**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA - A.D. 2023**

**CORAM: BAFFOE-BONNIE JSC (PRESIDING)**

**OWUSU (MS.) JSC**

**TORKORNOO (MRS.) JSC**

**ACKAH-YENSU (MS.) JSC**

**ASIEDU JSC** **CIVIL APPEAL**

**NO. J4/04/2022**

**15TH MARCH, 2023**

**EMMANUEL K. AZAMETI …… PLAINTIFF/APPELLANT/RESPONDENT**

**VRS**

**1. DINGLE DORDZI ATTIPOE**

**2. KWAKU NYATEFE** — **DEFENDANTS/RESPONDENTS/APPELLANTS**

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**JUDGMENT**

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**ASIEDU JSC:-**

**INTRODUCTION:**

My lords, this appeal is against the judgment of the Court of Appeal, sitting at Ho in the Volta Region, which was delivered on the 18th day of December 2019. In this judgment, the Plaintiff/Appellant/Respondent will be referred to as the Plaintiff whiles the Defendants/Respondents/Appellants will retain their original designation as Defendants in the matter. The Court of Appeal, had, in its judgment, reversed the judgment of the High Court which had declared title in a disputed area of land in the Defendants and thus, effectively, making the Plaintiff the owner of the said parcel of land. Aggrieved by the judgment of the Court of Appeal therefore, the Defendants filed the instant appeal on the 4th March 2020 and pray this Court, by way of relief, to set aside the judgment of the Court of Appeal and restore the judgment of the High Court dated the 12th December 2016.

**GROUNDS OF APPEAL:**

The grounds for the Defendants' appeal are:

> *(a). That the Court of Appeal woefully failed to adequately consider the case of the Defendants/Respondents/Appellants thereby occasioning substantial miscarriage of justice.*
>
> *(b). That the judgment is against the weight of evidence.*
>
> *(c). That the Court of Appeal erred in granting judgment for the Plaintiff/Appellant/Respondent in the light of the finding of the court that the Plaintiff/Appellant/Respondent failed to indicate the size of the land.*
>
> *(d). That the Court of Appeal erred in holding that Defendants/Respondents/Appellants did not adduce any evidence of long unchallenged possession and occupation in respect to the specific area of dispute.*

*(e). That the Court of Appeal erred in holding that the evidence of PW1, PW2, PW3 and PW4 were consistent and corroborative of Plaintiff/Appellant/Respondent's case.*

*(f). That the Court of Appeal erred in holding that the deficiency in Exhibits 1 and 2 by reason of the lack of any form of description could not be so cured by Defendants/Respondents/Appellants long, unchallenged, overt and transparent acts of ownership so as to defeat the interest of the Plaintiff/Appellant/Respondent regarding the specific boundary between Plaintiff/Appellant/Respondent and Defendants/Respondents/Appellants*

*(g). That the Court of Appeal erred in holding that DW1 and DW2 did nothing to help the Defendants/Respondents/Appellants' case regarding the Defendants/Respondents/Appellants' ownership of the area claimed by the Plaintiff/Appellant/Respondent.*

*(h). That the Court of Appeal erred in holding that in the recent event involving PW1 and his maize cultivation the parties accepted the burnt toti tree as the boundary that PW1 had not respected.*

*(i). That the Court of Appeal erred in holding that Plaintiff/Appellant/Respondent led substantial evidence of ownership in respect of the boundary claiming by the Plaintiff/Appellant/Respondent.*

*(j). That the Court of Appeal erred in holding that Defendants/Respondents/Appellants led scant evidence of possession with respect to the boundary claimed by the Defendants/Respondents/Appellants.*

*(k). That the Court of Appeal erred in holding that Plaintiff/Appellant/Respondent is the owner of the land claimed in the boundary dispute.*

*(l). Additional grounds of appeal to be filed upon the receipt of the record proceedings.*

We are compelled to express concern about the grounds of appeal in this matter. As many as eleven (11) grounds of appeal have been stated in the Notice of Appeal for our determination. A close scrutiny of the grounds of appeal will reveal that they could be subsumed or summarized into two or three grounds instead of eleven. A good ground of appeal must be pithy and not petty. A good ground of appeal must touch on and bring out the real issue to be determined on appeal and must not be peripheral in nature. For, an appeal is not won on the number of grounds that Counsel is able to raise but on one's ability to fish out the errors, both factual and legal, which have been committed by the trial court or the first appellate court and the substantial effect that those errors have had on the overall outcome of the case. Rule 6 (2), (b), (f), (4) and (5) of the Supreme Court Rules, 1996, CI.16 gives an insight into what should go into a ground of appeal. It states that:

> *"6. Notice of grounds of appeal*
>
> *(2) A notice of civil appeal shall set forth the grounds of appeal and shall state—*
>
> *(b) whether the whole or part of the decision of the Court below is complained of, and in the latter case the part complained of;*
>
> *(f) the particulars of a misdirection or an error in law, if that is alleged.*
>
> *(4) The grounds of appeal shall set out concisely and under distinct heads the grounds on which the appellant intends to rely at the hearing of the appeal, without an argument or a narrative and shall be numbered seriatim and where a ground of appeal is one of law, the appellant shall indicate the stage of the proceedings at which it was first raised.*
>
> *(5) A ground of appeal which is vague or general in terms or does not disclose a reasonable ground of appeal is not permitted, except the general ground that the judgment is against the weight of evidence and a ground of appeal or a part of it which is not permitted under*

*this rule, may be struck out by the Court on its own motion or on an application by the respondent."*

In their book Civil Appeals (2nd ed.), authored by James Leabeater, et al. and published by Sweet & Maxwell (2015), UK; the learned authors state at paragraph 15.008 at pages 400 to 403, among others, that:

*"The grounds of appeal identify the jurisdictional basis for and the scope of the appeal. They should identify succinctly and precisely the basis for the appeal court's jurisdiction to interfere with the decision of the lower court. They must set out:*

*(1). The grounds for asking the appeal court to review the decision of the lower court, and*

*(2). Whether it is the appellant's case that the decision of the lower court was 'wrong' and/or was unjust because of a serious procedural or other irregularity*

*However, the explanation as to why the lower court was wrong or the decision was unjust because of a serious procedural or other irregularity is not for the grounds of appeal, but rather the skeleton argument.*

*A decision is 'wrong' if the lower court erred in law, erred in fact or erred (to the appropriate extent) in the exercise of its discretion. Accordingly, if the ground of appeal is that part of the decision is 'wrong' the grounds of appeal must address the part of the decision said to be wrong and identify in what way it is said to be wrong i.e. an error of law, an error of fact and /or an error in the exercise of discretion.*

*A decision is 'unjust' because of a serious procedural or other irregularity if it has caused the decision of the lower court to be unjust. If the ground of appeal is that part of the decision arose out of a serious procedural or other irregularity then the nature of the irregularity must be set out."*

At *paragraph 15.010 page 402, the learned authors state that:*

*"The structure and length of the grounds of appeal will depend on the decision of the lower court.*

*The emphasis will always be on keeping them succinct. A failure to do so is likely to meet with criticism and is unlikely to assist the appellant's case. The appeal courts are not averse to expressing criticism where the grounds of appeal are unnecessarily long.*

*However, in the desire for succinctness, it is important not to miss an issue upon which the appeal is to be put…."*

My lords, from the pleadings and the evidence adduced before the trial court, one fact is not in dispute between the parties to this matter; and that is that, the parties admit that their respective land share boundary. For that reason, notwithstanding the numerous grounds of appeal raised by the Defendants herein, as shown above, there is only one main issue to be decided in this appeal, namely: What is the true boundary line between the Plaintiff's land and the land of the Defendants' family? The Defendants agree that the boundary dispute was the only issue before the trial Court, the Court of Appeal and presently, it is the only issue before this court. The agreement of the Defendants is expressed by their Counsel when he submitted at page 13 of his statement of case that *"with respect, the instant appeal is basically about the boundary which the Court of Appeal declared in favour of the Respondent."*

It must be placed on record that the Plaintiff refers to their land as Kpeyehi family land whiles the Defendants are said to occupy portions of Kpotave family land which their ancestor Bernard Tetekpli Nyatefe Attipoe, who later became enstooled as Togbe Duklui Attipoe III, acquired by purchase in the year 1923, that is, about one hundred years ago.

**BOUNDARIES:**

From the pleadings and the evidence on record, it is clear that the Plaintiff's family land was acquired through settlement by one Kpeyehi, a great grandfather of the Plaintiff and

that the Plaintiff is currently the head of the Kpeyehi family. These facts are not disputed by the Defendants herein. According to the Plaintiff, the land acquired by his great grandfather is at a place called Ziope and has been divided into two by the road from Ho to Denu as a result of which the Plaintiff describes the land to the left of the road as lot 'A' and the parcel to the right of the Ho to Denu road as lot 'B'. The Plaintiff says the boundary owners of the part of the land to the left side of the road are: Bortrie also known as Ahiagba family land, Zeleve family land, Humali Ashabi family land, the Kpotave family land on two sides, the Dzokple stream and then the Ho to Denu/Aflao road. The parcel of land lying to the right side of the Ho to Denu/Aflao road referred to as lot 'B' is, according to the Plaintiff, bounded by the Dzokple stream, the properties of Agorkpo, the Botrie family land, the property of Helega family and lastly the Ho to Denu/Aflao road. The Plaintiff's case is that it is the parcel of land to the left side of the Ho to Denu/Aflao road, lot 'A', whose boundary with the land of the Defendants is in issue.

The Defendants who indorsed a counterclaim on their statement of defence pleaded their boundary owners as "on the West by Dzotong Seke family land, on the North by Chief Lartey K. Agbeve family land, on the East by Ashiabi Hoegbe family land and on the South by Lawluvi/Kheyehi family land." These boundary owners were confirmed in the evidence in chief of the 2nd Defendant who testified on behalf of himself and the 1st Defendant.

**BOUNDARY FEATURES:**

In describing the features of the land in dispute, the Plaintiff testified in his evidence in chief, at page 105 of the record of appeal, among others, that:

> *"The land in dispute has a toti tree on an ant hill. There is also a toti tree on the boundary. From there, there is the road from Ziope to Batume. There is another ant hill on the boundary. There is also another toti tree and baobab tree on the boundary. There is also an*

*atite tree on the boundary. There is also xexeti tree on the boundary. Where Defendant trespassed onto our land is called Hiakatame, it goes back to the first ant hill. I have said that Defendants have land there called Kpotave land. They also farm on the Kpotave land. Kpeyehi family also farm on Kpeyehi (land)".*

In respect of the boundary features, the Plaintiff was asked the following questions under cross examination:

*"Q. The main boundary feature is the stream called Gadzatorwui or Hiakatami stream*

*A. Hiakatami is a marshy land. It is for Kpeyehi.*

*Q. There is a stream at the north-most part of your land.*

*A. I do not remember any stream being there.*

*Q. I put it to you that there is a stream on the land labeled as Gadzatorwui stream on Exhibit 'CE1'*

*A. There is nothing like that. What I know is that the land is marshy and when it rains water collects there.*

*Q. This stream forms the boundary between your land and the Defendants' land.*

*A. That is not correct."*

In their evidence in chief, the 2nd Defendant stated at page 175, in respect of the boundary features along their land and that of the Plaintiff's family land that:

*"On the Southern side we share boundary with Kpeyehi family land but through Hiakatame or Gadzatorwui. The burnt stump was never a boundary feature between any of us as alleged by the Plaintiff."*

At page 198 of the record of appeal, the 2nd Defendant stated that:

*"The boundary between my grandfather's land and Plaintiff's land is what I have described i.e. from where the wokpa tree is on an ant hill from Southeastern part on my grandfather's land, crossing Ziope Batume road where we have a culvert. After the road there is a stream known as Gadzatorwui or Hiakatame then to a small baobab tree and ends on a bigger baobab tree where the three of us meet again. The three are KPEYEHI FAMILY, Togbe Dukplui Attipoe (my grandfather) and Seke Dzotong family"*

Under cross examination Plaintiff's counsel asked the following question:

*"Q. I put it to you that Gadzatorwui or Hiakatame is not a common boundary feature between Kpeyehi family land and Kpotave family land.*

*A. That is not correct"*

Thus, as stated earlier, the issue between the parties is essentially about the boundary between their respective family land. That of the Plaintiff to the north of its land and the Defendants to the south of their land. It follows therefore that the northern boundary of the Defendants' land in respect of which, according to the Defendants, a dispute arose between the Defendants' ancestor, Togbe Duklui Attipoe III and Chief Lartey K. Agbeve, as pleaded by the Defendants at paragraph 23 of their amended statement of defence filed on the 7th July 2016, which was later settled between the parties thereto in 1938 as evidenced by exhibit 4 herein, bears no direct relevance to the boundary dispute between the Plaintiff's family land and the Defendants' family land. In this regard, we agree with counsel for the Plaintiff when he submitted at page 23 of his statement of case that:

*"The evidence of the Defendants that in 1938 there was a boundary dispute between Togbe Duklui Attipoe III and Chief Lartey Agbeve at the northern side of the Defendants' land is of no probative value as far as the determination of the issues at stake is concerned, whichever boundary was settled between the Defendants' ancestor and Chief Lartey Agbeve, his northern boundary owner, cannot be used to lay claim to the land at the*

*southern part of their Kpotave land. Additionally, neither the Plaintiff nor his predecessors were parties to that boundary settlement proceedings"*

It also needs to be pointed out that the parcel of land to the right of the Ho to Denu/Aflao road which the Plaintiff referred to as lot 'B' has nothing to do with the issue for determination herein which principally concerns the boundary between the Plaintiff's family land and that of the Defendants in this matter.

It is very instructive to note that the parties, per the order of the trial court, filed instructions to a court appointed surveyor who surveyed the lands of the Plaintiff and the Defendants and then prepared a plan as well as a survey report which were admitted in evidence as exhibits CE1 and CE2 respectively. Exhibit CE1 can be found at page 271 of the record of appeal and exhibit CE2 is also at page 272 of the record. Due to the process of photocopying, exhibit CE1 is virtually unreadable. However, the original copy which is very legible can be found in the case docket. In it, the area in dispute is clearly delineated and marked with yellow stripes. Exhibit CE1 also shows the owners of the boundaries of the respective lands of the parties.

In proof of his title to the land in dispute, the Plaintiff called four witnesses to testify in support of his claim. Two of the four witnesses are persons whose family land shares boundary with the Plaintiff's family land as well as the land of the Defendants' family. PW2, Atsu Ashabi is the head of the Ashabi family. According to PW2, the Ashabi, Kpeyehi and the Kpotavi land also known as Denu land share a common boundary *"which is a toti tree which has been cut down but not uprooted"* According to PW2, *"where the three lands have their common boundary the Ashabi and Kpeyehi also have a common boundary feature which is an ant hill."*

The toti tree which PW2 referred to as the common boundary for the three families' land is clearly indicated on exhibit CE1 with the inscription *'burnt toti tree'* written by it. And

the common boundary between Ashabi family land and the Kpeyehi family land is also marked on exhibit CE1 as point D/1 with the inscription *'burnt wokpa and xetri on anthill'*. During cross examination PW2 asserted that there is a culvert on the road from Ziope to Batume and there is a place where water collects but there is no stream. PW2 says there is a pond at that place known as Hiakatame but not a stream. PW2 flatly denied a suggestion that the common boundary for the land of the three families is where the burnt wokpa and exe tree on an anthill are. PW2 was emphatic that Kpotave land does not extend to the wokpa tree or the Hiakatame. The wokpa tree is the point marked D/1 on exhibit CE1.

The next boundary owner who gave evidence in the matter is Denu K. Daniel PW3 herein. And, according to him, the Kpotave land *"shares boundary with Kpeyehi land and Ashabi family. The land starts from toti tree where three lands converge"*. PW3 says that *"from where the three lands meet, (the Kpotave) stretches to an ehe tree on an ant hill. It stretches to a toti tree and extends to a baobab tree and to another tree called atite and another tree called ahihe tree and to another baobab tree and to a stream called Dzople and that is where our land ends"*. It ought to be stated that PW3 is the head of the Denu family, the original owners of the land purchased by Attipoe, the Defendants' great ancestor. PW3 was emphatic that the Denu/Kpotave land does not extend to the wokpa tree as asserted by the Defendants. PW3 also denied a suggestion that *'a culvert which crosses a stream called Gadzatorwui is another boundary feature between the Denu/Kpotave land and the Kpeyehi family land'*. Indeed, PW3 stated emphatically that there is no stream called Gadzatorwui.

It must be pointed out that of the three witnesses called by the Defendants herein none of them was a boundary owner or head of family of any of the three families mentioned as owning land around the disputed area or sharing boundary with the land in dispute. Pascal Atsu Awledor, who gave evidence as DW1, is a nephew to the 1st Defendant and a junior brother to the 2nd Defendant. Edith Fiafe, DW2 herein was a farmer who farmed

in the area. She was emphatic that when she was being given land to farm in the area there was no family member of the Ashabi family or the Kpeyehi family present and that she cannot state for a fact that the land given her for farming actually belong to the Defendants' family. Again DW3, Emmanuel Fianu testified to the effect that his father farmed on the Kpotave land and that his father was a brother to Togbe Attipoe who acquired the Kpotave land. Thus, as already stated, none of the witnesses for the Defendants is a boundary owner.

We wish to state that where a dispute between two parties is about the ascertainment of the boundary between their respective lands, the evidence of adjoining land owners is very crucial and cannot be discounted. See **Adwubeng vs. Domfeh [1997-1998] 1 GLR 282**. Where the evidence of adjoining land owners corroborates the claim of a party in a boundary dispute, as against his opponent, a court of law must give strong and convincing reasons for rejecting the evidence of the party whose claim has been corroborated by the boundary or adjoining land owners. In the instant matter, not only did the Plaintiff testify to the boundary features between the Plaintiff's family land and that of the Defendants, but the evidence of PW2 and PW3 who are the heads of their respective families whose land share boundary with the land of the Plaintiff as well as the Defendants testified to the features of the boundary of the land between the parties hereto and positively asserted the ownership of the Plaintiff's family over the land in dispute. On the preponderance of probabilities therefore, a court of law should lean favourably to the assertion by the Plaintiff as against that of the Defendants who could not call any boundary or adjoining land owner in support of their claim. In this regard, we agree with the court of appeal when it opined in its judgment at page 454 of the record that:

> *"We have spent sometime reproducing the evidence led in support of the Plaintiff's case to demonstrate its quality. These pieces of evidence offered by the boundary owners: PW2 and*

*PW3, PW1 who farmed on the Kpeyehi land, and PW4 who, with his father Badzivor Azameti, farmed on Kpotave land, were consistent and corroborative of the Plaintiff's case. It is thus unclear how the learned trial Judge discountenanced all of this evidence and as if the Plaintiff's case was of no consequence, proceeded to discuss and uphold the Defendants' counterclaim"*

Apart from the evidence of the adjoining land owners PW2 and PW3, Christian Kwame Gblorkpor, PW1 herein also gave evidence to the effect that the boundary between the Plaintiff's family land and that of the Defendants does not start from the wokpa tree and then any stream called Gadzatorwui. PW1 was emphatic that there is no stream by name Gadzatorwui as alleged by the Defendants which serves as the boundary between the Plaintiff's family land and the Defendants' family land. According to PW1 a toti tree serves as the boundary between the land farm by the Defendants as well as that of Humali Ashabi and the Kpeyehi lands. The evidence of PW4, Philip Kofi Azameti was also to the effect that:

*"Kpeyehi shares a boundary with Kpotave land from a burnt toti tree. From the toti the land stretches to Hungo road (Batume road) and extend to an ant hill. From the ant hill, it stretches to another toti tree which is there today. From there it extends to a baobab tree and then to an ant hill on which atite tree stands. It then extends to a xexeti (heheti) tree and then to another baobab tree and then to another ant hill and then to another baobab (Adido) tree. Then it enters Dzokple stream where there is a (Huti tree) silk cotton tree."*

It is very important to point out that none of the witnesses called to testify on behalf of the Plaintiff including the adjoining land owners who are the heads of their respective families agreed and accepted the claim of the Defendants that the stream called Gadzatorwui is the boundary between the Kpeyehi family land and the Kpotave land which is occupied by the Defendant. On the other hand, all the witnesses accept the fact

that the toti tree is the meeting point for the lands of the families of Humali Ashabi, Kpotave and the Kpeyehi family land.

In our opinion therefore, once the Court of Appeal came to the conclusion that the finding of the trial Judge in favour of the Defendants was not supported by the evidence on record, and that there was, on the contrary, cogent and quality evidence in favour of the Plaintiff's claim to ownership of the disputed land, (a finding which we have confirmed to be rooted in the evidence on record), the Court of Appeal was right in setting aside the finding of the trial court and consequently declaring the disputed land for the Plaintiff herein. Indeed, it will be tantamount to a dereliction of its judicial duty if after synthesizing the evidence on record, an appellate court comes to the conclusion that the finding made in favour of a party in the case is not supported by the evidence on record, and yet, fails to make the proper finding and pronounce upon the right conclusion that ought to be made in favour of the party whose case is supported by the evidence adduced at the trial. See **In re Bonney (Decd); Bonney vs. Bonney [1993-94] 1 GLR 610 SC**. If the findings of the trial court are concurred by the first appellate court, then a second appellate court, like the Supreme Court will be slow to interfere with such finding of facts. Thus, in **Koglex Ltd vs. Field [1999-2000] 2 GLR 437**, this court pointed out that:

> "Where the first appellate court had confirmed the findings of the trial court, the second appellate court was not to interfere with the concurrent findings unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice was apparent in the way in which the lower court dealt with the facts. Instances where such concurrent findings may be interfered with included where the findings of the trial court were clearly unsupported by the evidence on record or where the reasons in support of the findings were unsatisfactory; where there was improper application of a principle of evidence or where the trial court had failed to draw an irresistible conclusion from the

evidence; where the findings are based on a wrong proposition of law and that if that proposition be corrected, the findings would disappear; and where the finding was inconsistent with crucial documentary evidence on record."

In the instant matter however, the findings of the trial court on the crucial issue was not concurred in by the Court of Appeal, it implies therefore that the Supreme Court, as the final appellate court, had the duty to scrutinize the record and determine whether the conclusions reached by the court of appeal or the trial court is supported by the evidence adduced at the trial. In **Duodu vs Benewah [2012] 2 SCGLR 1306**, the court held that:

> "It is well settled that; an appellate court is entirely at liberty to review the evidence on record and find out whether the evidence supported the findings made by the trial court. The appellate court must not disturb the findings of the trial court if they are supported by the evidence…. The Supreme Court's duty as the final appellate court, is also to review the evidence on record to ascertain whether the findings were supported by the evidence on record, there being no concurrent findings of facts from the lower courts. And the duty of the Appellant is to demonstrate that the Court of Appeal was in error in reversing the findings of facts made by the trial judge."

See also Adjetey Adjei vs Nmai Boi [2013-2014] 2 SCGLR 1474 @ 1485.

We hold therefore that grounds (e), (h) and (j) of the grounds of appeal have not been made out and are accordingly dismissed.

**HISTORICAL/TRADITIONAL EVIDENCE OF ACQUISITION:**

As already pointed out, the Plaintiff claims their title to the land through settlement. At paragraph 3 of the amended statement of claim filed on the 10th May 2016, he pleaded that:

*"3. Plaintiff says that their great-grandfather Kpeyehi founded a large track of land at Ziope which land extends beyond the township of Ziope"*

In his evidence in chief the Plaintiff testified that:

*"I sued the Defendants in my capacity as the acting head of the Kpeyehi family. The Kpeyehi family land is at Ziope. (It is) my great-grandfather who got the land and settled there. He did not buy it. It is a very big land but the road from Ho to Denu has divided the land into two sides that is on both sides of the motor road"*

The Defendants also pleaded their root of title to their land at paragraphs 16 and 17 of their amended statement of defence filed on the 7th July 2016 as follows:

*16. The Defendants state in further denial of paragraph 26 of the statement of claim that the land the subject matter of this dispute is a portion of a larger land known and called Kpotave land which shares boundary with the Kpeyehi/Lawluvi family land.*

*17. The said Kpotave land was acquired by purchase from Dzobinu Go from Seke family in 1923 by Bernard Tetekpli Nyatefe Attipoe who later became enstooled as Torgbe Duklui Attipoe III"*

In his testimony before the trial court, the 2nd Defendant stated that:

*"The plaintiff sued us in respect of a land bought by my grandfather Torgbe in 1923 at Kpotave near Ziope that is my grandfather Torgbe Duklui Attipoe III. The land is called Kpotave land"*

It is clear from the above pleadings and evidence that the parties rely on traditional or historical evidence to assert their respective claims to the land in issue with the overall effect that each party claims to own the disputed land. The authorities are to the effect that where parties put up rival historical or traditional evidence with respect to their claims to land and there is virtually little to choose from the evidence, the best way to

determine ownership of the property is to evaluate the respective evidence in the light of recent acts of ownership. This principle of law which was enunciated in the Privy Council case of Adjeibi-Kojo vs. Bonsie [1957] 1 WLR 1223 @ 1226-1227; (1957) 3 WALR 257 had been applied, with approval, in a number of cases by this court. See Nana Asiamah Aboagye vs Abusuapanin Kwaku Apau Asiam [2019-2020] 1 SCLRG 712; Abadwum Stool & 3 Others vs Akrokerri Stool [2017-2018] 1 SCLRG 1; Ago Sai & Others vs Kpobi Tetteh Tsuru III [2010] SCGLR 762 @ 785 to 786. **In re Adjancote Acquisition; Klu vs. Agyemang II [1982-83] GLR 852**, the Court held that:

> *"The guiding principle on which the courts had treated and accepted traditional evidence as sufficient to establish title to land were that:*
>
> *(i) oral evidence of tradition was admissible and might be relied upon to discharge the onus of proof if it was supported by the evidence of living people of facts within their own knowledge. Commissioner of Lands v. Adagun (1937) 3 W.A.C.A. 206 cited;*
>
> *(ii) where it appeared that the evidence as to title was mainly traditional in character on each side and there was little to choose between the rival conflicting stories the person on whom the onus of proof rested must fail in the decree being sought for. Kodilinye v. Odu (1935) 2 W.A.C.A. 336, and Abakam Effiana Family v. Mbibado Effiana Family [1959] G.L.R. 326 C.A. cited;*
>
> *(iii) where there was a conflict of traditional history the best way to find out which side was probably right was by reference to recent acts in relation to the land. Yaw v. Atta [1961] G.L.R. 513 cited;*
>
> *(iv) where claims of parties to an action were based upon traditional history which conflicted with each other, the best way of resolving the conflict was by paying due regard to the accepted facts in the case which were not in dispute, and the traditional evidence*

*supported by the accepted facts was the most probable. Beng v. Poku [1965] G.L.R. 167 cited;*

*(v) where the whole evidence in a case was based on oral tradition not within living memory, it was unsafe to rely on the demeanour of the witnesses to resolve conflicts in the case. Adjeibi-Kojo v. Bonsie (1957) 3 W.A.L.R. 257, P.C.;*

*(vi) where the admission of one party established that the other party had been in long undisturbed possession and occupation of the disputed land, the party making the admission assumed the onus to prove that such possession was inconsistent with ownership. The law was that such a person in possession and occupation was entitled to the protection of the law against the whole world except the true owner or someone who could prove a better title; and*

*(vii) in a claim for title to land where none was able to show title because of want of evidence, or that the evidence was confusing and conflicting, the safest guide to determining the rights of the parties was by reference to possession. Dictum of Van Lare J.S.C. in Summey v. Yohuno [1962] 1 G.L.R. 160 at 167. S.C. cited"*

In respect of their claim to the land, the Defendants tendered in evidence exhibits 1 and 2 which are receipts dated 6th October 1923, evidencing the purchase of the land from one Dzobinu Go by the Defendants' ancestor B T N Attipoe. (See page 265 and 266 of the record). These receipts, unfortunately, failed to describe the land conveyed therein. Neither the size of the land sold nor the names of the boundary owners are stated on the receipts. The learned trial judge recognised this deficiency on the receipts but was quick to state that the deficiency on the receipts was cured by the occupation, possession and control which B T N Attipoe exercised over the land. See page 253 of the ROA. The Court of Appeal did not share this view taken by the trial Judge. Looking at exhibit CE1, the Plan tendered by the Surveyor, it cannot be denied that the land acquired by B T N

Attipoe is a very large track of land. It must be borne in mind also that it is not the whole of the land acquired by B T N Attipoe that is in issue in this case. What is in issue is the boundary of the land vis-à-vis the land of the Plaintiff and therefore acts of possession of the disputed area is key to the determination of who owns it. This is because section 48 of the Evidence Act, 1975, NRCD 323, rebuttably, presumes ownership in favour of the person who has possession of the land. The said section provides that:

> *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.*

See **Nyamaah vs. Amponsah [2009] SCGLR 361**. It is therefore very important for the court to determine by credible and verifiable evidence which of the two parties have exercised substantial acts of undisputed possession of the disputed land within living memory. And in this regard, quite apart from the evidence of the boundary owners or the adjoining land owners in the nature of the testimonies by PW2 and PW3, the Plaintiff called one Christian Kwame Gblorkpor who gave evidence as PW1. He stated that in 1985 he was given land by Torgbe Bina close to the boundary between the Kpeyehi family land and the Kpotavi family land. According to PW1 a toti tree served as a common boundary for three families' land being Humali Ashabi, Kpotave and Kpeyehi. PW1 cleared his land beyond the toti tree and planted maize at the same time that Defendants were also planting maize. After harvesting his maize, the Defendants caused Police to arrest him for harvesting maize on their farm. The matter was eventually settled by the elders of the area led by Awadada Visatse Adzago. PW1 testified that:

> *"The chiefs went to inspect the land and where I strayed to the Defendants land was carved out for the Defendants because I cleared around the boundary … While I was farming on*

*the land after the settlement, there was no challenge to my title. The land on which I was farming forms part of Kpeyehi family land…. Humali, Kpotave and Kpeyehi meet at a common boundary called toti. We share a boundary with Kpotave land at an ant hill on an Ehe tree and a baobab tree. The ehe tree is on the ant hill before we get to the baobab tree. We also share boundary with a stream from the baobab tree. The stream is called Dzokple …"*

The testimony of PW1 is to the effect that after the settlement of the matter between him and the Defendants in respect of the trespass which he committed by entering the Defendants' land beyond the toti tree which served as the boundary, there has not been any challenge by the Defendants with respect to his presence on the land in dispute. It must also be placed on record that PW1, a member of the Plaintiff's family and by extension the Plaintiff's family as a whole, has been on the land in dispute since 1985, a period close to 40 years. And, this is further evidence of the act of possession which the Plaintiff's family had exercised over the disputed land in living memory.

Again, the evidence of PW1 herein also bear testimony to the fact that the boundary between the Plaintiff's family land and the Defendants' family land was settled between the parties during the arbitration. The Plaintiff had pleaded from paragraphs 8 to 13 of their amended statement of claim that when PW1, a member of the Plaintiff's family, committed trespass by farming and harvesting on the Defendants' land beyond the toti tree, the matter was withdrawn from the Police Station for settlement by Awadada Vizaze Adzaho and thereafter, according to paragraph 10 of the amended statement of claim. *"the 2nd Defendant acknowledged that a burnt stump of Toti tree was the boundary feature between the Kpeyehi family and the Kpotave family land"*. The Defendants denied, in their amended statement of defence, the averments contained in paragraphs 8 to 13 of the amended statement of claim. However, the Defendants pleaded in paragraphs 7 and 8 that:

*"7. The matter was then withdrawn and gone into by the panel of arbitrators who found C. K. Gblorkpor liable and the maize collected from him and given to the 2nd Defendant.*

*8. The Defendants state in further denial of paragraph 12 of the statement of claim that the panel of arbitrators did not go into any land dispute between the parties."*

In his evidence in chief, the 2nd Defendant stated, among others, that:

*"There has never been any arbitration between us and the Plaintiff in respect of the land. The arbitration was only about stolen maize from my farm by one C. K. Gblorkpor. The maize was collected from C. K. Gblorkpor and given to me because the panel found that the land on which he farmed belonged to me and the maize also belonged to me."*

Now, the question to ask is that if the panel of arbitrators did not go into any land dispute between the parties, how were they able to come to the conclusion that the maize harvested by PW1 was on the Defendants' portion of the land beyond the boundary? Again, how were the arbitrators able to determine that the land on which C. K. Gblorkpor farmed belonged to the 2nd Defendant? It is therefore reasonable to suppose that, it is only after the arbitrators had settle the boundary between the two factions that it could have made a determination as to whose land the maize was harvested. The evidence of the Plaintiff, in our view, is more probable than the evidence of the Defendants on this issue. A fortiori, the evidence about the settlement of the boundary as the Toti tree is more probable than the evidence that no boundary was settled between the two parties after the dispute about the ownership of the maize had arisen. We therefore accept the Plaintiff's narration about the event surrounding the dispute about the ownership of the maize and the consequent boundary settlement.

The evidence by Pascal Atsu Awledor, DW1 herein, is that the Defendants are his relations and that he was told by his mother that his grandfather Togbe Duklui Attipoe bought the land in 1923 and that his family members have been farming on the land.

According to DW1, one Abadzivor, with the permission of his DW1's grandfather, Togbe Duklui Attipoe also farmed on the said land. Consequently, Counsel for the Defendants submitted that by exhibits 5 and 5A Abadzivor Azameti, the deceased head of the Plaintiff's family, paid rent in respect of the land in dispute for the farming activities he carried thereon. PW4 admitted that his father Abadzivor Azameti farmed on Kpotavi land for a period of seven years from 1968 to 1974 and that he used to follow his father to the farm which they christened *'Kpotave farm'*. One significant thing about the testimony of DW1 is that he admitted, under cross examination, that he (DW1) did not know the exact place of the Kpotave land where Abadzivor farmed. This piece of evidence is significant because, it is not the whole area of the land acquired by Bernard Tetekpli Nyatefe Attipoe in 1923 that is in issue. The question which the courts have been called to answer is to determine, on the preponderance of probabilities, whether the area which have been marked with the yellow stripes on exhibit CE1 as being in dispute falls within the land claimed by the Plaintiff or the land claimed by the Defendants. This being the issue, evidence of recent acts of possession is key to the unravelling of the ownership of the disputed area. And given the quality of the evidence adduced by DW1 one cannot say that acts of possession in living memory have been established in connection with the disputed area of land in favour of the Defendants.

Edith Fiave who gave evidence as DW2 says she is a farmer and lives at Ziope and that the land on which she farms was rented from three people: Doe Homali, Atsu Homali and Klu Homali. DW2 says she rented 14 acres of land in all and that these 14 acres of land which is located at Hiakatame belong to three different people who share boundaries. DW2 stated that:

> *"When they were coming to demarcate the land Atsu Homali told me that the land on the north belongs to the Homalis. The other land on the left is not for them and that it belongs to the Attipoe family. They also told me that the south side belong to the Kpeyehi family so*

*I should not go there. The boundary mark of the three lands was an ant hill and an ehe tree on top of the ant hill…. I took land from the Tetekpli family. Tetekpli's land is also at Hiakatame … I have been farming on Tetekpli's land for 9 years now…"*

Counsel for the Defendants state, as one of his grounds of appeal, that the Court of Appeal erred in holding that DW1 and DW2 did nothing to help Defendants' case regarding the Defendants' ownership of the area claimed by the Plaintiff. Counsel referred to an answer given by DW2 that she just harvested maize from the area called Hiakatame; counsel therefore submitted that the Court of Appeal erred in coming to the conclusion which it arrived at. Counsel's submission seems to be premised on the mere mention of the harvest of maize from the area called Hiakatame by DW2. It must however be borne in mind that the witness did not mention Hiakatame in relation to the land in dispute. DW2 in her evidence in chief had testified that she rented 14 acres of land from three different owners and that these 14 acres is *"located at Hiakatame on the Hormuvo road"*. It stands to reason therefore that DW2 used the name *Hiakatame* to refer to the place where she had her farm and not necessarily the land in dispute. We hold that the criticism leveled against the finding by the Court of Appeal is without any legal basis and that the Court of Appeal was right in saying that the evidence of DW1 and DW2 added nothing to prove that the Defendants have been in possession of the land which is in dispute before this court. We are of the view that positive evidence of possession of the land in dispute was required in order to tilt the balance in favour of a party.

The testimony of DW3, a relation of the Defendants, is essentially about the demarcation of the land purchased by Bernard Tetekpli Nyatefe Attipoe in 1923 among his children and also showing the boundary of his land to his relations. This, according to DW3, was done by Bernard Tetekpli Nyatefe Attipoe when he *"was of age"*. DW3 however admitted that no member from the Plaintiff's family was present when Bernard Tetekpli Nyatefe Attipoe was demarcating the boundary of his land and, to his children. We hold the view

that in matters like demarcation of the boundaries of land, the most reasonable thing to do is to inform and assemble relevant boundary owners to witness the event in order to avoid any future litigation as to the true boundary line between the owners of the land. In the instant matter, the Defendants devoted a greater portion of their evidence into proving that their ancestor Bernard Tetekpli Nyatefe Attipoe acquired, by purchase in 1923, a parcel of land. However, as already pointed out, it is not the land acquired by the Defendants' ancestor that is in issue in this matter. The issue confronting the parties is the true boundary between the land of the Plaintiff's family and that of the Defendants' family. Therefore, where doubt exist in respect of a party's claim to a particular boundary line, as in the present case, the evidence of adjoining land owners familiar with the boundary in dispute is very necessary and crucial to clear the doubt as to the true boundary line between the contending parties. See **Agyei Osae & Others vs Adjeifio & Others [2007-2008] SCGLR 499**. The Defendants in this matter failed altogether to call any adjoining boundary owner to give evidence as to the boundary between the Plaintiff's land and the Defendants' land. On the contrary, the Plaintiff called adjoining boundary owners who gave evidence to corroborate the boundary as stated by the Plaintiff as existing between their land and the Defendants' land. On the balance of probabilities therefore, the Plaintiff's case is more preferable as against the case put forth by the Defendants. For, the law is clearly stated in **Aryeh & Akakpo vs Ayaa Iddrisu [2010] SCGLR 891** that:

> A party such as the Defendants in the instant case, who has counterclaimed, bore the burden of proving his counterclaim on the preponderance of probabilities …. The party would win on the counterclaim on the strength of his own case and not on the weakness of his opponent's case.

In the instant matter, the Plaintiff seeks declaration of title to the land in dispute. The Defendants also seek declaration of title to the land in dispute. That is, the Plaintiff claims

that the disputed land forms part of its Kpeyehi family land whiles the Defendants also claim that the land in dispute is part of their ancestral land. That being so, the parties have an equal obligation to lead credible evidence to prove their respective claims. Thus, it was held by this court in **Jass Co. Ltd. & Another vs Appau & Another [2009] SCGLR 265** that:

> *"The burden of proof is always put on the Plaintiff to satisfy the court on a balance of probabilities in an action for a declaration of title to land. Where the Defendant has not counterclaim and the Plaintiff has not been able to make out a sufficient case against the Defendant, then the Plaintiff's claim would be dismissed. Whenever a defendant also files a counterclaim, then the same standard or burden of proof would be used in evaluating and assessing the case of the defendant, just as it was used to evaluate and assess the case of the Plaintiff against the defendant"*

There is also evidence on record by the Plaintiff to the effect that in 1990 the 1st Defendant sued the Plaintiff over the land in dispute and that, whiles that action was pending the Defendants went to the land and started farming thereon and also driving away the Plaintiff's family members then farming on the land. The Plaintiff therefore instituted the instant action against the Defendants. This piece of evidence adduced by the Plaintiff was never subjected to any challenge by the Defendants herein and therefore the Defendants are deemed to admit same. See **Fori vs Ayirebi [1966] GLR 232**.

More importantly, the significance of this piece of evidence is revealed by the fact that it shows that the Plaintiff and his family members, have within living memory, been exercising overt acts of ownership of the land in dispute long before the Defendants' recent intervention. This was confirmed by the Surveyor when he testified, at page 86 of the record, that both parties carry on farming activities in the area. However, as pointed out, the Plaintiff's claim to ownership of the disputed land is corroborated by the

evidence of the adjoining land owners who testified at the trial. We therefore affirm the judgment of the Court of Appeal when the learned Justices held that:

> *"It is important to note that the Plaintiff bore the burden of producing evidence in proof of his claim which was a declaration of title to land inclusive of the land in dispute. We have already observed that the evidence led by the Plaintiff was cohesive and consistent regarding the boundaries he asserted. Yet in the face of such evidence of boundary owners and users of the land, the learned trial Judge caused the purchase by Togbe Duklui Attipoe by exhibit 1 and 2 with no size or boundaries to override the boundary averred by a neighbour whose evidence was corroborated by other boundary owners as well as users of both Kpeyehi (Plaintiff's) land, and Kpotave (Defendants') land. In our judgment, the deficiency (size and description) contained in exhibits 1 and 2, if curable by act of possession as the learned trial Judge held, relying on the case of Botchway vs. Okine [1986-88] 2 GLR 1, could not operate to include land which was claimed by the Plaintiff and in whose behalf solid cogent evidence had been led, including the evidence of PW1 regarding recent acts of possession and user. Nor could the boundary dispute in 1938 between the Defendant and another boundary owner Chief Lartey Agbeve (not the Plaintiff), cure the defects in the conveyance such as to affect the Plaintiff's land, especially in respect of a boundary the Plaintiff's had adduced such cogent evidence in support of"*

In their statement of case, counsel for the Defendants argued grounds (a), (b), (e), (i) and (k) together. Ground (b) is the omnibus ground that the judgment is against the weight of evidence. There are several decided cases which have sought to explain this ground of appeal. In **Abbey & Others vs Antwi V [2010] SCGLR 17**, the court held in relation to this ground of appeal at page 34 of the report 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.*

See also Aryeh & Akakpo vs. Ayaa Iddrisu [2010] SCGLR 891 at page 899 of the report.

**AMENDMENT**

Under these grounds of appeal, counsel for the Defendants devoted much ink to discuss the number of amendments which the Plaintiff effected before the trial court in an effort to show that *"the Respondents did not present a cohesive and consistent case"*. See page 13 of the Defendants' statement of case. Counsel embarked upon an exercise of comparing various amendments done by the Plaintiff at the trial and then submitted at page 18 of their statement of case that:

> *"Incidentally, the Court of Appeal was of the view that Respondent has given ample, cohesive and consistent evidence to have merited judgment in his favour. With respect, a party who needed the assistance of a survey plan in order to change his case cannot be described as leading ample, cohesive and consistent evidence to have merited judgment in his favour."*

At page 23 of the statement of case, Counsel opined that:

> *The interesting aspect of Respondent's case is that exhibit CE1 has shown that while in the evidence of Respondent and his witnesses, there was a failed attempt to describe the Kpeyehi land which includes the land in dispute, the amended pleading especially paragraphs 20, 21 and 22 which sought to remedy the faulty and defective basis of the action concentrated on only portions of the land in dispute. With respect that makes the case of the Respondent inconsistent and incoherent and not consistent and cohesive as stated by the Court of Appeal".*

Again, at page 30 of the statement of case, Counsel for the Defendants submitted that:

*In paragraph 15 of the further amended statement of claim at page 100 of the record, the Respondent pleaded thus: 'Plaintiff states that the 1st Defendant has rather trespassed into the Plaintiff's family land without any justifiable cause.'*

*The above paragraph 15 of the further amended statement of claim is a total departure from the earlier pleading in paragraph 11 of the original statement of claim which states that '1st Defendant has rather trespassed into the Kpotave, Ashabi Humali and Dugo portions of Kpeyehi family land without any justifiable cause'*

It is important to stress the point that a party to a civil action has the right to apply to the court for leave to amend his pleadings in order that the main issue or question or controversy between him and his opponent may be brought forth to ensure a total and complete determination of the issue or controversy in order to avoid multiplicity of suit and so bring finality to litigation. And, the effect of a successful amendment is that the old pleading gives way to the new or amended pleading such that reliance can no longer be placed on the old pleading in the subsequent prosecution of the case. Thus, in **Warner v. Sampson [1959] 1 Q.B. 297** at p. 321, C.A Lord Justice Hodson came clear on the effect of amendment when he stated that:

*"Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried."*

And in **Sneade v Wotherton [1904] 1 KB 295** the court pointed out that:

*"An amendment takes effect not from the date that the amendment is made but from the date the original process was filed."*

Thus, it follows therefore that an amendment which had been carried out in accordance with the provisions of the Rules supplants the pleading which existed before the amendment was effected to the extent that the old pleading was regarded as never been in existence. It implies therefore that in the subsequent prosecution of the case, the court

and all the parties are bound and guided by the amended pleading. Consequently, we hold that the references by Counsel for the Defendants to the Plaintiff's pleading which existed before the filing of the amended writ of summons and the amended statement of claim on the 10th day of May 2016 in an effort to draw conclusions of inconsistency in the Plaintiff's case does not conduce to good and acceptable conduct of the case as a whole and this court roundly rejects that exercise.

Again, Counsel for the Defendants contended, as a ground of Appeal, *"that the Court of Appeal erred in granting judgment for the Plaintiff/ Appellant/Respondent in the light of the finding by the Court that the Plaintiff/Appellant/Respondent failed to indicate the size of the land."* With respect to Counsel, in an action for a declaration of title to land what needs to be proved was not necessarily the size of the land but the boundary of the land being claimed. There is always the temptation to equate the size of the land to the boundary of the land. In instances where the size of a particular land is in issue, then, concrete evidence ought to be adduced to prove the size of the land. However, where the controversy, as in the instant matter, was about the boundary line between the claimants, then there is little value in proving the size of one's land as against marshalling evidence to prove the true boundary line between the respective lands in controversy. In the instant action neither the Plaintiff nor the Defendants gave evidence in proof of the size of the respective land which they claimed; and, this was so because the size of their lands per se was not in issue. What was in issue was the boundary between the two parties. So, neither the Plaintiff nor the Defendants needed to adduce evidence in respect of the size of their respective land. A party is under no obligation to adduce evidence to prove a fact which was not in issue. Cogent evidence was rather expected to be given in proof of matters which are in issue and therefore section 11(1)(4) of the Evidence Act, 1975, NRCD 323 provides that:

> *11. Burden of producing evidence defined*

*(1) For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party.*

*(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.*

It is true that both parties indorsed their respective claim for a declaration of title to land. However, both the statement of claim and the evidence adduced before the trial Court showed, without a shred of a doubt, that the actual claim by the parties was for the determination of the boundary between their respective family land. Once no issue was joined between the parties as to the size of their respective land, there was practically no need for the adduction of evidence to prove a non-issue; that is, the size of the lands. See **Fori vs. Ayirebi and others [1966] GLR 627**. As was pointed out in **Ahadzi & Another vs Sowah & 2 Others [2019-2020] SCLRG 79** at page 94 that

*"The combined effect of sections 11(1), 14 and 17 of NRCD 323, is that, if a party fails to discharge the legal burden and the burden of persuasion (**sic**) in respect of any issue of fact which is upon him, the court is under an obligation to find against him on that issue."*

A re-statement of the legal position is that, if a party fails, on an issue in contention, to adduce credible evidence at the trial to discharge the burden to produce evidence, otherwise known as the evidential burden under section 11(1)(4) of NRCD 323 as well as the burden of persuasion, otherwise known as the legal burden, under section 12 of the Evidence Act, 1975, NRCD 323, the court is under an obligation to rule against that party on the issue in contention. It is a matter of academic significance that section 14 allocates the burden of persuasion; that is, the legal burden whiles section 17 also determines the party who bears the evidential burden; that is, the burden to produce evidence. Sections 14 and 17 for that matter do not create the burden of persuasion and the burden to

produce evidence. The actual creation of these obligations was done by sections 11 and 12 of the Evidence Act.

The impression must not be created as though there is a difference between the legal burden and the burden of persuasion. The two phrases refer to one and the same obligation. On the contrary, the distinction has always been drawn between the legal burden and the evidential burden. This distinction is made clearer by the learned author and editors of Phipson on Evidence (18th ed.), (2013), published by Sweet & Maxwell, United Kingdom. At paragraph 6-02 and 6-03 at pages 160 and 161, the learned author writes that:

> *"The persuasive burden has been referred to as 'the legal burden', 'the probative burden', 'the ultimate burden', 'the burden of proof on the pleadings', or 'the risk of non-persuasion. What is referred to in this work as the persuasive burden is the obligation imposed on a party by a rule of law to prove (or disprove) a fact in issue to the requisite standard of proof. A party who fails to discharge a persuasive burden placed on him to the requisite standard of proof will lose on the issue in question. The persuasive burden is often referred to as the burden of proof, but it is important to keep it distinct from the evidential burden.*
>
> *The evidential burden is sometimes referred to as 'the duty of passing the judge', or 'the burden of adducing evidence'. It obliges the party on whom the burden rests to adduce sufficient evidence for the issue to go before the tribunal of fact. In criminal cases (involving trial by a jury in Ghana) … the judge is obliged to withdraw an issue from the jury where the party on whom the evidential burden rests has failed to satisfy the burden. In other civil cases, the evidential burden may have significance where, by statute, presumption or otherwise, a presumption arises in favour of one party, or certain facts are treated as being prima facie evidence.*

*In both civil and criminal proceedings, the general rule is that the party bearing the persuasive burden will also bear the evidential burden.*

*Where a party has an evidential burden, it may be satisfied either by adducing evidence himself, or by eliciting evidence from the witnesses of his adversary. It is wrong to speak of the persuasive burden shifting during the course of the trial, but writers sometimes speak of the evidential burden shifting during the course of a trial as evidence is led.*

*One effect of the burden of proof is that if the party bearing the burden has not pleaded a positive case, the other party need not plead and prove that alternative states of affairs do not exist."*

In Halsbury's Laws of England, (5th edition), Volume 12 at paragraph 702, the learned authors state that:

*"There are at least two distinct senses in which burden of proof is used, and clarity over which sense is relevant at any given time is essential.*

*The legal burden (or burden of persuasion) is a burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case, or persuading the tribunal of the correctness of a party's allegations. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The incidence of this is usually clear from the statements of case, it usually being incumbent upon the claimant to prove what he contends.*

*The evidential burden (or the burden of adducing evidence) requires the party bearing the burden to produce evidence capable of supporting but necessarily proving a fact in issue; the burden rests upon the party who will fail if no evidence at all, or no further evidence, as the case may be, was adduced by either side. It has been said that the evidential burden shifts from one party to the other as the trial progresses according to the balance of evidence*

*given at any particular stage, but it may be more accurate to say that it is the need to respond to the other party's case that changes."*

At paragraph 447 page 24 of Volume 28, (5th edition), the learned authors again write:

*"A party to legal proceedings is said to bear persuasive (or legal) burden of proof in respect of a particular fact or issue in the cases where the onus is on him to prove that fact or issue to the required standard of proof. … In contrast, a party is said to bear an evidential burden where he is required to adduce evidence that is capable of belief and capable of (if believed) proving the fact or issue in question. … The evidential burden ordinarily lies on the party bearing the persuasive burden in respect of the issue in question, but this is not always the case."*

In ground (f) of the grounds of appeal, Counsel for the Defendants say *"that the Court of Appeal erred in holding that the deficiency in exhibits 1 and 2 by reason of the lack of any form of description could not be so cured by Appellants' long, unchallenged, overt and transparent acts of ownership so as to defeat the interest of the Respondent regarding the specific boundary between Respondent and Appellants"*

With respect to Counsel, the criticism in the ground of appeal is not fair to the Court as it does not represent the finding and the holding in question of the Court of Appeal which had been quoted above. The record shows that the Defendants could not prove acts of possession of the disputed land. That is not to say that the Defendants are not in possession of the land acquired by their ancestor, Togbe Duklui Attipoe. As stated above, the issue between the parties was not about title to the land purchased by Togbe Duklui Attipoe. The issue is about the boundary line between the Plaintiff's family land and the Defendants' family land and particularly, as to whether or not the area of land marked with the yellow stripes on exhibit CE1, the Plan drawn by the Surveyor, falls within the Plaintiff's family land or within the Defendants' family land. The Court of Appeal came

to the conclusion, which we agree with, that the Defendants and their witnesses could not prove, on the preponderance of probabilities, acts of possession of the disputed land as against the evidence of the Plaintiff whose witnesses, being boundary owners of adjoining lands, testified to the fact that, by the known boundary between the Plaintiff's family land and the Defendants' family land, the disputed area of land falls into the Plaintiff's part of the land and not the Defendants' family land. At any rate, as observed herein, the 1938 boundary dispute between Togbe Duklui Attipoe and its subsequent resolution, which in fact, was about the northern boundary of the Defendants' family land and the land of Togbe Lartey Agbeve is completely irrelevant to the main issue in the instant matter and should therefore not be imported into the present boundary dispute between the Plaintiff's family land and the Defendants' family land. This ground of appeal is not made out and it is accordingly dismissed.

**CONCLUSION:**

After reviewing the evidence given before the trial court, we are firmly of the opinion that the judgment of the Court of Appeal is supported by the evidence on record. We therefore dismiss the appeal and affirm the judgment delivered by the Court of Appeal on the 18th day of December 2019.

**S. K. A. ASIEDU**

**(JUSTICE OF THE SUPREME COURT)**

**P. BAFFOE-BONNIE**

**(JUSTICE OF THE SUPREME COURT)**

**M. OWUSU (MS.)**

**(JUSTICE OF THE SUPREME COURT)**

**G. TORKORNOO (MRS.)**

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