behalf in this matter, mandated by Exhibit 'A'. She continued that the land, the subject matter in dispute is situated at Obomeng and bounded by the Presby Church on one side, the property of Grace Oduraa, the property of Kwadwo Frimpong on another side and a street from Mpraeso junction to Obo junction called Abotari road. She said the land originally belonged to Nana Yaa Akyaa who fell the virgin forest and settled thereon many many, years ago and lived on it. It is her further case that Nana Yaa Akyaa was among the early settlers who migrated to settle at Kwahu Obomeng.

It is her case that, Nana Akyaa fell the virgin forest and cultivated food crops thereon. She remained in undisturbed and uninterrupted possession and worked on the land till she died. After her death, the land became her family property. She further added that Plaintiff succeeded Yaa Onyina about 50 years ago as her customary successor and has been appointed as the head of the Nana Yaa Akyaa family. It is her case that

Members of the Plaintiff's family have also built on the land the subject land in dispute and have been on it for more than 50 years now.

It is her further case that, the family house is made up of boys' quarters with 4 bedrooms and the main house which has 2 bedrooms and a hall. In addition, there are 3 toilets and 2 bathrooms. She further added that, the boys' quarters are occupied by caretakers of the house who live there with their wives and children. She said though the Plaintiff lives in Accra, she and many members of the family often visit Obomeng to spend time at the family house. She further testified that besides the buildings, the family has food crops such as plantain, cassava and other crops on the land. She continued that Plaintiff and his family connected the house to pipe-borne water, but Defendant has caused damage to portions of the pipe-borne line and as a result they do not get water from their tap.

The attorney also testified that Defendant started the construction of toilets and bathrooms for males and females for commercial purposes and destroyed most of the crops on the land. It is her case that before the Defendant started building these structures, members of the family were the ones responsible for keeping the subject land tidy and clean. According to her, a large part of the public place of convenience has been built on portions of the family's land and in front of the family house closing the entrance of the family house.

She said the structure will prevent the family from erecting a wall around the family house. It is her further case that, the public place of convenience which are toilets and bathrooms built for commercial purposes on a large portion of the family land and close to the family house is likely to pose health challenges since there is no constant water supply in Obomeng Township. According to her, apart from the odour from the toilet, flies may come from the toilet to their kitchen. She stated that, the toilet and bathrooms have been put up without their consent.

She continued that, it is not true that Ghana First Company own the project because, it is defunct and it is the Defendant who claims, all Obomeng lands belong to him so he can do whatever he likes. The Defendant brought the said defunct company to put up the said project on the land.

According to her, Opanin K. Kyei is not the head of the Nana Yaa Akyaa family but rather the head of the Bompata family and so has no interest in the land in dispute and that the state has not also paid any compensation to the family or compulsorily acquired the land for the said project.

She testified that the area where the defendant is building the toilet and bathrooms for commercial purposes has been zoned as a residential area and is not meant for a public commercial place of convenience. She concluded her evidence that, the construction by the defendant would also prevent family members from having access to roads in the area.

She tendered the following documents to buttress her case;

Exhibit 'A' - Power of Attorney dated 14th April 2023.

Exhibit 'B' - Pictorial aerial view of the plaintiff's Family House

Exhibit 'B1' - Pictorial aerial view of the structure under construction.

During the Cross-examination, plaintiff's Attorney maintained that, the current head of Nana Yaa Akyaa's family is the plaintiff Comfort Abena Fosua. She also admitted knowing the subject land and its boundaries. She indicated that, Nana Yaa Akyaa her great-grandmother stayed on the land in dispute for over 200 years and that she was among the early settlers who migrated from Bompata to settle at Kwahu Obomeng. She also insisted that, Nana Yaa Akyaa is a native of Kwahu Obomeng. She asserted that, when Nana Yaa Akyaa died, she was succeded by Yaa Onyina and that, it was when Yaa Onyina died that Comfort Abena Fosua, the plaintiff succeeded her. She insisted that James Debrah appointed Yaa Akyaa as head of the Yaa Akyaa family of Obomeng. She also maintained that the family has a building on the disputed land and that there is a space in front of the house reserved for crops which has been encroached on by the Defendant. She maintained that there is a concrete tank in front of the house in which they store water. The plaintiff's Attorney maintained that, it was the defendant who permitted the defunct Ghana First Company to erect the structure in his capacity as the chief. She asserted that, the defendant requested that the matter be brought to his palace for an amicable settlement. She asserted that, even though she could not tell the distance between the building project and the family house, they used to sit and cook where it had been trespassed. She denied that where the project has been erected is a government land. She admitted that Opanin Kyei is the head of a family at Bompata but he is not the one who released the land to the company. She insisted that it was the defendant who gave the land out without the consent of her family, and they did not receive any compensation from the state.

PW1 Joana Agyakwaa Boamah testified via her witness statement as follows: she lives at Nkawkaw and she is a retired midwife. She knows the Plaintiff. She is her elder sister, and she also knows the Defendant as the chief of Obomeng. According to her, the land

the subject matter in dispute is situated at Obomeng Kwahu and bounded by the Presby Church and the mission house, the property of Grace Oduraa. She said her family has put up more than five single room self-contained and boys' quarters on the land and they have lived in the house for more than 50 years now. She knows the land was acquired by their great-grandmother by name Nana Yaa Akyaa many years ago who performed acts of ownership on the land until she died. She continued that Nana Yaa Akyaa gave birth to five children and James Debrah was one of her children who built the house on the subject land in dispute and after his death, the house became a family property. She added that portions of the land around the house where they cultivated food crops such as cassava plantain and others has been destroyed by the defendant with a grader to pave way for the construction of the toilets and bathrooms for commercial purposes. It is her case that, many of the family members have lived in the house for many years without any challenge from anybody and they also have caretakers in charge of the house when family members are away. The caretakers are mostly in the house because, most of the family members are outside Nkawkaw so each time there is a funeral or any occasion, they come to Obomeng and that is where they stay. It is her case that, the portion which the defendant wants to develop does not belong to him but without their consent or any notice to them whatsoever, he has unlawfully entered the land and caused damage to their food crops on the land. She said the construction being undertaken by the defendant will prevent their family members from having access to roads in the area.

Also, the toilets and the bathrooms being built are so close to their family house and as such will cause serious health hazards to them. She concluded by testifying that the portion that the defendant wants to construct the toilet and bathroom facility is part of their family land, and it is reserved for members of their family to build in future.

During cross-examination, she gave her age as 86 years. She maintained that she could recall some names of family heads some of which are Yaa Akyaa, Yaa Onyina and Kwabena Debrah. She also mentioned that Yaa Akyaa succeeded James Debrah and after the demise of Yaa Akyaa, Yaa Onyina succeeded her and currently it is the plaintiff who

succeeded Yaa Onyina as the head of her family. She also confirmed that in her family, when the head of family passes on, the elderly is selected to be the head of the family. She also maintained that Nana Yaa Akyaa acquired the land in dispute many many years ago and that it was James Debrah who said the plaintiff should be appointed as head of the family before his death. She was informed about the encroachment, and she was at the scene to verify things for herself. She is unaware that the ongoing project is a government project. She also confirmed in cross-examination that the project is in the family house itself. She denied that the project is within the road reservation.

EVIDENCE OF THE DEFENDANT

When it was the turn of the Defendant to be heard, the Defendant testified through his attorney Kwesi Boye Dwamena without calling any witnesses. He testified as follows: He is the palace Administrator of Obomeng in the Kwahu Traditional Area. He knows the Defendant who is the Chief of Obomeng Kwahu in the Eastern Region of Ghana whose palace he works as the palace administrator. He has the authority to testify on his behalf in this matter.

He denies that the Plaintiff is bringing this action for and on behalf of Nana Yaa Akyaa family of Obomeng and maintains that, the Plaintiff is not the head of that family and cannot bring this action for and on behalf of the family.

It is his case that they have no hand in the construction of the modern toilet on the land in dispute. He said the toilet being constructed is a government of Ghana initiative under the presidential special projects for several communities.

It is his case that it was the officials of the Kwahu South Municipal Assembly who brought the contractor to the site to commence the project after a request for land was made through a letter dated 5th July 2018.

It is his further case that when the officials of Kwahu South Municipal Assembly and the contractor came to Obomeng, they decided to give the Obomeng community two of the toilet projects.

He testified that after going round the Obomeng township, the officials decided to construct one of the toilets on the land in dispute and the siting of the project on the land was agreed upon by the Plaintiff's head of family.

He added that the land which the Plaintiff is claiming is a reservation for the Electricity Company of Ghana. The high-tension electricity poles heading to the Afram Plains passes through the land.

He testified that by Government policy and operation of law, 100 feet on both sides of the electricity poles are reserved for the government of Ghana and cannot be claimed by any individual.

He said the action against his principal was totally unwarranted and only intended to embarrass him. It is his further case that, the Plaintiff is very aware that it is Ghana First Company Limited that is constructing the toilet but chose to ignore them but sued his principal. He added that, the Plaintiff is aware that the work is being done under the auspices of the Kwahu South Municipal Assembly but has deliberately ignored them in this action. He said a Letter of Appreciation dated 17th August 2018 from the Kwahu South Municipal Assembly to the Chief and Elders of Obomeng is available.

He testified that he believes that the Plaintiff is claiming that her land has been taken over for a project for the benefit of the community. According to the Defendant, what she ought to do is to apply to the Government of Ghana or the Municipal Assembly for compensation.

He tendered the following documents without objection.

Exhibit '1' - Power of Attorney

Exhibit '2' - A letter titled Request for Land.

Exhibit '3' - Letter of Appreciation

Under cross-examination, he admitted that the Plaintiff and members of their family are subjects of the Obomeng stool but denied that it is the Plaintiff and her family who were

in possession of the disputed land before the 5th of July, 2018. Instead, it is the Obomeng stool that was in possession of the land. He also asserted that they were unaware that, the Plaintiff was cultivating the land. He further asserted in cross examination that, the land did not belong to the Plaintiff so the Defendant was not supposed to seek their consent. That the head of Plaintiff's family was consulted only when the case was filed in this court. He also admitted that, the head of the Plaintiff's family was consulted after Defendant had released the land to the Kwahu South Municipal Assembly. He insisted that the head of the family Opanin Kyei agreed that the project should go on. That Abusuapanin Kyei was a member of the Obomeng Kwahu Abusuapanin caucus, but he does not know the specific family that the Abusuapanin Kyei heads. He also admitted not knowing the family the plaintiff belongs to. He further admitted in cross-examination that there was no compulsory acquisition of the land by the state. He asserted that proper assessment was done to determine the suitability of the project in the area before releasing the land and the same was documented.

The Defendant did not invite any witnesses to testify for him.

It should also be recalled that on the 8th of December 2022, this court made an order directed to the municipal Environmental Health Officer [MEHO] of the Kwahu South Municipal Assembly to visit the locus at Obomeng to verify whether the toilet and bathroom facility under construction will pose any health challenges to the houses within the community. The Report was filed in this court on the 29/12/2022, both sides did not express any intention to cross-examine the Municipal Environmental Health Analyst.

Section 114 [3] of the Evidence Act 1975 NRCD 323 makes the report of the court expert admissible to the same extent as the testimony of any other expert witness and shall be deemed to be in evidence without formal introduction by the court or any other party.

The report of CWI was deemed admitted in evidence once no counsel on any side intimated any interest in cross-examining him. The said report has it that if the facility is completed depending on how it is managed it will not pose any health challenges to the persons living close to the facility.

SUBMISSION BY COUNSEL FOR PLAINTIFF

The counsel for plaintiff filed his written submission On the 21/12/2023 though late.

- *Counsel submitted that the plaintiff has been able to prove her capacity to institute the action.*
- *That the facts of the root of title, identity of the land and act of possession were all admitted by the defendant in his defence.*
- *Plaintiff's usufructuary interest consist of perpetual rights of beneficial user of land which co-exist with the allodial title of the stool's absolute ownership and that defendant cannot make a valid grant without the consent of the plaintiff's family who are in possession.*
- *That defendant knows plaintiff is in possession that is why he claims he agreed with defendant head of family.*
- *That the issue as stake is not about the entity that is constructing the structure but instead the gravamen of the plaintiff's case is that the defendant stool has no right to have released their land to any 3rd party.*
- *That the credibility of the defendant's attorney is doubtful because in one breath he said the plaintiff's family did not own the land in another breath he consulted the head of plaintiff's family and in another breath the land is part of a reserved area for Electricity company of Ghana.*
- *That the Report of CW1 that is the Municipal Environmental officer filed in this court on the 29/12/22 revealed that there is a house which is 20 feet away by the facility and listed 6 health hazards associated with public toilet facility if not well managed. Counsel contended that no evidence has been provided to the contrary to convince the court that it will be well managed.*

The defendant did not file any submission for the consideration of the court.

I now wish to analyse the case and draw my conclusion.

EVALUATION OF THE EVIDENCE AND THE APPLICATION OF THE LAW

The law is settled that, this case being a civil one where no crime has been alleged by either party against the other, the standard of proof is on the preponderance of probabilities, see **Sections 11 (4) and 12 (1) of the Evidence Act, 1975 (NRCD 323)** and **Yorkwa V. Duah (1992-1993) GBR 278 CA.**

This standard of proof carries with it a burden on a party to produce sufficient evidence so that, on all the evidence, a reasonable mind could conclude that, the existence of the fact was more probable than its non-existence.

See:

- **Ackah V Pergah Transport Ltd & Ors (2010) SCGLR 728.**
- **Gihoc Refrigeration & Household Products Ltd. V. Hanna Assi (2005-2006) SCGLR 458**

Pursuant to this standard of proof lays a burden on a party who is asserting an issue in a civil case to lead evidence so that, the court would conclude that the existence of his evidence is more probable than its non-existence. This burden is captured under **Section 11 (1) 12 (1) of NRCD 323** as earlier stated.

The sections referred to in the above paragraph are as follows:

11 (1) *"For this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against the party".*

12 (1) *"Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities."*

In the case of **Zabrama V. Segbedzi *[1991] 2 GLR 221*,** it was held as follows; *"….a person who makes an averment or assertion which is denied by the opponent has the burden to establish that his assertion or averment is* true''

Also in the case of **Bank of West Africa Ltd. vrs**. **Ackun [1963] 1 GLR 17**, it was held that; "*the onus of proof depends upon the pleadings. The party who in his pleadings raises an issue essential to the success of his case assumes the burden of proof''*

Besides, in **Majolagbe vrs. Larbi and Ors [1959] GLR 190** it was held as follows;

"….the court expects a party who makes an averment [which the other side denies] to call such corroborative evidence in support of his own''.

In this case, the identity of the disputed plot is not in dispute. All the parties are *ad idem* as to the identity of the subject land. In fact, the identity of the land was not in contention at the trial since the defendant clearly admitted the boundaries as stated in paragraph 6 of the statement of claim, in paragraph 3 of his statement of defence. In the circumstances, a party need not prove the identity of the land before he succeeds in an action for declaration of title to land.

See: **In Re Ashalley Botwe Lands; Adjetey Agbosu & Ors. V. Kotey & Ors. (2003-2004) 1 SCGLR 420.**

In this case, five issues were set down during the application for directions. However, I think the main issues for determination are as follows:

a] Whether the plaintiff has capacity to initiate the action..

b] Whether the land in dispute belongs to the plaintiff's family.

c] Whether the land was validly acquired for the construction of the facility.

d] Whether the siting of the toilet facility will not pose any health challenges to houses close by and the plaintiff will have access to their house.

I am fortified in this direction by some decided cases.

In the case of **Fatal V. Wolley (2013-2014) 2 SCGLR 1070 on page 1076,** Georgina Wood CJ (as she then was) said as follows:

"Admittedly, it is indeed sound basic learning that courts are not tied down to only the 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 upon the court to receive evidence and adjudicate upon it. The converse is equally true. If a crucial issue is left out, but

emanates at the trial from the pleadings or the evidence, the court cannot refuse to address it on the grounds that it is not included in the agreed issues".

See also; **Environmental Development Group Ltd. V. Provident Insurance Co. Ltd & 2 Ors. (2020) 165 GMJ 39 SC.**

The law therefore allows a court not to restrict itself to the resolution of all the issues set down in an application for directions. The law is that a court of law is not bound to consider every conceivable issue arising from the pleadings and the evidence. If in the opinion of the court, few of the issues could legally settle the case by law.

See: **Vicentia Mensah V. Numo Adjei Kwanko II (2018) 117 GMJ 76 SC.**

Before I resolve any other matter, I wish to resolve the issue of capacity as the 1st issue [A] since it is at the core of this case.

Whether the plaintiff can institute the action

The issue of capacity has been held to go to the root of every matter and could be raised at any time in proceedings, even for the first time on appeal.

Once a plaintiff's capacity to institute an action has been challenged by his adversary, the burden falls on her to establish his capacity by cogent and credible evidence, see the case of **Kassek Akoto Dugbartey Sappor & 2 Ors v. Very Reverend Salomon Dugbartey Sappor [2021] SC NO. J4/46/2020 13TH JAN. 2021,** Prof. Mensa-Bonsu [Mrs] Jsc.

Regarding the writ of summons filed on the 5th of November 2018, the Plaintiff's title as the head of Yaa Akyaa's Family was not endorsed therein contrary to **Order 2 R. 4 of C.I. 47** which reads:

Rule 4- Endorsement as to capacity

[1] Before a writ is filed it shall be indorsed.

[a] where the plaintiff sues in a representative capacity, with a statement of the capacity in which the plaintiff sues or

[b] where the defendant is sued in a representative capacity, with a statement of the capacity in which the defendant is sued.

Besides, there is very little on the writ of summons to show that the Defendant was also sued as occupant of the stool even though he was described as the chief of Obomeng.

However, in the endorsement on the writ, the Plaintiffs prayed for a declaration of title to the land in dispute for her family and also in the statement of claim, the Plaintiff made it clear that she sues on behalf of the Yaa Akyaa family of Obomeng Kwahu. Besides, plaintiff and her sole witness led evidence to proof that she is the head of the Yaa Akyaa Family of Obomeng Kwahu.

In the Supreme Court case of **Edward Nasser & Co. Ltd. vrs. McVroom [1996-97] 468 SCGLR,** Acquah JSC had this to say:

"*A distinction can be made between evidence which is per se inadmissible and evidence which would have been rejected as inadmissible upon an objection being taken at the trial… Unless the evidence sought to be excluded is the type which is inadmissible per se, this court will not allow a party to the proceedings to complain when he had every opportunity to raise a formal objection to it at the time when questions were being asked''.*

As to which type of Evidence is inadmissible per se, the West African Court of Appeal in ***Abowaba vs. Adeshina [1946] 12 WACA 18*** *explained:*

"There are certain types of Evidence such as hearsay and unstamped or unregistered documents which are inadmissible per se, they cannot form the basis of a decision and objection to them may be taken at any stage of the trial or on appeal''.

In the case before me, there was no formal objection to the non-endorsement of the Plaintiff's capacity on the writ by the defendant. Therefore, based on the above reasoning in the **Edward Nasser case,** I will consider whether the Plaintiff was able to prove that she is the head of her family since per the Ratio in the case [supra], the Plaintiff's evidence is not inadmissible per se due to the non-endorsement of her capacity on the writ since both counsel relied on the evidence and cross-examined her extensively.

What is the position of the law on the proper party to sue in relation to stool and family lands?

Order 4 R 9 of CI 47 states:

[2] The head of the family in accordance with customary law may sue and be sued on behalf of or as representing the family.

[1] The occupant of the stool or skin, where the stool or skin is vacant, the regent or caretaker of the stool or skin may sue and be sued on behalf of or as representing the stool or skin.

It is clear as crystal that the Plaintiff did not endorse the capacity in which she sued on the writ of summons. However, she testified in her evidence-in-chief through her attorney and procured evidence to the fact that, the plaintiff is the head of the Yaa Akyaa Family and sues as such. In the case of **Nyamekye v. Ansah [1989-90] 2 GLR 152-163,** *it was held that as a general rule, the head of family as a representative of the family was the proper person to institute suits for the recovery of family land. And where the authority of a person to sue in a representative capacity was challenged the onus was upon him to prove that he had been duly authorised. He could not succeed on the merits without satisfying the court on that important preliminary issue. The customary law position was that when a successor was appointed, he was* ***ipsa facto*** *the head of the immediate family*. Also see **Fosua & Adu-Poku v. Dufie [deceased] & Adu-Poku Ensah [2009] SCGLR 310 at pg. 344 per Dotse JSC SC.**

From the evidence of the Plaintiff's attorney, plaintiff succeeded Yaa Onyina as her successor and she was also appointed as head of family of Nana Yaa Akyaa. In cross-examination, the attorney for the plaintiff maintained that it was one James Debrah who appointed the current head of family, the plaintiff herein. This assertion was corroborated by an 86-year-old family member that the plaintiff is the current head of the Yaa Akyaa family. Even though the evidence of PW1 on how the Plaintiff was appointed as head of the family is quite different from the narration of the plaintiff's attorney, none of them can be faulted because the witness's answer explained that of the Plaintiff's attorney. See page 40 of the proceeding being the cross examination of plaintiff attorney by the counsel for defendant.

Q] Tell the court, who appointed comfort Abena Fosua as the head of family of Nana Yaa Akyaa family of Kwahu Obomeng?

A] It was one James Debrah one of the children of Nana Yaa Akyaa who appointed comfort Abena Fosua as the head of family of Nana Yaa Akyea's family of Kwahu Obomeng.

However, at pg. 41 of the proceedings she explained further that it was the family who appointed the plaintiff;

Q] You have told this court that the plaintiff Comfort Abena Fosua was appointed head of family for Nana Yaa Akyaa's family by James Debrah is that correct?

A] It was the family of Nana Yaa Akyaa that appointed the plaintiff as head of the family.

Also see the questions and answers of PW1 during cross examination at pg. 46 of the proceedings;

Q] How was the plaintiff appointed as head of the family?

A] From our line of family when the head of the family passes on, we select an elderly person from our line as head of family.

It should also be recalled that PW1 later explained that it was James Debrah who instructed the family before his demise that the plaintiff should be appointed as head of her family, see pg. 47 of the proceedings;

Q] You will be surprised to know that the court is aware that it was James Debrah who appointed Comfort Abena Fosua as head of the Nana Yaa Akyaa family?

A] James Debrah said that Comfort Abena Fosua should become the head of the family before he passed on.

This explains and corroborates the attorney for the Plaintiff's earlier response to the question that, it was James Debrah who appointed the plaintiff as head of their family. PW1's description of how the plaintiff was appointed as head of her family buttresses and explains the seemingly contradictory statement made by the plaintiff's attorney.

In the case of **RT Briscoe Gh. Ltd V. Boateng [1968] GLR at 11-12**, *it was decided that, a judge is not entitled to disbelieve a witness merely because in narrating her account of events which happened sometime before she gave evidence in court a few slips here and there occurred in the evidence or there are few discrepancies between his story and that of another witness called to support her case on a particular issue.*

Despite the compelling evidence led by the Attorney of the plaintiff corroborated by the PW1, The Defendant maintained that the plaintiff is still not the head of her family and instead asserted that, one Abusuapanin Kyei represented the plaintiff's family and he is the one known to the defendant as head of the Plaintiff's family. Interestingly, the defendant's attorney did not know the family that the Plaintiff even hails from. See the following cross examination of the defendant's Attorney by counsel for plaintiff on page 52 of the proceedings;

Q] Do you also know the name of the family that the plaintiff belongs to?

A] No my Lady.

In the case of **In Re Ashalley Botwe Lands Case [Supra]** Wood JSC [as she then was] said that, *"….the burden of producing evidence in any given case is not fixed but shifts from party to party at various stages of the trial depending on the issues asserted and or denied''*

When the Defendant through his attorney asserted he knew all the heads of the family, he had the opportunity to prove but failed to invite the said Abusuapanin Kyei whom he mentioned as the one who represented the family of the plaintiff in the deliberations on the land to come and testify. His assertion was mere assertion without proof whatsoever. His failure to call the said Abusuapanin Kyei to buttress his assertion is fatal to his case.

I therefore hold that the plaintiff has been able to prove that she is the head of her family and per her statement of claim and the endorsement at the back of her writ she sued for herself and on behalf of the Yaa Akyaa family of Obomeng Kwahu.

On the part of the defendant, the Writ of summons has the name Nana Pinamang and beneath is 'chief of Obomeng-Kwahu'

It can also be gleaned from the pleadings and the evidence led by plaintiff through her Attorney that Nana Pinamang was sued as the chief of Obomeng although same was not categorically stated properly in the face of the writ as earlier stated. Throughout the trial, the Defendant did not object to how the endorsement of the writ was couched. However, per the ratio in the Edward Nasser case, I have considered the pleadings, the entire evidence of the plaintiff vis a vis that of the Defendant and I am of a firm opinion that the Defendant was sued as the chief of Kwahu Obomeng. The primary duty of the court in adjudication of any case as has been stated severally by the apex court is to do substantial justice and not to allow technicalities to impede such noble objective. See the case of **Frimpong V. Nyarko [1998-99] SCGLR 734 at 747, Acquah JSC.**

The second issue [b] which I now want to consider is;

Whether the land in dispute belongs to the Plaintiff's family.

THE CASE OF THE PLAINTIFF

Plaintiff through her Attorney testified that she is the head of the Yaa Akyaa family of Obomeng Kwahu. Even though the identity of the land was not in dispute the attorney of the Plaintiff described the boundary as bounded by the Presby Church on one side, the property of Grace Oduraa also on one side, the property of Kwadwo Frimpong on another side and a street from Mpraeso junction to Obo junction called Abotari road. It is even evident in paragraph 3 of the statement of Defendant that, Defendant admitted paragraph 6 of the plaintiff's statement of claim where the boundaries of the land in dispute were described by the Plaintiff. In the case of **Aryeh & Akakpo v. Ayaa Iddrisu [2010] SCGLR 891** it was held that, *"it is incumbent on the plaintiff to succeed in an action for declaration of title to land to establish positively the identity and the limit of the land. As has been reiterated, where the identity of the land is* ***not*** *in dispute the Plaintiff is not obliged to establish same,* see the case of ***In Re Ashalley Botwe Lands [supra]."***

Also in the case of **Mary Larley Nunoo vrs. Manase Ataglo [J4/74/2018] 2020 unreported SC [28 JULY 2020] Dordzie [Mrs] JSC**. It was decided that *"this action being an action in which the Plaintiff is asserting title to the disputed land, the law requires that she produces persuasive evidence establishing her root of title, her mode of acquisition and overt acts of possession''.*

In line with the above authority, the plaintiff traced through her attorney her root of title as coming from the late Yaa Akyaa who settled on the land then a virgin forest many years ago and lived on it. The plaintiff through her attorney also gave evidence to the effect that her family is in possession of the land and had crops like plantain, cassava and a house on a portion of the land. The plaintiff's attorney testified that the space encroached on by the defendant was what was formerly used for their garden activities and they used to sit and relax on a portion before the encroachment. This evidence was firmly corroborated by PW1. It is however trite that, possession in law raises a presumption of ownership. **Section 48 of the Evidence Act** provides that: *"A person in possession of land is presumed to be the owner of the land".* Exhibits 'B' and 'B1' show where the disputed land is situated.

I will quickly add that this is a presumption which can be rebutted with evidence by the person challenging the one in possession.

At this stage, it is fair to state that the Plaintiff has led some evidence in support of her case through her attorney and her witness for the burden to shift. As has been stated above the burden of proof is not static but moves from party to party depending on the issue asserted and denied. See **In Re Ashalley Botwe case [supra]**.

Notably, however, the defendants did not counterclaim but rather asserted that the land in dispute is government land which was requested by the Kwahu South Municipal Assembly through the defendant. Besides, he indicated that the Plaintiff head of family Abusuapanin Kyei was among the elders who gave the land out for the project. He tendered Exhibits 2 and 3 to buttress his case. The Defendant did not call any witnesses.

What is quite confusing about the evidence of Defendant is that in one breath the Defendant says the Land is a government land or a road reservation, in another breath during cross examination the defendant indicated that the stool has always been in possession of the land in other words, the stool owns the land see pg. 50 of the proceedings. However, by Exhibit '2' the request for the grant of the land was made to the Defendant in his capacity as the chief of Obomeng and per Exhibit 3 the letter of appreciation was addressed to the Defendant and his elders.

My contention is, if it is true that the land belongs to the state or the Assembly, why did the state Agency like the Kwahu South Municipal Assembly apply to the stool instead of the relevant state agency like the Lands Commission for the allocation of the land? And why is it that the defendant did not see it relevant to join the assembly or the Ghana First Company as a defendant if they are the owners of the facility and the present defendant has no hand in the said project.

Moreover, if Defendant is now claiming that the land belongs to the state, then Defendant had no power to receive the request and act upon same as he did. Interestingly, the letters did not refer to the plaintiff's family or one Opanin Kyei

It is to be noted that, the defendant seems to suggest that, it was the stool together with the family head of the plaintiff Opanin Kyei who gave the land out for the project. See the question and answer between the defendant and counsel for the plaintiff during cross-examination, pg. 52 of the proceedings.

Q] Nananom will deal with the head of the family who was in possession of that particular land?

A] Yes, my lady the head of the family Abusuapanin Kyei agreed with Nananom that a project should be sited at the selected site.

Q] Tell this honourable court the name of the family that Abusuapanin Kyei was headed?

A] Abusuapanin Kyei is a member of the Obomeng Kwahu Abusuapanin Caucus and was called to meet Nana on this issue.

Q] In other words you cannot tell this honourable court the name of the specific family that the Abusuapanin Kyei is headed?

A] No my lady

If the Defendant doesn't know the specific family of which the said Opanin Kyei is headed then why did they consult him? Besides, if indeed the land belongs to the state as it is been postulated by the Defendant, why should they seek the consent of the Defendant's head of family to grant same? Besides, granted the land is a stool land or it so belongs to the stool, then Nananom do not need the consent of the plaintiff family to grant same.

From the evidence of the Defendant and the cross-examination of the Defendant, the defendant is at a loss as to the ownership of the land in dispute. In one breath the stool claims to own the land in another breath it is government land. There is no documentary evidence that the land belongs to the government and the defendant did not call any material witness to corroborate his assertion that the land belongs to GRIDCO or any state agency. Besides, there was no reliable documentary proof or expert evidence that the site is within a road reservation.

About the road reservation pictures of the site did not assist the court that much without a site plan and/ Land surveyor's opinion. It is not the duty of the court to go out and fish for information about the land in dispute for any of the parties. It is the parties who should produce all the relevant information about the land for the consideration of the court. The exhibits shown to the court being exhibits B and B1 of the Plaintiff, Exhibits 2 and 3 of the Defendant did little to assist the court in deciding that the land is a state property or within road reservation. It has already been determined in the 1st issue that the plaintiff is the head of her family. At this stage, I can say without any equivocation that the evidence of the plaintiff in respect of the land has been consistent and seems to be more credible. The identity of the land was not in dispute, the plaintiff has been able to prove her root of title and acts of physical control of the disputed land which was corroborated by PW1, she has also shown evidence of complete user of the land,

unchallenged long peaceful undisturbed possession over a considerable period. I have no doubt that the stool in Obomeng , being part of Kwahu has an Allodial interest in the land in dispute however, the stool holds the Allodial interest for and in trust for its subjects and the subject are entitled to the beneficial interest or usufructuary right thereof and the individual family may assign or dispose of its interest thereof but the stool cannot dispose of the usufructuary property without the consent of the family, see page 11 of Dennis Adjei's **LAND LAW, PRACTICE AND CONVEYANCING IN GHANA 2ND EDITION**. The Usufructuary ownership proved by the plaintiff has not been rebutted by the Defendant see the case of **Coleman V. Tripollen and Others [J4/41/2018] SC [28 November 2018]** Dotse JSC. Plaintiff has by the balance of probabilities proved that the Yaa Akyaa family is the rightful owner of the land in dispute. Indeed, it is also evident that the family through its rightful head has not given the land out to any entity. The Defendant cannot give out what it has not got. Nemo dat quo non-habet principle applies here. Based on the above analysis I will settle issue two [B] in favour of the Plaintiff and declare that the land in dispute belongs to the Plaintiff's family.

Whether the land was validly acquired for the construction of the facility.

Now that the court has determined that Plaintiff's family has title to the disputed land, the compelling question is, was the land validly acquired by the Kwahu South District Assembly now the Kwahu South Municipal Assembly from the rightful owner or owners? From exhibits 2 and 3 it is evident that the land was acquired from the Defendant's stool, however, the Plaintiff has now proved by a balance of probabilities that her family owns the usufruct interest or title in the land. The rightful thing the assembly could have done was to deal with the actual owners of the land in dispute, in this case the Plaintiff who is the head of her family. The defendant could act as a facilitator being the chief of Obomeng or an allodial owner of the land, Kwahu lands being mostly stool lands with most subjects having usufruct rights. See JB Danquah's book on Akan Laws and Customs 1928. However, that did not happen. **The 1992 constitution of the Republic of Ghana** guarantees the right to ownership of property. **The Constitution**

Grants the state the right and power to compulsorily take possession of or acquire any property where the necessary conditions and mandatory requirements were satisfied or complied with. For instance, before any private property is expropriated it must be established that:

Act 20 1[a] *"The taking of possession or acquisition is necessary in the interest of the defence of public safety, public order, public morality, public health town and country planning or the development or utilization of property in such a manner as to promote public benefit''.*

1(b) *"The purpose or intention for the Acquisition ought to be stated and as to provide reasonable justification for causing hardship that may result to any person who has an interest or right over the property.''*

There is no evidence that the disputed land has been compulsorily acquired by the Government for any Agency or any company whether Defunct or otherwise for the construction of the facility. There is no documentary evidence of property acquisition of the land from the plaintiff's family. Based on the above observation, I decide that the land in dispute has not been properly acquired by the Defendant, the state or the Kwahu South Municipal Assembly from the rightful family, the Plaintiff's family or whoever encroached on the land in dispute. The issue [c] is therefore decided in favour of the Plaintiff.

Now the final issue to be resolved is as follows:

d] Whether the siting of the facility will pose any health challenges and the plaintiff can have access to their house.

It is the contention of the plaintiff that the siting of the facility, [public Toilet and bathrooms] on the land in dispute close to the plaintiff's completed house is likely to pose health challenges to the occupants of the house. This was denied by the Defendant. The court Suo moto ordered CW1, the Municipal Environmental Health officer of the Kwahu South Municipal Assembly to conduct a locus inspection to ascertain whether where the facility is sited is likely to pose health challenges to those living around the facility. With

the cooperation of both parties and their lawyers, CW1 was able to complete his work and a report was filed in this court on the 29/12 /2022. As earlier said, by law once the parties indicate to the court that they do not intend to cross-examine CW1, then his report is deemed admitted, see **Section 114 of the Evidence Act**. The law is that; a court is not bound by the evidence or opinion given by an expert such as a surveyor. However, it is equally the law that, a court should give good reasons why an expert evidence or opinion is to be rejected.

See:

- **Tetteh & Anor V Hayford (2012) 1 SCGLR 417.**
- **Sasu v. White Cross Insurance Co. Ltd (1960) GLR 4 CA.**

I have thoroughly perused the report of CW1 filed in this court on the 29th of December 2022. None of the parties opted to cross-examine CW1. if a party looks on and allows evidence which ought to be objected to pass without objecting, it forms part of the court record and the court will be entitled to consider it in evaluating the evidence for what it is worth, see the case of **Aryeh & Akakpo v. Ayaa Iddrisu [2010] SCGLR 891 at 902.**

From the conclusion of the Report of CW1, who did the environmental impact assessment of the facility under construction, the facility when completed and well managed in terms of hygiene and standards such as cleaning, regular disposal of anal cleansing materials, regular dislodgement etc would not pose any health hazards or challenges to the houses and persons living around the facility.

However, the facility is yet to be completed and so we are unable to determine whether high hygiene standards will be maintained. However, I am of the considerable opinion that at least, a project of this nature should involve a comprehensive Environmental Assessment Report factoring in Social Impact Assessment detailing the impact on community health and well-being among others bringing all stakeholders on board to make their input. For now, the CW1 was unable to state how the place would be kept forestalling health hazards unless through assumptions, he stated that if the place is kept well with the right gadgets, it will not pose any health hazards to persons living close by.

The court cannot rely on assumptions and speculations since there is no documentation on specific facilities intended to be used for the project. In the absence of any reliable documents from the Assembly or any Agency detailing the type of equipment to be used and how the facility will be kept, any reasonable person will be right to assume that the siting of the facility which is a public toilet is likely to pose health challenges to the health of persons living close to the facility. The court takes judicial notice of management of public toilets in the country which are mostly untidy. The report of CW1 states that there is a building located 20 feet away the facility Exhibit B series also show a number of houses within the vicinity, this sends signal that the area is a residential area. I therefore hold that the project will pose health risk to the persons living close by if it is operated without any comprehensive environmental assessment report involving all stakeholders. On the issue of inaccessibility to the Plaintiff's house, Plaintiff gave evidence and same corroborated by Pw1 on inaccessibility of vehicles to their house due to the siting of the structure. That notwithstanding, the defendant did not ask questions to challenge the plaintiff's assertion even though plaintiff procured evidence to cover this issue. As reiterated elsewhere in this judgement, the law is that where the evidence of a witness is unchallenged in cross examination, it is deemed to have been admitted by the other side, except for few exceptions not applicable here. See **AGC Ltd. vrs. Westchester resources Ltd. [2013] 56 GMJ 84 [PG 128],** I will therefore settle issue [d] in favour of the plaintiff.

In conclusion, I edge whoever put the structure on plaintiff's land to follow due process in acquisition of private property, taking into consideration the health implication. Having considered the above issues in this case, I hereby grant all the reliefs endorsed by the plaintiffs on her writ of summons. Title to the disputed land is hereby declared for the Plaintiff's family. The Plaintiff's family is to recover possession of same. The defendants, agents, assigns, workmen and any person traceable to the defendants are hereby perpetually restrained from having anything to do with the land. Cost of GH¢8,000.00 is awarded in favour of the plaintiff against the defendant.

(SGD.)

JUSTICE CYNTHIA MARTINSON (MRS)

HIGH COURT JUDGE