12-03-2024

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, NKAWKAW HELD ON TUESDAY THE 12TH OF MARCH 2024 BEFORE HER LADYSHIP JUSTICE CYNTHIA MARTINSON (MRS), HIGH COURT JUDGE

SUIT NO. C11/07/23

JANET OWUSUA ASENSO - **PLAINTIFF/APPELLANT**

VS

MADAM MARY OHENEWA PER
HER LAWFUL ATTORNEY
HAROLDOKO-ASAMOAH **DEFENDANT/RESPONDENT**

PARTIES

Plaintiff/Appellant present.

Attorney for the Defendant present.

LEGAL REPRESENTATION

Lambert A. Asobayire holding brief for Phidelis Osei Duah for the Appellant present.

Mr. Atuobi Danso for the Defendant/Respondent absent

Case stood down at 9:35 a.m.

Case recalled at 1:40 pm

PARTIES

Plaintiff/Appellant present.

Attorney for the Defendant present.

LEGAL REPRESENTATION

Phidelis Osei Duah for the Plaintiff/Appellant present.

Yiadom Atuobi Danso for the Respondent present.

JUDGEMENT

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This appeal is emanating from the judgment of the District Court, Abetifi-Kwahu before his Worship Mr. Alomatu a District Magistrate.

The JUDGEMENT is dated the 10th day of February, 2020. Plaintiff/Appellant (hereinafter called the Appellant) filed his writ on 14th of August, 2018 before the trial Court claiming the following reliefs against the Defendant/Respondent (hereinafter called the Respondent) for the following reliefs:

a) A declaration of title to that piece and parcel of land situated and lying at Pepease sharing boundary with Pepease market and Pepease Abetifi Road known as plot No. 5.

b) An Order of Interim Injunction restraining the Defendant, his agents' servants, and workmen from digging a manhole on the disputed land

c) Trespass

The writ was accompanied by an eight paragraph statement of claim.

The Respondent resisted the action by filing an eight-paragraph statement of defence and counterclaimed as follows:

i] A declaration of title to plot no 9

ii] General Damages for Trespass

iii] Perpetual injunction restraining the plaintiff, her assigns agents, and personal representative from entering the said plot to do anything forth with.

iv] Dismissal of the case with cost.

It should be recalled that One Madam Ohenewah Effah joined the action; however, she donated a Power of Attorney for her son Harold Oko-Asamoah to stand in her stead. Later the title of the suit was amended on the 16th of January 2019 as follows:

Janet Owusu Asenso

Vrs.

1] Kwasi Boateng

2] Harold Oko-Asamoah

Counsel for the Respondent then drew the attention of the Court that the 1st Defendant Kwasi Boateng is an unnecessary party and so on the 11th of February 2019, the Court granted leave for further amendment without any opposition instead of nonsuiting 1st Defendant. Then title was subsequently amended to include only Mary Ohenewaah Effah suing per her lawful Attorney, Harold Oko-Asamoah.

When the matter came up for hearing, the Appellant testified and called one witness. When the Respondent took her turn, her attorney testified and called two witnesses before the trial court. CW1, a surveyor, also testified before the Court.

After hearing the parties and their witnesses in the case, the trial Judge entered judgment in favour of the Respondent. This is found at pages 127 to 141 of the Record of Appeal (ROA). The Appellant being dissatisfied with the judgment of the trial Court mounted this appeal on the following grounds:

1. The judgment was against the weight of evidence.
2. The trial Judge erred when he excluded the site plans of the parties on the grounds that stamp duty had not been paid on the site plans.
3. The trial Magistrate erred by failing to fully appreciate the case of the Plaintiff/Appellant thereby giving judgment against her.
4. That the cost against the Plaintiff/Appellant is harsh and excessive
5. Further grounds would be filed upon receipt of the record.

The Appellants did not file any additional grounds of appeal.

It is trite that an Appellant who alleges that the judgement is against the weight of evidence bears the burden or onus of proving or demonstrating to the appellate court the kind or type of piece of evidence on record which were wrongly applied against him or her such that if those pieces of evidence had been applied in his or her favour, the outcome of the case would have tilted in his /her favour. The Supreme Court stated this in the case **Akuffo -Addo V. Catheline [1992]1 GLR 377 SC.**

It is also the law that an Appeal is by way of re-hearing, particularly, where the Appellant alleges in his notice of appeal that the decision of the trial Court is against the weight of evidence, it is incumbent upon an Appellate Court, in a civil case, to analyse the entire record of appeal, and consider the testimonies and all documentary evidence adduced at the trial before arriving at its decision. To satisfy itself that on the balance of probability, the conclusions of the trial Judge are reasonable or amply supported by the evidence.

See: **Tuakwa V. Bosom [2001-2002] SCGLR 61**

Abbey & Others V. Antwi V [2010] SCGLR 17

Ama Serwaa V. Gariba Hashimu and Another [2021] 172 GMJ 96 SC

I will therefore examine the entire proceedings to determine whether the conclusion by the trial Court can be supported in law.

The Appellant testified under oath as follows:

Her name is Janet Owusua Asenso she operates a Fufu pounding machine.

She lives in Pepease. She knows the Respondent but not Kwasi Boateng whom she refers to as the 1st Defendant. She began building stores at Pepease around the market. On or around May 2018, she saw the Kwasi Boateng digging a manhole just behind her stores on her land. She questioned him as to who permitted him to dig the manhole. He replied that he did so voluntarily. According to the Appellant, she followed up to the Town Council at Pepease to find out who granted him access to her land to dig. She said she was told that nobody had granted him permit to dig. It was her further case that she went to the Palace at Pepease to find out if the chief permitted Kwasi Boateng to go unto the land, and the Chief answered in the negative.

The Chief and his elders invited Kwasi Boateng to the palace to answer why he dug the manhole behind her store but he did not honour the invitation. Subsequently, she brought the matter to the Court to claim her land from Kwasi Boateng and to stop him from further encroaching upon her land. According to her, Kwasi Boateng should be ordered to fill the manhole he dug behind her stores. Her site plan exhibit A was later tendered without any objection.

It should also be noted that the Appellant subsequently filed a motion for leave to tender pictures which she succeeded in tendering and admitted in evidence as Exhibit B, B1 AND B2

She was cross-examined by the Respondent's Counsel. In cross-examination, she told the Court that the chief of Pepease, One Nana Ayipa Ababio II also known as Nana Ababio Bonsu granted the land to her evidenced by a site plan signed by

the said Nana in 2018. She further insisted she does not know anything about his chieftaincy dispute but what she knows is that he is the chief of Pepease and the rightful person to give out lands. She does not know that the Respondent acquired her land in 2007 from one Nana Ampadu Okyere. She insisted that when she initially went to the chief for the land, he directed her to the town and country planning office for demarcation and for her site plan. Boateng did not tell her that the land she was building on belonged to Mary Effah.

PW 1 Yaw Kyei gave evidence on oath that he lives at Pepease. He is a mason. He knows the Appellant. She engaged him to work on her land. He knows Kwasi Boateng but does not know the Respondent. He got to know Kwasi Boateng when working for the Appellant. He came to the site and invoked curses on him. Sometime ago, Appellant engaged him to do masonry work on the land for her. While working on the land for the Appellant, Kwasi Boateng came to invoke curses. He left the work. When he went to the land the next day he had dug a trench at the very place he was working. He could not continue with the work on the land as the trench would have caused the building to collapse.

In cross-examination, PW1 insisted that the land in contention is ½ plot which is close to the Pepease market. He also said when he was working on the Appellant's land Kwasi Boateng came to insult him without provocation.

When the Appellant closed her case, the Respondent opened her defence through her Attorney who testified as follows:

His name is Harold Oko-Asamoah. He lives at Lapaz-Accra, and he is a Printing Technician. He knows the Appellant. He got to know her when she sued his mother in the court below. Mary Ohenewaa Efah, the Respondent, is his mother. He tendered the Power of Attorney as Exhibit 1. He continued that his mother acquired the land in the year 2007 or thereabout from the late Nana Okyere Ampadu II Chief of Pepease. Mary Ohenewaa inherited that land from her late

Uncle. The said Uncle Kwabena Boateng had earlier constructed a building on the land leaving a small portion for manhole. The vacant land sold to the Plaintiff was part of the land which his mother is developing so it was not just lying without an owner. There is a site plan on the land.

It should be noted that the Court overruled an objection by the Appellant and allowed the Respondent to tender a site plan which was admitted and marked Exhibit 2. The Court also admitted a building permit which was also admitted in evidence and marked as Exhibit 3. According to him, the permit was granted on the 25th of September, 2006. He added that as a printing technician the mapping on exhibit 'A' is different from his as per the drawing of Pepease. He further added that he could not find Plot No.5 which the Appellant claims shares boundary with the market on her site plan. Again, the Texture of the paper used for the site plan is different from his. It is his case that usually site plans are done on tracing and not bond paper. For durability tracing paper is used. But the Appellant's paper is a bond paper it can easily get wet. According to the Respondent Attorney, it therefore renders exhibit 'A' (paper inferior) and the same should be rejected. He said the Appellant did not tender any building permit and that without a building permit construction should not commence. He finds it very disturbing for her to start building without a permit. However, they were given the permit to start construction. Respondent's Attorney said the Mason started the building on the portion of the land leaving the portion the Appellant claims, which was meant for a manhole for their building. It is his further case that the land the Appellant is claiming is part of their property. He knows that whoever sold it to the Appellant knew his mother was out of the country hence the person did that. It is his case that the seller asked the Appellant to build quickly on the land so that it would be too late for his mother to return and claim it. He testified that the Appellant was deceived to buy the land. This is because the land is at the centre of the town, not the outskirt. Other town folks told the Appellant that the land belonged to somebody but the Appellant went ahead to quickly develop the land. He added

that he is aware there is a chieftaincy dispute involving the said Nana Ababio Bonsu who sold the land to the Appellant at the Kwahu Traditional Council and Regional House of Chiefs. He wants the Court to declare that her mother Mary Ohenewaa owns Plot No. 9 as evidenced by Exhibit '2' which was granted to her by Nana Okyere Ampadu in the year 2007 which shares boundary with the lorry station of Pepease at the market.

In cross-examination, he asserted that plot no. 5 is not indicated within the Appellant's site plan. He insisted that plot No. 9 existed before plot No. 5 was created and that the Applicant's site plan was different from his. He also asserted that the numbering of plots is done by the assembly.

DW1 Yaw Koranteng testified on oath as follows: He lives at Pepease, and he is a trader and a linguist to the late Kyedomhene, one Nana Okyere Ampadu II. He knows Madam Ohenewaa Efah. He got to know her when she once came to see the late Nana Okyere Ampadu II. He continued that he knows about the land in dispute. He said in the year 2007 the Respondent came to the Chief Palace to tell the chief that his Uncle by name Kwabena Boateng gave her the land on which she was building but had no document covering the said land. There was an uncompleted building on the land. The Chief through him told her she needed the Town and Country Planning Department to process the document for her. Subsequently, the officials of Town and Country Planning Department were invited by the Chief and they came, the Chief delegated him, another Okyeame Yaw Koranteng Senior, Nana Kwabena Boateng Nifahene of Pepease, Nana Gyafo, Asumredu II and Kwaku Nkrumah together with the Town and Country Planning Department officials to go unto the land of Ohenewaa Efah. When they got there, they met Akosua Tima, the young sister of Madam Efah on the land. The Officers then took measurements of the land and demarcated the land for Efah. It was left with a small portion of the land that could not be occupied by any other person. She then pleaded with the officials that the small portion left be added to her land.

The officials then told her that the said request should be made to the Chief. When they returned, they informed the Chief about her request. The Chief accepted it and as a result, they added the remaining portion to the land of the Respondent (Ohenewaa Efah).

That in the presence of the Officials the chief granted the land to Ohenewaa and sealed the deed with a bottle of Schnapps and GH¢700.00. The Chief then told officials to prepare the site plan to cover the land for her and the same is Exhibit 2. He knows the Appellant in the Pepease community.

In cross-examination, He admitted his name is Yaw Koranteng. He asserted that he was a linguist even though there is a senior relinquish bearing the same name. He admitted that the Appellant said his late Uncle gave the land to her when she appeared before them at the palace.

DW2 Kwasi Boateng who was eventually non suited was invited by the Respondent as a witness he testified as follows: He lives at Pepease and works as a Security man at Kwahu Rural Bank Pepease. He knows Mary Ohenewa Efah who is his elder sister. He added that his uncle known as Kwabena Boateng gave the land to Mary Ohenewaa Efah. It was in 2007 that she went to the Chief palace and had a document prepared to cover the land for her, which she built on. She instructed her to be working on the land for her. She told him to dig a septic tank on the land for her. He knows the Appellant' she is a native of Pepease. She used to live in Accra and is now back to Pepease.

The Appellant did not have any cross-examination for the witness. However, the witness responded to the cross-examination of the Court a summary of which is as follows:

He was present when the land was gifted to the Respondent by her uncle and she rendered Aseda to him.

It should be noted that the earlier Order made by the Court to have a surveyor appointed was disregarded and instead an officer of the town and country planning unit was appointed to survey the land. However, the Court rejected the report dated 11/12/2018 and made an Order for a composite plan to be drawn with the aid of the site plan of both parties by Mr. Ernest Nyarko of the Lands Commission Survey and Mapping Division, Koforidua. There was no objection from both sides.

Evidence of CW1

On the 6th day of May 2019 CW1 started his evidence and gave further evidence on the 3rd of June, 2019 the Court witness testified as follows:

He is a surveyor from the Lands Commission Survey and Mapping Division Eastern Region. He said he went to the site of the disputed property with the two parties in this case. CW1 Said the Appellant pointed out the boundaries of her land. The Respondent also had the opportunity to point out the boundaries of his mother's land. He said that using the Global Position System [GPS] He picked the coordinates of the various plots. Having completed the field work he later plotted out the various plots. CW1 identified the land area of the Appellant as follows: P1 P2 P3 drawn with a red line, her boundary is indicated with magenta. The land area of the Respondent was also identified as follows; D1, D2, D3 and D4. However, her boundary is indicated as blue. It is his case that the Shaded hatched black Portion is the area in dispute. CW1 tendered the composite plan without objection from both sides and the Court admitted same as Exhibit CE1.

The relevant portions of the cross examination of CW1 by the Appellant is as follows:

CW1 admitted that he saw a manhole on P1 and P4. He also indicated that there is no number on the site given to him by the Plaintiff/Appellant but later admitted that her plot No. is plot No. 5 and that of the Respondent is plot No. 9.

Relevant portions of cross-examination of CW1 by Respondent's Counsel:

CW1 admitted that regarding the parties, the site plan they gave him and the actual physical pointing out on their respective boundaries show a larger land than what they had on their respective site plans. He also explained that a composite plan has to do with the comparison of two site plans that are superimposed. He said what the Respondent pointed out physically to him was what was used for the composite plan. He also indicated that the structures on their respective plans have been indicated on the composite plan.

When the Court took its turn to cross-examine him, he indicated that he saw an uncompleted structure on the Plaintiff/Appellant's land and the same was indicated on the composite plan. He also saw structures on the defendant/ respondent's land. He again indicated that per his work there has been an encroachment and that the Defendant/Respondent has come into the land of the Plaintiff. That on the disputed land he saw an uncompleted building and the Plaintiff pointed it out to be hers. She also said all the parties were present when he was undertaking the work.

As I have stated already, it was after the conclusion of the case that the trial Judge gave judgment in favour of the Respondent which triggered this appeal.

Counsel for both parties filed their respective submissions in this case.

SUMMARY OF THE SUBMISSIONS OF COUNSEL FOR PLAINTIFF/ APPELLANT.

Counsel submitted that the appeal should be upheld for the following reasons:

A] That the trial Judge erred when he excluded the site plans of the parties because site plans are not INSTRUMENTS under the Stamp Duty Act 2005

B] That Plaintiff/Appellant's site plan is distinct and does not abut Defendant/Respondent's site plan since the Appellant is claiming plot no. 5 and Respondent plot no, 9. That the surveyor who prepared the composite plan placed both lands together abutting each other.

C] That the composite plan is flawed in many respects since it does not capture all identifiable physical features like the market and lorry park which would have made it easier for the Court to reach a decision.

D] It was the Appellant who was in possession of the land and has an uncompleted building thereon and the Court witness testified to that. The Respondent did not give evidence of possession. CW1 concluded that the Respondent has encroached on the Appellant's land.

E] The Magistrate's position that the Appellant's land was granted alone by the chief without the concurrence of his elders was not supported by the evidence on record to allow him to reach such conclusions. Again, no where did the Respondent mention that her grant was made by the chief with the consent and concurrence of the elders.

SUBMISSION BY COUNSEL FOR DEFENDANT/ RESPONDENT.

On the part of the Respondent, her Counsel submitted that the appeal should be dismissed for the following reasons:

A] He argued that the Supreme Court has held that in an action for a declaration of title, it is the duty of the Plaintiff to prove his root of title, mode of acquisition and overt acts of possession and cannot rely on the weaknesses of the Defendant’s case. He further argued that where the Defendant counterclaims then the same burden must be used in evaluating and assessing the Defendant.

B] The Appellant did not identify any irrelevant matter/ matters which the trial judge took into account in arriving at the impugned decision. The Magistrate

rejected both site plans on the grounds that they had not been signed and that sins against the Stamp Duty Act 2005 [Act 689] and not because the stamp Duty had not been paid.

C] The trial Judge properly considered both cases and realised that the respondent had a long period of undisturbed possession since 2007 prior in time to the Appellant. Since both lands were granted by the Pepease stool, it is the 1st in time which should be upheld since the stool has no more land in the disputed property to grant to a later grantee.

D] The Appellant's hue and cry about the rejection of the site plans is much ado about nothing since the same was of no value for the determination of the issues of declaration of title before the trial court.

E] The Appellant fought his case principally on a flawed site plan. He also failed to call any material witnesses like his grantor. The side of the Plaintiff's land is greater than the one on the site plan. No Court of justice could be expected to give a declaration of title or recovery of possession to a Plaintiff whose boundaries are so uncertain.

F] Counsel for Appellant did not argue the issue of cost and is therefore deemed to have been abandoned.

It is my duty to decide one way or the other.

Let me reiterate from the onset that in the celebrated case of **Djin V Musah Baako [2007-2008] SCGLR 686,** the Court outlined the burden imposed on an Appellant who appeals on the omnibus ground of appeal. The Court said "Where an Appellant complains that a judgment is against the weight of evidence, he is implying that there were certain pieces of evidence on the record which, if applied in his favour, could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an

Appellant to demonstrate to the Appellate Court the lapses clearly and properly in the judgment being appealed against". This means, in this case, it is the Appellant who carries such a burden.

My duty as an appellate judge is to review the oral evidence as well as the documentary evidence and determine whether the conclusion by the trial Judge was right or wrong. In the substantive case, the Respondent counterclaimed. A person who counterclaims in a land matter bears the same burden to prove his case as that of the Plaintiff. Therefore, the Respondent having counterclaimed for a declaration of title also equally bore the same burden as the Appellant at the trial to prove her title.

See: **Dora Boateng v. McKeown Investment Ltd [j4/12A/2019][2020]Unreported SC [05 Feb 2020] Amegatcher JSC**

Kwahinkrom V. Mmonyi [2010] 28 MLRG 183 CA

Yorkwa V. Duah [1992-1993] GBR 278 CA

Ackah V. Pergah Transport Ltd & Another[2010] SCGLR 728

It should be noted that the Appellant did not file any additional grounds of Appeal as indicated in the Notice of Appeal filed on her behalf. **Due to the nature of the first three grounds of Appeal argued by Counsel for the Appellant, I will determine and resolve all under the omnibus ground of Appeal**.

Counsel for the Appellant submitted that the Court erred when he excluded the site plans of the parties on the ground that stamp duty was not paid on the site plans.

It should be noted that on the issue of the site plans this was what the Court said at pg. 138 of the ROA *"in the view of the Court, a cursory look at Exhibit A shows that it has not been* ***signed or registered."*** *It certainly sins against the Stamp Duty Act 2005*

[Act 689] therefore the Court cannot rely upon it. The trial judge also quoted the case of **Lizori Ltd v. Boye & School of Domestic Science and Catering Services** [2013-2014] SCGLR889. He ended by saying "*I, therefore, exclude exhibit A*".

In the case of **Lizori Ltd V Boye & School of Domestic Science And Catering [2013-2014] 2 SCGLR 889,** the Supreme Court held per Benin JSC at page 903 as follows: "The provision in section 32 of Act 689 is so clear and unambiguous and requires no interpretation. Either the document has been stamped and appropriate duty paid in accordance with the law in force at the time it was executed, or it should not be admitted in evidence. There is no discretion to admit it in the first place and order a party to pay the duty and penalty after judgment".

See also, **Woodhouse Ltd. V Airtel Ghana Ltd [2017] 114 GMJ 96 CA**

I must admit that site plans are not documents or instruments affecting land which ought to be stamped in accordance with the Stamp Duty Act, 2005 (Act 689) as rightly stated by Counsel for the Appellant. Also, It would have been wrong if the learned trial Judge had excluded the site plans on the reason that they are unstamped. See **Boateng v Manu [J8/42/2006][2006]DLSC 6437**

However, as rightly stated by Counsel for the Respondent and as appears in the records, the trial Judge's reason for excluding the site plans is that they are unsigned and unregistered. However this is not the ratio in the **LIZORI** case cited by the trial Judge and as remarked by Counsel for the Appellant. The decision to exclude the site plans because they are unsigned and unregistered to me is unfortunate; this is because no evidence was led as to the competency of signatories beneath the Appellant's site plan. An examination of Exhibit A shows clearly that Exhibit A was signed by the Town and Country Planning district director. No questions were asked to unravel the competency of the officer who signed the said document. There was no evidence on record to show that the site plan Exhibit A was not signed by a licensed surveyor. It should however be noted that site plans per se are not instrument under the Stamp Duty Act. The trial Court

therefore erred by excluding same. Also, 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 vrs. 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''.*
>
> I must however add that these site plans are not instruments affecting land and the requirement of registration and stamping do not affect them. See the case of **Boateng vrs. Manu [2006] DL SC 6437**

May I also say that unlike the Appellant's site plan, that of the Respondent was unsigned at all. The site plans tendered by the parties are not instruments or documents that affect lands per se in section 50 of the Stamp Duty Act 2005 ACT 689 and Section 281 of the Land Act 1036, considering the definition of Instruments. These site plans need not be registered as such under any enactment. The learned trial Judge should have allowed both site plans to go in for whatever they were worth without excluding them. These site plans do not confer any right or title to land.

I so allow both site plans to go in for whatever they are worth since they are not instrument affecting conveyance of land per se.

Both site plans having gone in for whatever they are worth, it ought to be recalled that the Appellant was claiming the land as demarcated on exhibit A which she referred to as plot

No. 5 whilst the Respondent was also claiming the land delineated on Exhibit 1 which she also referred to as plot No. 9.

As earlier indicated, both parties bore the burden of proof since the Respondent also counterclaimed. It is the basic principle of the law of evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim must fail. It is also trite that the method of producing evidence is varied and includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things without which the party might not succeed in establishing the requisite degree of credibility concerning a fact in the mind of the Court or the tribunal of fact. See

- **Daon Ackah v. Pergah Transport [2011] 31GMJ174SC Pg 183**
- **Amegashie v Okine [1992]2GLR319 Lutterodt J**
- **and Sec 11 of Evidence Act 1975b NRDD 323**

The controversy between Exhibit A and 1 led to the appointment of Court Expert CW 1. 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 vrs. Hayford (2012) 1 SCGLR 417.

Sasu vrs. White Cross Insurance Co. Ltd (1960) GLR 4 CA.

Darbah & Anor. Vrs. Ampah (1989-1990) 1 GLR 598 CA.

I have good reason to reject some portions of the report of the expert evidence, the Surveyor in this case.

In the case before me, the trial Court disclosed that from the evidence of CW1 both the land of the Appellant and the Respondent were bigger than what their site plans disclosed. It should also be recalled that since the Respondent also counterclaimed, both bore the burden of proving that the land in contention is for them. In the case of the Appellant, it should be noted that CW1 categorically stated that in his estimation the disputed land forms part of the Appellant's land; see Pg. 49 of ROA.

Q] Per your work, will you say that one party has encroached on the land of the other?

A] Yes

Q] Who did?

A] Comparing the site plans the two parties produced, and comparing them with physical measurements on the site, their respective physical measurements were more than what they have on their site plans. Per our physical surveying on the ground, the defendant had come all the way into the land of the plaintiff.

Q] What did you think would have accounted for the difference in land size as per their respective plans against what they pointed out physically to you?

A] It is because the layout from which they had their site plan was not marked on the ground.

However, it is very difficult to swallow hook line and sinker this evidence of CW1. This is because he testified that the physical land of the parties shown to him is more than what is on their respective site plans. But still managed to conclude that the Respondent has gone into the land of the Appellant even though from his own

assessment the layout from which the parties got their site-plans was not marked on the ground. I therefore wonder why CW1 seeing the defect in the site plans of both parties and also being minded that the layout from which they had their site plan was not marked on the ground could still conclude that the Respondent has gone into the land of the Appellant.

Again During the cross-examination of CW1 by the Appellant, this is what transpired between CW1 and the Appellant; see pg. 46 of ROA

Q] The site plan I gave you what was the number?

A] There was no number on it.

Q] I put it to you that there is a number?

A] It is no 5.

Q] What is the No. for the Defendant's plot?

A] No. 9

Interestingly at one time, CW1 told the Court that there was no number on the Appellant's site plan. At another time he admitted the Apellant's plot number is plot No 5. This is conflicting. However, a critical examination of the Appellant's site plan shows that there is plot No. 5 indicated on top of the site plan however within the demarcation on the site plan itself there is no plot No. 5 indicated for the Appellant as it is usually done on site plans or cadastral plans. However, what is more disturbing is the statement CW1 gave pertaining to the physical sizes of both lands being more than what has been demarcated on their site plans, his assessment of the layout of the area and his conclusion. I find this aspect of CW1's work and his conclusion on the encroachment to be unreliable.

What is therefore left to evaluate the case of the Appellant and the Respondent are their respective evidence and the witnesses as well as their documentary exhibits

including their site plans which I have indicated should go in for what they are worth and the rest of the report of CW1, being CE 1.

It is the case of Counsel for the Appellant that it is the Appellant who is in possession of the land and has a building on the land and per the evidence of CW1 the Court should have declared title of the disputed land to her.

The law is that possession is nine points of the law and a plaintiff in possession has a good title against the whole world except one with a better title' see the case of **Osei v Korang [2013] 58GMJ1 at 26-27**

Now it is apposite that we put the evidence of the Plaintiff in perspective whether she was able to prove that she has the right of title to the disputed land or the right to continue to remain in possession as against the true owner.

In this case, the Appellant gave evidence that she bought her land in 2018 from the chief of Pepease Nana Ayipa Ababio II, she started constructing her stores thereon but the Respondent trespassed onto the land to construct a Manhole. She made inquiries to ascertain who granted her access unto her land at the chief's palace and she was told nobody had given the land out to the Respondent. She tendered Exhibit A her site plan, Exhibit B, B1 and B2 being pictures of the manhole dug on the disputed land. When the capacity of his grantor to grant the land was challenged under cross-examination, she remained resolute insisting that his grantor has the capacity to grant the land in dispute. PW1, one Yaw Kyei who did mansory work for the Plaintiff testified in her favour and said he was among the team who demarcated the land for the Plaintiff in cross-examination.

Here it should be noted that the Respondent counterclaimed and per the ratio in **Jass Co. Ltd. & Anor vrs. Appau & Anor [2009] SCGLR 269,** a Defendant who files a counterclaim has the same burden as the Plaintiff in a declaration of title to land to satisfy the Court on the balance of probabilities that she has title to the land.

It is the assertion of Counsel on both sides that before title can be declared to the Appellant then the Plaintiff, she should have established positively the identity and the limits of the land she laid claim to as stated in a line of cases including **Nyikplorkpo vrs. Agbedotor [1987-88] 1 GLR 165 at 171**. With all deference to their positions, this is not the apt position of the law when a Defendant counterclaims against a Plaintiff over the same piece of land.

The law is that when the parties are litigating over the same piece of land none of them will be permitted to challenge the identity of the other person's land. See the case of **Subunor vrs. Kwao and Another [No.J4/07/2018][2019] Gbadegbe JSC**. However, in this case even the identity of the land was not in dispute at all even though the parties and CW1 made it appear as if the identity of the land was in dispute. The area in dispute is where the manhole was dug and the law is that when the identity of a particular land is not in dispute there is no duty cast on the parties to prove same. See the case Of **AGbosu and Others vrs. Kotey And Others [2003-2005]1 GLR 685**

In respect of her root of title, both the Appellant and the Respondent bore equal responsibility to lead evidence to prove the Root of Title on the preponderance of Probabilities. In this case, from the cross-examination of the Appellant by the Respondent Counsel, her Root of Title was challenged. In fact, the Respondent challenged the capacity of the Appellant's Grantor to grant the land in dispute. The law is that it is the responsibility of the grantor where the title of the grantee to the land is challenged or where the grantee's possession is disturbed to litigate his [Grantor's] title to the land. In other words, to prove that the right, title, or interest which he purportedly granted was valid. See **Salomey Shorme Tetteh & Another vrs. Mary Korkor Hayford and Another [2012] Civil Appeal no. J4/34/2 Jones Dotse JSC.** In this case, even though the Apellant's Grantor's capacity to grant the land was challenged, she did not call his grantor to testify for her. This is more important because both the Appellant and the Respondent both claim to have been

granted the land by the Pepease stool. Whilst the Appellant claims her plot No. is Plot 5, the Respondent claims hers is plot No. 9 and was granted before that of the Appellant. Again as earlier discussed, some aspects of the work of the surveyor was not that helpful. In the case of the Appellant, once his grantor's capacity to grant was under serious challenge she should have invited him and her failure to call him is detrimental to her case. The evidence of PW1 did not help much since it was merely on the building he put up for the Appellant but had very little knowledge on the grant of the site in contention that is the manhole area where he confirmed that the Respondent’s witness approached him and accused him of trespass and even cursed him. I am therefore not convinced that the Appellant was able to prove her root of title to plot No. 5 beyond a balance of probabilities. She did not call any material witness from the grantor's family or stool to buttress her case. From the evidence of the parties, the Court is clear in its mind that both parties pointed to the manhole as the land in dispute and so the identity of the land is therefore not in contention as earlier indicated.

As earlier stated, possession will only be granted to whoever is in possession of the disputed land once there is no other person with a better title to the land in dispute; **see Osei vrs. Korang [2013] 58 GMJ at 26-27 Ansah JSC.** Therefore, physical possession of property and documents alone cannot be conclusive evidence of title. **See Mamudu Wangara vrs. Gyato Wangara [1982-83] GLR 639 CA**

On the ground of Appeal that the judgement is against the weight of evidence, it is the contention of Counsel for the Appellant that she is in possession and he did state the correct law on possession. Granted that the Appellant is indeed in possession of the land as Counsel seemed to suggest, the law is that a person in de facto possession of land and assumes the character of the owner and exercising all the rights of ownership has a perfect good title against the whole world except the rightful or true owner. See the case of **Mumuni vrs. Nyamekye [2013] 58 GMJ 35**

CA at 66 Ayebi JA. CW1 also indicated that it is the Appellant's building that was found on the land in dispute.

Just as I earlier indicated some aspects of the evidence of CW1 is quite unreliable. It should be noted that CW1 missed the point by considering the disputed land as including the building of the Appellant. See the following responses of CW1 in cross-examination by the Court; See pg. 48 of the record

Q] On the disputed portion of the land did you see any structure?

A] Yes

Q] What did you see?

A] I saw uncompleted building.

Q] Did any of the parties identify this building?

A] It is the Plaintiff who did as her property

However, from the evidence of the parties, it is clear that the area in contention is where the manhole has been dug and not the building of the Appellant. On the issue of possession therefore CW1's evidence is totally unreliable. Granted that the Appellant was even in possession, her occupation has been challenged. See the Cross-examination of PW1 on page 59 of the court

Q] When you started working on the land 1st Defendant challenged you; how did he challenge you?

A] Whilst I was working on the land 1st Defendant came to insult me with curses that I should stop the work.

A] What did you do?

Q] I did not do anything but reported him to Pepease chief.

The law is that possession that is challenged and not quiet and peaceful is not considered as possession in the eyes of the law. See **Kama Health Services Limited vrs. Unilever Ghana limited Civil Appeal J4/24/2013**.

Therefore granted the Appellant is even in possession as Counsel seems to suggest, is there no true owner of the land?

Now as earlier indicated a counterclaim is a fresh action and so in this case the Respondent equally bore the same burden as the Appellant to prove her title to the disputed land. See **Dora Boateng vrs. McKeown Investment Ltd J4/12A/2019][2020]SC [unreported]**

Respondent who spoke through her Attorney told the court that he acquired the disputed land from the Pepease stool in 2007 and his plot is Plot No. 9. He continued that unlike the Appellant, his principal inherited her plot and the mason showed her the plot. The land in dispute forms part of the Respondent's plot. He said the Appellant's land is nowhere near her plot. He tendered the power of Attorney Exhibit 1 the site plan Exhibit 2 and the building permit as Exhibit 3 to buttress their case. He told the Court that the disputed area was left for the construction of a manhole after the acquisition of the building permit which building had started. The Appellant did not know that the Respondent owned the land which is in town. It is the case of the attorney for the Respondent that the Respondent has title to the land in dispute that shares boundary with the lorry station at Pepease and at the Pepease market. In cross-examination, he maintained that the Appellant's plot No. 5 is not indicated on his site plan and that his Principal's grant was the first in time.

Respondent invited DW1 the Linguist of the late chief Nana Okyere Ampadu II who sold the land to her to buttress her case. The said Linguist narrated how the Respondent came by his plot and how he personally witnessed the transaction from the beginning to its conclusion, mentioning all those present during the grant of the land to the Respondent. He actually identified Exhibit 2 as the document

that was prepared by the town and country planning Department for the Respondent.

It should be noted that after the testimony of DW1 the Appellant did not do any elaborate cross-examination of the contents of the evidence save the issue of his work as a linguist the law is that a person cannot prove a negative and so the onus was on the Appellant who was asserting that DW2 was not a linguist to have demonstrated otherwise.

The material evidence made by DW1 on the disputed property was not denied by the Appellant in cross-examination. The law is settled that when material evidence was not denied in cross-examination, no issue was joined and the party need not lead any further evidence on it. Similarly, when a party has failed to deny material evidence no duty is cast on the other party to proof it. **Western Hardwood Enterprises Limited and Another vrs West African Enterprises Ltd. [1998-99] SCGLR 105**

I, therefore, find as a fact that the evidence of DW1 on plot No. 9 is probable. I wish to add that the statement of claim and of defence filed by the parties are pleadings and not evidence. Therefore, if an averment of material evidence is denied or countered in the pleadings, it must also be denied in cross-examination and this is trite law. See the case of **Boi & Anor. vrs. Adjei [2014] SC [Unreported]**

In the case of the Respondent, the law requires of him in a declaration of title just like the Appellant to prove his root of title, the identity of the land positive overt act of possession or the right of possession or use of the land. See **Aikins v. Dakwa [2013] GMJ 187 at 213**. However, Physical possession alone as has been already discussed cannot ripen into ownership.

In the case of the Respondent she disclosed her root of title and called evidence from his Grantor's quarters to buttress his case, DW1 confirmed that he was present when the disputed land was granted to the Respondent and confirmed

Exhibit 2. I have no reason to disbelieve the evidence of DW1. The trial judge who saw him in person also believed him. DW1 has no interest in the outcome of the case. He is not related to any of the parties. His evidence was unshaken during cross-examination. The law is settled that where the evidence of such an independent witness on a vital issue corroborates the evidence of one party or the other, a Court is bound to accept the case of the party so corroborated by the independent witness unless there are good reasons for discrediting the independent witness. In this case, the reasons must be clearly stated in the judgment.

See: **Boateng vrs. Boateng [2009] 5 GMJ 58 CA**

Asare vrs Donkor & Serwah II [1962] 2 GLR 176 SC

Manukure vrs. Agyekum & Others [1992-1993] 2 GBR 888 CA

As I already indicated the identity of the land was of no issue since both parties claimed the manhole. In the case of the Respondent, he was able to demonstrate clearly that where the manwhole was dug is the disputed land. The site plan that was handed over to him has plot No. 9 and same was also shown on the site plan itself. This is unlike the Appellant who claims plot No. 5 even though inside the drawings on the site plan there was no plot number 5 indicated for the Appellant. I believe this led to confusion in the mind of CW1 in saying that there was no plot number on the site plan only for him to admit later that there was a plot number on the site plan. Again, the Appellant's evidence that the site was granted to her was challenged but she did not call any credible evidence to buttress her case contrary to the position of Proof as stated in the case of **Majolagbe vrs. Larbi [1959] 1 WACA 235.**

Counsel for the Appellant in discussing the omnibus ground of Appeal which is that the judgement is against the weight of evidence also hit hard on the observation of the trial Court that the grant of the Appellant land was not made by

the stool with the consent and concurrence of the elders. I strongly agree with Counsel for the Appellant that this piece of evidence was truly not borne out of the record even though the trial Judge rightly stated the position of the law on the grant of stool land.

Counsel for the Respondent also made fetish of the issue of non-registration of the site plans. However the law is that Registration of land per se cannot confer ownership to a party especially where the party with the registered document knew or ought to have known that the land in issue is encumbered. **See Tonado Enterprises vs. Chou Sen Lin [2007-2008] SCGLR 135 BROBBEY JSC.**

The above notwithstanding, statements and documents that the trial judge erroneously considered and disregarded such as the rejection of the site plans and others did nothing to overturn the decision in favour of the appellant.

I am therefore convinced beyond doubt that unlike the Appellant the Respondent was able to proof her case beyond a balance of probabilities and therefore the trial Court was right to declare title to her.

I therefore find as a fact that the land in dispute belongs to the Respondent. I do not think the trial Judge erred in declaring title to the Respondent save his line of reasoning in portions of the judgment in the Court below which have been noted and discussed in this judgment. The pieces of evidence identified by the Counsel for the Appellant could not overturn the judgement in favour of the Appellant. The effect is that the appeal fails and the same is dismissed. I will affirm the judgment of the trial Court dated 10th February, 2020.

It should be noted that the issue of excessive cost at the lower Court was not argued at all by Counsel for the Appellant. As rightly said by Counsel for the Respondent the failure to argue the said ground of Appeal by Counsel is deemed abandoned. I am therefore not persuaded to discuss the said ground relating to cost at the Court below.

I will award cost of GH¢4000.00 against the Appellant in favour of the Respondent.

(SGD.)

JUSTICE CYNTHIA MARTINSON (MRS)

HIGH COURT JUDGE