

IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL SITTING AT ACCRA
ON THE 25TH DAY OF JUNE, 2004 BEFORE
ANSAH, JA, {PRESIDING} AMONOO-MONNEY, JA AND
TWENEBOA-KODUA, JA.

CA. 49/2003.

1. GLADYS DORMAN]	... PLAINTIFFS/RESPONDENTS
2. ABIGAIL QUAINOO]	

VRS.

1. DIANA FENNING]	... DEFENDANTS/APPELLANTS
2. ARNOLD QUARTEY]	

J U D G M E N T

AMONOO-MONNEY, J.A. - The parties in this case are all blood relations. The two respondents are sisters. The first appellant is the grandaunt of the respondents, the second appellant is the uncle of the respondents and nephew of the first appellant.

2. On 22nd June, 1998 the respondents, as plaintiffs, sued out a Writ of Summons against the appellants, as defendants, in the Circuit Court, Accra claiming –

“(a) Declaration that H/No. A. 234 West Korle Gonno now known as H/No. A. 630/3 Mamprobi, Accra is family property and the Plaintiffs and their siblings have a right to stay (sic) in said house.

(b) Order of perpetual injunction restraining the Defendants, their agents or heirs from interfering with the quiet enjoyment of Plaintiffs and their siblings as family members of H/No. A. 630/3 Mamprobi, Accra.” In their Statement of Defence which was filed on 3rd July, 1998 the appellants counterclaimed against the respondents for -

“(a) An Order of recovery of possession of their rooms occupied by the Plaintiffs in House No. 234 West Korle Gonno now known as House No. A. 630/3 (No. 11) Ayikoi Road Mamprobi, Accra.

(b) Perpetual injunction to restrain the Plaintiffs by themselves their heirs successors, servants, workmen or agents or otherwise howsoever from interfering with the Defendants’ quiet and peaceful possession and enjoyment of House No. 234 West Korle Gonno now known as

House No. A 630/3 Mamprobi, Accra and also known as No. 11

Ayikoi Road Mamprobi, Accra.”

3. The issues that were set down for trial of the case at the court below were:-
 - “(a) Whether or not H/No. 234 West Korle Gonno now known as H/No. A. 630/3 Mamprobi, Accra is family property and thus Plaintiffs and siblings as family members have a right to stay in the said house.
 - (b) Whether or not Plaintiffs are entitled to an order of perpetual injunction restraining the Defendants, their agents or heirs from interfering with the quiet enjoyment of Plaintiffs and their siblings as family members of H/No. A.630/3 Mamprobi, Accra.
 - (c) Whether or not Diana Darku (deceased) ever made any gift of H/No. A. 630/3 Mamprobi to 1st Defendant and one Victoria Mensah (deceased).
 - (d) Whether or not 1st Defendant has any legal right to claim H/No. A. 630/3 Mamprobi as hers.
 - (e) Whether or not the 1st Defendant (sic) and her sister namely Mrs. Mariam Addo can after taking Letters of Administration in respect of their late mother’s Victoria Mensah (deceased) (sic) cause a letter to be written to State Housing Corporation to have name of Diana Darku changed into their joint names.
 - (f) Whether or not the 2nd Defendant and his sister Mrs. Mariam Addo committed fraud by causing H/No. A. 630/3 Mamprobi registered in their joint names.
- and (g) Whether or not Defendants are entitled to their counterclaim.” At the end of the trial the Circuit Court gave judgment for the respondents on 27th February, 2001 holding that “ the house in dispute, House No. 234 West Korle Gonno, is a family house and

that the Plaintiffs have a right to possession just like the defendants. The Plaintiffs are therefore entitled to stay in the said house without hindrance.” The learned trial judge continued:

“In view of above finding I order that the defendants, their agents, servants and assigns be and are hereby restrained perpetually from interfering with the quiet enjoyment of the Plaintiffs, their siblings who, as family members, have a right to stay in that house,”

4. It is from this decision that the appellants have appealed to this Court on the grounds that “the judgment is against the weight of evidence.” The Notice of Appeal indicated that “Further grounds of appeal will be added when the record of appeal is available,” and accordingly on 12th March, 2002 counsel for the appellants filed an additional ground that “The learned Circuit Court Judge erred in holding that house No. 237 (now known as House No. A. 630/3) is family property,” but strangely in his “Written Submissions On Behalf Of The Defendants/Appellants” which was filed on the same day, namely, 12th March 2002, the same counsel for the appellants stated thus –“On Tuesday March 12, 2002 the following additional ground of appeal was filed: The learned Circuit Court erred in holding that House No. 234 West Korle Gonno was allocated to the family then headed by Diana Darku to resettle that family after the destruction of a portion of their house by the 1939 earthquake.”

5. The name of Diana Darku (or Darko) who died in 1964 featured prominently at the trial and a lot of the incidents revolved around her. She was the aunt of the respondents’ grandfather, she was the aunt of the 1st appellant, and the grandaunt of the second appellant. The case of the respondents was that the house in dispute was acquired by their late grandfather, Joseph Oko Fenning, “the only man among his sisters,” a soldier who saw action in Burma and as he was leaving for the theatre of war in Burma the acquisition was made in the name of his aunt, i.e. his mother’s sister, Diana Darku, who was then living in the house, and that the house was one of the estate houses built by the Colonial Government then to house persons who were displaced by the earthquake of 1939. As the evidence unfolded it became obvious, as the trial judge found, at least in respect of the house in dispute in this case, that the Government built the estate houses to resettle households or families. Before the earthquake Joseph Oko Fenning, his aunt Diana Darku, the 1st Appellant, and some others were living at Otublohum. The gist of the case of the appellants was that the house in question was acquired by Diana Darku

and that she made a gift inter vivos of the house to the 1st appellant and her sister, Victoria Mensah, who died in 1981 and who was the mother of the 2nd appellant.

6. I will now refer to portions of the evidence led at the Court below.

In her evidence-in-chief the 1st respondent said:-

“We have sued them (i.e. the appellants) because the defendants have threatened to eject us from our mother’s house. 1st defendant is not the owner of the house. 2nd defendant is not the owner of the house also. Our grandfather, Joseph Oko Fenning bought the house.....My grandfather had to leave to fight in the Burma war. He decided to use the name of his mother’s sister for the house. She was living in the house. Diana Darku whose name was used for the document on the land is dead. My grandfather is also dead. When my grandfather and Diana Darku died, it remained my mother (i.e. Veronica Korkor Fenning), Diana Fenning (i.e. 1st appellant) and Victoria Mensah..... We are now living in a room which was allocated to my mother.” Part of her evidence under cross-examination ran thus –

“Q: You have told this court that the defendants are seeking to eject you from your mother’s house.

A: Yes.

Q: How did your mother acquire this house?

A: It belongs to my mother’s father.

x	x	x	x
x	x	x	x

Q: I put it to you that you have no legal right to come to court to claim property which supposedly belongs to your mother.

A: The property was left to our mother by our grandfather and that is where we are.”

It is note worthy that throughout the cross-examination of the 1st respondent in spite of the evidence she gave there was not even a single suggestion to her as to who, according to the appellants, is the owner of the house in dispute, and further that if indeed Diana Darku made a gift of the house to the 1st appellant and her sister during her lifetime there was no suggestion to her in that regard. PW1 Samuel Oko Fenning, son of Joseph Oko Fenning and uncle of the respondents, cousin of the 2nd appellant and nephew of the

1st appellant (i.e. his father's sister) said as part of his evidence under cross-examination that –

“Q: How did you get to know that your father acquired the house?

A: It was my grandmother Naa Tsitse Darko who told me.

Q: Is she Diana Darku?

A: Yes.

x	x	x	x
x	x	x	x

Q: I put it to you that the house belongs to Diana Darku.

A: I agree. It was because she succeeded my father.” Once again it must be noted that, there was no suggestion to him that his father's aunt, Diana Darku, made any gift of the house inter vivos to anyone.

7. The 1st appellant in her testimony at the trial Circuit Court said –

“I know the house in dispute. It was my aunt by name Diana Darku who bought the

house x x x x x x

Diana Darko did not have a child. She is dead. At the time she died she did not have a

husband. x x x x

Before Diana Darko died she gave the house to me and my sister. Her family members

knew about the gift of the house to us x x x x

The house is mine. x x x x

x x x . The house is not a family property.

x x x 1st plaintiff is living in the house.” She said

further as part of her evidence under cross-examination as follows:-

“Q: In 1939 when the earthquake occurred your family house was destroyed?

A: Yes.

Q: All those who were affected were re-settled.

A: Yes. We were given a place at Mamprobi.

Q: At the time of the earthquake, you, your brother Oko, your mother, Diana Darku and Victoria Mensah were resettled at Mamprobi.

A: Yes.

Q: The eldest was Diana Darko.

A: Yes. She took us there because she arranged for us to get the place.

Q: I believe that the houses were built and given to families whose houses were destroyed.

A: Yes.

Q: When your family took occupation of the house in dispute you were living with your husband.

A: Yes,

Q: You were living with him in a bungalow.

A: We were living in his father's house.

x	x	x	x
x	x	x	x

Q: I put it to you that your rights to house in dispute are no more than the rights of the Plaintiffs.

A: They have no rights over the house. Their mother has (sic) rights over the house.

Q: PW1 has rights over the house.

A: Yes he is called Fenning.

Q: 2nd defendant is not a Fenning.

A: No.”

It is revealing that her own counsel asked her only one question in re-examination which she was unable to answer. There was a deafening silence. The record indicates –

“Re-examination”

“Q: What interest does the mother of the Plaintiffs have in the house?

A: No answer.”

The second appellant, Arnold Quartey, for his part, in his evidence under cross-examination said, in part,

“Q: The Plaintiffs’ mother and her brother PW1 and your father are first cousins.

A: Yes.

Q: They are related to Diana Darko just as you and your sisters are related to Diana Darko.

A: Yes.

x	x	x	x
x	x	x	x

Q: I put it to you that the house was acquired by the family but in the name of Diana

Darko because she was the elder of the children.

A: I would not know that initially.”

DW1 Mrs. Mariam Naa Oyoe Addo, sister of the second appellant, in her evidence at the trial said “ I know that the house belongs to her (Diana Darko).

Diana Darko did not have any child.....The house is not family property. The house is for Diana Darko. All documents on the house bear her name..”

8. There are certain other features of this case that also deserve comment. It would appear that the real reason for the appellants asking the respondents to leave or vacate the rooms they occupy in the house in dispute is not that they are not entitled to live there but that the 1st respondent has misbehaved towards the 1st appellant, a sort of disciplinary measure, and not want of a legal or beneficial interest in the house. Moreover, if, as the appellants claimed, Diana Darko made a gift of the house in dispute to the 1st appellant and her sister who was the mother of the 2nd appellant, before Diana Darko died in 1964, why is it that at least for 17 years after her death the documents on the house continued to be in her name at the offices of the State Housing Corporation? Exhibit 8A which was tendered in evidence at the trial in the court below by the 2nd appellant and which is dated 27th March, 1981 reads in part “Received from Diana Darku the sum of one hundred and fifteen cedis eight pesewas being final payment against House No. 234 W.K.G. Estate.” Again in the course of the evidence of PW1 at the trial on 29th April, 1999 learned counsel for the appellants made this suggestion to him.

“Q: I put it to you that the house **BELONGS** to Diana Darko.

A: I agree. It was because she succeeded my father.” (emphasis mine).

That is not all. At the court below, DW1, who is a sister of the 2nd appellant, in her evidence-in-chief on 20th July, 1999 then being led by learned counsel for the appellants also said - “I know house in dispute.....It was Diana Darku who had her name on the Rent Card. I know that the house **BELONGS** to her”

(emphasis mine). She did not stop there. On 26th October, 1999 still in her evidence-in-chief led by learned counsel for the appellants she repeated –

“The house is not family property. The house is for Diana Darko. All documents on the house bear her name.” Even assuming that the house was the self-acquired property of Diana Darko, mindful though that the trial Circuit Judge made a finding that it was originally acquired as a family property, and I agree with that finding; on the death

intestate of Diana Darko in 1964, the house, by customary law, would be family property.

See **AMARFIO VRS. AYORKOR 14 WACA 554, MILLS VRS ADDY {1958}3 WALR 357 and KWAKYE VRS. TUBA AND OTHERS {1961} GLR (Part II) 535.**

As family property from the date of its acquisition, Diana Darku, by herself, was not competent to make any valid gift inter vivos to anybody.

9. Counsel for the appellants in his arguments in the Statement of Case filed on behalf of the appellants seems to overlook and ignore an important point the learned trial judge made in the judgement. The trial judge said – “There is no proven evidence that the house was acquired by the late Oko Fenning the grandfather of the Plaintiffs as has been alleged by the Plaintiffs. The Plaintiffs’ assertion that their grandfather paid the first instalment toward the acquisition has not been proved. The late Joseph Oko Fenning was one of the five persons who moved to the house when it was first allocated and he continued to be a member of the household until his death.....

.....
I have to emphasise that the Plaintiffs have a right to occupy the room in dispute not because their grandfather paid the first instalment, as claimed, which I have found not to be borne out by the facts, but because the house is family property and Oko Fenning is (sic) a member of that family and also that he was one of the five members of the family who moved from the ruined house after the earthquake to the new house when it was first allocated.”

10. The trial judge made a finding that all the essential requirements of a valid customary gift were not fulfilled in this case, that is, assuming that there was a purported gift. The judge found that for example no “aseda” was paid for the supposed gift and he relied on the cases of **SUMMEY VRS. YOHUNO {1962} 1 GLR 160,** and **AHMAD VRS. AFRIYIE {1963} 2 GLR 344.** See also **ASARE VRS. TEING AND ANOTHER {1960} GLR. 155.**

He actually found that Diana Darku did not make a gift of the house to the 1st appellant and her sister. He said – “I find that the claim by the defendants that the late Diana Darku gifted the house to them is false.” The falsity of this claim of the gift is manifestly and convincingly borne out by the startling fact that when in January, 1998 the appellants and DW1 sued the late mother of the respondents at the Community Tribunal in Osu in respect of the same house they averred in paragraph 3 of their Statement of Claim which

was filed on 23rd January, 1998, a copy of which the appellants tendered at the court below as exhibit 7 that:-

“After the death of Dinah Darko the 1st Plaintiff (i.e. the 1st Appellant) together with the mother of the 2nd and 3rd Plaintiffs (i.e. 2nd appellant and DW1) were the **ONLY SURVIVING CHILDREN** of the said Dinah Darko and **INHERITED THE HOUSE IN QUESTION IN ACCORDANCE WITH GA CUSTOMARY LAW.**” (emphasis mine). This was, as I have already indicated, on 23rd January, 1998. Now about 5 ½ months later these same persons, that is, the two appellants, supported by DW1, this time averred in paragraphs 12 and 13 of their Statement of Defence which was filed on the 3rd of July, 1998 that

- “12. The 1st Defendant states that at the time of the death of Diana Darku she was not survived by any child or widower save Diana Fenning and her sister Victoria Mensah.
13. The 1st Defendant states that in her life time, Diana Darku made a gift inter vivos of the house to Victoria Mensah mother of the 2nd Defendant and herself and they contributed to the payment of the lease purchase as in the Statutory Declaration of the 1st Defendant.” This statutory declaration was not tendered in evidence at the trial. It is obvious that this phantom theory of a gift inter vivos was craftily and cunningly conjured, contrived, constructed, and formulated by the appellants and DW1 between 23rd January, 1998 and 3rd July 1998, a little over 33 years after the death of Diana Darko. No wonder they said at the trial that all the persons who were witnesses to the giving away of the house in dispute are dead. It must also be noted that both the 1st appellant and DW1 had sworn at the trial that Diana Darko at her death was not survived by any child.
11. The learned trial judge, in my opinion, made the proper findings of fact in the areas within his competence and drew the proper inferences warranted by the primary facts that he found had been established. He gave a fair and well-reasoned judgment which I affirm. The appeal of the appellants therefore fails and I accordingly dismiss it.

JUSTICE OF APPEAL

ANSAH, JA - I agree.

**J. ANSAH
JUSTICE OF APPEAL**

TWENEBOA-KODUA,JA - I also agree.

**K. TWENEBOA-KODUA
JUSTICE OF APPEAL**

**COUNSEL - ANTHONY NORVOR FOR APPELLANTS.
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