IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)

PWAMANG JSC

DORDZIE (MRS.) JSC

HONYENUGA JSC

KULENDI JSC

CIVIL APPEAL

NO. J4/24/2021

15TH JUNE, 2022

1. MICHAEL ODAI LOMOTEY

2. EBENEZER OTU MAKPOI

…. PLAINTIFFS/APPELLANTS/RESPONDENTS

VRS

1. KWOW RICHARDSON

2. AKWASI PREMPEH

…. DEFENDANTS/RESPONDENTS/APPELLANTS

3. LANDS COMMISSION …. DEFENDANT

4. FREDRICK SHAMO KWEI …. CO-DEFENDANT/RESPONDENT

(Suing for himself and on

Behalf of other members of the

Numo Kofi Anum family)

JUDGMENT

MAJORITY OPINION

DORDZIE (MRS.) JSC:-

Facts: The plaintiffs in this suit Michael Odai Lomotey and Ebenezer Otu Makpoi claim they are administrators of the estate of their late father John Bortei Makpoi. It is the case of the plaintiffs that their late father owned a parcel of land situate at Nungua. The said land forms part of their late father's estate and it is described in the writ of summons as follows:

"ALL THAT PIECE OR PARCEL OF LAND situate lying and being at Nungua – Accra bounded on the North by property of Abli Adama measuring 1000ft. more or less on the East by Stool land measuring 620ft. more or less on the South by the Accra – Tema Motorway measuring 1000ft more or less and on the West by Stool land measuring 640ft more or less comprising an approximate area of 14.46 acres."

According to the plaintiffs, their late father came by the land by a grant from the Nungua Stool represented by Nii Odai Ayiku IV in 1962. The documents of the grant had been registered with Lands Commission and the family of John Bortei Makpoi had been in possession ever since.

It is contended by the plaintiffs that the 1st and 2nd defendants trespassed on their land and the 3rd defendant, Lands Commission had assisted them to register portions they have trespassed on.

The plaintiffs therefore on 21/8/2003 instituted the suit culminating in this appeal in the High Court Accra claiming the following -

1) "Declaration that ALL THAT PIECE OR PARCEL of land described in the SCHEDULE to the statement of claim.
2) Recovery of possessions
3) Perpetual Injunction restraining the 1st and 2nd Defendants their agents and assigns from interfering with the Plaintiff's quiet enjoyment.
4) General Damages for Trespass.
5) An order directed at the 3rd Defendant to plot and register the interest and title of the Plaintiffs."

The 1st& 2nd defendants resisted the Plaintiffs' claims and in an amended Statement of defence filed on 29/6/2007 averred that–

They are aware from their dealing with lands in the area that the whole tract of land in that area belongs to Teshie families especially the Numo Kofi Anum Family and the Nii Ashong Mlitse Family respectively all of Teshie. The Numo Kofi Anum Family hold a land certificate Number GA 2811 in respect of their land, which includes the disputed land. The Nii Ashong Mlitse Family also has a Declaration in respect of the area of land which Declaration is registered with the Land Registry number 5269/1977. That at the appropriate time, the said families would be joined to the suit.

The 1st and 2nd defendants further averred that a Memorandum of Understanding was executed between the lawful representatives of Numo Kofi Anum family of Tesa, Accra and the 1st defendant dated 19 September 2001, concerning the grant made to him by the Kofi Anum family. The Ashong Mlitse family also gave the 1st defendant a Power of Attorney over the land they granted him. It is the case of the first defendant that he had made searches with the Land Commission and relevant statutory institutions but had not come across any information that the land he is occupying belongs to the plaintiffs. In any event, he purchased the land from both the Numo Kofi Anum family of Tesa and Ashong Mlitse family in good faith and without any notice of any adverse title of the

plaintiffs. 1st defendant therefore, intends to rely on the Land Development (Protection of Purchasers) Act, 1960 Act 2, as part of his defence. The 1st defendant maintained that as an estate developer he had spent a colossal sum of money in building and developing the infrastructure on the land. The first and second defendants further maintained that even if plaintiffs' father had any land, the same had nothing to do with the lands defendants are occupying as the same are within the registered land of the Numo Kofi Anum and Ashong Mlitse families. The plaintiffs are therefore not entitled to their claims at all.

One Fredrick Shamo Kwei applied to be joined to the suit. In the affidavit accompanying the application for the joinder he described himself as a principal member of the Numo Kofi Anum family of Tesa and caretaker of the Numo Kofi Anum family lands. He deposed to the following facts in the affidavit:

1. "That I am the Deponent herein.
2. That I am a Principal Member and Caretaker of Numo Kofi Anum Family Lands at Tesa and have the authority and consent of the said Family to depose to these facts.
3. That Numo Kofi Anum (Deceased) during his lifetime acquired a vast piece of Land at Tesa bounded on the North by Otinshie/Bedzin, on the North-West by Otele/Bawaleshie and on the South-West by Martey Tsuru and on the South by Agbelesa, on the East by Adjiringanor.
4. That the Family land is divided into Northern and Southern Sectors by the Accra Tema-Motor Road.
5. That sometime in 2001, my family granted a piece or parcel of the family lands comprising about 26 Acres more or less to the 1st and 2nd Defendants.
6. That the Defendants have shown the Writ of Summons and the Statement of Claim to me.

7. That the Plaintiffs herein claim to derive their Title from Nii Odai Ayiku IV. Nungua Mantse by a grant dated 17February 1962.
8. That the land claimed by the Plaintiffs forms a part or portion of our ancestral family lands of which we have enjoyed quiet and undisturbed possession for years.
9. That in 1990, as a result of grants made by Nii Odai Ayiku IV, Nungua Mantse to certain persons of portions of our land my Family applied for their Nungua Stool to be joined to a Suit we have commenced in this Honourable Court titled: Suit No. 383/89

   Nii Mate Tesa & Others

   Versus:

   1. Numo Nortey Adjeifio

   2. Empire Builders Limited

   3. Nii Oda Ayiku IV, Nungua Mantse, substituted by Nii Osabu Adjin II (Deceased) substituted by Nii Afotey Odai IV. Dzasetse and Acting Nungua Mantse.

   4. Nii Adjei Akpor II Shikitele. Teshie

   5. Numo Adjei Kwanko II, Osabu & Ayiku Wulomo.

10. That the Suit is still pending; I am 6th Plaintiff and Counsel for the Nungua Stool, T.A. Tagoe Esquire, is currently cross-examining Witness of 1st Defendant.

11. That the Suit has been adjourned to 26March 2004.
12. That I am advised and verily believe the same to be true that since I am Plaintiff in Suit No. 383/89, I must apply as allodial owner to protect the interests of the Defendants and also the integrity of our lands.

13. That I am advised and verily believe the same to be true that my presence will assist in determining all the issues/differences in the matter and I pray to be joined as a Co-Defendant.

The court granted the application and he was joined to the suit as the co-defendant.

In his pleadings in defence to the suit the co-defendant averred that the 1st and 2nd Defendants are grantees of Numo Kofi Anum Family of Tesa which family is the undisputed owner in possession of the land in dispute. The land does not belong to Nii Odai Ayiku IV as a person or to the Nungua Stool and that; the Co-Defendant's Family had been in undisputed possession until recently when the Plaintiffs forcibly trespassed onto the land. The co-defendant further averred that the alleged payment of compensation to the plaintiffs was based on misrepresentation by the Plaintiffs and does not make the Plaintiffs undisputed owners of the land. It is further averred by the co-defendant that sometime in the early 1960s, Nii Odai Ayiku IV, then Nungua Mantse, without legal authority started making grants of portions of co-defendant's said land to certain persons including the father of the Plaintiffs. The co-defendant's family also noticed that certain other Quarters of Teshie were also laying Claims to their lands and making grants so the Co-Defendant's family commenced Suit No. 383/89 titled:

Nii Mate Tesa and Others

Versus:

1. Numo Nortey Adjiefio, Ayiku and Osabu Wulomo of Teshie.

2. Empire Builders Limited

3. Nii Odai Ayiku IV substituted, by Nii Afotey Odai IV Dzasetse and Acting Nungua Mantse.

The Co-Defendant averred that the said Nii Odai Ayiku IV went into Exile and so the Co-Defendant's family joined Nii Osabu Adjin I and upon his death Nii Afotey Odai IV, Dzasetse and acting Nungua Mantse has been substituted.

The co-defendant counter claimed for declaration of title to the land described in the schedule to plaintiffs' writ of summons.

The Trial Court

Evidence of the plaintiffs

To succeed it is trite that the plaintiffs provide sufficient persuasive evidence establishing their root of title, mode of acquisition and overt Acts of possession.

See the case of ***Mondial Veneer (Gh) Ltd.***

V. Amuah Gyebu XV [2011]1 SC G L R 466.

Plaintiffs were represented by an attorney one Nicholas Adotey who gave evidence on their behalf.

According to him the land in dispute is situate at Adjiringanor. It was acquired by his deceased uncle (The father of the plaintiff) from the Nungua stool in 1962. The transaction is evidenced by a deed of gift dated 7 February 1962 (Exhibit C).

The acreage of the land was originally 22.96 acres, however, the government compulsorily acquired a portion of it for the purposes of constructing the Accra - Tema Motorway, 8.49 acres was compulsorily acquired. The uncle was paid compensation. The witness tendered a valuation report exhibit D in proof of their claim of compensation payment to them in 1976. 14.49 acres of the land was what the plaintiffs' predecessor had left after the compulsory acquisition.

The registration process of their document met some challenges at the Lands Commission, which they were taking steps to resolve.

They do visit the land and sometime in 2003, they visited the land and found the 1st& 2nd defendants on the land developing same.

The stool Secretary of the Nungua Stool gave evidence in support of the Plaintiffs' case. He admitted the Nungua stool made a deed of gift of the disputed land to the plaintiffs' late father. The land in dispute according to him is situate at Nungua New Town extension, known as Adjiringanor. He tendered exhibits N, O, P, Q, R, S, and T as a proof of various grants the Nungua stool had made of the disputed area to third parties. However, in Cross-Examination he admitted that those grants are subject matter of litigation between the Nungua stool & the Numo Kofi Anum family of Tesa.

The plaintiffs closed their case by the evidence of Ridley Henry Lutterodt a lands officer from the Lands Commission. He testified that the amendment the plaintiffs made to the document they presented to the Lands Commission for registration was not fraudulent but it was made at the request of the Lands Commission. He tendered exhibit X a letter dated 20-12-1996 from the Lands Commission to support this.

Evidence of the defendants

The 1st defendant in defending the action testified that he is an estate developer. He had had land purchase transactions with one Seth Laryea Mensah the head of the Ashong Mlitse family of Odaitei Tse We and the head of Numo Kofi Anum family of Tesa.

The Ashong Mlitse family land is situate at Adjiringanor; it is an adjoining land to Tesa lands, which is owned by the Numo Kofi Anum family. Tesa is on the western part of Adjiringanor.

As proof of ownership of the land the Ashong Mlitse family gave him a copy of a judgment dated 26/4/89, which was given in their favour, and a statutory declaration, these are exhibit 1series. The Numo Kofi Anum family gave him a copy of their land certificate (Exhibit 2)

He then entered a memorandum of Understanding with the Ashong Mlitse family & the Numo Kofi Anum family to purchase 26.7 acres of their land for commercial development purposes.

They entered terms that would enable the development of the land benefit all the parties that executed the MOU. The MOU is exhibit 3.

According to 1st defendant, the Ashong Mlitse family further have him a Power of Attorney Exhibit 4 dated 28/2/2001, which gave him authority to

(1) To inspect the title documents of any developer of Ashong Mlitse family lands
(2) To survey all Ashong Mlitse family lands and bring to the notice of the Principals any such vacant land.
(3) To do anything else reasonable necessary to effectively and efficiently curb trespassers & encroachers from selling or developing the said Ashong Mlitse family lands. (The witness admitted that the Power of Attorney was revoked in 2005).

After obtaining the Power of Attorney and executing the MOU he conducted the necessary search and went ahead and purchased lands from the Ashong Mlitse family. He developed these lands and sold the developed properties to his clients.

He had developed an area where both families share boundaries (The Ashong Mlitse & Kofi Anum families) and had built a fence wall around more than 42 plots and was in the process of building structures, which had reached various stages when a group of

people from Nungua came & destroyed over 42 of the structures he had built. He conducted a search after the destruction in 2013. The Search report is Exhibit 5.

1st defendant maintained that he had not trespassed the land the plaintiffs are laying claim to. His search revealed that the portion he acquired falls within the Ashong Mlitse family land. Though a portion within the search showed a registration of Lomotey Makpoi, the area he occupies does not fall within Lomotey Makpoi registration.

Evidence of the Co-defendant

The Co-defendant who described himself as principal member of the Numo Kofi Anum family of Tessa and Caretaker of the family's lands stated in his evidence that his family executed an MOU (exhibit 3) with the 1st defendant. The 1st defendant showed the family the writ plaintiffs issued against him, therefore the family found it necessary to join the suit.

The co-defendant gave the boundaries of the land claimed by the Numo Kofi Anum family as follows: "On the south by Agblesa people, on the south west by Mante Tsuru family, on The North West by Otele / Bawaleshie family, on the north by Nii Osae Otinshie family. On The North-East by Ashong Mlitse family of Odaitei Tse we of Adjiringanor.

The Numo Kofi Anum family, according to the witness has a land title certificate to the land (Exhibit 6); the family is the allodial owner of a total acreage of 998.890. The Accra-Tema Motorway divided The Tesa family land into North and South as indicated in Exhibit 6.

The North is site A & South site B. The disputed land is on the Northern part of site A and comprises of 423.037 acres. The land the plaintiffs are claiming is less than 2 acres according to this witness.

He also tendered the Gold Coast Chief list of 1941 as exhibit 7. The list has Kpakpo Tesa as the Onukpa of Tesa; he was the grandson of Numo Kofi Anum. This is to demonstrate that Tesa existed as a village of its own and had a chief, in the person of Kpakpo Tesa in 1941.

On recent overt acts of possession by the family in respect of the disputed land, he testified that together with the other families of the adjoining lands they commissioned the department of Town & Country Planning to plan residential plot lay out for the area, which they did. His family constructed roads, brought electricity and water to the property. The grant made to the 1st defendant falls within the lay out and it is zoned as woodlot, it does not form part of the land plaintiffs exhibit C covers.

According to the witness though the Nungua stool had laid adverse claims to their family land and made grant to 3rd parties, The Nungua stool has no land in the area. Tesa is within Teshie traditional area.

He tendered Jackson Report of 1952 to support this (exhibit 8)

On his capacity, which is one of the issues arising in this appeal the co-defendant gave the following evidence in cross examination on 27/2/2008

Q: Who is the head of Numo Tessa Family?

A: I am now the head of family since 1 January 2008.

Q: At the time you applied to join the suit you were not head of family.

A: Yes I was having Power of Attorney from the head of family.

Q. But you did not deem it expedient to produce copy of the power of attorney

A: I can produce it if the court allows.

Q. even as at 13/2/08 you only described yourself as the principal member not head of family.

A. As principal member and holding Power of Attorney I can prosecute and be prosecuted."

Decision of the trial Court.

The plaintiffs raised the legal issue of the capacity of the co-defendant, not being the head of the Numo Kofi Anum family to be joined to contest the suit on behalf of the family. The trial court aptly stated the law in the case of Kwan v Nyieni & others [1959] GLR 67. The learned trial Judge, in my view further correctly interpreted **Order 4 rule 9 (2) of C. I. 47** and held that the co-defendant being a party on behalf of the Numo Kofi Anum family was in in line with the law. This is how the trial court's reasoning goes on the issue at page 245 -246 of the ROA.

"Firstly, the capacity of the Co-defendant. It has been submitted that the Co-defendant not being the head of the family could not have been joined to defend the action on behalf of the family. In his application to join the action, the Co-defendant had described himself as a principal member and a caretaker of the family lands; he should not have joined in his personal name. His capacity as stated in the affidavit in support of his application to join was not challenged; he is a principal member of the family and besides, the caretaker of the family's lands; he has full knowledge of the property and he testified as a principal member and a caretaker and tendered in evidence MOU signed with the defendants. In Kwan v Nyieni and Ors. (1959) GLR 67, the Court of Appeal held inter alia,

"(1) as a general rule the head of a family, as a representative of the family, is the proper person to institute a suit for the recovery of family land".

It however admitted that there were exceptions and in any such special circumstances the Courts will entertain an action by any member of the family either upon proof that he has been authorized by other members of the family to sue. In the instant case, not only is there no challenge by any member of the family to the Co-defendants representation, but he has the authority of the family and he spoke of matters of his own personal knowledge. Order 4 r 9 (2) of the Rules of Court provides inter alia,

"The Head of Family in accordance with the customary law may sue and be sued on behalf of or as representing the family.....

The word used is 'may' and as customary law is flexible, in the particular circumstances of a case, a member may sue or be sued on behalf of the family. In any case, in this instant case, I find the Co-defendant a competent representative of the family. He therefore has capacity to join in the action. In his evidence he said, when the Writ was issued against the defendants they came and showed it to the family and the family authorized him to join and protect the family's property."

The trial court concluded its decision thus:

"On the evidence I am satisfied that the co-defendant's family have been in possession of their land including the one in dispute for a very long time exercising overt acts of ownership over it.

The Jackson Report, which was tendered, had found the Teshie Stool to be the owners of Adjiringanor as against Nungua and Labadi Stools. The co-defendant referred also to some pending cases affecting the land and that whenever any such encroachment had occurred, immediate steps are taken to defend their title. The Nungua Stool, which is said to have granted the land to the plaintiffs never, joined in this action. Representatives who were called to testify on behalf of the Nungua Stool knew nothing or less about the land in dispute.

The pendency of the action in Suit No. L. 388/97 at the High Court would not stop this Court from deciding in this case. Under the principle of Lis alibi pendens, any of the parties could have applied for one of those cases to be struck out or stayed pending the determination of that case, but that was not done.

On the preponderance of the evidence, I am satisfied that the Co-defendant has been able to establish his family's title to the land in dispute. Accordingly, I dismiss plaintiffs claim and enter judgment for the Co-defendant against the plaintiffs on his counterclaim. Any order of injunction placed on the parties is hereby discharged"

The Court of Appeal

The plaintiffs appealed against the High Court judgment dated 12th of June 2008 on the following grounds:

i) The learned trial judge erred in finding that the disputed land is located at Tesa and not Adjiringano or Nungua New Town.

ii) The learned trial judge erred in holding that the Memorandum of understanding tendered by the 1st Defendant transferred and conferred title in the land to them.

iii) The learned trial judge erred in fact when she failed to hold that Odateitse We had not conveyed any land to the 1st Defendant as the purported Memorandum of understanding was signed by only the Co-Defendant.

iv) The learned trial judge erred in clothing the Co-Defendant with capacity though he admitted not being the Head of Family to join in the family name

v) The learned trial judge erred in entering judgment for the Co-Defendant in respect of the entire land in dispute though he claimed part and acknowledged title of the Plaintiffs in part.

vi) The learned trial judge also erred in relying on the case of Banga vrs Djanie which is a matter involving two Teshie families to conclude that the Nungua Stool does not own Agyiringano land.

vii) The learned trial judge erred in holding that the 1st and 2nd Defendants have developed the land in good faith and for which reason they ought to be protected when the said development works where carried out during the pendency of the suit.

viii) The learned trial judge erred in holding that the Plaintiffs did not describe their land with certainty when the writ had a schedule attached to it.

ix) That the judgment was against the weight of the evidence before the Court.

The Court of Appeal allowed the appeal and in its judgment dated 3 April 2019, set aside the judgment of the trial High Court based on the following reasoning:

a) The land, subject matter of the suit is situate at Nungua Adjiringano or Nungua New Town and not Tesa.

b) Exhibit 3 the MOU which forms the basis of 1st respondent's claim was wrongly admitted in evidence because it was not stamped. It had no information for which the trial judge could make findings of fact.

c) The co-defendant had no capacity to join the action. He failed to endorse the capacity in which he put up a counter claim. Throughout the proceedings, the trial court failed to cure this defect. The Court of Appeal concluded that the evidence of the co-defendant was not admissible because he lacked capacity to join the suit and set up a counter-claim on behalf of his family.

Supreme Court.

The defendants dissatisfied with the decision of the Court of Appeal appealed to this court on the following grounds:

GROUNDS OF APPEAL:

a) The judgment is against the weight of evidence.
b) The Court of Appeal erred in excluding the evidence of Frederick Shamo Kwei, the Co-defendant and so failed to give adequate consideration of the case of the defendants.
c) The Court of Appeal erred in not following the binding decision of the Supreme Court in the case of Nii Mate Tesa (substituted by Daniel Markwei Marmah) & 5 Ors vrs. Numo Nortey Adjeifio (substituted by Adjei Sankuma) & 6 Ors; Suit No. J4/44/2013 of 15 May 2014.
d) The Court of Appeal erred in not holding and finding that the plaintiffs failed to discharge the burden of proof on them.
e) The Court of Appeal erred in relying on the evidence of PW1 Ransford Adokwei Addotey in spite of his lack of capacity to testify on behalf of the Nungua Stool.
f) The Court of Appeal erred in not applying the maxim that a trespasser in possession has a good title against the whole world save the true owner to the fact of this case where the evidence shows that the defendants were in possession of the land.
g) The Court of Appeal erred in law when upon excluding exhibit 3 for want of stamping it set aside all findings in favour of the defendant without taking into account other evidence in favour of the defendants
h) The Court of Appeal erred in law when it excluded evidence of the first defendant on the Ashong Mlitse family's interest in the land after setting aside his Power of Attorney.

i) The Court of Appeal erred in wrongly excluding exhibit 3, which had been stamped for want of stamping.

At the hearing of the appeal, this court found it expedient, in view of references made to the case of Adjei Fio (substituted by Adjei Sankuma and Adjei Kwanko II vrs Mate Tesa (substituted by Marmah & others [2013-2014] 2 SCGLR 1537. A case, which appears to have involved the same subject matter as in this suit, to order the making of a composite survey plan to assist the court to resolve the issues effectively. Counsel for both parties consented to this proposal and the court at its sitting on 28 April 2021 made the following orders:

"Having explained to Learned Counsel for the parties herein, Nii Akwei Bruce Thompson for Defendants/Respondents/Appellants, and Adjei-Lartey for the Plaintiffs/Appellants/Respondents on the relevance and application of the Supreme Court case entitled Adjei Fio (Substituted by Adjei Sankuma & Adjei Kwanko II) Vrs. Mate Tesa (Substituted by Marmah) and Others, (Supra) to the land the subject matter of dispute in this Appeal and both having seen the wisdom in ordering and directing a Composite Survey Plan to be made, the following orders are accordingly made.

1. The parties are hereby ordered to submit to the Regional Surveyor, Mapping and Survey Division of the Lands Commission Greater Accra all Site Plans, Land Title Certificates of relevance in this suit within two weeks of this order with detailed Survey Instructions to be carried out on their behalf.
2. The land Title Certificate or any relevant Site Plan in respect of the Supreme Court Case reported on [2013-2014] 2 SCGLR at 1537 and referred to Supra must also be delivered to the same Regional Surveyor by the Defendants/Respondents/Appellants and verified to be so.

The Regional Surveyor is then directed to use the documents and Survey Instructions to prepare a Composite Plan, with all the relevant documents superimposed therein in particular to indicate the position of the land decided in the Supreme Court Case reported in (2013-2014] 2 SCGLR at 1537 and referred to Supra."

The above orders were complied with and the respective parties filed their survey instructions accordingly. On 30th November 2021, Mr. Frank Wontumi a surveyor from the Lands Commission testified in this court as Court Witness and tendered the composite plan he prepared in accordance with the court's orders and the survey instructions of the parties. The composite plan is in evidence as exhibit CE and his report is exhibit CE1. By the survey report, 98% of the land shown on the ground by the plaintiffs and on their site plan (which is the disputed land), falls within the area shown by the defendants and covered by the plan of Numo Kofi Anum family land exhibit B. The same plan being the judgment plan of the judgment of this court in the Mate Tesa case.

The Court witness was cross-examined by counsel for both parties. Thereafter counsel were ordered to file supplementary statements of case, which they did.

Submissions in support of and against the grounds of appeal

Counsel for the appellant argued ground (a) which is the general ground that the judgment is against the weight of evidence, together with grounds (b), (c), (e), (g) and (h). It is counsel's submissions on these grounds that the Court of Appeal erred when it rejected the evidence of the Co-defendant on the ground that he had no capacity to be joined to the action. In so doing, the court failed to consider the case of the defendants' altogether. Had the court considered the evidence of Co- defendant its verdict would have been different. The decision to exclude the evidence of the Co-defendant was per incuriam the Supreme Court's decision in the case of Adjeifio & Adjei Kwanko II & Ors

v Mate Tesa Substituted by Marmah [2013-2014]2 SCGLR 1537 on the issue. The evidence of the 1st defendant was also wrongly rejected by the first appellate court when the said court concluded that the 1st defendant testified on behalf of Nii Ashong Mlitse family per an invalid power of attorney. Counsel pointed out that the Nii Ashong Mlitse family are not parties to the suit therefore the 1st defendant could not have testified on their behalf. The 1st defendant mentioned the power of attorney in his evidence to support paragraph 4(b) of his averments in his statement of defence. It is further argued by counsel for the appellant that the parties have different grantors therefore the issue is not about priority of grant but about which of the grantors own the land. The decision of the trial court that the Numo Kofi Anum family, the grantors of the 1st and 2nd defendants own the land had been validated by the decision of the High Court in the Mate Tesa case supra which had been affirmed by the Court of Appeal and the Supreme Court.

It was further argued by counsel for the appellants that the plaintiffs failed to adduce sufficient evidence to establish their assertion that the disputed land is owned by their grantor, the Nungua Stool. There is sufficient evidence on record that the defendants are in possession of the disputed land. It is required of the plaintiffs to lead evidence to establish a good tile that would defeat the possessory title of the defendants but they failed to do so. Counsel concluded that the decision of the trial court is in line with the law and the decision of the Supreme Court in the Mate Tesa case, which declared Nii Kofi Anum family as owners of the disputed land as against the Nungua Stool.

Counsel for the plaintiff respondents on the other hand argued that the Court of Appeal committed no errors in its decision and was right in rejecting the evidence of the Co-defendant/respondent. It is the submission of counsel of the respondents that the decision of this court in the Mate Tesa case is distinguishable from this present case therefore the decision of the Court of Appeal rejecting the evidence of the Co-

defendant/Appellant is not per incurium. Counsel further argued that the land, which is the subject matter of the Mate Tesa case, is not the same as the land the subject matter of the present suit.

Counsel concluded that the appeal has no merit and should be dismissed

Consideration of the Appeal.

The ownership of lands in the area the disputed parcel of land falls had been a subject matter of litigation in our court system and had generated multiplicity of suits over the years. One would have thought that the decision of the Supreme Court in the Adjei Fio (Substituted by Adjei Sankuma & Adjei Kwanko II) Vrs. Mate Tesa (Substituted by Marmah) and Others (I will refer to this case from now as the Mate Tesa case), reported in [2013-2014]2 SCGLR 1537 would have put an end to litigation over the particular parcel of land in issue in this case. The records show that the Mate Tesa case lasted over 20 years in the court system. References made to that case by the Co-defendant in his pleadings and evidence to the court, and the plaintiffs' specific description of the land they are claiming in this suit, demonstrates that the decision of the Supreme Court in respect of ownership of the disputed land should have closed that chapter of litigation.

However, it appears the 'sacred principle' of stare decisis, which is enshrined in the 1992 Constitution and re-enacted in the Courts Act in 1993, had been thrown overboard in the hierarchy of our court system.

Article 129 (3) of the 1992 Constitution provides as follows:

(3)"The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all

other courts shall be bound to follow the decisions of the Supreme Court on questions of law."

This clause is re-enacted in the Courts Act verbatim.

Section 2 (3) of the Courts Act 1993 (ACT 459) reads:

> **(3)"The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law**."

By operation of these statutory provisions, the courts abide by former precedents on the same point of law decided in previous suits. In this suit, it appears the Court of Appeal overlooked this principle, and failed to abide by its own decision in the Tesa case and, the decision of the Supreme Court. It would be helpful at this stage to give a brief account of what transpired in the Tesa case.

The Tesa Case

The Co-defendant herein in his pleadings and evidence in the present case informed the trial court of the pending of the Tesa Case in the High Court at that time, in which he was the 6th plaintiff. He and other members of the Numo Kofi Anum family of Tesa had sued the Nungua stool and others in the Tesa case. The Nungua Stool was the 3rd defendant in that case and was represented by Nii Afotey Odai IV. The record clearly shows that the subject matter of that suit is the same as the subject matter of this suit. The description of the land the plaintiffs in the Tesa were claiming title to, is that the land is situate at Tesa and it is bounded on the East by Adjiringano, on the North by Otinshie, on the South by Agblesa and on the West by Martey-Tsuru and Bawaleshie. There is no dispute in the appeal before us that the parcel of land in dispute is the same as the one in the Tesa case. The High Court, in its judgment in the Tesa case, - suit N0

L383/89 dated 21 December 2009 held that Tesa is a village founded by Numo Kofi Anum by settlement. The Tesa lands are independent of Teshie Quarter lands and belong to Numo Kofi Anum and his immediate family that is his successors in title, who have exercised various overt acts of ownership over the land for a very long time without let or hindrance. The High Court's final decision on ownership of the disputed land is put in the following way at page 53 of the judgment "In the instant case, the plaintiffs have to my mind, through the evidence of the 3rd and 6th plaintiff's exhibit B and J, together with the testimony of PW1 and PW2 been able to establish the identity of the boundaries to the satisfaction of the court…….I will therefore declare the plaintiffs as entitled to declaration of title in respect of the land endorsed on the writ and captured in exhibit B. Should the plaintiffs be entitled to the entire expanse of land delineated in exhibit B? For the reasons stated above, I think they are."

For a better understanding, I would quote what exhibit B is as stated in page 41 of the said judgment, "Exhibit B- This is a plan of land covering the land reputed to have been settled upon by plaintiffs' ancestor Numo Kofi Anum which the plaintiffs are claiming before this court, and was tendered by 6th plaintiff. The plan shows the land as sharing boundary with the following. On one side by Otinshie. On another side by Adjiringanor. On another side by Agblesa. On another side by Mate Tsuru. The plan shows the extent of plaintiffs' land as covering an area of 918.24 acres extending from South of the Accra-Tema Motorway to the north of the Accra-Tema Motorway. Exhibit B also shows several sand pits within the disputed area of land claimed by the plaintiffs. The plan of land also indicates a dam, a lake as within the land. There are also indications of portions of land being claimed by the 3rd defendants within the disputed area, and some outside that area. The plan also vividly depicts the area of land that had been conveyed to the 2nd defendant and which they have registered at the Land Registry

on 10 June 1975 as N0. 1571/1979. Finally, this plan also indicates the area of land being claimed by Numo Adjei Norteyfio."

The second defendant in the Tesa case was Empire Builders Ltd.

The defendants appealed, the Court of Appeal affirmed the High Court's decision declaring tittle in the Numo Kofi Anum family. The Court of Appeal however varied the decision of the trial High court that the 1st, 2nd, 3rd 4th and 6th plaintiffs had the capacity to institute the action. The Court of Appeal took the view that the Numo Kofi Family is patrilineal, the 1st to 4th and 6th are matrilineal descendants of the family, as such they are not members of the family therefore, cannot sue on behalf of the family. Their names were struck out of the suit as wrongly joined to the suit. The Court of Appeal further held that the fact that the said plaintiffs were disqualified as parties on grounds of capacity does not strip them of their capacity to testify as witnesses. At page 12 of the said judgment the Court of Appeal held ***"in the light of the declaration that 1st to 4th and 6th respondents lacked capacity to initiate the present action does not strip them of their competency to testify to the issues in contention from their knowledge of the events. Hence evidence led by them in the trial would be considered in the same as at the trial…"*** **See Civil Appeal *No H1/92012* dated 19 April 2012**

This position of the law on this issue was affirmed by the Supreme Court when the case went on further appeal to the Supreme Court. This court per Gbadegbe JSC at page 1545 of the report, [2013-2014] SCGLR held ***"the question that next arises from the grounds of objection contended before us by the defendants is whether, having struck out the plaintiffs named on the writ save the fifth plaintiff, it was proper for the learned Justices of the Court of Appeal, to have acted upon the evidence of persons who had testified as plaintiffs but were found by them to have been wrongly joined to the action. This is an objection that, in our opinion, goes to form and not substance because by the rules of evidence, every person is competent to testify in an action. The***

evidence led by the said misjoined plaintiffs was not illegal but relevant for the purpose of the trial. Accordingly, the learned Justices of the Court of Appeal were right in taking them into account."

The Supreme Court upheld the decision of the two lower courts that the Numo Kofi Anum family owns the disputed land. The Supreme Court decision is dated 15 May 2014.

Grounds (a) (b) (c) of Appeal

The law on the admissibility of the Co-defendant's evidence was settled as far back as 12th of April 2012 by the Court of Appeal and affirmed by the Supreme Court on May 2014.

It is therefore palpably wrong for the Court of Appeal in its decision in this case dated3 April 2019 to throw out the evidence of the Co-defendant and hold that "Consequently the ground of appeal with respect to a challenge to the Co-defendant's capacity is hereby upheld. The resultant effect is that, however, meritorious the evidence of the co-respondent may be, it lacked the requisite legal foundation. To that extent, his evidence was inadmissible ab initio".

The Court of Appeal is bound by its own decision on the issue as well as the decision of the Supreme Court. For its erroneous decision, rejecting the evidence of the co-defendant it failed to consider relevant evidence that could have assisted it to assess the evidence on the balance of probabilities. The arguments of the appellants in support of grounds (a) (b) and (c) of the appeal are very sound. These grounds of appeal are hereby allowed. I would similarly uphold grounds (g) and (i). The M O U tendered by the 1st defendant and admitted in evidence as exhibit 3 was declared inadmissible by the Court of Appeal on the ground that it was not stamped. The Court of Appeal therefore rejected all findings made by the trial court based on the exhibit 3. The MOU marked as

exhibit 3 which forms part of the record of appeal before us is stamped, There is therefore no reason why ground (i) Should not be allowed; rejecting findings of the trial court related to exhibit 3 is equally wrong.

The Survey plan Exhibit CE having confirmed that 98% of the land in dispute falls within the area covered by the decision in the Mate Tesa case, takes the wind out of the sail of any arguments plaintiff /respondents have put across in opposing this appeal.

The Supreme Court had affirmed the declaration of title in the disputed land in the Numo Kofi Anum family of Tesa. The judgments of the two lower courts in the Tesa case, which was affirmed by this court clearly stated that the land the Nungua stool is laying claim to do not come anywhere near the land being disputed in this suit.

It follows then that the Nungua stool the plaintiffs' grantor never owned any part of the disputed land. Consequently, the Nungua Stool could not have made any grant to the plaintiffs of what it does not have. The legal principle of nemo dat qui non habet (no one gives who possesses not) is applicable in this case.

Consequently, the grant made by the Numo Kofi Anum family to the 1st defendant is valid and cannot be questioned by the plaintiffs.The findings of fact made by the trial court supports the evidence on record.

The trial court's analysis of the law on the circumstance where the co-defendant would be clothed with capacity to join the action I find to be sound and is line with decisions of this court that are more liberal in the application of the customary law exceptions laid down in Kwan v Nyieni supra. The decision in Kwan v Nyieni was given on 26 February 1959, subsequent decisions of the superior courts have demonstrated the rules ought to be applied with some level of flexibility since the law is not static but dynamic, and societal changes is bound to bring changes in our customary practices as well. I particularly share the view held by Wood JSC (as she then was) in Re Ashalley Botwe

Lands, Adjei Agbosu v Kotey case reported in [2003-2004]1 SCGLR 420 at 432 -433. Where she reviewed the rule in Kwan v Nyieni.

The rule as laid down in Kwan v Nyieni is as follows: ***"(1) as a general rule the head of a family, as representative of the family, is the proper person to institute a suit for recovery of family land;***

(2) to this general rule there are exceptions in certain special circumstances, such as:

(i) where family property is in danger of being lost to the family, and it is shown that the head, either out of personal interest or otherwise, will not make a move to save or preserve it; or

(ii) where, owing to a division in the family, the head and some of the principal members will not take any steps; or

(iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole.

In any such special circumstances the Courts will entertain an action by any member of the family, either upon proof that he has been authorised by other members of the family to sue, or upon proof of necessity, provided that the Court is satisfied that the action is instituted in order to preserve the family character of the property;"

In Re Ashalley Botwe Lands, Adjei Agbosu v Kotey this court per Wood (Mrs.) JSC sufficiently discussed the application of the above rules to conform to changes in the society and its cultural practices as time goes by. The learned jurist expressed her views on the issue, after quoting Kwan v Nyieni as I have done above and said - ***"Plainly, nothing in this passage can be read as establishing an intractable rule of law that an action instituted by a non-head of family, specifically ordinary members of the family,***

can only succeed upon proof that there was a head of family who was deliberately for one reason or the other refusing to act to save the property. On the contrary, the Court of Appeal recognized that there are situations, (described by the court as special circumstances) in which ordinary members of the family can in their own right, take up the mantel and sue to protect family property, without having to prove there is a head of family who is refusing to act. Therefore, actions brought by ordinary members of the family do not succeed only upon proof that there is a head of family who is apathetic. Even so, the Court of Appeal (per van Lare Ag CJ) identified only two broad special circumstances under which the general rule that only the head could sue, would not apply. These are: first, where the member of the family has been authorized by members of the family to sue; or, second, upon proof of necessity to sue.

Therefore, provided, of course, that the court is satisfied about the bona fides of the originator of the action, authorisation to sue is only one of the exceptions envisaged under the rule. Necessity is another. Even so, the Court of Appeal (per van Lare Ag CJ) was most careful not to provide a closed category of those possible special or exceptional cases in which the general rule would be inapplicable, hence his use of "such as". Given that society and, indeed, customary law is dynamic and not static, the Court of Appeal in Kwan v Nyieni had left the matter open for possible expansion of those special circumstances when the need arose. Therefore, the question whether any particular case falls within the stated exceptions rather than the rule or even an exception not identified in Kwan v Nyieni, is dependent on the particular facts of the given case. This has been the approach which has been consistently followed by our courts. See, for example: Sabbah v Worbi [1966] GLR 87; Hausa v Hausa [1972] 2 GLR 469, CA; and Otema v Asante [1992] 2 GLR 105.

Thus, the case of Yormewu v Awute [1987-88] 1 GLR 9, CA which the defendants relied on to buttress their argument, turned primarily on its own peculiar facts."

In the circumstances of this case, the co-defendant found it necessary to join the suit when the plaintiffs sued their grantees. In his application for joinder he deposed to facts of he being authorised by the family, he further deposed that he was the caretaker of the Numo Kofi Anum family lands and he represents the family in court matters. He confirmed this in paragraph 12 of his pleadings and in his evidence at the trial by citing the title of the case pending at the High Court at that time involving the Numo Kofi Anum lands, which turns out to be the Tesa case, which I have severally referred to in this judgment. For the reasons I have stated I endorse the trial court's reasoning and conclusion on the issue of the capacity of the co-defendant to join the suit. The decision of the trial court is sound, there is no justifiable reason why the Court of Appeal interfered with findings made by the trial court.

Upon joining the Co-defendant to the suit, Order 16 r 7(1) and Order 81 r 1(2) of the High Court (Civil Procedure) Rules, 2004 C.I. 47 empowered the High to amend the title of the casea ppropriately to cure the procedural defect in the title of the case, but it failed to do so.

An appeal having the nature of rehearing, this court can exercise the same powers as the High Court to cure the defect. The Supreme Court per Gbadegbe JSC in the Tesa case sufficiently addressed this issue, See pages 1546 -1547 of [2013-2014] 2 SCGLR. I entirely agree with the analysis and conclusions drawn by this court in the said case on this procedural issue. This court would therefore order that the title of this suit be amended, and the name of the Co-defendant to read "Fredrick Shamo Kwei suing on behalf of himself and other members of the Numo Kofi Anum family."

The appeal against the judgment of the Court of Appeal dated 3rd April 2019 succeeds in its entirety. The said judgment of the Court of Appeal is hereby set aside. The decision of the trial court is affirmed and we accordingly restore same.

A. M. A. DORDZIE (MRS.)

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA

(JUSTICE OF THE SUPREME COURT)

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

PWAMANG JSC:-

My Lords, the plaintiffs/appellants/respondents (the respondents) are the administrators of the estate of their late father, John Bortey Makpoi, alias Lomotey Makpoi and they sued the 1st and 2nd defendants/respondents/appellants (the appellants) in the High Court, Accra for declaration of title, recovery of possession, perpetual injunction and general damages for trespass in respect of a parcel of land they described and being at New Nungua Extension, Accra.

For the purposes of this appeal, the relevant parts of the case of the plaintiffs is that their father acquired the land by a Deed of Conveyance dated7th February, 1962 from Nii Odai Ayiku IV, Nungua Mantse. The grant to their father covered 22.96 acres and they say he exercised acts of ownership on it following the grant. While he was in possession, a portion, being about 8.49 acres, was acquired by the Government of Ghana as part of the Accra-Tema Motorway project. He applied to the government for compensation in 1976 and he was paid for the acquired portion. However, another portion of the land granted to their father adjoining the motorway was affected by the planning scheme at the time which zoned it as open space. As a result, when the Lands Commission were going to plot their father's land in their records, they requested him to amend the site plan to exclude the open space. Nevertheless, their father continued to posses the land and after his death they the children took over the land.

Their case was that, in the course of time, they noticed developments in the open spaces so they also applied to the Lands Commission to plot their land taken for the open space but Lands Commission demanded that they should go to the court for an order to that effect which they did. In 2003, the appellants trespassed on a portion of their land hence the present case was filed against them. They joined the3rd defendant to the suit and claimed against it for an order for them to plot the portion of their land that was initially excluded since the open space zoning was no longer in effect. The3rd defendant testified at the trial to corroborate the case of the plaintiffs that it requested for the amendment of the plaintiffs' site plan but that the original grant included the open space. The Co-defendant/respondent (the Co-defendant) was joined to the suit upon his own application for joinder.

When the appellants were served with the writ of summons and statement of claim, they entered appearance and filed statement of defence which they later amended. In

their latest amended defence they raised a number of points in their defence but the essential ones for the purpose of this final appeal were as follows;

3.In further denial of paragraphs 1 and 2 of the claim, 1st and 2nd defendants say that they are aware from their dealing with lands in that area that the whole tract of land in that area belongs to Teshie families specifically the Numo Kofi Anum Family and the Nii Ashong Mitse Family respectively all of Teshie.

4.1st and 2nd defendants say that while the Numo Kofi Anum Family are the owners of the land (including the disputed land) as per Land Title Certificate number GA2811, the Nii Ashong Mlitse Family also has a Declaration in respect of the area of land which Declaration is registered with Land Registry number 5629/1977. That at the appropriate time, the said families would be joined to this suit.

4(a) In further denial of paragraph 1 and 2 of the claim 1st defendant say that a Memorandum of Understanding was executed between the lawful representatives of Numo Kofi Anum family of Teshie, Accra and the 1st defendant dated 10th September 2001 concerning the granted land the defendant by the Kofi Anum family.

4(b)The Ashong Mlitse family also gave the 1st defendant a Power of Attorney over the land they granted him.

4(c)In all the searches conducted by 1st defendant at the Land Commission and statutory relevant bodies did not reveal that the land the 1st defendant is occupying now, belongs to the Plaintiff herein.

4(d) 1st defendant further say that in any event he purchased the land from both the Numo Kofi Anum family of Teshie and Ashong Mlitse family in good faith and without any notice of any adverse title of the plaintiff.

4(e) The 1st defendant as an estate developer had spent as colossal sum of money in building and developing the infrastructure of the land.

4(f) The 1st defendant intends to rely on the Land Development (Protection of purchasers) Act, 1960 Act 2, as part of his defence.

5.In answer to paragraph 3, 1st and 2nd defendant say that they acquired various tracts of land within the area from both Nii Ashong Mlitse family and the Numo Kofi Anum family respectively. That it is the various parcels of land granted from these two families that 1st and 2nd defendants have been given possession and it is on these lands that they are carrying developments.

6.In response to paragraphs 4 and 9 of the claim, 1st and 2nd defendants say that even if plaintiffs' father had any land the same has nothing to do with the lands defendants are occupying as the same are within the registered land of the families aforementioned.

7.Wherefore 1st and 2nd defendants say that plaintiffs are not entitled to their claim or at all.

Upon joining the suit, the Co-defendant filed a defence and counterclaim in which he averred that the land being claimed by the plaintiffs belonged to Numo Kofi Anum Family of Tesa but Nii Odai Ayiku IV sometime back purported to grant portions to several third parties including the father of the respondent. He admitted the payment and receipt of compensation by the father of the respondents but contended that that did not make them owners of the land since the land did not belong to the Nungua Stool. The Co-defendant pleaded that the appellants were grantees of the Numo Kofi Anum Family.

At the summons for directions stage (the case was filed under the old civil procedure rules) the parties filed many issues and additional issues for trial but the relevant ones for this appeal were;

a. Whether or not the late John Bortie Makpoi alias Lomotey Makpoi (deceased) was the owner of all that piece or parcel of land described in the schedule to the Statement of Claim.

b. Whether the Government of Ghana paid compensation to the said John Bortie Makpoi (Deceased) in respect of part of the land during the Accra-Tema Motorway Phase 1 construction.

c. Whether or not the Ashong Mlitse Family has any title to the Land.

d. Whether or not the Numo Kofi Anum family of Tesa has any title to the land.

e. Whether or not Numo Kofi Anum Family has been in undisputed possession of the land in dispute since the 1850s and has made several grants engulfing the area being claimed by the Plaintiffs.

f. Whether or not the Land granted by Nii Odai Ayiku IV to the father of the Plaintiffs forms a part of the land the subject matter of Suit No. 383/89 between the Co-Defendant's family as Plaintiffs' and Nii Odai Ayiku IV and others as Defendants.

g. Whether or not this belated action by the Plaintiffs as grantees is misconceived since the disputing allodial owners are litigating their respective titles in Suit No. 383/89 pending before Justice S. T. Farkye sitting as Additional High Court Judge.

The case went through a full trial at the end of which the High Court on12th June, 2008 pronounced judgment in the following terms;

"The court is of the view that the Co-defendant has established his case on the preponderance of probability. Accordingly, I dismiss plaintiffs claim and enter judgment for the co-defendant on their Counter-claim (sic). Any order of injunction placed on the parties is hereby discharged."

The judge rendered reasons for his judgment but the respondents were dissatisfied and they appealed against it to the Court of Appeal. By their judgment dated3rd April, 2019 the Court of Appeal unanimously set aside the judgment of the High Court and granted the respondents all the reliefs prayed for in the writ of summons. By an amended Notice of Appeal filed on12th December, 2019 (page 77 vol 2 of the Record of Appeal) the appellants have appealed from the judgment of the Court of Appeal to the Supreme Court. The Co-defendant in whose favour judgment was given by the High Court did not appeal.

After the necessary appeal processes were gone through, the appeal was heard and adjourned for judgment. However, in the process of considering our judgment, we detected that there was no evidence on the record that confirmed whether the lands claimed by the respondents and appellants actually fell within land adjudged in an earlier judgment of the Supreme Court dated 15th May, 2014relied on substantially by the appellants in their statement of case. At paragraphs 24 and 25 of their statement of case the lawyer stated as follows;

"24. It must be reiterated that the Supreme Court in the case of Nii Mate Tessa v Numo Nortey Adjeifio & Ors reported as Adjei Fio v Mate Tesa & Ors [2013-2014] 2 SCGLR 1537 confirmed the finding and holding of the High Court Coram Dotse JSC which had been affirmed by the Court of Appeal that Tesa Land is comprised in Land Title Certificate and is over 900 acres and it cuts across the Accra-Tema Motorway. This judgment puts an end to the issue of ownership between Nungua

Stool and the Nii (sic) Kofi Anum Tesa family and confirms the findings and conclusion of the trial judge was set aside by the Court of Appeal. The overwhelming evidence put beyond doubt by the Supreme Court judgment in that Tessa lands is owned by Kofi Anum family of Tessa.

25. The Court of Appeal failed to or refused to follow the binding decision of the Supreme Court in the case of Nii Mate (substituted by Daniel Markwei Marmah) & 5 Ors vrs, Numo Nortey Adjeifio (substituted by Adjei Sankuma) & 6Ors Suit No J4/44/2013 of 15th May, 2014 which would have led it inexorably to conclude like the trial Judge did that the Tessa Lands belonged to the defendants' grantors i.e. the Numo Kofi Anum family."

The case being referred to was stated in the pleadings of the Co-defendant in the High Court and one of the issues for trial in this case, issue (f) reproduced above, was actually whether the land in this case was within the land in contention in Suit No.383/89 that has culminated in the final appeal decided by the Supreme Court on 15th May, 2014. During the trial a composite plan could have been ordered to assist the High Court in the resolution of that issue but it was not done, yet the lawyer for the appellants claims the lands are the same. The gap in the evidence appears to have been due to the fact that the trial of this case was simultaneous with the trial in another High Court of Suit No 383/89. However, since at the time of hearing of this appeal, that Suit/No. 383/89 had been finally determined by the Supreme Court and Counsel for the appellants has requested us to apply it in the resolution of this appeal, we took the view, that in order that we do not give a judgment that may involve the same land and same parties or their privies which could be at variance with the final judgment in Suit No.383/89,it was necessary to order for a composite plan such that the lands claimed by the parties, both on the ground and per their documents, would be plotted within the plan of the land adjudged in favour of the Numo Kofi Anum Family in that case. This

has been done and the court appointed surveyor tendered the plan in evidence and was cross-examined.

My Lords, there are three key facts that have been established by the survey we ordered that are relevant for the determination of this appeal. First, about 98% of the land claimed by the plaintiff falls within the plan encompassing about 918 acres adjudged to belong to Numo Kofi Anum Family of Tesa. Second, only about 25% to 30% of the land claimed by the respondents is also claimed by the appellants, and third, all the land claimed by the appellants falls within the Numo Kofi Anum Family land. Another point we need to underscore is that, by our order for the composite plan, we have effectively admitted the findings in the judgments in the Suit No.383/89 as part of the evidence to be applied in deciding this case, notwithstanding that those judgments were not tendered formally in evidence. This we have power to do by way of taking judicial notice of the judgments under section 9 of the **Evidence Act, 1975 (NRCD 323)** and also in accordance with the decision of this court in the case of **Otoo & Anor v Dwamena [2018-2019] 1 GLR 23**. At p. 31 of the report the Supreme Court said that;

"It is trite learning that the doctrine of judicial notice is one of the exceptions to formal proof of facts before a court or tribunal, which is by adduction of evidence. Judicial notice may be taken only of facts which are notoriously true or are capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned. Courts frequently take judicial notice of geographic information, scientific data and statutes that are passed by the legislature or under its authority. Where a fact is subject to dispute on reasonable grounds, a court ought not to accede to an invitation to take judicial notice of it. ***Courts may take Judicial notice of court records, including final judgments, in other cases either by the court itself or other courts. By Section 127 of NRCD 323, final judgments of courts in Ghana are admissible evidence in proceedings.***

In respect of court decisions, judicial notice may be taken of the fact that such a judgment was given, but under certain conditions, it may in addition be taken of the facts and questions adjudicated therein…..when judicial notice is taken of adjudicated facts, the doctrine has the additional advantage of ensuring consistency in courts judgments which engenders confidence in the overall administration of justice."(Emphasis supplied)

But, as we have decided to take judicial notice of the facts decided in Suit No.383/89, we must be careful not to confound it with the doctrine of *stare decisis* captured in article 129(3) of our Constitution, 1992. That doctrine is confined to decisions of the Supreme Court on questions of law that are binding on other courts in subsequent cases and it does not cover findings of facts which judicial notice covers. Final decisions of any court relating to factual matters are binding in subsequent cases on account of the principle of *res judicata* and not *stare decisis*. The two are different in that *res judicata* covers findings of facts and law but *stare decisis* covers only decisions on questions of law. See **Otoo & Anor v Dwamena (supra).**

My Lords, it is critical to recognise that Numo Kofi Anum Family is not a party to this appeal. In fact, the family has never been a party to this case right from the High Court. When in the High Court Frederick Shamo Quaye applied to join the suit, he did claim that he was a principal member of the Numo Kofi Anum Family and when he testified under oath too he said he was a principal member of that family. But, he never stated that he was joining the case on behalf of the family. Additionally, although his pleadings in this case was titled "Statement of Defence and Counterclaim" Frederick Shamo Quaye did not seek any relief whatsoever by way of counterclaim, either in his own name or on anyone's behalf. See pages 80-81 vol 1 of the ROA. But at the time he gave evidence in this case, he knew that his claim of being a member of the Numo Kofi

Anum family had been challenged by the defendants in Suit/No.383/89; Nii Mate Tesa & Ors v Numo Nortey Adjeifio & Ors. Also, when he gave his evidence in this case claiming to be a member of that family he was challenged under cross examination and told that he hailed from Prampram. See page 200 vol 1 of the ROA. Anyway, from the findings in the judgment in Adjeifio v Mate Tesa relied on by the appellants, the issue whether Frederick Shamo Quaye was a member of the Numo Kofi Anum Family was finally settled when the Supreme Court in the 15th May, 2014 judgment affirmed the finding of the Court of Appeal that he was not a member of that family. The lawyer for th eappellants in his statement of case filed in the instant appeal has conceded that. See page 6 of his statement of case. At p.1545 of the report on the case it is stated as follows;

"Effect of the Court of Appeal striking out the first to fourth and the sixth plaintiffs named in the writ for misjoinder and acting upon their evidence as plaintiffs. The question that arises from the ground of objection contained before us by the defendants is whether, having struck out the plaintiffs named on the writ save the fifth plaintiff, it was proper for the learned Justices of the Court of Appeal to have acted upon the evidence of persons who had testified as plaintiffs but were found by them to have been wrongly joined to the action."

Frederick Shamo Quaye was the sixth plaintiff in that case. Yes, the Supreme Court held that the evidence those plaintiffs struck off gave in the High Court in Suit No383/89; Nii Mate Tesa v Numo Nortey Adjeifio could be applied in deciding the case, but the court confirmed that Frederick Shamo Quaye was not a member of the Numo Kofi Anum Family and they affirmed his striking off as a party to that suit.

Consequently, the Co-defendant did not even come within the range of persons who could qualify under the rule in **Kwan v Nyeini** to sue to protect Numo Kofi Anum family property. Furthermore, it means that Frederick Shamo Quaye stated untruths

under oath to have himself joined to this case in the High Court as a party, and when in his testimony he said he was a member of that family he was lying on oath. In the judgment of the Court of Appeal on appeal before us, the court held that Frederick Shamo Quaye had no capacity in this case. Though their reasons for so holding are different from those I have explained above, basing on the findings in Adji Fio v Mate Tesa, which we are taking judicial notice of, Frederick Shamo Quaye, in whose favour the High Court purported to give judgment in this case did not appeal against that finding denying him capacity. His want of capacity is so plain and so unanswerable after the judgment of the Supreme Court in Adjeifio v Mate Tesa (supra) that he did not join the appellants in this final appeal and we have no jurisdiction to make any orders in respect of him.

In the case of **Morkor v Kuma [1998-99] SCGLR 620,** this court, speaking through Sophia Akuffo, JSC (as she then was), said as follows at pages 636 to 637 of the Report;

"Indeed, it seems that the rationale for the whole of Order 15, r 6 (the equivalent of Order 4 r 5 of C.I. 47)(sic) is to ensure that proceedings are so managed by the court as to ensure that the dispute before it is resolved in the most efficacious and complete manner possible. It is for this reason that the rule empowers the court, suo moto, to order that a party cease to be a party or that other persons be added as parties. Where, in fact or in law, a person is not a proper party to a suit, then, no matter how actively the person had participated in the suit, the fact would remain that she was never a proper party."

That was a case that came to the Supreme Court on a final appeal but when the court held that a managing director was wrongfully joined to the case, the court struck her off as a party despite that she had actively participated in the proceedings from the High Court to the Supreme Court. So, on the authority of the case above, Frederick Shamo

Quaye is hereby struck off again as a party to this case in the High Court, just as was done by the Court of Appeal in the earlier case; Suit No.383/89; Nii Mate Tesa v Numo Nortey Adjeifio & Ors and affirmed by the Supreme Court in their judgment of 15th May, 2014.

What this means is that the purported judgment in his favour by the High Court in this case was null and void and same disappears from the record. The effect of striking off the Co-defendant is that the parties over whom the court has jurisdiction in this case are the respondents and the appellants and the land that is really in dispute here is the intersection of the delineation on the composite plan marked by the line A1, A2, A3, A4 depicting respondents land and the delineation marked by BB1, BB2, BB3, BB4 which is the appellants claim. It also means that the respondents claim to the land outside that intersection stands unchallenged. Nevertheless, since apart from recovery of possession they also claim for declaration of title and perpetual injunction in respect of that portion of the land, the evidence would still need to be examined to determine if they discharged the burden of proof that is required.

Another matter worthy of note in this appeal is the fact that the appellants have effectively abandoned their claim to the land through Ashong Militse Family, which family they claimed to also be their grantor in their pleadings in the High Court. In this final appeal they have placed total reliance on the claim of ownership of Numo Kofi Anum family declared in the judgments in Adjeifio v Mate Tesa (supra) and also the evidence of Frederick Shamo Quaye given in the High Court. As would soon be made clear when we review the evidence that was led in this case, the appellants did not adduce any evidence of ownership in themselves so they now say in their statement of case that, although they concede that Frederick Shamo Quaye was never a competent party in this case, the evidence he gave in the High Court should be applied in support

of their defence. The respondents, on the other hand maintain, that the evidence proved that the land they claimed belonged to them and the Court of Appeal were right in reversing the High Court and entering judgment for them.

However, before analysing the evidence, it is important to clarify a legal misconception about the effect of the Supreme Court judgment in Adjeifio v Mate Tesa & Ors (supra) on the claim of ownership of the land by the respondents. The notion is that since in that decision the claim of the Numo Kofi Anum Family was upheld over the claim therein of the Nungua Stool, the judgment operates as *res judicata* against the respondents as privies of the Nungua Stool. See paragraph 15 of the appellants' statement of case. That notion is however not reflective of the correct position of the law. In **Attram v Aryee [1965] GLR 341,** the facts of the case as narrated in the head note of the report were very similar to the instant case and were that; The plaintiff sued the defendant for a declaration of title to a piece of land situate at North -West Korle Gonno, Accra, damages for trespass and an injunction. By her writ the plaintiff claimed that she derived title to the land from the Sempe stool under and by virtue of a deed of gift dated 7 August 1952 and that she had enjoyed undisputed possession since then. Some time between 1960-61 the defendant entered upon the land and removed the pillars erected thereon by the plaintiff thus starting off the action. The defendant admitted entry upon the land but argued that the land was granted to his ancestors by the Alata stool. Judgment was entered for the plaintiff and the defendant appealed.
While this case was pending, litigation arose between the Sempe and Alata stools over a large portion of James Town lands including the subject-matter of the case. Judgment in that case was given in favour of the Alata stool. It was therefore argued on behalf of the appellant that that judgment was binding on the parties to the suit as privies to the stools.
In the head note, the Supreme Court held, dismissing the appeal as follows:

"(1) in the case of disputed ownership between the three stools of James Town, the sole basis for determining the issue is by reference to satisfactory evidence of effective control of the land in question by the subjects and grantees of the stool. Akue v. Ababio IV (I 927) P.C. '74-'28, 99 applied.

(2) On the evidence the land in dispute was under the effective control of the Sempe stool.

(3) A prior purchaser of land cannot be estopped as being privy in estate by a judgment against the vendor commenced after the purchase. Mercantile Investment & General Trust Co. v. River Plate Trust, Loan & Agency Co. [1894] 1 Ch. 578 and Abbey v. Ollennu (1954) 14 W.A.C.A. 567 applied." (Emphasis supplied)

Thus, as the respondents grant was taken in 1962, long before 1989 when Suit No.383/89 was filed, the final judgment against the Nungua Stool does not in law operate as res judicata against the respondents as privies of the Nungua Stool.

My Lords, **Attram v Aryee (supra)** was followed and applied by the Supreme Court in **Republic v Court of Appeal; Ex parte Lands Commission (Vanderpuye Orgle Estates Ltd, Interested Party) [1999-2000] 1 GLR 75** where at holding(2) of the head note the court held that; *"The law was that a purchaser of land would not lose his land by virtue of a judgment in a litigation commence after the sale. Similarly, even if a valid deed was subsequently invalidated by a judgment of a court, the doctrine of bona fide purchaser for value would apply to protect the title of the purchaser."*

The statement of the law by the Supreme Court quoted above disposes of the argument by the appellants at paragraph 22 of their statement of case, that subsequent to the execution of the conveyance to the plaintiffs' father in 1962, Nii Odai Ayiku was prohibited in 1983 from acting as a Chief per Executive Instrument 18. Such subsequent prohibition would not invalidate acts he did as a Chief before that prohibition.

So, what is the evidence on which the Numo Kofi Anum Family initially claimed ownership of the land in dispute in their case with Adjeifio and Others as well as in this case? I have acceded to the prayer of the appellants that though Frederick Shamo Quaye was not a party in the High Court, the evidence he gave should nonetheless be applied in determining this case. It must be understood that in Adjeifio v Mate Tesa, two Teshie families disputed over ownership of the land, with Nungua Stool joined to the case and the Numo Kofi Anum Family's claim prevailed because it demonstrated acts of possession in the form of their predecessors serving as Chiefs of the village of Tesa. The land claimed however was 918 acres and obviously extended beyond the settlement of Tesa. From the evidence led in this case, a number of decided cases were referred to and judgments tendered. The trial judge referred to the Jackson J judgment of 26th May, 1952 to be found at page 521 vol 1 of the ROA tendered by the Co-defendant, but it appears that she did not read the decision closely and did not appreciate its context. That judgment was given in a case concerning the rightful party entitled to be paid compensation by the colonial government for acquisition of land for the Infantry Training School (now called Ghana Military Academy and Training School) which land was near the coast and to the east of Teshie town in those days. The compensation was claimed by the Nungua Mantse, Teshie Mankralo and Labadi Mantse. At page 530 of the ROA, Jackson J stated as follows in his judgment;

"The traditional evidence satisfied me that the first occupants of this land were the Nungwas and they settled at first somewhere to the east of the Legon Hill about 8 miles to the north-West of the present site of Teshie. The next community to arrive were the people known as Ga Mashie and who settled at the place known as Accra….The next to arrive were the Labadis who appeared to have settled at first somewhere near Legon where they became embroiled in what is described as war with the Nungwas in the near vicinity. The outcome of this war some 300 years ago or so

appear to have been that the Nungwas settled where they are today on the coast and the Labadis settled also where they are today to the east of Ga Mashie. Within the community of the Labadis a demonic feud arose between a family of the then Mankralo and the rest of the town, as a result of which they fled from Labadi proper and settled at a place called Lojoku (a part of the land now acquired)… It was upon their arrival at Lojoku that they made contact with the Nungwas through intermediaries who appear to have been these Fanti fishermen…. Appreciating that the land at Lokoju was within the dominion of Nungwa and appreciating further the ancient enemity between the Labadis from whom they came and the Nungwas, that settlement of those refugees had to be regularized and custom demanded that certain things be done…."

By the provisions of the Public Lands Ordinance, compensation was payable to the person in possession of the land at the time of acquisition, and in that case the judge found that, although the Nunguas were the original owners of the land, the people of Teshie were in possession of it at the time of the acquisition so they were adjudged entitled to claim the compensation.

The effect of the evidence in the Jackson judgment is that the people of Nungua settled in the area first and the people of Teshie arrived much laterfrom Labadi and sought the permission of Nungua to settle there. It must be noted that the 1952 Jackson, J judgment concerned land near the coast and the circumstances under which Teshie's possessory rights were upheld are different from the land in dispute in this case which lies to the North of the coastal settlements of Nungua and Teshie. From the evidence, the general area of the land in question in this case is referred to by the settlements of Otinshie, Tesa, Adjirigano, Martey Tsuru and Agbleza. The Nungua Stool secretary, PW1, in his evidence however referred to the area as New Nungua Extension, but in land litigation, the name a party chooses to call the location a disputed land lies is not as significant as its actual location depicted on a survey map accurately drawn and the acts of ownership pertaining to the particular land in dispute. Of the cases tendered in

evidence in this case, it is the cases of Banga v Djanie tendered as Exhibit 1, Empire Builders Ltd v Topkings Ltd and also Adjeifio v Mate Tesa now relied on by the appellants, that concerned land to the North of the coastal settlements which lands may be conveniently described as Teshie and Nungua rural lands.

The judgment in Banga v Djanie confirms, that subsequent to the 1710, when the people of Teshie settled at the coast by obtaining land from the Nunguas, some of them subsequently moved out and settled on lands beyond the originally acquired area and became owners through such possession. TheCo-defendant's testimony at page 203 of vol 1 of the ROA is to that effect and is consistent with the findings in the case of Numo Kofi Anum in Adjeifio v Mate Tesa & Ors. Their claim to the land was therefore premised on possession and not as original owners. The original settlers on the lands from the evidence adduced in this case were the Nunguas but with time people from Teshie town at the coast moved out and acquired interests in certain lands to the North through acts of possession.

But, the evidence led in the form of the judgment in the case of Empire Builders v Top Kings Ltd, tendered in this case showed that the Nunguas continued to maintain possession of some of the rural lands. Where the evidence in a case established such possession, then the ownership of the Nungua Stool and its grantees was upheld against Teshie claimants, as was done in the Empire Builders case. At page 362 of vol 1 of the ROA, Brobbey, JSC (sitting as additional High Court judge) in the Empire Builders judgment (which has been affirmed by the Supreme Court) referred to copious evidence covering 73 leases granted by the Nungua Stool over land in the environs of Adjirigano which shares boundary with Tesa on its North-East. There is also a document tendered in this case of government acquisition of land for Scientific Instrumentation Centre at Otinshie which shares boundary with Tesa but it was

acquired from the Nungua Stool. Therefore, between Nungua Stool and its grantees on one side and Teshie families on the other side, ownership of land in Adjiringano, Tesa and Otinshie and their neighborhoods, is determined by effective possession as was held to be the case between Sempe and Alata Stools in **Attram v Aryee (supra)**.

From the evidence in this case, it would be illogical to infer that possession by Nungua Stool or its grantees of land at Adjiringano/Tesa is trespass when the Nunguas were the acknowledged first settlers in the area before the people of Teshie left Labadi to settle among them. If there is evidence of long continuous unchallenged acts of possession by persons from Teshie of land in the area to the exclusion of the Nungua Stool and its grantees, then they would have acquired an interest that can prevail over the Nungua Stool. However, if the evidence is that there has been long continuous, unchallenged acts of possession by Nungua Stool and its grantees of any land in the area to the exclusion of Teshie families, their claim must prevail over the Teshie claim. Therefore, it depends on the evidence on a case by case basis.

For that reason, whereas the overall claim of allodial ownership over the 918 acres involved in Adjeifio v Mate Tesa by the Nungua Stool was denied in the judgment of the High Court in preference to the claim of the Numo Kofi Anum family, which judgmentthe lawyer for the appellants reminds us repeatedly that it was delivered by our distinguished brother, Dotse, JSC, sitting as an additional High Court judge, our brother in his said judgment dated 21st December, 2009, upheld the interests of some grantees of the Nungua Stool in respect of whom the evidence before him showed they were in effective possession of lands within the 918 acres before the suit was commenced. Our brother in the conclusion of his judgment, which was upheld by the Court of Appeal and affirmed by the Supreme Court in the 15th May, 2014 decision, held as follows;

"d. Perpetual injunction is granted restraining the 1st,2nd,3rd,5th,6th, and 7th Defendants ***(safe (sic) the bona fide purchasers or beneficiaries of grantees or leases (sic) of land by 3rd defendant to persons contained in a list tendered by 3rd defendant as Exhibit I, which is a list of persons identified by Plaintiffs as being on the disputed land but against whom no action had been taken either to join them to the action or bring a substantive suit against them)*** *their agents, privies, servants, workmen, labourers and anyone whatsoever deriving title through or from them from having anything to do whatsoever with the land described supra."*

(Emphasis supplied)

The 3rd defendant in that case was the Nungua Stool and this order of our brother excluding its grantees and allowing them to possess their lands was not disturbed, neither by the Court of Appeal nor the Supreme Court. The respondents herein were not stated on Exhibit I most probably because this case at bar which was filed in 2003 and the list contained those grantees of Nungua that were not then in any litigation. In line with that, if the plaintiffs are able to establish by evidence that they were in effective possession of their parcel of land as grantees of Nungua Stool before and at the time Numo Kofi Anum sued in court in 1989, they mustalso be entitled to their land just as was done for those on Exhibit I. Excluding the land of the respondents herein from the 918 acres declared by the courts in favour of Numo Kofi Anum family would not be inconsistent with that earlier judgment but will in fact be in line with the effect of that decision. Since the counsel for the appellants has submitted that effect should be given to the judgment of our brother delivered in the High Court, he cannot approbate and reprobate the same judgment but must accept the part where the trial judge upheld the interests of the grantees of the Nungua Stool.

Now what was the evidence of possession of the particular parcel of land claimed by the plaintiffs that was adduced by the parties at the trial of this case. We must not view the evidence in general terms of the 918 acres comprised in the site plan of Numo Kofi Anum Family but attention must be on the 14.46 acres claimed by the respondents here. Even at the trial in Suit No.383/89, the Numo Kofi Anum family conceded, as per the order of the trial judge reproduced above, that not every acre of the 918 acres was effectively occupied by them. For me, the document of the grant to the father of the respondents tendered in evidence in this case is clear proof that their father's possession of the land granted him commenced around 1962. Then the documents evidencing the compensation paid to their father, Exhibit 'D', confirmed that by 1976 their father was effectively exercising exclusive rights of ownership over the land granted to him including the disputed portion here. Then PW 1 testified and tendered exhibits N, O,P,Q,S, and T, all registered grants made by the Nungua Stool between 1973 and 1978 which Co-defendant in his evidence said he was aware of, just as was conceded in Suit No383/89.All these acts of possession were unchallenged until much later after Numo Kofi Anum Family sued their Teshie compatriots in 1989 and the Nungua Stool was joined later and it claimed allodial title to the land. Those in possession such as the respondents father and the other registered Nungua grantees were not joined to the suit and the explanation Frederick Shamo Quaye gave in his evidence in this case was, that because the Nungua Stool was joined, they did not add the grantees. Meanwhile they joined the grantees of Numo Nortey Adjeifio to the suit. At page 197 vol 1 of the ROA he said as follows in evidence-in-chief;

"Yes the plaintiffs claim the land through the Nungua Stool. The Nungua Stool has laid adverse claim to our family land. Nii Odai Ayiku IV has made several grants interefering with family lands including the plaintiffs…We took steps to [protest] the Nungua Stool. My family has already instituted Suit No.383/89 against Teshie

quarters Kle Musum, which has interfered with our family land and then against the Empire Builders which Numo Odaitefio is the 1st defendant and 2nd defendant Empire Builders. With regard to the interference by Odai Ayiku we joined the Nungua Stool as 3rd defendant instead of taking action [on] the individuals."

But it was the grantees who were in possession dating back from 1962 onwards and the Numo Kofi Anum family did not challenge them for about 30 years. This for me amounted to admitting the right of the Nungua Stool to make grants of the land such that if even Numo Kofi Anum family had any title, it got extinguished. In fact, their case was that the Teshie family of Numo Nortey Adjeifio had no rights to grant the land to anyone and they joined the Nungua Stool to an action much later but it was not their principal target. As for the particular parcel in dispute in this case, Frederick Shamo Quaye did not allude to any act of possession whatsoever but only repeated the pleadings that the area is part of Numo Kofi Anum family plan tendered in Suit No.383/89.

Then the appellants comes unto the land. The testimony of the 1st appellant was that he is an estate developer who initially took a Power of Attorney from Ashong Militse Family to build on their land at Adjiringano for his clients. He did not acquire any legal or equitable interest in that land. When he started to work there he was introduced to Numo Kofi Anum Family as owners of the adjacent land so he entered into a Memorandum of Understanding (MOU) with that family too to build on their land for his customers. A reading of the MOU at page 500 vol 1 of the ROA, testifies that he did not acquire any legal or equitable interest in this land too. He was only permitted to enter the land covered by the site plan to develop for their mutual benefit and that appears to explain his failure to make any counterclaim in this case. The evidence of the respondents was that in 2003 when the appellants entered their land and started to

build a fence wall they promptly sued them in court and sought an order of interim injunction against them. The respondents said after service of the order of injunction, the appellants ignored it and continued to build on their land so they applied to commit them for contempt of court. In an affidavit in opposition to the application for committal for contempt at pages 27-28 of the ROA vol 1, the1st appellant admitted that at the time they were sued they had only partly constructed fence walls. In paragraphs 6,8, and 9of the affidavit he deposed as follows;

"6. That before we were served with the interim injunction order, we had constructed fence walls at various stages on most of these lands that we purchased from the aforementioned families. The pictures that have been exhibited only show some of these walls, which we have erected before the injunction order.
8. That presently we have virtually abandoned work on all our lands in the neighbourhood due to this injunction order.
9. That sometime later the applicants went and made some rather spurious allegations to the police of we having chased them out of their lands and the police came to arrest us not anywhere near the disputed land. We denied the allegation…."

The above is proof that right from the entry of the appellants unto the land the plaintiffs challenged them. In fact, even when the appellants went unto the land they claimed to belong to Ashong Militse family at Adjiringano that forms boundary with Tesa they were challenged by Nungua Stool. The testimony of the 1st appellant at page 183 vol 1 of the ROA was that;

"Sometimes we had attackers from Nungua Boys and extort moneys from us. At times they destroy our developments, until when we were developing an area given to me by Kofi Anum family and Odaitetse We where they share common . About 42

plots I had fenced and developing estates, which were at various stages. Then all of a sudden a group from Nungua 'Makpo' came and destroyed all the 42 structures."

As for the Co-defendant, he only talked about getting the area planned and being responsible for taking water and electricity to the whole area. If even that were so, if I own land in an area you also have land at and you bring electricity over my land, then you become owner of my land? Meanwhile, before bringing the water and electricity you were aware of my interest but you choose to ignore my interest and I should lose my land because of the utilities? There is no law like that to my knowledge.

The1st appellant having admitted that he was fiercely resisted by the respondents on his entry unto the land, he cannot rely on any act of possession in the teeth of the confrontation and litigation as the basis for claiming ownership of the land in law. The High Court Judge in this case therefore fell in error when she took the violent entry of the appellants unto the land as acts in support of their claim. The relevant possession that can support ownership is long continuous unchallenged possession prior to the dispute arising. The party with long, continuous and unchallenged possession before the dispute commences is the one whose claim of ownership ought to prevail, and in this case it was the respondents who demonstrated that.

My Lords, from the totality of the evidence adduced, I have no doubt in my mind that, in respect of the land in dispute in this case, the respondents evidence of long unchallenged possession has been corroborated by the appellants and the Co-Defendant so the case of the respondents must prevail over the appellants. The respondents from all the evidence discharged the burden of proof on them and are entitled to declaration of title to the land they claimed together with their other reliefs. It is true that the Court of Appeal decided the case largely on legal grounds, but a scrutiny

of the evidence and application of the right principles of law to the evidence, as has been abundantly shown above, supports the conclusion the Court of Appeal came to. On the evidence, the least that this court can do in this case is to grant to the respondents reliefs that uphold their possessory rights as was done for the other beneficiaries of leases granted by the Nungua Stool in Adjeifio v Mate Tesa already referred to. Anything less is be incongruent with that decision and contrary to the principle on which judicial notice is taken of findings in an earlier case explained in **Otoo & Ors v Dwamena (supra)**. On my part, I find no merit in the appeal and same is accordingly dismissed in its entirety.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

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