IN THE CIRCUIT COURT DUNKWA-ON-OFFIN; SITTING ON 12TH OCTOBER 2023

CORAM: HIS HONOUR YAW POKU ACHAMPONG

SUIT NO.: C1/12/2017

ADU ACHEAMPONG

VS

NANA YAW AMANKWA

Parties present

Counsel for Defendant, James Kojo Tsin absent

JUDGMENT

Plaintiff sued Defendant in this Court seeking the following reliefs:

1. A declaration of all that piece and parcel of ten(10) acres of land situate and Asuwerefor-Agya and bounded by the properties of Op. Yaw Assuman and Charles Buadoo is for the plaintiff.
2. Trespassed[sic]
3. Recovery of possession

Defendant counterclaimed as follows:

An order of the Honourable Court compelling Plaintiff to pay him damages cash the sum of GH¢30,000.00 for having instituted this unmertorious action against him.

The matter went on and on before my predecessor until I took over the adjudication of the case on 13th October 2021. I ordered for the record of proceedings to be typed out for easy and better perusal of the records. The registry of the court accordingly made the records available to the court. I perused the record of proceedings and found it adoptable for continuation and so I adopted same in accordance with the Supreme Court decision in the case *Agyemang(subst'd) by Banahene & ors v Anane [2013-14] 1 SCGLR 241*. The highest court of the land stated in that case that:

> *"The time was long overdue for a volte-face from the age-old legal position of no agreement by all the parties, no adoption of previous evidence in civil cases which the courts had unremittingly followed for decades. In the instant case, the Supreme Court would not tie itself to the existing legal principle, but liberate itself from its shackles.*
>
> *Thus, the instant appeal has provided the court with the opportunity to utilize the jurisdiction conferred on it by Article 129(3) of the 1992 Constitution, to depart from its previous decision taken in 2009 in Awudome (Tsitso Stool) v Peki Stool as rather being archaic, retrogressive and producing unjust result."*

At the application for directions stage before my predecessor, the following was set down as the issue for trial:

> Whether or not the disputed land belongs to plaintiff or defendant

The court as under my predecessor found that the case was a boundary dispute and so on that score, he ordered that a survey to be conducted for a composite site plan to be drawn. This was done. The surveyor appeared in court and was examined by the parties.

Section 62(1) of NRCD 323 states:

At the trial of an action, a witness can testify only if he is subject to the examination of all parties to the action, if they choose to attend and examine.

The Court, afterwards, proceeded to obtain evidence from the parties. Plaintiff testified and called one witness. Until the advent of the *High Court(Civil Procedure)(Amendment) Rules*, 2014(CI 87, a party would mount the witness box to adduce, produce or introduce evidence in support of his/her claim. But now a witness statement embodying the oral evidence of the witness would have to be filed. See Rule 4 of CI 87 which inserts Rule 3A to 3G in Order 38 of CI 47.

Thus Order 38 of the *High Court Civil(Procedure) Rules*, 2004(CI 47) states, *inter alia*:

3B.(1) A witness statement is a written statement singed by a person which contains the evidence which that person would be allowed to give orally at the trial.

If the witness statement is prepared by an expert, fair enough. Expert herein refers to a lawyer or somebody with the requisite knowledge about admissibility of evidence. But when it is prepared by an amateur, it may not be what is legally sensible for the purpose for which it is to serve.

Section 69 of the *Evidence Act* states:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to—

(a) make the interrogation and presentation as rapid, as distinct, and as readily understandable as may be, and

(b) protect witnesses from being unduly intimidated, harassed or embarrassed.

It does appear to me that the court's mandate under section 69 of NRCD 323 has been taken away when it comes to examination-in-chief of a witness. The court can only effectively apply its mandate as under section 69 of NRCD 323 when it comes to cross-examination of witnesses.

In the instant case, considering the way and manner plaintiff's witness statement is couched, I find it expedient not to paraphrase same but to produce salient portions verbatim. The following are the salient paragraphs of the content of the oral evidence of the plaintiff:

> "...
>
> 4. It was my uncle Op. Kwabena Pie who collected the said disputed land from Nana Kwabena Amankra in 1961.
>
> 5. Nana Kwabena Amankra gave 744.40 acres of land to my uncle Op. Kwabena Pie for cultivation.
>
> 6. After Nana Kwabena Amankra gave the said piece of land to my uncle Op. Kwabena Pie, my uncle made a site plan covering the whole land.
>
> 7. the said piece of land is situate at Nkasawura Stool Land and bounded by the properties of Asu Yawmfuo, Yaw Asuma, Charles Buadu.
>
> 8. Nana Buadu II summoned one Adu Acheampong in the High Court, Cape Coast in March, 1999 on this disputed land when Nana Yamoah Ponkoh II join[sic] the suit as Co-defendant which Judgment was given to him at the West African Court of Appeal on 23rd April, 1956.
>
> 9. That after the demise of Op. Kwabena Pie, the said land passes[sic] on to me as custodian of the said land.
>
> 10. That I have been exercising over[sic] at on the said land since the death of my uncle without any interfering from anybody.

11. I therefore state that Defendant has trespassed unto 10 acres land and sold the said piece of land to one Mr. Kumi for Galamsey without my knowledge and consent.

12. After hearing Defendant have[sic] trespassed onto my land I cautioned him but insist that the land belongs to him.

13. I therefore declared[sic] that the said piece of land in disputed[sic] does not belongs[sic] Defendant as being claimed."

Defendant testified and also called one witness. Defendant's witness statement appears better written but to balance the scales as regards presentation of evidence of the parties in this case, I will also produce the salient portions of Defendant's oral evidence verbatim. The following are what I call the salient portions of Defendant's witness statement:

"...

4. My late father called Op. Yaw Essuman acquired a vast land at Dominase Bethlehem from the late Nana Anyimadu I Nkasaworahene in 1958.

5. The said land measures 49.66 acre and same shares common boundaries with the properties of Kwabena Foh; Kwadwo Boateng, Kofi Ketewa; Nkasawora Forest Reserve and Asuo Yomfoo separating my father's land from that of Op. Aboagye's land.

6. I must state that it was my late father who broke he virgin forest of the said land.

7. Thereafter my late father cultivated cash crops such as cocoa citrus, oil palm and on various portions of the said land and intercropped same with food crops such as plantain, cassava, cocoyam, yam etc.

8. While I was young I was the only one among my siblings who was always with my late father while he was cultivating on said land till I completed my elementary education in 1973 at Dominase Anglican Middle School.

9. I continued to work with my father on the said land with my father until his demise in 2005.

10. In March 1970 my later father caused a site plan to be prepared to cover his total landmass[sic].

11. After the death of my father I continued to work on the said land and in the process the family members of my late father began to lay adverse claim to father's land and they started harassing me.

12. I sued them at the Magistrate Court, Dunkwa-On-Offin and at the end of the trial title to the said land was declared for me and costs of them[sic] of GH¢2500.00 was awarded against Defendants in my favour which was paid by them.

13. I do not share boundary with[sic] anywhere on my land with that of Plaintiff's late uncle, Kwabena Pie who's land plaintiff is currently in occupation of.

14. There is a large stretch of marshy land, in which lies the stream Asuyoromfoo saving[sic] as the boundary between, my land and that of Op. Aboagye and beyond Opanin Aboagye's land lie plaintiff's land.

15. I have not trespassed unto plaintiff's land so plaintiff is not entitled to any of his reliefs."

While perusing the record of proceedings as under my predecessor, something struck me so hard. It is the following as came up in the cross-examination of Plaintiff by Counsel for Defendant:

Q. What number of acres are you claiming defendant trespassed onto your land.

A. It is about 10 acres of my land.

Q. Per paragraph 2 of the evidence, you indicated 10 acres of your land that defendant sold out. Not so.

A. That is so.

Q. Same is 10 acres. Plaintiff explains that defendant gave out 10acres to small scale miners after this case came to court. So in all the disputed land should be more than 10 acres.

At one part you said the land in dispute is 10acres at another time you are saying the disputed land is more than ten acres so tell the court the size of the land in dispute with defendant.[SIC]

A. Per the surveyor's report the disputed land is about 15 acres.

Q. Put it to you that per the surveyor's part the disputed land is not 15 acres.

A. Per the surveyor's report that has been captured on the site plan is about 15 acres which belongs to me. I do not know the exact measurement of the disputed land so I shall go by that.

Q. So you are relying on surveyor's report to make a claim as you did not measure the land in dispute Not so.

A. That is so.

Q. So you want this court to believe that the surveyor knows the disputed land more than you the owner. Not so

A. That is not so. I know much more of the disputed land than the surveyor as I showed the disputed land to the surveyor for measurement.

Q. Who are the boundary owners that share common boundary with the land in disputed

A. One Charles Boadu, Op. Yaw Asumang, Op. Kwaku Duah, then to Op. Idan, Op. Boadu, Yaw Asumang and K. Duah and Idan share common boundary wit the stream Esuwrenfuor.

Q. Put it to you that the names of the boundary owners that you mentioned are not the boundary owners with respect to the land in dispute.

A. That is not true, as the boundary owners mentioned are those that have common boundary with respect to the land in dispute according to the plan.

Q. Which plan are you talking about as in Exhibit AA1 or Exhibit CW2

A. As in Exhibit AA1.

Q. in Exhibit AA1, how many acres of land did you claim is yours.

A. 744.40 acres of land

Q. On Exhibit CW2, it was stated that 150.62 acres being the area for the plaintiff. Not so.

A. The 150.62 acres as in CW1 was the disputed area that I showed the survey[sic] and same the entire land of mine at the area.

Q. in all, how many persons does you land share common boundary with.

A. They are Op. K Prempeh, Op. Fobi. Op. Agyei. Nyanor, Op. Owusu, Attah then timber road, then Charles Boadu to stream Esuwrenfuor

Q. So above are all your boundary owners, not so

A. That is so.

The Court is such a serious place that one does not just go to court unless one is very sure about one's case. 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.

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.*

A person going to court on a land case such as this ought to be sure about his boundaries and also ought to be sure about the size of his land. It is being sure about the size of your land that will convince you that some other person has trespassed onto your land.

The following also came up in cross-examination of Plaintiff by Counsel for Defendant that raised my eye brows as I perused the record of proceedings as before my predecessor. It is:

> …
>
> Q. Upon the death of Op. Kwabena Pie, did you go for L/A over his estate.
>
> A. No. But in practice in our family, when a member dies a customary successor is appointed who takes over the estate of the deceased and same managed without any problem.
>
> Q. When you say the customary successor takes over the estate of the deceased, what do you mean.
>
> A. The properties that belong to the deceased person his predecessors that named properties passed are entrusted to the customary successor to manage for the benefit of the family which he must account for.

Q. Which of the deceased person's property is managed by the customary successor for the benefit of the family for which he must account for

A. It is the family property in the case of the decease[sic] is what is entrusted to the customary successor to manage and account for including the deceased personally acquired property.

Q. Who do you say succeeded Op. Kwabena Pie.

A. My brother Yaw Agyekum.

Q. Where is Op. Yaw Agyekum.

A. Dead

Q. When did Yaw Agyekum pass on

A. 1988

Q. Who succeeded Op. Yaw Agyekum

A. Ama Sekyere and Akosua Anokyewaa were made joint customary successors to Op. Yaw Agyekum.

Q. Put it to you that under the customary law and practice no two persons are made joint successors.

A. That is true. But in this case the senior successor, Ama Sekyere was to succeed and after her death that Akosua Anokyewaa who also died in 2004.

Q. You will agree with me that after the death of Op. Yaw Agyekum you did not go for L/A or probate.

A. The family property under the hands of Op. Yaw Agyekum was given to my mothers[sic] but Op. Yaw Agyekum privately acquired property was taken over by Darkwa Boateng who went to court for its document.

Q. Did Op. Kwabena Pie's land upon his death become the family or self acquired property.

A. Kwabena Pie's personally acquired land was meant for all other members of the family who is[sic] interested to com and cultivate it.

Q. So Op. K. Pie's land is a family property or private property.

A. It was K. Pie's personally acquired land.

Q. So who inherited K. Pie's personally acquired land upon his death.

A. I inherited the said land after I completed Takoradi Polytechnic in 1966, I came ti join my uncle K. Pie in town and helped cultivate the land and he was then blind. I cultivated the land until 1987 when he died and I saw to his burial and has remained in[sic] the land till date. And Kwabena Pie's property that belong[sic] to the family which was inherited by Ama Sekyere and Akosua Anokyewaa when they too died, I inherited that land which I manage for the family and account for same.

Q. When you say you are the only person who farmed on Kwabena Pie's land at Dominase after his death, same is not true as Ama Serwaah and wife of K. Pie and Darkwa Boateng cultivated the said land upon Pie's death.

A. I did not say I was the only one who cultivated the said land after the death of K. Pie.

Q. If you say you inherited K. Pie's land in 1967 that cannot be true as you cannot inherit somebody unless upon his death

A. I did not say I inherited K. Pie in 1966 or 1967, I said I came from school to join him cultivate the said land at that time. The said land was so vast so K. Pie invited all family members interested in farming to come and cultivate portions of his land and I also cultivated portions of that land before K. Pie died in 1987. Even then I was not the customary successor directly.

Q. Put it to you that if you say you inherited K. Pie's private land, same is not true at Dominase.[sic]

A. It is true that inherited it.

Q. In which year did K. Pie[sic] land at Dominase come to you as the successor

A. That was in 2004.

Q. Ama Sekyere and Akosua Anokyewaa, which of them died in 2004.

A. Akosua Anokyewaa.

Q. Who succeeded Akosua Anokyewaa

A. Madam Adjoa Frema.

Q. Put it to you that you did not inherit K. Pie's land at Dominase in 2004 because according to you family practice as you told the court, you do not go for L/A or probate at the court but rather the family meets and appoint who will inherit the self acquired property of the deceased and those property that the family held in trust for the family.

A. It is true that I inherited Op. K. Pie's property upon his death.

Q. it is also not true that when your family member dies, you do not go to court for L/A or probate. As you told the court that when Op. Yaw Agyekum died, Darkwa Boateng went to court for L/A or probate

A. Op. Agyekum was government employee so when he died, Darkwa Boateng went to court for L/A so he can pursue Op. Yaw Agyekum to go for his benefits and settlements which was shared among Op. Yaw Agyekum's children

Q. You said you inherited Op. K. Pie's land in 2004. Not so

A. That is so.

Q. did you obtain L/A in respect of Op. K. Pie's estate

A. No, as it is not a practice in the family.

Q. Did you obtain vesting assent over Op. K. Pie's land

A. Not at all.

Q. Put it to you that you lack capacity to prosecute this case against the defendant as you did not have L/A or vesting ascent[sic] in this land in dispute

A. That is not true. I have capacity to do so.

Q. Put it to you that you have no land near where the defendant's land is

A. That is not true. I have land there with indenture and site plan backing it

Section 1 of *Administration of Estates Act,* 1961 (Act 63) states:

> *(1) The movable and immovable property of a deceased person shall devolve on his personal representatives with effect from his death.*
>
> *(2) In the absence of an executor the estate shall, until a personal representative is appointed, vest as follows:—*
>
> *(a) if the entire estate devolves under customary law—in the successor;*
>
> *(b) in any other case—in the Chief Justice.*

It suffices if the property left behind by a deceased devolves customarily. However, Plaintiff's own answers under cross-examination as above show that he was not made customary successor or he has not been made so. His answers under cross-examination as above also show that the land herein has not been vested in him either customarily or by some legal instrument of a sort.

Capacity goes to the root of a matter.

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."

It is for good reasons that Order 2 rule 4(1)(a) of CI 47 requires that a person suing in a representative capacity must endorse the capacity in which he sues. If the land is a family property, then an individual member of the family cannot sue in respect of the said property unless certain conditions are satisfied as required by law.

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

(2) The head of a family in accordance with customary law may sue and be sued on behalf of or as representing the family.

(3) If for any good reason the head of a family is unable to act or if the head of a family refuses or fails to take action to protect the interest of the family any member of the family may subject to this rule sue on behalf of the family.

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

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

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

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

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

Plaintiff herein never demonstrated that any of the conditions stated in K*wan v Nyieni* above prevailed for him to clothe himself with capacity to sue in respect of this land which he admits to be a family land. Plaintiff also never demonstrated that he underwent the requirements of the law as in order 4 rule 9(4), (5) and (6) and (7) of CI 47, clothing him with capacity to undertake this action.

The said rules of Order 4 rule 9 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.*
>
> *(6) If the head of a family is sued as representing the family but it appears that he or she is not properly protecting the interests of the family, any member of the family may apply to the Court to be joined as a defendant in addition to or in substitution for the said head.*

(7) An application under subrule (5) or (6) shall be made on notice to the parties in the action and shall be supported by an affidavit verifying the identity of the applicant and the grounds on which the applicant relies.

A member of a family may hold the customary freehold title over portions of family land and thereby can farm on it.

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

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

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

It is only the portion a person holds customary freehold title over, that he can lay claim to but even so he cannot alienate the land without the consent and concurrence of the family as may be represented by the head of family and principal members or elders of the family.

Plaintiff has failed to demonstrate that he has capacity to bring this action and therefore his claim must fail. It is very unfortunate that a case should be pending in this court for almost seven years only for the court to hold that the action is otiose for want of capacity on the part of the initiator of the action.

Order 4 rule 1(1) of CI 47 states:

> *Subject to these Rules, any person may begin and carry on proceedings in person or by a lawyer.*

An individual not being a lawyer can prosecute a case on his or her own. However such a person must have a good and fair knowledge of the law including legal processes to embark on such a journey without a lawyer in the driving seat. If there happens to be lacuna in that person's case, the vehicle may crash as it has happened in this case. I need to make this analogy: A person, when not feeling well in his body due some health challenges, may take paracetamol for minor headache and minor bodily weakness, but such a person being a lay person in the medical world and not being medically trained cannot take just any medicine for a complicated condition and cannot perform surgery on himself; he may die, get maimed or jeopardize his health in some way.

Law is orgainized set of rules made to regulate society in order to ensure order in the society. The law may be complex and in some situations technical. Therefore, it is for

good reasons that people are trained to be become lawyers so that they can assist people who may lack such training prosecute their cases in court. In land cases, technicalities abound considering the nature of such cases. A lay person may fail to appreciate such technicalities as has happened to Plaintiff herein.

I hereby dismiss all the reliefs endorsed on the writ of summons. I grant the counterclaim by Defendant to the extent that he is entitled to damages but the question is: should it be GH¢30000.00

Though, I acknowledge that the value of GH¢30 000.00 as it was on 27th January 2017 when Defendant filed his counterclaim may have diminished as at this day, I still find GH¢30 000.00 to be on the higher side as damages against Plaintiff. I rather, with due regard to the circumstances of this case, award damages of GH¢20 000.00 for Defendant/Counterclaimant against Plaintiff/Defendant to Counterclaim.

HH YAW POKU ACHAMPONG

CIRCUIT COURT JUDGE

12/10/2023