

IN THE DISTRICT COURT HELD AT ADIDOME ON TUESDAY THE 28TH DAY OF
FEBRUARY, 2023 BEFORE HER WORSHIP MOLLY PORTIA ANAFO-SALIA ESQ.

(MRS) DISTRICT MAGISTRATE

SUIT NO. A1/15/2020

TORGBUI AGBOTADUA OKUDZETO OF MAFI-ADIDOME: PLAINTIFF

VRS.

MISIDA ATSU OF MAFI-DADOBOE.....DEFENDANT

PARTIES

PLAINTIFF PRESENT.

DEFENDANT PRESENT

J U D G M E N T

The Plaintiff instituted the present action against the Defendant seeking the following reliefs:

(A)Declaration to title and ownership of that piece of land situate and lying at
Agorvodza measuring one (1) mile square.

On the North by Akoto land;

On the South by Akoto land;

On the East by Akoto land and

On the West by Akoto land.

(B) General damages for trespass

(c) Recovery of possession.

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(D) Perpetual injunction restraining Defendant, his agents, workmen assigns or any person acting or claiming through him for further acts of trespass.

(E) Defendant to be ordered to pay compensation of Ten Thousand Ghana Cedis (GH¢10,000.00) to Plaintiff's family for using the land over the years.

(F) Costs.

The Defendant pleaded NOT LIABLE to all the reliefs and he did not file any counterclaim in the instant suit, he therefore bears no duty to prove anything. The parties filed pleadings and stated their source of acquisition of the subject matter.

Plaintiff seeks an order for declaration of title to land, perpetual injunction, damages to trespass, compensation and recovery of possession he had to meet the general standard of proof required in civil cases as enshrined in the Evidence Act, 1975 (NRCD 323) specifically, Section 11 (4) and 12 which state the principle of law in civil cases to be proof by the preponderance of the probabilities as the standard of proof, required.

Section 11 (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 (1): "Except as otherwise provided by Law, the burden of possession requires proof by a preponderance of probabilities".

Section 12 (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.”

The general position on the burden of proof and of persuasion had had judicial approval by the Supreme Court in the case of *Ababio v. Akwasi IV* [1994-1995] GBR 774 where Aikins JSC (as he then was) expounded the position as follows:

“The general principle of Law is that it is the duty of Plaintiff to prove what he alleges. In other words, it is that party who raises in his pleadings an issue essential to the success of his case who assumes the burden of providing it. The burden only shifts to the Defendant to lead sufficient evidence to tip the scales in his favour when on a particular issue the Plaintiff leads some evidence to prove his claim. If the Defendant succeeds in doing this, he wins; if not he loses on that particular issue”.

The Principle has been summarized by the Supreme Court in the case of *Ackah v. Pergah Transport Ltd* [2011] 31 GMJ SC 174 at 178 that “It is a basic principle of the Law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence) without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a

reasonable mind could conclude that the existence of the fact is more probable than its non-existence. This is a requirement of the law on evidence under section 10 and 11 of the Evidence Decree”.

Again, In *Re Ashalley Botwe Land; Adjete Agbosu & Others v. Kotey & Others* [2003-2004] SC GLR 402 at 405 held that; “The import of all these authorities and statute is that, it is the duty of the Plaintiff to produce evidence to establish the requisite degree of belief concerning a fact in the mind of the court. Plaintiff cannot rely on the case of *Odametey v. Clocuh* [1989-90] 1 GLR 14 where it was decided that “If a Plaintiff in a civil suit failed to discharge the onus on him and thus completely failed to make a case for the claim of which he sought relief, he would not only rely on the weakness in the Defendant case to ask for relief. If he however, made a case which entitle him to a relief and if the Defendant when he did give evidence disclosed any weakness which tendered to support the Plaintiff’s claim, the plaintiff was entitled to rely on the weakness of the defendant’s case to strengthen his case”.

The Plaintiff assumed the duty to prove his case filed his, witness statement and Exhibits to support his case. Exhibits filed were notice to all trespassers, indenture and site plan, they were admitted and marked as Exhibit ‘A’ ‘B’ and ‘C’ respectively. The Defendant gave oral evidence but neither called a witness nor filed any Exhibit in support of his case.

It is the case of the Plaintiff that, he is the head of the Okudzeto family at Adidome. That the family in 1967 acquired a large tract of land from the principal members of Kwasi Amaglo and Sonyrahu Hunugbe, principal elders of the Akoto family of Mafi-Adidome. They were issued with receipt and Indenture and finally registered same at the Land

Commission. The family has been in possession until 2021, when the Defendant trespassed onto the land and with notices to warn him of his illegal activities, but he has been adamant.

The Defendant in his evidence stated that his grandfathers leased the subject matter to the Plaintiff so many years ago. That where he is currently engaged in his farming activities does not form part of the disputed land. That he has not trespassed onto Plaintiff's land.

Interestingly, during cross-examination the Defendant stated his grantor was one Togbe Owusu but with severally adjournments, the Defendant, failed to produce the said grantor to testify on his behalf. Meanwhile, he had stated again that, he was farming on a portion of his father's land. Strangely, the Defendant stated that, if Togbe Owusu came to testify that the place is for the Plaintiff, he will apologize to the Plaintiff. The issues for determination:

1. Whether or not the Plaintiff's family is the title and owner of the disputed land,
2. Whether or not the Plaintiff is entitle to damages for trespass and compensation of Ten Thousand Ghana Cedis (GHC10,000.00) for the usage of the land over the years,
3. Whether or not the Plaintiff's family can recover possession of the entire land,
4. Whether or not the Plaintiff is entitle to all the reliefs,
5. Whether or not declaration of title to land failure to join the grantor of the land is fatal to the action,
6. Whether or not the court can grant perpetual injunction on the Defendant.

The evidence before this court point to one direction that the parties herein are claiming the same land. While the Plaintiff has tendered in evidence an Indenture, site plan of a reasonable probability of the existence of a superior adverse claim, the Defendant has nothing to show for it.

The Plaintiff is seeking declaration of title to land and other reliefs, he will succeed only if he is able to establish the identity of the land in question satisfactorily according to law so as to entitle him to the reliefs. This onus of proof required by law as regards the identity of land would be discharged by meeting the conditions. Clearly stated in the case of *Tetteh v. Hayford* [2012] SC GLR 417 citing the case of *Kwabena v. Atuahene* [1981] GLR 136 thus:

- (i) the Plaintiff has to establish positively the identity of the land to which he claimed title subject matter to the suit,
- (ii) Plaintiff has to establish all his boundaries,
- (iii) where there is no properly oriented plan drawn to scale, which made compass bearings vague and uncertain, the court would hold that the Plaintiff had not discharged the onus of proof of his title.

Similarly, in *Agyei Osae & Others v. Adjeifio & Others* [2007-2008] SC GLR 499, held in an action for declaration of title to land, recovery of possession and injunction, a Plaintiff must establish by positive evidence of identity and limits of the land he claims".

The facts of this matter tend to turn to title and ownership in immovable property Law in Ghana. The Plaintiff, who is suing in his capacity as the current head of Okudzeto family of Adidome stated in evidence that, in 1967, precisely on the 17th day of July, his family

purchased the subject land from the principal members of Kwasi Amaglo and Sonyrahu Hunugbe Principal elders of the Akoto family of Mafi-Adidome.

Defendant on the other land stated his source of acquisition from his father and one Togbe Owusu respectively. That the father acquired the subject long ago.

Interestingly, he stated that, his portion where he has been in possession is not where the Plaintiff claims. This assertion was at paragraph 8 of his Statement of Defence. That his parents were from the Akoto clan of Mafi and as a result had a portion of land to farm which he inherited and has been farming throughout his life.

Per the assertion by the Defendant and without corroboration and a shadow of doubt, he almost convinced the court in believing that indeed he is Akoto clan descendant and could lay claim to his portion of land. The inconsistencies in Defendant's evidence, mentioning one Togbe Owusu as his grantor creates doubt in his evidence, though he has no mandate to prove his claim.

Plaintiff stated the location of the subject land at Agorvodza and bounded on the North by Lessors Land, on the South by Cattle Farmers Cooperative Farm, on the East by Adidome - Ho Road and on the West

by Tsawla-Wudzrolo Road. The Defendant in his viva voce evidence stated that he was familiar and knew his boundaries but never stated the boundaries except to say that he was not in possession of Plaintiff's land.

The Plaintiff apart from establishing the identity of the subject land, tendered Exhibits as documentary evidence to establish his superiority of the subject matter.

These documents are presented to court where there is a dispute surrounding such a grant or surrounding ownership of the land. In the

21st century therefore, documentary evidence to a suit has become necessary although absence of same should not deny any party justice. They make the work of the court easier.

On possession, the evidence from both sides established the Plaintiff's family took possession and erected pillars and they have been in peaceful possession of the said for over fifty (50) years until recently when Defendant trespassed on the land. Defendant also claim he has been in possession farming and enjoying his quiet time until Plaintiff surfaced. Defendant claim that he has not trespassed onto the Plaintiff's land but rather on his father's land makes him possessor of the land and is that recognized by Law?. In Ghana, there are two main ways a person could become a lawful possessor of title over land. It is either to have the title registered or to have such title formally transferred by customarily law. In this case, the Defendant tendered no Exhibit to prove his legal possession. Even to become a rightfully possessor at customarily law, it must have been transferred to the party claiming lawful possession.

Applying the foregoing to the evidence adduced in this matter, there has been an Exhibit on record, thus Exhibit 'B' that the Plaintiff after the issuance of the Indenture, took steps to concretize his possession of the land legally at the Lands Commission and same registered and stamped as Land Registry No. 12/1968 A/C 7759/67.

It is trite law that documentary evidence far outweighs oral evidence. The dictum of Ollennu J. (as he then was) in the celebrated case of *Majolagbe v. Larbi and Others* [1959] GLR 190-195; "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 example by producing documents, description of things reference to other facts or

circumstances and 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 witnesses does so by producing other evidence of facts and circumstances from which the court can be satisfied that what he avers is true”.

Following from the above the disputed land is the property of the Plaintiff and his family and not the Defendant notwithstanding his position as a descendant of the Akoto clan as he would like this court to believe.

On damages, it is trite learning that a person who has bought land and has been given possession may sue for damages and injunction when the land is interfered with by the act of his vendor or a third person, his remedy is damages for trespass and injunction to prevent further act of trespass, the case of Dankwa v. Kwabena [1965] GLR 299.

Damages are usually awarded as an alternative to specific performance mostly in land cases. The essence of damages is to put the injured person in the position in which he was before the injury. Damages is neither awarded to punish the offender nor to confer a windfall on the victorious party.

Trespass is actionable per se without proof of injury before damages would be awarded to compensate. General damages on the other hand is awarded to compensate the Plaintiff for the injury caused to the land. The Plaintiff is not required to prove anything about the injury but the award of it is at large and at the discretion of the court.

Now the issue of whether or not declaration of title to land failure to join or call the grantor of the land is fatal to the action. There are different modes by which land is disposed off or alienated. Some of the

dispositions are governed by customary Law and others by statute. The most common ones are by gift, sale or pledge etc. In all cases the person making the dispositions should have the power to do so. The *Nemo dat quo non habet* rule is paramount in land disposition because a person can only give which he has. Any grantor of land must have an interest in the said land before he can alienate. He may alienate his whole interest or less or interest but not an interest which is superior to what he has.

Declaration of title to land failure to join the grantor of land is fatal to the action.

Sasu Bamfo v. Simtim [2012] 1 SC GLR 136 at 158.

How does a party who seeks a declaration of title to land fail to join his grantor as a party to the action or call him as a witness when his title is hotly contested? His action is bound to fail.

It is also settled and trite law that a person claiming for declaration of title has to prove his root of title, mode of acquisition and various overt acts of possession exercised over the disputed land.

In Mondial Veneer (GH) Limited v. Amuah Gyebi XV [2011] 1 SC GLR 466, holding 4, where it was held.

“In land litigation, even where living witnesses had been produced in court as witnesses, the law would require the person asserting title and on whom bear the burden of persuasion, as the Defendant’s company in the instant case, to prove the root of title, mode of acquisition and various acts of possession exercised over the disputed land. It was only where the party had succeeded in establishing those facts, on the balance of probabilities that the party would be entitled to the claim”.

A party who relies in respect of derivatory title must prove the title of his grantor”

Awuku v. Tettey [2011] 1 SC GLR 366.

Further to prove ownership through possession must be long peaceful and uninterrupted. *Akosi v. Aveq* [1984-86] GLR 365.

The Defendant in evidence had stated that Togbe Owusu was his grantor and that not until the said grantor came to testify he had nothing to say. Despite several adjournments, he could not produce him in court. Meanwhile, he had stated that the portion he possessed was alienated through inheritance as his parents owned and possessed the land. The inconsistencies in his evidence create doubt in the mind of the court. He has been on the land over a long period though but failed to prove same. At one instance, Defendant prayed for locus in quo but the court could not grant that prayer because a visual inspection could not entitle him to any possession.

There are decided cases or authorities to the effect that inconsistencies or contradictions between pleadings and evidence which are not fundamental, may be pardoned or excused. In *Atadi v. Ladzekpo* [1981] GLRD 15 15 CA, it was held in holding I, inter alia“A trial court would however be entitled to accept one such conflicting evidence if he directed his mind to such conflict in a party's case and nevertheless, found it justifiable to make a finding in favour of the party on whose behalf a conflict existed having regard to the particular fact in issue and the circumstances surrounding the case”.

Despite this dictum, the fact still remains that, his traditional evidence could not substantiate his assertion of ownership.

From the evidence on record, there is sufficient evidence to support the subject land which is measured approximately 1840.82 acres as the property of the Plaintiff and his family acquired over 50 years and subsequently have been in possession. The Defendant apart from not

producing his grantor to be a witness in this case also failed in the production of the necessary documents as enunciated in the following cases; Pastor Yaw Boateng v. Kojo Manu & Anor [2007-2008] SC GLR 117, KAMA Health Service Limited v. Unilever Ghana Limited [2013] 65 GMJ Kwabena v. Atuahene [1981] GLR 136, CA and Nyikplorkpo v. Agbodotor [1987-88] GLR 165 to mention just a few. The courts have been enjoined to appreciate the crucial, that is, importance of site plan in case, where title to land is in dispute.

Last but not least, is the Plaintiff entitled to his claim. It is trite that a person who acquires land must ensure that he acquired the said property from the authority clothed with the capacity and authority to alienate the said property. In civil cases, the general rule is that the party who in his pleading or his writ raises issues essential to the success of his case assumes the onus of proof.

Faibi v. State Hotels Corporation [1968] GLR 471 and Bank of West Africa Limited v. Ackun [1963] 1 GLR 176 SC.

A well established principle which does not suffer materially from the above is that the person who asserts assumes the onus of proving the assertion either by a deduction and acceptance at common law or by statute.

The Plaintiff has demonstrated to this court that his set of facts are more credible than the Defendant and should be believed. In Ntim v. Essien [2001-2002] SC GLR 451 that:

“It is the trial court that determine credibility”

From the totality of the evidence adduced, I find as a fact that the Plaintiff who testified for himself and the family has proved ownership successfully. He has the right to claim title of a purchased land from the

principal members of Kwasi Amaglo and Sonyrahu Hunugbe Principal Elders of Akoto family of Mafi-Adidome which land is bounded on the North by Lessor's land measuring 1266 1 feet more or less, on the South by Cattle Farmers Co-operative Farm measuring 9503 feet more or less, on the East by Adidome-Ho Road measuring 9300 feet more or less, on the West by Tsawla-Wudzrolo Road measuring 8139 feet more or less with an entire measuring approximately 1840.82 acres. He attained a Land Registry No.122/1968 A/C 7759/ 67 and is in peaceful possession for over 50 years, deserves judgment against the Defendant as per the reliefs indorsed on the Writ of Summons.

Judgment is hereby entered in favour of the Plaintiff. I specifically order the Defendant to render vacant possession to enable the Plaintiff and his family to recover the full complement of the subject land by 31st March, 2023.

I award Ten Thousand Ghana Cedis (GH¢10,000.00) as damages for trespass.

I restrain the Defendant, his agents, workmen assigns or any person acting or claiming through him for further acts of trespass.

I award costs of Two Thousand Ghana Cedis (GH¢2,000.00) in favour of the Plaintiff.

(SGD)

H/W MOLLY PORTIA ANAFO-SALIA (MRS)

(DISTRICT MAGISTRATE)

28TH FEBRUARY, 2023

