IN THE CIRCUIT COURT HELD AT AMASAMAN – ACCRA ON WEDNESDAY THE 26TH DAY OF OCTOBER, 2022 BEFORE HER HONOUR ENID MARFUL-SAU, CIRCUIT COURT JUDGE

SUIT NO:C1/28/19

ERIC AKROFI DARKO
H/NO. H15
OFANKOR …
PLAINTIFF

VRS.

NANA AMA APPIAH …
DEFENDANT

_____

_____

PARTIES: PLAINTIFF PRESENT
DEFENDANT PRESENT

COUNSEL: SAMUEL OFOSU ESQ. FOR PLAINTIFF ABSENT
NANCY TETTEH ESQ. FOR DEFENDANT ABSENT

JUDGMENT

By a Writ of Summons and Statement of Claim filed on 30th January, 2019, Plaintiff claims against Defendant the following reliefs:

a) "Declaration of title to all that piece or parcel of land situate, lying and being at Ofanko in Accra containing an approximate area of 0.08 Acre

or 0.04 hectare more or less and bounded on the North-West by Lessor's land measuring 100.2 feet more or less, on the North-East by a proposed road measuring 35.1 feet more or less, on the South-Est by Lessor's land measuring 100.0 feet more or less, and on the South-West by Lessor's land measuring 35.0 feet more or less.

b) Recovery of possession of the disputed land.

c) An order for perpetual injunction restraining defendant herein, his agents, assigns, workmen, representatives, etc. from interfering with plaintiff's rights of title of ownership to the land which is the subject matter of this suit.

d) General damages for trespass.

e) GH¢1,200.00 being total cost of five boundary pillars unlawfully destroyed by defendant herein."

It is the case of Plaintiff that somewhere in the year 2016, he acquired the land in dispute from one Gloria Sena. According to him, the said Gloria Sena also acquired the land from Nii Kortey Boi II, Ofankor Mantse, head and lawful representative of the Awulemonaa family of Ofankor. Plaintiff says that Glorai Sena was given an indenture and he is the process of changing ownership to his name. According to him, he has commenced construction on the land and in recent times the Defendant has encroached on the land and destroyed five boundary pillars worth GH¢1,200.00, hence the instant action.

Defendant entered Appearance in person on 28th February, 2019 and filed a Statement of Defence on the same day. She contends that she bought her land from Asafoatse of Ofankor in 2004 at a consideration of GH¢1,200.00. According to her she paid a further amount of GH¢2,500.00 to the king of Ofankor represented by Korley. According to her, she was given another land after hers was sold to a different person. She says that she was not

given an indenture but rather a receipt for paymemt. Defendant contends that in the past years, Plaintiff who is an agent of Korley has been bringing different people to her land which always turns into a quarrel. She says that she always tells the people that she has bought the said land. She says that Plaintiff is developing a piece of land close to hers and has encroached on a portion of her land and destroyed a single room, wood, stones and other items valued at GH¢3,060.00. According to Defendant, she reported the matter to the Ofankor Police and was directed to the Police Headquarters and she went to the site with Police officers and pictures were taken. She says that the Plaintiff was arrested and while the matter was being determined, she was served with the instant writ.

Plaintiff filed a Reply on 15th March, 2019, according to him, it was Defendant who encroached on his land and destroyed the blocks laid. He states that it was rather Defendant who caused some individuals to destroy his boundary pillars and following his resistance the matter ended at the Police Station. On 3rd July, 2020, Defendant appointed counsel and on 7th August, 2020, Plaintiff did so as well.

Pleadings closed and on 25th March, 2019 this court differently constituted set down the following issues for trial:

1. "Whether or not the land in dispute belongs to the Plaintiff or Defendant.
2. Whether or not the said Gloria Sena also lawfully acquired the said land from Nii Kortey Boi II (Ofankor Mantse) Head and Lawful representative of the Awulemonaa Family of Ofankor.
3. Whether or not defendant has encroached on plaintiff's land.
4. Whether or not plaintiff is entitled to his claim."

The burden of proof in civil matters is on the preponderance of probabilities. Section 12 (2) of the **EVIDENCE ACT, 1975 (NRCD 323)** defines proof by a preponderance of the probabilities as follows:

> *"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."*

It is trite law that in a civil case, where a party sues for a declaration of title to land and an order for perpetual injunction, the onus is on the party to prove on a balance of probabilities ownership of the land in dispute. The burden of persuasion is therefore on the party who claims title to land.

See.

ADWUBENG V. DOMFEH (1996-1997) SCGLR 660;

JASS CO LTD & ANOR V. APPAU & ANOR (2009) SCGLR 265 AT 271;

NORTEY (NO 2) V AFRICAN INSTITUTE OF JOURNALISM AND COMMUNICATION & ORS (2013-2014) SCGLR 703 AT 724.

I shall consider the issues together. Plaintiff testified that in 2016 he purchased land from Gloria Sena (PW1) who also purchased same from Nii Kortey Boi II, head and lawful representative of the Awulemonaa family of Ofankor. According to him, he paid an amount of GH¢10,000.00 for the land and was issued with a receipt. According to him, his grantor (PW1) gave him an indenture and he was in the process of effecting change of ownership to his name. He testified that he built a two-bedroom house on the land. He stated that the Defendant is the owner of a piece of land he shares a boundary with but has recently encroached on his land. He tendered as *Exhibit A*, a receipt of payment and *Exhibit B* an indenture between Nii Kortey Boi II and Gloria Sena.

PW1 was Gloria Sena. She testified that in 2016, she sold the land in dispute to the Plaintiff. She stated that they are in the process of effecting a change of ownership of the land from her name to that of Plaintiff.

Korley Kortei, PW2 also testified that he was involved in the original sale of the land to PW1 acting as a representative of the Ofankor Mantse, Nii Kortey Boi II. He testified that he was also involved in the sale of Defendant's land, and he knows as a fact that she shares a boundary with the Plaintiff.

Defendant also claims ownership of the land. According to her, where she currently occupies was reallocated to her by Korley and she graded the land at her own cost to her satisfaction. She indicated that the Plaintiff encroached on her land and destroyed a single room she built. She tendered as *Exhibit 1* an indenture between Samuel Ashie Neequaye and herself.

I must add that the said *Exhibit 1* has missing pages hence this court does not have the full import of the said document.

To begin my assessment of the evidence before me, it is important to comment on and evaluate certain pieces of documentary evidence as far as their admissibility is concerned.

Section 32 (1) and 32(6) of the Stamp Duty Act, 2005 (Act 689) provide as follows:

> *"**32 Admissibility of insufficiently stamped or unstamped instrument***
>
> *32 (1) Where an instrument chargeable with a duty is produced as evidence*
>
> *(a) In a Court in a civil matter, or*
>
> *(b) Before an arbitration or referee*
>
> *the judge, arbitrator or referee shall take notice of an omission or insufficiency of the stamp on the instrument.*
>
> *…*
>
> *32(6) Except as expressly provided in this section, an instrument*

(a) executed in Ghana

(b) executed outside Ghana but relating to property situate or to any matter or thing done or to be done in Ghana.

shall except in criminal proceedings, not be given in evidence or be available for any purpose unless it is stamped in accordance with the law in force at the time when it is first executed."

Clearly then, the law places an obligation on a party who seeks to rely on an instrument intended to be produced in Court as evidence to ensure that same is duly stamped and the appropriate duty paid. This is a mandatory requirement which cannot be derogated from.

It was held further in the case of **THOMPSON V. TOTAL GHANA [2011] 34 GMJ 16 SC** thus:

'If inadmissible evidence has been received (whether with or without objection), it is the duty of the judge to reject it when giving judgment, and if he has not done so, it will be rejected on appeal, as it is the duty of courts to arrive at their decision upon legal evidence only.'

(*See also* ***NARTEY v. MECHANICAL LLOYD ASSEMBLY PLANT LIMITED [1987-88] 2 GLR 314***)

Finally, in the case of **LIZORI VS. BOYE SCHOOL OF DOMESTIC SCIENCE AND CATERING [2013-2014] SCGLR 889**, the supreme Court determined as follows:

'The provision in Section 32 of Act 689 was so clear and unambiguous and required no interpretation. Either the document has been stamped and appropriate duty paid in accordance with the law in force at the time it was executed, or it should not be admitted in evidence. There was no discretion to admit it in the first place and order the party to pay the duty and penalty after

judgment. Thus, the trial court would have been perfectly justified to reject the receipts without stamping'.

The conclusion from the above statue and case law is that the failure to stamp a document chargeable with stamp duty renders a document inadmissible in evidence and the Court does not have a discretion to admit same.

This Court has critically examined *Exhibits A* and *B* of Plaintiff and is satisfied that they have not been stamped in accordance with the Stamp Duty Act of 2005. Therefore, on the strength of Act 689 and the judicial decisions quoted supra, I find that the aforementioned Exhibits are inadmissible in evidence to prove the averments of the Plaintiff, same shall thus be disregarded.

In order to assist the court, determine this matter, an order was made for a Composite Plan to be prepared. The composite plan was duly prepared. (See. **MADAM COMFORT OFORI VRS KWAME APPENTENG, CIVIL APPEAL NO. J4/ 17/ 2017 dated 6TH DECEMBER, 2017**, Supreme Court, unreported).

From the Composite Plan, the land surveyed as shown on the Site Plan of Plaintiff's grantor's site plan is shewn edged yellow. The land as shewn by Defendant's site plan is shewn edged purple. It is apparent from the Composite Plan that Plaintiff's land as contained in his site plan falls within that of Defendant's land as contained in her site plan. The land in dispute is that shewn edged yellow on the composite plan.

A consideration of the area of the land in dispute from the Writ shows that the land of Plaintiff is 0.08 Acre while *Exhibit 1* shows that the area of Defendant's land is 0.14 Acre. During cross examination, PW2 testified that both Plaintiff and Defendant's land measure 100x35ft however Defendant encroached on Plaintiff's land about 15ft making her land 100x50ft. The following ensued during cross examination of PW2 by Defendant:

"**Q:** I put it to you that you did not replace the land with half plot but you replaced it with full plot

A: It is not true. Your plot size is 35x100. PW1 has 35x100, Plaintiff was having 35x100 and PW1 sold her land to Plaintiff to have a full plot. You still have your half plot 35x100 and you have encroached into Plaintiff's land."

From the evidence of PW2, Plaintiff's land should be larger than that of Defendant. The land in dispute is what Plaintiff is said to have purchased from PW1 shewn yellow on the composite plan. I consider that Defendant's land shewn by her site plan edged purple is actually larger than the land in dispute. PW2 admits that it was his surveyor who demarcated Defendant's land for her but what he demarcated was 35x100ft. What the evidence before this court fails to explain is how come the area of Defendant's land on her site plan is 0.14 Acre and that of Plaintiff is 0.08 Acre yet PW2 insists that both lands are 100x35ft. The testimony therefore that Defendant encroached on Plaintiff's land with about 15ft is not supported by the documentary evidence before this court.

Defendant testified that she was in possession of the land and Plaintiff caused his mason to remove a platform she had made for her four-bedroom house. During cross examination of Plaintiff by Defendant, the following ensued:

"**Q:** I put it to you that the platform I made to flow my 4 bedroom, you caused your mason to remove it

A: It is not true. When I bought the land, you had put 2 single rooms on the land. I hired the services of an excavator and graded the land because the place was hilly and after I graded the land I noticed Defendant was constructing trenches for foundation and I stopped her.

The 4 bedroom the Defendant is talking about is after my lawyer obtained injunction. The Defendant went behind the court to flow her building whereas I was not doing anything on the land."

Defendant testified that the land was hilly, and she graded the land upon being allocated. Plaintiff however indicated that he was the one who graded the land. During cross examination of PW2 he stated as follows:

"**Q:** Your surveyor was the one who demarcated the plot for me, the place was hilly, and I contracted someone to grade the land to level it
A: I know the place is hilly. The surveyor gave her 35x100. She graded the land."

This is clear corroboration by Plaintiff's own witness of the testimony of Defendant that she was the one who graded the land. In the case of **MANU V NSIAH[2005 -2006] SCGLR 25,** it was held that:

"Where the evidence of a party on a point is corroborated by the witnesses of his opponent, while that of his opponent on the same issue stands uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated evidence in preference to the corroborated one unless for some good and apparent reason the court finds the corroborated version incredible, impossible or unacceptable."

I therefore find that it was the Defendant who was first in time on the land, and she was the one who in fact graded the land. In the case of **MENSAH v. AHODJO [1961] GLR 296** it was held that:

"Where a defendant is in possession of land, a plaintiff who sues in trespass must prove that he has a better title than that of the defendant."

In this case, neither party have legal title to the land in dispute, hence there is no conclusive evidence of ownership of the land in dispute before the court. See: Section 111 of the **LAND ACT, 2020, (ACT 1036)**.

In **GEORGE KWADWO ASANTE & ANOR VRS MADAM ABENA AMPONSAH & ANOR, CIVIL APPEAL NO. J4/64/2021** dated 20th January, 2022, the Supreme Court held as follows:

"In an action for declaration of title the onus is heavily on the plaintiff to prove his case. If the plaintiff failed to discharge the onus on him and also failed to make a case for the reliefs sought, then he could not rely on the weakness of the defendant's case to ask for relief."

Also, in **AWUKU V TETTEH [2011]1 SCGLR 366;** the court held as follows:

"In an action for a declaration of title to land the onus was heavily on the plaintiff to prove his case. He must, indeed, show clear title. He could not rely on the weakness of the defendant's case. For a stool or family land to succeed in an action for declaration of title, it must prove its method of acquisition conclusively, either by traditional evidence or by overt acts of ownership exercised in respect of the land in dispute. (Odoi v Hammond [1991] 1 GLR 375 CA applied."

Defendant's testimony is that she was in possession of the land when Plaintiff encroached on same and informed her that PW1 had sold same to him, Plaintiff went ahead to destroy a single room she had put up on the land. Plaintiff stated as follows during cross examination:

"**Q:** I put it to you that you destroyed my building. I had a single room on my plot and you destroyed it.

A: Yes. I destroyed a structure but it was not a single room. It was a 60 block structure. The issue is that Defendant's building projected unto my land. I warned her to stop but she refused. Meetings were called to address that and you were asked to take 8ft out of the 15ft you have encroached in so that I take the 7ft but you refused. You invited me to the Police Headquarters and I submitted my documents to them. We were asked to go back to our grantors to intercede in settlement, the grantor asked me to call the Defendant, Defendant was called severally but she did not turn up and that is why I brought the matter to court."

I note from the Extract from Station Diary tendered by Defendant that she made the report to Police that her building had been damaged on 24th December, 2018. Plaintiff also contends that Defendant encroached on his land and destroyed five boundary pillars estimated at GH¢1,200.00. No further evidence has however been led in proof of this claim by Plaintiff. In the case of **YORMEWU v. AWUTE AND OTHERS [1987-88] 1 GLR 9** it was held as follows:

"It was settled law that when at the close of a case the judge came to the conclusion that the plaintiff's case was weak and that of the defendant's too was weak, the judge could not prefer the plaintiff's weak case to that of the defendant and it would be wrong to grant to the plaintiff the reliefs he sought. Where the defendant did not call any evidence at all the position would not be different unless there was a counterclaim. In which case, the evidence which would be require from the defendant, would be the evidence to establish the counterclaim and not evidence in rebuttal of the plaintiff's claim…"

Also, in **DUAGBOR AND OTHERS v. AKYEA-DJAMSON [1984-86] 1 GLR 697** it was held as follows:

> *"The evidence adduced by the plaintiff to support the title of the vendor was most unsatisfactory and that of his witness was weak and tended to support the contention of the co-defendant in certain respects. The trial judge in the circumstances ought to have applied the well-established principle that where the evidence was unsatisfactory the judgment should be in the defendant's favour on the ground that it was the plaintiff who sought relief but had failed to prove that he was entitled to what he claimed. Frempong II v Brempong II (1952) 14 WACA 13 cited."*

I consider the case of Plaintiff in support of a declaration of title in respect of the land in dispute to be weak. As the Defendant does not have a counter claim, Plaintiff bore the burden of proving his case on a preponderance of probabilities. I consider that having failed to do so; I am unable to find that Plaintiff has led sufficient evidence to meet the threshold to merit a declaration of title in his favour. This court is thus not in a position to prefer Plaintiff's weak case simply because the Defendant's was also weak. On the basis of the foregoing reasons, I find that Plaintiff's claim fails in its entirety, and I so hold. I shall make no order as to costs.

H/H ENID MARFUL-SAU

CIRCUIT JUDGE

AMASAMAN