

IN THE CIRCUIT COURT HELD AT CAPE COAST ON WEDNESDAY THE 24TH
DAY OF MAY, 2023 BEFORE HER HONOUR VERONIQUE PRABA TETTEH (MRS.),
CIRCUIT JUDGE

C1/03/2020

1. EBU. KOJO BENTUM (DECEASED) PER HIS LAWFUL ATTORNEY

2. ROBERT KOBINA JOHNSON

3. YAW AFAKWA

VRS

1. SAFOHENE KWESI ASSAN

2. KWEKU BREBO

Badu Prah for Plaintiffs

John Benson for Defendants

JUDGMENT

“Title is the means by which a person establishes his right to land. A person’s title indicates by what means he claims to be the owner of land. Title may take the form of possession or it may take the form of a document or a series of documents.”

BJ da Rocha and CHK Lodoh, Ghana Land Law and Conveyancing (2nd Ed.) page 99

The antecedents of this action can be traced to sometime in 2017 when members of the plaintiff’s family were arraigned before the Cape Coast Circuit Court for causing unlawful damage to property constructed on the land in dispute. The plaintiffs successfully defended the action; claiming ownership of the land and the case was truncated after a finding that no case had been made against them. The first defendant

who was a witness in that action, thereafter started to make claims to the land as belonging to his family, the Anomansa Aboradzie family of Kuntu. Thus, the plaintiff's commenced this action seeking declaration of title and other reliefs with the 1st defendant also counter claiming for similar reliefs.

The reliefs sought by the plaintiff in the suit filed on the 12th of September 2019 are:

- a. A declaration of title to and recovery of possession of all that piece or parcel of land situate, lying and being at Kuntu Kokodo measuring 0.23 acres and bounded on the south by property of Opanyin Kobina Aboraboa, on the north by the property of Maame Yeborba, on the west by property of Abirewa Esi Attah and on the east by property of Opanyin Kofi Nyarkoh.
- b. General Damages for trespass
- c. Perpetual Injunction restraining the defendants, the agents, workmen, servants, personal representatives and assigns from having anything to do with the land in dispute.
- d. Legal cost including lawyer's fees on the basis of full indemnity.

The counterclaim filed by the defendants also prays for the following:

- a. A declaration that the disputed land herein forms part of the family lands of the 1st defendant
- b. A declaration of title to all that parcel of land measuring 0.05 acres, the disputed land herein situate at Anomansa at Kuntu in the Mfantseman District of the Central Region
- c. Damages for trespass
- d. An order of perpetual injunction restraining the plaintiffs, their agents, workmen, privies, assigns, family members, all those claiming for or through

them from interfering with the 1st defendant's interest, possession and quiet enjoyment of the land.

- e. Any consequential relief(s) rising out of the pleadings and testimonies.
- f. Cost

The first plaintiff is the head of the Kuntu Kokodo Aborade family while the second and third plaintiffs are members of the said family. The first plaintiff, Ebusuapanyin Kojo Bentum passed away during the action and was substituted with Ebusuapanyin Kweku Kyia. The original first plaintiff sued per his attorney and after his death, the substituted head of family also filed a new power of attorney on the 13th of July 2021. The power of attorney was executed on the 3rd of May 2021. The first defendant is the Safohene of Kuntu and the head of the Anomansa Ebiradze family while the second defendant is a mason who hails from Kuntu. The first defendant defended this action as the second defendant did not take part in the trial and will thus be referred to as the defendant

The plaintiffs claim that their family owns three parcels of land where the in dispute is situated and that generations of their family had lived and occupied until the land was trespassed unto by the defendants. The defendant denied all the claims of the plaintiff and counterclaimed for declaration of title together with the usual ancillary reliefs for the Anomansa Aboradze family of Kuntu.

Both parties are by their reliefs seeking declaration of title to the piece of land in dispute. In *Mondial Veneer (gh) Ltd v Amuah Gyebu XV* [2011] SCGLR 466 at page 475, Georgina Wood CJ laid out the ingredients of proving title;

"In land litigation, even where living witnesses who were directly involved in the transaction under reference are produced in court as witnesses, the law requires the person asserting title,

and on whom the burden of persuasion falls, as in this case, to prove the root of title, mode of acquisition and various acts of possession exercised over the subject matter of litigation. It is only where the party has succeeded in establishing these facts on the balance of probabilities, that true party would be entitled to the claim”

In order to succeed, both parties must lead cogent evidence on these facts and not simply repeat their pleadings in the witness box. It is a well-established principle of law that in civil cases, the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence. This is referred to as proof by the preponderance of probabilities. See section 11(4) and 12(1) of the Evidence Act 1975 NRCD 323. This is the standard of proof even in land cases such as the instant one. With both the plaintiff and defendant seeking claims from the court they each have a burden of establishing their cases on the balance of probabilities.

In *Jass Co. Ltd and Another vrs Appau & another* [2009] SCGLR 265, the Supreme Court held unanimously that:

“The burden of proof is always put on the plaintiff to satisfy the court on a balance of probabilities in an action for declaration to title to land..... whenever a defendant also files a counterclaim, then the same standard or burden of proof would be used in evaluating and assessing the case of the defendant.”

All the issues raised by the parties were set down for determination by this court on the 28th of January 2023. It bears noting that, this was a total of 13 issues raised by the parties.

Both parties relied on oral traditional history to prove how Kuntu Township was established and how the name of the town originated. While both parties claimed that was proof of their claim of ownership, it is my opinion that both versions of their history could not be resolved during this trial. This is because the traditional evidence could not be verified by this court due to its insufficiency. The court will thus rely on the proven acts of recent history, where parties have exercised acts of ownership and possession to determine the ownership of the land in dispute. In the case of *In Re Taahyen & Asaago Stool; Kumanin II (substituted by) Oppon v Anin* [1998-99] SCGLR 399, the Supreme stated as follows:

“in assessing rival traditional evidence, the court must rather examine the events and acts within living memory established by the evidence, paying particular attention to undisputed acts of ownership and possession on record; and then see which version of the traditional evidence whether coherent or incoherent, is rendered more probable by the established acts and events. The party whose traditional evidence established such acts and events support or render more probable may succeed unless there exists, on the record of proceedings, a very cogent reason to the contrary.

Even though there were three plaintiffs, the plaintiff made their case through the first plaintiff's attorney. They initially intended to call two witnesses but made it known that due to ill-health, their second and last witness would not appear to testify. The plaintiff's only witness proffered documentary evidence in support of his case; it included a site plan of the land, a judgment and excerpts of record of proceedings produced from the national archives. Counsel for the defendant did not object to the tendering of the documents but raised serious issues having to do fraud concerning

alterations made by the witness on the face of the exhibits and the failure to produce the full record of proceedings of the cases tendered. I will now consider the allegation of fraud before delaying with their probative value of the exhibits.

Fraud

In furtherance of his allegations of fraud, the defendant sought leave to amend and when granted, amended his defence to include the allegation of frauds in respect of the witness's action. When fraud is alleged in civil proceedings, it must be proved beyond reasonable doubt. See. S. 13(1) of the Evidence Act, 1975, NRCD 323 which makes it clear that the burden of persuasion where a crime is alleged to have been committed requires proof of the elements of the crime beyond reasonable doubt. What are the ingredients of fraud that must be established by the defendant? In the case of *Bobie vrs 21st Century Construction Co Ltd and Others* (J4 5 of 2014) [2016] GHASC 72 (9 March 2016), the court referred to Lord Hershel's definition of fraud in *Derry v. Peak* (1889) 14 AC 337 at 374 where he said:

"fraud is proved when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth or (3) recklessly, careless whether it be true or false. To prevent a false statement being fraudulent there must I think always be, an honest belief in the truth and this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief"

The defendant thus had to prove that the plaintiff made a false representation, knew the representation to be false or did not care if the representation made was true or not. Some instances of fraud raised during cross examination of the plaintiff's witness have been produced below. The following dialogues ensued during the witness' cross examination

Q. Page 1 of your Exhibit B lists the pages of your alleged document in the whole of Exhibit B not so?

A. That is so

Q. Kindly take a look at the next page and tell the court the page number of your document. The page after the front page

A. It is page number eight (8)

Q. Is page 8 listed as one of the pages in the cover of the exhibit?

A. It is not actually listed here but it is an answer to a confirmation I want to make.

Another interaction that ensued

Q. In your witness statement you claim that this page 248 is a judgment, not so?

A. That is false. I did not say it was a judgment.

Q. I am putting it to you that this page 248 is part of a record of proceedings

A. That is true

Q. Do you agree with me that this portion is not the full record of proceedings you should have exhibited? It does not start and it does not end.

A. It is not the full record because it was not the total record I needed.

The above conversations were about the plaintiffs reproducing excerpts instead of the full record of proceedings for exhibits B, C and D. The witness' answer that he only

needed particular pages and hence his tendering of those particular pages is in my opinion reasonable. In any case, defendant had been put notice that those documents would be produced and could have produced the full records as well to counter the case of the plaintiff or show that the plaintiff was hiding important information.

Another interaction that took place during the cross examination was over alterations of the exhibits. It went as follows:

Q. Have you seen the pen markings, underlining and cancellations that you have made in the said record of proceedings before filing this matter?

A. I underlined it to help the court to know my reference points

Q. So you tempered with the record of proceedings before bringing it to court. I am putting it to you

A. It is not true. I was leading the court to follow what I was saying.

Again, I do not find the witness' action constitutes fraud within the meaning provided in *Bobie Vrs 21st Century Construction Co Ltd and Others(supra)*. In the exhibits, where particular passages have been underlined or highlighted, the plaintiff explained that it was meant to draw the courts attention to the relevant evidence. I do not find that attempts were made to hide the fact that those interlineations had been made by the plaintiff. I do not find that fraud has been perpetrated in this instance; no attempts were made to alter the contents of the documents to the decades old documents or to conceal any information from the court. I do not find to be established the intent to commit fraud or that fraud had been perpetuated by the plaintiff's witness to the degree required to be proved under the rules of evidence.

Possession of Land

The question of how plaintiff's family acquired the land and whether they had been in long and undisturbed possession of the land will be considered together as the evidence presented on the issues was congruent. Before coming to the plaintiff's testimony, I will first address the documentary evidence tendered by him. The witness' traces his family's occupation on the land to the first settlement of the five families after migrating from Mankessim. This version was contested by the defendant and even by the current chief of Kuntu, defendant's witness. Plaintiff as proof of the traditional evidence tendered several documents from the national archives to support their case. Exhibit B is an excerpt from a case between Nana Arhin Busumfie of Kuntu and Chief Kwamin Ekuban substituted, the chief of Suprudu. The underlined passage in the exhibit talks about the founding of Kuntu.

Exhibit C is from the record of proceedings in the case of *Kofi Atta, Head of Twidan Family of Kuntu per Kofi Arbah representing Twidan family of Kuntu vrs Oman of Kuntu per Nana Arhin Bosomfie*. In this excerpt produced is a dialogue where a witness is testifying about the settlement of the five families in Kuntu. The Exhibit D is a judgment in the case of *Head of Twidan Family of Kuntu per Kofi Arbah representing Twidan family of Kuntu vrs Oman of Kuntu per Nana Arhin Bosomfie*. Exhibit E is the Gold Coast Chief's List and for Kuntu is listed the name "Ahin Busumfie". Exhibit F is another page of the record of proceedings of the same case. Finally Exhibit G is a page from the record of proceedings of Exhibit B. As to why counsel for the plaintiff did not tender the full judgment and record of proceedings of these two cases as one document I cannot say. It would have reduced the number of exhibits and greatly assisted the court. I have however read and assessed these exhibits. I do not find that they are of great help to this court. The record of proceedings being testimonies of the parties in those cases cannot be relied on as truth of the matter as it is not a judgment making any

final determinations of fact. It is simply the testimony of a witness and as to whom those witnesses were, no evidence was led. I do not find that I can rely on those documents to make a finding of fact in favour of the plaintiffs as to how the families of both parties came to settle in Kuntu. Same applies to the judgment which makes no proclamation binding on this court.

Moving on, the plaintiff's attorney testified that his family was part of 5 families which also included the defendant's that first migrated from Mankessim to settle in Kuntu. He asserts that his family is distinct from the 1st defendant's family, hence, the affixation of Kokodo and Anomansa before the common family name of Aboradze. This evidence was not disputed by the defendant which makes it clear that the two families are distinct from each other. He claims that after the families had settled in the town, the land in dispute was first occupied by his ancestor called Opanyin Kwaku Arhin who put up swish houses for himself and his three sisters. When one of the houses collapsed, Opanyin Arhin's nephews by name Opanyin Kweku Brebo and Opanyin Kwesi Kom put up another building in 1956. It was occupied by other members of the family with the last person to occupy same before this instant dispute being Kobina Ebow. Kobina Ebow had constructed a corn barn and also lived with his family including his wife Aba Amokua before his death.

After his death, Aba Amokua (defendant's first witness), came to plaintiff's family to seek permission to build on the land. The then Ebusuapanyin, Kojo Bentum, refused to grant her the permission. Sometime later, the family realized someone was constructing a building on the land. When the building had reached window level, they destroyed the structure leading to their arrest by police. The case against them was subsequently dismissed by the Cape Coast circuit court. The 1st defendant also entered the land and began construction hence this action to stop him.

The second defendant's father was Kobina Ebow who occupied the land with his wife Aba Amokua. This Aba came and testified for the defendants. She claims that Kobina Ebow occupied the land with the permission of the defendant's family and that she never sought permission from plaintiff's family after his death to build on it. The fact that Aba Amokua was prevented from building on the land and her evidence that her husband was not on talking terms with the plaintiff's family explains her evidence in favour of the defendant. It stands to reason why she would support the defendant in his claim for the land and not the plaintiffs who were relatives of her husband. She was also the complainant in the case against the plaintiff's in the circuit court. In my opinion, the plaintiffs were able to establish that several members of their family had occupied the land for decades. Furthermore, the recent attempts made by the defendant's family to exercise any rights of ownership, was opposed by the plaintiff's family which led to the criminal case.

The defendant for his part relied on his own testimony and that of his two witnesses. The defendant filed two witness statements, one on the 20th of April 2020 and the other on the 25th of February 2022. He testified that, his family owned the land in dispute and that their land was granted to them by Nana Brebo, the founder of Kuntu. According to them, while the plaintiffs were also granted land, the location of their land is at a different place and the land in dispute does not belong to plaintiffs.

The defendants' narration of his family's possession of the land is actually through members of the plaintiff's family but claims it was with the permission of his family.

In the case of Kwaku Arhin, whom plaintiff's claim was the first to occupy the land, the defendant stated in his paragraph 13 of the initial statement of defence and in paragraph 12 of the amended statement of defence filed on the 14th of April 2022 as follows:

The defendants deny paragraphs 11, 12, 13, 14, 15 and 16 of the statement of claim. The first defendant states that Opanyin Kweku Brebo sought permission from the first defendant's uncle Safohene Kojo Atta and his family, the Anomansa Aboradzie who gave a portion of their land to him to temporarily build swish houses to operate a structure shop and that Opanyin Kweku Arhin never built any house for his sisters on the disputed land.

During cross examination of the first defendant however, this interaction ensued:

Q. the land in dispute is the land Kwaku Arhin put up a house for his three sisters, his wife and himself

A. it is true he put up the building for the people whose names have been mentioned but he acquired the land from my elders.

Even though the defendant initially disputed that Kwaku Arhin had ever occupied the land, his admission under cross examination corroborates the plaintiff's claim that their ancestor who they claim was first to occupy the land, did in fact occupy the land. This admission is crucial as it corroborated the plaintiffs' case. With respect to Opanyin Kweku Brebo, the first defendant testified that it was his uncle Safohene Kojo who granted the land to him to construct a sculpture shop. It is important to state that during his cross examination, the first defendant went as far to claim that the land on which the plaintiff's family house was situated belonged to his family. He also testified that it was after the death of Kobina Ebow, his family took possession which was resisted.

The defendant's testimony above established that members of the plaintiff's family had occupied the land for decades and in succession with there being no break to their occupation. As to it being with the permission of his family, I did not find conclusive evidence to be satisfied of same. He could not provide instances or occasions where those family members prior to the second defendant and his mother Aba Amokua had

recognized his family as owners of the land. It is only the testimony of Aba Amokua which was offered to prove that Kobina Ebow had sought permission from the defendant's family. I did not find her evidence as well to be conclusive proof; it is clear that both she and her husband had not been on good terms with the plaintiff's family. The evidence that she had been refused permission by the plaintiff's family to develop the land after her husband's death explains why she would side with the defendant's family over the plaintiff's over ownership over the land. I am not satisfied that this narration of facts together with the evidence of Ama Amokua is sufficient proof of recent acts of possession.

I am satisfied that it is members of the plaintiff's family who have occupied and maintained possession of the land; starting from Opanyin Kweku Brebo to the second defendant Kweku Brebo. The defendant could not provide any acts of ownership they had exercised over the land apart from the recent acts which were resisted. Even with Kweku Brebo the second defendant, it is clear that he is on the land because of his father, Aba Amokua's husband and the evidence shows that they are members of the plaintiff's family. I am satisfied and find that it was plaintiff's family that had been in possession of the land until recently and the recent acts which culminated in the criminal case before the circuit court cannot amount to acts of undisturbed possession over the land.

Identity of Land

On the issue of the lands identity, the plaintiff's witness listed the boundary owners as Opanyin Kobina Aborabora, Maame Yeborba, Abirewa Esi Attah and Opanyin Kofi Nyarko. The plaintiff did not call any of the boundary owners but I did not find the boundary to be an issue in this trial. The plaintiff also tendered Exhibit J a site plan titled "Plan of Land for Kweku Arhin". The site plan contains the size and dimensions

of the land and makes mention of the boundary owners and which side of the boundary they are. In *Tetteh v Hayford* [2012] SCGLR 417, The Supreme Court citing the case of *Kwabena v Atuahene* [1981] GLR 136 held that

“The plaintiff has to establish all his boundaries. Where there is no properly oriented plan drawn to scale, which made compass bearings vague and uncertain, the court would hold that the plaintiff had not discharged the onus of proof of his title.”

In the instant case, a plan drawn to scale was produced. I will therefore find that the land claimed by the plaintiff measures 0.23 acres and the dimensions are as stated in Exhibit J.

In the case of *In Re Ashalley Botwe Lands* [2003-04] SCGLR 420 the court in holding 4 stated the following:

“Although the general principle that a claim for declaration of title or an order for injunction should always fail if the plaintiff failed to establish positively the identity of the land claimed was sound law, its application was not mandatory where the identity or boundaries of the land claimed was undisputed. Where the identity or the boundaries of the land as pleaded by the plaintiff was admitted or not denied by the defendant, the applicable principle was that since no issue had been joined no evidence needed you be led on the identity of the land.”

During the trial, Exhibit J was not challenged. In fact, the document did not come up during cross examination. The defendant did claim that the land measures 0.05 acres but did not pursue this line of questioning under cross examination. For the defendant, no evidence as to who the boundary owners were was offered. During his cross examination, he was asked to mention their names, he could not. He rather claimed that he owned all the lands in the area and thus whoever the boundary owners were, it was he who gave them the lands. In the first place he did not know the names of the people

he claimed were occupying his land and sharing boundary with the land in dispute. And when he was told who they were, he did not dispute the fact but rather claim that he was the owner of their lands. No evidence of this ownership was offered apart from his claim.

Defendant also tendered documentary evidence in support of his case. Exhibit 1 is a land map titled Suprudu-Amissanu-Kuntu Boundary Dispute. It does not indicate where the defendant's family land lies neither does it indicate where the land in dispute falls. I do not find that it is of material benefit to the determination of the matters in dispute. Exhibit 2 is also map depicting Anomansa Aboradze Family land. It is said to cover 49.71 hectares of the land. On the face of this exhibit however, there is no indication of where the land in dispute is located. All exhibit 2 establishes is that the defendant's family own land at Kuntu which is not a matter in dispute. Exhibit 3 is a plan of land for one Kwaku Brebo and the land shown is said to be the land in dispute. In this exhibit the land is stated to measure 0.05 acres. I find the significance of this document to be the confirmation that it was occupied by Kwaku Brebo, the second defendant and this fact is also not in dispute. It does provide some level of exactness as to the size and location of the land just as Exhibit J of the plaintiff.

Exhibit 4 is a series of documents being receipts issued by Ebusuapanyin Kwesi Botwe acknowledging payments of money from different people as customary drink for lands leased. The earliest dated receipt is 5th November 2007 while the most recent is 20th May 2015. These exhibits are also offered as proof of the 1st defendant's family owning land at Kuntu. Once again this is not a matter in dispute. The plaintiff does not dispute that the defendant owns land at Kuntu, their claim is that the particular land in dispute does not belong to the 1st defendant's family.

The chief of Kuntu testified as the final witness in favour of the defendant. While his evidence was favourable to the defendant, it was clear during his cross examination that

he did not have sufficient knowledge of the particular land in dispute. His evidence established in my opinion, the undisputed evidence of the two families' settlement and occupation of Kuntu land.

Relying on the above principles, I find that Exhibit J which was not challenged is sufficient proof of the identity of the land and that the plaintiff has provided sufficient proof of the land's location and identity.

Before concluding, counsel for the defendant raised the issue of the capacity of the witness to act or represent the plaintiff as attorney in this matter. The power of attorney, marked as Exhibit A, was executed on the 5th of September 2019 by the original first plaintiff in this action in the person of Ebusuapanyin Kwadwo Bentum who died in February 2021. At the time of testifying, Ebusuapanyin Bentum had been substituted with Ebusuapanyin Kweku Kyia. A new power of attorney was executed and filed in this court by the substituted first plaintiff but this was not tendered and rather the old one was tendered hence counsel's objection to the witness. As a witness, I do not find that counsel's objections are valid as a party may call any person to testify in support of his case once he has knowledge of the matter. As to his representation as attorney once the deceased plaintiff was substituted and the substitution was in accordance with the rules of procedure, I am satisfied that the plaintiff's witness could and had capacity to testify as his attorney.

Conclusion:

I am satisfied and find that the plaintiffs have sufficiently established the root of their family's title to the land which is by the settlement of his family many years ago. I find that the evidence that Kwaku Arhin was the first person to settle on the land is more probable than not and the fact that the 1st defendant admitted to this fact under cross examination is evidence of same.

I am also satisfied that plaintiff discharged the burden to prove their family's possession and undisturbed occupation of the land through the narration of the different family members who had lived on the land from Kwaku Arhin to Kobina Ebow and even the second defendant who is a member of the plaintiff's family. I found also that the 1st defendant's attempt to take possession of the land was resisted by this suit and the previous case before the circuit court. I am also satisfied that the 1st defendant failed to establish that the members of the plaintiff's family had occupied the land with the permission of his family.

Finally on the issue of the identification of the land, I am satisfied that that Exhibit J tendered sufficiently revealed the dimensions of the land and the evidence of Exhibit J was not challenged by the defendants as to the size and dimensions and I find that plaintiffs have sufficiently discharged their burden as to the lands identity. I find therefore in favour of the plaintiffs on their reliefs.

The defendant's counterclaim is dismissed in its entirety for the reasons that first defendant was unable to establish his family ever being in possession of the land. Even though he claimed plaintiff's family had occupied the land with his family's permission he was unable to prove that beyond his repetition of his pleadings on oath. Any acts of possession are recent and having found in favour of the plaintiff, those acts constitute trespass. The plaintiff is thus awarded damages for trespass in the amount of GH¢10,000. Cost of GH¢8000 is awarded in plaintiffs favour.

(SGD)

H/H VERONIQUE PRABA TETTEH (MRS)

(CIRCUIT JUDGE)