THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 20TH DECEMBER 2022 CORAM: HIS HONOUR YAW POKU ACHAMPONG

SUIT NO.: C1/11/2022

KWABENA AGYAPONG ……. PLAINTIFF

VS

1. KOJO SAARA ……. DEFENDANT

2. ABENA DANSOWAA

PARTIES PRESENT

JUDGMENT

Plaintiff herein filed a writ of summons on 06th May 2022 seeking the following reliefs against Defendants herein, jointly and severally:

1. Declaration of title, ownership and recovery of possession of all that piece or parcel of marshy farmland which is situate, lying and being at a place commonly known and called Abrobem at Treposo and shared common boundaries with the properties of Kofi Atwedie(deceased), Op. Asiedu, Dunkwa-Awaso Railway line and another piece of farmland the 1st defendant has been laying adverse claim to.
2. Damages for trespass.

3. An order of perpetual injunction restraining the defendants herein, their agents, servants, successors in title etc from interfering with the plaintiff's peaceful enjoyment of the land in dispute.

On 23rd August 2022, Plaintiff herein filed a motion on notice for judgment in default of defence against Defendants herein.

In the affidavit in support of the said motion, the following is deposed to.

"...

3. That on 10/05/2022, the 1st and 2nd defendants/respondents filed conditional appearance to my writ and on 17/05/2022, they followed it up with a motion supported with an affidavit praying this honourable court to strike out the suit for lack of jurisdiction.

4. That on 22/06/2022, this honourable court dismissed the defendants/respondents said application and as rules of this honourable court demands, the respondents should have filed their statement of defence to my writ.

5. That the defendants/respondents have however not done so up to this date.

6. That for the avoidance of doubt, I attach herewith a photocopy of a search I conducted at the Registry of this court in respect of this claim which proves that the respondents have indeed failed to file their statement of defence as required of them to do.

7. That since the statutory period for filing their statement of defence has elapsed without the defendants/respondents doing so, I presume that the defendants/respondents have no defence to my claims.

8. In the circumstance, I am praying this honourable court to enter judgment for me as against the 1st and 2nd defendants/respondents herein in default of defence.

..."

Defendants filed affidavit in opposition in which 1st Defendant deposed to the following:

"...

2. That I am filing this process for myself and on behalf of 2nd Defendant/Respondent.

3. That we have been served with Plaintiff/Applicant's Motion paper together with the accompanying Affidavit in Support and I am vehemently opposed to the grant of same.

4. That to date we have not been able to file our Statement of Defense[sic] due to ill health on my part.

5. That we contend that we have strong defense[sic] to Plaintiff's action.

6. That in the circumstances we pray that leave be granted us to enable us file our Statement of Defense[sic] to contest this matter.

…"

On the return date of the motion, Defendants did not turn up in Court. The Court heard the plaintiff on the said motion.

A perusal of the records in this case confirms the depositions in the affidavit in support of the motion as regards paragraphs 3 and 4.

The time frames as provided by the rules of procedure guide us to have organized affair. However, owing to vicissitudes of life, one may not be able to follow the time requirements stricto sensu.

In re Coles and Ravenshear [1907] 1 K.B.1 at p. 4, C.A., Collins M.R. gave the following dictum which I find to be pertinent to the analysis here, to wit :

"*Although I agree that a Court cannot conduct its business without a code of procedure, I think that the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress, and the Court ought not to be so far bound and tied by rules, which are*

after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case."

In fact the rules of court require that the rules of court should be interpreted to ensure that as much as possible all matters in dispute are completely and finally dealt with and to avoid multiplicity of suits. See Order 1 rule 1(2) of the *High Court(Civil Procedure) Rules*, 2004(CI 47).

Therefore, when challenges such as as regards compliance with time limits arise, a party's case cannot be thrown out simpiciter for non-compliance with timelines.

Order 81 of CI 47 states:

(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall not be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order in it.

(2) The Court may, on the ground that there has been such a failure as stated in subrule (1), and on such terms as to costs or otherwise as it considers just

(a) set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein; or

(b) exercise its powers under these Rules to allow such amendments to be made and to make such order dealing with the proceedings generally as it considers just.

When Defendants had defaulted in filing their Statement of Defence, Plaintiff filed a document with the caption: "MOTION ON NOTICE FOR DEFAULT JUDGMENT". Plaintiff indicated on the motion paper that he was applying for "judgment in default of default[sic]...". When the motion was to be heard in Court, 2nd Defendant was present in

Court in her own right and as representing 1st Defendant. Defendants had not filed their Statement of Defence.

The Court noted the following:

> "Plaintiff has filed a document captioned "MOTION ON NOTICE FOR DEFAULT JUDGMENT" but it is not clear on the motion paper as to what he is seeking before the court and what has been stated on the motion paper does not make sense."

The Court proceeded to rule as follows:

> "The "MOTION ON NOTICE FOR DEFAULT JUDGMENT" filed by Plaintiff on 21st July 2022 is struck out as irregular as before the Court in the light of the foregoing reasons"

Subsequently, Plaintiff filed "Application for Directions". On the return date for the "Application for Directions", the Court noted as follows:

> "There is no Statement of Defence filed but Plaintiff has filed 'Application for Directions'."

The Court then proceeded to give the following ruling:

> "I do not see the basis of filing Application for Directions when there is no Statement of Defence filed. The Application for Directions filed on 05th August 2022 is hereby struck out as incompetent, frivolous, irregular and gross abuse of the court processes."

It is worth mentioning that Defendants were present in Court when the court gave the above ruling on the said "Application for Directions".

Then on 23rd August 2022, Plaintiff filed the motion for judgment in default of defence as above referred to. Plaintiff captioned that motion too: "MOTION ON NOTICE FOR

DEFAULT JUDGMENT". As at the time the motion was being heard, Defendants had not filed their Statement of Defence. Defendants, having filed Affidavit in Opposition as referred to above, failed to appear in Court to respond to the motion. They also did not attach any intended Statement of Defence to their Affidavit in Opposition.

The Court, having read, the motion paper and the affidavits, ruled as follows:

> "The application which with its intent and purpose is an application for judgment in default of defence is hereby granted as prayed for by Plaintiff herein. As this is a land case and judgment in a land case is judgment in rem, Plaintiff will have to mount the witness box and give evidence to prove his title. Further, Plaintiff will have to give evidence to assist the Court to assess damages, should Plaintiff become successful in proving his claims. Plaintiff is given up to two weeks from today to file his Witness Statements together with any documents that he relies on in this case."

For the sake of clarity, I produce verbatim the salient portions of the witness statement of Plaintiff:

> "...
>
> 3. I own the marshy piece of farmland in dispute. I had it as a gift in 2014 from my mother called Abena Mary
>
> 4. It formed an integral part of her larger piece of farmland that was gifted to her by her late father called Op. Ntekuri. The entire land so gifted by Op. Ntekuri was originally owned by him because he was the first to cultivate it from its virgin state many years ago.
>
> 5. The land is at a place commonly known and called Abrobem at Treposo and it shares common boundary with the properties of late Op. Kofi Atwedie, Op. Asiedu, Dunkwa-Awaso railway line and another piece of farmland, 1st defendant is laying adverse claim to.

6. I must disclose at this point that Op. Ntekuri ordered his younger brother called Op. Agyapong to show my mother the land and so when the time to do so came, Op. Agyapong instructed his son called James Fordjour to do the demarcation for her and he rightly did so.

7. When it was gifted to me in 2014, I allowed the land to lie fallow for some time until 2021 farming season when I cultivated a portion of it into food crops, and I was not challenged by anybody.

8. During the 2022 farming season, I made a new farm on this marshy land and planted maize therein.

9. The defendants who apparently claimed to own the land(though adverse) also planted maize in my new farm, and in the process all the maize so planted were destroyed.

10. I wish to state that my mother has once litigated over her portion of the land with 1st defendant before in the same court but the area in dispute (the marshy portion) was never part of that litigation.

11. That in that litigation, the 1st defendant had judgment as against my mother and she has since appealed to the appeals court in Cape Coast against that judgment.

12. I wish to state that the marshy piece of land in dispute is my personal property and that the 1st defendant is trying to take advantage of his success in that case over my mother to claim the area that never formed part of their earlier dispute.

..."

Plaintiff called two witnesses both of whom corroborated his evidence that the land in dispute herein was gifted to him.

Section 7(1) of the *Evidence Act* states:

Corroboration consists of evidence from which a reasonable inference can be drawn which confirms in some material particular the evidence to be corroborated and connects the relevant person with the crime, claim or defence.

In *Nunoo v Ataglo* (J4 73 of 2018) [2020] GHASC 49 (28 July 2020); Dordzie JSC stated, in reference to the case of *Mondial Veneer (GH) Ltd. V Amuah Gyebu XV* [2011]1SCGLR 466, that:

This action being an action in which the plaintiff is asserting title to the disputed land, the law requires that she produces persuasive evidence establishing her root of title, her mode of acquisition and overt acts of possession.

Civil cases of this nature are generally decided on the preponderance of the probabilities as stipulated in section 12(1) of the *Evidence Act,* 1975(NRCD 323) which states:

Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

Section 12(2) of NRCD 323 defines "preponderance of the probabilities" and it states:

"Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.

In *Serwah v. Kesse* [1960] GLR 227 at 228, the Court held that the proposition that the plaintiff in a land case must prove his case beyond reasonable doubt is not a correct statement of the law. Thus, the rule that in land cases an especially high standard of proof is required does not justify the burden of proof in civil cases being equated with the burden in criminal cases. However, proof in a land matter must be clear enough and I dare say, must be sacrosanct as the outcome may be judgment in rem.

There is this other principle generally applied to civil cases and it is that the plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case; see *Kodilinye v. Odu* (1935) 2 WACA 336 at 337 and also *Odametey v. Clocuh* [1989-90] 1 GLR 14, SC. The legal authorities have further held that conflicts in the defendant's case do not relieve the plaintiff of the burden on plaintiff to prove his case; and this is so even where those conflicts create doubt in the defendant's case.

In *Barimah Gyamfi v. Ama Badu* [1963] 2GLR 596 @ 598 Ollennu JSC stated:

> "*It must be observed from the outset that there is no onus upon the defendant to disprove a claim made by a plaintiff, so that, however, conflicting or unsatisfactory his evidence may be, the same cannot avail the plaintiff; evidence given by the defence only becomes important in a case either where it can upset the balance of probabilities which the plaintiff's evidence might have created in the plaintiff's favour, or where it tends to corroborate evidence of the plaintiff, or tends to show that evidence led on behalf of the plaintiff is true.*"

Plaintiff has demonstrated his root of title. Defendants did not adduce evidence to counter the evidence of Plaintiff as regards his title to the land. However, you do not come to a land court with mere rhetoric; ideally you ought to produce cogent documentary evidence to prove your claim. In the absence of any such document should you prove that the transaction culminating in your acquisition of title to the land qualifies to be under the exceptions provided under the law. If you are going by oral grant under customary law, then the evidence must be unequivocally clear about the customary processes that culminated in the transfer of title such as leading evidence on *aseda* or thanksgiving. Also, customary law should be specifically pleaded and evidence led on it, if one wishes to rely on customary law. See section 54 of the *Courts Act*, 1993(Act 459) as amended, on choice of law.

Section 1 of the *Conveyancing Act*, 1973(NRCD 175) states:

(1) A transfer of an interest in land shall be by a writing signed by the person making the transfer or by his agent duly authorised in writing, unless relieved against the need for such a writing by the provisions of section 3.
(2) A transfer of an interest in land made in a manner other than as provided in this Part shall confer no interest on the transferee.

Section 2 of NRCD 175 states:

No contract for the transfer of an interest in land shall be enforceable unless—
(a) it is evidenced in a writing signed by the person against whom the contract is to be proved or by a person who was authorised to sign on behalf of such person; or
(b) it is relieved against the need for such a writing by the provisions of section 3.

Section 3 of NRCD 175 states:

(1) Sections 1 and 2 shall not apply to any transfer or contract for the transfer of an interest in land which takes effect—
(a) by operation of law;
(b) by operation of the rules of equity relating to the creation or operation of resulting, implied or constructive trusts;
(c) by order of the court;
(d) by will or upon intestacy;
(e) by prescription;
(f) by a lease taking effect in possession for a term not exceeding three years, whether or not the lessee is given power to extend the term;
(g) by a licence or profit other than a concession required to be in writing by section 3 of the Concessions Ordinance (Cap. 136);
(h) by oral grant under customary law.

(2) Sections 1 and 2 shall be subject to the rules of equity including the rules relating to unconscionability, fraud, duress and part-performance.

NRCD 175 has been repealed by the *Land Act*, 2020(Act 1036). See section 282(1) of Act 1036. However, according to Plaintiff, he acquired the land in the year 2014.

Section 282(2) and (3) of Act 1036 state:

(2) Despite the repeal of the enactments in subsection (1), Regulations, by-laws, notices, orders, directions, appointments or any other act lawfully made or done under the repealed enactments and in force immediately before the coming into force of this Act shall be considered to have been made or done under this Act and shall continue to have effect until revoked, cancelled or terminated.

(3) An instrument or a document made or issued under the repealed enactments shall continue to be valid under this Act until otherwise revoked.

Therefore the law applicable as regards the transfer of land in this case is as provided by NRCD 175 above.

See sections 34 – 36 of the *Land Act* on the current position of the law on the above as was in the repealed *Conveyancing Act*.

Abban J in *Baah Ltd v. Saleh Brothers*[1971] 1GLR 119 observed as follows:

"It can therefore be seen that, on the whole, the plaintiffs simply put forward allegations of indebtedness in their statement of claim and repeated the same before the referee. It is well established that where a party makes an averment in his pleadings and it is denied, that averment cannot be sufficiently proved by just mounting the witness-box and reciting that averment on oath without adducing some sort of corroborative evidence. When delivering his

judgment in the case of Majolagbe v. Larbi [1959] G.L.R. 190, Ollennu J. (as he then was) at page 192 had this to say:

> *"Here I may repeat what I stated in the case of Khoury and Anor. v. Richter on this question of proof. That judgment was delivered on the 8th December, 1958, and the passage in question is as follows: -'Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness-box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true'."*

This opinion of the law was not only approved but also stressed by the Court of Appeal in its judgment in the case of Norgah v. Quartey, Court of Appeal, 15 May 1967, unreported; digested in (1967) C.C. 115.

In these circumstances, I am unable to say that the plaintiffs are entitled to the relief sought on the evidence before the referee. The evidence is not sufficient to satisfy the mind and the conscience of any reasonable referee and for that matter any reasonable judge so as to convince him to venture to act upon that conviction in favour of the plaintiffs. The referee was therefore justified in recommending that the plaintiffs' claim should be disallowed."

Section 10(1) of NRCD 323 defines "Burden of Persuasion" as follows:

> *For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.*

Section 10(2) of the *Evidence Act* states that:

The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

Section 11(1) of NRCD 323 defines "Burden of Producing Evidence" as follows:

For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.

Section11(4) of NRCD 323 states:

In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.

A judgment in a land case is judgment in rem. It therefore behoves a person seeking such a judgment to produce highly cogent evidence to prove his claim. A land one is laying claim to, should be clearly defined. One does not merely mention those he shares boundaries with and leave it at that. One needs to provide a site plan or a kind of map that will inform the court clearly and distinctly the particular piece or parcel of land one is laying claim to in court.

I do not see any basis to grant the reliefs of Plaintiff. That is not to say that he is not entitled to the land in dispute. But his case as presented to the court does not sufficiently fulfil the requirements as regards proof in law, particularly in a land case such as this. See the dictum of Ollennu J(as he then was) in *Majolagbe v. Larbi* supra which he earlier stated in *Khoury and Anor. v. Richter* supra. Plaintiff may take a cue from this judgment and have his title regularized in accordance with law so that he may be in the position to prove his title legally should any dispute arise as regards the land.

I hereby dismiss all the reliefs endorsed on the writ of summons.

(SGD)

HH YAW POKU ACHAMPONG

CIRCUIT COURT JUDGE

20/12/2022