IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: DOTSE JSC (PRESIDING)
OWUSU (MS.) JSC
LOVELACE-JOHNSON (MS.) JSC
PROF. MENSA-BONSU (MRS.) JSC
KULENDI JSC

CIVIL APPEAL
NO. J4/58/2022

1ST FEBRUARY, 2023

1. THOMAS BAIDEN
…… PLAINTIFFS/RESPONDENTS/RESPONDENTS
2. FRANK WALLACE

(SUING AS ADMINISTRATORS OF THE
ESTATE OF THE LATE THOMAS
KWESI BAIDEN)
H/NO. PLOT 16, CHAPEL HILL, TAKORADI

VRS

FRANCIS PARKER …... DEFENDANT/APPELLANT/APPELLANT
CAR WASHING BAY, NEAR BEACH

ROAD GOIL FILLING STATION, TAKORADI

JUDGMENT

PROLOGUE

<u>DOTSE JSC</u>:- Thomas Paine, writing on the topic common sense on George 111's speech in 1792, stated as follows

> *"How easy it is to base truth and language, when men, by habitual wickedness, have learned to set justice at defiance." Quotable Founding Fathers, page 133 Ed. By Buckner F. Melton Jn.*

Before the Plaintiffs/Respondents/Respondents, hereafter referred to as the Plaintiffs in this delivery issued the writ against the Defendant, they took a certain step. These are the instructions given to their Solicitors, Cann, Quashie & Co, to write a letter dated 12th June, 2019 to the Defendant/Appellant/Appellant, hereafter Defendant This letter has been tendered in these proceedings as Exhibit D, and it reads as follows:-

"Mr. Parker

Chapel Hill Goil Filling Station

Axim Road

Takoradi

Dear Sir,

Vacation of Access Road to Plot No. 16 Chapel Hill Axim Road Takoradi

We write on the instructions of Mr. Thomas Kwesi Baiden (deceased) owner of plot No. 16 Chapel Hill, Axim Road, Takoradi as epitomized by his personal representatives Frank

Wallace and Thomas Baiden, all of House on Plot No. 16, Chapel Hill, Axim Road, Takoradi.

Our instructions are that you have established a Car Washing Bay on the entrance of the access road leading to our client's property.

We are further informed that you agreed to remove the said Washing Bay any time our client requires the use of the access road.

Consequently, we shall be grateful if you remove the said Washing Bay within one month from the access road as our clients now require the access road for their egress and ingress into the said property.

Counting on your co-operation and prompt action.

Thank you.

Yours faithfully

Constantine K. M. Kudzedzi Esq

Cc: Frank Wallace Baiden

Thomas Baiden

Takoradi"

RESPONSE OF DEFENDANT TO THE LETTER

On the 10th day of July 2019, the Defendant engaged the services of Lawyer Edmund Acquaah-Arhin who responded to Exhibit D the letter of the plaintiff with Exhibit E as follows:-

"Constantine Kudzedzi Esq.

Cann Chambers

MBRA Annan Chambers

Takoradi

Dear Sir,

Re: Vacation of Access Road to Plot No. 16 Chapel Hill, Axim Road , Takoradi

I write as Solicitor for and on behalf of Mr. Francis Parker of Takoradi. I write with reference to your letter dated 12/06/2019, regarding the above subject matter.

Firstly, I have my client's instructions to clarify issues that are often misconstrued by your client:

1. The access in question is truly a pedestrian access and not a vehicular road as suggested.
2. It is currently not directly serving any household especially Plot No. 16 Chapel Hill, Axim Road, Takoradi who is entirely claiming the access.
3. The attached site plan which is also an extract from the Planning Department of Sekondi-Takoradi Metropolitan (STMA) clearly depicts vehicular and pedestrian access of the plot No. 16.
4. No verbal or written arrangement was made with anyone of the residents on the use of the access as car washing area.
5. **That I sought permission from the STMA a couple of years ago to use that proposed access (not existing).**
6. **That the Metropolitan Planning Authority will upon securing the needed funds to construct a culvert and engineered the drain construct the access.**

   I am reliably informed by my client that he has been correctly been allowed by the Metropolitan Assembly to use the place for the car washing purpose until the Assembly secures the necessary budget for the physical development of the area." Emphasis supplied.

OBSERVATIONS

Whilst the Plaintiffs have maintained the professional legal services of Cann, Quashie & Co. throughout this litigation from its inception, through the High Court, Court of Appeal and this court, the Defendant on the other hand changed Solicitors from Edmund Acquaah-Arhin who authored Exhibit E, for and on behalf of the Defendant, to the current Solicitor, John Mercer Esq.

From the contents of Exhibit E, the Defendant agreed that he had established the washing Bay on an access road, albeit, a pedestrian one for that matter.

What is of worthy of note is the open admission that the Sekondi-Takoradi Metropolitan Planning Authority which granted him permission to construct the washing Bay, will upon securing the needed funds construct the access. However, the narrative of the Defendants case changed completely upon the entry of Mr. John Mercer, who was engaged by the Defendant to conduct the case for him at the High Court, Sekondi to date.

PLAINTIFFS CASE AGAINST DEFENDANT AT THE HIGH COURT

Plaintiffs claimed the following reliefs against the Defendant specifically:-

(i) "An order directed at the Defendant to remove Defendant's car Washing Bay with its ancillary structures such as Polytanks and others from the access road to the Plaintiffs' property

(ii) Perpetual injunction restraining the Defendant, his agents, workmen, assigns etc. from constructing any structure in a manner that prevents them ingress into and egress from the plaintiffs plot and house."

The above writ and Statement of Claim were filed on 8th November 2019, barely three clear months after Defendants letter, Exhibit D was addressed to Plaintiffs Solicitors.

We have also seen a copy of a letter tendered in these proceedings as Exhibit F, which is relevant and we produce the contents as follows:-

It is interesting to observe that, on the 31st of July 2019, the Department of Urban Roads, Sekondi-Takoradi had the presence of mind to author the following letter Exhibit F, to the defendant copied to other officials of the Sekondi-Takoradi Metropolitan Assembly (STMA).

Urban Roads Dept

P.O. Box 233

Sekondi

31st July 2019

"Mr. Francis Parker

Beach Road Goil Filing Station

Dear Sir,

Development of Access Road on Chapel Hill-Takoradi Axim Road

Notice of Eviction

The Urban Roads Department of the STMA has secured funding for the development of the access road to a property as per the scheme attached.

We have observed that you are currently using the road access as a temporal car washing bay and wish to give you notice of the current development.

You are hereby given two weeks from Monday 5th August 2019, to remove all your valuable items on the roadway to allow space for the works to commence. Failure to

do will compel the office to remove same on the expiration of this two weeks notice and surcharge you with the cost of demolishing.

Yours faithfully,

ING. Michael Dzisi

Metro Director

Cc: The works Engineer, STMA

The Director, Physical Planning Dept, STMA"

SUBSTANCE OF THE PLAINTIFFS CASE AGAINST DEFENDANT

This appeal is rooted in the action taken by the Plaintiffs against the Defendant in relation to an area Plaintiffs claim to be an access road. It is the case of the Plaintiffs (suing as the administrators of the estate of the late Thomas Kwesi Baiden) that the Defendant, a car washing bay operator has constructed a washing bay in the access road leading to their property. Plaintiffs state that their property, Plot No.16 has only one access road from the main road and this access has been blocked by the Defendant. It is further the case of the Plaintiffs that the Defendant is extending his activities by erecting polytanks and digging trenches which would eventually block the access road completely. **Plaintiffs aver that they have written to the Defendant and even though the Defendant agreed that he has built on the access road and would move when money is secured for the construction of the access road, he has still refused to move despite being served with an eviction notice by the authorities**. Plaintiffs say that this has caused them great hardship and unless compelled by the court, the Defendant will continue with his illegal operation of his washing bay denying them of their peaceful enjoyment to their land.

SUBSTANCE OF THE DEFENDANT'S DEFENCE AT THE TRIAL COURT

The Defendant completely denied the Plaintiff's averment and put them to strict proof. **The Defendant first raised an objection as to the capacity of the Plaintiffs to mount this action.** Defendant further contended that Plot No. 16 has two access roads and that the officials of the Sekondi Takoradi Metropolitan Assembly (STMA) inspected the car washing bay location and gave their approval for the construction of the washing bay at that location.

The Defendant says that he has in no way through letters agreed that the road is an access road neither has he been served with any notice from STMA because he is in lawful occupation. Defendant further claimed that the Plaintiffs action is caught by the Limitations Decree.

TRIAL AND FINDINGS BY THE LEARNED TRIAL JUDGE AND HER DECISION

After trial, in which both parties testified and were extensively cross-examined on their evidence and documents which they tendered, the learned trial Judge in an erudite rendition delivered on 18th February 2021 made the following findings of fact.

> *"Apart from his unauthorized act of establishing the washing Bay, the Defendant has further worsened matters by erecting a Polytank, which is a brand of water reservoir in the access road and has recently dug out trenches in preparation to install more water reservoirs* ***which will then completely seal off the entire access road and deny the plaintiffs ingress and egress from their property, either by car or on foot. This action of the Defendant is causing the Plaintiffs hardship and denying them a peaceful enjoyment of their property.*** *"Emphasis supplied*

These are significant findings of fact which have remarkably established the case of the Plaintiffs on a balance of probabilities. Reference is also made to exhibit A, Letters of Administration, and exhibit B, the site plan of the property of the Plaintiffs which was

being obstructed by the activities of the Defendant. See also Exhibits D, E and F, already referred to supra.

The learned trial Judge made the following important observations after considering the substance of the evidence of the parties, the probative worth of their case as well as exhibits tendered. She stated emphatically in the judgment referred to supra again as follows:-

> *"In proof of their case, the Plaintiffs tendered in evidence Exhibit A. Exhibit A is the grant of letters of administration to the Plaintiffs of the personal property of Thomas Kwesi Baiden (decd) of H/No. PT 16, Chapel Hill Takoradi. This is the same property whose access is alleged to have been blocked by the Defendant. Clearly then, the plaintiffs who are the administrators of the property have the requisite capacity to bring an action in respect of the property. I fail to see what the grievance of the Defendant is and I find that the Plaintiffs are imbued with the capacity to bring the present action."*

On the probative value and effect of the other Exhibits tendered into evidence the learned trial Judge to our admiration delivered herself thus:-

> *"Exhibit B is the site plan for the property which is being obstructed by the Washing Bay. It was tendered in evidence without objection. It depicts the site of the property and a proposed site for a petrol station. This proposed petrol station has been developed presently and is known as the Beach Road Goil Filling Station. Next to the petrol station is an access road leading to the property, branching off the Axim Road which is a major road. Clearly, it is on this access road that the Defendant has built the Car washing Bay. Even though the site plan belongs to the Plaintiff and so might be seen as a self serving document, I will still accept the contents contained therein because from the looks of Exhibit B, it is an old document and could not be said to have been prepared in anticipation of this litigation. The proposed service station listed on the plan has come to fruition. The site plan as prepared*

is therefore a correct depiction or representation of the plan of the area currently being disputed. Plaintiff's Exhibit E is also a letter from Counsel for the Defendant, writing on the instructions of the Defendant in response to Exhibit D."

The learned trial Judge also considered in detail how the law can be used as an element and a tool to control society thereby instilling discipline by ensuring compliance with the basic tenets of orderliness in the following rendition:-

"If at the end of the judgment, it is found that the Defendant has indeed blocked a public access way, it would be a failure of the law to allow this illegality to persist by praying in aid unsustainable technicalities like the Defendant seeks to do now. ***When the times call for it, the law must be used as a shield to prevent violations of the rights of citizens****. Individuals must not be allowed to run roughshod over laws meant to order society and to keep peace and when called out on it, attempt to use the same laws as a sword to evade accountability. If this state of affairs is allowed to continue, we would only be encouraging a total breakdown of law and order and this certainly would be creating a recipe for disaster. In the words of the towering United States judicial figure, Justice Brandeis* ***"If we desire respect for the law, we must first make the law respectable."*** *Emphasis*

CLOSING STATEMENTS BY THE LEARNED TRIAL JUDGE

"On a whole evaluation of the evidence, I am of the opinion that the Plaintiffs succeed on their claims. They have been able to meet the requisite burden of producing the evidence to succeed. Their reliefs are hereby granted.

The Defendant is hereby ordered to remove his Car Washing Bay and water reservoirs aka polytanks which are obstructing the access road to the Plaintiff's property within thirty (30) days of the making to this order. If they fail to do so

the Assembly being the STMA should demolish the structures and the Defendant surcharged with the cost of the demolition.

A perpetual injunction is also ordered against the Defendant, his agents, workmen or assigns from constructing any structure in any manner which prevents ingress and egress from the Plaintiffs' property. Costs of ten thousand cedis awarded to the plaintiffs." *Emphasis supplied*

Despite the lenient orders especially as regards costs and time of demolition of the Washing Bay that were ordered by the learned trial Judge, the Defendant and his legal advisers on 1st March 2021, barely twelve (12) days after the delivery of the judgment filed the following grounds of appeal:-

GROUNDS OF APPEAL TO THE COURT OF APPEAL

i. The Court below should have dismissed the suit on ground of want of capacity on the part of the Plaintiffs.
ii. The Court below held wrongly that the defendant has obstructed access to the subject matter plot No. 16, Chapel Hill, Aim Road, Takoradi
iii. The judgment is against the weight of evidence adduced at the trial
iv. Additional ground(s) of appeal may be filed.

DECISION OF THE COURT OF APPEAL

On the issue of capacity which learned Counsel for the Defendant, Mr. James Mercer has held all along as his trump card, the Court of Appeal made light work of the said submissions in the following delivery:-

"Relating the above principles of the law to the established facts on record in this case therefore, it is clear that even if the Plaintiff's predecessor and father Thomas Kwesi Baiden (deceased), had no clear title to the said Plot No. 16 Chapel Hill Axim Road Takoradi, ***the***

fact that the Plaintiffs could demonstrate some form of possessory rights to the said property, (which was not disputed, not even by the Defendant) should be sufficient to clothe the Plaintiffs with every competence to maintain the instant action.

Based on a close perusal of all the evidence on record therefore, ***we find too extravagant a proposition to endorse, the otherwise vehement contentions by learned Counsel for the Defendant that the Plaintiffs lacked capacity to maintain this instant suit. For all the reasons afore-stated, it is our judgment that this first ground of the appeal has not been made out and must fail." Emphasis***

The Court of Appeal similarly made light work of the other grounds of appeal argued by learned counsel for the Defendant. Indeed, the surgical precision with which our brethren in the Court of Appeal dealt with the remaining grounds of appeal actually renders the decision of the defendant to pursue a further appeal to this court as not well grounded in fact and law, and amounts to forum shopping.

The court further held as follows:-

"Learned counsel for the Defendant's next line of attack against the judgment of the trial court was that it failed to give appropriate weight to Exhibit '2', which if it had done, would have resulted in a decision in his favour. Exhibit '2' is an extract of the "Takoradi Central Area Scheme" which states in part that, plot no. 16 had other alternative access routes, one from Baiden Close and the other through the Beach Road Roundabout to Air Force road.

Based on Exhibit 2 therefore learned counsel argues in his Written Submissions as follows:-

"…the contention by the plaintiffs that plot No. 16 is accessed by only one route was therefore untrue, in any case not made out and should have been rejected by the trial court."

We must say that we are unable to take any benign view of the above contentions otherwise rigorously urged on us by learned counsel for the Defendant. It needs reminding that the issue at stake was not whether or not plot no 16 Chapel Hill, Axim Road Takoradi, had

other alternative routes of access beyond the disputed area. ***The issue rather was whether the Plaintiffs had any right of way to access plot no. 16 through the disputed area and whether the Washing Bay constituted an obstruction to that access road.***

Based on the evidence before her, the learned trial Judge determined that even if other alternative routes existed for accessing plot no. 16 the washing bay was an obstruction through the disputed area to plot no. 16 and therefore constituted an illegality. We are satisfied that sufficient evidence existed on record to justify that finding of fact, and we are not prepared to disturb it.

The final and perhaps most critical piece of evidence which appeared to have crucially informed the learned trial Judge's decision to find in favour of the plaintiffs on their claim, was the fact that even though the Defendant had asserted that he had obtained the permission of the Sekondi Takoradi Metropolitan Assembly (STMA) to operate his Washing Bay in the disputed area, he could not substantiate that claim with any positive evidence at the trial. Consequent upon the Defendant's failure to substantiate its claim that it had permission from the STMA to operate a washing bay in the disputed area, the learned trial Judge considered herself left with no other option but to conclude as follows:-

"If indeed the Defendant had a permit to operate or has a legitimate reason to be operating from the access, he would have put it in evidence. Having failed to do so, ***I find that the Defendant was operating his Washing Bay without a permit and has no such authority to be on the public access road leading to the Plaintiff's property."***

The learned Judges of the Court of Appeal, finally evaluated the appeal and concluded that it is without substance and dismissed it in the following words:-

"We have thoughtfully reviewed the trial court's conclusions in the light of the established evidence on record in its entirety and have also closely attended the erudite written submission filed by learned counsel for the parties.

It is our opinion that the learned trial Judge, applied the law correctly to the facts on record before her*. In effect, her final verdict was the product of sound deductive analysis and we find no putative reason to disagree with her conclusions.*

Upon a careful analysis of all the materials on record before this court therefore, we find and hold that the learned trial Judge's decision that the Defendant's washing bay constituted an obstruction to the Plaintiffs' access to plot no. 16 Chapel Hill, Axim Road, Takoradi, was unassailable.

It seems to us that the Defendant's decision to situate his Washing Bay in an area that constituted an obstruction to the Plaintiff's right of access to their premises, was simply irreconcilable with what is right or reasonable. The learned trial Judge did not condone it, and neither can we." Emphasis

It is very surprising that, despite the authoritative, illuminative and erudite delivery by the Court of Appeal, the Defendant still had the boldness to appeal against the decision to this court on the following grounds of appeal:-

GROUNDS OF APPEAL TO THIS COURT

a. The Court of Appeal erred when it held, affirming the decision of the High Court, that the Plaintiffs have capacity to sue out the writ in this suit
b. The Court of Appeal in dismissing the appeal held wrongly that the Defendant's washing bay was/is constructed in a right of access to the Plaintiff's premises.
c. The Court of Appeal erred when it dismissed the appeal on ground that the Defendant could not substantiate his assertion that he had permission to build his washing bay.
d. The Court of Appeal like the trial court erred when it shifted the burden of proof in the first instance on the Defendant to disprove the claim of the Plaintiffs
e. Judgment is against the weight of evidence.
f. Additional ground(s) of appeal to be filed.

It must be noted that no additional ground(s) of appeal was filed.

ISSUE OF CAPACITY

In this judgment the issue of capacity will be dealt with first because capacity is the pillar upon which every matter stands.

Capacity is vital to the right to initiate any legal action in court. It must be noted that when capacity is raised, the Plaintiffs alone bear the burden of establishing his/her status to institute the action. For that matter whatever capacity in which the Plaintiffs have instituted the action would require proof.

The Supreme Court in the unanimous decision in the ***Fosua and Adu-Poku v Adu-Poku Mensah [2009] SCGLR 310*** case, after considering other cases like ***Nyamekye v Ansah [1989-90] 2 GLR 152, CA, Sarkodie I v Boateng II [1982-83] 1 GLR 715, SC, and Republic v High Court, Accra; Exparte Aryeetey (Ankrah Interested Party) [2003-2004] 1 SCGLR 398*** held on this issue of capacity on page 338 as follows:-

> *"The Supreme Court considers the question of capacity in initiating proceedings as very important and fundamental and can have a catastrophic effect on the fortunes of a case."*

The court further explained thus:-

> *"Want of capacity is a point of law which, if raised, goes to the root of the action."*

Counsel for the Defendant has submitted before this court that the Plaintiffs are not clothed with the requisite capacity to mount this action because they failed to prove that plot No. 16 belonged to their late father. It was argued that per the statutory declaration tendered by the Plaintiffs as Exhibit B1, the property belonged to J.W. Eyeson and not their father Thomas Baiden. Upon the death of the said J.W. Eyeson, their father Thomas Baiden claimed to have obtained letters of administration to administer the estate of J.W Eyeson. However the said letters of administration was not presented before the trial court. Also, the Plaintiffs do not have any vesting assent to show that the property is

vested in them to enable them sue. To the Defendant, since the action was a representative one, the inability of the plaintiffs to establish their capacity should lead to the collapse of their case.

The position of the law is that where a party's capacity to sue is challenged, he cannot succeed without proving he had the relevant capacity to sue. This position of the law has been endorsed by the court in several cases.

See cases like ***Asante-Appiah v Amponsah [2009] SCGLR 90 at 95 and Akoto II and Others v Kavege and Others [1984-86] 2 GLR 365*** where it was held that, persons suing in a representative capacity must establish that status. In this instance, the Plaintiffs have clearly established their capacity with the Letters of Administration.

When the issue of capacity is raised, the authorities like ***Sarkodie v Boateng II supra***, etc., have established that no matter the merits of the case of the party, failure to prove capacity should break the very foundation of the action. It is therefore clear that if a Plaintiff lacks capacity and it is so found by a trial court, the merits of the case should not be considered as the proper parties to the suit are not before the court.

Upon careful consideration of the record of appeal, we are of the opinion that the Court of Appeal rightly dealt with this issue of capacity and we accordingly stand by the reasoning of the learned justices.

In addition to the reasoning of the Court of Appeal, we would state here that the case of ***Kwan Vrs Nyieni [1959] GLR 67*** has made it clear that a person can sue to protect a property upon proof of necessity. The court stated that "*Anyone with an interest in the estate such as the beneficiary can take action even where there is no formal grant of letters of administration under which a vesting assent may be considered, provided the action taken is aimed at protecting the estate from being wasted".* This means that even without a vesting assent or letters of administration, a person can still sue to protect such property. This is therefore

contrary to the Defendant's assertion that without a vesting assent or the letters of administration of the estate of the late J.W Eyeson, the Plaintiffs could not sue.

Also in the case of ***In Re Ashalley Botwe Lands: Adjetey Agbosu & Ors V Kotey & Ors [2003-2004] 1 SCGLR 420*** the court held;

> *"The general rule recognised in **Kwan v Nyieni**, namely, that the head of family was the proper person to sue and be sued in respect of family property was not inflexible. There are situations or special circumstances or exceptions in which ordinary members of the family could in their own right sue to protect the family property, without having to prove that there was a head of family who was refusing to take action to preserve the family property. The special or exceptional circumstances include situations where: (a) a member of the family had been authorised by members of the family to sue; or (b) **upon proof of necessity to sue"**.*

In the instant appeal, the Plaintiffs, based on the principle of necessity are clothed with the requisite capacity to bring this action. The principle of necessity being that if they do not act fast to protect their property, the said property would be completely blocked by the Defendant. This will also prevent them from accessing their property thereby enjoying it and the value of the said property would depreciate such that it would become worthless because it would not be accessible. There is evidence on record that the Plaintiffs live in the said house and their father, whose Letters of Administration they provided also lived in that house before his death.

It is provided in **Section 48** of the **Evidence Act, 1975 (NRCD 323)** as follows;

*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."

When the above provisions are applied in the instant case, the inevitable result is what the Court of Appeal decided.

From the record of Appeal, particularly the witness statement of the 1st Plaintiff for himself and on behalf of the 2nd Plaintiff, he stated that he lives at Plot No. 16. This means he is in possession of the property and the law deems him as the owner of the property unless a contrary position is proven. If he is the owner of the property, then he has the right and capacity to institute this action to prevent the destruction or wastage of his property. It must be noted that no objection was raised to the occupation of the Plaintiffs in the property. The law deals with persons who have an interest in a matter and the Plaintiff by being in possession has an interest in this matter and on that basis can sue. See also the case of ***Namih v Ghassoub & Kumasi Municipal Council (Third Party) [1962] 1 GLR 54.*** (In this case, the trial Judge Apaloo J, (as he then was) visited the area in question to have a better understanding and appreciation of the issues before him.

We are however of the considered opinion that, on the state of the pleadings and the evidence led, there was absolutely no need to prove that the plaintiffs lived in that house. The evidence on this is unassailable and the presumption that they are in possession is established.

On the authorities cited above, we find that the Plaintiffs are clothed with the capacity to institute this action as rightly held by the courts below. This ground of appeal is accordingly dismissed.

In order to harmonise our treatment and delivery of the other grounds of appeal and having dismissed the ground of appeal on capacity, we want to consider all the other grounds under the omnibus ground of appeal which states:-

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

As a result, grounds (b) (c) and (d) supra will all be subsumed under this general and omnibus ground that the "judgment is against the weight of evidence".

In the case of ***Abbey & Others v Antwi [2010] SCGLR 17***, at pages 34-35, the following were stated as the guiding principles where an appellant alleges that the judgment was against the weight of evidence:-

> *"It is trite learning that where an appellant alleges that the judgment of the trial court is against the weight of evidence, the appellate court is under an obligation to go through the entire record of appeal to satisfy itself that a party's case was more probable than not."*

The court, has also taken a cue and guidance from the locus classicus decision of Sophia Akuffo JSC (as she then was) in the decision in the case of ***Tuakwa v Bosom [2001-2002] SCGLR 61 at 65*** and used it as a guide to formulate a roadmap which should be followed by this court whenever the said omnibus ground of appeal such as what we are considering in this case has been urged and argued.

This was in the case of ***Solomon Tackie and Ago Bannerman, (suing as Joint Heads of the Tackie and Bannerman Thompson Families- Plaintiffs/Appellants v John Nettey (substituted by Fred Bibi Ayimey & Anr, Defendants/Respondents (2021) DLSC, 10172 (Civil Appeal No. J4/44/2019 dated 24th March 2021.***

This abridged Roadmap reads as follows:-

i. Consider the case as one of re-hearing.
ii. Consider the reliefs claimed by the Plaintiff and Defendant if there is a counterclaim.
iii. Consider and evaluate the evidence led by the parties and their witnesses
iv. Evaluation of the documents tendered and their effect on the fortunes of the case.
v. An evaluation of the facts vrs-a-vis the laws applied by the lower courts.

vi. An evaluation whether the lower courts correctly or wrongly applied the evidence to the law.

vii. The burden on the final appellate court, to generally comb the record of appeal and ensure that the judgment appealed against can stand the test of time, having regard to the record of appeal.

In this instance, we have thoroughly reviewed the facts of this case, the decisions of the trial High Court and the intermediate appellate court. From our analysis and observations so far, it is quite apparent that applying the Roadmap envisaged in the Solomon Tackie case supra to the circumstances of this appeal leads conclusively to the fact that the requirements therein had been complied with by the lower courts, such that there is no real, imagined or putative need to have appealed against the judgment of the Court of Appeal.

Let us, however out of abundance of caution apply the above test to the specific grounds of appeal urged on us in this court by the Defendants.

DID THE DEFENDANT BLOCK PLAINTIFF'S ACCESS TO PLOT NO. 16?

Learned Counsel for the Defendant through his counsel argued that the courts below fell in error when they held that the Defendant has constructed his washing bay in an access road and by shifting the burden of proof in the first instance on to the Defendant to disprove the claim of the Plaintiffs. It was argued strenuously that the courts below relied on Exhibit B which was unregistered, unsigned and undated to conclude that the Defendant had built on an access road.

It is settled law that where the trial Judge has made findings of facts and there is evidence in support of those findings, the appellate Court will not interfere with them. The appellate court is not to set aside the findings of a trial court unless there is clear evidence

of some blunder or error which results in miscarriage of justice. In the case of ***Acquie v Tijani [2012] SCGLR 1252,*** the Supreme Court speaking with one voice through Anin Yeboah JSC (as he then was) stated as follows:-

> *"This court is the second appellate court before which this ground has been canvassed to invite it to reverse the findings of facts made by the trial court and affirmed by the first appellate court, i.e. the court of Appeal. It has been said several times that, in civil appeals the Supreme Court, as a second appellate court, should be slow in reversing findings of fact made by the trial court which had been concurred in by the Court of Appeal. The onus thus lies on the defendant in the instant case to demonstrate clearly that the findings were perverse and unjustified."*

In coming to this conclusion, the court in the Acquie v Tijani case supra considered and relied on the authoritative decisions in the following cases:-

- ***In re Aryeetey; (Decd) ; Aryeetey v Okwabi [1987-88] 2 GLR 44, CA***
- ***Achoro v Akanfela [1996-97] SCGLR 209***
- ***Obrasiwa II v Otu [1996-97] SCGLR 618 and***
- ***Obeng v Assemblies of God Church, Ghana [2010] SCGLR 300***

Our distinguished brother, Anin Yeboah JSC (as he then was) continued his rendition and explanation of the extent to which the said principle of a second appellate court such as this court applies in reversing findings of fact made by a trial court and concurred in by the intermediate appellate court as follows:-

> *"In the instant appeal, Counsel for the defendant, in an attempt to demonstrate that the findings made by the High Court and concurred in by the Court of Appeal were perverse,* ***pointed out very minor discrepancies in the evidence which were clearly inconsequential and did not go to discredit the plaintiff and his witnesses in anyway whatsoever. The trial Judges findings were amply supported by the***

evidence on record as he proceeded to give reasons for acceptance of one evidence against the other. To reverse concurrent findings of facts by virtue of very minor and irrelevant discrepancies in the evidence would be doing injustice to the two lower courts." Emphasis

Indeed, the above words of Anin Yeboah JSC (as he then was) appears as if he was addressing the conduct and circumstances of the Defendant in the instant appeal. The only point of difference is that, unlike the instant case there are neither minor nor irrelevant discrepancies that might aid the Defendant in anyway whatsoever to help tilt the case one notch higher than the two lower courts have determined.

From our analysis, and conclusions it is without doubt that, the Defendant and his lawyer engaged in a wild goose chase which fortunately the justice of the case has denied them from bulldozing their way through.

Under such circumstances, and guided by strong principles of law on the departure by a second appellate court from concurrent findings of fact made by two lower courts, this court is unable to depart from the respected authorities referred to supra. In this case, the Plaintiffs have sufficiently led evidence to establish their interest in Plot No. 16, and the house therein as well as the fact that the Defendant has not only blocked their access to the said house, but has also shown disrespect for Metropolitan Authorities in the entire case. In such a situation, the burden was squarely on the defendant to displace the evidence that the Plaintiffs have led. Unfortunately, this he woefully failed to do in this second appeal.

From the evidence available in the record of appeal, the courts below did not arrive at that conclusion by solely relying on Exhibit B as they considered all the evidence on record. We would first consider Exhibit E which is a reply to a letter written by lawyer for the Defendant to lawyer of the Plaintiffs. From the contents of Exhibit E which was written on the instructions of the Defendant, the Defendant admits that there is an access,

he however calls the access a pedestrian access and states that the access will be constructed by the STMA upon securing the needed funds. It must be noted that an access road does not only mean a vehicular access, it may be either pedestrian or vehicular access. The Defendant admits per Exhibit E that there is an access and it is upon this access that the he has built his washing bay preventing the Plaintiff from accessing his property. Exhibit F reinforces the fact that the Defendant is operating his washing bay on an access road. We are of the view that the courts below did not only rest their decision on Exhibit B as there is abundant evidence on the face of the record that the Defendant has built on the access road. No error of law was committed by the courts below to warrant a departure from the well-reasoned judgments of the courts below. The Defendant has not been able to establish any adverse finding to enable this court temper with the concurrent findings of the court below.

Again under this ground, counsel for the Defendant stated that there was an error of law when the courts below relied on Exhibits E and F. The argument here was that the Plaintiffs should have called an official from the Urban Roads Department to testify to the said Exhibit F and that the contents of Exhibit E was a letter written by a lawyer previously engaged by the Defendant and cannot be deemed to be an admission on the part of the Defendant. Besides, whether or not the area in dispute is an access road is not one to be determined by the Defendant or his lawyer through a letter but by the planning scheme of the area. Exhibit F is a letter from the Urban Roads Department. This letter was tendered without any objection. During cross-examination counsel for the Defendant did not question the witness on the existence or non-existence of the said letter. His main line of questioning was in relation to actions which have been done after the service of the said letter, Exhibit F. It shows that the Defendant does not dispute the fact that he is aware of this letter. If he is aware of this letter then the letter really exists, and there was therefore no need to call on an official from the Urban Roads Department to verify the said letter

as erroneously contended by counsel for Defendant. Learned Counsel contends that because no action has been taken by the Urban Roads Department after writing the said letter, it means they have realized that the Defendant is in lawful occupation of the disputed area. Our view is that, this contention is false, and is misleading.

Interestingly, during cross-examination of the Plaintiff by learned counsel for the Defendant this is what ensued. (See pages 139 and 140 of the Record of Appeal.)

Q: In Exhibit F reference is made to a scheme of the area which according to the letter was attached to it?

A: my Lord that is correct.

Q: you have not attached that scheme to your Exhibit F?

A: My lord the scheme is part of the documents I have tendered.

*Q: **you did not attach the scheme to Exhibit F because the scheme vindicates the case of the Defendant, I am suggesting to you?***

A: My Lord that is not correct. I have tendered all these documents with my papers" Emphasis

It baffles our mind how the scheme would vindicate the case of the Defendant when the same letter to which the scheme is attached stated categorically that it had been observed that the Defendant was using the road access as a temporal car washing bay and notice is hereby given to the Defendant to remove all his valuable items on the road way. It is this same scheme that the Defendant is relying on to prove that he is in lawful occupation of the access road and that the road in question is not an access road. The Defendant's reliance on Exhibit 2, the planning scheme would therefore not hold. Indeed this is further strengthened by Exhibit E. Exhibit E was written by lawyer for the Defendant upon the instructions of the Defendant. This means it was the Defendant who caused the lawyer

to write the said letter and he is therefore in agreement with the contents of the said letter. Indeed the concluding part of Exhibit E is as follows;

> *"my client has been correctly allowed by the Metropolitan Assembly to use the place for the car washing bay* ***until the Assembly secures the necessary budget for the physical development of the area****".*

In this suit, the Defendant still relies on the fact that he has been allowed to operate his car washing bay on the access area but is now denying the fact that he has to leave the area when the time is up. The Defendant has been aware for a long time that he would be moved from the area when the Assembly which he claims put him there, secures funding for the physical development of the area. Now Exhibit F indicates that the necessary funding has been secured and the Defendant is to move from the area as agreed. Even on this note, the Defendant must move from the area in question.

We have taken cognizance of the fact that, the Defendant does not dispute Exhibit F and is aware of its existence.

Our mind is thereon drawn to the gross disrespect of state authorities i.e. Urban Roads Department by the Defendant. He has been ordered by the Urban Roads Department per Exhibit F who are the authorities responsible for construction and demarcation of roads to remove his items from the disputed area but he has refused to do so and still insists on operating his car washing business, even in court. This gross disrespect for state authorities will not stand in any court of law. The Defendant is blatantly disrespecting institutions set up by law and a court of law cannot condone such disrespect.

DID DEFENDANT SUBSTANTIATE HIS PERMISSION TO OPERATE ON THE LAND

The Defendant next argued that, the Court of Appeal erred when it dismissed the appeal on the grounds that the Defendant could not substantiate his assertion that he had permission to build his washing bay.

This assertion was part of his pleadings and he needed to establish those facts. The Defendant was the one who introduced the fact that he was granted approval by STMA to build his washing bay on that particular access road. It was then his duty to show or prove this fact by way of evidence. It is surprising that the Defendant did not lead any evidence in support of this assertion. It is trite learning that bare assertion by a party of his pleadings in the witness box without more is no proof. The decision of Ollennu J, (as he then was) in ***Majolagbe v Larbi & Anor [1959] GLR 190*** is that;

> *"Proof in law is the establishment of facts by proper legal means where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true."*

See also the cases of ***Zabrama v Segbedzi [1991] 2 GLR 221, CA, Bonsu v Kusi [2010] SCGLR 60***. See also ***Abbey v Antwi supra***.

In the case of ***Ackah v Pergah Transport Ltd [2010] SCGLR***, Adinyira JSC stated that due to the contentious nature of the issues clearly depicted by the facts, this called for adduction of evidence by the party who raised the issue. As the respondent herein bears the burden of proof of the issue he was enjoined by the basic rules of evidence to prove the issue on preponderance of probabilities.

The Defendant who bears the burden of proving his own assertion that he was granted approval by the STMA to operate his washing bay on the access road failed to do so. This

averment was capable of proof which could be done by producing a permit, or a letter from STMA granting the approval etc. unfortunately no proof was established. Upon what basis then is the Defendant operating his business on the access road? After stressing in his pleadings that he had the approval to operate, when it came to establishing this fact, the Defendant had nothing to show for it.

CONCLUSION

On the basis of our rendition, we find no basis to disturb the judgment of the trial High Court which was affirmed by the decision of the Court of Appeal. We accordingly dismiss the appeal lodged by the Defendant against the Court of Appeal decision dated 17th November 2021. The appeal fails and is dismissed.

EPILOGUE

We must express our disgust and revulsion against the apparent attempt by the Defendant and his Lawyer John Mercer to circumvent the established facts in this case. This finds expression in the lack of candour exhibited by the Defendant after he engaged his new Counsel when the narrative clearly expressed by Defendant's previous Lawyer in Exhibit E changed without any basis whatsoever.

Indeed, this is one of the many Appeals that come regularly to this court which should have been dismissed in limine without any hearing.

We are therefore minded to humbly request His Lordship the Chief Justice to seriously consider to put before the Rules of Court Committee established under Article 157 of the Constitution 1992 to make Rules of Procedure to enable the Supreme Court deal with situations envisaged and provided under Section 34 (1) and (2) of the Courts Act, 1993 Act 459. Section 34 (1) of the Courts Act, 1993 reads as follows:-

> *"Where the Supreme Court considers that an appeal made to the court* ***is frivolous or vexations or does not show any substantial ground of appeal, the court may***

dismiss the appeal summarily without calling on any person to attend the hearing." *Emphasis*

There is therefore the urgent need to formulate Rules of Procedure to regulate the jurisdiction conferred on this court under Section 34 (1) and (2) of the Courts Act, 1993. This will definitely stem the tide in reducing the many frivolous and needless appeals that find their way to the apex court. This is the only way to reduce the workload that this court has been inundated with lately.

COSTS

We frown upon the conduct of the Defendant in this case. It is our view that he has deliberately used his rights to frustrate the Plaintiffs in the enjoyment of their access to their house despite the determination of these rights by the two lower courts.

In considering the award of costs, we take note of the apparent show of disrespect for institutions of state like the Department of Urban Roads and the Sekondi-Takoradi Metropolitan Assembly, exhibited by the Defendant throughout these proceedings.

The decadence of society which all well meaning Ghanaians complain about can only be restored if there is absolute compliance with directives from relevant state institutions by the citizenry, i.e. fellow Ghanaians.

We are therefore minded to award punitive costs of GH¢40,000.00 against the Defendant. If we are to change the narrative about how as a nation we want our institutions of state to be respected, then we should ensure strict compliance with directives and decisions from relevant state institutions and avoid situations like what is embodied in the following Ghanaian proverb *"cutting off the lizard's tail to spare the head."* In other words, an intentional conduct to spare a defaulting party from the actual degree or merit of

punishment which is desirable per the conduct if the extraneous issues are not taken into consideration.

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

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