IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: YEBOAH CJ (PRESIDING)

PWAMANG JSC

HONYENUGA JSC

AMADU JSC

KLENDI JSC

CIVIL APPEAL

NO. J4/54/2021

15TH JUNE, 2022

SAMUEL K. OTU BOATENG …… PLAINTIFF/APPELLANT/ APPELLANT

VRS

1. KOFI NTIM-MANU
2. KINGS LEE LIMITED

……. DEFENDANTS/RESPONDENTS/RESPONDENTS

JUDGMENT

KULENDI JSC:-

INTRODUCTION:

This is an appeal against the judgment of the Court of Appeal dated 18th June, 2020. By the said judgment, the learned Justices of the Court of Appeal affirmed the judgment of the High Court dated 18th April, 2019, which among others, declared Defendants/Respondents/Respondents (hereinafter referred to as 'the Respondents') the owners of a piece of land situate at McCarthy Hills, Accra, the subject matter of the suit.

The Plaintiff/Appellant/Appellant (hereinafter referred to as 'the Appellant'), aggrieved by the judgement, invoked the appellate jurisdiction of this Court by a notice of appeal filed on 8th September, 2020.

BACKGROUND:

The antecedent contentions culminating in this suit are as follows:

The Appellant and the 1st Respondent are neighbours and residents of McCarthy Hills, Accra. Both trace their individual roots of title to the land to the same grantor: the Nii Amoo Quaye and Nii Kweikuma families of Anumansa, Jamestown, Accra. The Appellant, per his averments, acquired his interest in the land in 1983 and obtained an indenture evidencing his interest in 1985. He then registered the land and obtained a Land Title Certificate dated 25th October, 1996. The Appellant therefore commenced an action in the High Court seeking the following reliefs per his writ of summons:

a. "Declaration of title to all that parcel of land situate at MaCarthy Hill, Accra and bounded on the North by the grantor's land measuring 110 feet more or less on the East by the grantor land measuring 110 feet more or less on the South by grantors land 185 feet more or less and on the South by proposed road measuring 135 feet

more or less on the North West by grantors land measuring 80 feet more or less and covering an approximate area of 0.37 acres.

b. Recovery of possession of all that parcel of land situate at MaCarthy Hill, Accra and described above;

c. Special damages of GH¢5,000.00 (Five Thousand Ghana Cedis) being cost of Plaintiffs fence wall wrongfully pulled down by Defendant,

d. General damages for trespass;

e. Perpetual injunction to restrain Defendant whether by its agents assigns privies servants Or workmen from disturbing Plaintiffs quiet enjoyment of its land at MaCarthy Hill, Accra;

f. Cost"

The 1st Respondent on the other hand, alleges that he acquired the land in 1992 from one Kyei Mensah who in turn is said to have acquired the land in 1972 from the same grantor as the Appellant. The 1st Respondent contended that he acquired the land and registered same in the name of the 2nd Respondent. The Appellant alluded to having performed overt acts of possession and ownership of the land. On their part, the Respondents contended that the land they acquired is different from that of the Appellant and in any case, that their grantor having earlier acquired the land from the same grantor as the Appellant, effectuated the principle of *nemo dat quod non habet* against the family which estopped them from purporting to grant the same land to the Appellant. On the back of these allegations per his statement of defence, the 1st Respondent counterclaimed for the following reliefs:

a. A declaration of title to all that piece or parcel of land, otherwise, known as House No. MH 28, McCarthy Road, McCarthy Hill, Accra as described in a Deed of Conveyance dated 5' February, 1992 and registered at the Land Registry (Deeds), Accra, as No. 327/1994.

b. An order for a superimposition of Plaintiffs Title registered as No. 472/1985 and dated 30'' January, 1985 against Defendant's Title cited in Paragraph 18 (a) supra.

c. General Damages for Trespass and Encroachment by Plaintiff.

d. An order of Perpetual Injunction restraining Plaintiff and/or his agents, servants, workmen or cronies from interfering with Defendant's land or the user thereof in anyway whatsoever in whatever manner and by whomsoever till the final determination of the suit.

e. Further or other reliefs.

f. Costs including Lawyer's Fee

The 2nd Respondent who was subsequently joined to the suit in the High Court at the instance of the 1st Respondent, delivered essentially the same defence as the 1st Respondent and by way of counterclaim, also sought the following:

I. "Declaration of Title to all that piece or parcel land, otherwise known as H/No.MH28 MaCarthy Hill Road Accra.

II. An order for the demolishing of the fence wall constructed by the Plaintiff on the part of the 2nd Defendant's land

III. An order for perpetual Injunction to restrain the Plaintiff his agents assigns and successors from further interfering with 2nd Defendant's quite enjoyment of the land."

The Respondents further contended that after Appellant instituted the action, they conducted a search which revealed that the McCarthy Hills lands including the subject matter of their dispute with the Appellant belonged to Gbawe Kwatei family and not the parties' said common grantor, the Nii Amo Quaye and Nii Kweikuma families of Anumansa, James Town, Accra. Consequently, the Respondents claimed that they regularized their title with the Gbawe Kwatei family and therefore that the Appellant's registration of the land was fraudulent.

The Appellant contended that the alleged regularization of title to the land by the Respondents with Gbawe Kwatei Family cannot vest title in 2nd Respondent because both 2nd Respondent and the Gbawe Kwatei Family are caught by limitation and acquiescence as Appellant has exercised ownership and possession over the disputed land since the grant was made to him in 1985 without challenge until sometime in 2013 when 1st Respondent and his agents forcibly broke down Appellant's wall.

At the conclusion of the trial, the High Court dismissed the case of the Appellant, upheld that of the Respondents and entered judgment in their favour in the following terms:

> "The Plaintiff's claim fails. Judgment in favour of the Defendants on their counterclaims as follows:

a) "A declaration of title to all that piece or parcel of land, otherwise, known as House No. MH 28, McCarthy Road, McCarthy Hill, Accra as described in a Deed of Conveyance dated 5th February, 1992 and registered at the Land registry (Deeds), Accra as No. 327/1994.

b) An order for the Chief Registrar of the Land Registration Division of the Lands Commission to expunge the name of the plaintiff Samuel K Otu and the Land Title Certificate No. GA 17316 Vol. 8 Folio. 232 from the Register of Lands.

c) An order for the demolition of the fence wall, if any, constructed by the plaintiff on the 2nd defendant's land.

d) General Damages of GHÇ30,000.00 for Trespass onto the 2nd defendant's land by Plaintiff.

e) An order of Perpetual Injunction restraining Plaintiff and/or his agents, servants, workmen or assigns from interfering with 2nd Defendant's land or the user thereof in anyway whatsoever in whatever manner and by whomsoever.

f. Cost of GH¢40,000. 00 against the plaintiff."

This judgment was subsequently affirmed by the Court of Appeal in its judgment dated 18th June, 2020 and aggrieved by this decision, the Appellant has lodged this further appeal, seeking to set aside the judgment and a grant of the reliefs sought per his writ.

GROUNDS OF APPEAL

The grounds of appeal as contained in the Appellant's Notice of Appeal dated 8th September, 2020 are as follows:

1. "The Court of Appeal failed to take Plaintiff/Appellant/Appellant's long possession of the disputed land in excess of twelve years into account in affirming the trial High Court's decision declaring title of the disputed land in Defendants/Respondents/Respondents.

2. The Court of Appeal failed to take cognizance of the fact that the disputed land was separate and distinct from Defendants/Respondents/Respondents' land as described in their indenture dated 5th February, 1992.

3. The Court of Appeal failed to apply the same standard of proof on Defendants/Respondents/Respondents who counterclaimed for declaration of title to the disputed land as it placed on the Plaintiff/Appellant /Appellant.

4. The judgment was against the weight of evidence."

In resolving the above grounds of appeal, we shall first discuss the omnibus ground of appeal together with the Appellant's ground one (1) and two (2). This is because the said grounds of appeal involve an evaluation of evidence on record. After the resolutions of grounds one (1), two (2) and four (4) together, we shall resolve ground 3 independently.

RESOLUTION OF GROUNDS 1,2 & 4

The Appellant's omnibus ground of appeal requires an evaluation of the evidence led at the trial. Similarly, grounds 1 and 2 which raises issues of identity of the land and Appellant's long years of possession, require an examination of the evidence on record in their resolution. It is therefore prudent to resolve all the three grounds together to avoid cumulative and repetitive evaluation of evidence on record.

Authorities abound that a contention on appeal that a judgment is against the weight of evidence requires an evaluation of the entire evidence on record. It requires an ascertainment of whether or not a piece of evidence on record has been misapplied or not given due consideration and therefore occasioning a miscarriage of justice. His Lordship, Dotse JSC in the case of **Abbey & Others v. Antwi** [2010] SCGLR 17 at 34, held as follows:

"*It is now trite learning that where the appellant alleges that the judgment is against the weight of evidence, the appellate court is under an obligation to go through the entire record to satisfy itself that a party's case was more probable than not. As was held by their Lordships in Tuakwa v Bosom [2001-2002] SCGLR 61 (Per Sophia Akuffo JSC),*

"an appeal is by way of re-hearing, particularly where the Appellant alleges in his notice of appeal that the decision of the trial court is against the weight of the evidence… In such a case, it is incumbent upon an appellate court, in a civil case, to analyse the entire Record of Appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that on a balance of probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence".

See also: Djin v Musah Baako [2007-2008] SCGLR 686;Agyenim-Boateng Vrs. Ofori & Yeboah (2010) SCGLR 861 at page 867;Bonney vrs. Bonney [1992/93 GBR 779; Margaret Osei Asibbey vrs Joyce Gbomittah & 2 Others, judgment dated 25th April,212 in civil appeal

J4/51/2011; Ama Serwaa vrs. Gariba Hashimu & Anor, judgment dated 21st April, 2021 in civil appeal No.: J4/30/2020.

In our evaluation of the evidence on record, we are mindful of the fact that the concurrent findings of the High Court and Court of Appeal cannot be hastily set aside save in deserving circumstances. In this regard, we find, as instructive, the dictum of Gbadegbe JSC in a judgment dated 25th November, 2020, in Civil Appeal No.: J4/61/2019 titled **MADAM EUGENIA AKUETTEH & 2 ORS vrs BEN AMOAKO ATTA & ORS**. The learned Justice held as follows:

> "As the relevant authorities on concurrent findings require us as the final appellate court to intervene in respect of such concurrent findings by the two lower courts only when such decisions are perverse or unreasonable, the question for our decision turns largely on the probative value of the evidence on which the decisions of the two lower courts is based. By the effect of the authorities, the appellants must demonstrate clearly that the factual determinations suffer from a misapplication of the relevant rules of evidence or glossed over vital documentary or oral evidence and or misread the evidence. See: Gregory Tandoh v Hanson [2010] SCGLR 970. Simply put, the effect of the evidence contained in the record of appeal should in the eyes of a reasonable tribunal point in a direction other than that accepted by the two lower courts. And in this regard, it is important to reiterate what the Court has repeatedly said that provided the decision of the two lower courts is supported by the evidence, we cannot interfere to substitute their decision with our own view of the facts on which their decision was based."

See also: Achiro v Akanfella [1996-97] SCGLR 209, OBENG & OTHERS V ASSEMBLIES OF GOD CHURCH, GHANA [2010] SCGLR 300 AT 409; NTIRI V ESSIEN [2001-2002] SCGLR

459; SARKODIE V F K A CO LTD [2009] SCGLR 79; JASS CO LTD V APPAU [20009] SCGLR 266 AND AWUKU-SAO V GHANA SUPPLY CO LTD [2009] SCGLR 713

Guided by the above, we now proceed to evaluate the evidence on record.

We note that the Appellant's indenture on the land in dispute is dated 1985. The Appellant registered the land at the Lands Registry as No.: 472/1985 and thereafter registered the land with the Land Title Registry and was issued with a Land Title Certificate No.: GA 17316 dated 25th October, 1996. The Appellant's contention and evidence of having constructed the wall around the land in dispute in 1984 was not controverted or denied by the Respondents at the trial.

During the cross-examination of the Appellant on 31st May, 2018 which may be found at page 305 of the Record of Appeal, the following ensued:

> *"Q: At the point in time under reference this parcel of land had no wall in the frontage and neither a gate?*
>
> *A: I walled this parcel of land way back in 1984 when I was still working on my current residence.*
>
> *Q: So you walled this parcel of land even before you allegedly obtained documents of title to it?*
>
> *A: As I have submitted in my statement this land was given to me in 1983 but the documentation process was not completed until 30/1/1985. As proof that I could have rightful ownership of the land Nii Kweikumah III allowed me to wall it saying at that time that if it was not for him someone was likely to come up with a challenge. So I was allowed to wall it in 1984 because I had parted with some compensation or rental fee but the whole transaction was consummated by 30/1/85."*

The above testimony was consistent with the Appellant's pleadings at paragraph 6 of his Amended Statement of Claim wherein he stated as follows:

> *"6. Plaintiff further states that upon the grant to him, he went into possession of same constructed a perimeter wall around it with a metal gate for security on the land and has since been exercising proprietary rights over the land. Plaintiff says he has also registered the land at the Land Title Registry with Land Certificate No. GA. 17316 dated the 25th October 1996."*

The contention of the Appellant that he constructed a wall around the land in 1984 was neither denied nor controverted by the Respondents at the trial.

At pages 310J and 312 of the Record of Appeal, the Respondents testified as follows:

> *Q: When you bought your property in 1992 there was a wall already constructed in front of the disputed property; is that not it?*
>
> *A: That is correct.*
>
> *Q: I am suggesting to you that it was the plaintiff who built that wall in 1984?*
>
> *A: I cannot tell.*
>
> *Q:I am further suggesting to you that at the time that he built the wall Mr. Kyei Mensah Apenteng owned the land that he sold to you and he never protested?*
>
> *A: At that time I was not present but if Mr. Kyei Mensah Apenteng agrees that the disputed land does not belong to him he would not have shown that place to me as his."*
>
> *...*

A:I indicated to the court yesterday that I came and met the wall on the land and I cannot tell whether the plaintiff built the said wall or Mr. Kyei but if the plaintiff was the one who built the wall I do not know.

At page 313 of the Record of Appeal, the Respondents further testified as follows:

Q: You have admitted that when you bought the land the wall in front of the disputed property was on the land?

A: Yes I told the court that Kwame Kyei showed me his boundaries on the land but I cannot tell whether that wall was built by Kwame Kyei or not.

Q:But the wall was there, that is what I want you to confirm.

A: Yes.

Q: And the city authorities had not had cause to pull down the wall on the disputed land?

A: I cannot respond to this question but the owner of the land has the cause to pull down the wall at any time.

Q: Until you caused your agents to pull the wall in front of the disputed property?

A: It is correct. I personally pulled the wall down when I had the intention of developing the land.

The 2nd Respondent again further testified at page 317 of the Record of Appeal that:

Q:In this matter on the 4/05/16 to you.

(Counsel reads paragraph 9 of 1st defendant's witness statement). In that paragraph you admit that it is the plaintiff who indeed built the wall?

A: What I meant is that at the time the plaintiff and myself were talking about the land the plaintiff indicated to me that he built the wall but at that time Kwame Kyei Appenteng was not present for me to enquire from him. All I was interested in was the land and not the wall.

Q: Again, in the 2nd defendant's statement of defence filed on the 14/01/16 at paragraph 9 again makes an admission that it was plaintiff that constructed the wall?

A:All I was interested in was the land and if you construct a wall around somebody's land it does not mean the land belongs to you.

Q: Plaintiff did not just build the wall he fixed metal gate to the wall and padlocked it and had the keys to it. I am suggesting that to you?

A: It is gated but it is always opened ajar and the plaintiff use to park his car there. If I also want to park my car there I can equally do so but my house is big enough for me to park there. This case came up when I realized that he wanted to claim the land that is when this matter came up.

Q: I am further suggesting to you that plaintiff always had sand and iron rods on the land which iron rods and sand are still on the land?

A: It is correct plaintiff has deposited these materials on the land it is so because there is no space on his compound when he is working on his building. The sand that counsel is referring to had been used and there is no sand on the land currently leaving only a small quantity of iron rods.

From the above, it is uncontroverted that the Appellant had exercised acts of ownership and possession on the land. He constructed a wall on the land in 1984. The Respondents admit that at the time of their alleged purchase of the land in 1992, the land had already been walled and gated. In their Statement of Defence, the Respondents accused the Appellant of allegedly constructing a wall around the land in dispute. The evidence on record shows that the wall had been constructed by the Appellant even before the Respondents' alleged purchase of the land in 1992. It is doubtful that a person would purchase a walled and gated land from another and not inquire, at least from his grantor, who constructed the wall.

What is more, after the Respondents alleged purchase of the land in 1992, the Appellant continued to exercise overt acts of ownership over the land. Firstly, the Appellant deposited sand and iron rods on the land in the year 2000. The Appellant was also using the land as his parking lot without the permission of the Respondents. These are acts that a true owner of the land would challenge. However, on the contrary, the evidence shows that the Appellant exercised these overt acts of ownership over the land without permission from the Respondents for years. We are of the considered opinion that this extensive and compelling evidence of the Appellant's prior acquisition and presence on the land was either glossed over, misread, misapprehended or totally disregarded and not given due consideration by both the trial and first appellate court. Needless to say, such an oversight and failure to give consideration to relevant evidence has occasioned the Appellant a miscarriage of justice.

It must also be noted that since the Respondents had a counterclaim, the parties bore an equal burden of proof in respect of their respective claims. Consequently, the parties bore an equal burden to prove the identity of the land to which their respective claims relate.

The parties tendered their respective land title documents. The Respondents tendered an indenture issued in the name of the 2nd Respondent by Kyei Mensah Appenteng on 5th February, 1992 as the evidence of the 2nd Respondent's title. The said indenture was annexed to the witness statement of the 1st Respondent as Exhibit 1 and same can be found at page 133 of the Record of Appeal.

The recitals of the 2nd Respondent's said indenture (Exhibit 1) is worth our consideration. In Exhibit 1, the land of the Respondents is described as follows:

> "The property consists of all the piece of land with a building thereon known as No. MH 28 MacCarthy Hill bounded by a proposed road measuring 50 feet more or less, on the east by a vendor's land measuring 140 feet more or less, on the south by vendor's measuring 100 feet, on the west by a proposed road measuring 50 feet, and on the north-west by vendor's land measuring 110 feet more or less and covering an approximate area of 0.27 acre which piece of land is more particularly delineated on the land hereunto attached and thereon edged pink which shows the relevant measurements."

It is worth mentioning that in the counterclaim of the Respondents, they sought "declaration of title to all that piece or parcel of land otherwise known as H/No. MH 28 MacCarthy Hill". Clearly, the Respondents' land size per their Exhibit 1 is 0.27 acres and the said land comprises a building thereon. It is this building which, together with the land size of 0.27 acres on which it is situated, that is described as House Number MH 28 in the conveyance between the Respondents and their grantor.

The 1st Respondent tendered the indenture which his grantor obtained in respect of the land in dispute as Exhibit 2. It is to be noted that in the recitals contained in Exhibit 2, the land acquired by the Respondents grantor is described as covering an approximate area of 0.32 acres. In startling contrast and contrary to the recitals contained in Exhibits 1 and 2, the

Respondents assert that the land that they acquired in 1992 from their grantor is 1.349 acres. When confronted during cross-examination by Appellant's Counsel over this significant discrepancy in the size of the land, the 1st Respondent explanation which is captured below is inconsistent with the Respondents own documentary evidence of the land they acquired. Besides, Respondents could not have purchased 1.349 acres of land and yet the conveyance only conveyed 0.27 acres to them. The explanation given by 1st Respondent as to why their conveyance recites 0.27 acres and not 1.349 acres they allege is lame and cannot support sound a proof on the preponderance of probabilities in favour of Respondents.

Significantly, the relevant testimony of the 1st Respondent's which may be found at pages 310G and 310H of the Record of Appeal, is as follows:

Q: You bought your property from one Mr. Kwame Kyei Mensah Appenteng; is that the case?

A: It is correct

Q: And he gave you an indenture evidencing the transaction; is that not the case?

A: That is correct.

Q: You have annexed your title deeds (Indenture) as Exhibit 1A to your witness statement?

A: Yes.

Q: When did you acquire the said property?

A: 1992

Q: The property that you acquired was a complete house; is that not it?

A: A complete house with adjoining lands in front of the house and at the back of the house.

Q: Exhibit A1 (Deed of Indenture) had a site plan describing the property that has been sold to you?

A: It is correct, there is a site plan in the indenture describing the property that has been sold to me but he also showed me the entire property that there is an adjoining land in front and also at the back.

....

Q: ***What is the size of the area of land that Mr. Kyei Mensah Apenteng sold to you as per your Title Deed?***

A: At the time the property was sold to me by Mr. Kyei Mensah Apenteng I counted it to be four (4) plots with the building at the middle.

Q: Can you take a look at the site plan attached to your exhibit 1A and tell the court what is the size the area of land that your acquisition covered?

A: The land on which the building is situate is measured 0.27 acre.

Q: Exhibit 1A is the document that Mr. Kyei Mensah Apenteng gave you?

A: It is not correct, when Mr. Kyei Mensah Apenteng sold the property to me he had used the building to acquire a loan. I asked him and he said he did not want to lose the entire land and that he registered the land on which the building is situate alone. He went further to show me the boundaries of his land consisting the one at the back and in front.

We find the explanation given by the Respondents implausible, unreasonable and untenable. In any case, in resolving this issue, we cannot lose sight of the fact that per the dictates of section 1 of the Conveyancing Act, 1973 (NRCD 175), the applicable law at the

time of the alleged acquisition, a transfer of an interest in land ought to be in writing unless relieved against the need for such writing by the provisions of section 3 of NRCD 175. The explanation offered by the Respondents as to why the grant made to them only recites 0.27 acres when in fact they are laying claim to 1.349 acres does not offer the Respondents a haven under customary law grant, will, intestacy, prescription or any of the exceptions to the requirement of writing provide for under section 3 of NRCD 175.

It is strange that after the Respondents' alleged purchase of the land of the size of 1.349 acres, only 0.27 acres was actually conveyed to Respondents. The justification is unconvincing and unreasonable. In effect, apart from the 0.27 acres, Respondents grantor did not convey any other interest in land to the Respondents. Besides, in the circumstances of this case, the conveyance in land to the Respondents could not have been partly written and partly oral. It is to be observed that the Respondents grantor only acquired 0.321 acres of land as stated in exhibit 2. The Respondents' explanation that it was only 0.27 acres of the 1.349 acres of land that was registered by their grantor is not borne out of the record. In any case, there is no evidence before this court to show that the Respondents grantor did acquire 1.349 acres and yet chose to register only 0.27 acres of land. It is to our minds, simply illogical to say that although Respondents acquired 1.349 acres from their grantor, their grantor only issued an indenture to cover 0.27 acres of land because their grantor did not want to lose the remaining portion of the land. The said Kyei Appenteng, who from the Respondents own documentary evidence, himself acquired only 0.321 acres of land cannot sell or convey 1.349 acres to the Respondents. We therefore have no difficulty in overturning the two lower courts finding in favour of the Respondents and or failure to give due consideration to such significant inconsistencies and improbabilities in the evidence of the Respondents on the size of the land they acquired.

Another piece of evidence that in our view was not properly evaluated nor given the required weight is the composite plan which was tendered by the Court appointed surveyor

and which can be found at page 415 of the Record of Appeal. From the composite plan, it can be clearly seen that when the various indentures of the parties were superimposed with each other, the two lands claimed by the parties are separate and only overlap by a tiny portion of land.

This is a clear case where the Court is faced with documentary evidence of Appellant's indenture of January 1985, Land Title Certificate of 25th October, 1996 coupled with undisputed acts of possession such as the construction of a wall and the gating of the disputed land in 1984 among others as against Respondents oral testimony of undocumented acquisition of the land in dispute in 1992 from a grantor who decided to transfer only 0.27 acres of land to him because the said grantor did not want to lose the remaining portion of land. It is trite learning that when a court is confronted with credible documentary evidence which is at variance with oral testimony, the court ought to generally prefer the documentary evidence to the oral evidence.

Also, in analyzing the evidence on record, the High Court and the Court of Appeal capitalised on an alleged misdescription of Appellant's land in Appellant's indenture and the accompanying site plan to come to a conclusion that Appellant's registration of the land was fraught with fraud. At page 490 of the Record of Appeal, the Court Appeal reasoned as follows:

> "… the land registered under PNDC Law 152 had a land depicted differently from the land as depicted in the site plan contained in Exhibit B. In the written submission of learned lawyer for Plaintiff, he appears to concede that the dimensions of the land as depicted in the cadastral plan in the land title certificate, Exhibit C changed from the dimensions of the land depicted in the site plan contained in Exhibit B but rationalized it by drawing attention to the fact that drawing cadastral plans "sometimes show deviations from the manual plan contained in Exhibit B". That is a possibility and in the view of the court that speculative possibility cannot be

> regarded as evidence worthy of acceptance. It can best be described as subjective thinking of learned lawyer for plaintiff but what he thinks cannot be evidence. If the cadastral plan Exhibit C differed from the plan in Exhibit B because the latter was done manually, there should have been specific evidence to that effect."

With respect to the learned justices of the Court of Appeal and the High Court, we do not think that their findings in this regard are backed by the totality of evidence adduced at the trial. We find that the Respondents did not establish their allegation of fraud to the requisite degree of proof. Authorities abound that allegations of fraud, being criminal in nature, require proof beyond reasonable doubt. Section 13(1) of the Evidence Act, 1975, Act 323 provides as follows:

> "In a civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt."

This Court has opined in the case of **RYEH & AKAKPO v AYAA IDDRISU [2010] SCGLR 891** that:

> "The rule in section 13 (1) of the Evidence Act, 1975 (NRCD 323), emphasizes that where in a civil case, crime is pleaded or alleged, the standard of proof changes from the civil one of the balance of probabilities to the criminal one of proof beyond reasonable doubt."

Similarly, in a judgment of this Court dated 23rd May, 2018 in Suit No.: J4/ 58/2017 entitled SODZEDO AKUTEYE & 2 OTHERS VRS. ADJOA NYAKOAH& 2 OTHERS, in commenting on the standard of proof where fraud is alleged held as follows:

> "No evidence was led by the Appellants to prove fraud against the 2nd and 3rd Respondents at the statutorily required standard of proof beyond reasonable doubt,

> even though the Appellants, in their pleadings, had particularized fraud against the 2nd and 3rd Respondents."

In the instant case, we do not think that the difference in the descriptions of the coordinates of the land in the site plan attached to the indenture and the coordinates of the land contained in the indenture itself is enough to ground fraud. This is especially so when there is no evidence that the coordinates referred to in the indenture is referable to a land different from the one in dispute. In our view, there is therefore no evidence on record to back the claim that land as described in the indenture is not the same as the land in dispute.

This Court, in a judgment dated 6th June, 2019 in Suit No.: J4/10/2018 entitled **Olivia Anim (Suing per her lawful attorney Diana Mensah Bonsu) v. William Dzandri,** speaking through Dotse JSC noted as follows:

> "It is not uncommon in land transactions for the parties to agree to sell and buy in one year and to conclude the transaction in another. The inconsistencies on the part of the Plaintiff and her attorney as to which year the land was acquired was therefore not fatal to her case."

In this instant case, the Appellant acquired the land in 1982 yet his indenture was issued to him in 1985. We do not think that the difference in the date on the site plan and the date on the indenture is enough to ground fraud . This is especially so when you consider the Appellant's over 15 years of adverse possession which as stated earlier remains uncontroverted by the Respondents.

Another aspect of the Respondents' case that influenced the decision in Respondents' favour is their regularization of their title with the Gbawe Kwatei Family. At page 508 of the Record of Appeal, the court held as follows:

> "If one were to proceed under the fundamental fact that the disputed land belongs to Gbawe Kwatei family as has been found, then any registration of any grant of the land not originating from Gbawe Kwatei family could be deemed flawed by mistake if not by fraud. Under the circumstance, to the extent that Exhibit F was obtained from a grant not made by Gbawe Kwatei family, Exhibit F can be said to have been obtained by mistake if not by fraud. In the view of the Court, by way of re hearing which the court is enjoined to do under Rule 8(1) of Cl 19, Exhibit F is flawed and so the cancellation thereof as ordered by the trial court will not be disturbed."

It is to be noted that the Parties are all residents of McCarthy Hills. In fact, the parties are neighbors who have their respective houses on lands acquired from the Nii Amoo Quaye and Nii Kweikumah families of Anumansa Jamestown. From the pleadings of the parties, it is evident that the parties have a common grantor. Whilst the Appellant contended to have acquired his interest in 1983, the Respondents asserted that their grantor had an earlier grant of the land in 1972 from the same family as the Appellant. The Respondents went further to assert that after a grant had been made to the 2nd Respondent, the Appellant's grantor had no interest to convey to the Appellant.

The evidence before us shows that it was after the commencement of the suit that the Respondents allegedly "realized" that the entire land belongs to the Gbawe Kwatei Family and not their original grantor, and thus approached the Gbawe Family to "regularize its title to the land". Obviously, this regularization is a belated attempt to overreach the Appellant and was done at a time the Respondents knew of the pendency of the suit in Court. The evidence on record shows that the land in dispute, abuts Appellant's other land, where Appellant operates a school and lives. Like the land in dispute, the Appellant has been on his other land for over 25 years and yet the Gbawe Kwatei Family has never disputed or challenged Appellant's possession and control of the land for all these years. Adverse possession would therefore operate against the grantors of the Respondents, the Gbawe

Kwatei Family and for that matter, against the Respondents. Besides, the Respondents themselves, purchased 0.27 acres of land from the same grantor as that of the Appellant and have since 1992, been in undisturbed possession of same. What is more, the evidence shows that Respondents' grantor acquired the land in 1972 and sold the land together with the building thereon to the Respondents. We do not think that the title documents executed in favour of the Respondents by the Gbawe Kwatei Family in 2015, when the Respondents were in the know of the contentions between the parties in Court should be accorded as much evidentiary weight to result in a title that can prevail over this overwhelming evidence of adverse possession.

Also, the Respondents tendered as Exhibit 4 which may be found at page 155 of the Record of Appeal. It is a search conducted at the Lands Commission with a site plan showing 1.09 acres of land. The search revealed that aside a portion hatched blue which was registered in the name of the 2nd Respondent and the portion marked "B" registered in the name of the Appellant, other portions of the land were registered in the name of five (5) different persons, all of whom trace their root of title from Nii Kwei Kuma III, with some of the conveyances dating as far back as 1958. It will be legally imprudent, to affirm the Respondents' alleged "regularization" of 1.349 acres when to our knowledge, all the other five persons who have registered interest in the said lands are not parties to the instant suit. The search results is dated July 2013. The Respondents were therefore on notice of the interest of the other person, who, per the search results, had various registered interests, when in 2015, Respondents went to the Gbawe Kwatei Family to regularize their title for juridical endorsement. On the basis of the Respondents own evidence (Exhibit 4) both the trial High Court and the Court of Appeal erred in preferring the Respondent's case to that of the Appellant.

The outstanding ground of appeal canvassed by the Appellant is that the Court of Appeal failed to apply the same standard of proof to the Respondents who counterclaimed for declaration of title to the disputed land as it placed on the Appellant.

In a land dispute, where there is a counterclaim, the counterclaimant bore an equal burden to prove his counterclaim, without which the counterclaim should fail.
In the case of ARYE & AKAKPO v AYAA IDRISSU [2010] SCGLR 891, this court held as follows:

> "A party who counterclaims bears the burden of proving his counterclaim on the preponderance of probabilities and would not win on that issue only because the original claim had failed. The party wins on the counterclaim on the strength of his own case and not on the weakness of his opponent's case."

This is because, per Order 12 rule 1 of the High Court (Civil Procedure) Rules, 2004, C.I. 47 as amended, a counterclaim assumes the appearance of an action to which the Plaintiff is to be treated as a Defendant to the Counterclaim. The roles of burden of proof reverses as far as proof of the counterclaim is concerned. A Defendant is not entitled to the grant of reliefs on his or her counterclaim unless he has proven his counterclaim to the requisite degree of proof. Order 12 rule 1 of C.I 47 states as follows:

> "**Rule 1—Counterclaim Against Plaintiff**
>
> A defendant who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in an action in respect of any matter, whenever and however arising, may, instead of bringing a separate action, make a counterclaim in respect of that matter."

In *Amon v. Bobbett* (1889) 22 QBD 543 Bowen LJ held at 548 thus:

" a counterclaim is to be treated for all purposes for which justice requires it to be so treated as an independent action."

We do not think the evidence offered by the Respondents in proof of their counterclaim satisfied the requisite degree of proof. The Respondents failed to satisfactorily discharge the burden of proof in respect of their counterclaim. As has been discussed in this judgment, the Respondents root of title is weak and lacks proper foundation. The grant made to the Respondents in 1992 encompassed only 0.27 acres and the said land is not the same as the land in dispute. The Respondents sought to rely on different site plans covering 0.27 acres, 1.09 acres and 1.349 acres all purporting to evidence their acquisition of the land in dispute. We struggle to overlook the inherent inconsistencies in the Respondents case in this regard. Also, Respondents Exhibit 4, the search results from the Lands Commission shows that Respondents' claim to 1.349 acres of land is fraught with legal challenges since five (5) other persons have registered interest in the land, with some of the interests dating as far back as 1958. The Respondents' case was therefore not proven to the requisite degree of proof to warrant a grant of the reliefs in their counterclaim. Consequently, the Respondents counterclaim ought to fail.

CONCLUSION: Having come to the conclusion that the judgement is against the weight of evidence adduced at trial, we are of the opinion that on the balance of probabilities, the Appellant's case was more probable than that of the Respondents. Accordingly, this appeal succeeds. We hereby set aside the judgment of the Court of Appeal in its entirety and enter judgment in favour of the Appellant as follows:

a. The Appellant is declared owner of all that parcel of land situate at MaCarthy Hill, Accra and bounded on the North by the grantor's land measuring 110 feet more or

less on the East by the grantor land measuring 110 feet more or less on the South by grantors land 185 feet more or less and on the South by proposed road measuring 135 feet more or less on the North West by grantors land measuring 80 feet more or less and covering an approximate area of 0.37 acres.

b. Appellant may recover possession of any or all that parcel of land situate at MaCarthy Hill, Accra in the possession of the Respondents

c. General damages for trespass is assessed at against the Respondents jointly and severaly.

d. The Respondents, whether by their agents, assigns, privies, servants or workmen are hereby perpetually restrained from disturbing Appellant's quiet enjoyment of the land described in "a" above;

e. Cost assessed at against the Respondents jointly and severally.

We are unable to grant the Appellant's relief "3" for special damages as same was neither particularised in the pleadings nor proven at the trial.

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

C. J. HONYENUGA

(JUSTICE OF THE SUPREME COURT)

I. O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

COUNSEL

NOOR-DEN SAEED ESQ. FOR THE PLAINTIFF/APPELLANT/APPELLANT.

NAA OYOO QUARTEY ESQ. DEFENDANTS/RESPONDENTS/RESPONDENTS.