

IN THE CIRCUIT COURT '4' HELD IN KUMASI ON THURSDAY

2<sup>ND</sup> NOVEMBER, 2023 BEFORE HER HONOUR JACQUELINE

EWUSI-SEKYI AVOTRI (MRS.), (CIRCUIT COURT JUDGE)

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SUIT NO: A1/85/2022

**CHARLES OWUSU BROBBEY**

**A.K.A AGYA OWUSU**

- **PLAINTIFF**

**VRS**

**JEMILA GYESIWAAH**

- **DEFENDANT**

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### **JUDGMENT**

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The Plaintiff instituted this action against the Defendant on the 4<sup>th</sup> day of May, 2022 and subsequently amended his writ of summons and statement of claim on 10<sup>th</sup> February 2023 pursuant to leave of the court granted on 7<sup>th</sup> February, 2023 praying this honourable court for; an order of the court declaring that it is the Plaintiff who acquired Plot Number 19, Block "C" Hemang on Adrebehi Stool Land and therefore, the one who holds it in trust for Amma Owusuaa (Juvenile), a further order for the recovery of the Allocation Note of the land in dispute and an order for perpetual injunction restraining the Defendant herein, her agents, assigns, workmen, etc, or anybody claiming title through her or for her from further interfering with the Plaintiff's land in dispute.

The summary of the Plaintiff's case is that, he got married to the Defendant in September, 2014 and have one issue (1) with the Defendant called Amma Owusuaa, however, the

marriage was customarily dissolved in the year 2018. According to the Plaintiff during the pendency of their marriage, he acquired Plot Number 20, Block "C" Hemang on Adrebehi Stool Land for the Defendant bonafide. The Plaintiff avers that he also acquired Plot Number 19, Block "C" Hemang on Adrebehi Stool Land in the name of their eight (8) year daughter Amma Owusuaa. He signed the Allocation Note as allottee and holding the land in trust for his daughter. It is the case of the Plaintiff that upon the dissolution of the marriage the Defendant took away all his documents including the title document of property Plot Number 19, Block "C" Hemang. Plaintiff avers that he has persistently made a demand on the Defendant to return the title document covering the property but to no avail. The Plaintiff alleged that he has information that the Defendant has the intention or made plans to sell the plot of land even though she has no interest in the said plot of land. Thus Plaintiff instituted this action and prays for the reliefs aforementioned endorsed on his writ of summons.

Defendant entered appearance on 11<sup>th</sup> May, 2022 and subsequently filed her statement of defence. Plaintiff filed his reply on 13<sup>th</sup> June, 2022. Upon leave granted to the Plaintiff to amend his writ of summons and statement of claim, the Defendant amended her statement of defence and filed same on 2<sup>nd</sup> March, 2023.

The Defendant denied all the averments of the Plaintiff except those she specifically admitted. The Defendant avers that the only document in her possession is the document covering Plot Number 20, Block "C" Hemang on Adrebehi Stool Land which the Plaintiff gave to her bonafide.

At the close of pleadings, the following issues were set down for determination by the court:

1. Whether or not Plot Number 19 Block "C" Hemang on Adrebehi is the property of the Plaintiff.

2. Whether or not the Defendant has possession of the Allocation Note of the house in dispute.
3. Whether the Plaintiff is entitled to recover the Allocation Note of the house.
4. Any other issues raised by the Pleadings.

To prove his claim in respect of the issues set down for determination the Plaintiff testified but did not call a witness. Plaintiff testified per his witness statement filed on 2<sup>nd</sup> September, 2023 and basically repeated the averments as contained in his statement of claim. Plaintiff tendered Exhibit "A" Allocation Note in respect of Plot No. 19 Block "C" Adrebehi Stool Lands in favour of Amma Owusuuaa. In cross examination, Plaintiff admitted that he appended his signature on Exhibit "A" as allottee as he was holding the land in trust of his minor daughter. He again admitted that the legal owner of the land is Amma Owusuwaa and not himself since he is holding the land in trust for his daughter Amma Owusuwaa. Witness again admitted that Defendant and himself are the biological parents of Amma Owusuwaa and that both of them have equal rights over their daughter and her properties as well. However, Plaintiff was quick to add that the Defendant is likely to dispose of the land or property.

Defendant testified but did not call a witness. By her witness statement filed on 15<sup>th</sup> September, 2022 and adopted as her evidence the Defendant testified that she only has in her custody documents covering Plot No 20 Block "C", Hemang on Adrebehi Stool Land, which is her bonafide property and not documents covering Plot No 19 Block "C", Hemang on Adrebehi Stool Land. According to the Defendant during the pendency of their marriage they jointly acquired another plot for their daughter and jointly constructed a six-bedroom house on the said plot of land for their daughter which is at lintel stage. She again said that the documents covering the plot of land they bought for their daughter that is Plot Number 19 Block "C", Hemang on Adrebehi Stool Land is in the custody of the Plaintiff and not in her custody.

During cross examination by counsel for the Plaintiff, the Defendant confirmed that there is some development on Plot Number. 19 Block "C" Hemang but denied that she took the documents covering the said plot of land along when leaving her matrimonial home. When asked the current status of Plot Number 20 Block "C", Hemang, she answered that same has been disposed of by herself. She denied that because she has sold Plot No 20 Block "C", Hemang she is likely to dispose of Plot Number 19 Block "C", Hemang.

Now, before I deal with the issues set down for determination, it is obvious from the proceedings that the instant case is purely a civil matter. It is a well-established principle of law that in civil litigation, he who alleges must prove her case and in the instant case, it is the Plaintiff who alleges and claims the reliefs endorsed on the statement of claim against the Defendant and therefore bears the burden of proof. That is the burden of adducing evidence to establish his case and the standard of proof that is required from the Plaintiff by law is proof on the preponderance of probabilities. Preponderance of probabilities according to section 12(2) of the Evidence Act, 1975 (NRCD 323) 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.*

A person who alleges a fact will assume both the evidentiary burden and the burden of persuasion. Section 11(1) and (4) of the NRCD 323 provides respectively as follows:

(1) *"...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) *"... 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."*

Parties to a civil suit carry a burden to prove their cases on the preponderance of probabilities in order to satisfy the court, as required by rules of evidence, that they were either entitled to the claim or defence they have asserted in their pleadings. Thus, in the case of **TAKORADI FLOUR MILLS V. SAMIR FARIS [2002-2006] SCGLR 882 at 900** the Supreme Court captured the trite position of the law relating to the burden of proof as follow: -

*“To sum up this point, it is sufficient to state that this being a civil suit, the rules of evidence require that the Plaintiff produces sufficient evidence to make out his claim on a preponderance of probabilities as defined in section 12(2) of the evidence Act, 1975 (NRCD 323). Our understanding of the rules in the evidence Act, 1975 on the burden is that in assessing the balance of probabilities, all the evidence, be it that of the Plaintiff or the Defendant, must be considered and the party in whose favour the balance tips is the person whose case is the more probable of the rival versions and is deserving of a favourable verdict”.*

**See: KOJO BAAH V. GHANA WATER COMPANY LTD & ANOR [2022] 177 G.M.J. @ 160-161.**

In the case of **ZAMBRAMA V. SEGBEZI [1991] 2 GLR 221 @ 246** the Court of Appeal held that,

*“A person who makes an averment or assertion, which is denied by his opponent, has a burden to establish that his averment or assertion is true. And he does not discharge this burden from which the fact or facts he asserted can properly and safely be inferred. The nature of each averment or assertion determines the degree and nature of the burden”.*

Also, in the case of **TETTEH V. T CHANDIRAM & CO. GH. LTD & OTHERS [2017-2022] 2 SCGLR 770**, the Supreme Court reechoed this principle in holding 2, *“where an appellant alleged a claim but was denied, it was the duty of the appellant to adduce credible*

*evidence to prove the claim and not to just mount the witness box and repeat her pleadings especially when the claim was capable of positive proof."*

In line with the above legal authorities, I will now take the issues and determine whether the Plaintiff has been able to lead evidence in proof of same in order for him to succeed in his claim against the Defendant.

## **ISSUE ONE**

Whether or not Plot Number 19 Block "C" Hemang on Adrebehi is the property of the Plaintiff.

It is the case of the Plaintiff that he purchased Plot Number 19 Block "C" Hemang on Adrebehi for the benefit of his daughter Amma Owusuaa a minor or juvenile. He appended his signature on the Allocation Note as allottee. A copy of the Allocation Note was tendered and marked as Exhibit "A" which is in the name of Amma Owusuaa. A father was under an obligation to support or make provision for his child. So where a father took conveyance of property in the name of his child, as in the present case, there would be a presumption of advancement that the father intended to part with both his legal and beneficial interest in the property to the child and that the property was intended to be a gift to the child.

The law is settled that where a father acquired property in the name of a child it created a presumption of advancement in favour of the child. That presumption is however, rebuttable by evidence showing either that there was no present intention to benefit or a contemporaneous act or declaration by the donor. However, acts or declarations by him subsequent to the purchase or transfer were not admissible in evidence against the donor, but subsequent acts and events were admissible in evidence against the donor.<sup>1</sup>

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<sup>1</sup> The Lawyers Companion, A Guide to Researching Ghanaian Case Law by Kwamina Mensah & Christopher Nyinevi, Ashmetro Prints, Kumasi, Ghana @242-243

**See: ASANTEWAA V. ANSONG [1992] 1 GLR 550.**

Halsbury's Laws of England explains the presumption of advancement as follows:

*"Where a father, or a person who has put himself in locus parentis, obtains a conveyance in the name of a child alone or in the joint names of the child and himself or a stranger, the father or other person is presumed to have intended to make a gift to the child. The presumption does not exist where the purchase is made by a mother, but slighter evidence is sufficient to prove an intention on her part to advance the child than would be required in the case of a purchase by a stranger. The presumption of advancement may be rebutted by evidence of a contrary intention collected from the acts and declarations of the parties before or at the time of the transaction, subsequent acts and events being only admissible as evidence against the party who did or made them and not in his favour. The presumption may exist even though the parent has actually received the income during his life and made leases of the property".<sup>2</sup>*

The law is settled that a presumption of advancement is created when a father or a male who stands in locus parents of a child obtains a conveyance in the name of the child or a wife.<sup>3</sup>

**See: Land Law, Practice and Conveyance in Ghana, Third Edition by Dennis Dominic Adjei @330-331.**

Applying the above principle to the instant case I cannot hold that Plot Number 19 Block "C" Hemang on Adrebehi is the property of the Plaintiff because if a father buys property in the name of his child, prima facie, it is a gift to the child and the presumption of advancement rises. Like any presumption, presumption of advancement can be rebutted by contrary evidence. See: Section 18 of the Evidence Act, 1975 (NRCD 323) which provides that:

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<sup>2</sup> 21Halsbury's Laws of England 201 (3d ed. Butterworths 1956) pt 2, section 1, para. 447

<sup>3</sup> In re Sasu-Twum (decd.); Twum v Sasu Twun [1976] 1 GLR 23.

“A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action”.

**See: DAVID OKAE ANSAH & ANOTHER V. COMFORT ANSAH [2022] 179 G.M.J @ 692-693.**

During the trial the Plaintiff was unable to rebut the presumption of advancement in his favour. I therefore hold that Plaintiff purchased the said plot of land for the benefit of his daughter Amma Owuwusa in whose name Exhibit “A” stands and therefore the beneficial interest in the said property is vested in Amma Owuwuaa. Indeed, Amma Owusuaa daughter of both Plaintiff and Defendant is a minor, however, since the Plaintiff signed Exhibit “A” as allottee he can hold the property in trust for his daughter until she attains the age of majority.

## **ISSUE TWO**

Whether or not the Defendant has possession of the Allocation Note of the house in dispute. It is the case of the Plaintiff that documents covering Plot Number 19, Block “C” Hemang are in the custody of the Defendant. Defendant has denied same so the onus is on the Plaintiff to lead cogent evidence to support his assertion that indeed the documents covering Plot Number 19, Block “C” Hemang are in the custody of the Defendant. **See: TETTEH V. T CHANDIRAM & CO. GH. LTD & OTHERS [2017-2022] 2 SCGLR 770 and ZAMBRAMA V. SEGBEZI [1991] 2 GLR 221 @ 246**

In the case of **EQUITY ASSURANCE V. PALMERS GREEN INT’L LTD [2019] 134 GMJ 57**, proof in civil trials were stated as follows;

*“Section 11(4) and 12 of the Evidence Act, 1975 (NRCD 323) require a plaintiff in a civil matter to prove his case on a balance of probabilities.*



*Based on section 11(4) and 12 of Evidence Act (NRCD 323), the Supreme Court in the case of Awubeng v. Domfeh [1996-97] SCGLR 660 held that standard of proof in all civil action was proof by the preponderance of probabilities and there is no exception to this rule”.*

Merely mounting the witness box to repeat ones’ averments in his or her pleading is not enough. The court expects a party who makes an averment (which the other side denies) to lead evidence in support of his case. In the case of **MAJOLAGBE V. LARDI & ORS. [1959] GLR 190**, the dictum of Ollenu J (as he then was) is still good law when he held:

*“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, descriptions 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 its 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: DAVID OKAE ANSAH & ANOTHER V. COMFORT ANSAH [2022] 179 G.M.J @ 696-697.**

From the authorities cited the Plaintiff was expected to proof his case in some positive way and not just mount the witness box to repeat his averments in his pleadings. Especially when in one breath he alleged that the Allocation Note in respect of Plot Number 19 Block “C” Hemang on Adrebehi is in the custody of the Defendant and in another breath he alleged that documents covering Plot Number 19 Block “C” Hemang on Adrebehi are in the custody of the Defendant. Plaintiff tendered Exhibit “A”, Allocation Note issued by Adrebehi Stool Land in favour of Amma Owusuwaa. The question is which other Allocation Note or documents are in the custody of the Defendant. If it is the case of the Plaintiff that other documents beside the Allocation Note

are in the custody of the Defendant, he should have lead sufficient evidence to prove same but he failed to do so. In any case issue two is whether or not the Defendant has possession of the Allocation Note of the house in dispute. From the evidence on record the said Allocation Note was tendered by the Plaintiff as Exhibit 'A" which presupposes that same is in his custody and not the Defendant. I cannot therefore, hold that the Defendant should return the Allocation Note to the Plaintiff since same is already in the custody of the Plaintiff.

### **ISSUE THREE**

Whether the Plaintiff is entitled to recover the Allocation Note of the house. I will not waste much time in addressing this issue, since the resolution of issue two has addressed this issue. Plaintiff tendered Exhibit "A" Allocation Note in respect of Plot Number 19 Block "C" Hemang on Adrebehi. Plaintiff failed to lead evidence to the satisfaction of the court that the Defendant is in possession of another allocation Note in respect of Plot Number 19 Block "C" Hemang on Adrebehi Stool Land for same to be handed over to him.

From the totality of the evidence on record I hold that the Plaintiff failed to establish his claims against the Defendant. The case of the Plaintiff is hereby dismissed and judgment is entered against the Plaintiff.

Cost of Gh¢2000.00 is awarded against the Plaintiff.

I wish to state that during the trial parties admitted that the interest of their daughter Amma Owusuaa is paramount and they both have equal right to protect the interest of their daughter in this case Plot Number 19 Block "C" Hemang on Adrebehi Stool Land. This Court in considering the interest of Amma Owusuaa holds that both the Plaintiff and Defendant are estopped from disposing of Plot No. 19 Block "C" Hemang on Adrebehi Stool Land in the name of their daughter Amma Owusuaa.

(SGD.)

H/H JACQUELINE EWUSI-SEKYI AVOTRI (MRS.)

(CIRCUIT JUDGE)

2<sup>ND</sup> NOVEMBER, 2023

COUNSEL:

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FOR PLAINTIFF

FRANCIS OPOKU ESQ. FOR DEFENDANT