IN THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 15TH JUNE 2023 CORAM: HIS HONOUR YAW POKU ACHAMPONG

SUIT NO.: C1/11/2018

KWABENA KUFFOUR ……... PLAINTIFF

(Suing for himself and on behalf of Agona Family of Ayanfuri per His Lawful Attorney Hagar Asiama)

VS

1. ABRAHAM NKWANTABISA …… DEFENDANT

2. HAGAR ODURO

PLAINTIFF'S ATTORNEY PRESENT

1ST DEFENDANT ABSENT BUT REPRESENTED BY NANA WADIE

2ND DEFENDANT PRESENT

KOFI BOYE ATENG FOR DEFENDANTS, PRESENT

ISAAC RICHMOND MENSAH FOR PLAINTIFF, ABSENT

JUDGMENT

INTRODUCTION

Plaintiff sued Defendants herein seeking the following reliefs:

1) Recovery of possession of Agona Family land lying and situated at Ayanfuri measured 7.26 acres and sharing boundary with Mallam Issa, Madam Adwoa Frimpomaa and Ayanfuri – Dunkwa road.

2) An order of perpetual injunction restraining the defendants, their agents, assigns etc from having anything to do with the relief (a) supra.[sic][with the said land]
3) Recovery of the sum GHC 36, 750.00 being Special Damages suffered[sic] by the Plaintiff and Members of Agona Family of Ayanfuri as a result of destruction of 120 Teak Trees, Building at Floor level, 6 Trips of Sand, 3 Trips of Stone and 3500 Building Blocks at the instance of the 1st Defendant.
4) General damages for trespass and further orders appropriate in the circumstance of this case.

It must be said that Counsel for Plaintiff labelled the reliefs e), f), g) and h) for reasons best known to him. As the labelling does not make sense, I had to adopt the 1, 2, 3 and 4 as above for clarity.

Defendants counterclaimed as follows:

a) A declaration that the Plaintiff is estopped from initiating the instant action, having been one of the three principal family members who gifted the disputed land to the 1st Defendant.

b)A declaration that, the Plaintiff lacks the requisite capacity to initiate the instant action.

c) A declaration that the gift of the disputed land to the 1st Defendant herein by the three principal members of his family was valid.

d) General damages.

e) Cost[sic]

I took responsibility over this case as a judge at the stage when Plaintiffs had closed their case and Defendants were to open their defence. I adopted proceedings in line with the Supreme

Court decision in *Adomako Anane v. Nana Owusu Agyemang & Ors*. Civil Appeal No.14/42/2013, delivered on 26th February 2014 per Georgina Wood CJ.

PLAINTIFF'S CASE

Plaintiff testified through an attorney as borne out by the title of the suit.

Prior to the advent of witness statements, the court could exercise reasonable control as to ensure that evidence was admitted in a manner that made the interrogation and presentation as rapid, as distinct, and as readily understandable as might be. See section 69 of the *Evidence Act*, 1975(NRCD 323). The court could write the evidence in words appropriate to the court in collaboration with the parties so there would be clarity. But these days as regards evidence-in-chief, it appears the court's power to exercise its mandate under section 69 of NRCD 323 has been taken away. Against this backdrop, I will not take the risk to paraphrase Plaintiff's witness statement which got metamorphosed into his evidence-in-chief during her examination-in-chief.

The following is the content of the evidence-in-chief of Plaintiff:

> "1. My name is Hagar Asiama.
>
> 2. I live at Ayanfuri…
>
> 3. That I am the lawful Attorney of the Plaintiff KwabenaKuufour[sic].
>
> 4. That the land in dispute was first acquired by his late uncle KwabenaBonnah[sic] who first reduced virgin forest unto his possession many years ago.
>
> 5. That the land so acquired by his late uncle measured about 7.26 acres and is situated at Ayanfuri and is bounded by the properties of MallamIssa[sic], Madam Adwoa Frimpomaa and Ayanfuri – Dunkwa road. A copy of the site plan is attached to this witness statement and marked Exhibit "A".
>
> 6. That on the death of KwabenaBonnah the land became the property of Agona Family of Ayanfuri.

7. That he currently possessed the land through inheritance and is for and behalf[sic] of the Agona family of Ayanfuri.

8. That sometime in 2004 one Peter KwakuBoakye[sic] alias Osei Badu and AkwasiAppau both members of Agona Family posing as caretakers of Agona Family purported to have granted the land in dispute to the 1st Defendant.

9. That one Ama Boahemaa also a member of Agona family challenged the 1st Defendant on the purported grant of Agona Family by Osei Badu and AkwasiAppau.

10. That the 1st Defendant sued the said Ama Boahemaa at Circuit Court, Dunkwa-on-offin[sic] for a declaration of title to the dispute land.

11.That the Circuit Court presided over by His Honour Samuel Asare-Nyarko in a judgment delivered on 18th July 2014 dismissed 1st Defendant's claim for declaration of title to the disputed land and vested title to the land to Agona family of Ayanfuri.

12. That at a meeting the Agona family decided to recovers[sic] the land in dispute from the 1st Defendant when he denied the title of Agona Family and laid adverse claim to the disputed land.

1.[sic] That when Agona Family decided to recover the land, the 1st Defendant went ahead and destroyed One Hundred and Twenty (120) Teak trees planted on the land by him and as a result of 1st Defendant's actions, he had suffered loss and damage.

13. That the 1st Defendant has also demolished a building at lintel level, Three Thousand Five Hundred (3,500) Blocks, Six (6) Trips of Sand and Three (3) Trips of Stone belonging[sic] Ama Appiah and Robert Swatson both members of Agona Family of Ayanfuri.

14. That 1st Defendants[sic] had granted part of the disputed land to the 2nd Defendant his daughter who is not a member of Agona Family to put up a building,[sic]

15. That the 2nd Defendant has cleared portion of the land and deposited sand and stones for the purpose of putting up building.

16. That he was appointed the head of Agona Family of Ayanfuri at a meeting in which the 1st Defendant was present.

17. That it is never correct that he together with other members of the family told the 1st Defendant that we sold the land to one Emma of WassaAkropong[sic] for sawmill.

18. That it is never correct that the 1st Defendant together with him and other members of the family contacted Emma to release the land back to the family and 1st Defendant paid GHC 400.00 to Emma to redeem the land back.

19. That it is never correct that he instructed the 1st Defendant to pay GHC 300.00 into the family account at Denkyira Rural Bank.

20. That Agona family of Ayanfuri of which he is the head has never opened any bank account with Denkyira Rural Bank.

21. That it is never correct that the 1st Defendant acted as a head of Agona Family of Ayanfuri.

22. That it is never correct that the Agona family of Ayanfuri gifted the land in dispute to the 1st Defendant and the family is never estopped to challenge the 1st Defendant.

23. It is never correct that the 1st Defendant had spent money to develop the land.

24. That he is entitled to the reliefs he is seeking from the court

..."

Plaintiff called two witnesses – one Akwasi Agyei who was referred to as PW1 and one Kwabena Awudi who was referred to as PW2. According to PW1, both Plaintiff and 1st Defendant belong to Agona Family of Ayanfuri and 2nd Defendant is a daughter of 1st Defendant. PW1 stated further that there was a larger family of the Agona family – one at Akwaboso and the other at Ayanfuri, and Plaintiff was the head of the Ayanfuri section. PW1 said he was present when the Agona Family had a meeting chaired by the then chief of

Akwaboso, Nana Adjei Kopah II(deceased) at Ayanfuri, after a dispute between one Ama Boatemaa[sic] and 1st Defendant in this very court. According to PW1, at that meeting, the Agona Family asked the 1st Defendant to vacate the land. PW1 continued his evidence-in-chief by saying that the chairman of the said meeting was mandated by the family to inform the 1st Defendant of the said decision of the family and so Nana Adjei Kopah II wrote to the 1st Defendant to vacate the land in dispute. [PW1 tendered in evidence a copy of the said letter – Exhibit B]. PW1 stated further that 1st Defendant refused to vacate the land and the family directed the Plaintiff to take steps to retrieve the land from the Defendants. PW2 also stated that both Plaintiff and 1st Defendant belong to Agona Family of Ayanfuri and that 2nd Defendant is a daughter of 1st Defendant and that Plaintiff is the head of Agona family of Ayanfuri. PW2 stated further that his mother was Ama Appiah and his mother belongs to Agona family of Ayanfuri. He stated further that his mother was putting up a building on the land in dispute. According to him, he was the one supervising the construction of the building and that the building was at the lintel level when the 1st defendant demolished it and also destroyed Three Thousand Five Hundred (3500) blocks, six(6) trips of sand and three(3) trips of stone belonging to his brother called Swatson. He tendered in evidence receipts and something he called 'honour certificate of cost of building materials and labour" marked them(as under my predecessor) Exhibit "C" series.

DEFENDANTS'/COUNTERCLAIMANTS' CASE

1st Defendant did not testify in this matter. Counsel for Defendants gave the following submission in respect of 1st Defendant:

> "The 1st Defendant who is almost in his 90's is currently not in the best of health condition. The information I gather from 2nd Defendant who is a biological daughter of 1st Defendant is that 1st Defendant is currently in Accra. We are of the view that the witnesses of Defendants have exhaustively made the case for the Defendants. In the

circumstances, I wish to activate Rule 3E(5)[sic] of CI 87 to put the Witness Statement of 1st Defendant in evidence as hearsay."

Rule 3A to rule 3G have been inserted in Order 38 of the *High Court(Civil Procedure) Rules*(CI 47) by the *High Court(Civil Procedure)(Amendment) Rules*, 2014(C.I. 87). This is captured in rule 4 of CI 87. 3E(5) as inserted in Order 38 of CI 47 states:

> *If a party who has served a witness statement does not call the witness to give evidence at the trial or put the witness statement in as hearsay evidence, any other party may put the witness statement in as hearsay evidence.*

See section 116 -118 of NRCD 323 on rules on hearsay.

I find 1st Defendant's witness statement to have been quite well written. I would have paraphrased same for the smooth running of this judgment but it was merely tendered in evidence as hearsay and there was no cross-examination on it, I will produce it *ipsissima verba*:

> "1. My name is the[sic] Abraham Nkwantabisea[sic] and I live in H/No. AYE 3/20 Ayanfuri.
>
> 2. The 2nd Defendant is my biological daughter.
>
> 3. The 1st Plaintiff is not the Head of family. I have been representing the family for all these years as acting Head of family and not the Plaintiff.
>
> 4. The Agona family of Ayanfuri has no substantive family Head.
>
> 5. In addition to representing the family [at] functions, I have on several occasions taken practical steps to protect property belonging to the family.
>
> 6. The Principal who is alleged to have given the authority to the Attorney is currently blind. I therefore doubt if such a document is coming from him.
>
> 7. I state for a fact that there is nobody and has never been anybody called KWAKU BONNAH in the Agona family in Ayanfuri.

8. The entire vast family land is vested in the Agona family in Ayanfuri but portions of same have been gifted to individuals including me.

9. The three principal members of the family namely, Akwasi Appau Mensah, Kwabena Kuffour (the Plaintiff herein) and Peter Boakye are those who take care of family land because the Agona family in Ayanfuri has no substantive family Head.

10.I was gifted the disputed land by the said Principal members of the family, including the Plaintiff herein, Kwabena kuffour[sic]. It is therefore strange he has turned round to initiate this instant action.

11. I am not the first family member to be gifted a portion of the family land by the three principal members. Persons like Hannah Baffoe, Hagar Asimah[sic](the Attorney herein), Cecilia Mensah aka Abena Appau and Kwabena Kuffour the so called Principal herein have also been gifted family land by the caretakers.

12. When I was gifted the disputed land, I duly performed the customary "Aseda" by paying GH¢300 in appreciation of the gift.

13. The Aseda I paid was deposited into the family Account in Dankyeraman Rural Bank, Ayanfuri. [A copy of the Passbook is marked as Exhibit '1' herein].

14. The said Kwabena Kuffour who is now challenging my title to the disputed land was one of the three Principal members of the family who received the Aseda from me after gifting same to me.

15. When I initially expressed interest in the disputed land, I was told it had been given to one Emma of Wassa Akropong to be used for Saw Mill but they would enquire from him if he was no longer going to use it.

16. When they (the three Principal members) contacted the said Emma, he indicated that he was no longer going to use the land but would only release it to the family if an amount of GH¢400 he had spent on grading the land was refunded to him.

17. I was asked to refund the said GH¢400 to him if I wanted the land and I did.

18. The Principal members were interested in giving the disputed land to me because I had told them my son, who is a medical doctor intended to build a clinic. They therefor[sic] expressed delight because such a project was going to be beneficial to the entire community.

19. It was after I had refunded the GH¢ 400 to the said Emma that the family through the three Principal members took the disputed land back and then gifted same to me.

20. After the disputed land was gifted to me, I got caterpillar to level the land in 2009 at a cost of GH¢3200 and subsequently moulded a thousand blocks on the disputed land.

21. In 2010, I visited the disputed land in the company of my son and a surveyor and while on the disputed land, a tipper truck brought a truck load of sand and deposited same on the disputed land.

22. We were told by the driver upon enquiry that it was one Ama Boahemaa who had instructed him to deposit same there.

23. I approached the said Ama Boahemaa and she claimed ownership of the disputed land. She subsequently started digging trenches on the disputed land so I reported her to the police in Ayanfuri but I was advised to seek redress in court which I did per Suit No. C2/53/2014[Marked as Exhibit '2' is a copy of the judgment of the court].

24. The trial court in the said suit granted my relief of injunction restraining the said Ama Boahemaa, her agents, servants and assigns from having any dealing with the disputed land, but interestingly, both Kwabena Kuffour and Hagar Asiamah are both surrogates of the said Ama Boatemaa[sic].

25. It is never true that the plaintiff had any building on the disputed land neither did he have any blocks on same.

26. There was also no single teak three[sic] on the disputed land. The Plaintiff is only peddling an untruth and ought not be entertained."

Defendants also called two witnesses. The first witness of Defendants who was referred to as DW1 gave his name as Kwesi Appau Mensah. He said that Plaintiff was his elder brother. According to DW1 he knew the disputed land very well because he was one of the caretakers of his family land and that they as caretakers took steps including court actions for and on behalf of the family to protect the said land.

DW1 stated in his witness statement which got metamorphosed into his evidence-in-chief as follows[paragraph 4 through paragraph 13…]:

> "4. This disputed land initially formed part of the family[sic] but we the caretakers of the land who are also the Principal members of the land[sic] gifted same to the 1st Defendant.
>
> 5. It is a fact that Kwabena Kuffour is not the Head of family. He has never been one. It is the 1st Defendant who has been acting as the Head of family.
>
> 6. The Agona family of Ayanfuri does not have a substantive Head of family.
>
> 7. When the 1st Defendant approached us the three Principal members to express interest in the disputed land, we were happy.
>
> 8. We were happy because he told us his son wanted to build a clinic and we thought it was brilliant idea.
>
> 9. The only problem was that, one Emma who had been granted the said land for the purpose of a Sawmill was yet to set up same.
>
> 10. We approached the said Emma and he told us he would release the disputed land to us only[if] we could refund the money he had expended on same already amounting to GH¢400[.]
>
> 11. When we informed the 1st Defendant, he readily refunded the money and we paid same to the said Emma and took back the disputed[sic].
>
> 12. It was after taking back the disputed land that we gifted same to the 1st Defendant. The Plaintiff herein, Kwabena Kuffour was one[of] us.

13. When he[sic] gifted the disputed land to the 1st Defendant he (1st Defendant) paid GH¢300 as Aseda and we paid same into the family Bank Account in Dankyiraman in Ayanfuri.

..."

DW2 is the second person who testified as a witness for Defendants. He gave his name as Peter Kwaku Boakye aka Osei Badin. He said both 1st Defendant and Plaintiff were his uncles. He further said that he knew the disputed land as a family land that was gifted to the 1st Defendant. In the witness statement of DW2 did he state the following also, as part of what became his evidence-in-chief[paragraphs 5 through 20]:

"5. My great grandfather, Kwabena Bonnah, who was head of the Agona family of Ayanfuri originally reduced a vast virgin land to a farmland and bequeathed same to the Agona family of Ayanfuri.

6. When my great grandfather died, he was succeeded by Samuel Kwame Essiam as Head of family and he held all family lands for and on behalf of the Agona family of Ayanfuri.

7. After the death of Kwame Essiam, one Nana Mintah became the Head of family but subsequently abdicated to become Chief of Akwaboso and one Kojo Appiah became the Head of family.

8. After the death of Kojo Appiah, the Agona family of Ayanfuri has not had any substantive Family Head. It is the 1st Defendant who has been acting as the Family Head to date.

9. At a point in time the family lands were being encroached upon by strangers and I had to take steps to protect same in conjunction with the 1st Defendant.

10. I was later joined by Akwasi Appau Mensah and Kwabena Kuffour the Plaintiff and we jointly protected the family lands.

11. The three of us, who became the caretakers of the family lands are also principal members of the Agona family of Ayanfuri and jointly acted for and on behave[sic] of the family in respect of all family lands.

12. We the caretakers namely, myself Akwasi Appau Mensah and Kwabena Kuffour(the Plaintiff herein) at a point in time were approached by one Emma who expressed interest in acquiring a portion of the family land for the purpose of establishing a Saw Mill. We discussed it extensively with the family and gave a portion to him and he paid the proceeds into the family Bank Account in Dankyiraman Rural Bank in Ayanfuri, an account we had opened to keep all proceeds from the family land.

13. Apart from the said Emma, we gifted portions of the family land to Hagar Asiama(the Attorney herein) Kwabena Kuffour (the Principal herein) Cecilia Mensah aka Abena Appau and Ama Boahemaa who are all family members.

14. The 1st Defendant at a point informed us he wanted a portion of land to enable his son establish a clinic. We were elated to hear this but the only suitable land had been given to one Emma for a Saw Mill but he had not yet commenced construction on same though he had finished with the land preparation.

15. We contacted the said Emma to find out if he was no longer interested in the said land and he indicated his willingness to release it on condition that we refunded an amount of GH¢400 he had expended on the land preparation.

16. We therefore informed the 1st Defendant and he readily refunded the said GH¢400.

17. After the refund, we took back the land and gifted same to the 1st Defendant and he duly expressed his appreciation by paying GH¢300 to the three of us including Kwabena Kuffour. We subsequently paid that money into the family Account at Dankyiraman Rural Bank in Ayanfuri.

18. The Plaintiff, Kwabena Kuffour, was one of three of us who jointly gifted the disputed land to the 1st Defendant. It therefore surprises me that he would turn round to engineer the commencement of this action.

19. It is not true Kwabena Kuffour is the Head of family. He has never been Head of family at my[sic] point in time. He was only one of the caretakers of the family lands who duly gifted the disputed land to the 1st Defendant and jointly took the decision to pay the proceeds into a family account.

20. He cannot therefore turn round to do what he is doing. We the family members have not given him any such authority."

ANALYSIS

The issues set down for trial as under my predecessor are as follows[produced *ipsissima verba*]:

(a) Whether or not the plaintiff is the head of Agona family of Ayanfuri and therefore has capacity to institute the present action.

(b) Whether or not the land that Circuit Court in suit No. C2/53/2014 vested title in Agona family is deferent[sic] from the present action.

(c) Whether or not the Plaintiff is entitled to his claim.

(d) Whether or not the 1st Defendant is entitled to his counterclaim.

(e) Whether or not the plaintiff is estopped from instituting the present action.

(f) Whether or not the instant action was validly initiated.

(g) Any other issue arising out of the pleadings.

Issue (f) as above was additional issue filed by Defendants.

Capacity goes to the root of a matter. Therefore issue (a) was crucial for determining this matter. In fact, if it had been resolved at the elementary stages of the case, probably there might have been no need to proceed to have a hearing to determine the issues in all i.e. if it was found that Plaintiff did not have capacity to institute this action.

Plaintiff appears to be saying that he was appointed the head of Agona Family of Ayanfuri at a meeting in which the 1st Defendant was present. Vide para 16 of his witness statement. 1st

Defendant on the other hand stated that Plaintiff was not the Head of family and that he(1st Defendant) had been representing the family for "all these years" as acting Head of family and not the Plaintiff and that the Agona family of Ayanfuri had no substantive family Head and that in addition to representing the family at functions, he had on several occasions taken practical steps to protect property belonging to the family. See para 5 of the witness statement of 1st Defendant supra. Neither Plaintiff nor 1st Defendant tendered any document in evidence to seek to prove his claim that he was the head of family. DW2 stated that Plaintiff was not the head of family and had never been the head of family. DW1 corroborated the bit of 1st Defendant's story about headship of the said family.

Section 7(1) of NRCD 323 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 considering the probative value of the evidence of DW1 and DW2, it is worth noting that DW1 and DW2 were presented to the Court by the defence as principal members of the said family – a claim, Plaintiff did not deny. Thus in cross-examination of Plaintiff, the following came up:

> Q. So you will agree with me that Peter Kwaku Boakye and Kwasi Appau Mensah are principal members of Agona Family of Ayanfuri.
>
> A. That is so.

The item called the scale of justice speaks volume about judicial adjudication. Evidence may be likened to weights – say e.g. lead and they are placed on the scale by the parties, where the scale tilts to may be victorious and the other vanquished. A word to the wise is enough.
Thus, it is stated section 12 of NRCD 323 that:

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

(2) "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 cross-examination of Plaintiff, the following transpired as regards the issue of head of family:

Q. Are you aware that Opanin Kwabena Kuffour is not the head of Agona family of Ayanfuri.

A. I know Opanin Kwabena Kuffour as the head of Agona family of Ayanfuri.

Q. Putting it to you that Opanin Kwabena Kuffour has never been and is not the head of family of Agona family.

A. I insist he is the head of Agona family of Ayanfuri.

…

Q. It is your case per paragraph 16 of your witness statement that the Agona family of Ayanfuri at a meeting appointed Op. Kwabena Kuffuour[sic] as a head of family. Can you tell the court when that meeting was held.

A. I cannot recall the exact date as it's been a long time now that Op. Kwabena Kuffuor[sic] has been made head of family.

Q. For how long now has Op. Kwabena Kuffour been made head of family.

A. My uncle Asiam was head of family and it was after his death that Op. Kwabena Kuffour has been made head of family. It is been a long time now.

Q. When did your uncle Asiam die.

A. It is[sic] been long time now that he died which I cannot recall when he died.

Q. Putting it to you that when uncle Asiam died, it was Nana Minta who became the head of family.

A. That is not true.

Q. Putting it to you that the same Nana Minta abdicated the head of family and became the chief of Akwaboso.

A. Nana Minta was never a head of family at Ayanfuri but he was made a chief of Akwaboso as he was living there.

Q. Putting it to you further that after Nana Minta became the head of family it was one Kojo Appiah who became the head of family of Agona.

A. That is not true. Agona head of family is Op. Kwabena Kuffour while the head of family of Agona family at Akwaboso is Kwame Anto but when the families meet Nana Kojo Appiah is the over all head of the two families.

Q. Putting it to you that, since the death of Kojo Appiah, Agona family of Ayanfuri has never have[sic] any head of family.

A. That is not true. At[sic] the two families of Akwaboso and Ayanfuri have their various head of family. It is the overall head of family which has not been replaced.

Q. Putting it to you that, it is the 1st defendant Abraham Nkwantabisa who at various times acted as head of family in the place of Op. Kojo Appiah.

A. That is not true.

...

Whilst DW2 was under cross-examination, the following took place as regards matters pertaining to the issue of head of family.

Q. I put it to you that your evidence in paragraph 8 of your witness statement that 1st Defendant is the acting head of the Agona family of Ayanfuri is not true.

A. That evidence of mine is true.

Q. I also put it to you that it is Kwabena Kuffour and Plaintiff herein who is the substantive head of the Agona family of Ayanfuri.

A. It is not true.

Counsel for Plaintiff did not ask any further questions of DW2 on this head of family controversy.

Kpegah J.A. (as he then was) stated in the case of *Zabrama v. Segbedzi* [1991] 2 GLR 221 @ 246 that:

> *" … a person who makes an averment or assertion, which is denied by his opponent, has a burden to establish that his averment or assertion is true, and he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can safely be inferred. The nature of each averment or assertion determines the degree and nature of the burden."*

Of DW1, Counsel for Plaintiff made the following cross-examination, as regards headship of the family:

> Q. I put it to you that your evidence in paragraph 8 of your witness statement that the Agona family of Ayanfuri do not have a substantive family head is not true.
>
> A. That statement of mine is true.
>
> Q. And your statement in paragraph 8 of your witness statement that the 1st Defendant has been the acting head of family is not true.
>
> A. That statement of mine is true.
>
> Q. I am putting it to you that Agona family of Ayanfuri has never had any such position as acting head of family.
>
> A. There is such a position in the Agona family of Ayanfuri.
>
> Q. I put it to you that it is Kwabena Kuffour i.e. Plaintiff herein who is the head of Agona family of Ayanfuri.
>
> A. It is not true.

Counsel for Plaintiff stated at this point that: "That will be all for DW1."

In *Ackah v. Pergah Transport Limited and Ors*[2010] SCGLR 728; Sophia Adinyira JSC, in an erudite fashion, made the following pronouncement at page 736 which is apt as regards proof in law:

> *"It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things(often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable*[sic] *than its non-existence. This is a requirement of the law on evidence under sections 10 and 11 of the Evidence Decree*[sic]."

Section 10(1) of NRCD 323 defines 'Burden of Persuasion' and it states:

> *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 NRCD 323 adds 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 of NRCD 323 defines 'Burden of Producing Evidence' and states further as follows:

> *(1) 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.*
> *(4) 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.

Section 80 of NRCD 323 states:

(1) Except as otherwise provided by this Decree, the court or jury may, in determining the credibility of a witness, consider any matter that is relevant to prove or disprove the truthfulness of his testimony at the trial.
(2) Matters which may be relevant to the determination of the credibility of the witness include, but are not limited to the following:

(a) the demeanour of the witness;
(b) the substance of the testimony;
(c) the existence or non-existence of any fact testified to by the witness;
(d) the capacity and opportunity of the witness to perceive, recollect or relate any matter about which he testifies;
(e) the existence or non-existence of bias, interest or other motive;
(f) the character of the witness as to traits of honesty or truthfulness or their opposites;
(g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;
(h) the statement of the witness admitting untruthfulness or asserting truthfulness.

In *Ntiri* v. *Essien* [2001-2002] SCGLR 451, it was held that the trial judge has the duty to ascertain credibility of a witness.

By section 80 of NRCD 323, I hold the view that the story of the defendants on the issue of head of family is believable.

Before I make any pronouncement on the first issue *supra*, let me navigate through the law in an endeavour to make some establishments on the other issues.

In discussing titles to land in the book *Ghana Land Law and Conveyancing*, second edition, 1999, the authors – B J da Rocha and C H K Lodoh made reference to customary freehold title to land. They stated at page 13 that customary freehold is an interest or title in land which a member of a community, which holds the allodial title to land, acquires in a vacant virgin communal land by exercising his inherent right to develop such vacant virgin communal land by either building or farming on it. Earlier at page 7, the said authors had stated:

> *"The allodial title is the basis of the customary law scheme of interests in land in Ghana. According to legal doctrine, the allodial title to every portion of land in Ghana was formerly vested in one of the customary law-communities, for example, stool(skin), family, clan etc. All interest in land in Ghana, both customary and otherwise existing today, are derived from the allodial title as their root of title."*

According to those learned authors, the customary freehold is an interest in land that prevails against the whole world including the allodial title which gave birth to it. Vide page 13 of the said book.

As land has become a hot commodity in many communities in Ghana, the prevalence of a situation where a member of the community breaks the virginity of a forest and acquires the customary freehold title is archaic or non-existent. However, a member of a stool/skin or family or such an entity can still acquire the freehold title if the stool/skin or family or such entity grants or gifts the land to a member if the land is abandoned or the holder of the title to the land forfeits his title in the land.

In *Frimpong v Poku*[1963] 2GLR 1 at 4, Akuffo-Addo JSC opined:

"The principle of customary law which says that a subject is free to cultivate any extent of stool land does not confer on a subject an unlimited licence for indiscriminate cultivation, and a subject usually obtains the formal permission of the stool for the purpose. Permission is never refused but it is necessary in order to enable the stool to keep a check on cultivated areas. In the days gone by when land was plentiful and persons seeking to cultivate were few, a subject would be shown a site or would choose his own site with approval of the stool and he could then extend his cultivation wherever 'his cultass could carry him', as the saying goes. In modern times, however, it has become necessary to ensure a more equitable distribution of available land for cultivation and the practice has been limited areas to be demarcated for subjects of the stool."

Whilst Plaintiff was being cross-examined, the following, *inter alia*, also took place:

...

Q. I presume you can read and write.

A. That is so

Q. Have you read the judgment you referred to in your paragraph 11.

A. No.

Q. So you will not be aware that in the said judgment the court found as a fact that the disputed land was gifted to the 1st defendant by three(3) principal members of Agona Family of Ayanfuri.

A. It is not true that 3 principal members of Agona Family gifted the land in dispute to 1st defendant. The judgment said we should go and settle the matter at home.

Q. Putting it to you that in that judgment the court found that the land in dispute was gifted to the 1st defendant by 3 members of Agona family of Ayanfuri.

A. That is not true.

...

Power of Attorney is defined in the book *Ghana Land Law and Conveyancing supra* as a document by which one person gives to another person authority to act on his behalf and in his name. See page 145 of the said book. Therefore, a holder of a power of attorney should be as knowledgeable about the subject matter as the donor. The donee of the power of attorney should be able to testify as the donor would and should be able to answer questions satisfactorily as the donor would. Failure of the donee is failure of the donor.

In the instant case, I find it intriguing and should I say preposterous for the plaintiff(by his attorney) to say that he had not read the judgment yet he stated what is in paragraph 11 of of his witness statement. What is even more, Plaintiff saying that the court asked the parties in that case to go and settle. That amounts to throwing dust into the eyes of the court. But as the court is wearing legal glasses, the dust will settle on the glasses and it will be wiped out so that the court will see clearly to appreciate the evidence and digest same through the alimentary canal of the law.

Order 4 rule 9 of C.I. 47 states, *inter alia*:

> *(2) The head of a family in accordance with customary law may sue and be sued on behalf of or as representing the family.*
>
> *(3) If for any good reason the head of a family is unable to act or if the head of a family refuses or fails to take action to protect the interest of the family any member of the family may subject to this rule sue on behalf of the family.*

In the case *Kwan v. Nyieni* (1959) GLR 67, the following principles were propounded by that Court:

1. *As a general rule the head of a family as representative of the family, is the proper person to institute suits for the recovery of family land.*
2. *To this general rule there are exceptions in certain special circumstances such as:*

i. Where the family property is in danger of being lost to the family and it is shown that the head (either out of personal interest or otherwise) will not make a move to save or preserve it or,

ii. Where, owing to a division in the family, the head and some of the principal members will not take any step; or

iii. Where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole.

The Court stated further in that case, as regards the exceptions that:

> "*In any such special circumstances, the court will entertain an action by any member of the family either upon proof that he has been authorized by other members of the family to sue or upon proof of necessity, provided that the court is satisfied that the action is instituted in order to preserve the family character of the property.*"

A family land is a family land and not a personal property of an individual member. Therefore, to my mind, in a case such as the instant case, if the head of family is in any way incapacitated to bring an action, a person acting as head of family may bring the action on behalf of the family with the consent and concurrence of principal members of the family. If there is no acting head, then, a principal member with enough knowledge about the matter could take up the mantle like an acting head would do as stated above. Giving power of attorney in the manner as Plaintiff is pursuing this case makes it look like he is pursuing a personal matter or without him the family is helpless. The power of attorney herein has questions on it as regards its authenticity and validity. Defendants objected to it that the donor was blind and could not have given that power. Plaintiff admitted under cross-examination that Plaintiff is actually blind, interestingly, there is no jurat clause to the power of attorney. As stated earlier, at the time I took over the matter, Plaintiff had closed his case and Defendants were to open their defence.

The learned judge His Honour Samuel Asare-Nyako(as he then was)in his conclusion in the judgment referred to by the parties herein *supra*, stated:

> "Now the defendant not being the head of family nor the agent of the head of family or the representative of the head of family was simply disturbing the possession of the plaintiff after plaintiff had spent money to clear the land in dispute and made same look therefore very attractive. In the considered opinion of this honourable court, the plaintiff could maintain an action against the defendant on his second claim. This honourable court therefore grants the second claim of the plaintiffs and orders a perpetual injunction restraining the defendant, her agents, servants and assigns from having any dealings with or on the said land in dispute. However for the avoidance of doubt, title in the land in dispute however remains with the Agona Family of Ayanfuri. There shall be no order as to costs."

From the foregoing reference made on title to land, I find that when the judge said that title to the land remains with the Agona Family of Ayanfuri, he meant the allodial title. When he ordered the perpetual injunction, he meant that 1st Defendant herein and Plaintiff therein had acquired the customary freehold title to the land.

CONCLUSION

I do not find that Plaintiff has any legal legs to stand to mount this action, considering that the court has made a pronouncement on title to the land already and judgment in land cases such as this is judgment in rem.

On the preponderance of the probabilities, I do not find Plaintiff's claim that he is the head of the family credible and therefore Plaintiff is not clothed with capacity to bring this action. I hereby dismiss all the reliefs endorsed on the writ of summons.

On the other, I grant the reliefs by way of counterclaim as endorsed on the document with the caption: "DEFENDANTS' STATEMENT OF DEFENCE AND COUNTERCLAIM" filed on 01st June 2018.

In *Ayisi v. Asibey III & Ors* [1964] GLR 695 @ 696-697, the Court held that:

> "*In assessing damages for trespass, consideration should be taken not only of the extent of the land on which the trespass had been committed by the individual defendants, but also the length of time that the plaintiff had been wrongfully kept off the land. Only the defendants who relied upon a customary grant from the M. Stool deserved to be condemned to pay exemplary damages to the plaintiff…*"

And in the case of *Mahama v. Kotia & Ors* [1989-90] 2GLR 24, the plaintiff sued defendants for damages for the demolition of her building and the surrounding wall and the taking away of her iron rods and using them. The trial judge found that defendants had no authority to demolish the building and, inter alia, awarded the plaintiff (i) ₵594 000.00 as the replacement value of the building, and (ii) ₵300 000.00 as exemplary damages for trespass. Defendants appealed against the quantum of the damages. In holding (2) the Court of Appeal held in dismissing the appeal that:

> *"In addition to the replacement value, the plaintiff was entitled to damages for being deprived of the use of her building. If she had to find an alternative accommodation, as in the instant case, that would have to be considered in the award of damages. Furthermore, where the damages were[sic] at large the manner of the commission of the tort might be taken into account; and if it was such as to injure the plaintiff's proper feelings of dignity and pride, it might lead to a higher award than would otherwise have been appropriate. Since on the evidence defendants did not only demolish the plaintiff's house out of spite and ill-will and without any authority but even took away the iron rods and used them in their own building, the award of ₵300 000.00 as exemplary damages was reasonable."*

In the circumstances, I award general damages of GH₵30 000.00 against Plaintiff.

I also find that Defendants are entitled to costs. See Order 74 of CI 47. In the circumstances, I award costs of GH₵10 000.00 against Plaintiff in favour of Defendants.

HH YAW POKU ACHAMPONG

CIRCUIT COURT JUDGE

15/06/2023