

IN THE DISTRICT COURT BECHEM HELD ON FRIDAY, 23RD DECEMBER, 2022
BEFORE HIS WORSHIP KORKOR ACHAW OWUSU, ESQ. DISTRICT
MAGISTRATE

SUIT NO. A1/24/ 2022

NANA TAKYI BOAKYE (SUNG ON HIS BEHALF
AND ON BEHALF OF ADUANA FAMILY OF BREME) } PLAINTIFF
BREME

VRS

NANA OTUO ACHEAMPONG }
BREME DEFENDANT

PLAINTIFF: PRESENT

DEFENDANT

ABSENT

EMMANUEL BOAKYE-YIADOM, ESQ. COUNSEL FOR THE DEFENDANT:

ABSENT

J U D G M E N T

The Plaintiff on the 5th May, 2022 filed a writ of summons accompanied by an affidavit in support for the following reliefs against the Defendant;

(a) A declaration of title to a piece and parcel of land situate at Breme Agya on Breme Stool Lands which shares boundaries with property of Breme Assemblyman, Late Opanin Yaw

Kuma, Late Obaapanin Waawa, Teacher Charles and Breme Agya stream which said land belongs to the Plaintiffs' Aduana Family of Breme.

(b) Recovery of possession of all the land stated above where the Defendant is claiming ownership without any justifiable cause.

(c) An order of perpetual injunction to restrain the Defendant, his agents, assigns, workmen or any of the Defendant's family member, etc. from dealing with the Plaintiff's family land in the disputed land in any manner whatsoever.

(d) Cost.

The Plaintiff from the averments contained in the affidavit in support is the head of Aduana Family of Breme and sued in that capacity. However, in his affidavit in opposition to the Plaintiff's averments, the Defendant only gave his name and residential address without disclosing his designation and/or status.

On 23rd of May, 2022, when the suit was called for mention; and plea taken, the Defendant's pleaded "*Not liable*" to the Plaintiff's reliefs wherefore the court ordered for parties to file their respective pleadings. However, the parties pleaded with the court to rely on their respective affidavits. The court magnanimously granted the parties' prayer and adjourned the matter to 30th June for them to file their respective *witness statements* on or before the said adjourned date.

It is significant to mention that the Plaintiff complied with the order of the court and filed his *witness statements*; however, the Defendant did not; and never did on the court days subsequent. In the face of the Defendant's failure and/or refusal to file his witness statement, he also failed to attend court to partake in the court proceedings *albeit* several hearing notes served on him.

In fact, I must state unapologetically that the law does not pamper recalcitrant litigants. That is, the fact that the Defendant failed and/or refused to attend court would not be a force disabling it from proceeding with the matter. The suit had to be heard at all cost.

It has become the practice that some litigants will just come to court to hear the suit mention; and thence disappear from court, particularly of plaintiffs. Thus, in order to prevent parties from embarking upon an act or omission with the likelihood of stalling proceedings in court, *order 25 rule 1(2)(a)(b)* of the *Civil Procedure (2009)*, C.I. 59, provides *inter alia*, that *where an action is called for trial and a party fails to attend, the trial court may where the plaintiff attends and the defendant fails to attend, allow the plaintiff to prove the claim. In much the same way, where the defendant attends court but the plaintiff fails so to do, the court may dismiss the action and allow the defendant to prove the counterclaim, if any.*

In that regard, *order 25 rule (2)(a)* and *(b)* of C.I. 59 was applied in the case of **Republic v. High Court, (Human Rights Division) Accra Ex parte, Josephine Akita, (Mancell-Egall, Attorney-General Interested Party) [2010] SCGLR 374** in which the applicant invoked the *audi alteram partem* rule because judgment was entered against him for failing to attend court. In dismissing the (*audi alteram partem*) application, the Supreme Court held that a party who had the opportunity to be heard but deliberately spurned that opportunity to satisfy his own decision to boycott proceedings cannot later complain that the proceedings have proceeded without hearing him and then plead in the aid of *audi alteram partem* rule.

This principle, *supra* espoused, was more elaborated in the Nigerian case of **Newswatch Communications Ltd v. Atta (2006) 1 All NLR at 224**, where it was stated;

“The constitutional principle of fair hearing is for both parties in the litigation. It is not only for one of the parties. In other words, fair hearing is not a one way traffic but a two way traffic in the sense that it must satisfy a double carriage way, in the context of both the plaintiff and the defendant or both the appellant and the respondent. The Court must not invoke the principle in favour of one of the parties to the disadvantage of the other party undeservedly.

That would not be justiceit is the duty of the Court to create the atmosphere or environment for a fair hearing of a case but it is not the duty of the Court to make sure that a party takes advantage of the atmosphere or environment by involving himself in the fair hearing of the case

A party who refuses or fails to take advantage of the fair hearing process created by the Court cannot turn round to accuse the Court of denying him fair hearing. That is not fair to the Court and Counsel must not instigate his client to accuse the Court of denying him fair hearing. A trial judge can indulge a party in the judicial process for some time but not for all times. A trial judge has the right to withdraw his indulgence at the point the fair hearing principle will be compromised, compounded or will not really be fair as it affects the opposing party. At that stage the trial judge will and rightly too for that matter retrace his steps of indulgence and follow the path of fair hearing as it affects the opposing party, who equally yearns for it in the judicial process. At that stage, the party who is not up and doing to take advantage of the fair hearing principle put at his doorstep by the trial judge cannot complain that he was denied fair hearing.”
(Emphasis mine).

In the quotation above “the party who is not up and doing” refers to the Defendant in the case at hand.

Bracing the court's elbows with the authorities and the statutory provision, on 29th August, 2022, the Plaintiff was granted audience in court. And for the purposes of appreciating the Judgment of the court, producing the summary of the Plaintiff's evidence will help.

The Plaintiff who gave his name as Nana Takyi Boakye; and the Krontihene of Breme testified for himself and on behalf of the Aduana Family of Breme. In his testimony, he traces the family's root of title from inheritance from their forbearers, Opanin Ayewoho, Opanin Yaw Premo, Yaw Bota, Osei Appau and Kofi Asamoah, among others. The Plaintiff added that the Aduana Family of Breme has been in occupation of the disputed land over a century without let or hindrance; and used entire land measuring about 4.00 acres cultivate cocoa.

According to the Plaintiff, before the death of his uncle Osei Appau in 2001, the subject matter land was given to the government of Ghana for the Presidential Special Initiative for planting oil palm trees. Similarly, in recent times, Osei Appau's successor, Opanin Kofi Asamoah, also took charge of the oil palm plantation on the subject matter land; which the Aduana Family has continued to enjoy and benefit from the land and the fruits therefrom without let or hindrance to date.

PW1, Afia Ayewa, gives evidence to corroborate the Plaintiff's testimony. According to PW1, in or about 22 years ago, her father, a principal member of the Aduana Family of Breme assigned a portion of land to her to cultivate palm plantation and harvest the fruits to extract oil from so that she will use the proceeds to cater for her father.

Therefore, it comes as a surprise to the Plaintiff and the entire Aduana Family of Breme for the Defendant, who is neither a family member nor a grantee of the Plaintiff Family,

to trespass onto the land to win sand; and claims ownership thereof. The Plaintiff is therefore, suing in his representative capacity as the head of family, seeking the court to grant the reliefs endorsed on the Writ of Summons.

APPLICABLE LAW

In all civil trials, the burden of proof rests on the plaintiff. That is to say: *“He who alleges bears the burden of proof”*. Therefore, in the case of **Jass Company Ltd and Another v. Appau and Another [2009] SCGLR 265 at 270 and 271**, the Supreme Court unanimously in dismissing the appeal by the plaintiff/appellants from the judgment of the Court of Appeal and affirming the judgment of the trial High Court for declaration of title to the disputed land in favour of the defendants/respondents stated *per* Dotse JSC as follows; *“We wish to observe that the burden of proof is always put on the Plaintiff to satisfy the Court on a balance of probabilities in cases like this. Thus, where in a situation, the Defendant has not counterclaimed; and the Plaintiff has not been able to make out a sufficient case against the defendant, then the plaintiffs claim would be dismissed”*. (See also **Odametey v. Clocuh [1989-90 1 GLR 15**, holding 1).

In the instant suit, the court shall settle on proof of ownership of land and what is required of the parties. In proof of ownership of land, one of the key elements to establish is the testimony of boundary owners. I must therefore, state that in the evidence by the Plaintiff, he was not prompted to call any of his boundary owners as witnesses. That notwithstanding, the court shall rely on statute to resolve the issue at hand.

Section 48 of the Evidence Act, 1975 (NRCD 323) on proof of ownership on land therefore, enacts:

“48. Ownership

(1) The things which a person possesses are presumed to be owned by that person.

(2) A person who exercises acts of ownership over property is presumed to be the owner of it”.

The underlying principle of *section 48* of *NRCD 323* is that until the contrary is established, there is a rebuttable presumption that the person in possession is deemed the owner of the land. Therefore, where the plaintiff discharges his duty of proof, the burden then shifts onto the defendant to prove their title.

In support of this principle, the case of **In Re Krah (Deceased) Yankyeraah & Others v. Osei-Tutu & Another (1989-90) 1 GLR 638** comes handy. In that case, it was stated (at holding 2 as appeared in the headnotes) that *in civil trials, although the burden of proof lay on the one who must succeed in the action it shifted in the course of the trial.*

So also in the case of **In Re Ashalley Botwe Lands; Adjetey Agbosu & Others v. Kotey & Others [2003-2004] S C GLR 420**, the court at holding 5 stated;

“The Court of Appeal erred in holding that the defendants had no obligation to prove their defence. Under the provisions of the Evidence Decree, 1975 (NRCD 323) the burden of producing evidence in any given case was not fixed, but shifted from party to party at various stages of the trial depending on the issue(s) asserted and/or denied. The trial Judge, therefore, had rightly held that the evidential burden fell on the defendants to lead credible evidence to displace the effect of their admission of the Plaintiff's undisturbed possession of the disputed land. Consequently, under sections 14 and 48 of the Evidence Decree 1975 (NRCD 323) a rebuttable presumption of ownership was raised in favour of the plaintiffs. The

defendants must lead credible evidence to displace such presumption with a view to avoiding a ruling against them on the issue of ownership”.

Considering the Plaintiff's case supported by PW1's evidence it has been proven that the disputed land is the *bona fidei* property of the Aduana Family of Breme; because he has successfully chronicled the history of the acquisition through inheritance.

With the history of the acquisition of the land apart, the Plaintiff has also been able to convince the court that the Aduana Family of Breme have been in possession and occupation of the land for over one hundred years. What else does he have to say to convince the court that indeed the land in dispute belongs to his family?

As earlier stated under *section 48 of NRCD 323* and propped up by the case of **In Re Ashalley Botwe Lands** (*supra*), where a presumption of title of ownership is made in favour of a plaintiff, the burden shifts on the defendant to prove their title. It is unfortunate that the Defendant failed and/or refused to appear in court to discharge the duty placed on him by law.

In that respect, the principle enacted under *order 25 rule 1(2)(a)(b)* of *C.I. 59*; as enlivened by the authorities of **Republic v. High Court, (Human Rights Division) Accra Ex parte, Josephine Akita**; and **Newswatch Communications Ltd**, (*supra*) shall lie.

Having considered the facts of the case, the evidence adduced; and the relevant statutes and authorities thereto, *vis-à-vis* the reliefs sought by the Plaintiff, the court shall enter judgment against the Defendant in favour of the Plaintiff; and shall further make the follow orders;

1. *All the reliefs endorsed on the Writ of Summons by the Plaintiff are hereby granted.*
2. *Cost of **GHC6, 000.00** awarded against the Defendant in favour of the Plaintiff.*

.....SGD.....

H/W KORKOR ACHAW OWUSU, ESQ.

DISTRICT MAGISTRATE

BECHEM DISTRICT MAGISTRATE COURT

23RD DECEMBER, 2022