

**IN THE SUPERIOR COURT OF JUDICATURE**  
**IN THE COURT OF APPEAL – ACCRA,**

**CORAM** - ARYEETAY, JA [PRESIDING]  
ANIM, JA  
APALOO, JA

**H1/144/05**  
**10<sup>TH</sup> MARCH, 2006**

AWUKU KONGLO BOKOR            } ... PLAINTIFF/APPELLANT  
THOMAS KWAKU AMESIMEKU }

V E R S U S

MANKRALO JAMES ASAFO (Dec.) ... 1<sup>ST</sup> DEFENDANT/RESPONDENT  
(Sub. by AMEGEDZRO ASAFO (Dec.) ... 2<sup>ND</sup> DEFENDANT/APPELLANT  
(Sub. by MANKRALO BRENTUO ASAFO IV

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**J U D G M E N T**  
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**APALOO, JA** - This appeal emanates from the judgment of the High Court Ho, dated 15<sup>th</sup> November 1996. The Court was presided by his Lordship G.K. Acquah then a Supreme Court Judge sitting as additional High Court Judge.

The trial judge entered judgment for the Plaintiff against the 1<sup>st</sup> Defendant for a declaration that the Plaintiff is the owner of the Bokor land. While dismissing 1<sup>st</sup> Defendant's counter-claim the trial Judge refused Plaintiff's reliefs for damages and perpetual injunction against the 1<sup>st</sup> Defendant.

The Plaintiff had sought by his writ the following reliefs.

- (a) A declaration that the Defendant was a mere tenant or alternatively a licensee of the Plaintiff in respect of the land in dispute.
- (b) Damages for trespass.
- (c) Perpetual injunction restraining the Defendant's Afloto family, their servants, agents etc. from further felling the Bokor family's oil palms or making any fresh cultivation of the said parcel of land without the consent in writing of the Plaintiff.

By his defence the 1<sup>st</sup> Defendant stated among others that the land the subject matter of the claim devolved on the Mankralo or chief but subject to user by both Plaintiff and Defendant's families respectively. 1<sup>st</sup> Defendant added that the palm trees felled by him were his bona fide property.

The 2<sup>nd</sup> Defendant who joined the suit as Co-defendant by a statement of defence averred particularly by his paragraphs 3, 4 and 5 as follows:-

- (3) The Co-defendant says that the land in dispute, which is known as Dzawor land was founded by his great ancestor by the name Tsrienye.
- (4) The Co-defendant says that the Dzawoe land is bounded as follows:  
On one side by the Gevier tribal land. On one side by the Plaintiff, on one side by the Defendant and on one side by the property of the Co-defendant.
- (5) The Co-defendant says that both he and his predecessors have been in undisputed possession of the said Dzawoe land and have exercised and continue to exercise overt acts of ownership over same without let or hindrance.

Two appeals were filed for determination. The first by 2<sup>nd</sup> Defendant/Appellant and the second by the Plaintiff/Appellant. The first appeal attacked the judgment affecting the 2<sup>nd</sup> Defendant and his claims to the Dzawoe land. His grounds were that the judgment was against the weight of evidence and that the trial judge failed to correctly define the boundaries established between the Plaintiff's Bokor land and the 2<sup>nd</sup> Defendant's Dzawoe land as clearly set out in the case.

The Plaintiff/Appellant complained that

- (a) "So much of the judgment as found that the 1<sup>st</sup> Defendant's predecessors has (sic) consistently accepted that the land was for Bokor." And
- (b) the refusal of the learned trial Judge to award the Plaintiff damages on the ground that the Plaintiff failed to establish that the felling of the palm trees occurred on the Plaintiff's exclusive domain on the land.
- (c) the failure of the trial judge to exercise his discretionary power under Rule 32 of L1. 128 for the purposes of a complete adjudication of all material points of difference between the Plaintiff and Defendant.

The grounds of appeal of the Plaintiff/Appellant repeated particulars contained in his complaints against the judgment with details thereof.

The case for the Plaintiff was that 500 acre land in dispute was given to his ancestor Bokor by a Gevier clan man called Gbettor as payment in kind in return for a loan. Defendant's case was that Gbettor gave the land to Bokor and Afloto together as brothers. Bokor was the Plaintiff's ancestor and Afloto was the ancestor of the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant claimed the land in dispute as his family land and referred to it as Dzawoe lands. He pleaded a number of judgments as having demarcated the boundary between his land and that of the Plaintiff.

In his submissions to this Court the 2<sup>nd</sup> Defendant agreed entirely with the trial Judge when he made the following findings of fact. That the 2<sup>nd</sup> Defendant disputes the western boundary of the Plaintiff's land and that the area in dispute covers 41.7 acres. That the 2<sup>nd</sup> Defendant and the Plaintiff accepted that their western boundary was settled in 1916 in the judgment titled Adjei Letsa Vrs. Dagadu Djame & Anor Exhibit DC1. That the boundary stated in Exhibit CD1 was later confirmed in 1940 by a decision in Adjei Letsa Vrs. Peter Konglo Exhibit F. That the land to the west of Dzogadze road belonged to Adjei Letsa the 2<sup>nd</sup> Defendant's predecessor while the land to the eastern part of Dzogadze road was the property of Peter Konglo the Plaintiff.

These findings were wholly acceptable to the 2<sup>nd</sup> Defendant but he complains nevertheless that the Plaintiff and 2<sup>nd</sup> Defendant are faced with the question of what is the correct boundary between their lands.

In my view the answer to this question has been clearly stated in the judgment. This is what the trial Judge said concerning the boundary.

“Looking at their respective versions of the boundary, it is clear that the difference between the Plaintiff and the 2<sup>nd</sup> Defendant starts from Atitekoe going northwards. For whereas from this Atitekoe the Plaintiff's boundary moves a little westwards up to Oduwti and goes by the old Dzogadze road, up to the place of Evuti, the 2<sup>nd</sup> Defendant's boundary goes straight ahead from Atitekoe through a rock and continues northwards by the Azanukope road up to an Adidoti.”

To confirm the position in respect of this conclusion reached by the trial Judge, he went further to state that:

“Now the 1916 judgment that is Exhibit CD1 is admitted by both Plaintiff and the 2<sup>nd</sup> Defendant as having laid down the correct boundary between their lands. And it is further admitted by both of them that the boundary set down in this 1916 judgment had been accepted and confirmed in two later suits that is Exhibits F and C.”

It is my considered opinion that the trial Judge adequately considered the issue relating to the boundary between the Plaintiff and the 2<sup>nd</sup> Defendant and his conclusions cannot be faulted.

In respect to 2<sup>nd</sup> Defendant’s ground two of his appeal, I have come to the conclusion that having regard to the evidence on record and particularly the Court plan Exhibit CE1 the trial Judge came to the right conclusion contrary to 2<sup>nd</sup> Defendants assertion that the trial Judge failed correctly to define the boundaries established between the Plaintiff’s Bokor land and the 2<sup>nd</sup> Defendant’s Dzawe land. His finding of fact that the disputed area covering 41.7 acres shaded yellow in Exhibit CE1 is the western boundary of Bokor land as settled in the 1916 judgment was based on evidence. Concerning this ground this was the conclusion of the trial Judge.

“And since the Plaintiff’s version of the boundary goes by this Dzogadze road, I accept his version as being in consonance with the boundary settled in the 1916 judgment as later confirmed in Exhibits ‘C’ and ‘F.’ I am therefore satisfied that the western boundary of Bokor land is as demarcated by the Plaintiff and indicated on Exhibit CE1.”

2<sup>nd</sup> Defendant/Appellant’s misgivings concerning the costs awarded against him will be considered later in this judgment. I shall however proceed to deal with ground one of the Plaintiff/Appellant’s appeal.

The historical evidence was clear that Plaintiff ancestor Bokor received 1<sup>st</sup> Defendant’s ancestor Asafo as his guest but did not settle Asafo within any demarcated boundaries on the land in dispute. Asafo and his people lived side by side with Bokor and his people on the land in dispute without any boundaries drawn between the two families for over 300 years.

The trial Judge made the following finding of fact which to my mind is pertinent to ground one of the Plaintiff/Appellant's case.

..... "Although the 1<sup>st</sup> Defendant and his Afloto family are not members of Bokor family and consequently are not owners of Bokor land, there is overwhelming evidence that they were permitted by Bokor to live and eat on the land. The Plaintiff in his evidence before me said that when Asafo and his son Dekunor and his wife were brought to Bokor, the latter.

"Granted land to them and they built their houses, made farms of corn, cassava and other crops." The trial Judge added that

"Since that time, Asafo and his descendants, the 1<sup>st</sup> Defendant, had been on the Land. The Plaintiff lead no evidence, and there is none before me, to the effect that Asafo and his relations were asked to pay tolls or tribute or had indeed been paying any such tolls. They were simply granted permission to make use of the land. It is only where they deny or fail to recognize the title of their overlords the Bokors, that they render themselves liable to be thrown out."

This conclusion reached by the trial judge has not been attacked or questioned.

Arising out of this finding the trial judge concluded further that:

"Since there is overwhelming evidence that both Plaintiffs and 1<sup>st</sup> Defendants have been eating anywhere on the land and since the Plaintiff failed to establish that the palm trees were taken from their exclusive domain on the land, I will refuse the claim for damages and perpetual injunction."

I have no doubt in my mind that the conclusion reached by the trial judge is sound in law.

The award of damages for trespass must be grounded on a finding of fact that the Defendant has indeed committed the tort of trespass. The evidence on record does not in any manner disclose that the 2<sup>nd</sup> Defendant or his ancestors were trespassers. They were and are on Bokor land with the leave and license of the ancestors of the Plaintiff. Indeed the question of trespass was raised before the trial judge for his consideration and by the record I do not perceive any element of trespass to warrant the award of damages for that tort. But most importantly the trial judge having found as a fact that the felled palm trees

were not taken from the exclusive domain of the Plaintiff's land, my view is that an award of damages in the circumstances cannot be justified.

As to the refusal of the trial judge to grant the relief of perpetual injunction against the 1<sup>st</sup> Defendant and his people the peculiar circumstances of this case must be revisited.

Will it be consciouable for an equitable relief of this nature to be granted to the Plaintiff after having lived together with the 1<sup>st</sup> Defendant and his people for 300 years or more. It is noted forcefully that the ancestors of the 1<sup>st</sup> Defendant, as found by the trial judge, were permitted and allowed to live and eat on the land. They were not required to pay any levies or tolls. The purpose of a perpetual injunction is to prevent permanently the infringement of those rights adjudicated upon and to obviate the necessity of bringing fresh action for later infringements of those rights. See **Directors of Imperial Gas Light Coke Co. Vrs. Broadbent [1859] 7 HL Cas 600**. The rights of the Plaintiff determined by the Court is simple and straight forward; the Plaintiffs are the land owners but the Defendants are in possession. These possessionary rights by the Defendants maintained over 300 years should not be disturbed by an injunction. In my view it is rather too late by years to disturb such a possessionary right.

In a case that has been on the list for 25 years, costs of ₦1,200,000.00 against 1<sup>st</sup> Defendant and ₦950,000.00 against 2<sup>nd</sup> Defendant awarded by the Court in my view is stretchng judicial generosity to it limit. I am unable to review the costs mulcted against the Defendants. The appeal by the 2<sup>nd</sup> Defendant/appellant fails as well as that of the Plaintiff/appellant. In the circumstances the judgment of the lower Court is affirmed.

**R.K. APALOO**  
**JUSTICE OF APPEAL**

I agree.

**B.T. ARYEETAY**  
**JUSTICE OF APPEAL**

I also agree.

**S.Y. ANIM**  
**JUSTICE OF APPEAL**

**Lawyers - Mr. W.A.N. Bossman for Plaintiff/appellant.**

**Mr. Alfred Agbesi for 1<sup>st</sup> Defendant/Respondent.**

**Mr. Charles Hayibor for 2<sup>nd</sup> Defendant/Respondent.**

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