IN THE DISTRICT COURT HELD AT ADANSI ASOKWA ON MONDAY, THE 9TH DAY OF OCTOBER, 2023 BEFORE HER WORSHIP LINDA FREMAH ADOM OKYERE, ESQ

SUIT NO. A11/01/2023

AKOSUA AMEYAA

V

AKWASI AMPONSAH
AKWASI ABOAGYE

JUDGMENT

The Plaintiff instituted this action against the Defendants on 11th April, 2023 and claimed the following reliefs:

"a. An order of the court for a declaration that the one and half acres or two poles of cocoa farm lying and situated at a place known and called Biakwaho and bounded by the properties of Abena Bosompemaa, Maame Asuo, Kwabena Fori which the 1st Defendant sold to the 2nd Defendant be declared null and void

b. An order of the court for Plaintiff's share of the cocoa farm

c. An order for cost"

In her witness statement, the Plaintiff claimed that she was married to the 1st Defendant for about fifteen (15) years and had children by him. She stated that during the subsistence of the marriage she acquired the subject farm with the 1st Defendant but upon their divorce, Plaintiff and 1st Defendant agreed for the farm to be managed by 1st Defendant and for the proceeds therefrom to be applied to catering to the needs of their three children. Plaintiff stated that about four (4) months prior to the filing of this Writ, the 1st Defendant informed her that he had sold the farm at a price of GHC. 4,000.00 to the 2nd Defendant without her knowledge and consent.

The 1st Defendant admits that he bought and cultivated the farm with the Plaintiff and that he had sold same to the 2nd Defendant without the knowledge of the Plaintiff. 1st Defendant claims that his reason for not informing the Plaintiff of this purported sale was because they were not in good terms at the time of the sale.

The 2nd Defendant on the other hand stated that he bought the farm from the 1st Defendant sometime in 2018. He claimed that the 1st Defendant told him that the farm was his bona fide property. He stated that even though he paid the 1st Defendant in full, 1st Defendant refused to provide him with documents covering the sale and purchase of the farm. 2nd Defendant called upon DW1 to give evidence in his favour.

The singular issue in this case is whether or not the sale of the subject cocoa farm by the 1st Defendant to the 2nd Defendant is valid.

The 1st Defendant stated in paragraph 6 of his witness statement that he sold the cocoa farm to the 2nd Defendant sometime in November 2018. 2nd Defendant admitted this averment and stated further that he has been in possession of the farm from 2018 till date, investing in and maintaining the farm. Neither the Plaintiff nor the 1st Defendant disputed this fact of the 2nd Defendant's possession of the cocoa farm.

By the provisions of **Section 11(1) and (4) of the Evidence Act, 1975 (Act 323)**, the duty or obligation or the burden of producing evidence is on the party against whom a ruling on that issue would be given if he failed to lead sufficient evidence.

Section 11 (1)(4) provides as follows:

"(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."

The Plaintiff claims to be a joint owner of the subject cocoa farm with the 1st Defendant whilst the 2nd Defendant claims to be a bona fide purchaser for value without notice. It is obvious that the Plaintiff has the duty to produce such evidence as would lead this court to conclude that the existence of the fact of joint ownership of the subject farm is more probable than its non-existence. If she did, the 2nd Defendant would then be obligated under **Section 14 of Act 323** to adduce evidence in answer to convince the court as to the existence or non-existence of the facts essential to his defence of bona fide purchaser for value without notice.

Section 14 of Act 323 states that *"except as otherwise provided by law, unless and until is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting."*

See also **Duah v Yorkwa [1993-94] 1 GLR 217**

In her bid to discharge this burden on her, the Plaintiff asserted that she and the 1st Defendant are joint owners of the subject cocoa farm which they acquired during the subsistence of their marriage. This is also the position of the 1st Defendant in respect of their title to the subject farm.

The averments of the Plaintiff and 1st Defendant are similar to those made by the husband and wife in the case of **Fynn v Fynn & Osei [2013-2014]1 SCGLR 727** where Wood CJ (as she then was) had this to say,

"It is noteworthy that the appellant for reasons best known to her sued the husband as 1st defendant. She could have called him as her witness, whereupon he could still have had opportunity to confess to his sins in disposing of their jointly acquired property without her consent. But she avoided that route as indeed was her constitutional right, choosing rather to make the love of her life her opponent; but perhaps for only that period they were to find themselves embroiled in this legal duel. That may well have been her fundamental right but then, she cannot escape the legal consequences flowing from that singular choice."

The court also stated that 'where no issue is joined as between the plaintiff asserting the fact and the defendant admitting it, no duty will be cast on the Plaintiff to lead evidence on the admitted fact. But the same cannot be said of another defendant who denies the assertion. Under such circumstances, a court is under a duty to treat the case of each defendant separately viz a viz the plaintiff's case on the merits and as relates to the fact in issue.' (See also **Kusi & Kusi v Bonsu [2010] SCGLR 65**).

Clearly, the 1st Defendant's admission of the Plaintiff's case cannot be used against the 2nd Defendant in this case. As between the Plaintiff and 2nd Defendant, the Plaintiff bore the duty of adducing enough evidence to demonstrate that she was indeed a joint owner of the farm with the 1st Defendant. It appears from the evidence that the Plaintiff merely relied on 1st Defendant's admission as concrete proof of joint ownership. Not only did the 2nd Defendant challenge this fact of joint ownership but he also proceeded to adduce evidence which on the balance of probabilities, proved that the property was owned exclusively by 1st Defendant and further that in any event he was a bona fide or innocent purchaser for value without notice.

The position of the law is that the Plaintiff herein has a duty to make a solid case against the 2nd Defendant independent of the 1st Defendant's admissions.

The Plaintiff's evidence is that she paid a half of the total customary cost of the farm which they acquired from the late Maame Baasem. She claimed that upon their divorce she did not demand for her portion of the farm because same was being managed by 1st Defendant and the proceeds therefrom, used to cater for their children. But this assertion was unsubstantiated by any piece of evidence on the record other than the 1st Defendant's admission of this assertion.

In the case of **Majolagbe v Larbi & Others [1959] GLR 190**, the court held that 'proof in law is the establishment of facts by proper legal means. 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, instance 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 its true.'

The Plaintiff claims that her alleged grantor is deceased but she failed to call other witnesses or present any documents or demonstrate such events or circumstances which could lead the court to believe that she and the 1st Defendant were married and that the subject farm was indeed acquired during the subsistence of that marriage. It was necessary for the Plaintiff to satisfactorily discharge the evidential burden on her especially in light of a clear denial of her averments by the 2nd Defendant. I find no other available and material evidence on the record sufficient to establish the averments made by the Plaintiff and she leaves me with no choice than to conclude that there is no scintilla of evidence on the record supporting her claim of joint ownership of the subject farm.

Relying heavily on the principles established in the Fynn v Fynn case (supra), I am of the view that the Plaintiff failed to discharge the evidential burden on her and she cannot also rely on the bare admission of the 1st Defendant to succeed in this regard.

The case of **Dr. Ansong & Another v Pastor Manu and Another [2013] GMJ 86** held that generally a person is said to be a bona fide purchaser for value without notice when he gives valuable consideration for a legal title or right in property and at the time of the sale, he was not actually aware of any pre-existing adverse or equitable interest in the property, and did not also have constructive or imputed notice of any such interest. Such a person takes the interest acquired by him free of the pre-existing adverse or equitable interest. The protection afforded under the law to a bonafide purchaser for value without notice is a complete one. The onus lies on the one making the defence to lead evidence to prove the same. See the case of **Duodu v Benewaah [2012] 2 SCGLR 1306**.

In the instant case, this burden lies on the 2nd Defendant and in proving this, he must demonstrate that he acted in good faith throughout the process leading to his

acquisition of the farm. One of the factors that show good faith is due diligence, for equity aids the vigilant and not the indolent. It is elementary that a purchaser of land must carry out necessary due diligence before making a purchase. In doing so, he is under an obligation to investigate any actual or constructive acts of possession over the land. This was the position of the law in **Ussher v Darko [1977] 1 GLR 476**.

The 2nd Defendant has essentially challenged the claim of joint ownership asserted by the Plaintiff and 1st Defendant. He stated that he knew for a fact that the Plaintiff and 1st Defendant were never married but that they were only cohabiting. He also asserted that he was aware that the Plaintiff and 1st Defendant had separated since 2005 whereas the alleged sale of the subject farm happened in 2018. He stated further that due to these factors, he believed that the Plaintiff had no interest whatsoever in the subject farm. He therefore paid for the farm knowing that same belonged solely to the 1st Defendant hence his plea in defence that he was a bona fide purchaser for value without notice. During cross examination of 2nd Defendant's witness by the Plaintiff a question was put to him thus,

"Q. Did you not know I was in the town when the 1st Defendant offered to sell the farm to you?

A. It is true. You were there but I knew you had been separated that is why I did not tell you about it."

Indeed, I am inclined to believe the 2nd Defendant's version of the facts as opposed to that of the Plaintiff. This is because, throughout the course of the trial the postures of the Plaintiff and 1st Defendant presupposed that they were married and had subsequently divorced. However, preliminary enquiries by the court from the Plaintiff and 1st Defendant indicated that they actually cohabited for many years and bore three (3) children together. The Plaintiff is on record thus, "I lived with the 1st Defendant for about fifteen (15) years but there were no customary rites performed…". The 1st Defendant also stated thus, "I lived with the Plaintiff but we did not perform any rites. We lived for about twenty (20) years and the cocoa farm was acquired in the course of those twenty (20) years."

The question of whether or not a union equates a valid customary marriage is well settled in law. The law has gone through several developments from the case of **Asumah v Khair (1959) GLR 353** where the parties living together as a couple with the acknowledgment of their families was considered a valid customary marriage to the recent decision in the case of Mintah v Ampenyin which established the current position of the law. In the case of **Yaotey v Quaye [1961] 2 GLR 573** it was held that essentials of valid customary marriage are:

1. Agreement by the parties to live together as husband and wife

2. Consent of the families of the man and woman to the marriage whether express or implied

3. Consummation of the marriage i.e., the parties living together openly as man and wife.

Subsequently, the court held in **Essilfie v Quarcoo [1992] 2 GLR 180** that 'there were two forms of valid marriages known to our customary law; first, the ordinary case where a man sought the hand of the woman from her family and with their consent performed the necessary ceremonies of payment of drinks, customary fees and dowry; and secondly, where although the customary marital rites had not been performed, the parties had consented to live in the eyes of the world as man and wife and their families had consented that they should do so, and the parties actually lived as man and wife in the eyes of the whole world. The consent of the family could be either actual and express or implied and constructive.' This position was further affirmed by the Court of Appeal in the case of **Irene Gorleku v Justice Pobee & Another [2012] 42 GMJ 53 CA**. The effect of the above cases was that if the parties agreed to live together as husband and wife, a valid customary marriage could be inferred from their conduct.

There was also the decision in the case of **Badu v Boakye [1975] 1 GLR 283** where Osei-Hwere J (as he then was) stated thus, "…where a man lives with a woman not as

a real wife but only as a concubine with the consent of the woman's parents, that association cannot be translated into a valid customary marriage because the man and the woman are reputed to live as a man and wife. Even though the defendant freely described the plaintiff as his wife and also described their association as 'marriage', this was no more than another euphemism for 'concubine' and 'concubinage' respectively."

The Supreme Court, speaking through Akamba JSC, in the case of **Mintah v Ampenyin [2015-2016] 2 SCGLR 1277** held in holding 3 as follows: 'A concubinage relationship did not constitute or equate to a valid customary marriage.' The court referenced the Black's Law Dictionary definition of a concubinage relationship as a relationship of a man and woman who cohabit without the benefit of a marriage. The woman in the relationship, the concubine, cohabits as a wife without title. Although a concubine was expected to serve all the functions of a legitimate wife, she has no authority in the family or household and was denied certain legal protections.' The court agreed with the position which was espoused by Osei-Hwere J (as he then was) and reiterated his quote above in this Badu v Boakye case (supra).

In one breadth, the Plaintiff and 1st Defendant admit that they are not a married couple, yet in another, they pose as husband and wife. The record clearly shows that even though they were cohabiting, no customary marital rites had been performed. I must say that I am bound by the Supreme Court decision in the Mintah v Ampenyin case (supra) so that unless the Plaintiff led further evidence to show that the union between herself and the 1st Defendant was a marriage relationship, same would amount to a concubinage. It is not enough for the Plaintiff and 1st Defendant to refer to each other as husband and wife respectively especially in light of their own admission that no marital rites were performed.

I have no difficulty in finding that the 2nd Defendant exhibited good faith in the acquisition of the farm and that within the circumstances he was presented with, I am

of the view that the 2nd Defendant did his due diligence before the acquisition of the farm from 1st Defendant.

The evidence shows that there existed nothing that ought to have put the 2nd Defendant on notice as to a possible interest of the Plaintiff and as such the plea of bona fide purchaser for value without notice should avail him.

I cannot help but wonder how it came to be that the 2nd Defendant took possession of the farm five (5) years ago, yet the Plaintiff who lives in the small village of Duampopo together with the 2nd Defendant was not aware of this fact until she was informed by the 1st Defendant of the sale. Again, neither the Plaintiff nor the 1st Defendant denied it when the 2nd Defendant stated that the two had been separated since 2005. This would then mean that per Plaintiff's own evidence she allowed the 1st Defendant to be in control and possession of the farm for about thirteen (13) years before the sale took place in 2018. Assuming without admitting, that the Plaintiff and 1st Defendant were a married couple and Plaintiff had any interest at all in the farm, she would have by her own conduct, set into motion a state of affairs which could cause any other person to believe that the farm belonged to the 1st Defendant alone, for it is trite learning that a person in possession of property can be presumed to be the owner of such property. **Section 48 (2) of the Evidence Act, 1975 (Act 323)** states that, *"A person who exercises acts of ownership over property is presumed to be the owner of it."* The 2nd Defendant was therefore entitled to presume that the 1st Defendant was the owner of the subject farm.

Section 26 of the Evidence Act, 1975 (Act 323) states that, *'except as otherwise provided by law, including a rule of equity, when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest.'*

By this provision, even if the Plaintiff did have any interest in the farm as she claims, her own conduct of having the 1st Defendant exercising sole control over the farm

would cause any third party to believe that the 1st Defendant was the exclusive owner of the farm. This fact should therefore be conclusively presumed against the Plaintiff. There is also no evidence on record that the Plaintiff and the 1st Defendant agreed for the farm to be shared at a particular point in time upon their separation. It is also quite bizarre that within those thirteen (13) years of separation and prior to the sale of the farm to the 2nd Defendant, the Plaintiff never asked for her share of the farm and yet she is in court now asking for her share of the subject farm. 2nd Defendant's DW1 in paragraph 4 introduced a piece of evidence which was not denied by neither the Plaintiff nor the 1st Defendant. DW1 stated that upon his visit to the farm together with the 2nd Defendant he observed that the farm was not in good shape as same had not been maintained for some years which means that even prior to the sale the 1st Defendant had stopped investing in the farm. Clearly, the Plaintiff was also not maintaining the farm prior to the sale and there is nothing on the record to show that at some point within those thirteen (13) of their separation, the Plaintiff had exercised any form of control over the farm. All these pieces of evidence, to my mind, make it unreasonable to expect that the 2nd Defendant would be put on or ought to have been put on notice of the supposed interest of the Plaintiff in the farm.

Indeed, the possibility of collusion between two people such as the Plaintiff and 1st Defendant in cases like this is not unknown to the courts and same was addressed in the case of Fynn v Fynn (supra). Here, the court referred to the case of **In re Asere Stool; Nikoi Olai Amontia IV (substituted by Tafo Amon II) v Akotia Oworsika III (substituted by) Laryea Ayiku III [2005-2006] SCGLR**, where the court laid down the following salutary rule of law that,

"Where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish that fact than by relying on such admission, which is an example of estoppel by conduct." The Supreme Court then went ahead and made exceptions to this general principle and held that **the rule will not apply where fraud or collusion is alleged and or proved.**

In paragraphs 7 and 8 of the witness statement of 2nd Defendant's DW1, he alleged that the 1st Defendant had demanded an additional amount of GHC. 1,000.00 from the 2nd Defendant which said money was allegedly paid through DW1 but 1st Defendant rejected the money and threatened to sell the farm to another person. When the 1st Defendant was given the opportunity to cross examine 2nd Defendant's DW1, his line of questioning only bordered on how much he had sold the farm to the 2nd Defendant for. He did not deny this alleged threat of reselling the land. He also did not put across any contrary explanation to this assertion by DW1.

Also, the Plaintiff herself in paragraphs 10 and 11 of her witness statement stated as follows:

"10. 1st Defendant asked me to help him with GHC. 4,000.00 so that he could refund the 2nd Defendant's money to him in order to reclaim the cocoa farm from the 2nd Defendant.

11. I helped 1st Defendant with the amount of GHC. 4,000.00 he requested to be paid back to 2nd Defendant and reclaim the cocoa farm but 2nd Defendant refused to accept the money when 1st Defendant presented it to him."

Considering carefully the facts of this case and the evidence presented herein, it is easy to believe that the Plaintiff and 1st Defendant may have colluded to recover the farm which they may have lost to the 2nd Defendant by selling same to him perhaps to resell same at a higher price. It is my humble view that to set aside the sale of the subject farm to the 2nd Defendant will be to allow the Plaintiff and 1st Defendant perpetuate fraud against the 2nd Defendant.

The exception created in the Fynn v Fynn case (supra) further cements the reason why the Plaintiff cannot succeed in this case except by presenting better evidence in support of her claim although an adversary (the 1st Defendant) who I find is not an adversary after all, had admitted facts which ordinarily would have been advantageous to the cause of the Plaintiff.

For the foregoing reasons, the Plaintiff's action fails and same is accordingly dismissed. There shall be no order as to costs.

SGD

MRS. LINDA FREMAH ADOM OKYERE, ESQ.

DISTRICT MAGISTRATE

09/10/2023