IN THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 30TH NOVEMBER 2023

CORAM: HIS HONOUR YAW POKU ACHAMPONG

SUIT NO.: C1/08/2019

ABA YAA

VS

EKUA AKOM

(Substituted by VIVIAN ADDO)

PARTIES PRESENT

HANNAH AFIA SARPONG FOR PLAINTIFF, ABSENT

JAMES KOJO TSIN FOR DEFENDANT, ABSENT

JUDGMENT

By an amended writ of summons filed on 20th May 2019, Plaintiff is seeking the following reliefs:

a. Declaration that title H/no. EMA/3/22, Dunkwa On-Offin[sic] is now vested in the plaintiff and her 7 children namely: Faustina Adams, Augustina Adams, Christiana Adams, Patrick Adams, Robert Adams, Samuel Adams and Francis Adams.

b. Recovery of possession.

c. Perpetual injunction to restrain the Defendant, her agents, assigns, workmen, privies etc from interfering with their peaceful possession and occupation of the disputed house.

d. Cost[sic].

Defendant relied on the averments in the statement of defence and counterclaimed as follow:

(a) A Declaration of title to the land and house Number EMA/3/22 situate thereon at Dunkwa – On – Offin in the Central Region.

(b) An Order for perpetual injunction to restrain the Defendant, her agents, assigns, workmen, privies, etc. from further interfering with the Defendant's land and house in dispute.

This is case that had gone on to a stage at which Defendant was to open her defence when I took over the matter from my predecessor judge on this case.

I observed from the record of proceedings that at the application for directions stage that the issue set down for trial by the court differently constituted as at that time was:

> Whether or not plaintiff or defendants are entitled to the disputed building put up by Robert Kofi Adams on plot No. H/No. EMA/3/22 at Dunkwa-On-Offin.

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

The evidence-in-chief of Plaintiff reads, *inter alia*, as follows:

> 1. I live at House Number EMA/3/22 Dunkwa-On-Offin and make this stayement in connection with the case. The contents are within my own knowledge.
>
> …

3. That the defendant(now deceased) is the younger sister of my late husband, Robert Kofi Adams who died in and around[sic[]1991.

4. That Vivian Addo is the daughter and customary successor of the deceased defendant.

5. That I got married to Robert Kofi Adams for many years and the marriage was blessed with 9 children.

6. That two out of my nine children are leaving[sic] seven(7) adult children namely: Faustina Adams, Augustina Adams, Christiana Adams, Patrick Adams, Robert Adams, Samuel Adams and Francis Adams.

7. That, during the lifetime of my husband, he was an auto mechanic and resident at Prestea for many years where he did his mechanic work. He returned to Dunkwa-On-Offin when he became old because Dunkwa was his hometown.

8. That my husband's father once acquired a plot of land at Dunkwa-On-Offin and developed same leaving an adjourning[sic] portion thereof undeveloped.

9. At a point in time, when my husband needed a plot of land to build thereon, he developed the adjoined undeveloped portion of his father's plot with prior consent of his mother and other siblings because his father had passed on.

10. That the area my husband developed could contain 5 bedrooms, 3 rooms downstairs and two rooms upstairs and that we were not able to completely finish the construction of the rooms upstairs when we rented same out to a church to complete the top floor.

11. That the church finished the construction of the two rooms upstairs and agreed with my husband to offset the total cost of construction with rent payment. That the church occupied the top floor for many years.

12. That as at now, the rooms upstairs were rented out by the defendant(deceased) to some tenants after the church who did the construction of the top floor left the premises.

13. That it was when my husband went on pension from Prestea that we went to live in the house.

14. That we the nuclear family lived in the house for many years until my husband died in and around[sic] 1991.

15. That, after the final funeral rites of my late husband, the entire family agreed that H/NO. EMA/3/22 located at Dunkwa-On-Offin was the only house my husband could build for the children and I and it was too small for the family to take a portion of same. They decided that my children and I should have title and possession of the house.

16. That the family having said this, the siblings of my late husband Robert Kofi Adams including the defendant(deceased) raised an objection on the ground that the plot of land the house is situate was acquired by their late father and same remained for the benefit of all the children including Robert Kofi Adams and before they would allow my children and I to take over the house some compensation should be paid to them in lieu of the plot which was acquired. The[sic] I paid the compensation to them.

17. That later on, the defendant(deceased) and one Nana Bayin, being beneficiaries of the compensation paid wanted to forcefully take the house in dispute from me.

18. That my husband rented out the upstairs rooms to some tenants prior to his demise and following the expiration of the tenancy agreement, Defendant's brother, Nana Bayin quickly and unknown to me re-rented the rooms upstairs. He rented them to tenants and has enjoyed the proceeds accrued therefrom exclusively to the detriment of my children and I.

19. That in and around[sic] 1992, a suit against Nana Bayin came up in the Circuit Court, Dunkwa-On-Offin but he did not turn up to have the case heard and the suit was struck out.

20. That Nana Bayin on his sick bed admitted his guilt and warned defendant from interfering with my right to the house but defendant did not heed his warnings even after Nana Bayin died in 2012.

21. That I am still resident at the ground floor(downstairs) of the disputed house but defendant(deceased) and her siblings continue to collect rent from the tenants upstairs without recourse to me.

22. That all attempts to have the dispute between us settled have not been successful despite the intervention of several persons.

23. That I am aged and frail and if the court fails to intervene, the defendant(deceased) and her siblings will continue to possess the top floor of the property."

On paragraph 23 of the witness statement of Plaintiff, I say that the court does not fail; the court administers justice with due regard to Article 125(1) of the Constitution, 1992.

Article 125(1) of the Constitution, 1992 states:

> *Justice emanates from the people and shall be administered in the name of the Republic by the Judiciary which shall be independent and subject only to this Constitution.*

It is a person that comes to court who should endeavour to prosecute his or her case properly by the right procedure, the right methods and the right substance.

Abban J (as he then was) stated the following in *Baah Ltd v. Saleh Brothers*[1971] 1GLR 119:

> *"It can therefore be seen that, on the whole, the plaintiffs simply put forward allegations of indebtedness in their statement of claim and repeated the same before the referee. It is well established that where a party makes an averment in his pleadings and it is denied, that averment cannot be sufficiently proved by just mounting the witness-box and reciting that averment on oath without adducing some sort of corroborative evidence. When delivering his judgment in the case of Majolagbe v. Larbi [1959] G.L.R. 190, Ollennu J. (as he then was) at page 192 had this to say:*

"Here I may repeat what I stated in the case of Khoury and Anor. v. Richter on this question of proof. That judgment was delivered on the 8th December, 1958, and the passage in question is as follows: -'Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness-box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true'."

Abban J(as he then was) whilst still making reference to the said dictum of Ollennu J(as he then was) stated further in *Baah Ltd v Saleh Brothers* supra that:

"This opinion of the law was not only approved but also stressed by the Court of Appeal in its judgment in the case of Norgah v. Quartey, Court of Appeal, 15 May 1967, unreported; digested in (1967) C.C. 115.

In these circumstances, I am unable to say that the plaintiffs are entitled to the relief sought on the evidence before the referee. The evidence is not sufficient to satisfy the mind and the conscience of any reasonable referee and for that matter any reasonable judge so as to convince him to venture to act upon that conviction in favour of the plaintiffs. The referee was therefore justified in recommending that the plaintiffs' claim should be disallowed."

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

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

Section 10(2) of the Evidence Act adds that:

> *The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.*

Section 11 of NRCD 323 defines "Burden of Producing Evidence"; subsections 1 and 4 state:

> *(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.*
> *(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.*

Sophia Adinyira JSC in *Ackah v. Pergah Transport Limited and Others* [2010] SCGLR 728; at 736 expatiated on sections 10 and 11 of the *Evidence Act* as follows:

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

It has been held in a number of decided cases that the notion that proof beyond reasonable doubt is what is required in a land case is wrong. See *Serwah v. Kesse* [1960] GLR 227 at 228.

However, considering the fact that a land case may produce a judgment in rem, an exceptionally high standard is required as compared to ordinary civil cases. However, the standard of proof as provided in section 12 of the *Evidence Act*, to my mind, still holds in a case such as the instant one, which is about a real property which includes a piece of land.

Section 12 of NRCD 323 states:

> *(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.*

It is intriguing that Plaintiff comes to court on land or real property case such as this and fails to produce any further evidence – documentary or a real item to seek to prove her case, but repeats her statement of claim in extenso sort of. See section 11(1) and (4) of NRCD 323 supra.

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

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

Plaintiff called one witness to seek corroborate her evidence. That witness was referred to as PW1.

Section 7(1) of NRCD 323 states:

> *Corroboration consists of evidence from which a reasonable inference can be drawn which confirms in some material particular the evidence to be corroborated and connects the relevant person with the crime, claim or defence.*

But PW1's evidence was full of hearsay statements inasmuch as Plaintiff's evidence was full of heasay statements some of which were repeated by PW1. Admissibility of hearsay evidence is guided by rules as provided in the *Evidence Act*. If one produces hearsay evidence then it will be imperative for one to produce the author of the hearsay statement to come to attest to that unless the author is unavailable as a witness by virtue of that person being deceased or being outside the country and cannot be reached or cannot be made to testify or cannot be found or located at all. Even if it turns out that the originator of the statement is unavailable to testify, because one has to succeed on the preponderance of the probabilities, there is the need for one to provide some sort of corroborative of evidence such as a document or a witness who was present when the statement in contention was authored. At this juncture, we shall journey through the cross-examination done of PW1 but before then let me produce the salient parts of the witness statement of PW1 which metamorphosed into his evidence-in-chief, for the sake of clarity of the analysis in this judgment:

> 1. I live at House Number EMA/3/22 Dunkwa-On-Offin and make this statement in connection with the case on behalf of plaintiff. The contents are within my own knowledge.
> 2. That I am the biological son of the plaintiff.
> 3. That the defendant(now deceased) is the younger sister of my late father Robert Kofi Adams who died in and around 1991.

4. That my late grandfather acquired the said land with house thereon and also build[sic] many houses and gifted them to his children except my father the late Robert Adams.

5. That my grandfather knowing very well that my late father was industrious told him to build on the adjoining plot because he was not gifted a house.

6. That at a point in time, when my father needed a plot of land to build thereon, he developed the adjoining undeveloped portion of his father's plot with the prior consent of his mother and other siblings because his father had passed on.

7. That during my father's lifetime, he was an auto mechanic and resident at Prestea mining quarters for many year where he did his mechanic work but returned to stay at Dunkwa-On-Offin upon retirement.

8. That we went to live at the disputed house in and around 1988.

9. That my nuclear family live in the house for some years until my father died in and around.

10. That the area my father developed contains 5 bedrooms, 3 rooms downstairs and 2 rooms upstairs. My fahter was unable to completely finish the construction of the rooms upstairs so he rented same out to tenants to complete the upper floor.

11. That the tenant church finished the construction of the two rooms upstairs and agreed with my father to offset the total cost of construction with their rent. That the tenants lived in the top floor for many years.

12. That, after the final funeral rites of my father'[sic] family, the entire family agreed that H/NO. EMA/3/22 located at Dunkwa-On-Offin was the only house my father could build for his wife and children and it was too small for the family to take a portion of same. They therefore gave the said house to my mother and her children.

13. That my father's siblings including the defendant(deceased) did not agree to us being given the house without giving compensation for same.

14. That my mother paid the compensation for the said house.

15. That later on, the defendant(deceased) and one Nana Bayin wanted to take the disputed house from us although they had been compensated.

16. That my father rented out the upstairs rooms tosome tenants prior to his demise and following the expiration of the tenancy agreement, defendant's brother, Nana Bayin quickly and unknown to use re-rented the rooms upstairs to tenants claiming that he was going to use the proceeds to renovate the said house but squandered same to our detriment.

17. That Nana Bayin on his sick bed admitted his guilt and warned defendant(deceased) from interfering with our right to the house but defendant did not heed his warnings even after Nana Bayin died in 2012.

18. Defendant(deceased) has been letting the rooms to tenants.

19. That we are still residing at the downstairs of the disputed house but defendant(deceased) and her siblings continue to take rent from the tenants without rendings[sic] accounts to us.

20. That my mother is aged and frail and the defendants' actions are an attempt to deprive us of the house which was built for our benefit."

The following, *inter alia*, came up during cross-examination of PW1 by Counsel for Defendant:

...

Q You will agree with me that the land on which your father built thereon belongs to your grandfather John Kwamena Adams.

A That is true

Q Per paragraph 5 "Quoted" I put it to you that your grand father never told your father to build on the disputed land.

A I was told by my grandmother in the presence of witnesses that the mud house that my grandfather built were shared among his other children without giving any to my

father. And so my grandfather gave a vacant portion of the land that house was put to my father to build his own house on the plot as he was an industrious man.

Q So you will agree with me that you were not present when your grandfather told your grandmother that your father should build on the vacant land.

A I agree with you. I was not present.

Q I put it to you that the fact that you said your grandmother told you this in the presence of you uncle that your father was industrious and so he was given the vacant land to build on is an afterthought other wise you would have added it to your witness statement.

A Same is not an afterthought so it is part of my witness statement.

Q As you can read and write, can you point out from your witness statement where you stated that your grandmother told you in the presence of your uncle that the vacant portion of the house was given to hour industrious father to build thereon.

A Yes, that is paragraph 4,5 and 6 of my witness statement.

Q I am putting it to you that your paragraph 4,5 and 6 of the witness statement do not contain the fact that your grandmother told you in the presence of your uncle that your father was given the vacant land to build on it.

A Same is contained in these paragraphs.

Q What is the name of your said uncle who was present when your grandmother told you about the vacant plot.

A Paa Kojo.

Q Is there any paragraph of your witness statement where Paa Kojo's name was mentioned.

A The paragraph 6 contains that.

Q Are you saying the name of your uncle Paa Kojo is not in your witness statement.

A Yes, his name is not part of the witness statement.

Q In paragraph 6 of your witness statement you said before your father could build on the adjourning land, he sought the prior consent of his mother and other sibling. Not so.

A That is so.

Q By this your answer, I put it to you that your grandfather John Kwamena Adams did not give the vacant portion to your father otherwise your father would not seek the prior consent of his mother and siblings before building thereon.

A Should the portion not given to my father by his father, he would not have gone into a discussion with them when he wanted to build thereon.

Q I am putting it to you that your grandmother and other siblings did not given their consent before your father built on that land. That is why in your paragraph 13 of witness statement you said my father's sibling did not agree to the house being given to you and sibling without giving them compensation.

A That is not true. I was not present when my father died. I was then at Prestea. It was after his funeral that my father's sibling demanded compensation from us as my father had left his estate for us. So we paid the compensation.

Q Putting it to you that you could not pay any compensation to your uncles as the land on which your father built on was gifted to your father.

A I said after my father's funeral that a meeting was held and they said to us we are a united father and the property my father left for us will not be disturbed so they requested from us the children to pay an amount as compensation and we paid same.

Q How much compensation did you pay as you are alleging.

A GH₵100.00

Q I put it to you that you did not pay any such GH₵100.00 as compensation otherwise you would have stated same in your witness statement.

A We paid the GH₵100.00

Q Putting it to you that the fact that you said you paid GH₵100.00 is an afterthought.

A That is not true.

...

Section 116(c) and (d) of NRCD 323 state the following concerning "hearsay":

(c) "hearsay evidence" is evidence of a statement, other than a statement made by a witness while testifying in the action at the trial, offered to prove the truth of the matter stated;

(d) a "hearsay statement" is a statement evidence of which is hearsay evidence;

Section 116(a) and (b) of NRCD give the following definitions:

(a) a "statement" is an oral or written expression, or conduct of a person intended by him as a substitute for oral or written expression;

(b) a "declarant" is a person who makes a statement;

Further in section 116 of NRCD 323, the following is provided:

(e) "unavailable as a witness" means that the declarant is:

(i) exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant; or

(ii) disqualified as a witness from testifying to the matter; or

(iii) dead or unable to attend or testify at the trial because of a then existing physical or mental condition; or

(iv) absent from the trial and the court is unable to compel his attendance by its process; or

(v) absent from the trial and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process; or,

(vi) in such a position that he cannot reasonably be expected in the circumstances (including the lapse of time since the statement was made) to have any recollection of matters relevant to determining the accuracy of the statement in question.

(f) "available as a witness" means that the declarant is not unavailable as a witness.

Section 117 of NRCD 323 states:

> *"Hearsay evidence is not admissible except as otherwise provided by this Decree or any other enactment or by agreement of the parties."*

and

Section 118(1) of NRCD 323 states:

> *Evidence of a hearsay statement is not made inadmissible by section 117 if—*
> *(a) the statement made by the declarant would be admissible had it been made while testifying in the action and would not itself be hearsay evidence, and*
> *(b) the declarant is:*
> *(i) unavailable as a witness, or*
> *(ii) a witness, or will be a witness, subject to cross-examination concerning the hearsay statement; or*
> *(iii) available as a witness and the party offering the evidence, has given reasonable notice to the court and every other party of his intention to offer the hearsay statement at the trial and that notice gave sufficient particulars (including the contents of the statement, to whom it was made, and, if known, when and where) to afford a reasonable opportunity to estimate the value of the statement in the action.*

It can be said that PW1's evidence did not really give life to the hearsay evidence given by Plaintiff. Also the corroborative effect of PW1's evidence on Plaintiff's testimony is really weak considering the volume of hearsay statements given by Plaintiff most of which had already been given by Plaintiff.

Earlier in the course of the proceedings in this case, Counsel for Defendant descended on Plaintiff with a barrage fire of cross-examination. The cross-examination is as long as River Mississippi. Despite the cross-examination being lengthy, I find it worthy to produce it fully in this judgment. This is because the cross-examination permeates the landmass of the case right to its bedrock. The cross-examination provides immense assistance to the court for the court's quest to determine the matter based on law. The cross-examination goes:

Q. You agree with me that the land on which your late husband put up a house does not belong to him

A I do not agree with you. Because my late husband's father owned the land and built on portions of the land. He gifted the rooms to the children without my husband being given some. So my late husband father after the undeveloped portion of the land to him to put up his own house. I even went to ask my mother in law if that gift will[sic] not create any trouble but she said no. I was then having five children with my late husband.

Q Do you agree with me that your husband's father is by name John Kwamena Adams

A Yes. When my father in law shared the house/rooms, the one meant for my husband was given to one of his two nephews and he gave the undeveloped portion of the land to my late husband.

Q How many children did John K. Adams have before his death

A Seven (7) children, two women and five (5) men

Q How many rooms did he share among the 7 children

A Each of them got a room to themselves except the eldest son who got 3 rooms because he took care of my father in law before his death. Some of the rooms were chamber and hall. One nephew of his also got a room but my late husband had no room shared for him hence the plot of land given to him.

Q Can you name those who had a room to themselves from the house

A Yes, each of the two nephew[sic] got one each. Mame Afua got chamber and a hall. Nana Benyin had chamber and a hall.

Q So in all; how many rooms did your late father in law share for his 7 children and two nephews.

A I cannot tell.

Q I put it to you that the figures you have given in respect the rooms allocated to your late father in law's children and two nephews are your own imaginations as same is not true.

A That is not true because after the rooms had been shared some of them collapsed broke down as beneficiaries died.

Q You will agree with me that although some of the beneficiaries of the rooms died, their rooms still remain theirs.

A I agree.

Q. So that cannot change the number of rooms your father-in-law gave out to the beneficiaries.

A That is so

Q Per paragraph 16 of your witness statement, the family of the late Kwamena Adams and siblings agreed to take compensation and give the portion of the land to you cannot be true.

A That is not so. My late husband told his brother Nana Benyin that his family should take some money from children and develop the portion of the land as he my late husband was not given any of the rooms so that his children can have a place of their own.

Q By this your answer it is not correct that John K. Adams willingly gave the land in dispute to your late husband.

A That is not the case. The reason why my late husband told his younger brother Nana Benyin as his house that he built is bigger than what their late father built and

shared for his children. After his death (my husband) including the plaintiff should not be thrown out of their house by the family. But they may take some compensation from his children and plaintiff to allow them to continue to own the house. Meanwhile we have already paid the said compensation to Nana Benyin and the nephew of the land owner at a meeting. So they have left the house for us.

Q Putting it to you that if your late father in law Kwamena Adams had gifted the portion of the land to your late husband, your late husband would not have told Nana Benyin to take compensation from you and your children so you can continue to live in the house your late husband built for you.

A That is not true. The contention of my husband's sibblings was that my late husband had so much in excess than what the rest of his sibling got. So they were bent on taken the said house from me and my children. That was why my late husband told Nana Benyin to take a little money from us to allow us to own and stay in that house. So at a family meeting a decision was taken for plaintiff's children to contribute money to go and put up three (3) rooms in my late husband's home town so that each year when they visit there they will have a place to sleep.

In further cross examination of Plaintiff, the following came up:

Q Who gave the disputed plot of land to your husband to build on it

A It was my husband's mother (mother-in-law)[sic] and her brother (brother-in-law)[sic] how did this Kwabena Adams who did so in his final will.

Q You want the court to believe that Kwamena Adams made a will

A That is so

Q So Kwamena Adams devised this land to your husband. Not so?

A The Senior brother of my husband told me that the portion was left for my husband as their father had shared all his rooms among his children leaving my husband without

a room. That was why I agreed for my husband to build on the disputed land after we had 8 children.

Q Who were the executors of Kwamena Adams's will you alleged he made.

A His wife and his elder's son that my father-in-law made executors in the will.

Q When did the executors apply for probate from the court.

A I do not know about that. All I know is that all the parties agreed to all that was said by my father-in-law. And I was shown a document that shows that, that portion was given to my husband as other rooms were already given out to other siblings.

Q Do you know whether vesting assent has been obtained over the disputed land.

A I do not know about it.

Q Putting it to you that John Kwamena Adam did not make any will devising the land in dispute to your late husband.

A That is so. But after the death of my husband, his siblings rose up to say that my husband got too much property from their father so we should pay some compensation to them so they will allow us to the said house and we duly paid the compensation to them as demanded.

Deeper down the cross-examination, the following transpired:

Q You said in your evidence that the family members of your deceased father-in-law took compensation from you and your children. Not so

A That is so

Q How much compensation did you pay to them then.

A ₵1,000 000 at the time now GH₵100.00

Q You will agree with me that the said ₵100.00 paid is not captured in the evidence-in-chief.

A That is so.

Q Who was the ₵100.00 paid to.

A I recall I paid it to Nana Benyin, Mame Akuaku and Kojo after discussing it with the family

Q Putting it to you that Nana Benyin, Akuaku and Kojo never received any ₵100.00 from you as compensation.

A That is not true as they received the said amount as compensation. That was why defendant told her lawyer she was coming to refund the said compensation to me and recover the building.

Q Putting it to you Vivian Addo defendant substitute never said any where that she was going to refund the said money to you.

A That is not true. Vivian said so to me.

Q And what if you had paid that ₵1000,000 to Nana Benyin and ors you should have said so in your evidence in chief.

A I said it was after the said money was paid to Nana Benyin and Ors before the property was given to me in return.

Q Putting it to you that the answer you gave above is not correct

A Same is true as defendant herein was she witnessed that payment.

Q You will agree with me that in stating Nana Benyin, Ekua Akom and Kojo as having received the compensation.[sic]

A That is so. But when this case came to court that Vivian Addo defendant came to me with 4 elder persons to say that she will like to pay back the compensation to me and take back the property. But I refused.

Q Putting it to you that Vivian Addo never came to you with 4 ors to refund compensation to you and take back the property.

A It is true defendant came to me with 4ors to request to pay back the compensation but I refused them the defendant and 4ors prayed for a little time to deliberate about that and come back but have since not returned till date.

Q Putting it to you that your previous answer is false.

A I said the truth.

Q When you paid the alleged compensation Vivian Addo was not present when the money was paid.

A Vivian Addo defendant was not present but she was duly informed later about it.

Q Putting it to you that the alleged compensation paid was not made known to the defendant herein

A That is not true as I made it known to the defendant.

Q Putting it to you that, the alleged payment of compensation to your late husband's children is an afterthought.

A Same is not an afterthought.

Q Per paragraph 20 of your evidence[sic], you said Nana Benyin admitted on his sick bed that the defendant should not interfere with the plaintiff's occupation of the property in issues.

A Yes Nana Benyin said so to the defendant and added that as they had taken the compensation from plaintiff, they should live in harmony.

Q Putting it to you that your last answer is an afterthought otherwise you should have stated so in your evidence in chief.

A Same is not an afterthought. I am saying the truth.

Q So you will agree with me that the alleged compensation you paid to defendants and the siblings were not documented.

A That is so. Defendant was not present at that time when I paid the said money was paid to Kojo Awotwi, Nana Benyin and one other whose name I have forgotten and

they told me after making that payment, no one else will challenge us over the said house.

Q You will agree with me that it is the defendant and the sibling who have been receiving rent over the said property.

A That is not true, the 3 who took money from me were those collecting rent over the house. It was after their death that Mame Akuako was receiving the rent as she was old and had no child to cater for.

Q So you will agree with me that from that time till now, it is the defendant and their sibling who have been renting out the disputed property.

A This defendant is not one of those taking rent from the disputed property. But Mame Akuako who was doing so.

Q You will agree with me that the defendant herein is the biological daughter of Akuako.

A Not at all. Defendant's biological mother is called Mame Afua. And defendant's mother Mame Afua warned them not to disturb us over the disputed house.

Q Putting it to you that defendant mother Mame Afua did not tell you that she warned her children not to disturb you over the disputed property.

A That is so as she did not tell me personally about that but she instructed her siblings not to disturb me over the disputed property after taking that money from me.

Q You will agree with me that the defendant's mother Afua and Akuako are siblings.

A That is so.

Q Do you know what is property rate.

A Yes I do.

Q As we speak who pays the property rate of the disputed house.

A I was paying but it got to a time when the officer collecting the rate came and I made him to explain to Akuako that as she was the one taking the rent [so]she has to pay the property rate and she agreed and started paying.

Q You will agree with me that when you pay property rate, you are issued with a receipt.

A I agree.

Q Putting it to you that from the onset it was Kwamena Adams who was paying the property rate of the house in dispute.

A That is not true.

Q Putting it to you that upon the death of Kwamena Adams, it was Akuako who has been paying property rate over the house in dispute.

A That is not true.

Q As we speak it is the defendant herein who is paying the property rate.

A That is not true.

Q Putting it to you that you are not entitled to the relief you are seeking in this suit.

A I am entitled to any claims as endorsed it rather the defendants who do not deserve theirs.[sic]

It was held in *Barimah Gyamfi v. Ama Badu* [1963] 2GLR 596 @ 598 per Ollennu JSC that:

> "*It must be observed from the outset that there is no onus upon the defendant to disprove a claim made by a plaintiff, so that, however, conflicting or unsatisfactory his evidence may be, the same cannot avail the plaintiff; evidence given by the defence only becomes important in a case either where it can upset the balance of probabilities which the plaintiff's evidence might have created in the plaintiff's favour, or where it tends to corroborate evidence of the plaintiff, or tends to show that evidence led on behalf of the plaintiff is true*."

The salient portions of the evidence-in-chief of Defendant that stemmed from the witness statement of Vivian Addo are hereby presented as follows:

> "...
>
> 2. I live at House Number EMA/3/22, Bodomkrom on Dunkwa-On-Offin.
>
> ...
>
> 5. The Plaintiff is my late Uncle Mr. Robert Kofi Adam's wife.

6. My late grandfather, Mr. John Kwabena Adams a.k.a. Kwabena Adams acquired a land at Bodomkrom at Dunkwa-On-Offin with Plot Number EMA/3/22.

7. That attached is the Building Plan of the plot my late grandfather Mr. John Adams acquired as same is marked as Exhibit EA "1".

8. My late grandfather developed the said Plot with a portion left vacant.

9. My family has been in possession of the land and building thereon therefore paying all the Property Rate to the appropriate authorities.

10. That attached is[sic] the receipts of the payments of the various Property Rate and other payment with respect of the subject matter as same is marked as Exhibit "EA2".

11. My late Uncle (Mr. Robert Kofi Adams) developed the adjoining land after the death of my late grandfather without the consent and approval of the other family members.

12. The Plaintiff and his family has[sic] been in possession of the three (3) rooms being[sic] built by her husband without interference from each of the family members even though the Plaintiff's husband did not take consent from the family.

13. The Plaintiff's husband built only three (3) rooms on the vacant adjoining land and lived there with the family until his demise.

14. After the death of the Plaintiff's husband, the family agreed and gave the Plaintiff and her children two (2) Chamber and Hall in addition to already three (3) rooms, she was occupying with her family so she can give same out for rent and use the proceeds to take care of her last child.

15. The Plaintiff is in possession of the three (3) rooms built by her late husband and the two (2) Chamber and hall given to her by the family without interference from anyone.

16. The land and the building thereon of House Number EMA/3/22 is the property of the family hence Plaintiff not entitled to her reliefs.

The court, presided over by myself, admitted the said plan of building in evidence in accordance with section 51 of NRCD 323 and marked it Exhibit 1 to conform to the conventional way of marking exhibits. So did I admit the said receipts and mark them Exhibits 2, 2A- 2H.

In the case of *Yorkwa v. Duah* (1992 – 1993) GBLR 278, it was held that wherever there was in existence a written document and oral evidence over a transaction, the practice in the court was to lean favourably towards the documentary evidence. In the same way, where a party is unable to produce documentary evidence in support of his case and his adversary does, the Court will more likely lean in favour of the party who produces documentary evidence in support of his case.

Also in *Fosua and Adu Poku v Dufie* (*deceased*) and *Adu-Poku* Mensah 2009 SCGLR 310, it was held that it is settled law that documentary evidence should prevail over oral evidence. Thus where documents supported one party's case against the other, the court should lean towards documentary evidence.

Defendant did not merely mount the witness box and repeat her averments on oath, she tendered in evidence a document to describe the building in contention; she also provided receipts to seek to portray to the court that her family had been paying property rates in respect of the building to buttress her claim that her family owned the building in contention. See the dictum of Ollennu J(as he then was) supra. Defendant, however, did not call any witness to seek to corroborate her evidence.

It was held in *Kru v. Saoud Bros & Sons* [1975] 1GLR 46, CA at page 48 per Apaloo JA that:

"In so far as the issue involves the sufficiency of proof, the accepted statement of the common law is:

"As a general rule, courts may act on the testimony of a single witness, even though uncorroborated; or upon duly proved documentary evidence without such testimony at all. And where the testimony is unimpeached, they should act on it and need not leave its credit to the jury.""

The learned judge making reference to *Ayiwa v. Badu* [1963] 1 G.L.R. 86, S.C.; *Republic v. Asafu-Adjaye (No. 2)*, Court of Appeal, 1 July 1968, unreported; digested in (1968) C.C. 106 and *Commissioner of Police v. Kwashie* (1953) 14 W.A.C.A. 319, further stated also at page 48 that:

"...judicial decisions depend on intelligence and credit not the multiplicity of witnesses produced at the trial."

In *Logos & Lumber Ltd v. Oppong* [1977] 2 GLR 263, CA, it was held that a court could act on the testimony of a single witness provided that:

(i)He was an honest witness; (ii)
There was nothing in his background to cast doubt on his veracity;
(iii)He had no motive to misrepresent facts or be biased; and
(iv)His evidence was in no way tainted, i.e. he was not an accomplice.

Defendant herein by the way she presented her evidence vis-a-vis the cross-examination done of her sounds credible as regards her counter evidence to the evidence led by Plaintiff. It was held in *Ntiri* v. *Essien* [2001-2002] SCGLR 451 that it is the trial court that has the duty to ascertain the credibility of the witness. The court may do this with recourse to section 80 of NRCD 323, which states:

(1) Except as otherwise provided by this Decree, the court or jury may, in determining the credibility of a witness, consider any matter that is relevant to prove or disprove the

truthfulness of his testimony at the trial.

(2) Matters which may be relevant to the determination of the credibility of the witness include, but are not limited to the following:(a) the demeanour of the witness;

(b) the substance of the testimony;

(c) the existence or non-existence of any fact testified to by the witness;

(d) the capacity and opportunity of the witness to perceive, recollect or relate any matter about which he testifies;

(e) the existence or non-existence of bias, interest or other motive;

(f) the character of the witness as to traits of honesty or truthfulness or their opposites;

(g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;

(h) the statement of the witness admitting untruthfulness or asserting truthfulness.

Upon weighing the evidence of Plaintiff and PW1, I find it hard to accept them as credible witnesses. Under cross-examination both witnesses were caught pants down as they provided highly unsatisfactory answers to questions posed them. They were mostly inconsistent with their answers and most of their answers provided no legal justification for the institution of this action. I need not belabour the point, the elaborate and extensive and intensive cross-examination done of them says it all. In fact I do not find their evidence convincing at all – both at law *stricto sensu* and at equity.

I hold that Plaintiff has failed to prove her case and so I dismiss the reliefs endorsed on the writ of summons.

On the counterclaim, I find that there is an issue as to capacity. Defendant said that her family had been in possession of the building the subject matter of the suit and that the said house

belongs to her family. See paragraphs 9 and 16 of the witness statement of Defendant supra. The defendant both original and substitute did not appear in
court as head of family.

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

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

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

1. *As a general rule the head of a family as representative of the family, is the proper person to institute suits for the recovery of family land.*
2. *To this general rule there are exceptions in certain special circumstances such as:*
   - *i. Where the family property is in danger of being lost to the family and it is shown that the head (either out of personal interest or otherwise) will not make a move to save or preserve it or,*
   - ii. *Where, owing to a division in the family, the head and some of the principal members will not take any step; or*
   - *iii. Where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole.*

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

> *"In any such special circumstances, the court will entertain an action by any member of the family either upon proof that he has been authorized by other members of the family to sue or*

upon proof of necessity, provided that the court is satisfied that the action is instituted in order to preserve the family character of the property."

Defendant did not indicate to the court in this case that the head of family had refused to sue Plaintiff as on the counterclaim. Defendant has also not indicated that she had gone through the processes required by CI 47 to sue Plaintiff on the counterclaim.

Order 4 rule 9(4) and (5) of CI 47 state;

(4) Where any member of the family sues under subrule (3) a copy of the writ shall be served on the head of family.

(5) A head of family, served under subrule (4) may within three days of service of the writ apply to the Court to object to the writ or to be substituted as plaintiff or be joined as plaintiff.

It is worth noting that a counterclaim is an action in itself where the defendant is the plaintiff and the plaintiff is a defendant. See Order 12 of C.I. 47.

In *Musah v Appeagyei* (J4 32 of 2017) [2018] GHASC 24 (2 May 2018), the Supreme Court stated per Yeboah JSC that:

"We think the law is that, when a party lacks the capacity to prosecute an action the merits of the case should not be considered. However, the two lower courts, with due respect, proceeded at length to discuss all the issues raised as if the appellant's case should be considered on the merits. If a suitor lacks capacity it should be construed that the proper parties are not before the court for their rights to be determined. A judgment, in law, seeks to establish the rights of parties and declaration of existing liabilities of parties. In the case of Akrong & Or v Bulley [1965] GLR 469 the then Supreme Court after holding that the plaintiff lacked capacity to prosecute the action as an administrator of the deceased, did not proceed to discuss the merits. For proceeding to discuss the merits when the proper parties are not before the court is not

permitted in law. In this appeal, regardless of the other issues raised, the High Court, and the Court of Appeal for that matter erred in determining the other issues raised."

I find that Defendant lacks capacity to bring the instant counterclaim as an action before the court. Just as the above *ratio decidendi* referred to in *Barima Gyamfi v Ama Badu* supra applied to the plaintiff herein, similarly it applies to the defendant as a counterclaimant.

I hereby dismiss the counterclaim as well.

Quite obviously, flowing from the foregoing, I find no justification to award costs in favour of or against either party.

(SGD)

HH YAW POKU ACHAMPONG

CIRCUIT COURT JUDGE

30/11/2023