

**IN THE CIRCUIT COURT HELD AT KUMASI (KMA) ON MONDAY THE 31ST
DAY OF OCTOBER, 2022 BEFORE HIS HONOUR ABDUL-RAZAK MUSAH,
CIRCUIT JUDGE**

SUIT NO. A1/44/2014

**1. ABENA NYARKO
2. ELIZABETH ACQUAH**

] PLAINTIFFS

VS

**1. ALBERT OPPONG
2. MR. ESHUN
3. MR. FELIX ABEKA QUANSAH**

] DEFENDANTS

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JUDGMENT

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Per their amended Writ of Summons filed on 23rd November, 2017 the Plaintiffs claim against the Defendants as follows:

- (a) Declaration of title to all that piece of land situate at Tarkwa Maakro and popularly referred to as Plot Number 13 Block R, Kumasi.
- (b) An order for recovery of possession of the said subject matter of this suit.
- (c) An order for perpetual injunction restraining the Defendants, their agents, workmen, assignors and servants from having anything to do with the said land and particularly from undertaking any constructional activity.
- (d) An order for general damages for trespass.

ISSUES

The issues set down for the trial of the suit on 2nd July, 2014 are as follows:

- a. Whether or not the demolishing of the Plaintiffs' structures has caused an untold hardship to the Plaintiffs.
- b. Whether or not the demolished structures by the Defendants fall within the 1st Plaintiff's property.
- c. Whether or not the 1st Defendant is building at the location where the Defendants demolished the 1st Plaintiff's structures.
- d. Whether or not the Plaintiffs were given notice by the 2nd and 3rd Defendants before they demolished the 1st Plaintiff's structure.
- e. Whether or not the 2nd and 3rd Defendants are officials of K.M.A.
- f. Whether or not the 2nd and 3rd Defendants led a team of officers from K.M.A. to undertake demolishing exercise of illegal structures built on and around the 36-inch Maakro Kronum water transmission pipeline which affected properties belonging to the Plaintiffs.
- g. Whether or not the said structures demolished were on Plot No. 13 Block R Tarkwa Maakro belonging to the Plaintiffs.
- h. Whether or not the 2nd or 3rd Defendants were performing their official duties when they led a team to undertake the said demolishing exercise.

OVERVIEW

This case was before my esteemed senior colleagues: Justice William Boampong, Justice Comfort Tasiame, His Honour S. O. Ansah (Now Decd.) and Justice Mary Nsenkyire.

The Honourable Court granted an interlocutory injunction on 5th May, 2014 restraining all the parties in the suit from any further developments and constructional work on the land in dispute until the final determination of same.

The original 1st Defendant died in the course of the trial and was substituted with Mr. Kwadwo Ahenkan which order was made on 15th November, 2017.

The Court having been reconstituted adopted the proceedings so far on 13th January, 2021.

PLAINTIFFS' CASE

The case of the Plaintiffs as can be gleaned from their statement of claim and the testimony of the 2nd Plaintiff testifying for and on behalf of herself and the 1st Plaintiff is that the 1st Plaintiff is the owner of Plot No. 13 Block R Tarkwa Maakro Kumasi. The plot was bequeathed to her under the Will of Kwabena Mensah, her late husband, and that she had been in undisturbed possession of the land since same was vested in her by the lawful executors of her husband's will until the 1st Defendant caused her arrest on the allegation that she had encroached on his land. Even though the Lands Commission confirmed in their survey report that there had been no encroachment and subsequent to that also intervened to help the 1st Plaintiff prove her title to the plot when her 'chop bar', provision store and four container stores for demolition were earmarked for demolition by the 1st Defendant who claimed that the structures encroached on his land.

The Plaintiffs subpoenaed PWI, Rhodaine Amoah-Darko, an Assistant Land Administration Officer of the Lands Commission, who corroborated the 1st Plaintiff's interest in the land in dispute emanating from the Will of Kwabena Mensah.

DEFENDANTS' CASE

The case of the 1st Defendant as gleaned from his Statement of Defence is that, the 2nd and 3rd Defendants are officials of Kumasi Metropolitan Assembly engaged to undertake a demolishing exercise of all structures illegally built on the 36-inch Maakro-Kronum water transmission pipeline, which said exercise affected properties belonging

to the Plaintiffs. He contends that he never engaged the 2nd and 3rd Defendants to demolish any property or structure belonging to the Plaintiffs. In concluding, he stated that he was not even present when the team from K.M.A. officials demolished the structures.

The 2nd and 3rd Defendants jointly filed a common Statement of Defence. According to them they are both employees of the Engineers Department of KMA. It is their case further that, the Regional Surveyor in a report recommended that all encroachments in the pipeline of the Ghana Water Company be cleared and that was where the 2nd and 3rd Defendants came into the picture. According to them the report did not only affect the Plaintiffs' plot but also other plots. They stated that the demolition exercise they undertook was legal and also the exercise was carried out after the necessary notices had been given to the owners of the affected properties.

BURDEN OF PROOF

As in all trials, it is the duty of the Plaintiff who has made a positive assertion to prove same on the preponderance of probabilities. In the case of *Sebastian Dzaisu & 92 Others vs Ghana Breweries Ltd* 16 MLRG 2008 P. 123 the Court held that:

"It is a basic principle in the law of evidence that the burden of persuasion on proving all facts essential to any claim lies on whosoever is making the claim."

Section 10 (1) of the Evidence Act, 1975 NRCD 323 defines burden of persuasion as:

"For the purpose of this Decree, the burden of producing evidence 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."

This being a civil suit the burden of proof requires proof on the preponderance of probabilities as provided in *Section 12 (2) of NRCD 323*.

In the case of *Takoradi Flour Mills v Samir Faris (2005-2006) SCGLR 882 at 900 Ansah JSC* stated thus:

“To sum up on this point, it is sufficient to state that this being a civil suit, the rules of evidence requires that the plaintiff produces sufficient evidence to make out his case on the preponderance of probabilities, as defined in Section 12 (2) of the Evidence Decree, 1975. Our understanding of the rules in the Evidence Decree, 1975 on the burden of proof is that in assessing the balance of probabilities, all the evidence, be it that of the plaintiff or the Defendant, must be considered and the party in whose favour the balance tilts is the person whose case is the more probable of the rival versions and is deserving of a favourable verdict.”

Also, a party who disputes a fact has the burden of producing evidence to the contrary in order to avoid ruling against him on that fact. See *Section 11(1) of NRCD 323*.

Ordinarily, where a court has taken a decision without due regard to a party who was absent at a trial because he was unaware of the hearing date that decision is a nullity for lack of jurisdiction on the part of the Court. See: *Barclays Bank vs Ghana Cable Co. (2002-2003) SCGLR 1* and also: *Vasque vs Quarshie (1968) GLR 62*.

However, where the party affected was sufficiently aware of the hearing date or was sufficiently offered the opportunity to appear but he refused or failed to avail himself the court was entitled to proceed and to determine the case on the basis of the evidence adduced at the trial. See: *In Re West Coast Dyeing Ind. Ltd; Adams vs Tandoh (1987-88) 2 GLR 561*

EVALUATION

It is worth stating that, the 1st Defendant did not participate in the proceedings throughout the trial though duly notified of same. The 2nd Defendant also stopped coming to Court during the trial despite being served with several hearing notices. The 3rd Defendant testified on 3rd November, 2021, but thereafter boycotted proceedings and failed to avail himself to be cross-examined. The evidence of 3rd Defendant was therefore expunged from the records. The case of all Defendants was therefore closed having failed to participate in the proceedings to defend the action.

I now proceed to consider the issues. I shall combine all the issues and the additional issues and address them simultaneously.

In the case of *Dr. R. S. D. Tei & Anor vrs. Messr Ceiba International [2008]* as per G. Pwamang JSC:

“It must be remembered that the fact that a Defendant does not appear to contest a case does not mean that the Plaintiff would be granted all that he asks for by the court. The rule in civil cases is that he who alleges must prove on the balance of probabilities and the burden is not lightened by the absence of the Defendant at the trial. The absence of the Defendant will aid the Plaintiff only where he introduces sufficient evidence to establish a prima facie case of entitlement to his claim.”

Clearly, there is no evidence on record indicating that the land in dispute is solely owned or was acquired by the 1st Plaintiff herein. Indeed, per the Plaintiffs’ own *Exhibits A and B* i.e., the Last Will of Panin Kwabena Mensah the late husband of the 1st Plaintiff and the vesting assent respectively, indicates that the 1st Plaintiff is the beneficiary of ‘one office structure at the edge of the plot/house’. On the evidence, Plot No. 13 Block R, Tarkwa Maakro was shared to a number of beneficiaries which includes the 1st Plaintiff. Since the 1st Plaintiff failed to prove her ownership of the entire Plot No. 13 Block R, Tarkwa Maakro title of same cannot be declared in her favour.

Further, there is equally no evidence on record to the effect that, the 2nd Plaintiff has any interest in the said Plot No. 13 Block R, Tarkwa Maakro.

The interest of the 1st Plaintiff as legitimate owner is limited to the portion of the Plot No. 13 Block R, Tarkwa Maakro that the 1st Plaintiff can claim as the owner that is the one office structure at the edge of the plot/house as expressed in *paragraph k* of Exhibit B. There is also no evidence of any form of conveyance to the Plaintiffs in respect of the entirety of Plot No. 13 Block R, Tarkwa Maakro. It is my finding that the said the 1st Plaintiff as well as the 2nd Plaintiff are not the owners of Plot No. 13 Block R, Tarkwa Maakro. Thus, title to same cannot be declare in their favour.

Now, there is this uncontroverted evidence on record that the 2nd and 3rd Defendants did demolish a property on Plot No. 13 Block R, Tarkwa Maakro which belongs to the

Plaintiff. It is further unchallenged that, the Plaintiffs were operating chop bar in the said property. There is also enough evidence on record that the space the Plaintiffs operated the said chop bar and for that matter where the demolished structure falls forms part of Plot No. 13 Block R, Tarkwa Maakro. Specifically, the Plaintiffs' demolished structure falls within the portion of Plot No. 13 Block R, Tarkwa Maakro which she was gifted under the Will of her late husband (*Exhibit A*). I therefore wonder how it is possible or under what authority did the 2nd and 3rd Defendants demolish the said property of the 1st Plaintiff which was rightly mounted on her plot? Further, there is no evidence of the Plaintiffs did encroach onto the water pipeline or reserved service space. It is my view that, the demolition of the Plaintiffs property by the 2nd and 3rd Defendants was not sanctioned by KMA as they claim as there is no scintilla of evidence of same on the entire record.

There is this piece of evidence which was not contradicted. The Plaintiffs tendered a letter written by the 1st Defendant giving them notice to quit from the subject plot. For the sake of better appreciation, I will reproduce the letter in this judgment:

“PLEASE, TAKE NOTE AND NOTICE that, you are given a period of Two (2) months from the date of this Notice to quit from the plot you are locating and operating your business.

This Notice takes effect from today and will lapse end of September, 2012. The said Notice have become necessary due to the fact that, I need the plot for my personal development.

I have the hope that, you will vacate from the said plot peacefully to avoid any future litigation.

Thank you.

Yours faithfully,

Sgd.

ALBERT OPPONG (LANDLORD)

CC:

The Assembly Member

Sub. Metro (KMA)

Suame - Kumasi

It is interesting to note that, even though the 1st Defendant denied knowledge and a hand in the demolition conducted by the 2nd and 3rd Defendants, he wrote the above letter claiming ownership of the land which the Plaintiffs operate their chop bar. How is it possible for the 1st Defendant give notice to the Plaintiffs to quit or yield vacant possession of the said land in issue and now turn round to deny ever having a hand in the destruction of the Plaintiffs property?

The above letter undoubtedly depicts that, the 1st Defendant laid adverse claim to the land or seem to have interest in the land in dispute especially where the Plaintiffs operated their chop bar business. Having adduced enough evidence on record in proof of the owner of the disputed property, the 1st Defendant failed to prove a superior interest in the land in issue as his as he claimed in *Exhibit F* as the Landlord. Clearly, therefore the 1st Defendant can safely be that he was behind the demolition of the property of the Plaintiffs on their portion of land. In other words, the 1st Defendant incited the 2nd and 3rd Defendant to demolish the properties of the Plaintiffs and clearly this was borne out of malice.

Flowing from above, it can equally be concluded that, the 2nd and 3rd Defendants were not performing their official duties when they led a team to demolish the Plaintiffs' structure.

Overall, I am sufficiently satisfied that, on the preponderance of probabilities, the Plaintiffs are entitled to judgment against the Defendants on reliefs 'c' and 'd' as endorsed on the writ of summons. Judgment is therefore entered for him. Specifically, judgment is entered in favour of the Plaintiffs as follows:

1. Perpetual injunction restraining the Defendants, their agent, workmen, assigns, assignors and servants from having anything to do with the said land and particularly from undertaking any construction or activity.
2. General damages assessed at GH¢ 50, 000. 00 against the Defendants.
3. Costs of GH¢ 5,000.00

SGD
H/H ABDUL-RAZAK MUSAH
(CIRCUIT COURT JUDGE)

REPRESENTATION

JANET OWUSU FOR THE PLAINTIFF

IBRAHIM ANYARS BAWA FOR THE 1ST DEFENDANT

PATRICK ADU POKU FOR THE 2ND & 3RD DEFENDANTS