IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: DOTSE JSC (PRESIDING)

AMEGATCHER JSC

TORKORNOO (MRS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

KULENDI JSC

CIVIL APPEAL

NO. J4/41/2021

18TH JANUARY, 2023

NANA OTUO ANTWI BOASIAKO …PLAINTIFF/RESPONDENT/APPELLANT

VRS

NANA ADJEI PANIN ….. DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

TORKORNOO (MRS.) JSC:-

Introduction

In 1927, almost one hundred years ago, the ancestors of the parties to the appeal herein met before the Native Tribunal of Kumasi in contest over the boundary between the Abonu (also spelt Abono and Abornu in various parts of the record of this suit) stool and the Deduako (also spelt Dediako) stool in the Ashanti region. In

that 1927 law suit, the progenitor of the Plaintiff/Respondent/Appellant in the appeal before us (hereafter referred to as Plaintiff) was called Kofi Tumtuo and the progenitor of the current Defendant/Appellant/Respondent (Defendant) was Kwame Adjaye. The current parties have been in contest over the boundary between the Abonu stool and the Deduako since 2007, eighty years after their earlier boundary dispute started.

History of current suit

Plaintiff's claims

In the writ issued on 25th April 2007, the plaintiff indorsed the following claims

1. A declaration of title to and recovery of possession of all that piece or parcel of stool land known and called Abornu and bounded by the following town/villages Kuntunase, Deduako, Adwafo, Nyameani and Obo
2. Damages for Trespass
3. Perpetual Injunction restraining the defendant, his relatives agents/servants from having any dealings with the Abornu land

In the accompanying statement of claim, plaintiff averred in paragraphs 3 and 4 that his stool owned all that land bounded by the stool lands of Kuntanase (also spelt Kuntenase in the records), Deduako, Adwafo Nyameani and Obo and that the boundaries of Abonu and Deduako were marked by '*Atta-ne Atta, Tetrefu Obuokrukro, ntome, odum tree, paapa tree, onyina tree, ntome, a hill called bipokoko, onyina tree and Nyameani stream'* (hereafter referred to as the Atta ne Atta -Bipokoko-Nyameani boundary direction)

After this, he went on to aver in paragraphs 9 to 11 that in the 1927 suit, the boundaries between their stool lands as shown by defendant's ancestor begun from '*Tetrefo Yineban stream, cemetery, onyina tree, Abankransu and Akatasu junction, Abankransu source, bamboo plants and Kuman stream*' (hereafter referred to as the

Tetrefo-Yineban-Kuman boundary direction). It is these features shown by the Deduako stool that were accepted by the Native Tribunal in order for judgment to be given in favor of the defendant in 1927.

According to plaintiff, since the 1927 judgment, the Abonu stool has remained on the right side of the said Tetrefo-Yineban-Kuman boundary direction whilst the Dediako stool has been on the left of these boundary features. Plaintiff went on to contend that the defendant had without any justification, demarcated portions of his stool land beyond the said boundary features to some farmers without his knowledge. He contended that this conduct constitutes trespass, leading to the indorsed claims.

Defendant's defence

The defendant admitted the plaintiff's description of the '*Atta-ne Atta, Tetrefu Obuokrukro, ntome, odum tree, paapa tree, onyina tree, ntome, a hill called bipokoko, onyina tree and Nyameani stream'* markings as forming part of the Abono and Deduako boundary features and identified more features in those boundary markings. The expanded features found in paragraph 4 of the Statement of Defence were:

Commencing from Atta-neAtta, stream, then to Obuokrukro stream, thence to an ntome tree, thence to Nyame Ama stream, thence to two Ntome trees, thence straight to Tetrefo streem, thence to Paapa and odum trees, (paapa and odum trees are now dead and none existent), thence to bipokoso, thence to two Ntome trees, thence to an onyina tree (now dead and none existent), thence to Kroman stream with two Ntome trees which forms 'hytre' among the plaintiff, defendant and Nyameani stool land.

Defendant denied plaintiff's paragraph 9 that the defendant's boundary features accepted by the 1927 Tribunal were from '*Tetrefo Yineban stream, cemetery, onyina tree, Abankransu and Akatasu junction, Abankransu source, bamboo plants and Kuman stream*' (Tetrefo-Yineban-Kuman boundary direction) and averred that he would put plaintiff to strict proof of this. Defendant insisted that his stool land lies on the left side of the Atta ne Atta-Bipo koko-Kuman stream boundary direction while

plaintiff's lies on the right side of the same Atta ne Atta-Bipo koko-Kuman boundary direction.

Defendant also alleged trespass on the part of plaintiff and went to contend that the principle of res judicata applies to the present action. Defendant then counterclaimed for

1. Declaration that by the judgments of the 1st Tribunal and the Appellant tribunal the defendant is entitled to the ownership of the stool land described in paragraph 10 of the statement of defence
2. Damages for trespass
3. Perpetual injunction.

Now the land described in defendant's paragraph 10 (*erroneously numbered as a second paragraph 9 in the Statement of Defence*) was land bounded by '*Nyamiani stool, Abornu stool, Kuntanase stool, Kokodei stool, Edwenese stool and Pieise stool*'

Reply

In a Reply, the plaintiff asserted that the subject matter of the dispute that was resolved in 1927 was an '*old cemetery*' which was adjudged to be on the land of the defendant. That is how the 1927 suit was adjudged in favor of the defendant in the 1927 suit, and that the boundary marks shown by the defendant in the 1927 suit are totally different from the marks indicated in defendant's current statement of defence. Plaintiff went on to aver in paragraph 7 of the Reply that he admitted the Tetrefo-Yineban-Kuman boundary features shown by the defendant in the 1927 suit and it is these features that marked the boundary between the plaintiff and defendant stool.

Proceedings and judgment of 11th May 2010

This first trial was conducted before Amoah J. The record of proceedings before Amoah J form part of the exhibits in this suit and were tendered as exhibit C. We must say that we found many of the processes in the Record of Appeal sent to us deficient in clarity and this is why we called for and perused the original docket to ascertain the true state of the processes filed and records presented to court.

From the record before us, Amoah J ordered the Regional Director of survey department to survey the land in issue and for the parties to file their instructions to the Regional Surveyor. This was on 23rd October 2007,

In compliance with this order, the solicitor of the Plaintiff gave instructions indicating the boundary markings between the parties that conformed with the concluding part of his Statement of Claim found in paragraph 9 - that the boundary between Deduako and Abonu are as identified by the defendant in the 1927 suit and moved along the Tetrefo-Yinaban-Kuman boundary line.

Counsel for defendant however gave instructions that conformed with the position in his Statement of Claim that the Deduako/Abonu stool boundary run along the Atta ne Atta- Bipokoso-Kuman stream direction. In essence, in both his pleadings and instructions to the Surveyor in this 2007 suit, the defendant had departed from the findings on the boundary of the parties which had been entered in the 1927 judgment.

It will be noted on page 5 of exhibit C, that after the testimony of the Regional Surveyor and cross examination of counsel for Plaintiff, the court sought the following clarification from the Surveyor:

Q. *Mr. Emmanuel Owusu, the instructions given by the Defendant was in accordance with a judgment given?*

A. No my Lord, but it was in accordance with the plan I prepared.

In his judgment, the trial judge recognized that though the parties were asserting two different sets of boundary features, there are two matters that the parties are ad idem on.

The first is that both parties rely on the record of the 1927 litigation and this litigation went in favor of the defendant. In the 1927 judgment, the boundaries shown by the defendant's ancestor was accepted as the true boundary between the two stools, and this was the Tetrefo-Yinaban-Kuman boundary line.

Second, the position from the records of that litigation is that while the plaintiff's stool lies on the right hand side '*of the surveyed area*', the defendant's stool land lies to the left.

The court evaluated that '*it is not the whole of the lands respectively claimed by the parties in the writ of summons or counterclaim that are in issue. Rather it is what forms the boundary features between the two stools that matters. Any differences in the boundary features contained in the pleadings or evidence of one party as compared with what the judgment contains would result in that party losing his case. Whatever new evidence adduced by the parties would be inconsequential in the circumstance*'

Amoah J was satisfied that the boundary features that were shown by the defendant's predecessor and accepted by the Native Tribunal in 1927 moved from the *Tetrefo stream, Yineban stream, cemetery, onyina tree, Abankransu and Akatasu confluence, Abankransu source, bamboo plants and Kuman stream*', i.e. the Tetrefo-Yinaban-Kuman boundary direction or boundary line

Defendant had therefore set up a different set of boundary features in this 2007 litigation from what his predecessor claimed in 1927. Amoah J rejected the boundaries described in the defendant's claim and counterclaim on account of this contradiction. He found the plaintiff's case more convincing and entered judgment for as the plaintiff and against the defendant. He ended by saying that '*in effect, the 1927 judgment is confirmed*'.

Appeals against the first High Court judgment

This judgment was affirmed by the Court of appeal when the defendant appealed. On appeal to the Supreme Court, the Supreme Court decided to remit the contentions down to the high court for trial de novo.

These were the reasons given:

'We have read the record of appeal and the submissions made by counsel in the matter and have come to the view that having regard to the 1927 decision entitled Chief Kofi Tumtuo v Chief Kwame Agyei determined on the 19-5-27 before the Native Tribunal of the Kumasehene tendered in evidence as Exhibit A at page 105 of the record of appeal, which determined the boundary between the parties herein as indeed, the two lower courts found in their respective judgments, and in order to have the said boundary effectively settled for the purpose of avoiding any future litigation in respect of same, we hereby proceed to set aside the decision of the Court of Appeal in the matter herein and in place thereof remitting the action herein to the high court Kumasi, for a trial de novo and in particular direct that an order of survey be ordered in respect of the disputed property with the area previously determined in the 1927 action being superimposed on the said plan for the purpose of determining whether or not the Defendants have actually trespassed the boundaries determined in the 1927 action.

The appeal for the reasons above, is allowed; we make no order as to costs'

It is easy to follow what led the Supreme Court to the decision to remit this case for a trial de novo. The bolded and underlined words below show that the Supreme Court recognized that the two lower courts had rightly found that the boundary between the stool parties had been determined by the Native Tribunal in 1927.

'having regard to the 1927 decision *entitled Chief Kofi Tumtuo v Chief Kwame Agyei determined on the 19-5-27 before the Native Tribunal of the Kumasehene tendered in evidence as Exhibit A at page 105 of the record of appeal,* ***which determined the boundary***

between the parties herein as indeed, the two lower courts found in their respective judgments*….'.* (emphasis ours)

However, as regards the common allegation of trespass made by the parties to the 2007 suit within the boundaries identified in the 2007 suit, the high court had failed to settle that issue. And that salient issue needed to be settled to prevent further litigation.

Second Trial

On assumption of the trial de novo, this time by Abodakpi J, the high court in 2015 directed that a survey be done '*and the 1927 plan super imposed on it*'. The problem with this order was that there was no evidence that a plan had been done after the 1927 litigation.

While Counsel for the plaintiff reiterated the instructions given during the trial before Amoah J which identified the boundary along the Tetrefo-Yinaban-Kuman boundary line, Counsel for defendant gave instructions that conformed with the Atta ne Atta – Bipokoko- Nyameani boundary direction that Amoah J had found to contradict his ancestor's testimony in 1927. Defendant even went further to extend the details of the markings in this Atta ne Atta – Bipokoko- Nyameani boundary direction.

This survey plan was tendered on 25th February 2016 as exhibit CWA1, and its accompanying report as CWA. It was dated 7th December 2015. After the tendering of the plan and report, the high court insisted on a plan being drawn '*of the land in terms of the 1927 judgment and another plan of the land based solely on survey instructions given in this trial denovo*'. This was on 6th May 2016. The Regional surveyor was therefore ordered to receive the 1927 judgment, and draw the plan by identifying the features given in the judgment.

This was also done. It is instructive that this second map dated 19th July 2016 and tendered as exhibit CWA2 on 20th July 2016 showed the same details as the plan tendered as CWA1.

The Import of the evidence in the maps

We must at this point, on a careful perusal of these survey maps, explain the difference between the **Tetrefo-Yinaban-Kuman** boundary line and the **Atta ne Atta – Bipokoko- Nyameani** boundary line. The most significant matter to note is that the two boundary lines are neither parallel nor close to each other. They run at a right angle to each other and so are perpendicular to each other.

Tetrefo-Yinaban-Kuman boundary moves north-east from Tetrefo

The Tetrefo-Yinaban-Kuman boundary line runs **northwards** from the southern point of the Tetrefo stream (where it is not contested that Deduako shares boundary with Kuntenase), to the landmarks Nyinabunu (also spelt Yinaban or Yinabun in parts of the records) stream, to an old cemetery, to Nifakwan (a road on the right), ntome plants to bepokokoo to onyina tree, to Abonkrasu stream to Akotasu/ Abonkransu confluence to the source of Abankransu stream (where it is not contested that Deduako shares boundary with Edwenase stool land), to a group of bamboo plants and thence to the Kuman (also spelt Kumarn and Kumanu) stream. According to Plaintiff, the Kuman stream serves as the head boundary for Abonu, Deduako and Nyameani.

This northbound boundary is what Amoah J had held to be the boundary between Deduako and Abonu because it is this north bound Tetrefu-Yinabu-Abonkrasu boundary line that the 1927 judgment accepted as the boundary line between the Deduako and Abonu.

And it is along this north bound Tetrefu-Yinabu-Abonkrasu boundary line that the old cemetery that had been contested in the 1927 litigation lies on the left side of.

And it is this north bound Tetrefu-Yinabu-Abonkrasu boundary line that Deduako was held to be on the left of, while Abonu lay to the right of same.

Atta ne Atta – Bipokoko- Nyameani boundary line moves in a south-eastern direction

On the other hand, the Atta ne Atta – Bipokoko- Nyameani boundary line is on the southern end of the territories being described, and **moves east ward** from the western point of Atta ne Atta stream (where it is not contested that Abonu shares a boundary with Kuntenase stool land), to Obuokrukro stream, to ntome trees, Paapa and odum trees, Kwaiyifua stream, more Ntome and Oyina trees, Bepokoko hill, to Nyameama stream and thence to Kroman stream (where it is not contested that Abonu shares a boundary with Nyameani).

This east bound stretch of land lies **to the right** of the north bound Tetrefu-Yinabu-Abonkrasu boundary line. In this wise, the Tetrefu stream is on the west and left side of the Atta-ne-Atta stream. It is these east bound boundary features on the south that Defendant had done a volte face in 2007 to claim as Deduako's boundary with Abonu though the 1927 suit had found Deduako's boundary with Abonu to run northward along the Tetrefu-Yinabu-Abonkrasu boundary line.

Why would defendant do this turn around in 2007? It is easy to see from the survey map – exhibit CWA1 - that, Defendant could not have made a claim to the 938 acre stretch of land at stake in 2007 unless he put the location of his boundaries to the right of the Tetrefu-Yinabu-Abonkrasu boundary line asserted by his ancestor and established from the 1927 case.

While the old cemetery that was in contention in 1927 lies to the left side of the Tetrefu-Yinabu-Abonkrasu north bound boundary line, the disputed land in the 2007 law suit on appeal lies to the right of the Tetrefu-Yinabu-Abonkrasu boundary.

Thus if the determination of the 1927 judgment that the Deduako/Abonu boundary line runs northward from Tetrefu-Yinabu-Abonkrasu stands, with Deduako on the left and Abonu on the right of this boundary line, then all the current disputed land, which lies to the right of the Tetrefu-Yinabu-Abonkrasu north bound boundary line cannot belong to the defendant, and must necessarily belong to the plaintiff.

The surveyor's testimony

The same regional surveyor, Emmanuel Owusu who testified before Amoah J in 2009 also testified before Abodakpi J.

The surveyor's testimony found on page 227 of the Record of Appeal is extremely illuminating and confirms the explanation we have just set out above. He said

'*the starting point of* ***plaintiff's land as found in the 1927 judgment lies to the right side***, ***while the defendant's land lies to the left side***, *as depicted by the composite-plan produced.* ***The point indicated as PSP, marks the beginning of the Tetrefu Stream, and from there plaintiff's portion of land lies to the right side while the left side is for defendant***

The defendant's portion of land *is also indicated by a full green line,* ***as portrayed by the composite plan produced, taking into account the defendant's starting point, where we have Attanie Atta stream which is denoted by DSP on the composite-plan***. ***The defendant's portion of land as found in the 1927 judgment, as lies to the left side of the composite-plan produced while the plaintiff's land lies to the right side***. *I have found that* ***the plan produced is a true reflection of the boundary features captured in the 1927 judgment***. *And it is also the true reflection of what is on the ground*'

All emphasis is ours.

The Surveyor also tendered a copy of the 1927 proceedings and judgment from the national archives as exhibit CWA3 and we have found it highly helpful in the resolution of the conundrum that the Supreme Court sought to resolve once and for

all – regarding who has ownership of the stretch of land being claimed by both Deduako stool and Abonu stool. This is because as indicated, the writings from these ancient proceedings found in the Record of Appeal have been defaced in many places.

From exhibit CWA3, Tumtuo had, in 1927, testified regarding his boundaries thus:

'*I live at Abonu; I am the Odikro there. The land there belongs to me and I serve Kuntunasihene with it. I have boundaries with Kobina Dumfah, Odikro of Yamiani and Kwame Adjaye. I have boundaries with these people as stated and I do not cross boundaries*'

Tumtuo ended his evidence in chief with the words '*I have a boundary from Mesaasi to a stream called Abonkransu to Kumarmu'*.

This 1927 testimony by plaintiff's predecessor conforms exactly with the north-bound boundary trajectory of Tetrefu-Yinabu-Abonkransu boundary line between Deduako and Abonu because, although Mesaase is not shown on the survey maps, its location is alleged to be around the old cemetery where the 1927 conflict sparked from. This would put it in the same neighborhood as the Tetrefu stream.

Exhibit CWA3 also establishes that it is defendant's ancestor Adjaye who showed a deputation of linguists, the Deduako/Abonu northern boundary line starting from Tetrefu stream in the south and climbing up through Yinabu, the Abonkransu stream, where Deduako shares a clear border with Edwenasi, and ending up at the stream called Kumarmu stream by Tumtuo and the Plaintiff herein, but Tetrefu by Defendant herein.

The Linguist Kobina Kwarku gave testimony on behalf of the deputation, and we find it interesting that defendant said in paragraph 3 of his 2007 Statement of Defence that '*…even though the inspection team consisted of twelve persons including three linguist, Kobina Kwaku was not among them*'. This averment can only be a blatant attempt to wriggle out of being bound by the testimony that had clinched judgment

for the defendant's ancestor in 1927. It is also a clear untruth because Kobina Kwarku's testimony is found on page 8 of CWA3, as spokesperson of the deputation that went to inspect the land. And this was the most critical testimony that settled the 1927 dispute. He testified as follows:

'*We went as we were sent and inspected that portion leading to Kuntunasi the next day we inspected Deduako portion all what we saw were written down. The boundary starts from. 1st Tetrefu,* ***all the left*** *from Tetrefu for Deduakohene to a river called Yinabun, thence to the cemetery we took the right road and reached an Onyina tree which is also a boundary. Thence to Abonkransu and Akatasu junction thence to Abonkransu source and bamboo trees, thence to a stream named Kumarn where Plaintiff said his boundary extends to.* ***Deduako showed their boundary thus 1st****. From Ata & Ata to Buokrokro to Ntome to an Edum tree, Kwayi Efua* ***all the right for Tumtuo****. Thence to Oyina tree where Abonkransu is and to Yamiama Deduako said this was where Yamianihene gave them and said Tumtuo's boundary was not according to what was given them. Plaintiff told us his land was on the right and in this case, the cemetery which brought the case was on Defendant's land*'. (all emphasis ours)

The import of this testimony is more than clear. While Adjaye from Deduako showed Deduako boundary first as moving northward from Tetrefo through Yinabun to Kumarn '*where plaintiff said his boundary extends to*', Tumtuo showed land marks from Ata & Ata through Buokrokro to Yamiama and asserted that all the right was for him. The 1927 case was settled on this premise, and judgment regarding ownership of the cemetery was given in favor of Adjaye.

Witnesses

In this second trial, the plaintiff was content to close his case on his own evidence and the evidence of the Surveyor. The defendant testified and called three witnesses.

Judgment after second trial

At the close of the second trial, Abodakpi J, just like Amoah J before him, determined on page 6 of his judgment that '*it is apparent, this fresh trial is not about title to the various stool lands, but its rather a boundary dispute between the two stools*.'

He therefore distilled the new issue he believed to be central to resolution of the dispute in the trial de novo as '*Whether or not is the defendant or it is plaintiff who has trespassed, the boundaries as established in the 1927 judgment*'

After a laborious review of the evidence of the parties and their witnesses including the court witness, and the testimony of the linguists who inspected the land in 1927 found in exhibit CWA3, Abodakpi J identified testimonies that were alleged by defendant to stand against plaintiff and found that were not borne out by the record on pages 25 to 26 of his judgment.

He then went on to look at the claims of trespass, considered the under pinning principles on the role of possession in a dispute centered on trespass, and concluded that despite evidence of acts of possession testified to by defendant and his witnesses, it is these very acts that constituted the trespass alleged by plaintiff.

He postulated that '*the 1927 judgment was itself about boundaries only and did not determine the entire identity of the two stool lands. In other words, the proof of the entire identity and the establishment of the entire identity of the two stool lands was not the decision arrived at. Both stools have valid title to their respective stool lands and a finding that deprives one of them title or ownership to its land in its entirety will be a finding not borne out of the evidence adduced in this trial and the 1927 trial as well*'. His conclusion was that '*on the preponderance of the probabilities I find and hold that boundary features shown by plaintiff, constitute a true representation of the boundary between the two stools; the plaintiff really lies to the right of that boundary line given by him and as found by this court*.'

He entered judgment in favor of plaintiff, held that defendant had trespassed unto plaintiff's land and awarded damages for trespass assessed at 40,000 Gh and costs of 10,000 Gh,

Appeal

This trajectory of standing decisions in favor of the plaintiff however changed at the Court of Appeal. The Court of Appeal evaluated that the preponderance of evidence before it favored the defendant. And that, if the trial judge had given proper and critical consideration to the evidence adduced by the parties, their witnesses and the surveyor and instructed himself properly on the law, he would have come to a different conclusion.

The Court of Appeal reversed the judgment of the high court and entered judgment in favor of the defendant on his counterclaim save for the claim for damages for trespass. The Court of Appeal went on to declare ownership of the disputed land measuring 938 acres to be part of the Deduako stool land, and restrained the plaintiff and his privies from interfering with the possession and enjoyment of the disputed land by the defendant.

It is this decision that has been submitted to us on appeal on the following grounds:

a. The honorable court of appeal failed to take congnisance of the fact that the fundamental breaches of the relevant laws and practice found on the face of the notice of appeal rendered the notice of appeal a nullity

b. The judgment is against the weight of the evidence on record

Consideration and analysis

Ground (a)

In this first ground of appeal, counsel for plaintiff urges that where a party has substantially violated mandatory procedural rules, especially those that touch on the

institution of a cause of action or substantive remedy like an appeal, the courts have at all times insisted on the application of the rules. It is only when the procedural misstep is trivial or inconsequential that the courts have deferred the strict application of the provided rules of court. Counsel for plaintiff cited inter alia **Ayikai v Okaidja 111 2011 SCGLR 205, International Rom Limited v Vodafone Ghana Limited.** He concluded that the court of appeal erred when it failed to dismiss the appeal on this premise.

What were the alleged fundamental breaches of relevant laws and practice found on the face of the notice of appeal that rendered the appeal a nullity? The parties had been wrongly designated. The judgment that had been appealed was described as a judgment of 31st May 2018 instead of 30th May 2018. In paragraph 4 of the notice of appeal, counsel for appellant had indicated that reliefs were being sought from the high court, instead of the Court of Appeal. Finally, the paragraph 5 of the notice of appeal indicated that the person that would be affected by the appeal was the defendant – who was himself the appellant - instead of the plaintiff

Counsel for defendant on the other hand submits that on a reading of **Rule 63** of the **Court of Appeal Rules 1997 CI 19**, it shows that the waiver of non compliance of any rule of practice or procedure is at the discretion of the Court of appeal, and it is the court that has the discretion to decide whether non-compliance with any rule of practice or procedure is so fundamental as to 'amount to it being set aside'.

Rule 63 reads:

Waiver of non-compliance Rules

'*When a party to any proceedings before the Court of Appeal fails to comply with these Rules or with the terms of any given order or directions given or with any rule of practice or procedure directed or determined by the court, the failure to comply shall be a bar to further prosecution of proceedings unless the court considers that non-compliance should be waived*'

While agreeing with the Court of Appeal in their expression of disapproval at the extreme lack of diligence that is reflected on the notice of appeal filed in that court, we cannot agree with counsel for plaintiff that it is only when a procedural misstep is trivial or inconsequential that the courts have deferred the strict application of the provided rules of court. Neither can we agree with counsel for the defendant that the waiver of non compliance of any rule of practice or procedure is at the discretion of the court of appeal or any court.

It is important to appreciate the fundamental rule that the exercise of a court's discretion must always be in accordance with law, and no court has discretion to waive non-compliance with rules of court that also breach statute or a constitutional provision. The decision of this court in **Republic v High Court (Fast Track Division) Accra; Ex Parte Ghana Lotto Operators Association (National Lottery Authority Interested Party) 2009 SCGLR 372** , on the legal principle that no court could commit an error that amounted to violation of statute applies.

In **Republic v High court Accra Ex Parte Allgate Co Ltd (Amalgamated Bank Ltd Interested party) 2007-2008 2SCGLR 1041**, this court in contemplating the conditions under which a court could waive irregularities arising from non-compliance with rules of procedure in **Order 81 of the High Court Civil Procedure Rules 2004, CI 47**, distilled directions on the circumstances under which the violation of rules of court would render a process void. Its decision was that it is non-compliance with rules of court that are so fundamental as to go to jurisdiction, or which are a breach of the Constitution, or breach of a statute other than the rules of court, or a breach of the rules of natural justice that would result in nullity of a process issued. See also **Frimpong v Nyarko 1998-1999 SCGLR 734**, **Oppong v Attorney General 2000 SCGLR 275**

Thus the position of the law on whether or not a procedural misstep should result in the nullification of processes or proceedings rests on the very concept of validity. If

the act, no matter how seemingly inconsequential, affects the validity of the court's work in attaching to its jurisdiction, or constitutes an illegality or unconstitutionality, the process or proceeding cannot be saved. These are the factors to take into consideration. In **Ahinakwa 11 (substituted by) Ayikai v Okaidja 11 2011 1 SCGLR 205** cited by counsel for plaintiff, the issue determined was whether the lower court's jurisdiction had been invoked at all by reason of the conduct of the proceedings through the issue of a Writ of Summons when the Rules of Court provided for the proceedings to be conducted by motion. The position of this court was that the defect occasioned in proceeding by writ of summons instead of motion, was so fundamental that the proceedings were improperly constituted. This goes to jurisdiction.

In the present case, we note that the offending notice of appeal that drew the opprobrium of the Court of appeal and is being presented to us as so irregular that the entire appeal and judgment based on it should be declared a nullity, was properly filed in the high court as an appeal to the Court of appeal. The notice of appeal was filed within the period set for the appeal, it was filed in the right registry, and headed appropriately.

Though it describes the defendant as respondent, when he was the appellant and the judgment delivered on 30th May 2018 as having been delivered on 31st May 2018, and also identified the appellant as the person affected by the appeal, instead of the respondent, these mistakes are at worst, clerical. They do not compel a jurisdictional error, they do not breach any statute or constitutional provision, and they do not violate any rule of natural justice. They would therefore not render the notice invalid.

The issues determined in the cases cited by counsel for plaintiff are easily distinguishable from the nature of the present notice of appeal. Following the clarity provided above, we believe that our opinion expressed will suffice to correct

whatever misapprehension of the circumstances in which a procedural misstep will lead to a nullity.

The judgment is against the weight of evidence

On careful review of the entire record before us, we are satisfied that the court of appeal labored heavily under a misapprehension of the import of the evidence before it, and so failed to properly direct itself on the law and the evidence. The decision in **In Re Bonney (Decd); Bonney v Bonney 1993-94 1 GLR 610 at 617,** cited by the court of appeal in support of the over turning of the findings of the high court would respectfully apply to the court of appeal and not the high court. This court had directed that an appellate court '*should not under any circumstances interfere with the findings of fact by the trial judge except where they are clearly shown to be wrong, or that he did not take all the circumstances and evidence into account, or has misapprehended certain of the evidence, or has drawn wrong inferences without any evidence to support them, or that he has not taken proper advantage of his having seen and heard the witnesses*.'

Again, primary findings of fact are the preserve of trial tribunals, and whenever such findings are supported by evidence on record, they are not to be disturbed. Such findings ought to be respected through the hierarchy of the courts unless they are not supported by evidence on record or are considered to be unreasonable on the facts of the case as presented. See **In Re Taahyen & Asaago Stools; Kumanin 11 (substituted by) Oppon v Anin [1998-99] SCGLR 399 at 406. (Kumanin v Anin)**

In the same vein, a second appellate court should be hesitant in upending findings of fact by a trial court that have been concurred in by a first appellate court. In the present suit, the high court on two occasions had favored the plaintiff with judgment, and this should have compelled the court of appeal to take an excruciating look at the evidence to understand its nuances at every turn, before over turning the evaluation of the two trial court.

In such a situation, as determined in **Gregory v Tandoh 1V & Hanson 2010 SCGLR 971 at 985 to 987,** the second appellate court may only overturn the decision of the two lower courts where there were strong pieces of evidence on record which made it manifestly clear that the findings of the trial court and the first appellate court were perverse or inconsistent with important documentary evidence or the totality of the evidence on record and the surrounding circumstances of the entire evidence on record. Such a decision would constitute a miscarriage of justice, and the second appellate court reverses the decisions to ensure that absolute justice is done. When it is also clear that the reasons in support of the findings had so wrongly applied principles of law such that if the error was corrected, the decision cannot stand, the second appellate court ought to overturn the decision. See **Koglex Ltd (No 2) v Field 2000 SC GLR 175.** If there is a neglect of some principle of law or procedure which if corrected, the decisions cannot stand, there is a duty to ensure the reversals of the decision, as determined in **Adu v Ahamah 2007-2008 1 SCGLR 143** cited by plaintiff counsel. In the appeal before us, we think that the court of appeal failed to heed to these principles that must guide appellate courts.

The identity of the boundary between Deduako and Abono determined by the 1927 litigation and confirmed by the high court

On page 10 of their judgement, the learned judges of the court of appeal quoted the following from the high court judge's evaluation of where the location of the disputed land lay. '*When the aggregate of what the Plaintiff and the Defendant and his witnesses have said are compared with what the CW1 surveyor has said both in examination in chief and cross examination, as well as his findings, it could be seen that he has not contradicted or challenged the parties on the assertions or accounts they have given. Apart from not accepting suggestions from the defence about sources, confluence and directions of rivers, he seemed to have agreed on every material part of the Defendant's defence. Whether it*

be in terms of the boundary features mentioned or existence of farming activity on the land in dispute. He also agreed with the material suggestions of Plaintiff about the boundaries and the fact that people are farming in the disputed area. Indeed, his case is that Plaintiff is claiming exactly the same land that Defendant is also claiming. A perusal of his report and findings therein confirm what I have said above. Above all, CW1 has accepted that Deduako land lies on the left side of the cemetery and Abono on the right. And he did not contradict the defence when they said the disputed land is on the left of the boundary features they have shown'.

After this quote, the court of appeal went on to make this evaluation:

'*The surveyor also agreed to a suggestion by counsel for the Plaintiff/Respondent at page 111 of the Record of Appeal that from the plan, the plaintiff's land is on the right and the Defendant's land is on the left. If as agreed by the Surveyor and the parties herein, it is a fact that the Defendant's stool land lies to the left hand side of the boundary and Abono stool land, which belong to the Plaintiff and his subjects lies to the right hand of the boundary demarcated by the Surveyor and since the Surveyor found on the ground, as observed by the trial judge above,* ***that the disputed land is on the left hand side of the boundary, then it follows as a matter of logic that the disputed land is part of the Defendant's stool land***'. (emphasis ours)

The court of appeal continued in this trajectory in these words found on page 13 of their judgment

'*As already observed, since the trial Judge found that the Surveyor agreed with the Defendant that the disputed land lies to the left of the boundary shown by the parties, in so far as the Defendant's stool land lies to the left of the boundary shown by the parties, the irresistible and most logical conclusion was for the learned trial judge to hold that the disputed land is on the defendant's part of the boundary and therefore forms part of the defendant's stool land*'.

We are afraid that this is total mix up on the copious evidence regarding the boundary lines in issue. Earlier on in this judgment, we painstakingly showed that in 1927, the defendant's ancestor showed his boundary with Abonu as running northwards from the southern point of Tetrefu stream.

And it is in relation to this north bound boundary Tetrefu-Yinabu-Abonkrasu line that the old cemetery that was contested in 1927 lay on the left side of. And it is this north bound Tetrefu-Yinabu-Abonkrasu boundary line that Deduako lies to the left of, and Abonu lies to the right of. And this is what led to the judgment that the old cemetery was in Deduako land, and not Abonu land.

Contrary to the 1927 litigation situation however, the disputed land in this 2007 litigation lies TO THE RIGHT of this north bound Tetrefu-Yinabu-Abonkrasu boundary line. A studied look at the exhibits CWA1 and CWA easily reveals this. Thus, it is a complete misapprehension of the identity of the relevant Deduako boundary line when the learned judges of the appeal opined that '*If as agreed by the Surveyor and the parties herein, it is a fact that the Defendant's stool land lies to the left hand side of the boundary and Abono stool land, which belong to the Plaintiff and his subjects lies to the right hand of the boundary demarcated by the Surveyor and since the Surveyor found on the ground, as observed by the trial judge above,* ***that the disputed land is on the left hand side of the boundary, then it follows as a matter of logic that the disputed land is part of the Defendant's stool land***

We think that it is easy to see why the Court of appeal landed in this misapprehension. It has been caused by the change in the defendant's indications of Deduako's boundaries since it was sued in 2007. As earlier pointed out, the defendant did a volte face from the boundaries his predecessor had showed in 1927 and adopted the plaintiff's description of the marks of its boundary with Deduako in paragraph 4 of its Statement of Claim. These boundary marks which run from Atta ne Atta Stream through Bipokoko to Nyaeameani stream were on the right side of

the 1927 established boundary between the parties. It is also south-east bound, and perpendicular to the north bound Tetrefo-Yinabun-Abankransu boundary.

And defendant tenaciously clung to these south-east boundary marks described in paragraph 4 of the plaintiff's Statement of Claim notwithstanding the fact that in paragraphs 9 to 11 of the Statement of Claim, plaintiff had clarified that the 1927 judgment had accepted defendant's Tetrefu-Yinabun-Abonkransu north bound boundary, and so for the 80 years after that decision, this was the relevant recognized boundary between the two stools.

Indeed, it was clear that the defendant was being disingenuous when he started to adopt the Atta ne Atta-Bipokoko-Nyameama boundary markings as its boundary line with the Plaintiff. Defendant was being disingenuous because as already said, the Plaintiff had gone on and clarified that he agreed with the 1927 adjudged boundaries in paragraph 9 of the Statement of Claim and held that out to be the relevant boundary line since 1927.

We must insert here that in his 1927 testimony, Tumtuo did not describe his boundaries with Deduako as lying from Atta-ne Atta stream to Nyameama stream. These land marks were identified by the deputation of linguists who went to physically inspect the boundaries of the parties and reported to the Native Tribunal as being part of Abonu's land, and we refer to the exact words in the testimony of linguist Kobina Kwarku set out earlier. '*From Ata & Ata to Buokrokro to Ntome to an Edum tree, Kwayi Efua* ***all the right for Tumtuo***'

We also see that what makes the presentation of the Atta ne Atta through Bipokoko to Nyameama boundary markings as the 'left and right' respective boundary between Deduako and Abonu even more incoherent in the current litigation is that this line rans flat and south-east. The disputed land is therefore not to the right of the Atta ne Atta through Bipokoko to Nyameama boundary line, but above it. So the introduction of Deduako lying to the right of an Abonu boundary on that south-east

direction in this 2007 suit lacks coherence as much as it contradicts the standing decision from 1927 through to the first and second judgments from the high court. If Deduako really shared a boundary with Abonu along the Atta ne Atta -Bipokoko-Nyameama boundary markings, then Deduako would be sitting north and on top of Abonu, and not on its right or left.

The Court of appeal was therefore palpably wrong and misdirected itself when it evaluated that *'…since the trial Judge found that the Surveyor agreed with the Defendant that the disputed land lies to the left of the boundary shown by the parties, in so far as the Defendant's stool land lies to the left of the boundary shown by the parties, the irresistible and most logical conclusion was for the learned trial judge to hold that the disputed land is on the defendant's part of the boundary and therefore forms part of the defendant's stool land*

Estoppel per Res judicata

The defendant had claimed the application of the principle of res judicata in his Statement of Defence. After adopting the south east boundary features that ran from Atta ne Atta, and anchoring his defence on the 1927 judgment, he pleaded in paragraph 13 of his Statement of Defence

13. the defendant will contend that the principle of Res Judicata applies in the suit.

We agree with defendant that the issue of the boundary between Deduako and Abonu is one issue that estoppel per res judicata inescapably applies to, a position that can be inferred from the order of the Supreme Court when it remitted the suit to the high court for a trial de novo. We reproduce the relevant words below:

We have read the record of appeal and the submissions made by counsel in the matter and have come to the view that ***having regard to the 1927 decision*** *entitled Chief Kofi Tumtuo v Chief Kwame Agyei determined on the 19-5-27 before the Native Tribunal of the Kumasehene tendered in evidence as Exhibit A at page 105 of the record of appeal,* ***which***

determined the boundary between the parties herein as indeed, the two lower courts found in their respective judgments….(emphasis ours)

This court tacitly recognized that the two lower courts had aptly found in their respective judgments that the 1927 judgment had finally determined the boundary between the two stools before the court.

As determined ad nauseam from several cases, the doctrine of res judicatam applies when an earlier judgment involved the same parties on the same subject matter. Such a judgment shall be binding on the parties and their privies, assigns and successors in title.

This court in **Agbeshie and Another v Amorkor and Another [2009] SCGLR 594** intoned the law on the subject briefly as follows:

'it is well settled under the rule of estoppel, that if a court of competent jurisdiction has tried and disposed of a case, the parties themselves and their privies cannot thereafter bring an action on the same claim or issue'.

Citing inter alia **Dahabieh v SA Turqui & Bros [2001-2002] SCGLR 498 at 507**, this court in **Agbeshie v Amorkor** also quoted Azu Crabbe CJ in **Asare v Dzeny [1976] 1 GLR 473 at 478**:

'*By the doctrine of estoppel per rem judicatam a final decision of a concrete issue between parties by any court having jurisdiction to determine that issue, will forever preclude either party from raising the same issue against the other party to the decision, whether the trial is before the same court, or before any of higher or lower jurisdiction*'.

When the doctrine of estoppel per res judicata is raised, the court is bound to examine the full record of the earlier proceedings alleged to bind the parties before it and satisfy itself that the subject matter, interests and capacities of the parties alleged to be bound by an earlier judgment are the same as in the contemporary dispute in which the defence is raised. If it is, then the parties and their privies in interest are

bound by the earlier decision , **Appeah and Another v Asamoah [2003-2004] 1 SCGLR 226**. Indeed, the new cause of action merges with the standing judgment.

It comes therefore as no surprise to us that both Amoah J and Abodakpi J were not distracted by the new boundaries that defendant had become enamored with in the 2007 suit, while paradoxically claiming the application of res judicata when it came to the boundary line recognized in the 1927 judgment.

In the present litigation, the plaintiff is the direct descendant of the Nana Tumtuo, and the defendant is the direct descendant of Nana Kwame Adjaye. Although in the 1927 litigation, the central issue before the Native Tribunal was whether an old cemetery in a place called Mesaasi was on Deduako land or Abonu land , the Native Tribunal sent a deputation to physically determine the boundaries between the two stools in order to make its determinations. And the Native Tribunal entered its judgment by accepting the boundaries as designated for Defendant's ancestor Adjaye in these words:.

Judgement: *Judgment for defendant the fact that it was his forebears who authorised the Plaintiff's ancestors to use the cemetery in dispute. Plaintiff can use the cemetery as before, and the usual drink to be given to defendant*.

The defendant is bound by the acceptance of his boundary with Abonu and the Court of appeal was wrong in mis-reading this standing decision that had been infected with a new set of boundary lines by defendant.

Unfortunately, we find that counsel for defendant has misquoted the testimony of linguist Kwarko to us in his submissions to this court. He said on page 19

'*On the part of the defendant's predecessor the Tribunal determined his boundary features inter alia as:*

'Deduako showed their boundary thus 1st Ata & Ata to Buokrokro to Ntome to an Edum tree, Kwayi Efua all the right to Tumtuo. thence to Papa to Ntome continued to an Oyina we

reached a hill called Bipo Koko. Then Onyina tree where Abonkransu is and to Yamiama. Deduako said this was where Yamianihene gave them and said Tumtuo's boundary was not according to what was given to their Plaintiff which brought the case was on Defendant's land'.

What is wrong with the quote above is that the first line takes the full stop away from '1st.' It has also deleted 'From' between '1st ' and 'Atta ne Atta', in order to change what was actually said. It has also changed the expression '*the right for Tumtuo'* and made it *'all the right to Tumtuo'*. Indeed, this excerpt from the linguist's testimony has been edited in so many ways – and we repeat the unedited quote below, so the differences can be seen.

'*We went as we were sent and inspected that portion leading to Kuntunasi the next day we inspected Deduako portion all what we saw were written down. The boundary starts from. 1st Tetrefu, all the left from Tetrefu for Deduakohene to a river called Yinabun, thence to the cemetery we took the right road and reached an Onyina tree which is also a boundary. Thence to Abonkransu and Akatasu junction thence to Abonkransu source and bamboo trees, thence to a stream named Kumarn where Plaintiff said his boundary extends to. Deduako showed their boundary thus 1st. From Ata & Ata to Buokrokro to Ntome to an Edum tree, Kwayi Efua all the right for Tumtuo. Thence to Oyina tree where Abonkransu is and to Yamiama Deduako said this was where Yamianihene gave them and said Tumtuo's boundary was not according to what was given them. Plaintiff told us his land was on the right and in this case, the cemetery which brought the case was on Defendant's land*'.

This editing to change the meaning of a quoted excerpt from the 1927 proceeding is inappropriate .

Surrounding towns/villages

The Court of Appeal went on to evaluate that there are other pieces of material evidence which supported the claim of the defendant to the declaration on his

boundaries in his counter claim. In their view, these pieces of material evidence also defeated the claim of the plaintiff.

The first of this material evidence related to Edwenase stool. The court of appeal said that the testimony of DW1 that Edwenase does not share and has never shared a boundary with Abonu, though Edwenase shares a boundary with Deduako at the Tetrefo river (also called Kumar river by plaintiff) was critical.

We are unable to agree with the Court of Appeal that this testimony is relevant. This is because the uncontested evidence from the survey maps is that Edwenase shares a boundary with Deduako on Deduako's north-west end. At the northern point of the Tetrefu river (called Kuman river by both Tumtuo and the Plaintiff herein), the evidence also is that the disputed land lies at some distance from Edwenase. When cross examining the surveyor, counsel for plaintiff asked on page 116 of the ROA

Q. and from the source where we have Kuman up to the area between Edwenase and the disputed land is quite a distance

A. Yes my lord.

Again, in the cross examination of the defendant, defendant testified that Edwenase was not close to the disputed land.

On page 270, this is what transpired

Q. But you did not show Kokodie as part of your boundary owners

A. that is so, it is not only Kokodie that I did not mention; Kuntunase and Edwenase because they are not close to the disputed area

From the above, the firm record of defendant's boundary with Edwenase and plaintiff's lack of claim to a boundary with Edwenase, as well as the Edwenase Abusuapayin's denial of a boundary with Plaintiff does not weaken plaintiff's claim to the disputed land.

We also see that the alleged trespass by Deduako on the land in dispute was being conducted close to the Edwenase boundary with the Tetrefu/Kumarn river.

On page 123 and 124 of the ROA, the surveyor was asked by counsel for the defendant:

Q. *up there that we have the boundary between the Edwenase stool and the disputed land you will agree with me that we have Nana Agyei plantation there*

A. that is correct

Q. what did you see there when you went to locus?

A. we saw a palm plantation being cultivated by the defendant

Q. Apart from plantation, you also saw other cocoa plantation within the disputed area

A. that is so

Q. some of the owners are Afia Serwaa and Abena Tawiah

A. that is correct

Q. *And the other farmers that have mentioned are also subject of Deduako*

If defendant and his privies had been vigorously engaged in commercial farming around the Tetrefo/Kumar stream in the northern part of the disputed land, it is not surprising that DW1, should testify that there is no boundary between Edwenase and Abonu. We do not find this testimony to be significant to the resolution of Plaintiff's claim to the disputed land, as considered by the court of appeal.

Tetrefo/Kumar/Kuman stream in the north

Nor do we find defendant's calling of the northern stream Tetrefu, corroborated by DW1, significant as against plaintiff calling the same stream Kumar stream. What rather impresses us is that as far back as in 1927, Kobina Kwarko testified that Tumtuo showed his boundary as running north up to this stream, and the name

given to it by both Tumtuo and Adjaye at that time was 'Kumarn stream'. This is the relevant excerpt from his testimony

'*We went as we were sent and inspected that portion leading to Kuntunasi the next day we inspected Deduako portion all what we saw were written down. The boundary starts from. 1st Tetrefu,* ***all the left*** *from Tetrefu for Deduakohene to a river called Yinabun, thence to the cemetery we took the right road and reached an Onyina tree which is also a boundary. Thence to Abonkransu and Akatasu junction thence to Abonkransu source and bamboo trees,* ***thence to a stream named Kumarn where Plaintiff said his boundary extends to***.

This ancient traditional evidence corroborates the Plaintiff's case, and makes the plaintiff's case preferable to the defendant's case that this river is called Tetrefu. The principle enunciated in **Adjeibi-Kojo Bonsie 1957 3 WALR 257** is that coherence and demeanour are not the test factor when it comes to weighing which rival story from traditional history is to be preferred. The court must test the rival pieces of traditional evidence against recent acts, because in the course of transmission from generation to generation, mistakes may occur without any dishonest motives. See also **Adwubeng v Domfeh [1996-97] SCGLR 660** at page 672 on the direction that the resolution of rival traditional history does not depend on the acceptance or rejection of the entire history of a party, but on the application of the salient part of that history to the determination of the issue at hand. The reverse must also be applicable. In the instant case, the recent calling of the stream as Kuman by the Plaintiff, when tested against the traditional history recorded in the 1927 proceedings, makes the plaintiff's identification of the stream as Kuman preferrable to the defendant's calling of the stream Tetrefu in recent times.

As noted by Acquah JSC as he then was in **Kumanin v Anin** (cited supra), in assessing rival traditional evidence, what is important is to find out which of the rival versions is authenticated by acts and events within living memory, especially

where such acts and events are acts of possession and ownership by a party claiming ownership and title to the subject matter of the claim.

This is one situation in which the Court of Appeal should have allowed itself to be guided by the well known precept for evaluating evidence articulated in **Manu v Nsiah [2005-2006] SCGLR 25** that where the evidence of a party on a point is corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good and apparent reason the court finds the corroborated version incredible, impossible or unacceptable. In the present case, it is the defendant who had raised the binding nature of the 1927 proceedings in his statement of defence. These very same proceedings contradicted the Tetrefu name he gave to the Kumarn river, making his testimony on this issue the testimony that is contradicted by historical evidence.

We cannot therefore agree with the Court of Appeal in its evaluation found on page 20 of its judgment that '*it flows as a matter of logic that if the disputed land shares boundary with Edwinase stool land, then between the plaintiff who has denied sharing boundary with Edwinase stool land, and the defendant who has asserted sharing boundary with Edwinase stool land and whose case has been corroborated by the Oyoko Abusuapanin Kwadwo Appiah of Edwinase, the Defendant's case ought to be preferred over the case of the plaintiff on the preponderance of probabilities*.'

We are afraid that the court of appeal failed to comb through the record to ascertain the clear evidence before it from the survey map, and the 1927 proceedings. Or perhaps it used the Record of Appeal as is, which we found to be highly unclear when it comes to the maps and the 1927 proceedings.

Illegible and Unclear Record of Appeal

We will give the direction that whenever an appellate court is confronted with an unclear or illegible Record of Appeal, the court must obtain the original records from the docket with the Registry, in order to ensure that the court's evaluation is based on an appreciation of the primary records submitted at the trial, compared to the photocopies bound into the Record of Appeal.

Possession

The court of appeal also disagreed with the trial judge that the physical presence of defendant and people claiming through him are the very acts that plaintiff had asserted to constitute trespass. And yet the honorable court appreciated that though possession raises a presumption of ownership by application of **section 48 of the Evidence Act, 1975 NRCD 323,** this presumption may be rebutted with cogent evidence.

48. Ownership

1) the things which a person possesses are presumed to be owned by that person

2) a person who exercises acts of ownership over property is presumed to be the owner of it

Since possession is a rebuttable presumption, the presence of defendant on that northern part of the disputed land only placed an obligation on plaintiff to prove his superior title to that area of land. It is appreciated that a party who claims declaration of title must prove on the preponderance of probabilities acquisition either by purchase, traditional evidence or clear and positive acts of unchallenged and sustained possession or use of the disputed land. The decision of this court in **Abbey v Antwi [2010] SCGLR 17** expatiates on this established principle.

From the scope of evidence, we are satisfied that the record before us provides the preponderance of evidence on how plaintiff's stool obtained its interest in the disputed land.

Title to the disputed land

The proceedings found in CW3 provide cogent evidence on the source of plaintiff's claim to the disputed land. Tumtuo the plaintiff, testified simply and strongly regarding his boundaries in these words:

I have boundaries with Kobina Dumfah, Odikro of Yamiani and Kwame Adjaye….I have a boundary with defendant from Mesaasi to a stream called Abonkransu, to Kumarmu'

From our study of the original of the survey map, Yamiani lies to the right of the disputed land, and Deduako lies to the left of the disputed land. For Tumtuo to share a boundary with both Yamiani and Adjaye, he could only be asserting ownership of land that lies between Yamiani and Deduako. Thus in 1927, though it was not the current disputed land that was in issue, Nana Tumtuo pointed out boundary owners in a context that supports a claim to the current land in dispute in 2007.

Again, the testimony that his boundary was from *Mesaasi to a stream called Abonkransu, to Kumarmu* conforms to the north-east bound trajectory that hugs the disputed land in this 2007 dispute.

The consistency of this ancient and traditional evidence with the current claim weighs extremely highly in favor of the Plaintiff regarding his boundaries as asserted in the present action.

Tumtuo was cross examined on his testimony by the defendant Adjaye.

Q. *How and from where did you get the land*

A. It was presented to me by Kuntanasihene

Q. Do you remember my ancestors permitted your forebears to make a cemetery there

A. No. I do not remember that

Q. Do you remember Kankam sold the land to Krafunuma

A. I do not know. I did not buy it.

These questions were the first introduction of the names Kankam and Krafunuma, and to the position that the plaintiff's ancestors obtained the land through a transaction with the defendant's ancestors. The preponderance of testimonies from 1927 to the current case establishes this source of acquisition for Abonu

In his testimony in defence, Adjaye recounted the significant boundary marks of Deduako land and how his ancestors had dealt with Deduako lands from ancient history. It is useful to set out the full statements from his testimony found in exhibit CWA3 in order to appreciate what Adjaye himself established as how the royals of Deduako had dealt with the land that determined the boundaries between Deduako and Abonu in the past. He testified:

'*Amponsaim was my grandfather he lived at Suadru. One chief called Kwakye Dapua lived in that division my Nana Antwi intended to fight him, they crossed Banko. He was advised not to go the battle with all his Royalists and at Deduako he made them settle. After the battle Nana advised Adjaye Panin then Deduako Odikro to farm to Bupoayasi.* ***My Nana Kankam got a debt, and sold many of subjects yet the amount received could not cover the debt****. He sold a portion of his land at Aku to one Brebu. He presented asiriwa land to the Odikro there by the request of the Ashantihene****. He sold the Abonu land to Krafunuma. It extends to a stream called Atta nie Atta thence to Abupropro.*** *On the banks of Abuopropro* ***Nana planted Ntome when he sold the land****. some also in* ***Tetrefu signifies boundary and extends to Odum tree. From there it extends to a tree called Parpa and then the Ntome continues and to Bupokokosu. Low Bupokoko is Oyina tree, and another at Yamiama stream where also is another Oyina tree****. These form the boundary and to that end my land extends. Plaintiff recently sent to tell me that I had ordered his land to be farmed on. I denied. I messaged Plaintiff at Kumasi if he did not know the boundary, I would go and show him when he returned from Kumasi. The next day Plaintiff and his people came to my village Deduako.* ***I told him where my subject farmed***

was not part of his. He said it was for him and he swore to it. I responded to the oath that that portion is part of my land*. With regard to the cemetery my Nana Fiwah made there and Plaintiff's ancestors Ama Jafu and Amuam begged her to give them a place to make cemetery. Fiwah and Adjaye Panin informed Odikro, Yamiani, who agreed that they might be allowed to use the same place*

This evidence establishes important positions. Adjaye's ancestor Kankam had sold land around the boundary features described to Kranfunuma of Abono. It was around the lands with these boundary features that the 1927 dispute between Adjaye and Tumtuo had erupted, along with its protestations with oaths. What we find significant is that Adjaye described the lands lying from Atta ne Atta to Yamiama as having been sold to Kranfunuma of Abonu by Kankam of Deduako.

The extensive cross examination of Adjaye by Tumtuo after this testimony established more pillars regarding how plaintiff's ancestors gained access to the current disputed land

Q. Do you remember I took my lake and the land and I have been living on it till now

A. I have said part is for you and part for me

Q. How did I get that portion if all were for your ancestors

A. you possess the lake and the surrounding land is yours

Q. Do you remember I farmed across the Nie Atta about three years ago?

A. I submitted a report when Kuntanasihemaa said she would go to inspect the land but because of a dispute with my uncle, I have not got the time to press on it.

Q. Do you remember my subject lives at Bupokokosu

A. That place is not mine, and I am not disputing for that.

The Tribunal then questioned Tumtuo:

Q. Is the land for your ancestors of old?

A. Yes

Q. is Atta Nia Atta for you

A. Yes

Q. Have you any other cemetery

A. I have another

Q. How did you get a land at Deduako

A. Kuntunasihene got it and gave it to me

Q. Who was the original owner

A. It was for Kwakye Depoa

Q. Has Kwakye Depoa fought first or Depoa

A. It was Ntow Koko

Q. Who was the land for

A. It was for Ntow Koko

Q. Did you know Kwakye Depoa and Ntow Koko's boundary?

A. No I did not know it

Q. If you do not know the boundary, how can you know your claim for Ntow Koko

A. Kuntanasihene gave me the land and I do not know the boundary

Q. The Head boundary is from Mesaasi. Where does it extend to

A. It extends to Abonkransu

From this cross examination, Tumtuo was claiming land around the lake, and an examination of CWA1 shows that the lake is close to the southern end of the Tetrufu to Abonkransu boundary line. This was the location of the 1927 dispute.

Again, Tumtuo claimed land up from Mesaase to Abankransu, and asserted that the land was given to him by Kuntanasihene. He also corroborated Adjaye's testimonies on battles involving Depoa and Ntow Koko. These testimonies show that as far back as 1927, the plaintiff's ancestor was not restricted to Abonu stool lands below the southern marks of Atta nie Atta to Nyameama stream, as defendant seeks to depict in this 2007 suit. Tumtuo was asserting ownership of the current land in dispute which stretched west to the cemetery that sparked the 1927 dispute, and north from Mesaasi to Abronkansu.

The testimonies of other witnesses were equally significant.

Testimonies of Witnesses

The first witness called was Yaw Ampofo of Kokofu, who testified that he had farmed rubber and palm wine on part of the contested land under the authority of the Odikro of Abonu for ten years and shared the money with him. He gave these significant answers under cross examination:

Q. *Do you know the boundary of Plaintiff and Defendant?*

A. I was told the boundary is ***from a stream called Okuman to Mesaasi***

Q. *Can you tell if it is right?*

A. I cannot tell

Q. Was defendant present?

A. He was not

This witness therefore corroborated the position that as far back as 1927, the known boundary between Deduako and Abono run from the Okuman river or stream

which is found up north and south near Nyameani, and to Mesaase down south, near Kuntanase's land.

The second witness called Kofi Dabawa also gave the following significant testimony. He testified that he is a stranger on the land, and neither a native of Deduako nor Abonu. He said:

'*Sometime ago about four years ago, one Kwadjo Esubo and his nephew came to Doyina. His nephew died.* ***He asked Deduako Odikro to show him a place to bury it. Odikro said they should take it to Abonu to bury. The deceased was buried on Abonu land****. The parties concerned gave us drink. I went and informed Tumtuo*

What we glean from this witness is that Abonu land shared a boundary with Deduako around the cemetery, a place on the south western end of the land in dispute. The only inference from this is that Abonu land stretched from that cemetery area to the east. This stretch is the area in dispute now.

These significant testimonies from 1927 suit lay the strong foundation for understanding how Abonu came to own the disputed land that is still being contested by Deduako. But by far, the testimony that seals the establishment of Plaintiff's ancient ownership of the land in the present dispute came from the defendant's third witness called Kobina Dumfah, Chief of Yamiani. His testimony shows that the royals of Yamiani are closely related to Deduako. He stated:

'*My grandfather Amponsaim fought with Kwakye Dapoe who was living there. He fought Depoa with Jarkyehene and Doyinahene also Appiaduhene. Kwakye Depoa was defeated and all his things taken from him. There was another Ohin called Ntow Koko living at Omansu. Asamanhene also wanted to fight Ntow Koko. Busumfuo Akroa Fu asked my Nana whether he liked the Lake or the land, which they had taken. My nana said he liked the land and not the Lake. When Nana was going to the battle he almost went with his Royalists numbering about seventy. He was advised and he left his nephew Ansiri at Deduako.* ***Nana Kankam was indebted and he sent to Odikro Abonu to pledge the land. He paid £8 for it****. He*

showed his nephew Ansiri where ***the land extends to****. The boundary is from Abonu Ntatasie to Atta Nia Attamu. Thence to Buokrokro from there is planted Ntorme, up a hill is seen a stream Tetrefu after Tetrefu is another ntorme, a tree called Parpa is also there and Ntome continues till it reaches Oyina tree and to Abonkransu source, and Odum tree and to a stream called Yamiama. This was where ancestor showed Defendants forbears to farm to. Okranfunuma begged my grandfather Adjaye Panin for a place for cemetery it was granted to him.*

What testimony on how the current disputed land came to be owned by Abonu can be clearer than this? It corroborates Adjaye's earlier testimony on how the land left the possession of Adjaye's ancestors through a transaction with Abonu. We think that this ancient testimony seals all matters in contention in favor of the Plaintiff before us. But there is more.

The fourth witness was obviously a witness from the side of Deduako. He was described as Kwaku Fokuo Deduako, linguist. He had the following testimony and the significant parts are highlighted

My uncle, whom I succeeded to was called Atta Panin, Abrankasi Hene. ***Kankam got a debt of £480.*** *His mother Doiefiey Ankam sold all her subjects it would not cover the debt.* ***She advised my uncle Atta Panin to negotiate the sale of portion of the land. the land sold to Yaw Pensah*** (an illegible word) **Okranfunma** ***was of the called Mpenkyinani for £8****…*

This testimony confirms the Kankam debt, and the sale of land to Okranfunma.

The final testimony before the native court was from the deputation sent to make physical inspection of the land in dispute given by linguist Kobina Kwarko that we have already highlighted in this judgment.

It is from this thorough collection of evidence that the very clear picture as to how Deduako came to lose title of the current land in dispute to Abonu is established.

The testimonies, especially that of Adjaye and his relative Kobina Dumfah, Chief of Yameani, reveal that originally, the ancestors of Deduako had possession of the disputed land. That possession changed when Nana Kankam, the forbear of Adjaye and the Defendant herein, extended himself in battles, sold his subjects to cover his debt, and when that could not get him out of debt, took 8 pounds from the Odikro of Abonu for the land within the boundaries that Tumtuo and Adjaye showed to the deputation led by linguist Kobina Kwarku.

While Adjaye had testified before the native Tribunal that Nana Kankam '***sold*** *the Abonu land to Krafunu*', his relative Kobina Dumfah of Yameani testified that '*Nana Kankam was indebted and he sent to Odikro Abonu to* ***pledge*** *the land. he paid 8£ for it'*. Thus both of them are agreed that the land they were describing was relinquished by Nana Kankam for money to Abonu.

When one reads Tumtuo's protestations in his affidavit supporting the appeal against the 1927 judgment that the Mesaasi land belonged to Deduako, one finds his demand for explanation as to how the then land in dispute could have been returned to Deduako when it had been sold or pledged without evidence of redemption.

Other Testimony

All of these testimonies are corroborated by defendant's witness DW3 in the trial before Amoah J on 28th July 2009. This testimony can be found on page 39 and 40 of exhibit C.

After giving his name as Nana Owusu Panin Edusei 11 and stating that he knows the parties, he was asked:

'Q. *Tell the Court, what you know about the case?*

A. What I know about the issue between the two chiefs was that, not long ago, the Chief of Deduako informed me that the Chief of Abonu had taken civil action against him in respect of a land at Mpechiani on Deduako Stool land at the High Court.

*My lord**, that land was sold to Abonuhene by my predecessor Nana Kankam Boadu IV**. My lord, he had a case before the Asantehene Otumfuo and that was why he sold the land. He was mulcted in costs and that land which was occupied by her mother then Queen mother called Akam Dufie. **He sold the land to the Abonuhene for 8pounds**. That land had streams and ntormey trees as the boundary features. That land which belongs to the Nyameanihene had a common boundary with the Deduako Stool. ….'*

He went on to describe the Atta ne Atta-Buokukrom-Bepokawkawso-Kuman features. And ended on page 41 with:

*'During the year 1927 Abonu stool sworn an oath against Deduako Chief Nana Kwame Adjei claiming the lands around the cemetery. Odikro Nana Kwame Adjei responded to the Oath and the matter went before Otumfuo's court. **Because the land was sold by Nana Abramkese Nyameanihene to Abonuhene, the Chief of Deduako elected Abramkese Nyameanihene as a witness, so he testified on behalf of the chief of Deduako and Deduako Chief had judgment'***

This is the classic example of a witness of a party corroborating the position of his opponent. Clearly the evidence available establishes beyond reasonable doubt that the land in issue was sold to Abonuhene by Deduakohene before the 1927 litigation. Of course, these various testimonies show slight variations as traditional evidence is wont to reflect, but their consistency in supporting the position that long before 1927, the land in the location of the current dispute transferred from Nana Kankam of Deduako to Abonuhene for consideration is beyond reasonable doubt.

It is also the duty of a plaintiff who claims a declaration of title to land to identify clearly to the court the area of land to which the claim relates. **Bissah v Gyampoh 111 1964 GLR 381**

And in this wise, this almost a century old collection of testimonies also establish the boundaries of the expanse of land in the current dispute, corroborate plaintiff's position on ownership and puts the plaintiff's claims on being bounded by Yameani,

Deduako, Kuntanase and the Kumarn river up north beyond doubt. This is finally clarified by the survey map presented to the court.

Contemporary Evidence

More weight is added by the evidence of Nana Kyei Baffuor of Nyameani, who was called as DW2 by the defendant herein. His crisp testimony was that

'*Nyameani is also near Abono.* ***We share boundary with Abono*** *and even the land that Abono occupies was granted to us by Abrankese Nyameani.* ***Abrankese Nyameani do not share boundary with Deduako*** *because Deduako chief is nephew to Abrankese Nyameani chief. I was not born at the time but I know the history of the litigations between the stools in 1927.* ***What I know is that the grandfather of Nana Abonohene Nana KraFruma****, came to request for a place to stay from the Deduako chief. The boundaries starts from a River called Atta ne Atta, then continues to a River called Buokrukru, from Buokrukru to a flower called Ntome….The Nyameama become the boundary between the two stools. From Atta ne Atta to Nyameama River, Abono stool lies to the right and the Deduako lies on the left then from there the land belongs to Nyameani stool…. The defendant sometime complained that the plaintiff has trespassed unto his land but this is the boundary I have mentioned from 1927 judgment. We inspected the land and observed that Abono chief has trespassed unto the Deduako through Pease and Edwenase but his land does not extend that far'*

This contemporary evidence from the defendant's witness seals up the prevailing testimony on how Plaintiff's ancestors obtained the land in dispute, and its boundaries as shown on the survey map. It passes the test on how to weigh traditional evidence set out in **Adjeibi-Kojo v Bonsie** and **Adwubeng v Domfeh** cited supra. Since defendant did not call witnesses to testify as to where the Plaintiff had trespassed to beyond the boundary lines shown by the survey map, but chose to claim the entire disputed land, we cannot find the last part of Nana Kyei Baafuor's testimony helpful in identifying the location of the place allegedly trespassed by the Plaintiff. Wherever it is, Nana Kyei Baafuor's testimony that the trespass was in

Edwenase points to the alleged trespass being beyond the north and west part of the land in issue.

We think that if the court of appeal had done the requisite consideration of all the evidence required by an appeal premised on the ground that the judgment of the lower court was against the weight of evidence, it would have upheld the judgment of the high court, rather than reverse it. When an appellate court is faced with a ground of appeal that the judgment is against the weight of evidence, it bears the duty of combing the entire record to evaluate the sustainability of this ground of appeal. The oft cited cases of **Tuakwa v Bosom [2001-2002] SCGLR 61** and **Djin v Musah Baako [2007-2008] 1 SCGLR 686** confirm this principle. Also important is the position enunciated from **Attorney-General v Faroe Atlantic [2005-2006] SCGLR 271** and affirmed in **Owusu Domena v Amoah [2015-2016] 1 SCGLR 790** that the ground of appeal that a judgment is against the weight of evidence evokes a consideration of applicable law, for in essence, what it means, inter alia, is that having regard to the facts available, the conclusion reached, which invariably is the legal result drawn from the concluded facts, is incorrect. Legal issues are within the purview of the ground of appeal that a judgment is against the weight of evidence. In the presence case, the salient legal issues were whether the decision in the 1927 case rendered the boundary line between the Abonu and Dediako res judicata, whether or not the parties had proved their entitlement to the land within the alleged boundaries on a preponderance of probabilities, whether the Plaintiff or Defendant had proved their ownership of the stretch of 938 acres of land in contention on a preponderance of probabilities, and whether or not either party had trespassed on the other party's land. On each of these issues, the court of appeal was wrong in reversing the earlier findings of the high court in favor of the Plaintiff.

Trespass

We are satisfied that to the extent that the evidence is that the defendant has placed plantations on the disputed land, and given commercial grants to others to do same, the trespass of defendant is established, and the court of appeal wrongly reversed the trial court's evaluation of the claim of trespass by the plaintiff. Regarding the claim of trespass by the defendant, the testimony of Nana Kyei Baafuor that the plaintiff had trespassed on land beyond his boundaries in Piesie and Edwenase has already been described as unhelpful, in view of the failure to identify the exact location of this trespass outside of the disputed land.

Defendant's counterclaim

The evidence before us, especially exhibit CWA1, shows that defendant's stool lands are indeed bounded by Kuntanase, Edwenase and Abono stool lands. What is not clear from the maps is the location of Kokodei and Piesie lands. Though defendant testified that they are not located on the survey map because there is no dispute regarding his boundaries with them, the defendant should have taken steps to establish by positive evidence, where his lands share boundaries with these stools, in view of the counterclaim. Because as already identified, the principle in land litigation is that a plaintiff (and a counter claimant is a plaintiff in relation to the counter claims), succeeds on the strength of his own case, and not the weakness of his opponents.

Conclusion

On the basis of the above considerations, we reverse the judgment of the Court of Appeal dated 30th July 2020 and restore the judgment of the high court dated 30th May 2018 with regard to the finding of trespass, damages for trespasses assessed at 40,000 Ghc and costs of 10,000 Gh in favor of plaintiff. We also grant the reliefs sought by plaintiff for declaration of title to and recovery of possession of all that piece or parcel of stool land known and called Abornu and bounded by Kuntanase, Deduako, and Nyameani, identified as the 938 acres of land specifically delineated

on the survey map ordered and tendered in this court as exhibit CWA1. Defendant is restrained by perpetual injunction from interfering with the quiet possession of Abornu land.

Save for a declaration that from the evidence, defendant shares boundaries with Kuntanase, Edwenase and Abonu stools, the defendant's counterclaims are dismissed.

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

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

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