IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)

PWAMANG JSC

HONYENUGA JSC

PROF. MENSA-BONSU (MRS.) JSC

KULENDI JSC

CIVIL APPEAL

NO. J4/20/2020

15TH JUNE, 2022

1. DR. ERIC GRAHAM

2. CARMIN ABA AMONUA GRAHAM ……. PLAINTIFFS/APPELLANTS/ RESPONDENTS

VRS

1. MRS. VIVIAN AKU BROWN-DANQUAH

2. ADORKU AKUFFO } **DEFENDANTS/**

3. BENJAMIN ACQUAYE HAMMOND } **RESPONDENTS/APPELLANTS**

4. FAISAL MOHAMED SAKA

JUDGMENT

DOTSE JSC: -

The central theme of the appeal by the Defendants/Respondents/Appellants, hereafter simply referred to as the Defendants, against the Court of Appeal (majority) judgment dated 31st January 2019 **is the effect of the root of title of the Plaintiffs/Appellants/Respondents, hereafter, Plaintiffs whose title had been anchored on the will of their predecessor Bergina Briandt tendered and marked in these proceedings as Exhibit B.** Indeed the second ground of appeal formulated by the Defendants reads as follows:-

> ***"The majority with all due respect erred when they held that the Will of Plaintiff's great grandmother is the proof of root of title provided by the Plaintiffs in respect of the disputed land."***

As a result we deem it quite expedient to go back to the basic principles upon which Wills are written and executed to offer us some understanding about the dispositions in Exhibit B concerning the land in dispute.

Prof. W. C. Ekow Daniels, writing in his invaluable book *"The Law on Family Relations in Ghana"* page 434 offered the following definition and history of Wills when he stated thus:-

(b)"***Definition:*** Blackstone defines a ***"Will as the legal declaration of a man's intention, which he wills to be performed after his death.*** According to Maine,***"A Will or testament is an instrument by which the devolution of inheritance is prescribed."***A more comprehensive definition was given by Jarman, an English author, as follows:-

"A Will is an instrument by which a person makes disposition of his property to take effect after his decease, and which is, in its own nature, ambulatory and revocable during his lifetime". Emphasis

The learned and distinguished author, continued on the same page 434 as follows:-

(c) ***"History of Wills:*** *Testaments are of very high antiquity. In the seventh century, we are told that the jurists of that period proffered the view that "****the power of Testation itself is of Natural Law, that it is a right conferred by the Law of Nature.****"* Atkinson,the learned American author on Wills wrote as follows:- "In 2548 B.C, ***we find an Egyptian executing an instrument on papyrus, witnessed by 2 Scribes, settling certain property upon his wife, and appointing a guardian for his infant children.***" Testaments were in use among the ancient Hebrews, and Salon was the first legislator who introduced a somewhat qualified privilege of testamentary disposition among the Greeks. In Rome, Wills were unknown until the laws of the Twelve Tables were compiled around 450 B.C and the right of making Wills became a creature of Civil Law. Historically, the making of Wills had been recognized in England from the Anglo Saxon era through the period of the Norman Conquest to the modern age; starting from the statute of Wills 1540. As Blackstone put it, "**with us in England this power of bequeathing is co-eval with the first rudiments of the law; for we have no traces or memories of anytime when it did not exist." Emphasis supplied.**

The question then arises as to:-

WHO THEN HAS CAPACITY TO MAKE A WILL AS WAS DONE BY THE PREDECESSOR OF THE PLAINTIFFS BERGINA BRIANDT IN EXHIBIT B?

Justice Prof. A. K. B. Kludze, in his scholarly work, *"Modern Law of Succession in Ghana" 2015 Edition, Foris Publications* at page 17 wrote thus:-

> ***"The capacity to make Wills, or testamentary capacity, involves a consideration of two main issues, viz***
>
> ***(a) Possible subjects of dispositions by Will, and***

(b) The personal capacity of the would-be testator to dispose of property which could properly be the subject of testamentary disposition.

Possible Subjects of Disposition By Will

In some communities, a Ghanaian may make a customary law Will or samansiw to dispose of his property. In addition, under the Wills Act, 1971, (Act 360) "a Ghanaian may dispose by Will of any property belonging to him as his self acquired property**.** ***This power of testamentary disposition also existed under the received English Wills Act 1837.*** Under both the customary law and these statutes, a property held on behalf of a group of persons, such as a family property, cannot be the subject matter of a testamentary disposition by an individual person in his own right. **Any purported disposition of family property by Will is ineffectual because "nemo dat quod non habet**"- *(See Bransby v Grantham (1578) Plowd 525, 526, 75 E.R. 776,777; Hastings (Lord) v Douglas (1634) Cro. Car 343, 346; 79 E. R. 901, 903)*

The learned author then continued on same page as follows:-

> "***Indeed this is the meaning of Section 1 of the Wills Act, 1971, which provides that a person may make a Will "disposing of any property which is his or to which he may be entitled at the time of his death or to which he may be entitled thereafter.***

In section 3 of the Wills Act, 1837, the provision was that:-

> "It shall be lawful for every person to devise, bequeath, or dispose of, by his Will executed in manner hereinafter required, ***all real estate, and all personal estate which he shall be entitled to, either at law inequity, at the time of his death, and which if not so devised, bequeathed or disposed of would devolve upon the heir at law." (Emphasis supplied)***

It is interesting to note that the existing law at the time the Will of the Plaintiff's predecessor was executed was the 1837 English Wills Act, referred to supra. From the above, it can be comfortably concluded that under the 1837 and 1971 Wills Act, the power to make a Will is available provided the following conditions exist.

1. Relevant age under the respective legislation21 years under the English Act of 1837 and 18 years under the Ghanaian Act of 1971.
2. The document must be in writing and in accordance with the requirements of the law
3. The property disposed of or devised in the Will must belong to the testator
4. Or must belong to the testator at the time of his death; or
5. After his death
6. It must be noted that persons suffering from insanity or infirmity of mind or lack the requisite age of capacity except members of the Armed Forces engaged in active service cannot make a valid Will.

WHAT RELIEFS DID THE PLAINTIFFS CLAIM AGAINST DEFENDANTS IN THE HIGH COURT?

The Plaintiffs claimed the following reliefs against the defendants:-

- Declaration of title to all that piece or parcel of land situate and lying at Boi in the Greater Accra Region of the Republic of Ghana and containing an approximate area of 34.658 hectares (85. 635 acres) more or less which is more particularly delineated on survey plan **No. Z5913 and covered by land Certificate No. Ga 31351, VOL.06 Folio 138 dated 22nd December 2009**.
- Perpetual injunction restraining the Defendants, their agents, assigns, privies, workmen and servants from dealing with the land in any way detrimental to the interest of the Plaintiffs

- Recovery of possession
- Damages for trespass
- Costs

Out of abundance of caution and for purposes of emphasis and clarity, it is important to set out in detail paragraphs 6, 7, 9, 10, 11 and 12 of the Plaintiffs Statement of Claim in support of their reliefs against the Defendants.

6. "Plaintiffs say that they have a piece or parcel of land at Boi in the Greater Accra Region bequeathed to them by their late father Reverend Joseph Eric Graham.

7. Plaintiffs say that the said piece or parcel of land had always been the property of their great grandmother, Bergina Briandt until her death in October 1902.

9. Plaintiffs say that their late father during his lifetime caused the land to be plotted and registered at the Lands Commission Secretariat.

10. Plaintiffs say that upon the coming into force of the Land Title Registration Law the land was duly registered at the Land Title Registry and Land Title Certificate was issued to their father the late Reverend Joseph Eric Graham.

11. Plaintiffs say that after the death of their father Reverend Joseph Eric Graham in January, 1992 they applied to the Land Title Registry for the Title to be transferred into their names.

12. Plaintiffs say that after the necessary formalities, the Land Title Registry duly transferred the ownership of the land to them and a new Certificate with registration number GA 31351, VOL 6, Folio 138 was issued in their joint names". Emphasis

EVIDENCE LED BY THE PLAINTIFFS IN PROOF OF THEIR ROOT OF TITLE PLEADED IN PARAGRAPHS 6, 7, 9, 10, 11 AND 12 OF THEIR STATEMENT OF CLAIM

The primary document tendered and relied upon by the Plaintiffs in support of their root of title is Exhibit B, the Will of Bergina Briandt.

Paragraph 2 of the said Exhibit B, devised the disputed land to the following: Christiana Ayao Fleindt, Theodora Rottmann and Bertha Rottmann as follows:-

> *"I hereby give, devise and bequeath to my relation Christiana Ayao Fleindt of Christiansburg and to my nieces Theodora Rottmann alias Theodora Lieb and her Sister Bertha Rottmann alias Berthan Glattli both of Switzerland for their own use and benefit absolutely and forever,**all my estate and effects both real and personal, whatsoever and wheresoever and what nature and quality soever. "*** Emphasis

From the evidence on record, the only relation of the Testatrix Bergina who lived in Ghana and thus could have benefited and did infact benefit from the properties devised in the said Will was Plaintiffs great grandmother, Christiana Ayao Fleindt who was the niece of the Testatrix whom she had adopted and treated as her own child. This Christiana was the mother of the Plaintiffs father. Reference paragraph 5 of Exhibit C which is an Assent executed by Rev. Joseph Eric Graham as an Administrator of the said Estate. There is also evidence on record that nothing was ever heard of the other beneficiaries named therein, namely, Theodora Rottmann and Bertha Rottman respectively.

The evidence on record also discloses that, one Thomas William Quartey was named in the said Will of Bergina Briandt as the Executor, but was unable to obtain probate of the Will before he died on the 14th of July 1944. Upon this realisation, Plaintiff's father Rev. Joseph Eric Graham on the 31st day of July 1986, by document, a Vesting Assent,

Registered as No. 210/1988 and tendered in these proceedings as Exhibit C which traced the root of title of the properties devised in the Will and in which the following declarations were made:-

4. "Comprised in the Testatrix's estate is a large parcel of land situate at East of Boi Village in the Greater Accra Region and hereinafter more particularly described;

7. On the death of the Testatrix the Administrator's said mother became the owner of the said parcel of land and on her death on the sixteenth day of June one thousand nine hundred and five (1905) the said land became vested in the Administrator and his sister Beatrice Steiner.

9. The Administrator as the sole surviving child of the said Christian Ayao Fleindt deceased and the sole surviving grandchild of the Testatrix and in accordance with Osu customary law the person legally entitled subject only as hereinafter mentioned to the said parcel of land situate at East of Boi village and comprised in the estate of the Testatrix's said Will has been in **the possession of the said land and has for many years consistently exercised acts of ownership over the same."**

In paragraph 10 of the said document, the Administrator therein referred to overt acts of ownership that he and the others had performed on the land in the Boi village as well as Statutory Declaration he and others in the village had made of personal knowledge of relevant facts in the village which he referred to and forms part of the record.

To conclude this exhibit C, it was declared in paragraph 11 as follows:-

11. The Administrator now wishes to formally assent to the vesting of the said parcel of land situate at East of Boi Village and hereinafter more particularly described in himself in manner hereinafter appearing:-

> ***"Now the administrator as the personal representative and the only surviving grandchild of the Testatrix HEREBY ASSENTS to the vesting in himself of ALL THAT piece or parcel of land comprising an approximate area of eighty-two decimal eighty one one (82.811) acres situate at East of Boi village in the Greater Accra Region ALL WHICH land is more particularly delineated in the plan hereto and therein edged with pink absolutely and forever and free from all encumbrances TO HOLD the same UNTO himself and the children of her deceased sister."*** Emphasis

We have also verified in the record, a Statutory Declaration sworn to by the following persons to the effect that the land specified in Exhibit C supra and the schedule to Exhibit D, is the property that has been vested in Rev. Joseph Eric Graham. Other declarants of this document are the following:-

1. Mary Korlei Nortey of No. 008- Boi village
2. Noi Kofi of No. 012 – Boi village
3. Emmanuel Nortey of No. 013 – Boi village
4. Doe-Djebu and Yaw Djebu both of krobiwohor village to the East of Boi-village

Note that it was the declaration and thumbprint of Doe-Djebu that has become controversial.

We have also apprized ourselves of the contents of Exhibit A, which contains depositions in the Will of Rev. Joseph Eric Graham, the Plaintiffs father in which he made depositions bequeathing the Estate of Bergina Briandt in the land at Boi Village, near Abokobi and the property at Kuku Hill, Osu and others to the Plaintiffs herein and other beneficiaries therein named.

We have verified the said depositions and found them to be consistent with the pleadings and the evidence on record.

The Plaintiffs also specifically in paragraphs 13, 15, 16, 17, 18 and 19 of their Statement of Claim pleaded acts of trespass which amounted to pillage and destruction of plaintiff's land at Boi village by the Defendants or their agents as follows:-

13. ***"Plaintiffs say that they have been in undisturbed possession of the land just as their predecessors have until early this year when the Defendants started making adverse claims to the land.***

15. "Plaintiffs say that the Defendants have started allocating portions of their land to prospective developers who are illegally paying huge sums of money to the Defendants.

16. Plaintiffs say that anytime they attempt to assert their right of ownership over the land they are met with resistance from the Defendants, sometimes with threats of physical violence from the Defendants.

17. Plaintiffs say that the Defendants have engaged land guards who have now started terrorizing the Plaintiffs' assignees who have legally acquired portions of the land from the Plaintiffs.

18. Plaintiffs say that they have made several lawful attempts including reporting the conduct of the landguards to the police to prevent the Defendants and their agents from dealing with their land but the defendants have remained very adamant.

19. Plaintiffs say that some unknown faces who acquired portions of their land from the defendants are putting up structure on the land at a frenetic pace to the disadvantage of the Plaintiffs." Emphasis

Since the writ was issued in November 2013, it meant that the acts complained of by the Plaintiffs against Defendants commenced in early 2013.

After narrating various steps that they, the plaintiffs and their predecessors in title had taken to establish and confirm their predecessors root of title, the 1st Plaintiff detailed in exhibit D, the search results about their land, the requisite statutory steps taken which included publications in the National Dailies. These specie of conduct also included the grant of Land Title Certificate in respect of the disputed land as confirmed by Exhibit E. We have also verified and confirmed the cadastral plan of the Plaintiffs as contained in Exhibit F.

All these specie of conduct no doubt led the plaintiffs and their families to perform various overt acts of ownership in respect of the land without let or hindrance from anybody including the Defendants whatsoever.

For example, it is on record that, the Defendants in pursuit of their land at Boi Village, undisputably sought the assistance of the 1st Plaintiff who was then working at the 37 Military Hospital through one Dr. Hammond, father of the 3rd Defendant and the 2nd Defendant to help them locate their Adutso family land at Boi village, near Abokobi. In this respect, the Plaintiffs offered the assistance of their family Surveyor one Michael Etsiwa to help them locate their land. This Michael later testified during the trial as P.W.I.

The Plaintiff thereafter with the support of other residents of Boi Village assisted the Defendants to locate the Adutso family lands at Boi Village.

These meetings and interactions were progressing successfully until the Defendants unleashed landguards at one such meeting who perpetuated acts of violence and disrupted all these negotiations.

Despite the existence of Exhibit G, which is a letter authored by the 1st Defendant's brother Dr. Awuku Akuffo in 1975, to the plaintiffs father conclusively asserting that

the Adutso family land is separate and distinct from the Plaintiffs family land, the Defendants have refused to accept these basic facts.

Flowing from the above specie of conduct, the 1st plaintiff has testified that the 3rd and 4th Defendants in particular acting on behalf of the other Defendants with the violent support of land guards have trespassed unto the land and are actively selling the lands to persons who have started developing the land. The Plaintiffs have further alleged that the Defendants are using violence and intimidation on the land to prevent them from laying claims to the land, as a result of which reports had been made to the Police.

The Plaintiffs have even asserted that one Doe Dzebu who is a licensee of the Plaintiffs, testified on their behalf in Suit No. 433/06 before Agbloryor J, that he lives on the 1st Plaintiffs land at Krobiwohor and that 1st Plaintiff is his landlord. See Exhibit H.

Finally, the Plaintiffs relied on exhibits J and K, which are Archival records stating that the Adutso family lands was actually sold to their predecessors and also that the Nii Odartey Sro Family of Osu did a **Declaration as far back as April 1974 in which they named the plaintiffs family as their neighbours respectively**.

Relying on all these specie of conduct, the 1st Plaintiff testified that the land the subject matter of this appeal actually belongs to them.

CASE FOR THE DEFENDANTS

The Defendants entered appearance through their Solicitor on 4th December 2013 and filed their Defence on 11th December 2013. In their pleadings, the Defendants asseverated per paragraphs 4, 6, 7, 8, 9, 10, 11 and 12 and relied on the said averments to prove and establish their root of title as follows:-

4. "The Defendants further say that the Plaintiffs have no capacity to bring this action.

6. The Defendants say that Adutso family is the customary owner in possession of the land in dispute and that any purported registration of any portion of Adutso family by the Plaintiffs is a nullity.

7. In further denial of the plaintiffs' statement of claim, the Defendants say that the land the subject matter of this suit is the legitimate property of Naa Adutso family and that Naa Adutso family is the owner in possession of the land in dispute.

8. That the Defendants aver that sometime in the year 1856, Amoa Kwadwo, the then Mankrado of Brekuso customarily granted the land in dispute to Ayi Baflasi her ancestor.

9. That the Defendants aver that Ayi Baflasi upon customarily acquiring the land from Amoa Kwadwo the then Mankrado of Brekuso reduced the entire land which is approximately 238.8 acres into his possession by farming on various portions of the land, undertook hunting activities as well as harvesting economic trees on the land.

10. That the Defendants aver that Ayi Baflasi remained in possession of the land by farming on it and upon his death, the land granted to him customarily devolved on Madam Adutso, the granddaughter of Ayi Baflasi who customarily succeeded Ayi Baflasi.

11. That the Defendants aver that it was during the lifetime of Madam Adutso that Ado Dwobi II, successor in title to the said Amoa Kwadwo formally reduced the land customarily granted to Ayi Baflasi into writing and he executed a deed of

gift dated 13-5-1955 in favour of Madam Adutso, covering the land granted to Ayi Baflasi by Amoa Kwadwo the then Mankrado of Brekuso.

12. That the Defendants say that the said deed of gift dated 13-5-1955 mentioned in paragraph 8 supra, was duly registered with Land Registry No.1935/1972.

EVIDENCE OF DEFENDANTS IN DEFENCE OF THE SUIT

In a witness statement by the 1st Defendant, she traced their root of title to the following events.

a. That the disputed land was granted to their ancestors Ayi Baflasi in or about 1856 by Amoa Kwadwo, Mankrado of Brekusu

According to the 1st Defendant, the 1856 transaction was later reduced into writing by Nana Ado Adwobi II, then Mankrado of Brekuso who executed a deed of GIFT to the Adutso Family – see exhibit 1 tendered during the proceedings as No. 1935/1972. **This meant this noted transaction took place in or about 1972.**

Various overt acts of ownership like farming, hunting were allegedly performed by the Defendants on the land in dispute. **Some of these acts lay in grants to Ewe and Ga settler farmers like Amega Dzebu, Numo Adansean old colonial soldier, Ataa Laryea and other settler farmers.**

Villages such as Krobiwoho, Masha Alahu, Adansi and Voodoo shrines known as Nana Atongo had been established on their land by some of the settler farmers. See Jackson report, tendered as Exhibit 3.

The Defendants relied on paragraphs 13 and 14 of their Defence in support of the overt acts of ownership referred to supra.

13. The Defendants aver that Madam Adutso during her lifetime permitted Ewe settler farmers as well as other settler farmers to farm on portions of the land the subject matter of the said deed of gift mentioned in paragraphs 10 and 11 supra

14. Further, the Defendants state that the land in dispute falls within Naa Adutso family land and that members of Naa Adutso family and grantees of Adutso family who have been in possession of the land by farming on it since time immemorial."

TRIAL AND DECISION OF THE HIGH COURT DATED 19TH FEBRUARY 2016

After trial in which the parties and their witnesses and the Court appointed Surveyor and expert witness testified, the learned trial High Court Judge delivered himself thus:-

> "On the issue of the identity and boundaries of the land I do not think there is any misunderstanding about the area of land in contention.
>
> **The parties by their pleading identified and pleaded about the "land in dispute". I hold each to be bound by their pleadings and hold that parties have accepted this agreed fact of the "Land in dispute" as established.**
>
> The defendants did not counterclaim against the plaintiffs. This does not mean that the Defendant should sit back and look on the Plaintiffs to prove what they claim to be entitled to from the Defendants.
>
> By reason of the provision of Section 11 (1) and 14 of the Evidence Act, a Defendant should help his own cause.
>
> The said provision provides that:-
>
> **Section 11 (1)**

"For the purpose of this Act. The burden of providing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on an issue.

Section 14

Except as otherwise provided by law unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non existence of which is essential to the claim or defence he is asserting."

From these provisions it is therefore clear and indeed imperative that if a defendant desire a determination to be made in his favour then he has a duty to help his cause or case by adducing before the court such facts and evidence that will induce the determination to be made in his favour.

On the preponderance of the probabilities, I am satisfied that the Plaintiff have not advanced any testimony as expected of plaintiffs in this land suit, plaintiffs did not establish by the slightest degree of certainty in my mind that they are entitled to title or ownership of the land in dispute. **The Plaintiffs first purported to claim the land through a Will that gave no land then fraudulently procured a Land Title Certificate.**

I therefore deny the plaintiffs the claim to be adjudged the owners of the land in dispute. I did not find any credible evidence from the Plaintiffs that they have the possession of the land in dispute according to the tenets of the law.

On the contrary the Defendants proved conclusively from the evidence and testimony from witnesses that they the Defendants have had right to the land since many years ago in the name of the Adutso family.

I deny Plaintiffs the reliefs of recovery of possession against the Defendants and also refuse to place any injunctive restraining orders on the Defendants.

I assess cost of GH¢20,000.00 in favour of the Defendants."

APPEAL AND DECISION OF COURT OF APPEAL

The Plaintiff feeling aggrieved and dissatisfied with the decision of the learned trial Judge referred to supra appealed against it to the Court of Appeal. The Court of Appeal, on 31st Janaury, 2019 allowed the appeal of the Plaintiffs against the trial court decision by a majority decision. The following constitute the salient reasons why the majority of the Court of Appeal allowed the appeal and gave judgment in favour of the Plaintiffs.

"The Plaintiffs have adduced sufficient evidence both oral and documentary to meet all the requirement of the law in proving title to the land they are claiming.It is a grave miscarriage of justice on the part of the trial court to give title of the land plaintiffs are claiming to the defendants when the defendants' title document proves that their land is outside the land plaintiffs have successfully adduced evidence establishing that they are the owners of.

Having found that the plaintiffs have sufficiently proved title to the area of land described on the writ, what is the fate of the small area where the site plan of the defendants overlaps a portion of the land plaintiffs have proved to belong to them.

On the preponderance of probabilities I find it is a more probable situation that the area belongs to the plaintiffs for the following reasons,

Firstly, Nana Ado Dwobi II the defendants' grantor said he issued exhibit 1 defendants' title document for the purposes of a litigation the defendants' family

was involved in at the time. **Though he said he sold the land the defendants have lived on for a long time to them, the document described the transaction as s deed of gift.**

Secondly there is ample evidence on record showing that the defendants are not certain about the identity of their land. **The evidence of the various land owners in the area who gave evidence as plaintiffs' boundary owners emphasized that the defendants have held meetings with them seeking their assistance to identify their land.** This situation is confirmed by the defendants' oral evidence on the location of their land which is at variance with their documentary evidence on the identity of the land. A further confirmation that the defendants are not certain on the identity of the land is exhibit P which the 1st defendant wrote seeking assistance from the District Assembly in the area and various institutions to help them demarcate their land. **There is also exhibit G in which the defendants'' brother wrote confirming that the Adutso and Graham lands are separately located.**

It is trite learning that it is the trial court that has the right to make primary findings of fact and where those findings are supported by the evidence on record the appellate court is not permitted to interfere with same. However there are circumstances where the appellate court can disturb such findings. In the case of ***Fofie v Zanyo [1992] 2 GLR 476*** the Supreme Court per Francois JSC outlined the exceptions as where ***"the court below had applied wrong principles in arriving at the result or taken into account matters which were irrelevant in law or had excluded matters which were crucially necessary for consideration, or had come to a conclusion which no court properly instructing itself on the law could have reached."***

I have amply demonstrated in this judgment that the trial court failed to make primary findings of fact on the identity of the land either party to the dispute are claiming and therefore fell into the error of concluding that the defendants own the property the plaintiffs are claiming in this suit. He further failed to consider crucial documentary evidence for example exhibit CE1, exhibit G, exhibit I, exhibit P and K and came to conclusions that are not supported by evidence on record.

Similarly the trial Judge made findings of fraud on no evidence presented to him on fraud. His conclusion therefore that the plaintiffs came by their title documents by fraud is totally unacceptable. For the above stated reasons, the appeal in my view must succeed. The appeal is hereby allowed accordingly.

The judgment of the High Court is hereby set aside. The Plaintiffs succeed in all their reliefs sought in the writ of summons.

The Plaintiffs are hereby granted recovery of possession of their land. The defendants, their agents, assigns, privies, workmen and servants are hereby perpetually restrained from entering the land or dealing with the land in any way detrimental to the interest of the plaintiffs.

For their acts of trespass the plaintiffs are entitled to nominal damages. I would in that vein award plaintiffs GH¢10,000.00."

APPEAL BY DEFENDANTS TO SUPREME COURT

The Defendants also felt aggrieved and dissatisfied with the majority decision of the Court of Appeal and accordingly appealed against it on 28th March 2019 with the following as their grounds of appeal:-

"**Grounds of Appeal**

1. The majority decision is totally against the weight of evidence led at the trial.
2. The majority with all due respect erred when they held that the Will of Plaintiff's great grandmother is the proof of root of title provided by the Plaintiffs in respect of the disputed land.
3. The majority with due respect erred in declaring title in the disputed land in favour of the plaintiffs.
4. The majority with due respect erred when they held that the trial judge made findings of fraud on no evidence presented to him on fraud.
5. The cost of GH¢150,000.00 awarded in favour of the plaintiffs is excessive and without any basis whatsoever.
6. Further or other grounds of appeal shall be filed upon receipt of the record of proceedings.

Relief Sought From the Supreme Court

i. That the majority judgment be wholly reversed as having absolutely no merit.
ii. An order setting aside the judgment of the Court of Appeal.
iii. That the dissenting judgment of Amadu Tanko JA be upheld and the appeal herein allowed and the judgment of the High Court restored."

EVALUATION OF THE GROUNDS OF APPEAL

We have perused the erudite but repetitive statements of case of learned Counsel for the Plaintiffs, Nii Akwei Bruce Thompson and for the Defendants, Prosper Nyahe respectively.

In order to be logical and consistent with the presentation of the arguments by learned Counsel for the parties, we have decided to follow the pattern adopted by them which commences with Ground 4, then Grounds 1, 2 and 3 are argued together and Ground 5 as the closing chapter.

GROUND 4

THE MAJORITY, WITH DUE RESPECT, ERRED WHEN THEY HELD THAT THE TRIAL JUDGE MADE FINDINGS OF FRAUD ON NO EVIDENCE PRESENTED TO HIM ON FRAUD

Learned Counsel for the Defendants, Propser Nyahe, in his opening remarks on this ground of appeal, quoted in extenso from the portions of the majority decision on this matter of fraud, and stated thus:-

> *"With due respect, the above findings by the majority at the court below received no support from the evidence on record whatsoever. Indisputably, there is evidence, oral and documentary on record which totally deflected the findings of the majority as captured supra and I shall humbly demonstrate this in the course of arguing this ground of appeal."*

Learned Counsel for the Defendants, Prosper Nyahe, then proceeded to state the new scope of the application of fraud which he stated thus:-

> ***"Where there is evidence of fraud on the record, the court is duty bound to consider that evidence and act upon it, even if fraud was not specifically pleaded as required by the rules of pleadings." Emphasis***

Learned Counsel then referred to the case of Appea v Asamoah [2003-2004] 1 SCGLR 226 holding 4, where the Court held as follows:-

> *"Fraud would vitiate everything. And ordinarily, fraud should be pleaded. It had not been pleaded in the instant case. Notwithstanding the rules on pleadings,* ***the law was that, where there was clear evidence of fraud on the face of the record, the court could not ignore it. Since the judgment, exhibit 1, had not been obtained in the district court on the basis of the lease that had been fraudulently procured,*** *it was*

null and void and of no effect as rightly found by the trial High court and affirmed by the Court of Appeal."

Leaned counsel also referred to the decision of this court in the cases of ***Amuzu v Oklikah [1998-99] SCGLR 141 at 183, Asamoah v Servodzie [1987-88] 1 GLR 67 SC and Atta v Adu [1987-88] 1 GLR 233, S.C.***

The evidence upon which this argument of fraud had been latched onto by learned Counsel for the Defendants stems from the evidence on record which suggests that the thumbprint of DW2, Doe Dzebu one of five Declarants to a Statutory Declaration made by the Plaintiffs covering the disputed land is not his thumbprint. During the proceedings at the trial High Court, this D.W.2 denied having ever thumb printed any such document. A subsequent Police Forensic examination also confirmed that Doe Dzebu's thumbprint was not one of the five thumbprints on the said document.

Based upon the above, learned counsel for the Defendants submitted as follows:-

"My Lords, it is my humble submission that the findings by the learned trial Judge that Exhibit "C" is a fraudulent document is amply supported by overwhelming evidence on record, and therefore cannot be impeached. Clearly, the findings by the learned trial Judge that Exhibit C- the Statutory Declaration was fraudulent is amply supported by the finger print expert's Report tendered in evidence as Exhibit "CW2" as well as the evidence elicited through cross-examination of DW2 – Doe Dzebu".

At this stage, we deem it expedient, to set out in extenso the Forensic Report which was tendered during the trial as follows:-

"THE GHANA POLICE

(Criminal Investigation Department)

P. O. Box 505 Accra, Ghana

CID/CDSB/30/58/SFS/15/V.1

20th August 2015

DR ERIC GRAHAM & ANR-PLAINTIFFS

VRS

VIVIAN AKU BROWN-DANQUAH & ORS – DEFENDANTS

Your letter dated 07/08/15 refers:-

2. I return herewith the following thumb printed documents received on 19/08/15 as follows:-

a. Duplicate document captioned "Witness Statement by Doe Dzebu – DW2"

b. Duplicate document captioned "The Statutory Declarations, Act 1971 (Act 389), Declarations as to ownership of a parcel of land situate at East of Boi village in the Greater Accra Region and pencil marked as "B".

3. Result of Comparison: Forensic examination of the above documents reveals that;

a. The thumbprint against the name Doe Dzebu on the document captioned "Witness Statement by Doe Dzebu – DW2" mentioned in paragraph 2 (a) marked "A1" DOES NOT correspond with any of the thumbprints on the StatutoryDeclarations mentioned in paragraph 2 (b) marked " B1-B5".

4. Examined by ASP/Mr. Isaac Okrah (Fingerprint Expert. Gazette No. 42, 1997

Academic and ProfessionalQualifications

Dip. In Statistics and Advance Mathematics (ISSER) UG, Legon

Dip in Computer (IMIS) UK

B(ED) Mathematics, Winneba

Advanced Fingerprint and Computers (New Delhi) India

CrimeScene Investigations (Lyon) France

AST/AFIS and Forensic Dactyloscopy (Spanish Embassy) Accra

FBI Advanced Latent FingerprintTraining (America Embassy) Accra

5. Re-examined and certified by DSP/MR J.D.B Dabuo

For Asst. Commissioner/CDSB

(J.D.B Dabuo) DSP

The Registrar
High Court
Accra"

Learned counsel for the Defendants also called in aid the age old principle that an appellate court should be slow and hesitant in departing from cogent findings of fact made by the trial court.

In this respect, learned Counsel referred to a plethora of cases such as ***Bisi v Tabiri aka Asare [1987-88] 1 GLR 360 SC, Osei (Substituted by) GILARD v Korang [2013-2014] I SCGLR 221 at 227 to 228*** and others which clearly explained the circumstances under which an appellate court can or may depart from the findings and or conclusions reached by a trial court.

In the instant case, learned counsel concluded that the findings by the trial court aresimply unassailable, and it is thus not open to the appellate court to interfere with the said findings. See cases such as **Fofie v Zanyo [1992] 2 GLR 475 S.C, holding 4, and**

Amoa v Lokko & Alfred Quartey (substituted by Gloria Quartey &Ors [2011]1 SCGLR 505, at 513 where the court held as follows:-

> *"It is only when the findings of the trial court are not supported by the evidence that the appellate court could interfere and substitute its own finding for that of the trial court. It is trite law that the trial court has exclusive duty to make primary findings of fact which would constitute the means by which the final outcome of the case would be arrived at."*

Learned counsel concluded his submissions on this ground of appeal by referring profusely to the decision of our respected Sister Agnes Dordzie JA (as she then was) in the unreported decision of this court ***in CA. No. H1/46/2014 intitutled Owuo v Owuo*** which was upheld on appeal by this court in the case of ***Owuo v Owuo [2017-2018] SCGLR, 730*** at holding 4 thereof, and argued that, the decision of the majority of the Court of Appeal on this issue of fraud cannot stand. He thus urged the court to set aside the decision of the Court of Appeal on this ground.

Learned counsel for the plaintiffs, Nii Akwei Bruce Thompson, in his statement of case, argued that, the learned trial Judge was indeed in error when he spoke of fraud. This is against the background of events that preceded the thumbprint examination. This specie of conduct are the following:

1. The Statutory Declaration in Exhibit C, was executed on 31st July 1986, (29 years to the forensic examination of thumbprint made on or by the 27th day of July 2015, the date the witness statement was sworn).
2. The said Doe Dzebu was then aged 81 years old and the fact that he was still a farmer with all the associated hazards that go with it.
3. Note ought to have been taken of the fact that it was a photocopy of the Exhibit C thumbprint that was used to match the after 29 years thumbprint of the said person Doe-Dzebu.

4. The antecedents of the said Doe-Dzebu which unfolded during the trial court were such that he cannot be relied upon as a truthful person.

These specie of conduct, exhibited by the said Declarant lay in some of the following:-

a. The discredited personality of the said Doe-Dzebu had been established beyond any redemption. For example, during the trial court, he exhibited traces of falsehood on the least occasion i.e. lying under his teeth that he was at one time living on the Plaintiff's land at Krobiwohor and that 1st Plaintiff was his landlord, and at other times, that he was on the Defendants land as a tenant. See Exhibit H, judgment given by Agbloryor J, on the 4th of October 2010 in Suit No. 43/06 intitutled***Vivian Aku Brown-Danquah –***

Plaintiff v Samuel Language Odartey– Defendant in which the learned trial Judge made significant findings of fact.

b. What is of interest is that, in the said case before Agbloryor J, the plaintiffs herein were not parties therein. However, the said Doe-Dzebu had been described by the learned trial Judge in the said case as follows:-

"The evidence of the star witness Doe Dzebu is most unreliable since he moved from saying that he and his siblings are living on plaintiff's land to end by saying, he lives on Graham's land at Krobiwohor and that Dr. Graham is his landlord." The plaintiff referred to therein is the 1st Defendant therein.

This description actually makes the said Doe Dzebu an unreliable person who comes out as a deceitful and dishonest person.

c. We also note that, even though the judgment of Agbloryor J, referred to supra is reputed to have been set aside on appeal, the findings on the inconsistent testimony of the said Doe Dzebu will stand the test of time at all times. This is because facts are facts. What he said during the trial cannot be changed. That impression is real and is indelible.

WHAT IS THE VALUE OF EXPERT OPINION?

In the locus classicus case of ***Sasu v White Cross Insurance Co. Ltd, [1960] GLR 4, CA,*** the issue of what weight should be attached to an expert evidence came up for serious attention, understanding and rendition. It is considered worthwhile to set out in detail the facts of this case and relate it to the circumstances of the forensic examination of Doe-Dzebu's thumbprint. This is particularly intriguing because of the evidence elicited from CW2, Isaac Okrah, (ASP) the Forensic Expert during cross-examination by learned Counsel for the plaintiff as follows:-

Q. Did your samples correspond with what is on the statutory requirement to declaration?

A. Whatever is brought is what we work with

Q. Does your work involve inviting an individual to take his or her finger print as far as the document submitted to you is concerned?

After some objections by learned counsel for the Defendants, the learned trial Judge allowed the question and it was answered thus:-

A. I work within the court order, given me. I was supposed to compile the two documents." *(I think it should read compare)*

Later, further cross-examination went thus

Q. Your failure to invite Doe Dzebu was a fundamental error

A. Until the moment I did not know Doe Dzebu was alive"

This clearly then would lend credence to the fact that the method of the Forensic examination in not taking the sample of the thumbprint of Doe Dzebu coupled with the

inadequacies of the thumbprint on the Witness Statement makes the forensic report suspect and unreliable.

FACTS IN THE SASU V WHITE CROSS INSURANCE CO. LIMITED CASE

The Plaintiff therein, insured his Morris minibus with the Defendant on 31st December 1956. On 27th March 1957 the vehicle was involved in an accident and on the defendants instructions it was repaired by C.F.A.O Limited, Accra, who wrote to the Plaintiff on 12th June 1957 as follows:-

> *"At your request we confirm that we give you exactly the same guarantee as the guarantee given by Nuffield on new vehicle for the work we have done on your J2 Bus."*

On 3rd September 1957, the same vehicle was again involved in an accident, this time due to a defect in the steering mechanism. **It was common ground that the cause of the defect in the steering mechanism was a disconnected ball-joint at the steering drop arm, due to a nut on it having gradually worked loose, the process having stripped the thread on the drop arm.** The vehicle was again taken (on the defendants instructions) to C.F.A.O Limited, Accra for repairs, but the defendant refused to be responsible for their completion, **on the ground that the defect which had caused the accident and resulting damage was due to a failure on the Plaintiff's part to maintain the vehicle in an efficient condition.**

On 12th November 1957, Plaintiff issued a writ in the High Court against the defendants, claiming the full value of the car, viz, £855. In giving judgment for the defendants the learned Judge (Ollennu J) (as he then was) referred to the expert evidence as follows:-

> *"In my opinion, that expert evidence, given by those two highly qualified automobile engineers, is not only scientifically sound but practically real. I do not see how negligence in repairing a car would make the threads on the drop arm wear off so smoothly for the nut to fall off. Upon the evidence before me I have not the slightest doubt that the cause of*

the second accident was non-maintenance of the vehicle, resulting in the bolt on the steering falling off, and the vehicle running out of control."

On appeal to the Court of Appeal, the court coram: Korsah CJ, Vanlare, JA, and Granville Sharp JA, held:-

"Expert evidence is to be received with reserve, and does not absolve a Judge from forming his own opinion on the evidence as a whole."Emphasis

In the course of their delivery, the court quoted with approval Taylor on Evidence (12th Ed); Vol. 1 para 58 at p. 59 as follows:-

"Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. ***These witnesses are usually required to speak, not to facts, but to opinions;*** *and when this is the case, it is often quite surprising to see* ***with what facility, and to what an extent, their views can be made to correspond with the wishes or interests of the parties who call them.*** *They do not, indeed, wilfully misrepresent what they think,* ***but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of forming an independent opinion. Being zealous partisans, their belief becomes synonymous with Faith as defined by the Apostle, for it too often is but "the substance of things hoped for, the evidence of things not seen."*** *To adopt the language of Lord Campbell,* ***"skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence."***

Concluding this matter, the court stated as follows:-

"We are of the opinion that the learned trial Judge ***erred when accepting without question the opinion of the experts, he dismissed the plaintiffs claim to be indemnified and entered judgment for the defendant company."***

The appeal was therefore allowed on the basis that the defendant company is liable to indemnify the plaintiff in sum to be found upon an enquiry by the court below. The case is accordingly remitted to the court below for quantum of damages to be determined.

The above case has been followed in a long line of cases such as ***Darbah v Ampah [1989-90] 1 GLR 598 CA and Tetteh & Anr. v Hayford (substituted by) Larbi and Decker [2012] 1 SCGLR 417*** where the court emphasized the need that, ***whenever a court decides not to use expert opinion, it must nonetheless give good, cogent and convincing reasons why the expert evidence is to be rejected.***

We have evaluated learned counsel for the Plaintiffs references to several scientific works in his statement of case appealing to us to be cautious in accepting hook, line and sinker expert opinion such as theForensic Report.

Having considered all the references made on scientific works relating to fingerprinting we are of the considered opinion that, **"Police Forensic examination" in this case might as well be prone to error and or sloppy work depending upon the facts enumerated supra.**

In such circumstances, it would have been prudent for the learned trial Judge to have taken into consideration the antecedents of this particular witness and evaluated how he conducted his affairs with the parties in the case especially in Suit No. J4/4/2016 intitutled***Vivian Aku-Brown Danquah v Samuel LanquageOdartey.***

As settler farmers, Doe-Dzebu was content with playing the plaintiffs family against the Defendants and indeed other land owning families in order to survive and outwit them on the land.

Taking all the above factors into consideration, it is our considered view that the learned trial Judge had no basis to invoke fraud to hold and rule for the Defendants in this case, the way he did.

As was held by the Supreme Court in the case of ***Fenuku v Teye [2001-2002] SCGLR 985*** holding 5 as follows:-

> *"The law regarding proof of forgery or any allegation of a criminal act in a civil trial was governed by Section 13 (1) of the Evidence Decree, 1975 (NRCD 323), which provided that the burden of persuasion required proof beyond reasonable doubt. In the instant case, even though the trial High court had examined the evidence before him and had come to a conclusion of his own on the issue of forgery,* ***it seems he had not adverted his mind to the standard of proof required under section 13 (1) of NRCD 323 to prove forgery. The Supreme Court, by way of re-hearing, looking at the evidence adduced, was not satisfied that forgery has been established beyond reasonable doubt. Emphasis***

By parity of reasoning we conclude this ground of appeal by stating that if the learned trial Judge had adverted his mind to the many instances enumerated supra, the Judge would not have gone that tangent by declaring the thumbprint of Doe Dzebu as fraudulent. The trial court should have directed the Forensic expert to have taken a fresh thumbprint of the witness Doe Dzebu and compare it with the other two thumbprints. Since that was not done, as admitted by the Police Forensic expert himself that he did not know that the witness was alive, the entire process is flawed and must be jettisoned.

Based on the facts enumerated above, we hold and rule that the finding on fraud was wrongly made and is accordingly set aside.

Considering the fact that as a second appellate court, this court is required to consider the appeal as a re-hearing.

We would under these circumstances affirm the decision of the majority of the Court of Appeal on this issue of fraud. In passing, it is worth to consider the fact that, we have looked at the minority decision of the court below but we are not persuaded by the arguments therein. We therefore affirm the decision of the majority of the Court of Appeal on this issue of fraud.

GROUNDS 1, 2, AND 3

1. **THE MAJORITY DECISION IS TOTALLY AGAINST THE WEIGHT OF EVIDENCE LED AT THE TRIAL**
2. **THE MAJORITY WITH ALL DUE RESPECT ERRED WHEN THEY HELD THAT THE WILL OF THE PLAINTIFF'S GREAT GRANDMOTHER IS THE PROOF OF TITLE PROVIDED BY THE PLAINTIFFS IN RESPECT OF THE DISPUTED LAND**
3. **THE MAJORITY WITH RESPECT ERRED IN DECLARING TITLE IN THE DISPUTED LAND IN FAVOUR OF THE PLAINTIFFS**

It is important to deal with the principle of law that are necessarily linked with the discussions with all the above grounds of appeal.

This court in our unanimous decision in the unreported case of ***Solomon Tackie and Anr. v John Nettey (substituted by Fred Bibi and Anr. Suit No. CA.J4/481/19*** dated 24th March 2021 after analyzing cases such asthe following:-

- ***Tuakwa v Bosom[2001-2002] SCGLR 61 at 65 per Sophia Akuffo JSC (as she then was),***
- ***Abbey & Others v Antwi V [2010] SCGLR 17, at 34-35, per Dotse JSC***
- ***Ampomah v Volta River Authority [1989-90] 2 GLR 28***

- ***Djin v Musah Baako [2007-2008] 686***
- ***Ago Sai & Others v Kpobi Tetteh Tsuru III [2010] SCGLR 762, at 791 – 792***
- ***Akufo-Addo v Cathline [1992] 1 GLR 377***
- ***Mintah v Ampenyin [2015-2016] 2 SCGLR 1277 at 1282 and***
- ***International Rom Ltd (No. 1) v Vodafone Ghana Ltd & Fidelity Bank Ltd (No.1) [2015-2016] 2 SCGLR 1389*** set out a road map which has to be considered when an appellant alleges that "the judgment is against the weight of evidence" in the following terms:-

"What all these authoritative decisions require of an appellate court, such as this court especially, when a ground of appeal like the instant, formulated on the basis that *"the judgment is against the weight of evidence"* have to do are the following:-

i. Consider the case as one of re-hearing. This means an evaluation of the entire record of appeal
ii. Consider the reliefs claimed by the Plaintiff and if there is a counterclaim by the Defendant, that must equally be considered.
iii. **Consider and evaluate the evidence led by the parties and their witnesses in support of their respective cases especially the cross-examination as this is the evidence that is now elicited from the parties and their witnesses after the tendering of the witness statements.**
iv. **An evaluation of the documents tendered during the trial case and how they affect the case.**
v. **An evaluation of the facts of the case vis-à-vis the law applied by the trial court and the intermediate appeal court.**
vi. **A duty to evaluate whether the trial court and the Court of Appeal correctly or wrongly applied the evidence adduced during the trial.**

vii. **The burden on the final appellate court, such as this court is generally to carefully comb the record of appeal and ensure that both in terms of substantive law and procedural rules, the judgment appealed against can stand the test of time. In other words, that judgment can be supported having regard to the record of appeal.**

The above criteria are by no means exhaustive, but only serves as a guide to appellate courts such as the task facing us in the instant appeal:" Emphasis supplied.

In our examination of grounds 1, 2, and 3 of the grounds of appeal urged on us by the Defendants, in the instant appeal, we shall apply the above road map as a guide.

ARGUMENTS OF LEARNED COUNSEL FOR THE DEFENDANTS

In articulating his arguments in respect of ground one of appeal, learned Counsel for the defendants referred to and relied on the following cases to support his arguments.

- ***Tuakwa v Bosom supra,***
- ***Owusu-Domena v Amoa [2015-2016] 1 SCGLR per Benin JSC***
- ***Tormekpey v Ahiable [1975] 2 GLR 432 CA, holding 1,***

ARGUMENTS BY COUNSEL FOR PLAINTIFFS

On the part of learned Counsel for the Plaintiffs, reference and reliance was placed on the case of ***Bonney v Bonney [1992-93] 2 G.B.R 779*** where the Supreme Court like the unreported Solomon ***Tackie and Anr. v John Nettey (substituted by Fred Bibi supra***), gave guidelines, on the duties of an appellate court in circumstances such as the instant one.

APPRAISAL OF THE ROAD MAP BY THIS COURT

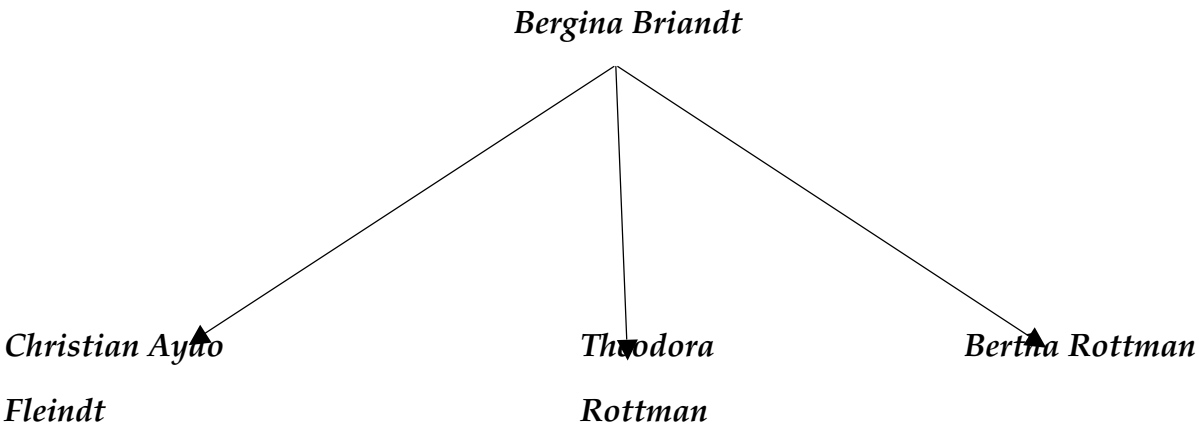
We have evaluated this appeal in line with the guidelines outlined supra. In our evaluation, we have come to the conclusion that the learned trial Judge and the

minority opinion of the Court of Appeal did not consider the germane issues at stake therein.

On the contrary, the majority opinion of the Court of Appeal was really surgical in their narration, analysis and conclusions reached in their judgment. As will soon be shown, there is just one irresistible conclusion that can be reached if a genuine assessment is made of the facts and conclusions reached by the Court of Appeal.

1. By considering the entire appeal as a re-hearing encompasses an authoritative review of the appeal from the trial court to the appeal before us in the Supreme Court.

   The genesis of the Plaintiff's action finds expression in paragraphs 6 and 7 of the averments of their Statement of claim where they aver that the land in dispute originally belonged to their great grandmother, Bergina Briandt and after her death, through their grandmother and finally their late father Reverend Joseph Eric Graham. The line of succession would seem to be like this.



Rev. Joseph Eric Graham

Plaintiff herein

The operating words of the WILL of Bergina have already been set out supra. However, for purposes of emphasis, it is important what is meant by the devises such as

> *"…**all my estate** and effects, both **real and personal**, whatsoever and wheresoever and what nature and quality soever*". Emphasis

What do we term here as *"my estate"?*Blacks Law Dictionary, 9th Edition, by Bryan A. Garner, Editor in Chief, defines estate on page 626 as follows:-

> *"The amount, degree, nature and quality of **a person's interest in land or other property;** esp, a **real-estate interest that may become possessory;** the ownership being measured in terms of duration."*

The same Blacks Law Dictionary on page 1337, defines real property as follows:-

> *"(18c**) Land and anything growing on, attached to, or erected on it**, excluding anything that may be severed without injury to the land. Real property can be either corporeal (soil and buildings) or incorporeal (easements) – Also termed realty; real estate Cf- personal property."* Emphasis

On page 1322 of the same Blacks Law Dictionary, probate estate is defined as

> ***"(1930) A decedent's property subject to administration by a personal representative. The probate estate comprises property owned by the decedent at***

the time of death and property acquired by the decedent's estate at or after *the time of death. Also termed probate property." Emphasis*

From the above definitions, it is quite clear that, the devises by Bergina in her Will, Exhibit B is one that touches and or concerns her interests in land or other properties.This includes land and or anything growing on it, and includes also a deceased person's interest in land related properties.

Furthermore, it is also quite clear that in the said WILL, the Testatrix therein appointed one Thomas William Quartey as the sole Executor. From the evidence available, this Thomas William Quartey did not take probate to execute the Will before he died later in 1944 or thereabout.

Under the circumstances, it had to take the Plaintiff's father, Rev. Joseph Eric Graham to have executed a WILL, Exhibit A, to give effect to all the various lacuna's that had been created by the inaction of his predecessor's in title.

This meant that, what the Executor and other beneficiaries of the Estate failed to do, he sought to do. It must be borne in mind that, the said devises in the Will of Bergina are not the best. That is not how devises are ordinarily drafted. However, it must be also made clear that it is only members of a Testator's family who will know where her real estate properties are and search for them for purposes of administering the Estate.

The explanation for this had been laid out in the evidence of 1st Plaintiff during the trial as well as in Exhibit C. Even though this exhibit C is a Statutory Declaration by the Declarant, it however sets out the events historically as they happened and is consistent with the evidence on record.

This Exhibit C, in the recitals sets out in clear terms the reasons for the exhibit.

Exhibit C, made and declared by Rev Joseph Eric Graham and these are the reasons: It states as follows:-

WHEREAS

(1) *Bergina Briandt nee Hesse Late of Osu named as the Testatrix died on 13th day of October 1902, having made her Will dated 25th May 1900 whereby he appointed* ***Thomas William Quartey as the Executor therein.***

(2) *The said* ***Thomas William Quartey,*** *the Executor named therein died on the 14th day of July 1944 without having taken probate of the Will of the Testatrix named herein.*

(3) *Letters of Administration with the said Will of the Testatrix were on the 8th day of November 1985 granted by the High Court to Rev. Joseph Eric Graham the Administrator therein and a surviving grandchild of the Testatrix.*

(4) *Comprised in the Testatrix's estate is a large parcel of land situate at East of Boi village in the Greater Accra Region.*

(5) *Christiana Ayao Fleindt the only surviving beneficiary in Ghana of the Will of Bergina is the mother of the Administrator and Declarant, Rev Joseph Eric Graham, father of the 1st Plaintiff.*

We have apprized ourselves that, the recitals and acknowledgements made in the said Exhibit C, have legally vested title of the real estate of the Testatrix in the Plaintiffs and their predecessors in title.

What is the connection between the devises in the said Will of the Testatrix to the land in dispute and the Plaintiffs as a whole?

The learned author, Prof. A. K. P. Kludze, in his invaluable book, *"Modern Law of Succession in Ghana"* 2015 Edition, writes on page 81 on the construction of Wills as follows:-

> *"The cardinal rule in the construction of a will is that the intention of the testator, as declared by him and apparent in the words of his Will, must be given effect, so far as, and as nearly as may be, consistent with law. See cases such as* ***Hickling v Fair [1899] A.C. 15, 27, Beaudry v Barbeau [1900] A.C. 569, 575, Papillion v Vocie (1728) Kel. W. 27, 32, 25, E.R. 478".***

See also the Ghanaian case ***of In Re Buxton, Deceased, Buxton v Appiah & Another [1961] GLR 601*** where Ollenu J (as he then was) held as follows:-

> *"****in construing a document clear and unambiguous words must be given their ordinary meaning. But where the words will become absurd when read with the other parts of the document and considered along with the surrounding circumstances extrinsic evidence is admissible to help resolve the latent ambiguity." Emphasis***

Concluding his decision in the ***In Re Buxton Deceased case*** *supra,* Ollennu J, (as he then was) stated thus:-

> *"I hold therefore that the words "the receipts" appearing in clause II of the Will mean the batch or bundle of receipts in the handwriting of Mr. Nelson and a list of the makers of which is in the possession of Mr. Nelson;* ***and "the receipts" appearing in clause 12 of the Will mean the receipts in the other batch or bundle which was found among the testator's personal effects."***

Continuing the write up on page 81 of the 2015 Edition of the Book *"Modern Law of Succession in Ghana"* Prof. Kludze stated thus:-

> *"If the intention of the testator can be ascertained from the Will itself, that intention must prevail.* ***If the court of construction is in a difficulty when trying to deduce the true intention of the testator, it applies what are known as the rules or canons of construction*** **in** *order to ascertain that intention.* ***The testator may not***

have had these rules of construction in mind when he made his will; they are, however, employed as a matter of convenience dictated by necessity, to give a meaning to the Will." Emphasis

HOW DOES THE ABOVE PRINCIPLES OF CONSTRUCTION APPLY TO THE INSTANT CASE?

It has to be borne in mind that the original root of title of the Plaintiffs to the disputed land is the Will of Berginiaal ready referred to supra.

It has also been established that the definition of real estate therein in the Will connotes immovable property and not only personal effects, to wit, "beads" as erroneously contended by the Defendants.

It is also on record, from Exhibits C and D, that as a result of the inability of the named Executor in the Will, Exhibit B to obtain probate, legitimate legal steps were taken by the father of the 1st Plaintiff to obtain Letters of Administration with the Will of Berginia annexed, therein as is permitted by the rules of procedure and construction.

Under the circumstances, we consider it proper that the declarations made in Exhibit C and the search results in Exhibit D have called in aid the need to admit the use of extrinsic evidence.

When this is done, it becomes very clear that the "*real estate"* mentioned in the Wills of Berginia in Exhibit B and that of Rev. Joseph Graham in Exhibit A, and amplified with specific details in Exhibit C have created the necessary nexus to link the devises made in Exhibit B to include the properties not only in Osu but also the one in dispute at the East of Boi, near Abokobi.

The details have been clearly set out in the Exhibits mentioned supra and that these speak for themselves.

The defendants have anchored their case as per their pleadings in their Defence and their witness statements on the fact that the Plaintiffs had no capacity. No evidence was however led on the said pleadings. Thereafter, the defendants averred and testified that the land claimed by the plaintiffs is not situate at Boi because all Boi lands belong to the Boi stool. However as indicated during the trial per the results of the composite plan ordered, that evidence has fallen flat as unreliable.

Even though the defendants averred that the disputed land belonged to their Adutso Family, who are in possession of same, the evidence on record does not support this erroneous contention and as found by the learned trial Judge.

In evaluating the evidence of the parties, and the record of appeal, we are of the view that the decision of the learned trial Judge to strike out paragraphs 16, 17 and 20 of the 1st Plaintiff's witness statement on 23rd July 2015 was wrong in law and not supported by the pleadings.

This is because, if paragraphs 13, 14, 15, 16, 17 and 19 of the Plaintiff's statement of claim are taken into consideration, the learned trial Judge would not have struck those paragraphs out. This is because it is a cardinal rule of pleadings that evidence is not pleaded but only relevant facts upon which the evidence will be based, that are pleaded.

As a result, we accordingly set aside that decision as perverse and restore the said paragraphs 16, 17 and 20 of the Plaintiffs Witness Statement to the record.

We have during the course of our delivery in this case discussed some of the guidelines referred to supra in the Solomon Tackie case supra.

For example, we have also discussed the effect of Exhibits A, B, C and D of the plaintiffs on the fortunes of this appeal.

We have also discussed the principles of law concerning the legitimacy of the devises in the Wills of Berginia and Rev. J. E. Graham in Exhibits B and A respectively.

We have also apprized ourselves with the following exhibits of the Defendants, Exhibit I of the Defendants which spans pages 521-527 of the record but does not support the Defendants root of title. This is because, during the trial a composite plan had been drawn based upon orders made by the learned trial Judge. Additionally, the parties were directed to file Survey Instructions.

This composite plan had been tendered and marked therein as Exhibit CEI. We agree with the majority opinion of the Court of Appeal that a superimposition of the respective site plans indicates quite conclusively **that the Defendants site plans does not cover the plaintiff's land, it is only a small portion which does. In essence, it is apparent from Exhibit CE1 that the Defendants land does not cover plaintiffs land.**

In view of the state of the appeal record and the statements of case filed by learned Counsel for the parties, this court directed the Regional Surveyor, Survey and Mapping Division of the Lands Commission to draw a plan of the respective lands in dispute, out of abundance of caution, we set out in extenso the orders made by this court on 21st April 2021 when the order for Survey was made as follows:-

"**IN THE SUPERIOR COURT OF JUDICATURE**

IN THE SUPREME COURT

ACCRA – AD 2021

Suit No. CA. J4/20/2020

21st April 2021

DR. ERIC GRAHAM & ANR - PLAINTIFFS/RESPONDENTS

V

VIVIAN AKU BROWN & OTHERS - DEFENDANTS/APPELLANTS

1. The attention of the panel has been drawn to the decision of this court in ***Suit No. J4/4/2016 dated 29th June 2016intitutled Mrs. Vivian Aku-Brown Danquah – Plaintiff/Appellant/Respondent v Samuel Lanquaye Odartey – Defendant/Respondent/Appellant.***

2. We also observe that, the Supreme Court made a determination in the judgment as follows

   "Furthermore, both parties in their pleadings identified Dr. Graham as a common boundary owner to the NorthWest of the land each of them claimed and led evidence of ownership in respect of that land."

3. We further observe in the said judgment, the evidence of the cross-examination of PW2, Edoe Dzebu, who was aged 80 years at the time he testified as the star witness of the plaintiff therein, herein Defendant.

The cross- examination is recorded as follows:-

Q. "Do you know Rev. Graham?

A. Yes, I do.

Q. How do you know him?

A. Rev Graham is the father of Dr. Graham and their land is around the area we are.

Q. In your evidence you also stated that Graham is not your landlord but it is rather the Adutso family who are your landlords.

A. I said Krobiwoho was established on Adutso family land but it has expanded onto Graham's now.

Q. Currently, where are you leaving? Are you on Adutso land or Graham's land?

A. Currently I am on Graham's land"

4. This Court in the said Suit concluded the judgment thus:-

> *"It would appear that when PW2 testified and exposed defendant as trying to suborn him, defendant lost all hope in his case hence his representative's testimony was porous and he was evasive throughout his cross examination. On all the evidence adduced at the trial, we hold that the Court of Appeal was right in preferring plaintiff's case to that of defendant. Accordingly defendant's appeal fails in its entirety and same is dismissed. The judgment of the Court of Appeal dated 20th November, 2014 is hereby affirmed."*

In view of the matters raised above, **this court in order to protect the sanctity of the court's decisions in previous cases would want the parties herein to address this court on the relevance and applicability of the said judgment in *Suit No. J4/4/2016* to the circumstance of the appeal in Suit No. CA.J4/20/2020**."

In this second case as well, the parties were instructed to file survey instructions to the Surveyor.

As a result, a composite plan was prepared and tendered by Mr. Frank Wontumi a representative of the Regional Surveyor, who tendered the said plan marked CE and the Report as **C. E. I.**

Our ocular observation of this Exhibit CE and C.E.I respectively make it clear that apart from being boundary neighbours, the Plaintiffs and Defendants lands differ.It also came out significantly that, the land covered in ***Suit No. CA. J4/4/2016*** intitutled ***Mrs. Vivian Aku Brown Danquah – Plaintiff/Appellant/Respondent v Samuel Lanquaye Odartey – Defendants/Respondent/Appellant*** dated 29th June 2016 is outside the disputed land.

For example when learned Counsel for the Defendants Mr. Prosper Nyahe cross-examined the Surveyor CW.1, the following transpired:-

Q. Mr. Wontumi, it is true that the **Appellant in their survey instructions furnished you with the judgment plan in Suit No. J4/4/2016**

A. Yes my Lord

Q. Who pointed Krobi Woho village to you?

A. It was pointed to me by the two parties, the Plaintiffs and the defendants.

Q. I am putting it to you that it was only the Plaintiffs who pointed it out to you

A. My Lords, that is not correct

Q. What did you see in Krobi Woho village?

A. My Lords, at KrobiWoho, we saw a settlement and portions had also been developed with modern structures but you see the **ruins of the old settlement there.** Infact, some were even in occupation by the inhabitants of the place.

Q. Did you see any idol or idols in Krobi Woho village?

A. No- my Lords. Nobody showed me an idol. I only requested them to take me to Krobi Woho and they took me there.

Q. From your own survey work that you did, your composite plan which dramatically differs from Exhibit D which formed the basis for it being used during the trial, I am putting it to you that your survey work is unsafe to be relied upon.

A. My Lords, it is very safe to be relied upon"

Nii Akwei Bruce-Thompson, learned Counsel for the Plaintiffs on his part cross-examined the Surveyor thus:-

Q. On the composite plan indicated by ***the colour magenta is the judgment plan*** *in Suit No. J4/4/2016, is that correct?*

A. That is correct my Lords

Q. The area in dispute fall outside this judgment plan, is that correct?

A. That is correct.

Q. The Respondents **filed a land title certificate which they labelled Exhibit A, is that correct?**

A. That is so, my Lord

Q. Did you indicate it on the composite plan?

A. Yes my Lords

Q. As what?

A. **It is shown as red**. Land shown on land title registration plan for Dr. Eric Engman Graham and Amin Graham edged red.

Q. **The land covered by the land title plan covers the area in dispute, is that correct?**

A. **That is so my Lords**

Q. **The Respondents also attached as Exhibit B, their layout plan, is that correct?**

A. **Yes my Lords**

Q. **It is also indicated on the composite plan?**

A. **Yes, my Lords. That is Exhibit B and that is what is numbered 1, 2, 3 up to 12.**

Q. It falls within the site plans of the Respondents, is that correct?

A. It reasonably falls inside the land title plan of the **Defendant?**

Q. The Respondents also attached as Exhibit C their survey instructions, a site plan with land registered number 2101/1988 presented at the Lands Commission on 3rd February 1988, is that correct?

A. Yes, it is edged broken brown

Q. That also falls within the land title plan of the Respondent, is that correct?

A. It reasonably falls inside

Q. Now also attached as Exhibit E by the Respondent is a composite plan between one Osei Bonsu, grantee of the Respondent and Madam Adutso

A. That is so my Lords.

Q. It falls within the land title plan of the Respondent, is that correct?

A. **My Lords, the portion involving Jeffery Yaw Osei Bonsu falls within the land of the Plaintiffs and there was another portion which also falls within the site plan of the judgment plan.** They were in two parts but like I said because we were constrained by colour, **we showed the whole of that composite plan in one colour and that is the cyan.** So portions of the cyan, fall inside the judgment plan and a **portion also falls inside Dr. Graham's land.** The portion which falls inside Dr. Graham's land is indicated. You can see it and the portion which falls inside the judgment plan is also indicated.

Q. **So the area in dispute especially Dr. Graham's land falls to the west of the judgment plan.**

A. That is so my Lords

Q. **From your composite plan, the area that the Respondents claim the Appellants had trespassed falls outside the judgment plan of the Appellants, is that not correct?**

A. **That is correct my Lords"?**

Members of the Court took turns to ask questions after learned counsel for the Plaintiffs concluded his cross-examination as follows:-

Q. By Court:- From what you have done in the composite plan, what is the effect of the Adutso family's judgment plan on the land in dispute?

A. **My Lords, as far as the composite plan is concerned, their site plan falls outside that of Dr. Graham and then the boundaries which were shown by both parties do not fall inside the site plan of Adutso family.**

By way of futher answers to questions from the court, the Surveyor stated as follows:-

a. **That exhibits B and C reasonably fall inside the property of the 1st Plaintifs and Exhibit D is the composite plan, but portions of that fall inside 1st Plaintiffs land and a portion on Defendants family land.**
b. **That the area of land covered by the indenture made between Shormey Dowuona and Nitaku Holdings falls inside the judgment plan of the Defendants.**
c. As regards the composite plan prepared at the court below, **portions of the land of Jeffrey Yaw Osei Bonsu falls within the 1st Plainitffs land, and a small portion in the Defendants land.**
d. **That areas harshed red are the grantees of the 1st Plaintiff and the non-harshed areas are those indicated by the Defendants.**

EFFECT OF COMPOSITE PLAN PREPARED IN THE SUPREME COURT

1. **That the land covered by judgment in Suit No. J4/4/2016 intitutled Mrs. Vivian Aku Brown Danquah v Samuel Lanquaye Odartey dated 29th June 2016 does not form part of the 1st Plaintiffs land whatsoever.**
2. **That, the Plaintiffs and Defendants are boundary neighbours.**
3. That the preponderant view from the evidence of the Surveyor is that **the plaintiffs claim has been consistent with their documents of title whereas those of the Defendants is inconsistent and keeps changing with the effluxion of time.**

EVALUATION OF GUIDELINES III, IV, V AND VI OF THE ROAD MAP IN THE SOLOMON TACKIE AND ANR V JOHN NETTEY (SUBSTITUTED BY FRED BIBI) CASE SUPRA

We will take numbers (iii) (iv) (iv) and vi together. From the evidence, it is clear that the Plaintiffs case is more credible than the Defendant's. From our assessment, the Plaintiffs have been able to establish their root of title from their respective ancestors, Berginia and Rev. Joseph Eric Graham respectively.

The fact is also that, we have conclusively established that by the canons of construction, the executor of the will or the beneficiaries are entitled to use extrinsic evidence to establish that Bergina owned real estate at the places that they knew she owned these properties. This is necessary to give effect to the Will as was prepared and written by the Testatrix.

We have already set out these particulars in detail elsewhere in this rendition and there is no need to repeat them.

At this stage, it is perhaps very necessary to refer in extenso to Exhibit P. This exhibit is a letter written by the 1st Defendant on behalf of the Adutso family dated 7th August 2012. Out of abundance of caution, we reproduce the full contents of the said letter.

"NAA ADUTSO FAMILY

OF OSU AND SOUTH ABOKOBI

P. O. BOX 9545, AIRPORT ACCRA

7th August 2012

The District Chief Executive

Abokobi District Assembly

Abokobi- Accra

RE: A REQUEST FOR BOUNDARY DEMARCATION ASSISTANCE

Honourable,

The Adutso Family of Osu by this letter wish to appeal to you through this medium to use your good office to restore sanity in the administration of lands within your jurisdiction.

Of late due to lapses in the administration of Lands in our country especially, the Greater Accra Region, some people and groups of individuals have taken advantage of the situation to arbitrary extend their boundaries to engulf their neighbours.

*These unfortunate underhand dealings sometimes result in violent clashes with its attendant consequences, such as lost of limbs, destructions of properties and sometimes precious lives are lost due to paroquial and selfish interest. It also bring about the non-implementations and non-compliance o of the intended planning scheme of the district assembly***. Our family has a large track of land, approximately Two hundred and thirty –eight point eight acres (238.80) lying and situated between Ablajei and Boi. And we share boundaries with the following families (i.e) Nii Akporman, Dr. Eric Graham's property, Akoblem property, Akokome Property, Abladjei lands and the Hesse Family property***.**

We implore your noble character and your August Assembly, come to bear through summons to us all, and provision of security to insure the proper demarcation of our respective boundaries, this will inure to the attainment of the better Ghana Agenda. We attached see for your perusal, the Photostat copy of our registered document. Our Family is prepared to bear the cost of this exercise.

Thank you for your kind co-operations.

Please acknowledge receipt

Best Regards

Yours Sincerely

Mrs. Vivian Aku Brown-Danquah

(Head of Madam Adutso Family)"

By the contents of the said letter, the 1st Defendant in the letter to the District Chief Executive of the Abokobi District Assembly affirmed and acknowledged the fact that the Adutso Family shared land boundary with the following persons and or families on their land within Ablajei and Boi as follows:-

- Nii Akporman
- Dr. Eric Graham's property
- Akoblem property
- Abladjei lands
- Akokome property
- Hesse Family property

It is worth noting that, the writ in the instant appeal was commenced in the trial High Court on 7th November 2013. This meant that, the 1st Defendant wrote Exhibit F, almost 10 months prior to the institution of the suit. This is an admission that the 1st Plaintiff is a land boundary neighbor of the Defendants family which the 1st defendant had acknowledged in the said Exhibit P.

Notice must also be taken of the fact that, before the trial court, the Plaintiffs called the following witnesses most of them boundary witnesses

1. Michael Etsiwah - PW1

This witness, although an unlicensed Surveyor, had worked for the Plaintiffs and helped prepare their Exhibits C and D, respectively.

He was also at a point engaged by the Defendants **to help them locate their land.** From the appeal record, and his testimony, we are of the view that this witness had a deep knowledge of the land in dispute because he had lived on the land which shared boundary with the Plaintiffs land.

2. Nii Odartey Sro III - PW2

This witness testified as head of the three joint heads of Nii Odartey Sro family of Osu. Even though this witness lost a land dispute with the 1st Defendant in Suit No. J4/4/2016 already referred to supra, we believe his testimony as regards the fact that Plaintiffs own the land in dispute.

3. Adjei Adjetey -PW3

This witness testified as a member and representative of the Nii Adjetey family of Teshie, and a boundary witness.

4. John Markwei Korley - PW4

He testified as a representative of the Nii Boye Din family of Teshie-Gbugbla and a boundary witness.

5. Emmanuel Tawiah Sowah – PW5

He testified on behalf of the Nii Akpor family of Teshie and Akporman

From our understanding of the record of appeal, all the above witnesses testified about their knowledge of the land in dispute and as boundary owning families in some respects with the Plaintiffs.

The defendants on the other hand called the following witnesses:-

1. **Nana Addo Banafo III, Mankrado of Brekuso- DW1**

This witness testified as Mankrado of the Mankrado stool of Brekuso and that the land in dispute falls **within a larger tract of Brekuso Mankrado stool land customarily gifted to Ayi Baflaso, 1st Defendant's ancestor.**

This is contrary to pleadings in Suit No. J4/4/2016 and this case.

2. **Doe-Dzebu - DW2**

   He testified on behalf of the Defendants that his father Amega Dzebu settled on the Defendants land at Krobi Woho village and that they attorned tenancy to Defendants and her ancestors before her. However as we have stated elsewhere in this judgment, this witness is a rogue and a dishonest person, whose testimony should not be believed for the reasons stated therein.

3. **Nii Ayeh Fio - DW3**

   He filed a witness statement to the effect that he is the head of the Odai Ntow family of Ashongman-Kwabenya, Teshie, and Ga, - Accra respectively. He also testified that his family owns the Ashongman lands and that they share boundary with the Defendants.

The above constitute in a nutshell the oral evidence given by the parties in support of their pleadings and various exhibits tendered in support thereof.

We have also evaluated the judgments of both the trial High Court and that of the majority judgment of the Court of Appeal. Whilst we are satisfied with the analysis and conclusions of the majority of the Court of Appeal decision, we are however of the view that the judgment of the High Court was perverse and was rightly set aside by the intermediate appellate court.

We now consider the last road map in the ***Solomon Tackie and Anr. v John Nettey (substituted by Fred Bibi & Anr) case*** supra.

As indicated in this rendition, as part of our appellate jurisdiction, this court very early in our hearing of this appeal, ordered a fresh survey plan with directions to the parties to file instructions for the purposes of a new composite plan to be prepared to guide this court in our determination of the issues germane in this appeal.

As a result, Mr. Frank Wontumi, a licensed Surveyor and staff of the Survey and Mapping Division of the Lands Commission represented the Regional Surveyor, Greater Accra and tendered the composite plan as CE, and the report as CE1 respectively.

The said evidence and reports of this court witness, referred to as CW/S/C, was very incisive.

We have perused the original statements of case of learned Counsel for the parties as we have already alluded to.

We have also read in detail the supplementary statements of case filed by the parties after the evidence of the Surveyor. It was evident from the write up of learned counsel for the Defendants Prosper Nyahe, that he observed the collapse of his case with the evidence of the Surveyor. No doubt, learned counsel, instead of concentrating on the salient points and issues arising from the testimony of this Surveyor, rather spent a considerable and substantial part of his supplementary Statement of case to re-argue his case on Fraud that the learned trial Judge found in Plaintiffs Exhibit C. We have not found anything of substance by learned counsel for the Defendants, on this new evidence led in the Supreme Court.

NEW EVIDENCE IN THIS COURT

For example, the crux of this survey was to settle the position of the land in the unreported judgment of this court in Suit No. J4/4/2016 dated 29th June 2016 intitutled,

Mrs Vivian Aku Brown Danquah- Plaintiff/ Appellant/Respondent v Samuel LanquayeOdartey – Defendant/Respondent/Appellant, and the land in dispute herein.

In that unreported decision referred to supra, the Defendants herein, therein Plaintiffs described their land the subject matter of the dispute in Suit No. J4/4/2016 referred to supra as follows in paragraph 3 of their Statement of Claim. **This court per our respected brother Pwamang JSC who spoke with unanimity on behalf of the Supreme Court in delivering the said judgment quoted the said averments as follows:-**

> "Plaintiff pleaded as follows in her latest amended statement of claim filed on 26/8/2010 (page 26).
>
> Plaintiff avers that her ancestor Ayi Baflasi **acquired a parcel of land through settlement and a portion of the land which shares boundary with Ablor Adjei through purchase a long time ago and same is situate at Abokobi and stretches between Boi and Ablor Adjei villages and is bounded on the North-west by Dr. Graham's land, Akporman land and Akoble family land measuring a total distance of 5119.88 ft more or less,…"**

The crux of the above pleading is that, the 1st Defendant herein had again acknowledged the fact that the Plaintiffs Graham family shares boundary with their land in the disputed area. This has been consistent with all the material pieces of evidence on record from all the boundary witnesses called by the Plaintiffs, the 1st Defendant's own Exhibit P already referred to supra and their own pleadings in paragraph 3 of the Suit in J4/4/2016 supra.

From the plan of the land in dispute as drawn and indicated on the composite plan, it is apparent that Plaintiffs land as shown to the Surveyor on the land is edged black.

Similarly, the Plaintiffs land as indicated in the land Title Registry documents (LTR) is edged Red.

Plaintiff's land as indicated in Exhibit B is edged Blue and marked from the legends 1 - 12 and is almost exactly as the area edged Black except for a small portion to the north.

Similarly, the land shown in the LTR and indicated on the land of the Plaintiffs by the Surveyor edged Red is almost as exact as the portion edged Black and the other edged blue and marked 1 -12 therein.

Again the portion of the Plaintiffs land shown and depicted by their Exhibit C is broken Brown and this is also very consistent with the area of land generally depicted as belonging to the Plaintiffs on the ground and also represented by the legends of the other exhibits, B, D and as shown on the land in dispute.

Furthermore, all the grantees of the Plaintiffs are hatched in red and this is also consistent with the land as shown by the Plaintiffs vis-à-vis plaintiff's exhibits B, C and D.

These specie of conduct is consistent with the performance of OVERT ACTS of ownership by the Plaintiffs on the land in dispute.

KROBI WOHO SETTLEMENT

The said Krobi Woho settlement was shown by both parties to the Surveyor as being on their land. From the narratives in the appeal record, it would appear that the settlers obtained their grants from both parties. However, if we take the evidence of the material witness of this settlement, Doe Dzebu into consideration and his inconsistent and dishonest testimonies, we are inclined to believe that his parents obtained grants initially from the Plaintiff's father and later, they must have attorned tenancy to the Plaintiffs, hence the disputed thumbprint of this witness on Exhibit C and its irregular

and improper forensic examination and report. This report has already been discredited and the less said about it, the better.

However, the Plan of land in Indenture number 1975/1973 dated 24th September 1973 and executed between Shome Dowuona and Nitaku Holdings and edged in broken black appears to be outside the Plaintiff's land.

Similarly, the plan of land indicated on the composite plan involving Geoffrey Yaw Osei Bonsu and the 1st Defendants Adutso family edged in the colour Cyan appears outside the disputed area of the Plaintiffs.

The Defendants land as shown by them to the Surveyor on the land has been edged Green. Even though this land is within the area of land in dispute, from the observations, it is clear that this land does not form part of the disputed land.

Similarly, the grantees of the Defendants marked and edged in black on the composite plan, is however inconsistent with the entire evidence on record. It is significant to observe that the portion of land in Indenture dated 13th May, 1955 with Registry No. 1935/1972 and executed between Ado Dwobi, Mankrado of Brekusu and Madam Adutso and shown on the composite plan marked as broken black is outside the disputed land.

Finally, the Adutso Family land as per judgment in Suit No. J4/4/2016 already referred to supra and edged in the colour Magenta is outside the disputed area.

THIS COURT'S OBSERVATION

We observe that the Surveyor, Frank Wontumi, appeared to us to have performed his task creditably. From our observations, we disagree with learned Counsel for the

Plaintiffs that the record of proceedings attributed to the Surveyor in the following answer during the cross-examination of learned counsel for the plaintiff is a mistake. The question and answers went thus:-

Q. "The respondents also attached as Exhibit B, their layout plan, is that correct?

A. Yes my Lords

Q. It is also indicated on the composite plan?

A. Yes, my Lords. That is exhibit B and is numbered 1, 2, 3 up to 12.

Q. **It falls within the Land Title Plan of the respondents; is that correct?**

A. It reasonably falls outside the land title plan of the Defendants."

This would therefore mean that it falls within the area of land of the Plaintiffs or Respondents herein.

Having isolated the Defendants that it falls outside their land, it definitely meant that the land falls within the Plaintiffs land.

Reference must also be made of the various three publications done by the plaintiffs in the National Dailies when Exhibit C was executed.

These processes must be deemed as notices to the whole world, the Defendants inclusive, who sat by and did nothing.

The position of the Plaintiffs is further strengthened by the ownership and boundary status of the Plaintiffs which had been acknowledged by the Defendants variously in Exhibit P, their pleadings in judicial proceedings, referred to supra in Suit No. J4/4/2016 and by their own witnesses and conduct also referred to supra.

Taking all these specie of conduct into consideration as well as the effect of the composite plan in this court, we are of the considered opinion that the judgment of the

majority of the Court of Appeal is based on sound and principled narration of the facts, evaluation of the evidence and the exhibits tendered during the trial as well as the application of relevant laws.

OVERT ACTS OF OWNERSHIP

In this appeal, we have found on the whole that the Plaintiffs and his predecessors in title have over the years exercised various overts acts of possession and ownership on the land in dispute to authenticate their version of how their ancestors settled on this land in dispute.

Without meaning to be repetitive, this land devolved from the Plaintiffs great grandmother Bergina Briandt to their grandmother Christiana Ayao Fleindt and in between them to Awula Dede who performed various averts acts on the land until the Plaintiff's father perfected the root of title by executing Exhibits B, C and D respectively.

These specie of conduct have also been acknowledged by the Defendants herein who have authored exhibit P, pleaded in Suit No. J4/4/2016 supra acknowledging that they share boundary with the Plaintiffs Graham family.

In addition, there have been other overt acts by the Plaintiffs grantees on the land in dispute reference Exhibit CE and CE1, prepared by Court witness Frank Wontumi. Despite the doubts created over the establishment of *"KROBI WOHO"* village, we take the view that the said village was set up upon the express permission and authority of the Plaintiff's ancestors, but with the passage of time, the settlement extended to the Defendants land. This explains the dishonest and inconsistent testimony of DW2 – Doe-Dzebu. In this respect, we have looked at Exhibits 2, 2A to 2N series, which were tendered on behalf of the Defendants, in the original court docket. These are colour photographs depicting portions of the said Krobi Woho village. Indeed, the pictures in

the original docket are clearer than the black and white in the appeal record. As a matter of fact, our observations of this exhibit 2 series are the following:-

i. Most of the buildings therein have fallen into ruins.
ii. Most of them, if not all were built as mud houses with cement plastering and foundation.
iii. There are some structures which look like water collecting receptacles consistent with people who live in such settlements who want to harvest rain water.
iv. There appears to be some structures which look like images of idols or some shrines of deity which the settlers worship.
v. On the whole, this Krobi Woho village looked really unkept, decrepit and had definitely fallen into ruins.

In our understanding, for acts ofpossession and ownership to ripen into overt acts, these must be open and observable and should not be concealed and or secretly done by the persons involved.

The acts of the persons who settled in this Krobi Woho village although qualified as an overt act attributable to both parties, definitely fell into ruins at all material times to the action.

The preponderant, visible and ocular observation from Exhibits CE, and CE1 and also from the testimony of Mr. Frank Wontumi is also consistent with our findings that the Plaintiffs have authenticated their overt acts of possession and ownership more than the Defendants.

In the instant case, even though we are aware of the caveat that a court is not bound to accept evidence given by an expert such as a Surveyor, we need to stress the fact that in this case the said Surveyor has impressed us as a court, and we believe his testimony and explanations.

See cases of ***Sasu v White Cross Insurance Co. Ltd., supra and Darbah v Ampah supra.***

In a litany of decided cases, it has been held that *"to succeed in an action for declaration of title to land, a party must adduce evidence to prove and establish the identity of the land in respect of which he claimed a declaration of title."*

See the following cases:-

1. ***Anane v Donkor [1965] GLR 188, S.C***
2. ***Kwabena v Atuahene [1981] GLR 136, C.A***
3. ***Bedu v Agbi [1972] 2 GLR 238, C.A***

The principle that in action for declaration of title one must prove its method of acquisition conclusively, either by traditional evidence, or by overt acts of ownership exercised in respect of the land in dispute has been conclusively met by the Plaintiffs herein. See also the following cases:-

1. ***Odoi v Hammond [1971] 2 GLR 375***
2. ***Fosua & Adu-Poku v Dufie (Deceased) and Adu-Poku Mensah [2009] SCGLR 310***
3. ***Mondial Veneer (Gh) Ltd. v Amuah Gyebu XV [2011] 1 SCGLR 466***

On the basis of the facts relied upon by the parties in this case as well as the statements of case file by learned counsel for the parties which we have duly considered, we are of the view that, the appeal by the Defendants against the majority decision of the Court of Appeal in respect of the above stated grounds 1, 2, and 3 must fail. This appeal in respect of those grounds of appeal are accordingly dismissed.

GROUND 5

The cost of GH¢150,000.00 awarded in favour of Plaintiffs is excessive and without any basis whatsoever

Our search throughout the entire two volumes of the appeal records has not disclosed that the majority of the Court of Appeal awarded costs of GH¢150,000.00 against the Defendants.

Maybe, the appeal record the Defendants are working with is different from the court records. Under the circumstances, we dismiss the said ground of appeal as untenable and not borne out by the record.

CONCLUSION

We will under the circumstances having taken all the above into consideration, dismiss the appeal by the Defendants against the majority decision of the Court of Appeal. We hereby affirm the said decision dated 31st January 2019.

We also base our decision on the composite plan prepared by Mr. Frank Wontumi, licensed Surveyor, who testified as court witness and tendered Exhibit CE and CE1. As per Exhibit CE, we direct that the plaintiffs land is as shown and marked per their Exhibit B and indicated from legends 1, 2, 3 through to 12 on Exhibit CE.

This is to avoid confusion in future between the parties.

PRACTICE DIRECTION

We note that, the parties herein were directed by the trial High Court to prepare a composite plan delineating their land boundaries. The parties accordingly filed survey instructions as a result of which the plan was prepared and tendered in the trial court. Unfortunately, despite the clarity which the said composite plan brought to the understanding of the land boundaries, the learned trial Judge failed to use it.

This inexplicable silence by the learned trial Judge on the Survey plan, prompted our respected Sister Dordzie JSC sitting as an additional Judge of the Court of Appeal when she spoke on behalf of the majority in the Court thus:-

> *"In this case despite the fact that the court made appropriate orders for the drawing of a composite plan and the parties equally filed the appropriate instructions and a composite plan drawn according to the instructions of the court and the parties were presented to the court, the court strangely ignored this all important evidence altogether and did not give any consideration to it in any way whatsoever in its judgment. As a result the court made no primary findings of fact that could help it resolve the first issue it set down to determine."*

The minority judgment restates the principle on expert opinions but surely the reason for choosing not to rely on it must be articulated? Total silence in such situation is unacceptable, and even disrespectful to the expert witness.

Despite the fact that learned counsel for the Defendants herein Prosper Nyahe was the same Solicitor for the Plaintiffs therein in Suit No. J4/4/2016, and was aware of the boundary owners mentioned by his own clients therein, he kept these facts away from the court. But as fate would have it, our distinguished brother, Pwamang JSC who authored the said judgment on behalf of the court drew this court's attention to the said phenomenon.

This led this court to make the orders for the survey Plan in this court already referred to supra. This composite plan has not only brought clarity to the determination of the boundaries between the parties in the instant suit, but also settled the position of the parcels of land in the instant suit and in Suit No. J4/4/2016 as well.

The learning from this experience has led us to issue a Practice Note for observance by all Courts as follows:-

In order to stem the tide of frivolous, vexatious and repetitive land disputes, whenever a decision of a court of competent jurisdiction has been pleaded in a land dispute in a fresh land case and or on appeal, and it appears certain that portions of the land had been adjudicated in an earlier dispute or decided case raising the applicability of the principle of res judicata between the parties or their predecessors, it is desirable for the court to determine whether the parcels of land are same or distinct parcels of land. In circumstances like this, either the trial court or the appellate court is required to order the preparation of a composite plan to determine the position of the land in dispute and that of the decided case the subject matter of the res judicata application. The Court shall then make use of the composite plan before coming to its judgment in the case.

That is the only way we can prevent unnecessary and needless land disputes from being re-litigated all over again.

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA

(JUSTICE OF THE SUPREME COURT)

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

(JUSTICE OF THE SUPREME COURT)

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

COUNSEL

NII AKWEI- BRUCE THOMPSON ESQ. FOR THE PLAINTIFFS/APPELLANTS/RESPONDENTS WITH GEORGE AGBEKO ESQ. AND EBENEZER AYIKU ESQ.

PROSPER NYAHE ESQ. FOR THE DEFENDANTS /RESPONDENTS /APPELLANTS.