

CORAM: HIS WORSHIP MR. MAWUKOENYA NUTEKPOR (DISTRICT MAGISTRATE), SITTING AT THE DISTRICT COURT, BOLGATANGA IN THE UPPER EAST REGION OF GHANA, ON WEDNESDAY, THE 5TH DAY OF OCTOBER, 2022.

SUIT No. UE/BG/DC/A9/6/2020

TAHIRU LYDIA

PLAINTIFF

VRS.

DAVID ATUGIYA

DEFENDANT

TIME: 09:50AM

PLAINTIFF PRESENT

DEFFENDANT PRESENT

ISSAHAKU TAHIRU LAWAL, ESQ. FOR THE PLAINTIFF PRESENT

AFOKO AMOAK, ESQ. FOR THE DEFENDANT PRESENT

JUDGMENT

Introduction

1. Before I proceed to determine this case on its merit, I would like to put on record the duty imposes on this court to deliver a judgment within a certain period after a close of each case. **Order 28 Rule 2 of the District Court Rules 2009 (C.I. 59)** provides that:

*“It is the duty of the Court to deliver judgment as soon as possible after the close of each case before it, and in any event **not later than four weeks after the close of the case.**”*

By this provision the court is mandated or required to deliver its judgment within four weeks after close of parties’ case. It is indisputable fact that procurement of proceedings at the district court delays. Every lawyer practicing at the District court may be familiar with the fact that one of the main challenges facing the District Court is procurement of proceedings timeously. If the court is expected to wait for recorders to type the proceedings or for lawyers to obtain the proceedings to file submissions before the court delivers its judgment, the court may be in breach of **Order 28 Rule 2 of C.I. 59** as stated above. It must also be noted that failure or inability of lawyers to file written submission or addresses due to one reason or the other, (for example not procuring court proceedings on time, ill-health among others), should not prevent the court from delivering its judgement within four weeks after close of parties case. Submissions, though useful in assisting the court, do not form part of the evidence. The court is to rely on evidence. In the case of **Mrs Vicentia Mensah Vrs. Numo Adjei Kwanko II (Civil Appeal No. H1/185/2013) (dated 12th March, 2015) or [2015] DLCA4779**, the Court of Appeal, where His Lordship Marful-Sau J.A (as he then was) presiding stated at page 4 of the Judgment;

“I do not think that the mere fact that the Court did not receive written addresses of counsel for the appellant rendered that judgment of the court irregular. ... Written addresses even though sanctioned by the rules of court to do not form part of the evidence adduced at the trial. The trial court is to determine the case based on the evidence adduced at the trial and not the written addresses of counsel. Much as written addresses are helpful to the court, it cannot be argued or made to appear that

a Judge cannot or may not render a judgment in the absence of an address by counsel in a case. ..."

(See also AMERLEY v. OTINKORANG (1965) GLR 658)

The lawyers in the instant case were given the opportunity to file their written submissions but only Counsel for Plaintiff did so while the counsel for Defendant could not do so. The court will therefore proceed to deliver its judgment as scheduled in absence of the written submissions of counsel for Defendant.

2. By a Writ of Summons and Particulars of Claim filed on the 21st day of May 2020, the Plaintiff claims against the Defendant as follows: -
 - a. A declaration of title to all that piece of land known as unnumbered plot and containing an approximate area of 0.46 Acres situate at Soe Residential Area in the town of Bolgatanga of the Bolgatanga municipality in the upper east region of the republic of Ghana lying about 5,701.06 feet from the north-western edge of survey pillar SGV 6/95/8 and 13,239. 80 feet to survey pillar SGVE 3/04/4A bounded on the northwest by proposed road measuring on that side 200 feet more or less on the NORTH-EAST by lessor's land measuring on that side 100 feet more or less on the south-east by lessor's land measuring on that side 200 feet more or less and on the south-west by unnumbered plot measuring on that side 100 feet more or less.
 - b. Perpetual injunction restraining the defendant, his agents, assigns, privies and all those claiming through him from interfering with the plaintiff's quiet enjoyment and use of the said land.

- c. Damages for trespass.
 - d. Costs including solicitor's fees.
3. On the 18th day of June 2020, the Defendant filed his defence and the counterclaims against the Plaintiff as follows:
- a. Declaration of title to all that piece or parcel of All that piece of land known as unnumbered plot and containing an approximate area of 0.46 Acres situate at Soe Residential Area in the town of Bolgatanga of the Bolgatanga Municipality in the Upper East Region of the Republic of Ghana lying about 5,701.06 feet from the North-Western edge of survey pillar SGV 6/95/8 and 13,239,80 feet to survey pillar SGVE3/04/4A and bounded on the North – West by proposed road measuring on that side 200 feet more or less on the North – East by lessor's land measuring on that side 100 feet more or less on the South – East by lessor's land measuring on that side 200 feet more or less and on the South West by unnumbered plot measuring on that side 100 feet more or less.
 - b. Recovery of possession of the said land.
 - c. Damages for trespass.
 - d. Costs.

Plaintiff's case

1. The plaintiff avers that somewhere in 2015 she bought an unnumbered plot of land at Soe, Bolgatanga from one Albert Kuguriye Tunti. The plaintiff further avers that the said unnumbered plot was first acquired by Albert Kuguriye Tunti and a lease executed between the said Albert Kuguriye Tunti and the Tindana of Soe on 3rd

March 2008. Plaintiff says the land was sold to Albert Kuguriye Tunti by Akatorti Anamoo, the then Head of family. The plaintiff states that by a Deed of Assignment dated 28th January 2015 all that interest and rights in the unnumbered plot, Soe, Bolgatanga was assigned by the said Albert Kuguriye Tunti to the plaintiff for the unexpired term of the lease. The plaintiff avers that she has been in possession and exercise control and ownership over the unnumbered parcel of land and deposited two trips of quarry sand on the land to commence building. The plaintiff states in April 2020, the Defendant started laying adverse claims to the said land and brought a bulldozer to level the two trips of quarry sand as well as destroyed the pillars of the land. The plaintiff says that defendant brought gravel on the land thereby trespassing on the plaintiff's legally acquired land. The plaintiff further states that her husband went and met the defendant for discussion and the defendant proposed to pay for the land which he refused. The plaintiff further avers that the defendant by his conduct has evinced an intention not to allow the plaintiff develop her legally acquired land unless restrained by this Honourable court. The plaintiff states that the defendant's conduct is illegal, unlawful and unconscionable.

Defendant' case

4. The Defendant vehemently denied Plaintiff's claim. Defendant says the land in dispute is part and parcel of the Aboatugiya family land located at Bolga soe. Defendant says Aboatugiya family has been in possession of their family land including the land in dispute for generations farming and exercising other acts of ownership over the said land. Defendant says neither the Assignor, Albert Kuguriye Tunti nor his lessor, the Tindana of Soe is a member of the Aboatugiya family. Besides, they do not own any part or parcel of the Aboatugiya family land.

Defendant says neither Albert Kuguriye Tunti nor the plaintiff carried out due diligence for if they had done so they would have known that the person Akatorti Anamoo who purportedly sold the land to them is not from the Aboatugiya family but rather Aboakatorti family of the Aboa Clan and does not have any farmland or interest in Aboatugiya family land.

5. Defendant says he decided to use a portion of his family land to develop into a Petrol Service Station and during the clearance of the land that two strangers, now known to be the plaintiff and one other called Rafael came wandering around the land adjoining his plot. Defendant says he walked up to them and asked if he could be of any help to them and they said the adjoining plot was theirs and asked about how they came to own his family land, they refused to answer and walked away. Defendant says all of the time he was formalizing up his documentation to fulfill the obligations of acquiring a fuel station including the survey work carried out by officers from the Land Commission and up to the time he was clearing the land as indicated above in April, 2020, there was no sand or stone or any semblance of building material on the land adjoining plaintiff's land until sometime in May 2020 that plaintiff deposited two trips of quarry sand on the land as part of his grand scheme to claim the land in dispute and had never been in possession and control of the land in dispute. Defendant admits pouring gravel on the land but says that the land in question is his family land formally acquired to develop a fuel filling station hence the pouring of gravel as part of the development of his fuel service station. Defendant says he is lawfully on his own land and denies any trespass to his own land. Defendant says the plaintiff is not entitled to her claim or any at all.

Issues

6. The issues for determination in this case are as follows:

- a. Whether or not the Aboatugiya family is different from the Aboakatorti family.
- b. Whether or not Plaintiff is the Lawful Assignee of the land in dispute.
- c. Whether or not Defendant is entitled to his counterclaim.

The fundamental principles governing the law of evidence in Ghana.

7. **Section 10 of the Evidence Act, 1975 (NRCD 323) provides as follows:**

(1) For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

(2) The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.

Section 11 of NRCD 323 also provides that:

(1) *For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue*

(4) *In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.*

Section 12 of NRCD 323 (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.*

Also in *Majolagbe v Larbi & others* (1959) GLR 190-195, it was held at page 192 that:

"Proof, in law, is the establishment of fact by proper legal means; in other words, the establishment of an averment by admissible evidence. Where a party makes an averment, and his averment is denied, he is unlikely to be held by the Court to have sufficiently proved that averment by his merely going into the witness-box, and repeating the averment on oath, if he does not adduce that corroborative evidence which (if his averment be true) is certain to exist." See also **Klutse v. Nelson** [1965] GLR 537 and **Air Namibia (Pty) Ltd. V. Micon Travel & Tour & 2 Ors**, [2015] 91 G.M.J, @ page 177.

Legal Analysis, evaluation of evidence and discussion of issues

8. The first issue to consider is Whether or not the Aboatugiya family is different from the Aboakatorti family as well as whether or not Plaintiff is the Lawful Assignee of the land in dispute. It is trite law that it is the duty of a Plaintiff to prove his case for he who alleges must prove. **In Air Namibia (Pty) Ltd. V. Micon Travel & Tour & 2 Ors, [2015] 91 G.M.J,** It was held at **page 177** that:

“It is trite law that it is the duty of a Plaintiff to prove his case for he who alleges must prove. In other words, it is the party who raises an issue essential to the success of his case who assumes the burden of proving such issue. This burden of proof is statutorily defined in sections 10 (1) and (2) 11(1) and (4) and 12(1) and (2) of the Evidence Act, 1975 (NRCD 323) and explained in the case of Adwubeng v. Domfeh [1996-97] S.C.G.L.R. 660. It must be noted that specific pleading of an issue of fact by a plaintiff in the civil case requires a specific denial of that issue of fact by the defendant in his statement of defence in order to cast a duty on the plaintiff to adduce credible and sufficient evidence of that issue of fact in order to succeed in his claim. That is the rationale behind the enactment of section 10, 11 and 12 of the Evidence Act, 1975 (NRCD 323). Thus section 11(4) and 12(2) of NRCD 323 has provided in clear and uncertain terms that the standard of proof in the civil case is proof by a preponderance of the probabilities Adwubeng v Domfe (supra). But a bare assertion of the plaintiff in his evidence of the issue of fact he had asserted in his pleadings will not be sufficient to discharge his burden of proof of that assertion if he wants to succeed in his claim. He must go further to produce other evidence of facts and circumstances from which the court can be satisfied that what he has asserted is true. Such other evidence of such facts may include documentary evidence of the issue(s) asserted.”

9. Also, it is a settled principle of law that a bare assertion or merely repeating a party's pleadings in the witness box without more does not constitute proof. **In KLAH V. PHOENIX INSURANCE CO. LTD [2012] 2 SCGLR**

1139, this principle was reiterated:

"Where 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 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."

10. Plaintiff testified herself and called two other witnesses (thus Albert Kuguriye Tunti-PW1 and Kennedy Avooro-PW2). She says that she bought the land from PW1 in 2015 and has been in possession since then. The said transaction between Plaintiff and PW1 is evidenced by Deed of Assignment dated 28th January 2015 which was tendered in evidence as **Exhibit A**. Plaintiff testified that the land was sold to PW1 by Akatorti Anaamoo, the then head of family by a Lease dated 3rd March 2008. The said Lease was also tendered in evidence as **Exhibit D**. She testified that she took over possession of the land and exercise ownership and control over the land by depositing two trips of quarry sand on the land as well as connecting water through standing pipe on the land ready to begin her construction on the land. Plaintiff says she obtained a building permit from the Bolgatanga Municipal Assembly, which was tendered in evidence as **Exhibit B**. It is the Plaintiff case that she mounted pillars on the land but the Defendant

demolished the pillars as well as brought a bulldozer to level the quarry sand she poured on the land.

11. Defendant also testified himself and called two witnesses (thus Samuel Aduko Atugiya Ayine-DW1 and Pastor Michael Anamoo-DW2). Defendant says he belongs to Aboatugiya family of Soe and that the land in dispute belongs to his family. It is the Defendant's case that Aboatugiya and Aboakatorti families are different families. He added that the two families have their separate piece of land. Defendant testified since Akatorti Anamoo belongs to Aboakatorti family he had no authority or capacity to lease the land in dispute to PW1, who subsequently assigned his unexpired interest to the Plaintiff. Defendant says his family, Aboatugiya family has been in possession of his family lands including the land in dispute for generations farming and exercising other acts of ownership without any interference from any quarters. In other words, the defendant claims his family has been in undisturbed possession till Plaintiff encroached upon the land. DW1, Defendant's elder brother, testified that the land in dispute is about 300 meters from his house and that he passes there almost every day. He however testified that he stopped farming on that land for the past 18 years. This contradicts Defendant's evidence that his family had been in possession of the said land till Plaintiff come onto the land.

12. This court has examined the evidence on record and is convinced of the validity of the Deed of Assignment (**Exhibit A**) between **PW1 and Plaintiff** dated 28th January, 2008 as well as the Lease (**Exhibit D**). The court finds as a fact from the evidence on record that Akartorti Anamoo who sold the land to **PW1** had the capacity to do so. Besides, the court finds as a fact that the Plaintiff has been in possession of the land till the Defendant encroached upon the land. The Plaintiff

has therefore succeeded in satisfying the court of the existence of the facts contained in her claim by the preponderance of the probabilities. Plaintiff is accordingly declared the lawful assignee of the land in dispute.

13. Also, from the evidence on record, the defendant has failed to prove to the satisfaction of this court that the land in dispute belongs to Aboatugiya family of Soe-Bolga and that the said family has been in undisturbed possession of the said land. The Defendant also failed to convince the court that Aboatugiya and Aboakatorti families are different families and that the two families have their separate piece of land. I will now proceed to determine the next issue.

14. The next issue to consider is whether or not the Defendant is entitled to his counterclaim. It is a well-established principle of law that a defendant who files a counterclaim has the same burden of proof as a plaintiff. In the case of **Nortey (No.2) V. African Institute Of Journalism And Communication & Others (No.2) [2013-2014] 1 SCGLR 703**, the principle was stated thus,

“Without any doubt, a defendant who files a counterclaim assumes the same burden as a plaintiff in the substantive action if he/she has to succeed. This is because a counterclaim is a distinct and separate action on its own which must also be proved according to the same standard of proof prescribed by sections 11 and 14 of NRCD 323, the Evidence Act (1975)”.

15. In the instant case, the Defendant counterclaimed against the Plaintiff for the land in dispute. He therefore has a burden of proof to discharge. As stated above, the court has examined the evidence of the parties on record and the court is of the

considered opinion that the Defendant has failed to establish the existence of facts contained in his counterclaim by the preponderance of the probabilities. The Defendant's counterclaim is accordingly dismissed.

Conclusion

16. Having examined the whole evidence adduced by the Plaintiff and Defendant on record and from the foregoing analysis, the court holds as follows:

- a. Plaintiff succeeds in her action and is therefore declared the owner all that piece of land known as unnumbered plot and containing an approximate area of 0.46 Acres situate at Soe Residential Area in the town of Bolgatanga of the Bolgatanga municipality in the upper east region of the republic of Ghana lying about 5,701.06 feet from the northwestern edge of survey pillar SGV 6/95/8 and 13,239. 80 feet to survey pillar SGVE 3/04/4A bounded on the north-west by proposed road measuring on that side 200 feet more or less on the NORTH-EAST by lessor's land measuring on that side 100 feet more or less on the southeast by lessor's land measuring on that side 200 feet more or less and on the south-west by unnumbered plot measuring on that side 100 feet more or less.
- b. An order for perpetual injunction is granted against the defendant, his agents, assigns, privies and all those claiming through him and they are restrained from interfering with the plaintiff's quite enjoyment and use of the said land.
- c. Defendant failed to discharge the burden of proof in respect of his counterclaim. Defendant's counterclaim is accordingly dismissed.

d. Cost of **GHC2,000.00** is awarded in favour of Plaintiff against the Defendant.

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HIS WORSHIP MAWUKOENYA NUTEKPOR
(DISTRICT MAGISTRATE)