IN THE CIRCUIT COURT HELD AT MPRAESO ON TUESDAY 25TH DAY OF APRIL 2023

BEFORE HIS HONOUR STEPHEN KUMI, ESQ, CIRCUIT JUDGE.

SUIT NO: C1 /12/ 2021.

FRANK ANIM DANSO - PLAINTIFF.

V

OHENE NANA KWAME ASANTE - DEFENDANT.

J U D G M E N T:

The Plaintiff herein is a trader in Accra. On the basis of a writ of summons dated 22nd June, 2021, issued at his instance from the Registry of this court with its accompanying statement of claim, he Plaintiff claimed against the Defendant for the following judicial reliefs;

1. Declaration of title to land with boundaries as follows-
    a. SGED 039/15/1
    b. **SGED 039/15/2**
    c. **SGED 039/15/3**
2. **Recovery of the land.**
3. **Damages.**
4. **Costs.**

THE CASE OF THE PARTIES FROM THE PLEADINGS:

The Plaintiff says that he took a lease of stool land measuring 0.56 acres from Mpraeso stool in 2017; with an indenture together with a site plan issued to him in that regard on 1st day of February, 2017. He states that the land situates and lies at Mpraeso; with its boundaries commencing from survey pillar marked SGED 039/15/1; SGED 039/15/2; SGED 039/15/3 and SGED 039/15/4.

He alleges that the Defendant has trespassed on the land and had gone further to register tha land at the Lands Commission without his consent. He contends that his enquiries from his lessor revealed that the stool has not granted any lease in respect of the land to the Defendant and thus the Defendant has trespassed on to his land.

It is the position of the Plaintiff that the Defendant's registration of the land at the Lands Commission constitutes fraud and gave the particulars of fraud as follows;

i. The land has not been leased to the Defendant.
ii. Judgment used to register the land was procured with deceit without telling the court the true size of his land.
iii. Quickly registering the land knowing very well that the size of the land he registered was not his land.

It is the case of the Plaintiff that the Defendant will not vacate the land in favour of the Plaintiff unless compelled by the court and thus prays the court to grant him the reliefs endorsed on the writ of summons.

The record shows that copies of the writ and statement of claim were served on the Defendant on 7th July, 2021. Thereafter, the Defendant- acting through his Counsel- filed a notice of conditional appearance on the 13th of July, 2021; copy of which was served on the Plaintiff's Counsel on 19th July, 2021.

The Supreme Court in the case of **Republic v. High Court, Accra; ex parte Aryeetey (Ankrah Interested Party** ***[2003-2004] SCGLR 398 unambiguously stated per Kpegah JSC*** the circumstances under which conditional appearance may be entered. The grounds upon which a defendant may conditional appearance are; to intend to object to the issue or service of the writ or notice of the writ; to object to the jurisdiction of the Court; to apply to set aside the writ or notice of the writ or the service of same. However, the Defendant did not subsequently bring any application to have the suit struck out on any of the above grounds within fourteen (14) days upon entering the conditional appearance as required under Order 9 rule 8 of the C. I. 47 of 2004.

The effect was that the conditional appearance transformed into and was treated as a normal or unconditional appearance as per Order 9 rule 7 (2) of the C. I. 47 (supra). From the record, the Defendant rather filed a statement of defence on 20th August, 2021; which was more than one month after filing the conditional appearance.

I hold that by filing the statement of defence or than by bringing any of the above-mentioned applications upon filing the conditional appearance, the effect was that the Defendant took a fresh step, waived or lost any rights he could have enjoyed under an entry of conditional appearance and ***a fortiori*** served as evidence of his submission to the jurisdiction of this court for the case to proceed normally

against him. See the case of ***Ahmed Muddy Adam v Frank Nuamah***; Suit ***no: H1/114/2018; delivered on 18th October, 2018;*** per Dennis Adjei J.A.

DEFENCE OF THE DEFENDANT FROM HIS PLEADING:

In paragraph one, Defendant averred that "save as hereinafter expressly admitted the Defendant denies each and every material allegation of fact contained in the statement of claim as if the same were set out in extenso and traversed seriatim".

In the case of ***Akyer v. Ghana Industrial Development Corporation And Other*** **[1963] 2 GLR 291, SC, Adumua Bossman JSC, (as he then was),** after he had quoted and considered the cases of *Adkins v. North Metropolitan Tramways Company* [1863] 63 L.J.Q.B. 361, *John Lancaster Radiators Ltd. v. General Motor Radiator Co., Ltd.* [1946] 2 All E.R. 685, C.A., came to the conclusion that a general traverse as is found in the Defendant's' paragraph 1 of the statement of defence amounted to a sufficient denial to a plaintiff's claim. This is what he said:

> ***"It seems reasonably clear from these authorities therefore that the statement of defence filed on behalf of the first defendants adequately and sufficiently denied the allegation in paragraph 1 of the plaintiff's statement of claim and thereby put the plaintiff to proof of that allegation. It falls then to ascertain if the plaintiff discharged that onus."***

Despite the above legal effect of the Defendant's general denial to the claims of the Plaintiff, the Defendant went on to specifically deny the material claims of the Plaintiff as follows: The Defendant denied that he has trespassed on to the land of the Plaintiff. He also denied that he had gone to fraudulently register title to the land at the Lands Commission.

His version is that he initially acquired the land from the Chief of Mpraeso in 2003; and that subsequently by a lease dated 20th July, 2010, the Chief of Mpraeso-Kwahu, Nana Amapdu Daaduam II, acting with the consent and concurrence of the principal elders of the Mpraeso stool granted a lease in all that piece and/or parcel of land in dispute to him for a term of 99 years; which was renewable for a further 50 years subject to the terms contained therein.

Defendant states that he entered into possession of the land and registered his acquired interest in the land and has since then been in undisturbed possession of the land till date. He contends that Plaintiff could not have validly obtained a lease of any part of his parcel of land from the Mpraeso stool nor

from any other person as same had already been granted to Defendant and thus any purported alienation to the Plaintiff is void and of no effect.

Defendant further states that if the Plaintiff had conducted the barest due diligence on the land he would have been put on notice that the land lad already been granted to Defendant. It is his case that the Plaintiff is not entitled to his claims or reliefs.

The Plaintiff, upon service of the copy of the statement of defence on him, filed a reply, whose purpose was to just deny every material allegation or claims of the Defendant. However, as has been held in the case of In Re Ashalley Botwe Lands; Adjetey Agbosu and Others v Kotey and Others (2003- 2004) SCGLR 420, per Wood JSC (as she then was); the legal position is that;

> ***"a reply is not even necessary if its sole aim is to deny the facts alleged in the statement of defence, for in its absence, there is an implied joinder of issues on the defence. In other words, in its absence, all the material allegations of fact in the defence are deemed to be denied".***

Azu Crabbe JA (as he then was) in the case of *Odoi v. Hammond* [1971] 1 GLR 375 at 385, CA , also stated as follows as the main purpose of a reply;

> ***"The main purpose of a reply in pleadings is to raise in answer to the defence any matters which must be pleaded by way of confession and avoidance, or to make any admissions which the plaintiff consider it proper to make. 'The reply is the proper place for meeting the defence by confession and avoidance': per James L J in*** **Hall v. Eve** ***[1876] 4 Ch D 41 at pp 345-346, CA."***

At the close of pleadings, the Plaintiff pursuant to the rules of court filed an Application for Directions dated 6th October, 2021, in which he raised the following as the issues to be set down for the trial;

1. Whether or not Plaintiff took a lease of a stool land measuring 0.56 acres from Mpraeso stool since 2017.
2. Whether or not the boundaries of the land commence from survey pillar marked SGED 039/15/1 to SGED 039/15/4.
3. Whether or not on 1st day of February, 2017, an indenture with site plan attached was issued to Plaintiff by the lessor.
4. Whether or not Defendant had gone to register the land at the Lands Commission without Plaintiff's consent.
5. Whether or not the lessor, Mpraeso stool had granted any lease of the land to Defendant.

6. Whether or not the registration of the land at the Lands Commission by the Defendant constitutes fraud.
7. Any other issues arising out of pleadings.

Meanwhile, the Defendant also filed the following additional issues for the consideration of the court;

i. Whether or not the property in dispute is the Defendant's (property).

ii. Whether or not the Defendant has been in undisturbed possession of the land in dispute from 20-07-2010 to date.

The court merged the issues raised by the Plaintiff and the additional issues filed by the Defendant and adopted them as the issues to be set down for the trial. The court accordingly ordered the parties- assisted by their respective Counsel- to file and serve on each other their respective witness statements and exhibits, if any, that they would rely on to prove their separate cases at the trial. A case management conference was subsequently conducted. The parties complied with the orders paving way for the trial.

BURDEN OF PROOF ON PLAINTIFF:

I wish to respectfully take a short yet necessary detour to state the duty cast on the Plaintiff in this case and how same ought to be discharged in order to succeed in this case per her claims and the reliefs that she seeks for. This is because it is the Plaintiff who has issued the writ, which has raised issues, and which issues have been denied by the Defendants, who has and now assumes the onus of proof.

The relevant principle of law prominent in all civil claims is that, he who asserts must prove. This was reiterated by the Supreme Court in **Dzaisn v. Ghana Breweries Ltd [2007/08] SCGLR 547** where the court held:

> ***"It is a basic principle of law of evidence that the burden of persuasion in proving all essentials to any claim lies on whoever is making the claim."***

See also ***section 10(1) of the Evidence Act, NRCD 323*** which provides as follows:

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

Similarly, ***section 12(1) of the NRCD 323*** also reads as follows:

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

In the case of ***Takoradi Flour Mills v Samir Faris [2005-2006] SCGLR 882 holding 2,*** the Supreme Court enunciates the law on civil proof thus:

> *"The Plaintiff in a civil case is required to produce sufficient evidence to make out his claim on a preponderance of probabilities."*

See also holding 5 in the same case where it was stated that;

> *"It is sufficient to state that this being a civil suit, the rules of evidence require that the plaintiff produces sufficient evidence to make out his claim on a preponderance of probabilities, as defined in Section 12(2) of the Evidence Decree, 1975 (NRCD 323). 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."*

Similarly, in ***Okudzeto Ablakwa (No. 2) v. Attorney-General and Obetsebi-Lamptey (No. 2) [2012] 2 SCGLR 845***, the Supreme Court in dealing with the burden of proof held at page 867 of the report as follows:

> *"… he who asserts, assumes the onus of proof. The effect of that principle is the same as what has been codified in the Evidence Act, 1975 (NRCD 323), s 17 (a) … .What this rule literally means is that if a person goes to court to make an allegation, the onus is on him to lead evidence to prove that allegation, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in court if the case is based on an allegation which he fails to prove or establish."*

These are general principles on the burden of proof that a plaintiff or a claimant in civil suits assume without exception. However, there is some specific burden and standard of proof which applies and comes into play and for the consideration of the courts in land actions, just as we have in the present suit by the Plaintiff.

In that regard, I refer to and quote herein the case of ***Ago Sai and Others v Kpobi Tetteh Tsuru III [2010) SCGLR 762 at 779, where Ansah JSC (as he then was),*** held inter alia, as follows on the burden of proof that the Plaintiff assumes or has in a case ot this nature and hue:

> ***"This being an action for a declaration of title to land, the burden of proof and persuasion remained on the Plaintiffs to prove conclusively that on the balance of probabilities, he was entitled to his claim of title. This he could do by proving on the balance of probabilities the essentials of their root of title and method of acquiring title to the area in dispute, the Ogbojo lands". See also the case of Fosua & Adu-Poku v Dufie (Deceased) and Adu Poku- Mensah (2009) SCGLR 310 at 325- 327 per Atuguba JSC (as he then was).***

Meanwhile, in the case of Benyak Company Ltd v Paytell Ltd and Others (infra) the Supreme Court of Ghana had stated the following as the burden of proof on a Plaintiff in land actions of this nature for the stated reliefs:

> ***"It must be made clear that the action was for declaration of title to land and the usual ancillary reliefs. As the allegations of facts pleaded in support of the plaintiff's reliefs were all stoutly denied, the onus of proof of title was squarely on the plaintiff.***
>
> ***This is so in every civil case where averments are denied as the law has settled this in authorities namely: BANK OF WEST AFRICA LTD v. ACKON [1963] IGLR 176 SC, ABABIO v. AKANSI [1994-95] GBR Part II 74 and DUAH v. YORKWA [1993-94] IGLR 217 CA. Indeed, this court has held that the plaintiff, apart from pleading his root of title, mode of acquisition and overt acts of membership, if any, must prove that he is entitled to the declaration sought. In AWUKU v. TETTEH [2011] ISCGLR 366, this court has decided that in an action for a declaration of title to land, the onus was heavily on the plaintiff to prove his case, he could not rely on the weakness of the defendant's case. He must, indeed, show clear title…"***

The Supreme Court in the case of ***Ababio v. Akwasi [1994-95] GBR 774*** reiterated this point succinctly at page 777 of the report per Aikins JSC as follows:

> ***"The general principle of law is that it is the duty of a plaintiff to prove his case, i.e. he must prove what he alleges. In other words it is the party who raises in his pleadings an issue essential to the success of his case who assumes the burden of proving it. The burden only shifts to the defence to lead sufficient evidence to tip the scales in his favour when on a particular issue the plaintiff leads some evidence to prove his claim. If the defendant succeeds in doing this he wins; if not he loses on that particular issue."***

I must indicate clearly and it is instructive to state an important and non-negotiable duty of the court even in the face of all the burden of proof that the Plaintiff and indeed both parties in the suit have in this judgment. It is that it is the bounden duty of the court to assess all the evidence on record in order to determine in whose favour the balance of probabilities should lie or tilts.

This duty has been clearly enunciated in the case of ***In re Presidential Election Petition (No. 4) Akuffo-Addo and Ors. v. Mahama and Ors. [2013] SCGLR (Special Edition) 73,*** where the Supreme Court held at page 322 of the report as follows:

> ***"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."***

SUMMARY OF EVIDENCE ADDUCED BY THE PLAINTIFF AND THE DEFENDANT AT THE TRIAL:

For the case of the Plaintiff, the Plaintiff, testified by verifying his witness on oath, which he relied on and same was admitted into evidence as his sworn evidence-in-chief. He called one witness and closed his case. I must indicate that the sworn evidence-in-chief of the Plaintiff as per his witness statement was a rendition of his pleadings/statement of claim.

Plaintiff called one witness; Nana Ampadu Daaduam II, the Chief of Mpraeso-Kwahu as his sole witness. He is the alleged lessor of the Plaintiff.

In addition and in support of his case, the Plaintiff had also tendered into evidence Exhibit A which was made up of an indenture with a site plan issued to the Plaintiff by the Mpraeso stool acting through the Chief of Mpraeso-Kwahu, Nana Ampadu Daaduam II.

The Defendant also testified and called one witness in support of his case. He was Okyeame Yaw Baah; a former linguist to the Mpraeso Chief. The Defendant tendered the following exhibits into evidence in support of his case;

Exhibit 1: A purported lease agreement executed between the Nana Ampadu Daaduam II.

Exhibit 2: A site plan of his land

Exhibit 3: A judgment of the High Court, Koforidua, dated 19th day of February, 2014.

Exhibit 4: A photograph of some buildings erected on a parcel of land

LOCUS IN QUO INSPECTION AND OBSERVATIONS:

At the end of the trial but before the final judgment, the court took a decision- with the consent of the parties and their Counsel- to visit the locus of the disputed property. The court took the decision mainly to view the actual location of the land- that is whether it was on the left or right hand side of the road from Mpraeso to Nkwatia; and also to ascertain and view the presence of any buildings or structures on the land; as well as the presence of some ECG high tension lines that allegedly run across the land of the Defendant, which had come up during the trial.

The two parties had the chance to point out their lands and the aforementioned characteristics and also had the chance to cross-examine each other on oath. The court was of the opinion that the above observations and matters satisfied the requirements of the law on its decision to go to and view the locus. See the case of ***DARFOUR JNR. v. BOATENG (1976) 2 G.L.R. 191 CA.*** In the course of the judgment- and where necessary- I shall refer to some specific observations at the locus.

FACTS ADMITTED TO OR NOT IN CONTENTION BETWEEN THE PARTIES:

On the whole of the evidence before the court after trial, the following facts appear not to be in contention or are admitted:

a. ***That both parties have one common grantor; in the person of Nana Ampadu Daaduam II, the Chief of Mpraeso-Kwahu.***
b. ***That the common grantor dealt with and granted land to the Plaintiff and Defendant at different points in time.***
c. ***That between the Plaintiff and Defendant, the Defendant was the first the common grantor dealt with and allocated a piece of land.***

The facts in contention or in dispute would be discussed or resolved next.

DETERMINATION OF THE ISSUES.

Meanwhile, the issues in this judgment have been captured above. And I do not wish to repeat them again at this point.

Inasmuch as I concede that it was on the basis of those consolidated issues set down for trial that the parties and their Counsel prepared and submitted their respective witness statements, however, it is my considered opinion that when the pleadings of the parties as well as the evidence that they have adduced at trial are closely looked at, it would reveal and it may be seen that there are a couple of them that are very prominent whose resolutions could probably or substantially dispose of the suit and determine the dispute between the parties.

The position of the court finds support per the ***ipsissima verba*** of ***Wood CJ (as she then was) in the case of Fatal v Wolley (2013- 2014) 2 SCGLR 1070, at holding 2 as follows:***

> ***"It is sound learning that the courts are not tied down to only issues identified and agreed upon by the parties at pre-trial. Thus, if in the course of the hearing, an agreed issue is clearly found to be irrelevant, moot or even not germane to the action under trial, there is no duty cast on the court to receive evidence and adjudicate on it. The converse is equally true. If a crucial issue is left out, but emanates at trial from either the pleadings or evidence, the court cannot refuse to address it on the ground that it is not included in the agreed issues.."***

In the same vein, ***Anin Yeboah JSC (*** as he then was) in the case of ***Vincentia Mensah and Another v Numo Adjei Kwanko II; Civil Appeal No. J4/17/ 2016, delivered on 14th June, 2017,*** stated as follows:

> ***"It must, however, be made clear that a court of law is not bound to consider every conceivable issue arising from the pleadings and the evidence if in its opinion few of the issues could legally dispose of the case in accordance with the law".***

In ***Armah v. Hydra foam Estates (Gh.) Ltd [2013-2014] 2 SCGLR 1551,*** the Supreme Court held that it is the duty of the court to determine the main or ultimate issue in controversy.

See also ***FIDELITY INVESTMENT ADVISORS v. ABOAGYE ATTA (20032005) 2 GLR 188, CA)*** where the court held that what issues were relevant and essential was a matter of law entirely for the judge to determine.

In the light of the above authorities, the court has found that on the basis of the pleadings and the evidence led at the trial, the following is the main or ultimate issue for determination in this judgment;

Which is whether or not the Nana Ampadu Daaduam II- the common grantor of the parties- had originally or previously allocated the same land in dispute- situate on the right hand side of the road from Mpraeso to Nkwatia- to the Defendant many years before the allocation to the Plaintiff?

Ultimate issue is defined in Black's Law Dictionary, 9th edition, page 908, as '***a not-yet decided point that is sufficient either in itself or in connection with other points to resolve the entire case.***

In the considered opinion of the court, the resolution of this issue will lead to a resolution of the entire matter or dispute between the parties including resolving what I consider to be ancillary issues in this judgment. From the evidence led so far at the both parties have mentioned or named the PW1, Nana Amapdu Daaduam II, and the Mpraeso stool as their common grantor to the same land. For example the Plaintiff at the paragraph 3 of his statement of claim, pleaded that;

"3. Plaintiff states that he took a lease of a stool land measuring 0.56 acres from Mpraeso stool since 2017".

On the other hand, the Defendant at the paragraph 4 of his statement of defence made similar claims as follows;

"4. Defendant says that by lease dated 20-7-2010, Nana Amapdu Daaduam II, Chief of Mpraeso, acting with the consent and concurrence of the principal elders of the stool granted a lease in all that piece and/or parcel of land situate and being at Mpraeso….. to the Defendant for a term of 99 years and renewable for a further 50 years subject to the terms contained therein".

At the trial, the Plaintiff called the PW1 as his main witness. On the authorities, the Plaintiff by calling the PW1 as a witness was only complying with the law on such matters. Because it is trite law that in land actions of this nature, when a Plaintiff's title is in issue, he has a duty to either join his grantor or at the minimum call his grantor to give evidence in his favour.

A similar scenario played out and is reported in the case of ***Asare v Donkor and Serwaa II (1962) 2 GLR 176, SC,*** where both the plaintiff and the defendant in a land case claimed the same grantor (an ***odikro)*** and the odikro testified for the plaintiff. It was held that the court was bound to accept the corroborated evidence of the plaintiff in preference to that of the defendant.

The PW1 in his testimony on oath admitted knowing and transacting with the both parties, albeit at different points in time. However, the point of departure and which appears to be the kernel of is evidence is captured at the paragraph 21 of his verified and admitted witness statement as follows;

> ***"17. I reiterate that the land I granted the Defendant lies on the left hand side of the Mpraeso-Nkwatia road which the Defendant proceeded to clear; whereas the land granted the Plaintiff herein lies on the right hand side of the road as one travels from Mpraeso towards Nkwatia".***

Indeed, during his cross-examination by the learned Counsel for the Defendant, the PW1 repeated his assertion as seen in the following exchanges;

> ***Q: I put it to you that any subsequent agreement you executed with the Plaintiff in 2017 is void as you had leased same to the Defendant and for which he has obtained judgment for it.***
>
> ***A: In the year 2010, I never gave any land to the Defendant. It was before 2010. But that agreement was in respect of the land at the right hand side of the road. I never gave the land on the right hand side to him".***

It is my considered opinion that the evidence of the PW1 as the common grantor one way or the other as to between the parties he granted the land in dispute to is very relevant and crucial. This is because of the principle held in the case of ***OGBARMEY-TETTEH v. OGBARMEY-TETTEH [1993-94] 1 GLR 353***, at holding 4 on the vital evidence of a common grantor where it was held thus:

> ***"Where rival parties claimed property as having been granted to each by the same grantor, the evidence of the grantor in favour of one of the parties should incline a court to believe the case of the party in whose favour the grantor gave evidence unless destroyed by the other party..."***

On the evidence, the land in dispute lies on the right hand side of the road from Mpraeso to Nkwatia. What has been in dispute is who between the two parties was given the land by the common grantor. The court visited the locus in the company of the parties and confirmed that the land in dispute lies on the right hand side of the road from Mpraeso to Nkwatia.

So in applying the above principle to the facts of the case, then it can be said that to the extent that the PW1 as the common grantor has testified that he gave the land in dispute to the Plaintiff, then that should generally or even automatically incline this court to believe the case of the Plaintiff and by extension find that the Plaintiff owns the land in dispute unless destroyed by the Defendant.

However, the testimony of such a grantor in favour of one party is not by any means sacrosanct or unimpeachable. So that if the evidence or testimony of the said common grantor is discredited or destroyed during the cross-examination or by any other evidence on record, then the court may be entitled to disregard the testimony of the said common grantor. Anin Yeboah JSC (as he then was) reiterated this exception to the general rule in OGBARMEY-TETTEH case (supra) when he remarked as follows in the case of ***Benyak Company Ltd v. Paytell Ltd. [2013-2014] 2 SCGLR 976,*** that;

"…***We do not doubt the soundness or accuracy of the principle of law enunciated in the above case. However, the issue is whether the evidence of the grantor (PW1) was discredited…"***

So the important question to ask at this juncture is whether or not the evidence of the Nana Ampadu Daaduam II, the common grantor, was discredited or destroyed by the Defendant at the trial? The effect is that if it is answered in the affirmative that the evidence of PW1 was discredited or destroyed, then the court may rule in favour of the Defendant. However, if it is answered in the negative, then it means that the PW1's evidence remains intact and credible and ***a fortiori*** would require the court to rule in favour of the Plaintiff on the issue.

The Defendant- from the record- attempted to discharge the burden of discrediting or destroying the testimony or evidence of the PW1 by asking him some questions as follows ;

> ***"Q: Somewhere in 2014, you went to court to testify in respect of the land in dispute.***
>
> ***A: Yes. At the Koforidua High Court.***
>
> ***Q:When you were testifying in this particular land in dispute, the Defendant had already built on the land in dispute.***
>
> ***A: I said the land I gave to him was on the left hand side, there is no building on it from Mpraeso to Nkwatia road.***
>
> ***Q: But when you went to testify at the Koforidua High Court, you testified in respect of the land at the right hand side of the road from Mpraeso to Nkwatia.***
>
> ***A: I never gave the land on the right hand side to the Defendant. I only gave the land on the left hand side to him. And that was why he went to clear it..***

Q: You also did not object to the Defendant that you did not give the land in dispute to him at Koforidua (High Court).

A: I said I did not give him the land. At the Koforidua High Court, I stated that I gave the land on the left hand side to the Defendant. At the Koforidua High Court, the land in dispute was the land on the right hand side.

Q: And it is the same land in which you testified about at the Koforidua which is in dispute before this court".

In respect of the above questions during the cross-examination and in support of his claim that the PW1 had granted the land in dispute to him and had exercised acts of possession for many years before the grant to the Plaintiff, the Defendant had tendered into evidence the ***Exhibit 3;*** a final judgment of the High Court, Koforidua, dated 19th day of February, 2014, Coram His Lordship Fred K. Awuah (as he then was).

That judgment was the result or product of a civil suit intitutled ***"Electricity Company of Ghana v Kwame Asante @ Ohene Nana"; Suit No. C12/18/2012.*** The Defendant in this case was the Defendant in that suit/judgment. From the said judgment, it appears that the Electricity Company of Ghana as Plaintiff has instituted the action at the High Court because the Plaintiff had alleged that the Defendant who was then constructing some buildings on a parcel of land had his development or constructions directly under the 11 K. V. Feeder (High Tension) electricity lines which posed safety concerns and sought for an order for the Defendant to remove or demolish all his structures under the said High Tension lines.

The Defendant had denied the claim of building under the High Tension lines and amongst others claimed he was building on a rightfully acquired land. He had mentioned the Mpraeso stool and the PW1 in this case as his grantor. The Electricity Company of Ghana however called the PW1 in this case as one of their witnesses in that trial. However, at the end of the trial, the court had ruled in favour of the Defendant's counterclaim while dismissing the Plaintiff's action.

The court had amongst others held that the Defendant had acquired the land containing his constructions from the Mpraeso stool and the PW1, that the Defendant was rightfully on his land and that the Plaintiff had failed to prove that any of the about twenty houses or buildings of the Defendant was under the High Tension lines.

So what is the legal effect and indeed the probative value of the Exhibit 3 in this case, especially when neither the Plaintiff nor the PW1 was a party to that suit or judgment?

In ***Peniana v. Affram [1966] GLR 220, SC, Bruce-Lyle JSC (as he then was)***

> ***"….It is quite evident from the evidence and from the judgment of the learned trial judge that the judgment in these actions were tendered not to operate as res judicata but as the learned trial judge rightly said to show that the sales by Bie and Bansah to the plaintiff's late father had taken place. The principle of law is that a judgment in a previous land suit is admissible in a subsequent suit though one of the parties to the subsequent suit was not a party to the former suit; such a judgment is admissible as evidence of acts of possession and evidence of exercise of acts of ownership, but not as establishing res judicata and this principle was followed in the case of Ababio II v. Catholic Mission (Priest-in-Charge).2 On this principle we find that the learned trial judge was right in admitting these judgments and acting upon the same…."***

Similarly, in the case of ***Benjamin Johnson v Fati Williams; SUIT NO. HI/168/2011;*** delivered on 1st December, 2011, Ofoe JA quoted the immediately preceding authority, which he affirmed and refined it as follows;

> ***"I believe may be coming from misapplication of the principles governing the use of previous judgments. We need not detain ourselves on the principles of estoppel which normally arises when issues about previous judgments are under consideration because none has been pleaded and is not contended by any of the parties. It is only where it is intended that a judgment should operate conclusively as estoppel that the matter of estoppel should be expressly pleaded. The law does not however prevent a judgment being used as a relevant fact from which the court may draw conclusions in favour of the person who tenders it even though one of the parties to the subsequent suit was not a party to the former suit. Refer to the cases of Peniana v. Affram (1966) GLR220 and Nana Akoto II v. Nana Akwesi Agyeman (1962) 1GLR524. But the question is what type of conclusions is the court capable of drawing from such previous judgment when one of the parties and predecessors were not parties in the previous suit? A court definitely should have limits to what use it can make of facts and finding in such previous judgments. In an adversarial system of ours where parties have the sole duty marshalling evidence and defend such evidence in cross examination it won't be difficult to appreciate the injustice that will arise if a court just draws any type of conclusion from facts and findings in the previous judgment not known or tested by a party in the subsequent trial. It is for this reason that the party tendering the previous judgment is obliged to use the trial processes to get into the subsequent trial facts from the previous judgment that he believes will inure to his benefit. It is my view that any such importation from previous judgments by a court should be done such***

that it does not deny the other party a hearing on the imported fact and does not cause any injustice to the other party….".

In the case of **Agya Boakye Atonsah Prempeh v. Eric Ofei Kwarpong and Others [2018] DLCA 4436,** Mariama JA (as she then was) stated that: "**With respect to the Defendant relying on a judgment, what better proof can one offer than a judgment? A judgment is a documentary proof par excellence.** ***This is because, his grantor's mode of acquisition, both oral and documentary was evaluated by the Highest Court of the Ghana, the Supreme Court.***"

In the opinion of the court, based on the above authorities, inasmuch as the Exhibit 3 could not have operated as estoppel against the Plaintiff- especially as he nor the PW1 was a party properly so-called to the said suit and judgment at the High Court, Koforidua- nevertheless that entitled the Defendant to rely on it as admissible evidence of acts of possession and evidence of exercise of acts of ownership, and also entitled both the Defendant and the court to draw relevant conclusions and inferences in favour of the Defendant who tendered it.

An inference in the legal sense is a deduction from the evidence and if it is a reasonable deduction it may have the validity of legal proof. See the case of ***Gershon Yao Adabunu v Seth Dovie and Ano; Civil Appeal No. 79/2003; delivered on 18th June, 2004***; per Akamba JA (as he then was).

From the Exhibit 3, it is clear that the land in that action had some buildings on it. It is also from the Exhibit 3 that the ECG High Tension lines passed over or were close to the land which contained the buildings of the PW1. In addition, from the Exhibit 3, the buildings of the Defendant on the land the subject matter of dispute before the High Court, Koforidua, were close to the property of one Wofa Kissi, a neighbour of the Defendant.

I am going to reproduce below some of the exchanges that took place during the cross-examination of the PW1 when he testified at the High Court, Koforidua, which are found in and were evaluated by the trial judge in the judgment, Exhibit 3;

"Q: I suggest to you that the area Defendant is developing in relation to the high tension lines is not different in terms of closeness to the High Tension lines from Wofa Kissi's house at Mpraeso?

A: I cannot tell because it does not concern me.

Q: I put it to you that the area where the Defendant is developing is not close to the high tension lines.

A: I am insisting that it is right beneath the tension lines.

Q: How do you know?

A: When you are passing you see ".

Indeed, the above facts concerning the physical characteristics on the land and the dispute about the specific nature and identity of the land granted to the Plaintiff and Defendant- in terms of their actual locations on the road from Mpraeso to Nkwatia; and the need to resolve them- informed the court's decision at the end of the trial but before judgment to conduct a locus inspection in the presence of the parties to enable the court resolve those facts that were not only crucial but could only have been done or resolved by ocular view of same. See ***Asare v Donkor and Serwaa II*** case (supra) per Ollenu JSC (as he then was).

At the locus, both parties pointed out the same area of land, save that the one pointed out by the Defendant was about 10% bigger than the area of land pointed out by the Plaintiff. It was on the right hand side of the road from Mpraeso to Nkwatia. The area of land pointed out by the parties showed the presence of some at least a dozen of buildings that appear to have stood there for some time now. The buildings matched the buildings in the Exhibit 4 tendered by the Defendant.

I saw the ECG lines which appeared to run over the land on the right hand side of the road from Mpraeso to Nkwatia and the high tension lines were around the buildings erected by the Defendant. The parties also showed me the house or property of Wofa Kissi; which appeared to share boundaries with the property pointed out by the parties, situate on the right hand side of the road from Mpraeso to Nkwatia.

Now, opposite the land pointed out by the parties- that is on the left hand side of the road from Mpraeso to Nkwatia- which was pointed out by the Plaintiff as the one the PW1 gave to the Defendant- had no buildings nor any signs of recent development on it. I also did not see any ECG lines on that side of the road and the house of Wofa Kissi was not on that side of the road from Mpraeso to Nkwatia.

Indeed, during his cross-examination by the Counsel of the Defendant at the trial in this court, the PW1 replied as follows to show that the land he gave to the Defendant shared boundaries with the property of Wofa Kissi:

"Q: So you did not give him that land but you have watched on while the Defendant has developed the land in question since 2002.

A: There was a dispute over the land between the Defendant's and Wofa Kissi in which I ruled against the Defendant. The Kwahu Omanhene invited me and Wofa Kissi and the Defendant to Abene. But the Defendant failed to show up. And when we went to the Koforidua, I had not seen any building or apartment on the land".

The reasonable inference or conclusion I make is that at the time the Electricity Company of Ghana sued the Defendant before the High Court, Koforidua, in October, 2012, the Defendant was already on the land and was exercising acts of ownership and possession because otherwise the ECG would not have sued the Defendant over the high tension lines that run over the buildings of the Defendant. Similarly, the PW1 could not have invited the Defendant and the Wofa Kissi to a settlement attempt before the Kwahu Omanhene over the land.

Another relevant or necessary inference is that the particular piece of land for which the Electricity Company of Ghana sued the Defendant over could only have been on the right hand side of the road from Mpraeso to Nkwatia, and not in respect of any land located on the left hand of the road from Mpraeso to Nkwatia.

Another inference from the Exhibit 3 is that contrary to the statement of the PW1 that at the trial in the High Court, Koforidua, he had stated or told the court that he had only given the land on the left hand side of the road from Mpraeso to Nkwatia to the Defendant, the evidence of the PW1 at the trial and which appears at page 13 of the Exhibit 3, shows or suggests that the PW1 was not even certain about the location of the land he had given to the Defendant at the time he testified before the High Court, Koforidua;

"Q: Do you know why you are here?

A: Yes, My Lord.

Q: Will you tell the court.

A: The land in dispute is at Mpraeso and it was acquired by the Defendant from me 6 to 8 years ago. I did not know the exact land but I know that the Defendant acquired a piece of land from me about 6 to 8 years ago.

Q: Tell us why you are here.

A: The Defendant acquired this land from me on the other side of the road going to Nkwatia. Sometime later he sent a bulldozer to the land and cleared a large portion of it. Whenever it rained there was erosion and the earth washed down to the main road so my paramount chief Daasebreh Akuamoah Boateng II Kwahumanhene suggested to me that I should stop the developer. More or less at the same time the EPA wrote to me stop the developer and perhaps make him to replant. I conveyed the message to the Defendant and suggested to him that should find another convenient place and he would not leave. Unfortunately, at that time I had not executed any indenture..".

It is the considered opinion of the court that on the balance of probabilities, the evidence tilts more in favour of the assertion or claim of the Defendant that the land the PW1 gave to the Defendant and which was the subject matter of dispute in the suit before and judgment of the High Court, Koforidua, was the land on the right hand side of the road from Mpraeso to Nkwatia.

In the case of ***Asare v Donkor and Serwaa II*** (supra) the Supreme Court had ruled in favour of the respondent mainly because he had called the common grantor- Matthew Anokye- as a key witness to the transaction or grant to testify in their favour at the trial; while the appellants failed to called the other named witness to the transaction, Gyantutu after the testimony of Mathew Anokye.

The court had found one of the two main issues to be resolved as "***to whom was the grant of the land in dispute made: the respondent or the first appellant".***

However as was stated by Ollenu JSC, under such circumstances, when rival parties claim the same property from a common grantor, ***" the only way whereby that first issue can be determined is through the evidence of the said Mathew Anokye and evidence of any other eye witness to the separate grants".***

It would therefore appear that in a case where rival parties claim the same property and disclose a common grantor, the testimony of the common grantor may not be treated as sacrosanct and unimpeachable truth but must be carefully evaluated in relation to the testimony of any other eye witness who was present during the transaction or allocation of the land in question. The court will therefore then be required to evaluate the competing evidence and determine which of the two versions is more credible and probable. See the of ***Quaye v. Mariamu [1961] 1 GLR 83***

In this case, the Defendant called one of the witnesses to the grant or allocation to the Defendant. The DW1, who was a linguist or ***okyeame*** of the PW1 for many years and during the time of the transaction between the PW1 and Defendant testified that the PW1 gave or granted the land on the right hand side

of the road from Mpraeso to Nkwatia- the property in dispute- to the Defendant; and not any land on the left hand side of the road.

From the record, the testimony or evidence of the DW1 remained intact and was not shaken or discredited during his cross-examination. He appeared to have a much better recollection of the transaction between the PW1 and Defendant. He also appeared to have physically taken part in the demarcation of the land to the Defendant, contrary to the PW1, who appeared to have only given instructions for the Defendant to be granted a parcel of land without necessarily been present, even if not an unusual practice when a chief or occupant of a stool allocates lands in this country.

The DW1, Okyeame Yaw Baah, had answered as follows when he was cross-examined by the Counsel of the Plaintiff:

> ***"Q: Who sells or allocates land to prospective developers in Mpraeso***
>
> ***A: The Chief.***
>
> ***Q: And you are telling the court that the one who sold the land does not know where he sold the land?***
>
> ***A: It can be possible. Because the chief sent me and the draughtsman to allocate the land on the right land side to the Defendant.***
>
> ***Q: I put it to you that what you said cannot be true and he knows the land he gives out to prospective developers.***
>
> ***A: It is not every time or all the time he knows lands he gives out. The chief would ask us where there are vacant lands to lease out or sell".***

In the light of all the above, the court makes the following findings of fact:

1. The PW1 as chief of Mpraeso and his elders gave the parcel of land in dispute situate on the right hand side of the road from Mpraeso to Nkwatia to the Defendant originally by customary grant around 2003.
2. That the land the PW1 gave to the Defendant was not located on the left hand side of the road from Mpraeso to Nkwatia.

3. That the PW1 gave the same land to the Plaintiff only in 2017, many years after the similar allocation or grant to the Defendant.
4. That the Defendant has been on the land exercising various acts of possession on the land including the erection of several buildings on the land at the time of the transaction between the PW1 and Plaintiff.

Following from all of this, I hold that at the time the PW1 allocated the land in dispute to the Plaintiff in 2017, the PW1 as the occupant of the Mpraeso stool, had divested himself/itself of any interest in the land in dispute. The effect was that the PW1 as grantor had nothing to pass to the PW1 as per their 2017 transaction. The ***nemo dat quod non habet*** rule was thus applied automatically..

In Tetteh and Another v. Hayford (Substituted by) Larbi and Decker [2012] 1 SCGLR 417 it was held as follows:

> ***"On application of the nemo dat quod non habet maxim, the Asere Stool, having divested itself of its interest in the land in favour of the original defendant long ago in 1974, had nothing with regard to the divested land to convey again; and so any purported sale of the already divested land, subsequently made to the plaintiff, is null and void…".***

In the case of ***Seidu Mohammed v. Saanbayee Basilide Kangberee [2012] 2 SCGLR 1182***, the Supreme Court, per Dotse, JSC again stated emphatically as follows:

> ***"This principle of nemo dat quod non habet operates ruthlessly and by it an owner of land can only convey title that he owns at the material time of the conveyance and since by the evidence on record, Anna Benieh Yanney, had divested herself of title in the same parcel of land to Emmanuel Yaw Nkrumah, the plaintiff's vendor on 12 – 12 – 1986, there was definitely no title left in her to convey to any other person, at the time the conveyance to defendant's vendors was effected. The conveyance to the defendant's vendors and subsequently to the defendant herein are therefore null and void and of no effect."***

The principle of nemo dat quod non habet has received notorious application by the courts in this country. In Abua ***v. Keelsen; Yima v. Keelsen (Consolidated Supreme Court, Suits No. 81/92 and L.20/92, 16 March 2011 unreported cited with approval in Tetteh (substituted by) Larbi and Decker [2012] 1 SCGLR 417 at page 431,*** the Supreme Court also stated the principle as follows:-

> ***"It can thus be safely concluded that the principle nemo dat quod non habet applies whenever an owner of land who had previously divested himself of title in land previously owned by him to***

another person, attempts by a subsequent transaction to convey title to the new person in respect of the same land cannot be valid."

There overwhelming evidence from the record is that at the time of the grant to the Plaintiff as per his Exhibit A dated 1st day of February 2017, the PW1 had earlier and many years before granted the same area of land on the right hand side of the road from Mpraeso to Nkwatia to the Defendant.

I will therefore hold that the transaction between the Plaintiff and the PW1 was encumbered or caught by the principle of nemo dat quod non habet and therefore PW1 and the Mpraeso stool gave nothing to the Plaintiff and the Plaintiff ***a fortiori*** obtained no title.

The court in making the above findings and conclusions has been mindful of one of the cardinal duties of a court in evaluating evidence led during trial which is for the court to assess all the evidence on record in order to determine in whose favour the balance of probabilities should lie. Some cases in point are ***Adwubeng v. Domfeh [1996-97] SCGLR 660; and Takoradi Flour Mills v. Samir Faris [2005-2006] SCGLR 882.***

A more recent rendition of the principle was made by the Supreme Court in ***In re Presidential Election Petition (No. 4) Akuffo-Addo and Ors. v. Mahama and Ors. [2013] SCGLR (Special Edition) 73,*** where the Supreme Court held at page 322 of the report as follows:

> ***"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."***

ISSUES 4 AND 6 RAISED BY PLAINTIFF:

I have found it imperative to the comment on and resolve the issues 4 and 6 as raised by the Plaintiff in his application for directions. They are:

> ***4. Whether or not Defendant had gone to register the land at the Lands Commission without Plaintiff's consent.***
>
> ***6. Whether or not the registration of the land at the Lands Commission by the Defendant constitutes fraud.***

In terms of the issue 5, the court finds that to the extent that the court has found that the Defendant obtained the land from the Mpraeso stool and the PW1 many years before him and has been exercising acts over the land long before the Plaintiff's transaction with the PW1 only in 2017, then the Defendant was lawfully on the land and had legal right over the land and did not need the permission or consent of the Plaintiff to deal with the land in a manner he liked as long as it was within the limits of the law and terms of the grant , including going to register the land. See the case of ***Nyikplorkpo V. Agbodotor [1987-88] 1 GLR 165 per Abban JA (as he then was).*** Issue 5 is therefore resolved in favour of the Defendant.

Meanwhile, with respect to the issue 6, the Plaintiff had pleaded that the Defendant's registration at the Lands Commission, Koforidua, was tantamount to fraud.

In the case of ***Okofoh Estate Ltd v. Modern Sign Ltd (1996-97) SCGKR 224 @ 253,*** Edward Wiredu, JSC, succinctly stated the position thus:

> ***"An allegation of fraud goes to the root of every transaction. A judgment obtained by fraud passes no right under it and so does a gorged document or a document obtained by fraud pass no right."***

Wood JA (as she then was) ***in Good Shepherd Mission v. Sykes and Ors [1997-88] 1 GLR 978- 99 CA*** defined what constitutes fraud and cited two distinguished English textbook writers, ***D. L. McDonnell and J.G. Monroe*** in their book ***Kerr on Fraud and Mistake (7thed***) and defined fraud as follows:-

> ***"Fraud in the contemplation of a civil court of justice may be said to include properly all acts, omissions, and concealment which involve a breach of legal or equitable duty trust or confidence, justly reposed, and are injurious to another or by which an undue or unconscient advantage is taken of another. All surprise, trick, cunning, dissembling and other unfair way that is used to cheat anyone is considered as fraud. Fraud in all cases implies a wilful act on the part of anyone whereby another is sought to be deprived, by illegal or inequitable means of what is entitled to."***

The Blacks Dictionary (9th ed.) also defines fraud thus***:-***

> ***"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."***

In **Sasu Bamfo v. Sintim [2012] 1 SCGLR 136,** fraud was required to be proved beyond reasonable doubt by the person who alleges fraud. Also, the Supreme Court in **Fenuku and Anor v. John-Teye and Anor [2001-2002] SCGLR 985** held that:

> ***"The law regarding proof of forgery or any allegation of a criminal act in civil trial was governed by section 13(1) of the Evidence Decree which provided that the burden of persuasion required proof beyond reasonable doubt."***

The Supreme Court, in the case of **the Republic v. the High Court Judge (2006) I GMLR 118,** also took a serious view of a similar allegation of fraud and stated at page 136 as follows:

> ***"Fraud is a serious sin against the administration of justice and fraud vitiates everything... The proponent must not only distinctly specify the alleged fraud, but also strictly prove same because it is not permissible to infer fraud from general situations or facts…".***

The onus of proof was therefore on the Plaintiff to prove fraud against the Defendant beyond reasonable doubt. Plaintiff in his Statement of Claim and filed witness statement had given the particulars of the said fraud as follows:

a. The land has not been leased to the Defendant.
b. Judgment used to register the land was procured with deceit without telling the court the true size of the land
c. Quickly registering the land knowing very well that the size of the land he registered was not his land.

On the evidence adduced before the court, the court finds that the Plaintiff failed to prove fraud against the Defendant beyond reasonable doubt. On the first part of the allegation of fraud that the land has not been leased to the Defendant (obviously by the PW1), the court does not find any evidence to support that, both based on the evidence adduced before the court and based on the inferences and conclusions made from the Exhibit 3, which amply supported a transaction between the PW1 and the Defendant over the land in question.

I must state clearly that even without the said disputed lease executed between the PW1 and the Defendant in 2010, the prior and original grant of the land in 2003- during the presidency of President Kuffour as the PW1 stated- by the PW1 to the Defendant was valid and vested title in the Defendant even without requiring the execution of a formal document.

In holding 3 in the case of **BROWN v. QUARSHIGAH (2003-4) SCGLR 930**, the Supreme Court stated that:

> ***"An effective customary conveyance of land would divest the grantor of any further right, title or interest in the land. Consequently, the customary law vendor could not make another valid grant of the same land".***

In **OKONTI BORLEY V. HAUSBAUER [2011] 39 GMJ 25 at 38,** the Court of Appeal per Kusi Appiah JA stated as follows:

> ***"where the parties have a common grantor, the only consideration for any court that is called upon to decide which of the two grantees must have title to the land should be who got the grant first. This must be so due to the fact that a grantor who has previously granted land to one person is not permitted by any law to derogate from that grant and give the same plot to another person, except where the first grantee is in breach of a covenant entitling the grantor to re-enter and he has actually re-entered the land…".***

Once land has been granted to a person, it cannot be taken away from him and another piece given him in substitution without his consent. The grantor would be acting unlawfully if, without the consent of the grantee, he should grant the original land to another person, allocating another piece of land to the original grantee. And the party to whom a purported grant of such land is made would be guilty of trespass if he entered upon it without the permission of the original grantee. **Bruce v. Quarnor *[1959] G.L.R. 292***

On the second and third parts of the allegation of fraud that the judgment used to register the land was procured with deceit without telling the court the true size of his land, all that I can say is that the Defendant was not the Plaintiff in that case and even in his counterclaim, he only sought for "an order to compel the Plaintiff (ECG) to remove the lines from the Defendant land".

The High Court was essentially to determine if the construction and activities of the Defendant were close to the high tension lines; in other words if the Defendant was within his land. The issue of the specific size of the land or the Defendant appear not to have been an issue. In any case, this court- as a Circuit Court- cannot in and by this instant judgment have jurisdiction to investigate and question the propriety or otherwise of the judgment of a superior court such as the High Court, Koforidua.

A decision of a court- more so a superior court- is presumed to be valid until its invalidity has been established in a court of competent jurisdiction. As was famously held by Lord Radcliffe in ***Smith v. East Elloe Rural District Council [1956] AC 736 at 769,*** the law is that :

> ***"An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."***

See also the case of ***Republic v High Court, Accra; Ex-parte Continental Cargo and Trading Services Inc; delivered on 24th July, 2002; per Afreh JSC*** (as he then was).

In similar vein, Abban J (as he then was) in ***Republic V. Maffat; Ex-parte Allotey {1971} 2 GLR 391*** said that;

> ***"An order or judgment from the superior Courts unlike those from inferior Courts are presumed valid .... A person who willfully disregards such orders does so at the risk of being brought up for contempt."***

In the opinion of the court, the said judgment of the High Court, Koforidua, Coram His Lordship Fred K. Awuah remains valid, with all its warts and all. It has not been set aside either by appeal or quashed by resort to any of the prerogative orders or writs including Certiorari.

As a corollary to the above, it has always been the law that a final judgment of a court of competent jurisdiction is one notable source of good title to land**.** In the Exhibit 3, the learned trial judge gave judgment to the Defendant on his counterclaim, remarking or finding that; "… ***From the evidence of the PW1 it is not in doubt that the land in dispute was customarily granted to the Defendant and therefore the latter has the right or title to same".***

In addition, per ***section 207 (1) (h) of the Land Act, 2020 (Act 1036),*** a court judgment in respect of an interest in land is registrable instrument. In that regard, the court fails to see how the Defendant committed fraud by going to register the land at the Lands Commission, Koforidua, based on the judgment he had obtained from a court of competent jurisdiction.

In the opinion of the court, if there is anyone whose acts may be expressed as "fraudulent", it should be the Plaintiff. This is because from the evidence, apart from the fact that he was not a prudent

purchaser for value without notice, he also went ahead to acquire the land when he knew or ought to have known that the land he was going to acquire was occupied or encumbered.

In **Boateng v. Dwinfuor (1979) GLR 360**, the Court of Appeal stated that ***"…a purchaser was deemed to have notice of all that a reasonable prudent purchaser would have discovered. Thus where the purchaser had actual notice that the property was in some way encumbered, she would be held to have had constructive notice of all that she would have discovered if she had investigated the encumbrance."***

In the instant case, based on the evidence before the court at the trial, there is no doubt that the Plaintiff saw that part of the land he was acquiring was encumbered or was in possession as the buildings of the Defendant are glaringly on the land, even if they only occupied part of the building. Even long before the days of the suit at the High Court, Koforidua, the Defendant had developed part of the land.

Thus the Plaintiff's assertion or response during his cross-examination by the learned Counsel of the Defendant that at the time he went to purchase the land there were no apartments on the land and that it was on his return from outside the country that he saw some development on the land and an erection of a wall by the Defendant cannot be true and supported on the evidence.

At the paragraph 7 of the Defendant's statement of defence, he had put forward or pleaded the following defence to suggest that the Plaintiff was not a prudent purchaser for value without notice;

> ***" 7. Defendant says that if Plaintiff had conducted the barest due diligence on Defendant's parcel of land he would have been put on notice that the land had already been granted to Defendant".***

The Plaintiff in his reply filed on 15th September, 2021, responded at paragraph 6 that;

> ***"6. In reply to paragraph 7 of the defence Plaintiff states that he is very aware that the land belongs to him and that there was no need to conduct any due diligence on my own property".***

Clearly, such a reply from the Plaintiff to a challenge by the Defendant that he had not acted with prudence in purportedly acquiring the property only supports a reasonable inference that the Plaintiff fell short of a prudent purchaser.

In the instant case, it appears that the Plaintiff merely relied on the representations by the PW1 as Chief of Mpraeso and his belief in his powers as the custodian of the Mpraeso stool lands to acquire the land without conducting other independent or corroborative investigations.

It needs emphasizing the point that on the authorities it is expected of any diligent purchaser of land not to conduct only formal searches but also informal searches too. For example, the presence of the buildings on the land should have put him on notice. Nearby to the buildings of the Defendant is the property of Wofa Kissi.

Indeed, the expectation of the law is that for a person who was going to acquire those lands, he could have enquired from potential boundary owners and neighbours to have obtained some information about the land he was going to acquire. But he did not. Plaintiff appeared to have acted ***mala fide.***

The general principle of equity is that a purchaser is deemed to have notice of all that a reasonably prudent purchaser would have discovered if she had investigated his vendors title. A purchaser is required to take reasonable care to obtain any relevant information otherwise they will be fixed with constructive notice of any matter they would have discovered had they made the normal and customary enquiries over the title deeds or the land. See *Reeves v. Pope* [1914] 2 KB 284, *Boateng v. Dwinfour* [1979] GLR 360 at 366 C.A.

In addition, the Plaintiff had also put up a defence that the Defendant if anything at all had developed only part of the land and that part of the land was bushy with no developments. Now even though I concede that the Defendant has not fully developed the whole of the land in dispute- especially from the court's view of the land with the parties- that cannot be fatal to the Defendant's title or interest in the land and same cannot inure to the Plaintiffs benefit.

This is because it is trite law that possession in law is possession in fact. Possession involves the physical control over the thing itself that is corpus possession and the intention to exercise exclusive possession of the land itself, which is *animus possedendi*. In other words, possession of land may be actual or constructive. Actual possession is *"physical occupancy or control over property,"* whiles right to possession (constructive possession*) "is control or dominion over a property without actual possession or custody of it"*. See: Black's Law Dictionary (2009, 9 ed. 1281).

That union between actual physical possession and mental possession is found in this case by the Defendant. See the dictum of Kludze J.S.C (as he then was) in the case ***BROWN V. QUARSHIGAH (2003-2004) SCGLR 930 ; and Twifo Oil Palm Project Ltd V. Ayisi and Others [1982-83] GLR 881-896 CA.***

The Plaintiff's claim thus does not find favour with this court and still affects his purported title from the PW1 even it he was of the opinion that the Defendant had not fully and completely developed the whole of the land. The slight development of the land by the Defendant together with his clear intention to possess it to the exclusion of others, especially with the erection of the wall around it, was enough in law.

In **Mary Laryea Nunoo v. Manase Afaglo; J4/73/2018 dated 28th July 2020**, the Supreme Court noted as follows which I find applies to the instant case ***mutatis mutandis*** against the Plaintiff:

> ***"Where a purchaser of land had the opportunity of seeing evidence of possession no matter how slight on any part of the land he intended to purchase but he fails to investigate the authority behind [0]the adverse possession he is fixed with notice of the adverse possessor"***

The Plaintiff therefore has himself to blame. This court cannot help him as he acquired no valid grant or lease from the PW1 and the Mpraeso stool. This is because…

> ***"In law, the first plaintiff witness had no title to pass to the plaintiff as he had already made a valid grant to the third defendant, because a subsisting valid grant made by the first plaintiff witness created an encumbrance on the land even if it was initially a customary grant, for a conveyance of land made in accordance with customary law was effective as from the date it was made."***

See the case of* Benyak Co. Ltd. v. Paytell Ltd. and Ors *[2013-2014] 2 SCGLR 976 @ 977 per Anin Yeboah JSC (as he then was).

Professor Kludze JSC in the case of BROWN v QUARSHIGAH case (supra)explained the law in the following words:

> ***"If an interest is validly created in favour of one party at customary law without a written instrument to be registered, a subsequent attempt to grant the same land to a different person will be a nullity because the grantor, having divested himself of his interest in the property, would have nothing to grant or convey to a different person. In that circumstance, the earlier grant prevails, not because of the priority of registration, but because the purported subsequent grant is null and void".***

In relating the above to the PW1 as the grantor, he is also aware or deemed to be aware of the judgment of the High Court, Koforidua, which gave judgment to the Defendant. So that at the time he

purportedly granted the land to the Plaintiff, he was deemed to have had notice of that judgment and the Defendant's judicially declared right in that land.

Even if he was not a party to that case and judgment, he could have taken advantage of the avenues under the law as a "stranger" to have challenged that judgment including having it set aside, as the judgment one way or the other affected his interest in the land. **See Gbago v. Owusu (1972) 2 GLR 252**; **Lamptey v. Hammond (1987-88) GLR 327** and **Wolley v. Nsiah (2003-2005) 1 GLR 69**. But the PW1 did not resort to any of the legal avenues. He therefore granted the land to the Plaintiff obvious of and subject to the existence of that encumbrance.

Last but not least- and as an issue arising from the pleadings that I am entitled to comment on and resolve, the court finds that the PW1 on the evidence is guilty of acquiescence as he has been aware before and after the action before the High Court, Koforidua, and the resultant judgment and before the allocation to the Plaintiff, the development and activities of the Defendant on the land but has sat by and not taken any action while the Defendant expends money and resources to develop the land.

From the facts, the PW1 and Defendant appear to have known each other for a very long time. It is not the case that the Defendant is a stranger at the town who just went to occupy the land.

Acquiescence is defined in Blacks Law Dictionary as a person's tacit or passive acceptance; implied consent to an act. Acquiescence as a principle of substantive law is based on the concepts of good faith and equity.

It would be seen that the Plaintiff's right of action first accrued to the PW1 as grantor through whom the Plaintiff derives his title. But he did not challenge the presence and development of the Defendant on the land. It cannot be said that the PW1 has not been aware of the activities and development on the land by the Defendant.

I concede however that the court has taken note of some of the concerns of the PW1 especially with respect to the lease that the Defendant had tendered at the trial. According to the PW1 he had not prepared that and that it was the Defendant who prepared it and brought it to him sign, which he rejected, especially when it contained that he had leased the land to the Defendant for 99 years, renewable for another 50 years, which he had found ridiculous.

Indeed, this court evaluated that document and found some insertions and erasures in the document. It raise some doubts and suspicions about its authenticity. This court thus in arriving at its decision did not place much weight on the Exhibit 1, the said lease executed between the PW1 and Defendant.

DUODU AMADU AND ANOR V. BERNARD NIMAKO AKOWUAH AND ANOR [2012]52 GMJ 27, per Anin Yeboah JSC

Nonetheless, that cannot be fatal to the Defendant's better claim to the land, based on the aforementioned reasons, especially in the light of the established grant of the land to the Defendant by the PW1 in the early 2000s and the Defendant's many years undisturbed possession and activities on the land and for the fact the Plaintiff was not a prudent purchaser for valuable consideration without notice.

In **HAMMOND V. ODOI [1982-83] 2 GLR 1215** Adade J.S.C. dissenting held that *"Where a prior oral customary grant can be established, no amount of subsequent conveyances, registered or not, can defeat the customary title.*

However, the PW1 is estopped through his acquiesance from asserting his rights because after the Defendant had acquired the land in good and entered same in obvious good faith many years before the grant to the Plaintiff, the PW1 stood by for many years while the Defendant incurred expenditure in developing the land. The PW1 and by extension the Plaintiff are deemed to have waived their rights. ***See also Coleman v. Shang [1959] G.L.R. 390, C.A.; and Morgan Kwame Opoku v Akosua Osaa; Civil Appeal No: H1/214/2018; delivered on 21st March, 2019; per Cecilia Sowah, JA.***

CONCLUSION AND DISPOSITIONS:

In the case of ***OXYAIR LTD and DARKO v. WOOD [2005-2006] SCGLR 1057***, it was also held that in the case of oath against oath, it was the duty of the trial court, or for that matter, any court to consider the evidence adduced to form a judgment as to what version of events was more credible. The judge could not be faulted on his decision if it had been based on the evidence on record.

Similarly, in the case of ***LUTTERODT v. COMMISSIONER OF POLICE [1963]2 GLR 429, SC***, it was held that when it comes to oath against oath, it is incumbent upon the trial court to examine he evidence before preferring one to the other. The court should then give reasons for the preference.

The parties were required to adduce sufficient and credible and quality evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than it non-existence. And the real standard required of them- in terms of the main suit and defence of the Defendant- is proof on the preponderance of the probabilities. ***See sections 12 (2) and 14 of Evidence***

Act (supra) referred. The court found the case of the Defendant to be more probable, superior and weightier of the two versions before it.

Since the standard of proof in a civil action is proof on preponderance of probabilities, a party need not prove his case with absolute certainty or with mathematical exactitude. The standard of proof required in civil suits was explained in **Bisi v. Tabiri and Anor [1987- 88] 1 GLR 386**, where the Court held as follows:

> ***"The standard of proof required of a Plaintiff in a civil action was to lead such evidence as would tilt in his favour the balance of probabilities on the particular issue. The demand for strict proof of pleadings had however never been taken to call for an inflexible proof either beyond reasonable doubt or with mathematical exactitude or with such precision as would fit a jig-saw puzzle. Preponderance of evidence became the trier's belief in the preponderance of probability. But probability denoted an element of doubt or uncertainty and recognized that where there were two choices it was sufficient if the choice recognized and selected was more probable than the choice rejected."***

I will also refer to the fourth holding in the judgment of ***Amissah JA in Ricketts v. Addo [1975] 2 GLR 158 at 160;*** where it is stated as follows, which in my considered opinion applies to the facts of this case ***mutatis mutandis*** in terms of the reasonably probable case of the Plaintiffs and their family over the lands;

> ***"The principle that in an action for a declaration of title, the plaintiff should not rely on the weakness in the defence case but on the strength of his own case, had its simplest application in the situation where a plaintiff could not on his own make out a case of his title at all and relied on the defects in the defendant's case to justify his claim to title . . . Therefore, if the defendant's case was measured against the plaintiff's and the plaintiff's was found more probable, a determination which necessarily involved the balancing of the strengths and weaknesses of the rival claims, the plaintiff's case had to be accepted."***

The court in this case thus found the defence of the Defendant to be the more probable and credible of the two versions of the story: Which is that long before and many years preceding the transaction between the Plaintiff and the PW1, the Defendant had transacted with the PW1 and the PW1 and the Mpraeso stool had given the same parcel of land to the Defendant by customary grant. Even in Equity, the Defendant being the first grantee of the land holds priority in equity over the Plaintiff.

The court accordingly dismisses the Writ of Summons and Statement of Claim of the Plaintiff and ***a fortiori*** all the reliefs he sought for.

Meanwhile, after reviewing Order 74 of the C. I. 47 of 2004, the court awards costs of GHC 5,000.00 (Five Thousand Ghana Cedis) in favour of the Defendant to be paid by the Plaintiff.

SGD:

H/H STEPHEN KUMI, ESQ
CIRCUIT JUDGE.

BOTH PARTIES PRESENT:

<u>COUNSEL</u>:
J. K. BOAKYE MENSAH, ESQ, FOR THE PLAINTIFF PRESENT.

BENJAMIN AGYEPONG, ESQ, FOR THE DEFENDANT ABSENT.
sk.