IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: YEBOAH CJ (PRESIDING)

PWAMANG JSC

KOTEY JSC

AMADU JSC

PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL

NO. J4/64/2022

7TH DECEMBER, 2022

NANA KORKOR NTIM ……. PLAINTIFF/APPELLANT/APPELLANT

VRS

STEPHANIE ANSAA OPARE ……

DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

KOTEY JSC:-

INTRODUCTION

This appeal is instituted against the unanimous judgment of the Court of Appeal, Koforidua, dated the 16th of December 2020, which affirmed the decision of the High

Court dated 19th Day of July 2019, striking out the suit therein as disclosing no reasonable cause of action since the action initiated by the Appellant was statute-barred. The Plaintiff /Appellant/Appellant (hereinafter the Appellant), dissatisfied with the decision of the Court of Appeal, has brought the instant Appeal to this Court. The Defendant/Respondent/ Respondent will hereinafter be referred to as the Respondent.

BACKGROUND

The Appellant commenced an action at the High Court, Koforidua, by an amended writ of summons and amended statement of claim filed on 13/05/2016 against the Respondent for the following reliefs

1. Declaration of title to a piece or parcel of land at Kitase-Akuapem bounded on the Southwest by Aburi – Accra motor road, on the North- West by Springfield Avenue, on the North-East by Adusei Poku Lands on the East and South - East by the Asona Family, and on the South by the Asona family lands making an approximate area of 22.76
2. Damages for trespass
3. Recovery of possession,
4. Perpetual injunction against the Respondent, her agents, assigns, representatives and successors from making any claim to the land in dispute.

The Appellant alleged in her amended statement of claim that she is the queen mother of Kitase and that her family, the Asona family owns a vast tract of land in the Kitase-Peduase area. She further alleged that as the queen mother, the principal members of the Asona Royal family granted her land to assist her in her administration and that she had taken control and possession of the land and exercised ownership over the land. She claimed further that apart from her no other senior or principal member of the Royal Family can or has the right to deal with anyone in respect of those lands.

The Appellant averred that she had, in her capacity as queen-mother granted parcels of the land to several people, some of whom have built on the lands and occupied same. She claims that she made a grant of the subject matter to one Glenda Mills; however, litigation arose as one Dr. and Mrs. Kwesi Nuamah challenged the grant in suit no. 104/2002 at the Circuit Court, Akropong – Akuapem titled **Dr. Isaac Kwasi Nuamah and Mrs. Linda Nuamah v Glenda Mills and Nana Korkor Ntim**

She successfully defended her title and obtained a demolition order to demolish the structure of encroachers on that land. The order was however stayed on the application of the Respondent herein, who alleges that she is the owner by the purchase of the subject matter and had reduced it to possession by building a piggery and fence wall. The Appellant then instituted a search at the Lands Commission to verify the claims of the Respondent. Based on the site plan presented by the Respondent, her investigation revealed that the parcel of land claimed by the Respondent fell out of the boundaries of her lands, wherein she instituted the suit at the High Court.

The fundamental case of the Respondent is that she had purchased 0.51 acres of land from Viola Jones in 2001 and duly registered same. She averred that she had not been a party in the suit at the circuit court in respect of which the Appellant had obtained judgment and the demolition order. She alleged that she immediately reduced the land into her possession by employing a caretaker, putting up a wall, and constructing a piggery. She further contended that if the land is found to be the Appellant's, she had been in quiet possession since 2001 before the Appellant attempted to demolish her structures in 2015; thus, the action is statute-barred to the Appellant, and therefore the case be struck out.

TRIAL HIGH COURT

After the Appellant had filed and served her Amended writ of summons and the statement of claim, the Respondent filed an initial defence on 8/11/16, to which the

Appellant filed her reply on 24/11/16, bringing pleadings to a close. The Appellant then filed her application for direction on the same 24/11/2016, while the Respondent filed additional issues on 1/12/16, after which directions were taken. Under the court's order, the Appellant filed her witness statement and pretrial checklist on 20/1/17 and 24/1/17 respectively. On 31/1/17, the Respondent filed a motion for leave to amend her defence, which was granted. The Respondent then filed her amended defence on 10/3/17, where she contended that in the case she was found to be on the Appellant's land, the court must consider that she had been in adverse possession of the land since 2001 and had enjoyed quiet possession from 2001 to 2015 in which case the suit should be dismissed as statute barred. The Appellant filed no reply to this amended statement of defence. The Respondent herein then filed her pre-trial checklist and witness statement on the10/3/17.

As with procedure, the court ordered a composite plan to be drawn wherein the parties filed their respective survey instructions. After the composite plan was filed, the surveyor's evidence was taken as CW1. The evidence of the court witness showed that even though the Respondent's boundary, as shown on her site plan is outside the Appellant's land, on the ground, the Respondent's boundary is within the Appellant's land. He also confirmed that the Respondent had put up a partial wall and piggery on the land.

Subsequently, the trial court adjourned to give a ruling on the preliminary issue of the operation of the statute of limitation about the Respondent's occupation of the disputed land. The court ordered the parties to file their written submission to determine the issue with which they complied.

The learned High Court judge, on 19/7/2019, delivered her judgment after a summary trial on consideration of the parties' submissions. The court found for a fact that the Respondent had been in adverse possession of the Appellant's land and had enjoyed undisturbed possession of the land for 14 years. Consequently, it held in favour of the

Respondent that the appellant's suit is indeed statute-barred and therefore discloses no reasonable cause of action. The Appellant's action was accordingly struck out.

COURT OF APPEAL

The Appellant, unsatisfied with the above judgment, initiated an appeal at the Court of Appeal. The grounds for Appeal at that Court are as follows.

i. The judgment was against the weight of evidence.

ii. The trial judge erred when she failed to take evidence from the Plaintiff thereby breaching the rule of audi alterum partem

iii. that the trial judge erred in law by applying the statute of limitation to dismiss the Plaintiff's claim

iii. Additional grounds of appeal will be filed upon receipt of the Record of appeal (sic).

No other ground was filed as indicated in the Notice of Appeal. The Court of Appeal, in its judgment, found no cause to interfere with the decision of the trial High Court. In the opinion of the learned justices of the Court of Appeal, it was clear on the uncontested facts on the record that since 2001 the Respondent had been on the Appellant's land in the mistaken belief that it was the land she had acquired and registered. The court was also satisfied that the procedure adopted by the trial court conformed to the requirements of the law and that the correct principles were applied in coming to its decision to dismiss the action.

APPEAL TO THE SUPREME COURT

Aggrieved by the refusal of his Appeal by the first appellate court, the Appellant filed this instant Appeal before this Court, seeking a reversal of the decision of both the

Trial Court and the Court of Appeal. The grounds of Appeal filed by the Appellant were as follows:

i. The court below erred in law when it allowed the defendant/respondent/respondent (hereinafter called 'Defendant') to use an amended defence to set up an entirely new case based on which the plaintiff's suit was dismissed.

ii. The court below erred in law when it held that the plaintiff impliedly admitted averments in the defendant's amended statement of defense by not traversing these averments in her (plaintiff's) reply.

iii. The court below erred in law by holding that the defendant is protected by the limitation act 1972 (act 54) when the act, read as a whole, clearly relieves the plaintiff of its application.

iv. The court below erred by holding that adverse possession operated against the plaintiff, taking the circumstances of the case into account, the plaintiff had (or could reasonably have) no notice of the defendant's presence on the land until 2011, when an interlocutory injunction restricting plaintiff's case to the land ended

v. The court below ignored the fact that the defendant came on the disputed land during the time the land was a subject of litigation, and there was a subsisting interlocutory injunction on respect of the disputed land, thereby developing the land in violation of orders of the court.

vi. The court below ignored averments in the plaintiff's Statement of claim to the effect that the defendant was nowhere on the disputed land at all times material until 2011 when the defendant alleged predictors in title lost a suit against the plaintiff

vii. Further grounds of appeal may be filed upon receipt of the record of appeal.

Let it be on record that the Appellant did not file any additional Grounds of Appeal as indicated in its Notice of Appeal.

ISSUES FOR DETERMINATION IN THIS APPEAL

This court thinks that the fundamental issue of relevance determining this appeal is **Whether or not the Trial High Court erred when it resolved the Preliminary issue of whether the action is statute-barred summarily.**

The Appellant's Case

The essence of the Appellant's argument on the procedure per her Counsel's statement of case is that the trial court erred when it did not take evidence in the determination of the preliminary issue. Counsel for the Appellant contended that it could not be distilled on the face of the pleadings when the cause of action against the Respondent accured to the Appellant. Counsel for the Appellant contends that the Respondent's alleged adverse possession and the 14 years of quiet possession are highly doubtful. He argues forcefully that the court ought to have taken evidence to ascertain when the Respondent had adverse possession to do true justice to the issue of limitation.

The Respondent's case

The Respondent's statement of the case failed to address this court on the procedure used to dismiss the preliminary issue. However, reading Counsel's submission concludes that the grounds demonstrated by Defendant are nothing but superfluous and a figment of the Appellant's imagination.

When parties cannot resolve their disputes, they often go to court for court to decide their controversies. Procedure rules or rules of court help facilitate the settlement of disputes by providing an efficient and effective means of resolving them. The rules

are used by courts to govern the conduct of their business. The conduct of court cases is regulated by rules to ensure a fair trial of the case. The principal enactment that regulates civil proceedings at the court of the first instance is the **High Court (Civil Procedure) Rules, 2004 CI 47.** The objectives of CI 47 can be found in **Order 1 Rule 1(2), as** ', *These Rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between the parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any such matters are avoided.'*

Generally, the main stages of civil proceedings at the High Court and other courts of the first instance include the Commencement stage. During this stage, the parties gather information and prepare for the court case. The case is usually commenced by issuing a writ or as stipulated by an enactment. The Pleading stage follows the commencement stage. In this stage, one party files a "complaint" to start the court case, usually, the statement of claim accompanying the writ of summons. The other party files some "answer" to the complaint, known as the statement of defence, if he intends to defend the suit. Discovery and disclosure of documents is the next stage. During this stage, both sides exchange information and learn about the strengths and weaknesses of the other side's case.

Then comes the Pre-trial stage. At this stage, the parties start preparing for trial. This stage includes the application for direction, the pre-settlement stage, and the Case Management Conference stage. They get their evidence and witnesses in order, engage in settlement discussions, and file motions with the court to resolve the case or narrow the issues for trial. The Trial Stage follows this. During this stage, the judge or jury hears the case. The length of time the court hears the case depends on the case's complexity. At this stage, witnesses are examined, evidence is presented, the issue is eventually decided, and a judgment is entered. The last stage is the post-trial stage. During this stage, one or both parties might appeal the decision from the trial, or the winning party might try to collect the entered judgment.

Usually, a litigant expects that a case follows its natural course and should be determined on the merits following a full trial, which is generally conducted in the presence of both oral and documentary evidence. However, some issues arise from the pleadings that can truncate the matter before the trial. These issues are referred to as preliminary legal issues and are provided for in the rules of the Court. However, it is open to the parties to raise objections at the beginning of the matter to issues relating to but not limited to, jurisdiction and court processes. These can be referred to as preliminary legal objections. There are not provided for by the rules but are borne out of practice.

Let us offer the distinction between preliminary legal issues and preliminary legal objections. A preliminary legal objection is a legal argument that seeks to prevent a court process from being conducted in violation of applicable law. In the case of **Oppong v Attorney-General [1999-2000] 2 GLR 402**, the court stated that 'after all, a preliminary objection aims at having the proceedings to which it relates thrown out of court.' It is raised to challenge the juridical competence of the court to entertain a particular process or document. Usually, the issues raised in a preliminary legal objection are based on the points of law that are apparent in the filed documents and are consistent with the facts of the case. Preliminary Legal objections are raised by the parties either by oral or formal application to the court for which the court must mandatorily decide on. See **National Electoral Commission And Mrs. Rebecca Adotey Ex-Parte: George Amoo (Court of Appeal, Civil Appeal No. 42/99 dated 13 Jul 2000).** More importantly, the court does not have to take oral or documentary evidence and certainly does not have to go into the case's merit to dispose off a preliminary objection.

To illuminate any confusion on preliminary objections we adopt the brief exposition by the Uganda court in **Yaya Farajallah v Obur Ronald and three others (High Court**

of Uganda, Gulu Civil Appeal 81 of 2018) [2020] *'It is thus based on a commonly accepted set of facts as pleaded by both parties. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Preliminary objections relate to points of law presented at the outset of a case by the defence without going into the case's merits. In any preliminary objection, therefore, there is no room for ascertainment of facts through affidavit oral evidence.*

On the other hand, the issues referred to as preliminary legal issues arose out of the pleadings. These primary issues can be based on facts, law, or both. Preliminary legal issues are generally decisive or potentially decisive issues. The **English case of *(McLoughlin v Grovers (A Firm)* [2001] EWCA Civ 1743, para 66**) *states that a preliminary issue* should be capable of one of the following:

(1)Deciding the whole, or a significant element, of the claim.

(2)Reducing the costs and scope of the main trial.

(3) Improving the possibility of a settlement of the whole proceedings

Where the disposition of the issue resolves the dispute, the court can give its judgment and not a mere ruling. The resolution of some preliminary issues calls for cogent evidence to be pleaded for the court to decide on the issue especially when facts are in dispute. The essence of dealing with the preliminary issue before the main trial is to shorten the hearing and reduce cost-effectively, in line with the objectives of Order 1 rule 2. The High Court is permitted to set aside issues after the close of pleadings and before the application for direction. This method can expedite the case and allow the parties to resolve their issues without going through a full trial.

What is the posture of the court in deciding preliminary issues? **Order 33 Rule 3 of CI 47** permits the court ' *To order a question or problem arising in any cause or matter whether of fact or law, or partly or fact or part of the law, raised by the pleadings to be* ***tried before, at, or after the trial of the cause or matter*** *and may give directions as the manner in which the question or issue shall be stated.* Again **Order 33 Rule 5 of C1 47,** which is

titled dismissal of action after the determination of the preliminary issue says *'Where it appears to the court that the decision of any question or issue arising in any cause or matter* ***and tried separately*** *from the main cause or matter substantially disposes of the cause or matter or renders trial of the main cause or matter unnecessary, it may dismiss the cause or matter or make such other order or give such judgment as may be just.'* The principal rules of procedure for civil cases permit the court to try separately any cause of matter that may render trial of the main matter unnecessary. By this the rules impliedly allow the courts to rule on preliminary issues. This is because, after the close of pleadings, the next stage is the Application for Directions under Order 32. At this stage one may raise any preliminary issue; it is at that stage that it ought to be determined. Where legal arguments can resolve the issue, it will be set down by the judge and taken before other issues. Thus, where that point disposes of the entire case, the judge can proceed to pronounce judgment.

Statute of limitation

Litigation must come to an end therefore where a cause of action accrues to a person and that person fails to take advantage of it, that right must come to an end at a point in time. Therefore, although a plaintiff can bring a cause of action, they lose the right to enforce it through the judicial process if the period that the law provides for such actions has already elapsed. In Ghana, the **Limitation Act 1972 (NRCD 54)** sets out the limitation periods for most actions. In this case, where a cause of action accrues to a party who fails to enforce his right the action may be said to be barred after the period stated in NRCD 54 has lapsed. **In Jean Hanna Assi vrs. Attorney General (Civil Appeal No. J4/17/2016)** as follows: "If indeed it is [statute barred], then there is no need to look at the merits of the case since the statute of limitation is a venerable shield that can be used to *ward off indolent and piecemeal litigators."*

Section10 of Limitation Act 1972 (NRCD 54) states (1) A person shall not bring an action to recover a land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or if it first accrued to a person through whom the first mentioned claims to that person.

(2) A right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run.

(3) Where a right of action to recover land has accrued, and before the right of action is barred, the land ceased to be in adverse possession, the right of action does not accrue until the land is again taken into adverse possession.

(4) For the purpose of this Act, a person is in possession of a land by reason only of having made a formal entry into the land.

(5) For the purposes of this act, a continual or any other claim on or near a land does not preserve a right of action to recover the land.

(6) On the expiration of the period fixed by this Act for a person to bring an action to recover land, the title of that person to the land is extinguished

(7) For the purpose of this section "adverse possession" means possession of a person in whose favour the period of limitation can run."

For a party to succeed in his plea of limitation, he must demonstrate that he is by law, in adverse possession of the land. Section 10(2)(3) and (7) of the **Statute of Limitations Act, 1972 (NRCD 54)** states as follows: "10(2) A right of action to recover land does not accrue unless the land is in possession of a person in whose favour the period of limitation can run.

(3) Where a right of action to recover land has accrued, and before the right of action is barred, the land ceased to be in adverse possession, the right of action does not accrue until the land is again taken into adverse possession. (7) For the purpose of this section "adverse possession" means possession of a person in whose favour the period of limitation can run."

From the above, the 12 years limitation period does not run unless the person against whom a suit is instituted for the recovery of land is in adverse possession of same. What then constitutes adverse possession? In the case of **Adjetey Adjei v. Nmai Boi [2013-2014] 2 SCGLR 1474**, Her Ladyship Sophia Adinyira JSC (as she then was) had this to say in explaining adverse possession : "Adverse possession must be open, visible and unchallenged so that it gives notice to the legal/paper owner that someone was asserting a claim adverse to his. And section 10 of the Limitation Act, 1972 (NRCD 54) has substantially reflected the English Statute of Limitation provisions and the common law. Under the present law, the person claiming to be in possession must show either (i) discontinuance by the paper owner followed by possession; or (ii) dispossession or as it was sometimes called 'ouster' of the paper owner'.

According to Osei Tutu J in the case of **Naa Dedei Aryee Suing Per Her Lawful Attorney Leopold Nii Armah Aryee v. Mrs. Koranteng, Mrs. Philomena Aduhene (Rtd.) And Supt. Aduhene (Rtd). (High Court Suit No: Fal 599/14 19 Nov 2018**) 'The underlying principle of limitation of action to land is the principle of adverse possession to the knowledge of the actual or paper owner. My understanding of the law is that the issue of limitation is considered where at the time Defendant exercised adverse possession, the Plaintiff was around and was very much aware or should reasonably have been aware but failed to contest the action in Court. Again in the case of **Mrs. Vivian Aku-Brown Danquah v. Samuel Lanquaye Odartey (Supreme Court Civil Appeal. No. J4/4/2016 dated 29th July 2016),** Pwamang JSC held: "A party who seeks to rely on the statute of limitation as a defence in an action to recover land must prove that he had been in adverse possession of the land subject-matter of the action and that such adverse possession has been continuous for more than twelve years to the knowledge of the true owner'. It is also trite that to prove that the defendant has the right over some property through adverse possession, they must fulfill

the essential ingredients of *nec vi, nec clam and nec precario,* meaning without force, without secrecy, and without permission of the paper owner.

DETERMINATION OF WHETHER A SUIT IS A STATUTE BARRED

Order 11 rule 8(1) of the High Court Civil Procedure Rules, 2004 C.I. 47 provides: "A party shall, in any pleading subsequent to a statement of claim, plead specifically any matter, for example, performance, release, *any limitation provision,* fraud or any fact showing illegality (a) which the party alleges makes any claim or defence of the opposite party not maintainable; or (b) which, if not specifically pleaded, might take the opposite party by surprise; or(c) which raises issues of fact not arising out of the preceding pleading."(emphasis mine).

The rationale for the above is stated in the case of **Binga Dugbartey Sarpor v Ekow Bosomprah (Supreme Court Civil Appeal No. J4/55/2020 dated 2 Dec 2020)** citing his Lordship Benin JSC in the case of **Armah v. Hydrafoam Estates (Gh.) Ltd [2013-2014] 2 SCGLR 1551** *at pages 1568 to 1569* that "A party who seeks to rely on laches, acquiescence or limitation has a duty or obligation to plead them or to plead such facts as evince an intention to rely on same. … These matters like laches, acquiescence and limitation are all to be pleaded since the party who is entitled to rely on them may decide not to do so; the other party should not be taken by surprise and is therefore entitled to notice in the pleadings in order to raise any answer he may have to these claims. …. Thus, they cannot be raised for the first time on appeal unless the pleadings disclose the factual basis and evidence on it was led at the trial.

However, the Supreme Court in the case of **Ebenezer Kwaku & 2 Ors v. Mankralo Tetteh Otibu IV (Supreme Court, Appeal No J4/53/2021, 7 Jul 2021)** has held that 'Whenever legally justifiable or appropriate, substantial justice must never be sacrificed on the altar of technicism or technical rules of procedure. Thus in the

situation where neither the plea has not explicitly been set out but the defendant's statement of case points unequivocally or substantially to the plea, the court is bound to consider it, as if the defendant had explicitly raised same".

Time for limitation will start to run when the cause of action arises. It is, therefore essential when dealing with limitation statutes to determine the precise date upon which the cause of action arose. Without this basic fact, it will be impossible to compute the time. The limitation period can be determined by considering the relevant dates of when the cause of action arose, and the date the action commenced. When deciding the issue of limitation, the answer is to look at the statement of claim and the writ of summons, which allege the wrong was committed and provide the plaintiff with a cause of action. The trial court should consider when the cause of action arose, when the case was filed, and the limitation period stipulated by the relevant statute. This will enable the court to calculate whether or not the action was commenced within the period allowed by law.

Where the facts on the face of the pleadings admit to limitation, it becomes a preliminary objection and, in some cases, a preliminary legal issue. This is because at that point, whether or not the action is statute-barred is purely a point of law that the court must determine summarily since the facts clearly show when the cause of action arose and when the action was stated. It may also be that the plaintiff has admitted to the fact of limitation. That objection, which is essential that the court does not have jurisdiction to enquire into the case, can be resolved summarily as envisioned by the Benin JA (as he then was). The court in **Anim-Addo and others v Addae -Mensah and others [1995-96] 1 GLR 15-19**. *The 'preliminary issue' will include such matters as jurisdiction of the court, the statute of limitation, or any other legal point which can be taken at the early stages of litigation and which can be disposed of summarily at that stage….*'

The court must note that, as cautioned in the case of **Nana Bronin Abankro v & Anor. v. Solomon Ntiamoah & ors. (Court of Appeal Suit No. H1/14/2017 12 Jul 2017)**

that *'The mere fact that a party pleads limitation against another party in a suit does not automatically terminate the suit. Where the person whom limitation is raised against denies it in his pleadings, the Court is duty-bound to determine it on merits before the main trial where it was set down as an issue or as part of the trial'.*

This is especially so where the question of the action being statute-barred imitation is a mixed bag of facts and law; the party who alleges must prove that the action taken is indeed statute-barred. In this case, the court, after considering the pleadings, may hold that evidence needs to be led to determine whether or not the suit was statute-barred. The onus is on the party relying on limitation to establish when the cause of action accrued to Plaintiff. It is not enough to plead a particular date. If that date is not admitted by any reply of Plaintiff to Defendant's Statement of Defence, then there is nothing on which the necessary computation can be made. It is not permissible, and it would be wrong for a Court to compute time from a date pleaded in the Statement of Defence, not admitted in the Reply and not proved by credible evidence.

In the instant case, the Defendant/Respondent has pleaded in his statement of Defence that the action taken by the Plaintiff/Appellant is statute-barred. It is/was, therefore, the burden of the Defendant to prove by credible evidence that the cause of action had accrued and had been extinguished to the Plaintiff. It is imperative in the defence of limitation for the party alleging same to show when the cause action arose. In the instant appeal, it is not enough, in the opinion of the court, for the defendant to plead that ' *Defendant says that she has had the land since 2001 and has a structure on the land and that she was not a party to the suit for which the said judgment and demolition order was granted*.' It is also not enough for the defendant to say in Paragraph 8 of the amended statement of defence that *'Defendant will contend that the action by the plaintiff is statute-barred*.'

In any case, the Plaintiff did not reply to the amended statement of defence. It means that she automatically joined the issue with the defendant. It has been held

that *' the failure to file a formal reply to a statement of defence did not necessarily amount to an admission of the facts pleaded in the view of deference and consequently it was not necessarily fatal to the plaintiff case. A reply was not even necessary if its sole aim was to deny the facts alleged in the defense for on its absence there was an implied joinder of the issues to the defense … However, where the defence included a counterclaim, a reply would become necessary for the purpose of embodying the defence to the counterclaim in the reply'* dictum of Azu Crabbe JA (as he then was) in the case of **Odoi v Hammond [1971] GLR 375 at 385.** See also **In Re Ashalley Botwe Lands; Adjetey Abgosu & Others v Kotey and others [2003-2004] SCLR 420**.

For added measure, the plaintiff in his amended statement of claim statement in paragraph 11 of her amended statement of claim, *'since 2001 the plaintiff says that the Defendant never appeared on anywhere on the land, and that was only seen in 2015 when she used the Police at Aburi to stop workers who were carrying out the lawful court order of demolishing structures on the land.* The plaintiff also avers that in paragraph 12 of her amended statement of claim that, *the plaintiff says that litigation before the circuit court over the land went on between 2002 and till judgment in June 2011. In this long duration of the suit, the defendant was not found anywhere on the land.'* Even though the parties filed witness statements, it will be an exercise in futility to refer to anything stated in the witness statements as means of proving anything because it is trite that evidence that has not been cross-examined is of no use to the courts.

The court must remember that it is not enough for the defendant to merely plead a particular date unless the plaintiff admits the date in reply to the statement of defense. Where the defendant, the Respondent herein, pleaded statutory limitation of action and the same was not admitted in the plaintiff's reply, the court, of necessity, must resolve the issue based on the proffered evidence.

Further, the evidence of the court witness, the surveyor, only showed that there was a piggery on the land, which indeed belonged to the Defendant however that cross-examined testimony of the surveyor failed to tell the court the exact date the piggery was built. He admitted that the defendant had encroached onto the plaintiff's land. Nonetheless, the evidence of the only witness cross-examined could not give the court an indication of the date the Defendant came into possession of the land. Still, the evidence failed to extract the date when the plaintiff discovered the defendant had come into possession of the land. Applying the wise words of Her Ladyship Adinyira JSC supra, the defendant would only be in adverse possession and time would have begun to run against the Plaintiff only when the plaintiff became aware or should have been aware of the defendant's presence on the land.

In addition, the facts on the face of the pleadings failed to show the 12 years continuous adverse possession which must be present before the action is barred to the Appellant.

Consequently, the trial court erred when it decided this preliminary issue on whether or not the action was statute-barred summarily. This is because it needs to be clarified from the face of the pleadings when the action accrued to the plaintiff. Again, the plaintiff joined issue with the defendant when he did not reply to the amended statement of defence.

The courts must apply serious caution in hearing preliminary issues even though the power to hear them is discretionary, as seen in Order 33 rules 3 and 5. The Court's choice should be exercised depending on the facts of the case. The essence of dealing with the preliminary issue is to expedite the case and save the parties the trouble of going through a full trial, in line with the objectives of Order 1 rule 2. The High Court can set aside issues for determination after the closing of pleadings and even before the application for direction stage.

The Irish Supreme Court advised **in Tara Exploration and Development Company Limited v Minister for Industry and Commerce [1975] IR 242**

By practice, the use of preliminary issues as a means of disposing of trial is restricted in the field in which it can operate. First, there must be a question of law that can be identified among the issues in action. Further, this question of law must be such that it can be decided before any evidence is given. If particular facts have to be proved, or if facts are in dispute, the rule does not apply. In addition, it must appear to the court to be convenient to try such a question of law before any evidence is given. This will involve a consideration of the effect on other issues in the case and whether its resolution will reduce these significantly or shorten the hearing. Convenience in this respect must also be considered in the light of what appears fair, proper, and just in the circumstances."

Where a preliminary issue is based on admitted fact, it may be taken summarily and before the commencement of trial. Conversely, courts are advised to postpone the hearing on a preliminary issue, especially when it involves taking evidence. The courts must be eager to hear the merits of a case through trial. They must not ordinarily permit a defendant to get the suit terminated prematurely except on more robust and more substantial grounds. Even at that, the trial courts are encouraged to determine certain jurisdictional questions while delivering judgment to allow the appellate court to look at everything on appeal. If fact Benin JA in ***Anim – Addo*** supra cautioned against deciding some matters preliminarily, saying that *'Preliminary issue, in my view, will not include matters like capacity of the plaintiff, res judicata, estoppel, etc. which actually call for pleadings and evidence to establish at the trial itself. Thus the question of whether the action itself is res judicata is not an issue which can be determined before pleadings are closed and without evidence being led to establishing it.'*

This position of hearing the primary issue or objection during the trial is critical to aid the appellate court when the issue is again raised on appeal (even if it is for the first time). This will enable the appellate court to look beyond the plaintiff's writ of summons and statement of claim and consider the defendant's statement of defence, the plaintiff's reply, and even evidence led in the case to enable it to determine the issue ultimately.

The appellate Court's fundamental role is to re-hear the suit within the context of the grounds of Appeal. In **Tuakwa v. Bosom [2001-2002] SCGLR 61,** the Supreme Court instructed that the appellate Court must analyze the entire Record of Appeal before arriving at its own decision on whether the trial court was correct in its decision. In the instant case, there is no evidence on the record on which this appellate court can decide on the main issue for determination. There is no evidence on the record upon which this court can determine whether the action was statute-barred or not.

Conclusion

In light of the foregoing, the appeal is allowed. The judgment of the trial High Court dated 19th July 2019, which was affirmed by the Court of Appeal, is hereby set aside. We order that the case is remitted to the High Court and tried afresh by the High Court, differently constituted.

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

I. O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

PROF. H.J.A.N. MENSA-BONSU (MRS.)

(JUSTICE OF THE SUPREME COURT)

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