

IN THE CIRCUIT COURT HELD IN KUMASI ON FRIDAY THE 17TH DAY OF MARCH, 2023 BEFORE HER LADYSHIP JUSTICE PRISCILLA DAPAAH MIREKU (MRS.), SITTING AS ADDITIONAL CIRCUIT COURT JUDGE.

SUIT NO. A1/515/14

OP. KWAKU ASARE @ KWAKU ANU

VRS:

OHENEYERE ABENA AKYAA PANIN

JUDGMENT

The Plaintiff instituted this action against the Defendant on the 3rd day of June, 2014 for the following reliefs;

1. Declaration of title to plot Nos. 18, 19 and 20 Atonsu–Kaase Road on Takyiaw Stool Lands, Atonsu-Edwinase, Kumasi.
2. An order for recovery of possession.
3. Damages for trespass.

4. An order of perpetual injunction to restrain the defendant, her agents, servants, workmen and all other claiming title through her from dealing with the plot in dispute.

One Mahama Sorogo on the 25th day of November, 2014 was joined to the suit as the 2nd defendant and the plaintiff later discontinued the suit against him.

The summary of the Plaintiff's case is that, he acquired two plots of land from Obaapania Ama Nyantakyiwaa (deceased) and one plot of land from Madam Ama Benewaa Regina in 2002 and 2004 respectively. According to the plaintiff, he had been in quiet possession of the plots until the defendant trespassed on the land claiming that she has taken back the plots. That the action of the defendant is unlawful and will not be stopped unless compelled by the Honourable Court.

The defendant claims prior to the demise of her predecessor she became sick which affected her mentally and physically which led to her inability to administer the Takyiwa stool land and also signed allocation notes for prospective allottees. That the plaintiff fraudulently acquired the subject matter or plots in issue and set out her particulars of fraud as follows;

- a. That the documents presented were only photocopies and when asked to produce their originals for comparison the plaintiff was unable to do so.

- b. That because the said Kofi Owusu Dwumfour and George Agyapong had access to the previous allocation noted issued by the 1st Defendant's predecessor, they had erased the names and plot numbers and inserted the plot numbers as claimed by the plaintiff and as well as his name.
- c. That since the 1st Defendant's predecessor was at the time mentally incapacitated, she could not have executed the said allocation notes as claimed by the plaintiff.
- d. That the signature on the said allocation note is remarkably different from that of the 1st Defendant's predecessor.

The defendant further claims she does not know plot numbers 18, 19 and 20 but she rather allocated plot numbers 5 and 7 Atonsu-Kaase road properly described on the planning scheme as plots numbers 5 and 7, Kaase Land Fill Road, Atonsu Edwinase, Kumasi to one Mahama Sorogo. That the plot referred to as plot no. 18 of the planning scheme is plot no. 2 Kaase Land Fill Road, Atonsu Edwinase is a refuse dam. The defendant denies conducting herself illegally and counterclaim for the following;

- a. A declaration that all that parcels of land describe as plot numbers 12, 13, 14, 15 and 17 Kaase Land Fill Road, Edeinase-Kumasi is the property of the Takyiaw Stool.
- b. An order for recovery of possession of parcels of land described in paragraph 19(a) supra.

- c. An order of perpetual injunction, restraining the plaintiff, his agents, assigns, privies and workmen from entering, developing or otherwise interfering with the parcels of land describe in paragraph 19(c) supra, the property of the Takyiaw stool.
- d. General damages for trespass.
- e. Cost.

The issues that were set down for trial at directions were as follows;

1. Whether or not the Plaintiff is the lawful allottee of Plots Nos. 18, 19 and 20 at Atonsu-Kaase road, Kumasi.
2. Whether or not the allocation notes and other documents in possession of the plaintiff in respect of these plots are genuine.
3. Whether or not the plaintiff has been in quiet and undisturbed possession of these plots since same were allocated to him.
4. Whether or not the 1st Defendant's takeover of the plots in dispute is lawful.
5. Whether or not Plots Nos. 5 and 7 Kaase Land Fill Road, Atonsu-Edwenase are the same as Plot Nos. 18, 19 and 20, Atonsu-Kaase Road, Kumasi.
6. Whether or not the 1st Defendant could lawfully allocate the plots in dispute to the 2nd Defendant.
7. Whether or not the Plaintiff is entitled to his claim

8. Whether or not the Defendants are entitled to their counter-claims.
9. Any other issue raised on the pleadings.

What constitutes proof in law?

Proof is defined by the **Dictionary of law, L.B. Curzon** as “*method by which the existence or non- existence of a fact is established to the satisfaction of the court*”

Section 12 of the Evidence Act 1975 (NRCD 323) provides 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.

There are several cases that discuss the burden of proof and one such case is the case of **ZAMBRAMA V. SEGBEZI [1991] 2 GLR 221 @ 246** which it was held 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 from which the fact or facts he asserted can properly and safely be inferred. The nature of

each averment or assertion determines the degree and nature of the burden.

In a recent case of **Equity Assurance v. Palmers Green Int'l Ltd** [2019] 134 GMJ 57, proof in civil trials were stated as follows;

Section 11(4) and 12 of the Evidence Act, 1975 (NRCD 323) require a plaintiff in a civil matter to prove his case on a balance of probabilities. Based on section 11(4) and 12 of Evidence Act (NRCD 323), the Supreme Court in the case of Awubeng v. Domfeh [1996-97] SCGLR 660 held that standard of proof in all civil action was proof by the preponderance of probabilities and there is no exception to this rule.

The evidential burden will first be on the plaintiff to prove his case by the preponderance of probabilities and after he does same, the evidential burden will shift to the defendant to prove same. This will also be the vice versa with the defendant's counter claim. At the end of the conduct of this case, the party that will be able to prove their case by the preponderance of probabilities will be victorious.

This is land litigation and both the plaintiff and the defendant are praying for declaratory reliefs. The plaintiff is praying for declaration of title in his favour. In the case of **AWUKU V. TETTEH** [2011] 1 SCGLR 366 the court held that,

“In an action for 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 case of **MONDIAL VENEER (GH) LTD V. AMUAH GYEBY XV [2011] 1 SCGLR 466**, also held that, there is the *“need for person having burden of persuasion to prove root of title, mode of acquisition and acts of possession exercised over disputed property.”*

And in **ARYEH & AKAKPO V. AYAA IDDRISU [2010] SCGLR 891**, the court was of the view that, *“to succeed in an action for declaration of title to land, injunction and recovery of possession the plaintiff must establish by positive evidence the identity and limits of the land claimed.”*

The plaintiff in proving his case testifies on his own behalf and called one Kofi Owusu Dwumfour to testify on his behalf. The plaintiff also tendered the witness statement of one George Agyapong who was supposed to have been called as his witness passed on before the plaintiff could do same.

Per the evidence of the plaintiff, he acquired two of the subject matter on 16th September, 2002 from the Takyiaw stool and the plots are Plot No. 18 Boakye Ansah Road Atonsu-Edwenase and Plot No. 19 Atonsu-Kaase Road which he paid the necessary consideration to the occupant of the stool Obaapanin Ama Nyantakyiwaa.

That he was given an allocation notes and site plans. These allocation notes and site plans the plaintiff sought to tender were all rejected after an objection was raised by the defendant that they were photocopies and the allocation note had not been signed by the allottee, while the site plan has not been endorsed by any licensed surveyor. Counsel for the plaintiff argued that what they had was signed so he does not understand why the photocopy was not signed. A photocopy cannot be different from the original. Also the site plan had no indication that it was prepared by a licensed surveyor thus both were rejected and marked as Exhibit 'R' and 'R1'. The plaintiff further testified that he was in possession of the land and remained on same until the death of Obaapanin Ama Nyantakyiwaa in the year 2011. According to the plaintiff he further acquired the plot adjoining the plots aforementioned known as Plot No. 20 Atons road from one Madam Ama Benewaa Regina Hammond and was given a document executed by the said Madam Ama Benewaa transferring her interest in the plot to him. Same was marked as Exhibit 'B' and Exhibits 'A' and 'A1' are the allocation note and site plan of Plot 20. The plaintiff insists at the time he acquired the plot of lands, the defendant's predecessor was mentally stable and saw him developing the land he had acquired without any objection. That plot numbers 5 and 7 Atons-Kaase road mentioned by the defendant is the same as his plot numbers 18, 19 and 20 aforementioned. The defendant accused the plaintiff rather of fraudulently making new plan of the area and in the process changing the plot numbers. The plaintiff testifies that he had cement blocks,

trips of sand and stones and uncompleted structures on the land. That he further put some artisans on the land.

The plaintiff witness Kofi Owusu Dwumfour (PW1) testified that he use to work with one George Agyapong (deceased) and Owusu Asante (deceased) for the Takyiwa stool and that the plaintiff acquired two plots of land from Obaapanin Ama Nyantakyiwaa in 2002. This assertion by PW1 was confirmed by the defendant during cross examination.

The defendant however alleges that PW1 and George Agyapong (deceased) fraudulently sold the subject matter to the plaintiff. That at the time the allege sale was made her predecessor was mentally unstable and physical weak. That, the documentation produced by the plaintiff was a photocopy and he could not produce original. According to the defendant, the signature on the allocation notes produced by the plaintiff was totally different from that of her predecessor but she did not tender anything to prove her claim. A mere assertion of fraud will not suffice. In the case of **Oduro & Others (N0. 2) v. Owusu (substituted by) Baffour (No. 2) [2017-2020]1SCGLR 934 at 937**, the court held that,

“an allegation of fraud must be particularized and evidence led in proof thereof.”

In this case, the defendant did the particularization but did not lead any evidence to prove same. The defendant’s allegation that Obaapanin Nyantakyiwa was weak and

mentally unstable was not substantiated with any evidence. Neither did she lead any evidence to show that exhibits 'A' and 'A1' were fraudulently obtained.

The defendant in one breath claims that when she ascended the stool, she made publication for whoever acquired the land from her predecessor to come forward with their documentation for verification and tendered Exhibit '2' as proof. The plaintiff however did come forward until she sold same to Mahama Sorogo. And in another breath says the plaintiff came but did not have documentation and she directed him to produce same but when the plaintiff brought his documents they were photocopies and she asked him to produce the original which the plaintiff did not have. A document being a photocopy does not make it fraudulent automatically. The defendant claimed the signature of Nana Ama Nyantakyiwaa on the allocation paper was completely different from her original signature but the defendant did not tender any of the original allocation notes that had her signature that could buttress her claim. In her defence she claimed PW1 and George Agyapong deceased had access to original allocation papers, so they erased the name and plot numbers on the allocation note that is why the plaintiff did not have an original document. If that was so, then at least the signature of the allotor will be original.

In proving fraud which is a criminal offence, the onus on the defendant is proof beyond reasonable doubt and not by the preponderance of probabilities. In **Boateng (No. 2) v. Manu (No. 2) [2007-2008] SCGLR 1117, @ 1126**, per Atuguba JSC stated,

“It is well established that a finding of fraud is not to be made without clear and cogent evidence upon the subject”.

In **Ackah v. Pergah Transport Ltd and Others [2010] SCGLR 728 at 736**, it was also held that,

“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 plaintiff claims he made payment to Obaapanin Ama Nyantakyiwaa himself and same corroborated by PW1. During cross examination by the defendant’s counsel he put it to the plaintiff several times that he did not pay any money to the said Obaapanin but same was denied by the plaintiff and insisted he did same.

The defendant does not deny the fact that PW1 and the late George Agyapong use to work for the stool as claimed by the plaintiff but avers that they fraudulently sold the plots in issue to the plaintiff.

The defendant failed to prove fraud and the plaintiff succeeded in proving that he acquired plots of land from the Takyiwaa stool and same was allocated to him. The court finds that the change of the plot numbers is as a result of the demarcation by the defendant and from the word go the identity of the land has not been in issue.

With regards to plot 20 as describe by the plaintiff, he testify that he acquired it from one Benewaa which same was allocated to her by the Takyiaw stool and the defendant also denies same claiming that it is a refuse dam. The defendant tendered a cadastral plan and same was objected to by the plaintiff and this court allow it to go in for what it is worth. Thus it was marked as Exhibit '1'. Exhibit '1' as tendered by the defendant does not show who authored the said land and whether indeed it is coming from the town and country planning department of Kumasi Metropolitan Assembly. The said exhibit is also not stamped. It being a land document it ought to have been stamped. In the case of **Lizore Ltd. v. Boye and School of Domestic Science and Catering [2013-2014] 2 SCGLR 889**, the Court of Appeal ruled that exhibit 'A' being unstamped, ought not to have been admitted into evidence. This was also rebutted in the case of **Woodhouse Ltd v. Airtel Ghana Ltd. ,Civil Appeal No. J4/08/2018, dated 12th December, 2018 (SC)**. An inadmissible evidence admitted into evidence does not make same admissible. Thus this court rejects exhibit '1' and will not rely on same.

This court finds that the Takyiwa stool allocated the subject matter to the plaintiff and the defendant has failed to prove that the acquisition was fraudulent.

In the case of **Sarkodie v. FKA Co Ltd. [2009] SCGLR 65 at 70**, the Supreme Court reechoed the holding in the case of **Dovie & Dovie v. Adabunu [2005-2006] SCGLR 905** where it was held that,

“An effective customary conveyance divested the grantor of any further right, title or interest in the land to convey or grant to a subsequent grantee.”

Thus the defendant was bound by the actions of her predecessor and could not have allocated the subject matter to another when same had already been allocated to the plaintiff. If indeed the defendant believed the plaintiff had acquired the land fraudulently, she should have taken the right steps to set aside the sale and not to compulsorily take away the land.

The Court finds that, the plaintiff has proven his case by the preponderance of probabilities and the defendant has failed to prove her counter claim. Judgment is hereby entered for the plaintiff for the following reliefs;

- i. Declaration of title to plot Nos. 18, 19 and 20 Atonsus – Kaase Road on Takyiaaw Stool Lands, Atonsus-Edwinase, Kumasi.
- ii. An order for recovery of possession.
- iii. Damages for trespass.
- iv. An order of perpetual injunction to restrain the defendant, her agents, servants workmen and all other claiming title through her from dealing with the plot in dispute

The evidence shows that indeed the defendant trespassed on the plaintiff's land when she re-entered the land. Thus damages of Ten Thousand Cedis (GH¢10,000.00) are awarded against the defendant and cost of Eight Thousand Cedis (GH¢8,000.00) is awarded against the defendant.

SGD.

PRISCILLA DAPAAH MIREKU (MRS.)

(JUSTICE OF THE HIGH COURT)

CIRCUIT COURT 2, ADUM-KUMASI