

IN THE DISTRICT COURT TWO TAMALE
HELD ON MONDAY 31ST OCTOBER, 2022
BEFORE HIS WORSHIP D. ANNAN ESQ.

SUIT NO. A1/6/22

BETWEEN

DR. JABRIL D. SAYIBU

-

PLAINTIFF

AND

ABDULAI MAHAMA

-

DEFENDANT

JUDGMENT

1. This is a judgment relating to land. The plaintiff describes himself as a Financial Economist and Businessman while the defendant describes himself as an Arabic Cleric. The land in dispute is within the magisterial district of this court.
2. Per his writ of summons filed on 16th March, 2022 the plaintiff claims against the defendant, the following reliefs:
 - a. Ejectment of defendant.
 - b. Recovery of possession.

- c. Perpetual injunction restraining the defendant, his agents, workmen or his representatives from operating at the back or premises of plaintiff's H/No. G 42, Sabonjida, Tamale.
 - d. Mandatory injunction directed at the defendant to remove his said structure thereon.
 - e. Costs.
3. After service of the Writ of Summons on the defendant, the defendant was in Court on 7th April, 2022 and pleaded not liable to plaintiff's claim. Both counsel for the parties herein prayed the court for an appointed of surveyor who will assist them to settle this matter. The court granted the application. However, at the next hearing dated 10th May, 2022 the court noted that the defendant had filed a Defence and Counterclaim indicating that the matter should proceed to trial.
4. The plaintiff on 13th May, 2022 filed a Reply disputing the averments of the defendant.

PLAINTIFF'S CASE

5. Plaintiff claims that he owns the land with Plot No. 42, Sabonjida, Tamale and that he purchased it from one Iddrisu Mahama on 27th August, 2021. He contends that the plot had a building on it, but upon acquisition he demolished the said building. He, however, noticed that the defendant who occupies building on Plot No. 41 which shares common boundary with his property had constructed a shed/penhouse/structure (hereinafter referred to as shed) which had extended onto his plot. He indicates that he drew the attention of the defendant to remove the shed/penhouse/structure but defendant refused or neglected his request.
6. In his Reply, the plaintiff adds that the said shed is obstructing the development of his land. He stressed that the fact that the previous owners of his plot had tolerated or consented to the existence of the said shed does not bar him for claiming same. He argues also that the site plan of the defendant is obsolete and do not conform to the current layout of the area.
7. The plaintiff tendered in evidence the following exhibits in support of his case:
 - a. Exhibit A - Statutory Declaration transferring ownership to Plaintiff dated 17/3/22
 - b. Exhibit A1 – Plaintiff's Site plan
 - c. Exhibit A2 – A Cadastral Map
 - d. Exhibit A3 – The deed of assignment between Iddrisu Mahama and Plaintiff dated 21/12/21.
8. Plaintiff did not call any witness aside his testimony.

DEFENDANT'S CASE

9. Defendant, on his part, contends that the said shed is not on plaintiff's land. He states that his plot with H/No. G. 41 is a family home acquired in 1955. Defendant maintains that his father built the said shed over 20years ago and he has continued the animal rearing after his father passed on. He argues that the shed is attached to his wall with a lane between the shed and plaintiff's land. He argues further that the said shed had been there when the previous owners lived on plaintiff's property and that it is rather the plaintiff who wants to extend his acquisition to where the shed is located.

10. The defendant also tendered in evidence the following in support of his case:
 - a. Exhibit 1 – Lease approval by Lands Department dated 1st June, 1955.
 - b. Exhibit 1A – Defendant's Site plan
 - c. Exhibit 2, 2A and 2B – Series of pictures showing the two houses and the shed/penhouse/structure.

11. Defendant did not also call any other witness aside his testimony.

EVIDENCE OF THE COURT EXPERT

12. The parties herein consented to the appointment of a surveyor to (a) ascertain the correct boundaries of plots numbers G. 41 and G. 42 and (b) determine whether the shed is on either plot. The surveyor, Mr. Mohammed Danladi, tendered in evidence his report and was marked as CW1. His report will be analyzed later in this judgment. Both parties cross-examined him on the report.

ISSUES FOR DETERMINATION

13. The issues borne out by the facts are:

- a. Whether or not the defendant's shed is on plaintiff's land?*
- b. Whether or not the continued existence of defendant's shed precludes plaintiff's claim?*
- c. Whether or not plaintiff or defendant is entitled to their respective claims?*

BURDEN OF PROOF

14. In civil cases, the general rule is that the party who in his pleadings raises issues essential to the success of his case assumes the onus of proof on the balance of probabilities. See the cases of **Faibi v State Hotels Corporation [1968] GLR 471** and **In re Ashalley Botwe Lands; Adjetey Agbosu & Ors. v. Kotey & Ors. [2003-2004] SCGLR 420**. The Evidence Act, 1975 (NRCD 323) uses the expression 'burden of persuasion' and in section 14 that expression has been defined as relating to, 'each fact the existence or non-existence of which is essential to the claim or defence he is asserting.' See also ss. 11(4) and 12(1) and (2) of NRCD 323 and **Sarkodie v FKA Company Ltd. [2009] SCGLR 65**.

15. With regards to what is required of the plaintiff in land cases, the law is that the he must succeed on the strength of his own case and not on the weakness of the defendant's case, see **Odametey v Clocuh [1989-90] 1 GLR 14, SC**. In **Kodilinye v Odu [1935] 2 WACA 336**, the court puts it simply that. "in case of doubt, ...the party who asserts must lose."
16. Where there is claim and a counterclaim, the Supreme Court speaking through His Lordship Ansah JSC in the case **Osei v Korang [2013] 58 GMJ 1**, stated as follows:
- "... each party bears [the] onus of proof as to which side has a claim of title against his/her adversary, for a counter claimant is as good as a plaintiff in respect of a property which should he assays to make his/her own."

ANALYSIS OF THE ISSUES

Issue a

17. Issue a, thus, *whether or not the defendant's shed is on plaintiff's land?* It is trite law that he who asserts must prove. In the case **Okudzeto Ablakwa (No. 2) v. Attorney-General & Obetsebi-Lampsey (No. 2) [2012] 2 SCGLR 845**, the Supreme Court in dealing with the onus of proof of an allegation held at page 867 as follows:
- "...What this rule literally means is that if a person goes to Court to make an allegation, *the onus is on him to lead evidence to prove that allegation*, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in Court if the case is based on an allegation which he fails to prove or establish."
18. The law further requires that, "[w]here 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." See the celebrated case of **Majolagbe v. Larbi [1959] GLR 190** per Ollennu J (as he then was) at page 192.

19. From the evidence, the plaintiff maintains that the said shed is on his land per his boundaries. Defendant disputes this but is unable to tell the extent of his boundaries. As mentioned earlier, the parties consented to the appointment of a surveyor to help ascertain the correct boundaries of plots no. G41 and G42 and also whether the said shed was on either plot. They both submitted their site plans to the appointed surveyor. The surveyor in his testimony stated that both plaintiff and defendant plots reflect the current positioning of their lands as per the records at the Lands Commission. He, however, stated that the defendant's shed was four (4) feet into plaintiff's land.

20. It must be noted that the court is not bound by the surveyor's report, since the report is only to help the court to come out with a reasoned decision, see the case of **Tetteh v. Hayford [2012] 1 SCGLR 417**. These are excerpts of the cross-examination of the Court Expert by counsel for the plaintiff:

"Q: Paragraph 3 of your findings/observations, 'the penhouse as indicated on the composite plan has about four feet of the measurement falling into Dr. Jabil D. Sayibu (plaintiff) claim on the ground', not so?

A: Yes.

Q: That is all.”

21. Counsel for defendant also cross-examining the Court Expert, this is what ensued:

“Q: Paragraph 3 of your findings, you indicated the 4 feet of the measurement of the penhouse falls into plaintiff’s claim on the ground, is that the case?”

A: Yes.

Q: But in the composite plan, the pen house does not fall into plaintiff’s plot?

A: It is inside plaintiff’s claim.

Q: When you say the plaintiff’s claim are you talking about what you have found out or what the plaintiff has said?

A: The claims are two. One, they all tendered their documents for their claims. Two, they indicated what they claim on the ground. 3. According to plaintiff’s claim, what he has on the plan and what is on the ground is affected by 4 feet of the pen house.”

22. From the above, I agree with the findings of the Court Expert and hold that defendant’s shed has entered plaintiff’s land by 4feet, see the case of **Majolagbe v. Larbi (supra)**.

Issue b

23. Now, regarding issue b, *whether or not the continued existence of defendant's shed precludes plaintiff's claim*, the onus is on the defendant to prove, see **In re Ashalley Botwe Lands (supra)**.

24. The defendant per his testimony stated that his father built the shed over 20 years ago and he has continued the animal rearing after his father passed on. He contends that the said shed had been in existence when the previous owners lived on plaintiff's property and that it is rather plaintiff who wants to extend his acquisition to where the shed is located. The defendant disputed this claim more particularly that if the previous owners tolerated or consented to the existence of the said shed, it did not bar him for claiming same now.

25. This is what ensued when plaintiff was under cross-examination:

Q: That shed is not in any way on the plot number 42 and that is why the previous owner of that plot never had any issue with location of the shed for over 20 years that it has been in existence?

A: That is inaccurate.

26. Here are excerpts of cross-examination of the defendant

Q: You are saying that this your structure had been there over 20 years ago when the previous owner of G.42 was there, not so?

A: That is so.

Q: The structure was there with the consent of the previous owners?

A: That is untrue.

Q: I am putting it to you that the new owner has now got the use of the portion on which your structure is on?

A: It is not on the plaintiff's land.

27. From the above, it is unclear to this court what defendant's is asserting. The reason being that the defendant at a point says that the shed is on his land and has been there for over 20 years. As afore-determined, where the shed is belongs to the plaintiff. In fact, the defendant cannot claim adverse possession over his 'own' land. The defendant, in another instance, claims that since the shed was on plot no. G. 41 that is why the previous owners of plot no. G. 42 had no issue with the location of the shed. The question is, if the defendant believes that the shed is on his land, would there be the need for consent? Absolutely, not. Again, he cannot claim adverse possession if he believed that the land is for him. Then, under cross-examination, he now claims that the shed was there without the consent of the previous owners. I find the evidence of defendant, not credible, see the case **Ntim v Essien [2001-2002] SCGLR 451**.

28. Moreso, I do find that where the previous owners allowed it, the acts of the defendant will not amount to that of acquiescence or adverse possession. Thus, defendant continues to rear his animals there with the consent of the previous owners, save that the new owner has come and does not want to extend that

consent. The law is that being on the land of another person with the person's consent does not make you the owner or that you acquire a life interest therein, see the cases of **Menuna Amoudy & Ors. v Antwi** [2003-2004] SCGLR 967 and **Armar Nmai Boi & 2 Ors v Adjetey Adjei & 12 Ors.** [2010] SCGLR 17.

29. I therefore hold that the defendant has failed to lead sufficient evidence in precluding the plaintiff's claim, see **Majolagbe v. Larbi (supra)**.

Issue c

30. Finally on issue c, *whether or not plaintiff or defendant is entitled to their respective claims*, it is clear from the afore-determined issues that the plaintiff has been able to prove his claim. The plaintiff is, therefore, entitled to his claim and I so hold without more.

CONCLUSION

31. I hereby enter judgment in favour of the plaintiff for the following:

- a. The defendant to remove his shed/penhouse/structure with immediate effect.
- b. Plaintiff to recover possession of the land measuring 4feet being the land on which the defendant has his shed/penhouse/structure, as per the composite plan attached to Exhibit CW1.
- c. The defendant, his agents, workmen or his representatives are perpetually restrained from interfering with plaintiff's property, thus plot no. G. 42.
- d. Costs of GHS5,000.00 is awarded in favour of the plaintiff.

H/W D. ANNAN ESQ.

[MAGISTRATE]

DAJIAH J. IDDRISU FOR PLAINTIFF

ESTHER YIRIBOM WITH AWUNI L. MABEL FOR THE DEFENDANT

References:

1. *ss. 11(4), 12(1) and (2) and 14 of Evidence Act, 1975 (NRCD 323)*
2. *Faibi v State Hotels Corporation [1968] GLR 471*
3. *In re Ashalley Botwe Lands; Adjetey Agbosu & Ors. v. Kotey & Ors. [2003-2004] SCGLR 420*
4. *Sarkodie v FKA Company Ltd. [2009] SCGLR 65*
5. *Odametey v Clocuh [1989-90] 1 GLR 14, SC.*
6. *Kodilinye v Odu [1935] 2 WACA 336*
7. *Osei v Korang [2013] 58 GMJ 1*

8. *Okudzeto Ablakwa (No. 2) v. Attorney-General & Obetsebi-Lampsey (No. 2)* [2012] 2 SCGLR 845
9. *Majolagbe v. Larbi* [1959] GLR 190
10. *Tetteh v. Hayford* [2012] 1 SCGLR 417
11. *Menuna Amoudy & Ors. v Antwi* [2003-2004] SCGLR 967
12. *Armar Nmai Boi & 2 Ors v Adjetey Adjei & 12 Ors.* [2010] SCGLR 17