IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2024

CORAM: SACKEY TORKORNOO (MRS.) CJ (PRESIDING)
BAFFOE-BONNIE JSC
PROF. MENSA-BONSU (MRS.) JSC
ACKAH-YENSU (MS.) JSC
GAEWU JSC

CIVIL APPEAL
NO. J4/45/2023

24TH JANUARY, 2024

SIMON HOPPER ..... PLAINTIFF/RESPONDENT/
(SUING FOR AND ON BEHALF OF THE ROYAL NSONA FAMILY OF NKANFOA) RESPONDENT

VRS.

KWESI KWETIA ..... DEFENDANT/APPELLANT/APPELLANT

J U D G M E N T

SACKEY TORKORNOO CJ:

Background

[1] The Plaintiff/Respondent/Respondent (hereinafter referred to as "the plaintiff") obtained judgment from the High Court sitting in Cape Coast against the Defendant/appellant/appellant (hereinafter referred to as "defendant") on 15th January 2021. The defendant appealed against the judgment to the Court of Appeal which

dismissed the appeal and affirmed the judgment in favour of the plaintiff. Dissatisfied with the decision of the Court of Appeal, the defendant appealed to this court. This court dismissed the said appeal and states the reasons for the dismissal hereunder.

CASE OF PLAINTIFF

[2] The plaintiff brought this action on his own behalf and as seen from the title to the suit, on behalf of his Royal Nsona Family of Nkanfoa. In his statement of claim, the plaintiff stated that he is an elder of the said family and since no head of the family had been appointed after the demise of the former head of family, Nana Kobina Essilfie in 2016, he commenced the action on behalf of it. He averred that his ancestors have been in occupation of Nkanfoa lands and same had been attached to the Royal Nsona family from time immemorial. He also claimed that his family had farmed on Nkanfoa lands for their livelihood without any interference from any person/s.

It was his case that the defendant is a member of a different section of the Royal Nsona family at Nkanfoa. Plaintiff claimed that the two sections of Royal Nsona family members have co-existed peacefully on Nkanfoa lands with each family fully aware of the boundaries of its lands.

[3] It was his complaint that in 2014 the defendant, without reference to farm owners of the Royal Nsona family and without the consent or concurrence of the family, caused the marking up or demarcation of a road on the said land. This caused damages to the plaintiff's farm products and acacia trees. On enquiry from the family head at the time of this alleged infraction, the plaintiff was informed that the defendant had not been authorized to undertake the acts. Despite being advised against going on with the acts complained of, the defendant further sold out portions of the disputed land to developers who had cleared the lands for development and also caused damage to farm produce and trees.

[4] It is this insistence on continuing with these acts that caused the Plaintiff to commence the action on 16th January 2017 and for the following reliefs:

a. A declaration that the Defendant cannot interfere with the Plaintiff's exercise of usufractuary rights on the land situate, being and lying at Nkanfoa, Cape Coast, in the Central Region of the Republic of Ghana which shares boundaries on the North with the Land of Abura, on the West with the farm lands of Abura, on the West with the farm lands of Ante Efua Amissah, on the South with the farmlands of uncle Kweku Boye and on the East with the farm lands of uncle Kojo Bosu.

b. An order of the Court restraining the Defendant from interfering with plaintiff's exercise of usufractuary right over the land in dispute.

c. A declaration that the Defendant has trespassed onto the lands of the Plaintiff.

d. An order of award of general damages against the Defendant for the said trespass.

e. An order of award of specific damages against the Defendant in favour of the plaintiff for the plants and produce the Defendant unlawfully destroyed.

f. An order of perpetual injunction restraining the Defendant his agents/assigns/privies/workmen and all those claiming through him from interfering and disturbing the plaintiff and all those claiming through him the Plaintiff's quiet enjoyment of the land in dispute.

THE DEFENCE

[5] Defendant presented a three stringed defence. First, defendant admitted that Plaintiff is a member of a 'rival' Nsona family at Nkanfoa, albeit strangers who joined the defendant's Royal Nsona family on Nkanfoa lands, and do not own any land at Nkanfoa. Plaintiff therefore has no capacity to commence the instant action because he has not

shown any designation or authorization from the Royal Nsona family to commence the action in issue.

[6] Second, the defendant set out that the plaintiff's family challenged the defendant's Royal Nsona family as to the ownership of the Nkanfoa Stool. This matter travelled from the Oguaa Traditional Council to the Supreme Court in the case of **Essilfie & Anor vrs Nana Anafio VI & Anor with suit number 61/90.** The defendant's ancestor was proclaimed owner of the Nkanfoa stool on 22nd March 1994.

In another litigation with Suit No. LS 15/76 at the Cape Coast High Court entitled **Ebusuapayin Kobina Essilfie (substituted by Kofi Powyosu) & Anor vrs Nana Anafu VI & Anor,**, the plaintiff's Nsona family also asserted ownership of Nkanfoa lands. Judgment was entered in favor of the defendant's Royal Nsona family of Nkanfoa in April, 1982. The plaintiff's family are therefore estopped by the decisions in the above judgments from challenging the title of the defendant's Royal family to Nkanfoa land by virtue of these judgments.

[7] The third string in defendant's defence is that he is the sitting Chief of Nkanfoa, and as owners of Nkanfoa lands, his Royal Nsona family need not consult the plaintiff's family for the plotting and zoning of Nkanfoa lands.

The defendant further contended that by virtue of urbanization of Nkanfoa, the need arose to plot Nkanfoa lands to befit urbanization for which reasons the District Statutory Planning Committee under the Local Government Act decided to rezone Nkanfoa lands by providing roads and utility services at Nkanfoa. When the process started under the instruction of the District Assembly the sister of the plaintiff raised issues and reported the matter to the police. That did not yield any results.

[8] The issues for trial settled by the high court at the close of pleadings were:

1. Whether or not Defendant has interfered with the usufractuary right of the Defendant over the disputed land.

2. Whether or not Defendant's interference with the Plaintiff's usufractuary right over the land in dispute constitute trespass.

3. Whether or not plaintiff is entitled to his claim.

4. Any other relief(s) as the Honourable Court may deem fit to order or grant.

5. Whether or not Defendant owns any land in the disputed area.

6. Whether or not defendant is estopped by the Supreme Court judgment in the case of **Essilfie & Anor v Nana Ango IV & Anor in suit No. 61/90**

HIGH COURT DECISION

[9] The high court was not impressed with the defendant's defences. The high court straightened out the import of the capacities of the two parties, the legal import of the claims of the plaintiff, and the legal outcomes of the two suits presented as having created estoppel per res judicatam in relation to plaintiff's claims.

On these three points, the high court clarified that since there was no dispute about the land belonging to the Royal Nsona family of Nkanfoa and the two parties belonging to the same larger Royal Nsona family of Nkanfoa, albeit different sections, the plaintiff was properly before the court for ventilation of his claims. He made this significant statement regarding the import of the earlier judgments: "*It can thus be safely concluded from that judgment that the parties in that case and by necessary implication parties in this suit are the same Nsona family who are the bonafide owners of Nkanfoa stool, that (sic) Nkanfoa lands*'. (page 6 of the judgment)

[10] Second, the judge pointed out that the plaintiff had claimed usufructuary right to the land in issue in the present suit. This was not a matter resolved against the plaintiff in the previous litigations. In the previous litigations, he said that '*the real import of the judgment is that the present Plaintiff Nsona family cannot call upon the Defendant's Royal*

Nsona family to account to the Plaintiffs. The Plaintiffs thus lost the case in that score. Plaintiff did not lose that case on the score that by virtue of that judgment, they have lost their usufructural interest in the Nkanfoa lands which they already occupied…

[11] On the other hand, it was the opinion of the trial judge that the present claim of plaintiff to usufructual interest in the land in issue was supported by the decision in the previous litigation, and the evidence in the litigation conducted before him. He said on the same page 6 -

The Plantiff (sic) usufructual interest in the Nkanfoa land was maintained and preserved by the said judgment. It is exactly that usufractual right of the plaintiff in the Nkanfona lands that is the disputed land that the present plaintiff in this action had sought the protection of this court.

The usufructual Right of the Plaintiff had earlier been confirmed in an earlier case which both parties had relied on in this suit

I have no legal right to depart from the earlier judgment both parties have relied on (sic) I will not venture to do so.

I accordingly declare that the Defendant cannot interfere with the Plaintiff's exercise of usufructual Right in the disputed land. I restrain the Defendant from doing so'

The trial judge continued:

'*It is not denied on the records that the Plaitiff is a member of the Nsona family of Nkanfoa and he together with other family members have variously made farms on portion of the Nsona famly land. The Defendant had also admitted that he had caused people or caused damage to the farms of the Plaintiff and others in respective (sic) of the reason given by the Defendant for doing so. This being the case, the Defendant has interfered with the Plaintiff's usufructuary rights over the land in dispute and the same constitutes trespass to the Plaintiff's land*'

[12] Save for the prayer for special damages of 10,000Ghc that the trial judge held to be unproved, he granted all the claims of the plaintiff, and awarded him nominal damages of 2000Ghc for the destruction of the trees and farm crops.

JUDGMENT OF THE COURT OF APPEAL

[13]The grounds of appeal against the high court judgment were:

a. The judgment is against the weight of evidence before the Court.

b. The trial court erred in law by calling on the Defendant to open his defence after the Plaintiff had failed to discharge the burden of proof on him in accordance with section 11, 12 and 14 of the Evidence Decree i.e. NRCD 323, when he failed to identify the land in dispute in addition to either calling boundaries owners etc to testify on his behalf to collaborate his case.

[14] On hearing the appeal, the three Judges absolutely appreciated the case presented by the plaintiff. The court was satisfied that the boundaries of the lands in issue were sufficiently identified and so dismissed the second ground of appeal. Since the omnibus ground that the judgment is against the weight of evidence compelled a rehearing, they reexamined the issues determined by the trial court.

On the issue of capacity it was their view that *'the Respondent (plaintiff) was himself entitled to a personal remedy against the Appellant (defendant) for the alleged acts of trespass perpetrated on the Respondent's farm*'. This justified the plaintiff's capacity to be heard by the court. The court of appeal also noted that the pleadings revealed that plaintiff took out the writ in his capacity as principal member and elder of his family, '*since at the date of commencement of the action, no head of his family had been appointed following the death of the former head*'. It was the view of the court that by pleading facts and leading evidence in support of the necessity for '*preserving and safeguarding the interests of his family in the disputed land, the recognized exceptions in the proviso*

to the principle in ***Kwan v Nyieni [1959] GLR 67,*** *can apply to properly vest the (plaintiff) with capacity to act and safeguard the family character of the properties in dispute, and also claim appropriate compensatory reliefs for injuries sustained not only by other family members but also by his own self for the (defendant)'s acts of trespass*'.

[15] On the issue of whether the plaintiff was estopped from litigating his current claims by reason of the 1982 determinations in Suit No. LS 15/76 at the Cape Coast High Court in **Ebusuapayin Kobina Essilfie (substituted by Kofi Powyosu) & Anor vrs Nana Anafu VI & Anor,**, the court of appeal found the 1982 judgment to have been categorical in the finding that the parties are members of the same Nkanfoa Stool family, even though they belong to different sections. The court of appeal quoted directly these words found in the 1982 judgment: '*the defendants deny that the Nkanfoa Stool and lands belong jointly to them and the plaintiffs although they admit that both of them belong to the Nkanfoa Stool family*'

[16] On the basis of this finding, the court of appeal agreed with the high court that the relevant holding from Suit. No LS 15/76, was that the plaintiff's section of the family, being subordinate in standing could not competently call upon the defendant's section to render accounts to it. Neither did the judgment in Suit. No LS 15/76, deny the plaintiff's predecessors of their usufructuary rights and interests in the disputed land. The court of appeal found the plaintiff's possessory presence on the land established from the records, as admitted by the Defendant, and held that '*the undisputed acts of possession exercised by the (Plaintiff)'s family is consistent with long cherished principles of our customary land tenure system, which recognizes the existence of usufructuary interests in the form of possessory rights held in land by a subject of the stool or member of the family, whilst the normal allodial title vests in the stool or family itself. This customary law principle, described as '****a hallowed canon of customary law****' by Francois JA (as he then was) in the case of* ***Mansu v Abboye & Anoi [1982-83] GLR 1313*** *has been vaunted in a long line of cases*.'

[17] They dismissed the submission that the trial judge was in error in upholding the Plaintiff's claim to be entitled to the exercise of usufructuary rights over the land claimed

by them. On the contrary, they were of the view that his determinations were credible and consistent with the evidence on record.

Appeal to the Supreme Court.

[18] Grounds of Appeal submitted were:

1. That the judgment is against the weight of evidence.

2. That the Court of Appeal, Cape Coast respectfully misconstrued the import of the judgment in Suit No. 15/76.

[19] As already indicated, we are fully satisfied that the determinations of the high court, as affirmed by the court of appeal, are absolutely right in law.

The continued submissions of counsel for defendant on the plaintiff lacking capacity to sustain this action seems to totally fail to appreciate the two pronged causes of action that plaintiff presented to court. There was the personal action to recover damages for destruction to his crops, and this alone gave the plaintiff standing in court. And there was the representative capacity that plaintiff disclosed as a member of a section of family whose head had died at the time he commenced the court action after they had experienced interference with their possessory rights. On the issue of the demise of his family head at the time the action was commenced, we fail to see the premise for defendant's continued protests, in the absence of evidence to the contrary.

[20] But for the fact that we wish to make some legal positions very clear, we would simply have affirmed the judgment of the court below. However, the continued assertions of defendant reflect a certain tunneled vision of family and stool heads having a right to dispose of family and stool lands, without an obligation to consider any secondary rights of members of the family or members of the ethnic group that that the occupant of the stool governs, that seems to be taking hold of the country. This reasoning is wrong, it

has no basis in constitutional, statutory or customary law. And even worse, this notion is rapidly whittling away the integrity of the nation's entire land tenure system, and the ability of the land tenure system to support the rights of present and unborn generations to their access to equity and capital obtained for them by their ancestors.

[21] It seems that the Defendant is stuck in this notion that as Odikro of Nkanfoa, and head of the dominant section of Nsona family in Nkanfoa, no other occupant of land in Nkanfoa, who also comes from the Nsona family, can question how the land is disposed off. This notion seems to be the underpin to the description of plaintiff's family section as a '*rival Nsona family*' that has no authority over lands. How can family membership be premised on rivalry, such that it leads to lack of rights in jointly held family assets such as stool or family lands? This paradoxical notion has no standing in constitutional, statutory or customary law arrangements. The point that the parties admitted to hailing from the larger Nsona family resident in Nkanfoa, albeit from different lines of the Nsona family, and the point that this gave rights to the plaintiff to protest acts that interfered with his (and other family members') use of family land, was driven strongly home by the Court of Appeal in its judgment, and we must, for the record, reiterate same with strong emphasis on **the trust nature of the position of Odikro.** This is the reason why plaintiff's action is sustainable, and the defendant's protests are untenable.

[22] An Odikro is a trustee of the properties of the stool and the citizens of the stool area are the **beneficiaries** of the trust. In this wise, the standing decisions presented to the courts by the parties only establish one thing: the plaintiff's right to undisturbed possession of the land on which he and other family members have farmed from the historical past, and the defendant's obligation, as a legal custodian of the land, to inform, and negotiate with such rights holders if there is a presentation by the urban planning authorities to request the use of farm lands for communal purposes.

As rightly pointed out by the Court of Appeal, the seeming statutory shift by the enactment of section 50 (20) to (22) of the **Lands Act 2020 Act 1036**, makes the ability of an allodial owner to recover land in the possession of a usufructuary title holder where land is required for development purposes, subject to payment of compensation or other

settlement. In the same vein, the holder of a usufructuary interest, cannot alienate same without the consent of, and compensation of the allodial interest holder. This statutory regulation of these customary law interests does not represent a shift that places a strangulatory mercantile hold over lands in the hands of chiefs or family heads. It only emphasizes their obligation to recognize the beneficial interest of citizens of stools, and family members in the lands that they have occupied for long periods, and accord recognition to these secondary rights when there is a need to interfere with same. This is the constitutional direction of **articles 257 and 267 of the 1992 Constitution**, and constitutes the fundamental law of Ghana. **Article 267 (1)** reads:

Stool Land, Skin Lands, and Property

267 (1) *All stool lands in Ghana shall vest in the appropriate stool on behalf of, and in trust for the subjects of the stool in accordance with customary law and usage*

This same direction is given for when lands are vested in the President for public use under article 257. The President holds it in trust.

Public lands And Other Public Property

257 (1) *All public lands in Ghana shall be vested in the President on behalf of, and in trust for, the people of Ghana*.

And the **Lands Act 2020 Act 1036** clearly kowtows to this constitutional direction. In sum, the foundational law of Ghana is that no regulator, or trustee of lands, holds title to himself, and has the right to appropriate land being used by beneficiaries of the land, without prior recognition of their prior acquired rights.

[23] As far back as the time Ghana obtained independence, the principle of trusteeship of the Odikro was recognized in **Ohimen v Adjei (1957) 2 WALR 275** at 279 in these words of the Supreme Court per Ollenu J;

"There are four principal methods by which a stool acquires land. They are; conquest and subsequent settlement thereon and cultivation by subjects of the stool; discovery, by hunters or pioneers of the stool, unoccupied land and subsequent settlement thereon and

use thereof by the stool and its subjects; gift to the stool; purchase by the stool. Each of these methods involves either the sacrifice of lives of subjects or the expenditure of energy or contribution of money by subjects, and use and occupation of the land by the subjects. The stool holds the absolute title in the land as trustee for and on behalf of its subjects, and the subjects are entitled to the beneficial interest or usufruct thereof and have to serve the stool. Each individual or family is regarded in the broad sense as the owner of so much land as it is able by its industry r by the industry of its ancestors to reduce into possession and control"

[24] This trust relationship puts the Odikro in the position of a caretaker and he cannot unilaterally dispossess the members of their usufructuary right in the land.

In Achiase Stool v Appiah [1962]2 GLR 159 at *161* it was opined" *I should be prepared to hold as a matter of customary law that subject-farmers are bound to pay their quota of a debt incurred by the stool in litigation over land on which they farm. That is the equivalent of customary tribute which is normally payable by stranger-farmers*. ***After all, the stool holds the legal estate in the land for the beneficial enjoyment of its subjects and it seems to me contrary to reason that they should be entitled to enjoy the beneficium sine onero."***

[25] To determine the right of usufruct once acquired, **Mansu v Abboye and Another [1982-83] GLR 1313-1323** held that, it *"could be determined only by [the holder's] consent, his abandonment or upon failure of his successors."*

In Abotsi (An Infant), In Re; Kwao v Nortey and Others (1984-86) 1 GLR 144, the Court of Appeal held that: *"a caretaker was a fiduciary agent appointed by another person to administer property in the interest of a fiduciary… under both the English common law and customary law a fiduciary was obliged to act in the interest of his principal. If he committed a breach of that duty, under the rules developed in equity, **he was a trustee accountable to the beneficiary**. Similarly an examination of the customary law position showed that with the exception of immunity that was accorded to a family head or chief while he held office, all customary fiduciaries were accountable".*

[26] From the above, it is clear that the citizens around a stool are the beneficiaries for whom the Odikro acts. Therefore, the usufructuary interest of the members cannot be taken away from them by the Odikro by his simple say so.

Learned author Justice Dennis Dominic Adjei in his book, **"Land Law, Practice and Conveyancing in Ghana" 3rd Edition 2021, Buck Press**, at page 32 reviewing the rights accompanying usufructuary interest as recognized in **Oblee v Armah and Affipong [1958] 3 WALR 484** , articulated thus;

"A subject unlike a stranger does not need either express or implied consent of the stool to occupy any unpossessed land of the stool because by custom a subject becomes the owner of such land by virtue of possession and farming. The land acquired by such a subject cannot be disposed of by the stool on the basis that the subject did not receive a formal grant from it. ***An alienation of land by a stool which is occupied by a subject who holds usufructuary title is null and void".*** (emphasis ours)

[27] So to the issues set down and tried by the high court, the answer to each of them will be 'yes'

1. Whether or not Defendant has interfered with the usufractuary right of the Defendant over the disputed land. (Yes)

2. Whether or not Defendant's interference with the Plaintiff's usufractuary right over the land in dispute constitute trespass. (Yes)

3. Whether or not plaintiff is entitled to his claim. (Yes)

4. Any other relief(s) as the Honourable Court may deem fit to order or grant.

5. Whether or not Defendant owns any land in the disputed area (Yes, to the extent that he is the successor of the dominant family head, he is trustee of the reversionary allodial interest,)

6. Whether or not defendant is estopped by the Supreme Court judgment in the case of **Essilfie & Anor v Nana Ango IV & Anor in suit No. 61/90 (Yes)**

[28] The appeal is dismissed and the judgment of the Court of Appeal dated 27th April 2022 is affirmed. Costs of 20,000 Ghc is awarded against the defendant and in favor of the plaintiff.

G. SACKEY TORKORNOO (MRS.)
(CHIEF JUSTICE)

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

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