

IN THE DISTRICT COURT 2, TAMALE
HELD ON MONDAY, 3RD OCTOBER, 2022
BEFORE HIS WORSHIP D. ANNAN ESQ. MAGISTRATE

SUIT NO. A1/8/22

BETWEEN

IDDRISU ABDUL MUMIN KAITA - PLAINTIFF
[SUING PER HIS LAWFUL ATTORNEY ZUBAERU ABDUL MUMIN KAITA]

AND

1. AMINU MUSAH - DEFENDANTS
2. SADICK MUSAH
3. UMARU MUSAH

JUDGMENT

INTRODUCTION

1. On 12th April, 2022 the plaintiff through his lawful attorney, Zubearu Abdul Mumin Kaita, instituted this action against the defendants for the following:
 - a. Declaration that parts of defendants' building and their pen house are plaintiff's plot no. 80.

- b. Mandatory injunction directed at the defendants to remove their structures on plaintiff's plot.
 - c. Perpetual injunction directed at the defendants, their agents, representative or whoever in claiming through same, from interfering with the ownership and quiet enjoyment of plaintiff's property.
 - d. Costs including solicitor's fees.
2. On 28th April, 2022 when the matter was called, defendants pleaded not liable to plaintiff's claim. Subsequently, defendants filed a statement of defence dated 19th May, 2022 denying plaintiff's claim in its entirety. According to the defendants, their plot no. 79 indeed shares boundary with plaintiff's plot no. 80 but contend that per their demarcation they have not encroached onto plaintiff land in anyway.

PLAINTIFF'S CASE

3. Plaintiff in his witness statement filed on 1st June, 2022 states that he acquired his plot from one Baako Napari in 2006. Upon acquisition, he caused the following to be issued which he exhibited during the trial:
- a. A Statutory Declaration of Transfer of Land marked as Exhibit A
 - b. Site plan marked as Exhibit A1
 - c. Allocation letter marked as Exhibit A2.
4. Plaintiff asserts that he later decided to build a fence wall only to discover that defendants have built a pen house and a portion of their building were on his property. Due to this development, he advised defendants to engage the services of a surveyor to determine the boundary impasse. According to plaintiff, the said surveyor's report indicated that defendants' pen house and part of their building were on his land. However, the defendants rejected the surveyor's report. Plaintiff

adds that another surveyor was engaged when the matter went before the Tuutingli Chief and the report of the surveyor was similar to the earlier one. Plaintiff states further that the 2nd surveyor planted pillars to indicate demarcations of both plots, yet the defendants went to destroy them and threatened his family members. Hence, this present suit.

5. Let me point out at this moment that the plaintiff did not tender the said reports of the surveyors.

DEFENDANTS' CASE

6. Defendants through the 3rd defendant filed their witness statement dated 6th June, 2022. In the said statement they contend that they have been on their property since 1994. They add that when the matter went before the Tuutingli Chief, plaintiff was told to follow the pattern of the old settlers, but plaintiff refused. What old pattern means, defendants did not clearly explain but stated that lands in that area, Kpanvo Residential Area, are not properly measured so plaintiff should just follow from theirs. They claim that plaintiff engaged a surveyor who concluded that the pen house was the problem between them. So they immediately caused it to be removed. Defendants contend further that plaintiff was not satisfied with the removal of the pen house and went ahead to plant pillars beyond what the surveyor had demarcated. In view of this, defendants also engaged a surveyor whose report, according to them, stated that their building was not on plaintiff's land.
7. Similar to the plaintiff, the defendants also did not tender the reports of the surveyors. They also failed to file a copy of their site plan, except that a copy of

their site plan was filed later for the purpose of a composite plan. Counsel for plaintiff did not raise any objection to this.

8. Both parties, in fact, prayed the Court for an independent surveyor to be appointed. On 7th July, 2022 this Court ordered for the appointment of a surveyor with the following survey instructions:

- a. Ascertain the correct measurements of plot numbers 79 and 80, both at Kpanvo Residential Area
- b. Ascertain whether or not there is any overlap or encroachment by either party.

COURT'S WITNESS

9. The Court appointed surveyor filed his report on 25th August, 2022 with the following observations and composite plan demarcations:

Observations:

- a. There is a general problem in the area since the dimensions of plots on the ground do not conform to the same measurements on paper (local plan).
- b. There is an overlap between the two parties' claims on the ground.
- c. Plaintiff's plot is not yet developed, but the defendants' plot is developed.
- d. The area is largely built up but development does not strictly conform to the local plan (planning scheme) of the area.

Composite Plan

1. The plaintiff's land as claimed on the ground is shown edged YELLOW on the composite plan and has an area of 0.22acre instead of 0.23acre as per the local land use plan.
2. The defendants' land as claimed on the ground is shown edged GREEN on the composite plan and has an area of 0.17acre instead of 0.20acre as per the local land use plan.
3. The local plan (planning scheme) from the Physical Planning Department of Tamale Metropolis is the same as the court exhibit, provided by each party and shown edged BLUE.
4. The land in dispute is hatched on the composite plan and this covers an area of 0.014acre.
5. Buildings and fence walls were captured as details during the survey and are depicted as DASH line.

10. The surveyor, Mutaru Fuseini Adam, filed the above report and same was marked as Exhibit CW1.

ISSUE FOR DETERMINATION

11. The only issue borne out of the facts is, *whether or not defendants' building has encroached onto plaintiff's land?*

BURDEN OF PROOF

12. In civil cases, the general rule is that the party who in his pleadings or his writ 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; Adjete 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. 12(1) and (2) and 11(4) of NRCD 323.
13. 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**. There is no onus on the defendant to disprove the claim by the plaintiff. Therefore, however unsatisfactory or conflicting the defence may be, it cannot avail the plaintiff. In **Barima Gyamfi v Ama Badu [1963] 2 GLR 596**, the Supreme Court held that the evidence of the defence only becomes important if it can upset the balance of probabilities which the plaintiff's evidence might have created in the plaintiff's

favour or if it tends to corroborate the plaintiff's evidence or tends to show that the evidence led on behalf of the plaintiff was true. Because of these possible effects of the defendant's case, the court is duty bound to consider the case of the defendant, no matter in what form the defence is presented. See also the case of **In re Presidential Election Petition (No. 4) Akuffo-Addo & Ors. v. Mahama & Ors. [2013] SCGLR (Special Edition) 73.**

ANALYSIS OF THE ISSUE

14. As noted earlier, the only issue borne out of the facts is, *whether or not defendants' building has encroached onto plaintiff's land?* Both parties, and for that matter the plaintiff, relied heavily on the evidence of the Court Expert, i.e. the surveyor. Therefore, an analysis of the surveyor's report, Exhibit CW1, in the light of the evidence given by the surveyor will be helpful as it will put into context the eventual decision of this court.

15. Both parties cross-examined the surveyor. This is what ensued when counsel for the plaintiff asked his questions:

"Q: You agree with me that the local plan which you used was the physical plan of the Tamale Metro?

A: That is so.

Q: You agree with me that the Tamale Metro is in charge of the physical planning of Tamale?

A: *It is so. When I mention local plan, it does not mean that it is the local people that designs it. It is now a new term used by the physical planners in place of layout or planning scheme.*

...

Q: *The site plan you obtained from them, it matches with the local plain obtained from the Tamale Metro?*

A: *That is so.*

...

Q: *The green line indicated by the defendants as their property has gone into plot 80, not so?*

A: *Yes.*

Q: *The place you marked 'black', that one is within plot 80, is that not so?*

A: *It is within both plots.*

Q: *I am putting it to you that when you look at the plan of the area, the black hatched one is inside plot no. 80 on top of plot no. 79 boundary?*

A: *They both enter each other. The end of the black towards plot 79 is the claim of the plaintiff and that on top of plot 79 into plot 80 is also the claim of the*

defendant. Whereas plaintiff is showing his boundary which is overlapping defendant's own, defendants' are also showing their boundary which is also overlapping plaintiff's.

Q: When plots 80 and 79 meet on the plan, there is a space between plot 80 and plot 79 as indicated on the composite plan?

A: Per the local plan, plaintiff's dimension on that side, i.e. north-west is supposed to be 105 feet more or less and that of the defendants' is 95 feet. The same applies to the opposite side and this two sum up to 200feet. But on the ground, the two sum up to 190 feet, thus a shortage of 10 feet. This means that none of the parties can get their original dimension i.e. 105 feet for plaintiff and 95 feet for defendants.

Q: You agree with me that 105 feet is bigger than 95 feet, not so?

A: Yes.

Q: Which means that plaintiff's plot is bigger than defendants' plot in the measurement?

A: That is so.

Q: When you look at the eastern boundary of plot 80, the demarcation line, what does it stand for?

A: It is somebody's property, a building, it is an L-Shape building.

Q: Did you find out who that building belongs to?

A: No.

Q: *That building is into plot no. 80?*

A: *The building in into 4 plots, it is an intersection.*

Q: *Out of the 4 plots, is plot no. 80 part of the 4 plots?*

A: *That is so.*

Q: *I am putting it to it you that that portion of the building is into plot no. 80?*

A: *That is correct.*

Q: That portion of the building belongs to the defendants?

A: I cannot confirm.

Q: *Defendants plot or part of their building is inside the plaintiff's plot?*

A: *It is inside the overlap*

Q: *What you are describing as overlap is part of plaintiff's plot, not so?*

A: *Both are claiming ownership.*

Q: If you look at the plan, as in the layout that the L-Shape building, portion of it is inside plot no. 80?

A: In the course of my work, the defendants never claim that building to be theirs. Because the boundary they showed me did not include that building.

This is what ensued when defendants also cross-examined the surveyor:

Q: *When you came, you also took your measurements, how was your measurement?*

A: *The measurement we took on the ground is not the same as the measurement on paper. It is like the layout was a bit compromised so the dimensions on the ground are lesser than the dimensions on paper.*

Q: I am putting it to you that the plaintiff's plot is bigger than ours?

A: Yes.

Q: When you came, were our pillars planted properly?

A: You have all the 4 corner pillars, but as indicated earlier the ground measurements are lesser than the paper measurements. You are talking about 80x90, but the paper measurement, thus the local plan, it is supposed to be 95x90.

Q: Is the issue between the two parties a general issue within the said area, where you carried out your work?

A: The dimensions as I mentioned earlier, you cannot get it exactly but the ground measurement are lesser than the measurements on the paper on the local plan.

...

Q: *Where there is the overlap, is there a property there, thus the place marked black?*

A: *There is little portion of defendants building inside that of plaintiff's?*

Q: *By how many?*

A: *About 5 feet, more or less."* [Emphasis mine]

16. It must be noted that per the authorities, the court is not bound by the surveyor's report, but it is only supposed to help the court to come out with a reasoned decision. The court can thus, upon stated reasons, depart from the contents of the report as presented by the surveyor, see the case of **Tetteh v. Hayford [2012] 1 SCGLR 417**.

17. Based on the above authority, I will depart from some of the findings of the surveyor. Reasons being that, one, the surveyor admits that plots 79 and 80 are based on the local plan (planning scheme) approved by the physical planning

department of the Tamale Metro and this is correctly shown on the composite plan hatched in Blue. However, he concludes that plots 79 and 80 on the grounds overlap each other. I find that difficult to accept. Two, the ground demarcations of defendants' plot no. 79 falls outside the approved local plan. So why would the surveyor urge on this court to use the ground demarcations by the parties, when the court is minded about the approved local plan? Three, the portioned hatched black which is inside plot 80, the surveyor indicates that both parties are claiming it because it overlaps each other. From the composite plan, it doesn't. Four, the surveyor failed to identify the property of the defendants on the composite plan, but admits in cross-examination that the defendants' building has entered into plaintiff's plot about 5 feet, more or less. So the L-Shape building that he claims did not form part of his work, he found that useful to show it but not the property of the defendants?

18. As part of his instructions, the surveyor was to ascertain the correct measurements of the two plots as per that approved plots by the Physical Planning Department of the Tamale Metro and also ascertain whether there was an overlap or encroachment by either party? Hence, if on the composite plan plots 79 and 80 are the approved demarcations on paper by the Physical Planning Department and are correctly shown, however on the grounds parties have plotted different demarcations, then this court's function is to come to a conclusion in line with the approved plan and nothing else. The mere fact that the parties have not followed the physical planning scheme (approved plan) of the Tamale Metro, whether there is uncertainty with the measurements in the area or not, does not mean that this court should give its blessings to it. The evidence of the surveyor that both plots overlap into each other and that both parties are claiming same is hard to accept.

The surveyor was therefore disingenuous with some of his findings or he failed to understand his instructions.

19. From the composite plan, I find the plaintiff ground demarcations falling within the planned demarcations, save the portion where the L-Shape building has entered his land. The defendants' ground demarcations, however, fall completely outside its planned demarcations and even entered into that of the plaintiff, i.e. the portion hatched black. The portion hatched black clearly falls within the approved plan of the plaintiff. In effect, since both parties rely on the report of the surveyor, I find the composite plan as appropriate and that the plaintiff has been able to prove his case that the defendants' have encroached onto his land.

CONCLUSION

20. I, hereby enter judgment in favour of the plaintiff as follows:

- a. I decree that part of defendants' building are on plaintiff's land, measuring 5 feet more or less.
- b. The defendants to remove their structure on the plaintiff's land.
- c. The defendants, their agents, assigns, privies, servants or workmen are perpetually restrained from disturbing the plaintiff's quiet enjoyment of his land as described in the composite plan.
- d. Costs assessed at GH6,000.00 in favour of the plaintiff.

H/W D. ANNAN ESQ.

[MAGISTRATE]

DAJIAH J. IDDRISU ESQ. FOR THE PLAINTIFF
DEFENDANTS APPEARED IN PERSON

Reference:

1. *Faibi v State Hotels Corporation* [1968] GLR 471
2. *In re Ashalley Botwe Lands; Adjetey Agbosu & Ors. v. Kotey & Ors.* [2003-2004] SCGLR 420
3. ss. 12(1) and (2), 11(4) and 14 of Evidence Act [NRCD 323]
4. *Odametey v Clocuh* [1989-90] 1 GLR 14, SC
5. *Barima Gyamfi v Ama Badu* [1963] 2 GLR 596
6. *In re Presidential Election Petition (No. 4) Akuffo-Addo & Ors. v. Mahama & Ors.* [2013] SCGLR (Special Edition) 73
7. *Tetteh v. Hayford* [2012] 1 SCGLR 417