IN THE DISTRICT COURT HELD AT KUKUOM ON MONDAY THE 21ST DAY OF NOVEMBER, 2022 BEFORE HER WORSHIP AKUA OPPONG-MENSAH (ESQ)

SUIT NO. A1/01/20

ABENA NYARKO

VRS

KWAKU MENSAH

JUDGMENT

BACKGROUND AND FACTS: The facts of the case which culminated in the institution of this suit by the Plaintiff are that the Plaintiff's late father, one Opanin Kofi Dukuu gifted a cocoa farm, the subject matter of this dispute to the Plaintiff. The Defendant, who is the biological brother of the Plaintiff was appointed as caretaker, to control the affairs of the farm on the Plaintiff's behalf. The Defendant, who was engaged as a caretaker however reneged on his obligations, and rather laid adverse claim to the disputed land. The Plaintiff being aggrieved by the Defendant's conduct, instituted the instant suit against the Defendant.

The Plaintiff, initially, on the 15th of October, 2019, sued for the following reliefs:

a. An order to enforce the arbitration award published in favour of the plaintiff in respect of one cocoa farm situate, lying and being at a place commonly known and called Aboe on Kamire Stool Land and bounded by the respective properties of Abena Serwaa, Kakraba, Adwoa Kyerewaa and Kwaku Mensah (defendant herein) which said matter was arbitrated upon by the Kukuom Traditional Council

six years ago which said award took effect three years ago, but which the Defendant has failed/refused to comply with despite repeated demands.

b. An order compelling defendant to account for proceeds from the said cocoa farm from the year 2017 to date.

The Plaintiff, however subsequently amended her writ of summons and per an amended writ of summons on 22nd January, 2020, sued for the following reliefs:

a. Declaration of title and recovery of possession of all that one cocoa farm lying and being at a place commonly known and called Aboe on Kamire Stool Land and bounded by the properties of Abena Serwaa, Kakraba, Adwoa Kyerewaa and Kwaku Mensah (defendant herein) which said cocoa farm the defendant has forcefully taken possession of and is enjoying the fruits accruing therefrom to the detriment of the Plaintiff.

b. An order compelling the defendant to account for proceeds from the said cocoa farm from 2017 till date of surrendering the said cocoa farm to the Plaintiff.

c. Perpetual injunction restraining the defendant his assigns, agents etc. from dealing with the said cocoa farm in any manner whatsoever.

The Defendant in response to the Plaintiff's claim also filed a counterclaim claiming the following reliefs:

i. A declaration that by virtue of the gift from his late father and the will he executed dated 6th February, 2013, he is the lawful owner of the land the subject matter of this dispute

Ii. Perpetual injunction restraining the Plaintiff, her assigns, servants etc. from interfering with the Defendant's use or title in his farm the subject matter of the dispute.

The Defendant subsequent to this action being instituted by the Plaintiff, on the 23rd of December, 2021, commenced an action in the High Court, Sunyani in respect of the same farm against two other persons (of which the Plaintiff was excluded).

This court however being guided by the case of EDWARD ABANG MARLEY V. EBO JUNIOR, MAWU DZAKE, TEACHER ADZRAKU ALHAJI AND MADAM AMERLEY SUIT NO.CI/32/2015, 12 JUL 2017, where the court stated inter alia that where two suits on the same subject matter are in different courts such as a High Court and a Circuit Court, both suits may go on concurrently unless the defendant applies to one of the Courts to stay proceedings pending the determination of the other, proceeded to hear the matter.

The main issues for determination are:

(i) whether or not the Plaintiff established her root of title;
(ii) whether or not a customary gift of the disputed cocoa farm was made to the Plaintiff
(iii) whether or not the Defendant has an interest in the land.

EVIDENCE AT TRIAL

PLAINTIFF'S CASE

The Plaintiff's case is that prior to the death of her late father, he gifted the cocoa farm which is the subject matter in dispute situate at Aboye and bounded by the

properties of Abena Serwaa, Kakraba, Adwoa Kyerewaa and Kwaku Mensah (the defendant herein) to her. It is the case of the Plaintiff that when her father put her in possession of the disputed cocoa farm, she initially appointed her elder brother Kofi Karikari as the caretaker of the farm, but he was enjoying the proceeds without giving her a share of same so she rather appointed the Defendant to act as her new caretaker. The Plaintiff further alleges that when she handed over the farm to the Defendant, he did not demonstrate candour in his duties, and also refused to share the proceeds with her. It is further the case of the Plaintiff that due to the Defendant's conduct, she summoned him before the Kukuom Traditional Council. The Plaintiff further claims that the panel decided to go for a Locus Inspection to ascertain the veracity of the Plaintiff's claim, and when the Defendant was invited, he refused to show up. It is again the Plaintiff's case that they were again invited to the Chief's Palace, but there again, the Defendant refused to appear and the Plaintiff was asked to give her evidence. The Plaintiff also claims that after the settlement at the "Ahenfie", her father asked her to allow him to continue to feed from the farm, to which she agreed and paid aseda of GH250, in the presence of witnesses. The Plaintiff's case however is that as a result of her late father's pleadings, the Defendant was sharing the proceeds with her father (to the exclusion of the Plaintiff). The Plaintiff's case is that the Defendant has refused to give possession of the farm to her despite repeated demands.

The Plaintiff, in support of her claim called two witnesses, PW1, Nana Kwaku Marfo and PW2, Nana Abeam Addai Danso.

PW1, Nana Kwaku Marfo, the customary successor and younger brother of the late Opanin Kofi Dukuu, in his evidence to the court stated that during the lifetime of his late brother, Opanin Kofi Dukuu and his wife Maame Akua Adomah, cultivated a farm at a place known as Abisunwo. The Plaintiff, who was then a minor

accompanied them to the farm on a particular occasion and fell sick, and was rushed home for treatment. According to PW1, during the healing process, his late brother took his sick daughter (Plaintiff) to a native doctor for further treatment. PW1 further alluded to the fact that his late brother informed him that the native doctor asked him to promise something dear he would do for his daughter if he was able to heal her, so he gifted the disputed farm to the Plaintiff. PW1 further stated that his late brother, Opanin Kofi Dukuu, gave the disputed farm to his son, Kofi Karikari to manage on behalf of the Plaintiff. According to PW1, when Kofi Karikari took over the said land he was not accounting for his stewardship, and eventually the Defendant returned from Kumasi and agreed to act as caretaker of the land, but when he took up caretakership he failed to account to the Plaintiff. PW1 further stated that his late brother advised the Plaintiff to lodge a complaint at the Kukuom Chiefs palace for them to settle the matter. PW1 further testified that when the matter was brought before the Chiefs and elders, his late brother requested for some consideration (aseda) from the Plaintiff to officially seal the said gift, so the Plaintiff paid aseda of GHC250. PW1 further stated that after the death of Opanin Kofi Dukuu, the Plaintiff approached the Defendant to recover possession of the land which had been gifted to her, but the Defendant refused to give back same to her. PW1 in his evidence to the court also stated that when the Plaintiff informed him of the behaviour of the Defendant, he advised her to report the matter to the Kukuom Chief's Palace, but the Defendant refused to appear for amicable settlement, so the Plaintiff thought it expedient to seek recourse in court.

EVIDENCE IN CHIEF OF PW2

PW2, Nana Abbeam Addai Danso in his evidence to the court stated that sometime ago, the Plaintiff summoned her brother, Kwaku Mensah, the Defendant before Nananom concerning the disputed cocoa farm, in which he PW2 was the chairman of the panel.

PW2 stated that the panel sat on the matter and invited the parties together with their late father Opanin Kofi Dukuu. PW2, further stated that the Plaintiff's father, Opanin Dukuu made it clear that he had gifted the disputed cocoa farm to the Plaintiff.

PW2 stated that based on this fact, the Plaintiff's late father also stated that if the Defendant had any claim to make he should rather contact him instead of the Plaintiff since he had brought the Defendant to the farm, to manage and take care of the farm for and on his behalf and after his death the disputed farm should revert to the Plaintiff.

PW2 further stated that the late Opanin Dukuu, also gave the reason for gifting the cocoa farm to the Plaintiff, was that at a point in time, the Plaintiff fell sick and was taken to a native doctor and as a condition for her healing, he was made to gift the cocoa farm to her.

PW2 further stated that the Plaintiff paid a sum of GHC250 as aseda to seal the gift in the presence of the panel. PW2 again testified that after the death of their father Opanin Kofi Dukuu, the Plaintiff came to report that the Defendant had refused to give possession of the disputed farm to her, so the Defendant was invited to appear before the panel, and upon his arrival, he informed the panel that his father had made a will.

PW2 stated that due to the above, the panel decided to inspect the farm the Defendant was claiming had been willed to him to ascertain whether it was the same land that had been earlier gifted to the Plaintiff. PW2 stated that the panel went to inspect the farm but the Defendant refused to attend so they advised the Plaintiff to take civil action, hence this present suit.

DEFENDANT'S CASE

The Defendant contends that the land which is the subject matter of this dispute was gifted to him by his late father during his lifetime to show appreciation for his contribution to the cultivation of the farm in the presence of credible and living witnesses. It is the case of the Defendant that whilst he was residing in Ejisu, his father invited him to assist him to tend the disputed land. The Defendant further alleges that he acceded to his late father's invitation and built a hut on the disputed land which his wife and children including his late father (until his demise), lodged in for over fourteen years prior to the institution of this action. It is the Defendants case that he continued to be in undisturbed possession of the farm until his father's death when his siblings began laying adverse claim to the disputed farm through subterfuge and various machinations. The Defendant also contends that the land which is the subject matter of the dispute was at no point gifted to the Plaintiff but during her father's lifetime the Plaintiff complained to some Kukuom sub-chiefs to force their father to give part of his cocoa farm to her. It is also the Defendant's case that the gift was further consolidated by a Will his father executed in his favour in demonstrating appreciation of his diligence, and therefore the Plaintiff was not entitled to any of the reliefs she was claiming in court.

The Defendant in support of his case, tendered in the Last Will and Testament of Opanin Dukuu dated 6th February, 2013 as 'Exhibit 1', a writ and statement of claim

in respect of the case, the Defendant instituted in the High Court intituled Kwaku Mensah v Akwasi Atta and Akua Afiriyie Suit No C1/07/8/2021 as

(Exhibits 2A and 2B), the Reading of the Last Will and Re-Reading of the Last Will and Testament of the late Opanin Kofi Dukuu dated 17th of August, 2016 and 17th of October, 2016 respectively as Exhibits 3A and 3B and entries in Ghana Cocoa Board, Cocoa Farmer's Passbook as Exhibit 4 series (Exhibit 4A, 4B and 4C).

The Defendant also called one witness, Dramani Inusah in support of his claim in respect of the instant suit.

DW1, Dramani Inusah, in his evidence to the court stated that he was well acquainted with both parties as their late father, Opanin Dukuu's mother hosted his deceased migrant father when he first settled at Kamirekrom. DW1 further asserted that the Defendant's late father Opanin Kofi Dukuu, was the person who personally cultivated the cocoa farm and solely enjoyed the proceeds thereof. DW1 further testified that about 14 years ago, the late Opanin Kofi Dukuu invited him, together with one Okyeame Kwabena Manu (linguist), now deceased, and the then Gyaasehene of Kamirekrom, the late Teacher Agyemang to the palace of the Kotinhene of Kamirekrom, one Kwasi Pong (also deceased), and informed them that due to the Defendant's goods services rendered he was gifting the farm to him.

DW1 further testified that the Defendant gave aseda of one bottle of schnapps and eight bottles of soft drink to the late Opanin Kofi Dukuu to seal the gift.

DW1 stated that the Defendant and his father were in peaceful occupation of the said farm until the Plaintiff lodged a complaint at Kukuom's Chief's palace that she should be given part of the late cocoa farm.

DW1 again testified that the Defendant's father the late Opanin Dukuu refused to honour the invitation to the palace and also asked the Defendant not to do so, but the arbitrators went ahead and purported to demarcate a portion of the farm to the Plaintiff.

In essence, it was the testimony of DW1, that to the best of his knowledge the late Opanin Dukuu, during his lifetime gifted the disputed land to the Defendant to the exclusion of all others.

Before I proceed to determine the issues, I must state that both parties in the matter gave vague evidence and infinitesimal details as to the exact date or even the year that they assert that the land was gifted to them, which the court deems crucial in ascertaining the authenticity of the event. The court would however determine the issues with the evidence on record which was proffered by the parties

WHETHER OR NOT THE PLAINTIFF ESTABLISHED HER ROOT OF TITLE

A germane issue for determination is whether or not the Plaintiff established her root of title.

It is a sound proposition of law that a party seeking declaration of title to land in a suit is required by law to establish his or her root of title.

This principle of law has received judicial pronouncement in a plethora of authorities. In the case of Mrs. Vincentia Mensah v Numo Adjei Kwanko II Civil Appeal No. J4/17/2016, delivered on 14th June, 2017, the court stated:

"In land suits in which title is in issue, the party claiming title must always plead and prove his root of title to enable him succeed.

Furthermore, in the case of Mondial Veneer (Gh) Ltd v. Amuah Gyebu XV (2011) SCGLR 466 at page 468 (holding 4), Georgina Wood CJ elucidated on the requirements laid down by law in proving title to land and opined

"In land litigation, even where living witnesses involved in the transaction, had been produced in court as witnesses, the law would require the person asserting title and on who bore the burden of persuasion... to prove the root of title, mode of acquisition and various acts of possession exercised over the disputed land. It is was only where the party had succeeded in establishing those facts, on the balance of probabilities, that the party would be entitled to the claim"

The Plaintiff, per her claim before the court traces her root of title from her late father Opanin Kofi Dukuu, whom she asserts acquired the disputed cocoa farm decades ago, and was in uninterrupted possession till he made a gift of the disputed cocoa farm to her. The Defendant himself acknowledges that until an alleged gift was made, the disputed farm was at all material times, the bona fide property of their late father which was further affirmed by the sole witness of the Defendant, Dramani Inusah (DW1).

However, the courts have held that proof of root of title is not conclusive evidence of title and ownership to land. In the case of ***Thomas Cobbinah Yaw Asiedu v Isaac Kwofie, Civil Appeal No H1/25/2017, dated 12th July, 2018,*** the court stated that the evidence of a party of his root of title and acts of possession were prima facie evidence of title to a property but same could be displaced by cogent evidence negating title to the property.

The Plaintiff, in her testimony to the court alluded to the fact that the disputed cocoa farm was gifted to her by her late father prior to his death. Consequently, although the Plaintiff has succeeded in proving her root of title, there is a duty cast

on the Plaintiff to provide lucid evidence to the court to establish unchallenged title to the land.

This brings to the fore the next issue the court is to consider, that is, whether or not a customary gift was made to the Plaintiff.

WHETHER OR NOT A CUSTOMARY GIFT OF THE COCOA FARM WAS MADE TO THE PLAINTIFF

The essentials of a customary law gift were discussed in the case of Ibrahim Gyamfi & Anor v Cecelia Boahene and Anor Suit No OCC/156/15, decided on 1st December, 2015, per Angelina Mensah-Homiah J (as she then was).

The court in its judgment relied on the case of Barko v Mustapha (1964) GLR 78, where the Supreme Court, laid down the ingredients of a customary gift. The court noted that for a customary gift to be given effect in law, the following ingredients must be present: (i) publicity;

(ii) acceptance; and

(iii) the donee must be placed in possession.

More recently in the case of Nathaniel Baddoo and 3 Others v. Mrs. Mercy Ampofo and 2 others SUIT NO.OCC/95/14 · FEB. 24, 2016, the court relying on the case of KYEI and ANOR V. AFRIYIE (1992) 1 GLR 257 per Lartey J observed:

"The essentials of a valid gift in customary law were publicity, acceptance and placing the donee in possession. The way to give publicity to a gift of land was to make the gift in the presence of witnesses. The acceptance should be evidenced by the presentation of "drink" or some small amount of money to the donor, part of which was served to the witnesses. “

The court in the case of Ibrahim Gyamfi & Another v Cecelia Boahene and Another (supra) further considered the case of Asare v. Teing and Another (1960) GLR 155, where the Plaintiff alleged that her father had made a customary gift of a piece of land to her in his lifetime, but she had permitted her father to be in possession for twenty years, and also allowed his family to remain on the land , four years after his death, so as to use the rent accruing therefrom to erect a monument, but the court held that no such gift existed as she had failed to prove the essential requirements of a valid gift in accordance with customary law, which were, publicity, acceptance and placing the donee in possession.

Similarly, in the instant case the Plaintiff notwithstanding the fact that she contends that an alleged gift of the disputed cocoa farm was made to her by her late father, was never in possession of the farm during the lifetime of her father. Furthermore, it emerged at the trial that although the Plaintiff claimed that a gift of the disputed cocoa farm, had been made to her, her father remained in possession and enjoyed the proceeds thereof to cater for himself as he was ill and advanced in age, as the Plaintiff was not financially stable and in a position to support her late father, so an agreement was broached that he would use the proceeds thereof for his upkeep.

The question for the court then is whether considering and evaluating the evidence before it, the gift the Plaintiff asserts was made to her by her father when she allegedly fell ill at a tender age and was reaffirmed in the presence of the chiefs and elders of Kukuom meets the requirements of the law.

From the evidence garnered at trial, the Plaintiff failed to demonstrate that when she alleged that her father had made a gift of the disputed cocoa farm to her in her honour from recovering from an illness as a young child, there was publicity of the

said gift, where her late father expressed the intention to gift the land to her in the presence of witnesses.

Furthermore, there is not an iota of evidence to show, that at the time the initial gift was alleged to have been made, acknowledgment or acceptance of the gift in the form of aseda or a token of appreciation was made.

Again, though the law recognises conventional forms of aseda, as was proffered in the case of Anaman v. Eyeduwa [1978] 1 GLR 114, where the court observed that the use or enjoyment of the thing gifted though non-conventional could be considered as aseda or due knowledge of the gift, the Plaintiff did not lead any evidence to show that personally enjoyed the use of the cocoa farm without interference.

Furthermore, there was no evidence to show that in the lifetime of the Plaintiff, she exercised overt or constructive acts of possession.

On what constitutes possession, in the case of TWIFO OIL PLANTATION PROJECT LIMITED V. AYISI AND OTHERS [1982-83] GLR 881, the court explained the terminology of possession in the following terms:

It (possession) (emphasis mine) may mean effective physical control or occupation evidenced by some outward act. This is sometimes called de facto possession or detention and is always a question of fact. The word may also mean legal possession, which is defined in Words and Phrases Judicially Defined, edited by Sir Roland Burrows to be:

"that possession which is recognized and protected as such by law. The elements normally characteristic of legal possession are animus possidendi together with that amount of occupation or control of the entire subject matter of which it is

practically capable and which is ordinarily sufficient for practical purposes to exclude strangers from interference.

Consequently, there was no evidence to establish that the Plaintiff was in possession of the dispute at the time the initial gift was made.

The court now considers whether a gift was however made by the late Opanin Kofi Dukuu in favour of the Plaintiff during the meeting before the panel of elders at Kukuom.

As may be gleaned from the evidence, when the Plaintiff summoned the Defendant before the panel, the Plaintiff's father made the Chiefs and elders aware that he had gifted the land to the Plaintiff and further requested for the Plaintiff to pay aseda of GHC250 in the presence of the Chiefs and Elders of Kukuom. This piece of evidence was corroborated by PW1 and PW2 in their evidence.

In the recent case of YAW SEFA V. OSEI KWAME AND KWASI AFRIYIE COURT OF APPEAL · H1/17/2021 · MARCH 25, 2021 · GHANA, in determining whether a customary gift had been established, the court relied on the Supreme Court case of Giwa v. Ladi (2013) 63 GMJ 1, per Benin JSC at pages 18 and 19 where he stated:

… "The most important element of a customary gift that runs through these authorities and several others is that the gift must be offered and accepted and must be witnessed by somebody else other than the donor and donee. Thus when the fact that a gift has been made is challenged, it will not be sufficient to state barely that a gift was made; you have to go on to show the occasion, if any, on which a gift was made, the date and the time if possible, the venue and most importantly, in whose presence it was made.

These factors are by no means exhaustive, but it is important that when you seek to claim a gift was made by a donor who has since died a bare averment and a bare assertion will not suffice as proof".

Again, in the case of In Re Suhyen Stool; Wiredu and Obenwaa v. Agyei and Others [2005-2006] SCGLR 424 Prof. Ocran JSC in a Chieftaincy Appeal case extrapolated on the requirements of a customary law gift and stated

"The requirements of a gift at customary law were:

(i) There must be a clear intention on the part of the donor to make a gift

(ii) Publicity must be given to the making of the gift and

(iii) The donee must accept the gift by himself or herself giving thanks offering or conventional aseda or by non-conventional aseda such as simply using and enjoying the gift or by doing act which fulfilled the object which the giving of the gift was meant to fulfil, namely the expression of gratitude and the symbolic acceptance of the gift".

The Plaintiff has established the germane requirements of publicity and acceptance, but there is no evidence that the Plaintiff exercised any form of possession over the land.

In the case of **MR. PETER OSEI AFRIYIEV. PASTOR OSEI AGYEMANG AND JANET OSEI AGYEMANG** SUIT NO.INTS/13/12 · 10 FEB 2015 · GHANA, relied on the case of Bonney v Bonney (1992-93) 2 GBR 779 where the Supreme Court held that "The consent of the members of, or witnesses from, the donor's family was no longer necessary for a valid gift inter vivos of self-acquired property; neither did the continued enjoyment by the donor of the property so gifted detract from the validity of the gift.

In Jacqueline Asabere and Anita Asabere v Johnson Aboagye Asim CIVIL APPEAL NO: H1/41/2016 · 19 OCT 2016, the court also stated:

The broad essentials of a valid gift in customary law are that (1) there must be a clear intention on the part of the donor to make a gift, (ii) publicity must be given to the gift and (iii) the donee must accept the gift by himself giving thank-offering or aseda, or by enjoying the gift.

Again, in the YAW SEFA V. OSEI KWAME AND KWASI AFRIYIE (supra), the court was of the firm view that the where the three requirements for a valid customary gift as outlined in the Suhyen case are fulfilled or met, namely that there was an intention on the part of the donor to make a gift, publicity of the gift had been made and that either conventional or non-convential acceptance or acknowledgment, had been made, a customary gift could be established. The highlighted requirements did not transcend to possession. Therefore, though possession, may assist the court in establishing title, it need not necessarily be proven for a gift to be established.

From the foregoing, the court is of the view that although the Plaintiff's father remained in possession of the farm and enjoyed the proceeds thereof, based on the case of Bonney v Bonney (1992-93) 2 GBR 779, the continued enjoyment by the donor of the property so gifted did not detract from the validity of the gift, and a customary law gift was made at the meeting of the Chiefs and elders in favour of the Plaintiff.

The Defendant filed a counterclaim to the Plaintiff's action which is construed as a separate claim in law. Therefore the court would proceed to evaluate the evidence of the Plaintiff, before it proceeds to discuss issue three to determine whether the Defendant is entitled to his counterclaim.

ANALYSIS AND EVALUATION OF EVIDENCE

The law is clear, that in civil trials, the standard of proof required for a party to prove the veracity of his or her claim in court, is proof on the balance of probabilities. This is codified under our law under sections 12 (1) and (2) of the Evidence Act, 1975 (NRCD 323) which provides:

Section 12—-Proof by a Preponderance of the Probabilities.

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

(2) "Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.

In the case of Kwabena Osei Bonsu v K. Amponsah Darko, Suit No

FAL/864/2015, delivered on 17th July, 2017, the court stated "Now, it is a basic principle of the law of evidence, that in civil cases, the standard of proof required of a party is proof on a balance or preponderance of probabilities. This has been defined in the Supreme Court case of *SAGOE and OTHERS v. SOCIAL SECURITY AND NATIONAL INSURANCE TRUST (SSNIT) [2012] SCGLR, 1093* as *" weightier or superior evidence."* What this means is that, to succeed on a claim, a party must satisfy the Court of the probable existence of a fact in issue than its non-existence. Put differently, for a party to succeed, the probabilities must substantially be in favour of that party.

The Plaintiff whose claim basically hinged on an alleged gift which she claimed was initially made years ago could not proffer evidence to the court to establish the ingredients of publicity, acceptance and possession, to show that a gift had been made.

The court is however of the view that at the meeting of the Chiefs and Elders, a gift was perfected, when publicity was of the gift was made by the late Opanin Kofi Dukuu, and acceptance of the gift by offering aseda of GHC250 was made by the Plaintiff in the presence of the Chiefs.

In essence, although the Defendant denied that the land had been gifted to the Plaintiff, from the evidence adduced, it may be surmised that the Defendant was aware of the said gift.
It emerged in cross-examination of PW2, that after the Chiefs and elders had amicably settled the matter, following the death of his late father, the Defendant came to show them a Will purportedly made by the late Opanin Kofi Dukuu. Notwithstanding the fact that the Defendant refutes this assertion, I am of the fervent belief that if a gift of the cocoa farm the subject matter in dispute, had not been made in favour of the Plaintiff in the presence of the Chiefs and Elders, the Defendant would not have construed it necessary to show the will to the Chiefs and Elders.

The following ensued in cross-examination

Q Do you remember that after the passing on of my late father, I showed you a will that has been prepared by my late father.

A. That is correct, you did show me a Will and that also buttresses the fact that Nananom sat on this matter and it was determined. Nananom, did not accept the will. That is why we asked you to show us the land, you were talking about.

Q I did show the will to you because after the demise of my father, the Plaintiff was laying adverse claim to the land, that is why I showed you the will, and not because you sat on this matter

A. That is not correct, it is because this matter had earlier on been brought to Nananom.

Q. Your claim that Nananom sat on this matter is not correct, because the Plaintiff herein never stated so in court

A. That is not correct. The matter was brought before Nananom. Your father came in and told Nananom, that he has asked you to use the proceeds from the farm to take care of him.

Q. Why did you have to visit the farm on three occasions?

A. We went to the farm on three occasions, because on the first occasion your father was alive and showed us the land and the boundaries, and we went there on the second occasion, because of the Will purported to have been made by your father, so we wanted to ascertain whether it was the same land. You refused for us to come and determine whether it was the same land. We called but you refused to pick our call. We went there on the third occasion, but you failed to appear. At this point we advised the Plaintiff to bring the matter before the court.
Prior to this, during the trial, PW2, in cross-examination provided names of all the Chiefs and elders who were present, namely, Nana Ntra Agyapong, Ankobeahene, Nana Asamoah Nyamekye, Sanaahene, Nana Oduro Animapauh, Okyeame, Nana Obeng Bempah, Akyeamehene, Nana Asare Bediako, Mawerehene, Nana Amanor,

Okyeame, Nana Okyere Nsiah, Gyaasehene, and Nana Agyenim Boateng, Benkumhene, during the occasion the panel sat on the matter, where the Plaintiff paid aseda to the late Opanin Kofi Dukuu, in reverent acknowledgement of the gift in line with the requirements in Giwa v Ladi (supra).

The court finds PW2 to be a credible witness as his testimony was not fraught with any contradictions and inconsistencies. Furthermore from his demeanour at the trial, the court considers, the narration of events by PW2 is a true reflection of what occurred.

Therefore as may be surmised from the above, the only logical deduction, that can be made, is that the Defendant witnessed the cocoa farm the subject matter of this dispute being gifted to the Plaintiff, and that is why he proceeded to challenge same with the Will purportedly made by his father.

Furthermore, this further buttresses the claim by PW1 that the Defendant was present when the cocoa farm, the subject matter of this dispute was gifted in favour of the Plaintiff

Q It is not correct that my late father gifted the land to the Plaintiff herein, and she offered aseda in my presence

A What I've told the court is the truth, that the Plaintiff when she was gifted this portion of the land offered aseda in the presence of the Chiefs and elders of Kukuom, as well as we the siblings of your late father Dukuu and you yourself were present.

Though it has been irrefutably established that a customary gift of the cocoa farm was made to the Plaintiff, as the Defendant is claiming in his counterclaim that same was gifted to him and that it was further consolidated in a will purportedly

made by his late father, the court would have to establish, if indeed a gift was made and whether it preceded that given to the Plaintiff.

ISSUE 3

Whether or not the Defendant has interest in the land.

The court in determining issue 3, now proceeds to consider the counterclaim of the Defendant

The Defendant per his counterclaim, is seeking a declaration of title to land, per a will dated 6th February, 2013, purported to have been made by his late father which consolidates the gift made by his late father about 14 years prior to the institution of this action.

The crux of the Defendant's counterclaim is that during his father's lifetime his father engaged him as a caretaker to cultivate the cocoa farm in dispute, and due to his industry and good services rendered to his father, the cocoa farm was gifted to him in the presence of witnesses.

The Defendant, to buttress his claim filed a statement of defence and counterclaim and a witness statement in which he claimed that he had living and credible witnesses to testify to the alleged gift.

However, in court, he called only one witness, DW1, Dramani Inusah to testify to the alleged gift. The witness Dramani Inusah asserted that the other witnesses were deceased. This questions the credibility of the Defendant as it contradicts his claim that there were living and credible witnesses testify to the gift.

Furthermore, DW1 averred that a gift was made to the Defendant almost 14 years ago, which is highly improbable from the evidence garnered at trial. The Defendant indicated that he had been on the land for about 15 to 16 years (approximately over 15 years), and had even built a hut on same, but however in his evidence stated

that during the first year which is about 14 years ago, his brother Kofi Karikari acted as a caretaker for him but failed to render accounts so he claimed the farm back. Essentially, the Defendant was not on the land at that material time 14 years ago, for the late Opanin Dukuu to have gifted the land in appreciation of his good services rendered, as he alleged.

Though the court wishes to refrain from speaking on the validity of the will as same has not been admitted to probate (from the evidence) neither has it been declared valid by any Court, the court observed that although DW1 stated that the Defendant presented one bottle of schnapps and eight bottles of soft drink to seal the gift, per the said Will dated 6th February, 2013, the aseda offered was one bottle of schnapps and cash sum of GH6.

The court finds great difficulty in believing the Defendant, due to his contradictions, though he is relying on a will dated 6th February, 2013, on Exhibit 3A, the Re-Reading of the Last Will and Testament of Opanin Kofi Dukuu of Dantano near Kukuom which he tendered in evidence, the date of the will was 11th March, 2013.

Again, DW1, in cross-examination appears to have retreated from his claim that he could affirm with absolute certainty that the land had been gifted to the Defendant

Q You claim you were present when the land was gifted to the Defendant, in Ashanti custom, can someone who gifted something to a person claim it back.

A The land belongs to him, so if he's claiming it back and giving it to anyone, he is the owner of the land, so he can gift it to any person he wishes, so I do not know anything about that

This lends credence to the fact that if indeed, the land had been gifted to the

Defendant, the late Opanin Dukuu could not have regifted the same land to the Plaintiff.

The Plaintiff and PW1's assertion is therefore more probable, that the Defendant was a caretaker of the land, and that is why when the late Opanin Dukuu gifted the cocoa farm, the subject matter of this dispute, to the Plaintiff in the presence of the Chiefs and elders, he requested that he be allowed to feed from the land, as the Defendant was taking care of it on his behalf.

In the case of Joyce Adjoa Akoh Dei v Robert Hanson Suit No FAL/967/2015, the court per Justice K. A. Gyimah stated that where the defendant has a counterclaim, he becomes a plaintiff in respect of the counterclaim and he is subject to the same burden that has been placed on the plaintiff with respect to proving the counterclaim. The Defendant has however failed to discharge this burden.

Furthermore, the Defendant tendered in a Ghana Cocoa Board Passbook, in support of his claim that he is the bona fide owner of the cocoa farm. The passbook, however is not conclusive evidence of ownership of the land. The intrinsic purpose of possession of a Cocoa Passbook as a caretaker, is to account for and have a written record the proceeds accruing from the farm thereof, and in no way confers ownership.

The court is therefore of the view that the Defendant failed to prove his counterclaim and even if the court had been minded to grant same, the court's hands were tied as the Will which he sought to rely on does not have full legal effect.

The court therefore finds that the Defendant does not have any interest in the land.

CONCLUSION

The court, though it considers none of the evidence given by either of the parties as sacrosanct without inconsistencies, on the preponderance of the probabilities, considers the claim of the Plaintiff more probable, even though the arrangement she had with the father in regard to the gifted land was rather unconventional and unorthodox, based on the credible testimony of her witnesses, who did not depart from their claims.

Furthermore, in the case of Osei substituted by Gilard v Korang (2013-2014) 1 SC GLR 221, the court observed that although possession is prima facie evidence of the right to ownership, possession is only nine-tenth of evidence of good title, which can crumble if the other party can show evidence of better title.

Again, in BINGA DUGBARTEY SARPOR v EKOW BOSOMPRAH, CIVIL APPEAL NO. J4/55/2020, 2 DEC 2020, the Supreme Court, in dismissing the case of an appellant who had been in possession of the land for 20 years stated that, a long period of possession of land does not guarantee title nor does it by itself estop another from challenging the title to the land.

Therefore, following the gift made to the Plaintiff, though the Defendant and his family had set up a home on the disputed land, he relinquished any interest he had in the land.

Based on the above, the Plaintiff is entitled to the reliefs she is claiming from the court.

Judgment entered in favour of the Plaintiff on reliefs (a), (b) and (c). The Defendant is however to further give the Plaintiff a 50% portion of the proceeds realized from 2017 to date. The Defendant's counterclaim is dismissed.

No order as to costs.

SGD

AKUA OPPONG-MENSAH

DISTRICT MAGISTRATE