

**IN THE DISTRICT MAGISTRATE COURT HELD AT NEW TAFO-AKIM
ON FRIDAY 19-05-2023 BEFORE HER WORSHIP JOSEPHINE SARFO
(MRS.)**

SUIT NO: A1/22/2021

**EMMANUEL OSEI BONSU
(Suing for himself and on behalf of
Other siblings of Akim-Maase)**

PLAINTIFF

VRS

**1. AKOSUA SERWAAH
2. KWAME BOAKYE**

Both of Akim -Maase

DEFENDANTS

PARTIES - PRESENT

JUDGMENT

The Plaintiff issued a writ of summons out of the registry of this Court on 31/05/21 for the following reliefs:

- a. Declaration of title to land situated and lying at Maase Anyinasin Road.
- b. Recovery of possession of the said land.
- c. Perpetual injunction restraining Defendant, her agents, her assigns, her privies, etc from interfering with the said land.
- d. Cost of litigation.

Plaintiff brings this action for himself and on behalf of other siblings namely: Comfort Adjeiwaah, Elizabeth Amoanimaah and Julian Osei Twumwaah. Plaintiff avers that the 1st Defendant is a sister from a different mother whilst the 2nd Defendant is an elder of Christ Apostolic Church, Maase. It is the case of Plaintiff that his late father, Opanin Kwaku Annane married four wives in his lifetime

namely: Afua Dokua, Afua Ntiamoah, Akua Animah and Abena Yaawowah. That Afua Dokua had four children with their father i.e. plaintiff and the siblings. Afua Ntiamoah had a child with their father namely Julian Osei Twumwaah. Akua Animah had a child with their father namely Akosua Serwaah the 1st Defendant herein whilst Abena Yaawowah had twins with their father namely Afua Atta and Atta Kofi. The Plaintiff stated that upon the demise of their father, his land that is the land in dispute was given to the children by his family. That the land measures 100 feet by 60 feet and situated at Maase and bounded on one side by Maame Nyawor's land, on one side by Kwaku Seth's land and on the other side by Opanin Kwaku Adu's land. Upon the insistence of the 1st Defendant, the land was shared into two equal parts, Plaintiff together with his siblings and Julian Osei Twumwaah took one part whilst the 1st Defendant and Afua Atta and Atta Kofi took the remaining half upon the instructions of the head of family and their uncles. Subsequent to the sharing, he graded the portion which devolved to him and the siblings however, the 1st Defendant has sold the portion belonging to Plaintiff and his siblings to the 2nd Defendant who is developing same at a faster pace. That all attempts to restrain the 2nd Defendant from developing the land in dispute have proved futile.

In their statement of defence filed on 14/06/21 in the registry of this Court, the Defendants denied Plaintiff's claim and averred that their father did not gift any of his two parcels of land to any of his children nor was any family meeting convened after the 1st Defendant's father's demise by the father's family to handover the lands to the children. It is their case that the Plaintiff and siblings have been farming on their father's land located at Tumantu Maase whereas the 1st Defendant and sibling have also been farming on the second plot located at Anyinasin road also in Maase. Thus, both sets of siblings took possession of the respective lands they were farming

on upon the demise of their father and their father's family are aware of this arrangement between the siblings. The Defendant further averred that the land in dispute was never shared into two by the father's family rather it is the Plaintiff who has turned around to lay claim to her portion of land at Anyinasin road having already taken possession of the land at Tumantu Maase. According to the 1st Defendant she sold one plot out of the one and half plot at Anyinasin road to one Kofi Boateng having obtained the consent of the aunt and other siblings to sell same to pay for the child's school fees; that both the father's family and her siblings are aware and consented to the sale. The Defendants therefore counterclaimed as follows:

- a. Declaration of title to land situate and lying at Anyinasin road Maase and sharing boundaries with Kwaku Seth, Kwaku Sefa, Atta Maame and Mr. Moses.
- b. Recovery of possession of the said land.
- c. Perpetual injunction restraining Plaintiff, his agents, assigns, privies, labourers from having anything to do with the disputed land.

At the end of the parties' pleadings, the issues which came up for determination by the Court were:

1. Whether or not the land in dispute was the self-acquired property of the father of the Plaintiff and the 1st Defendant, Op. Kwaku Anane?
2. Whether or not the land devolved to the children of Op. Kwaku Anane upon his death and if so?
3. Whether or not the 1st Defendant had capacity to sell the land to Kofi Boateng the vendor of 2nd Defendant without the consent and concurrence of her other siblings?

4. Whether or not the 2nd Defendant is a bona fide purchaser for value without notice?

ANALYSIS OF THE EVIDENCE AND EVALUATION OF THE LAW

As there is a claim and a counter claim both parties have obligations to prove their claims and counter claims on the balance of probabilities. The dictum of Brobbey JSC in the case of **IN RE ASHALLEY BOTWE LANDS [2003 – 2004] SCGLR 420** is instructive in this regard that:

“The effect of sections 11(1) and 14 and similar sections in the Evidence Decree 1975 may be described as follows: A litigant who is a defendant in a civil case does not need to prove anything. The plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time if the court has to make a determination of a fact or of an issue, and that determination depends on the evaluation of facts and evidence the defendant must realize that the determination cannot be made on nothing. If the defendant desires a determination to be made in his favour, then he has a duty to help his own cause or case by adducing before the court such facts or evidence that will induce the determination to be made in his favour...”

In respect of the defendants’ counter claim it is to be viewed with the same scale of measurement as if they were the plaintiff. As far back as the case of **AMON v BOBBETT (1889) 22 QBD 543** where Browne LJ noted that:

“a counter claim is to be viewed and to be treated for all purposes for which justice requires it to be so treated as an independent action”.

Dotse JSC came to the same conclusion on counter claim actions in the case of **JASS CO. LTD v APPAU [2009] SCGLR 269 at 271** that:

‘whenever, a defendant also files a counterclaim, then the same standard or burden of proof would be used in evaluating and assessing the case of the defendant just as it was used to evaluate and assess the case of the plaintiff against the defendant’

Plaintiff testified that upon the death of their father, Opanin Kwaku Anane, his land which he acquired in his lifetime was handed over to his children which includes the 1st Defendant and the Plaintiff by his late father’s family. Upon the insistence of the 1st Defendant, the land was divided into two; the Defendant and one set of the siblings took possession of one part whilst the Plaintiff and his siblings also took possession of the other part. The Plaintiff stated that after the division, he went into possession of their portion by clearing the land. The 1st Defendant has sold the portion belonging to Plaintiff and siblings to the 2nd Defendant who is developing the land and all efforts to stop him has proven futile.

Frank Afrane (PW1), a cousin to both the Plaintiff and 1st Defendant testified that the land in dispute was originally the self acquired property of his late uncle, Opanin Kwaku Anane. Upon his death, the land was handed over to his children who divided the land into two; one set of children including the Plaintiff took possession of one part while the second set of children including the Defendant took possession of the other part. He noticed some time later that some one was putting up a building on the portion allocated to the Plaintiff and his siblings. Further inquiries revealed that the 1st Defendant had sold that part to the 2nd Defendant.

1st Defendant in her testimony averred that the land sold to the 2nd Defendant was the self acquired property of the late father, Kwaku Anane. According to the 1st

Defendant, she has been in possession of the land for 14 years clearing and farming on same. After the father's demise the family did not apply for letters of administration to administer his estate. She was in financial distress at a time her daughter had gained admission to the teacher training college and upon informing her aunt, Akua Kyeiwaa, about her crises, the aunt advised her to sell one plot of the land to pay the daughter's school fees. The aunt got her a buyer, Kofi Boateng, who purchased the land from 1st defendant for GHC 3,000.00. Kofi Boateng, later came to request for a refund of the money after the Plaintiff had confronted him that the land belonged to him. The issue ended up at the Police Station and subsequently she told Kofi Boateng to sell the land to some else as she was not in a position to refund his money to him. Kofi Boateng later sold the land to the 2nd Defendant herein.

Akua Kyeiwaa (1DW1) testified for the 1st Defendant and averred that she gave the 1st Defendant permission to sell the land in dispute to pay for her daughter's school fees after the 1st Defendant had consulted with her concerning her financial constraints. She averred that she got a buyer for the 1st Defendant who purchased the land for GHC 3,000.00. That the Plaintiff confronted her concerning the land in dispute and she admitted having granted the 1st Defendant authority to sell same. She further stated that the family did not apply for letters of administration upon the demise of his brother, Kwaku Anane.

The 2nd Defendant in his testimony stated that his uncle, Yaw Okordie, was in search of land to purchase and his enquiries led him to Kofi Boateng (2DW1) who informed him that he had a piece of land at Anyinasin road which he was selling. He went to inspect the land and after being satisfied with it he called his uncle to inform him about same and his uncle remitted an amount of GHC 4,000.00 to Kofi Boateng as payment for the land. Upon payment, he went with his uncle to inspect the land and they also hired labourers to clear the land. According to the 2nd Defendant, before

purchasing the land, they visited Akua Kyewiaa, aunt of the 1st Defendant who assured them that there was no dispute concerning the land. With these assurances, they went ahead to pay for the land. Later on, the Plaintiff informed him that there was a dispute concerning the land he had purchased from Kofi Boateng.

Kofi Boateng (2DW1), testified that he purchased the land in dispute from the 1st Defendant for his son in law. He was informed about the land in dispute by 1DW1, Akua Kyeiwaa. Upon purchasing the land, his son in law informed his uncle about the land he had purchased. The son in law's uncle by name Frank also informed the Plaintiff about the sale of the land. The son in law later informed him that he was no more interested in the land and asked for a refund. He in turn informed the 1st Defendant about the son in law's decision and also asked for a refund. Upon repeated demands on the 1st Defendant for a refund, he lodged a complaint against her at the Police station. 1st Defendant asked him to look for someone to buy the land in dispute so she could refund his money to him since she was not in a position to refund the money to him. He eventually sold the land to the 2nd Defendant for GHC 4,000.00 and gave it to the 1st Defendant who refunded his GHC 3,000.00 to him and kept the GHC 1000.00.

I find from the evidence adduced so far that the land in dispute was the self acquired property of the late Op. Kwaku Anane, the father of the Plaintiff and the 1st Defendant. Though the 1st Defendant and her witness Akua Kyeiwaa sought to tell a different tale that the land 1st defendant sold was a family property, the 1st Defendant had already admitted of the fact that the land was the property of the late father in both her statement of defence and in paragraph 2 of her witness statement. During cross-examination of 1DW1, she again admitted that the land in dispute was the self acquired property of Kwaku Anane but devolved to the family upon his death and it was not gifted to anyone. Indeed, if Kwaku Anane's land was not gifted in his

lifetime to anyone then it could also not have metamorphosed into a family property upon his demise. Furthermore, both 1st Defendant and her witness alluded to the fact after the death of Kwaku Anane, the family did not apply for letters of administration to administer his estate. The question a reasonable mind would ask is if indeed the land the 1st defendant sold was a family property and not the self-acquired property of Kwaku Anane, why would his family require letters of administration in respect of same?. It is evident thus that the land the 1st Defendant sold to the vendor of the 2nd Defendant was the self-acquired property of the late Kwaku Anane. The 1st Defendant also sought to impress it upon this Court that the land was not shared among the children of his late father and no letters of administration had also been granted for the administration of his estate. These admissions notwithstanding, she also went ahead to sell the land to Kofi Boateng when she knew very well that no letters of administration had been granted in respect of the late father's estate. In law, what the 1st Defendant did would amount to intermeddling which is a criminal offence under our laws since she is seeking to use the non-existence of letters of administration as defence in respect of the sale of her father's land. The land in contention being the self-acquired property of Kwaku Anane devolved unto the surviving spouses if any and children by operation of law.

Having come to the finding that the land in contention was the self-acquired property of the late Kwaku Anane, which devolved unto the children, the next question posed to be answered in this judgment is whether or not the 1st Defendant had capacity to sell the said land. It is the case of the Plaintiff that the land was divided into two upon their father's demise. The 1st Defendant and one set of the siblings took possession of one part whilst the Plaintiff and a second set of siblings took possession of the other half. However, to his dismay, he realized that the 1st Defendant had sold the part belonging to his set of siblings. The 1st Defendant on the

other hand contends that she has been farming on the portion she sold out to the vendor of the 2nd Defendant for 14 years. She denied that the land had been divided among the siblings and thus when she was faced with financial challenges and had to send the daughter to the training college, she went to see the aunt, Akua Kyeiwaa (1DW1) who consented to the sale of the land and went on to find her buyer. It is the opinion of the Court that since the land was the property of Kwaku Anane and it devolved unto the children by operation of law and as it was not shared per the contention of the 1st Defendant, it remained the property of all the siblings as a whole. Thus the 1st Defendant could not have sold the land to the grantor of the 2nd Defendant without the consent and concurrence of her other siblings. If it was the case that the 1st Defendant admitted that the land was shared among the siblings or gifted to the siblings by the late father, the 1st defendant could also not have sold the portion belonging to the other siblings as she had no title to transfer to the buyer in the first place. The 1st defendant has argued that she has been farming on the land since the demise of the father. In the view of the Court her farming on the land did not ripen into ownership in the face of evidence that she was asked by the siblings to farm on the land to prevent encroachers from taking over the land. She therefore did not have any title to transfer as she only acted as caretaker for herself and siblings. For the law is that a person who has no interest in a land cannot transfer any interest in the same land. The latin term for this principle is *nemo dat quod non habet*. The principle was succinctly put by the Supreme Court in the case of **SEIDU MOHAMMED v SAANBAYE KANGBEREE [2012] 1 SCGLR 1182** as “the latin maxim operates ruthlessly and by it, a stool, a family or individual owner of land could convey the title it has or an inferior title which had not been granted at the material time of the conveyance to another but any purported grant of title it has not got or which is already vested in a person by virtue of an earlier grant would render the subsequent grants null and void”.

In this instance, since the 1st Defendant could not have sold the land without the consent and concurrence of the other siblings, Kofi Boateng acquired no title to the land in the first instance. He therefore could not have transferred any title in same to the 2nd Defendant. At best the 2nd Defendant's title to the land in dispute was defective since his vendor had no title to the land, he purportedly sold to him.

The aunt also did not have any authority to consent to 1st defendant's sale of the land not being the owner of the land. The land was neither a family property nor was she the head of family to have consented to its sale. 1DW1 and the 1st Defendant in my view colluded to deprive the children of Kwaku Anane of their father's bona fide property which devolved unto them upon his death.

I move on to the last issue which is whether or not the 2nd Defendant is a bona fide purchaser for value without notice?

In **APPOLO CINEMAS ESTATES (GH)LTD V. CHIEF REGISTRAR OF LANDS [2003-2005] 1 GLR 167**, the Court explained the circumstances under which the plea will be available to a party. The Court held that: **“the plea of bona fide purchaser for value without notice was an absolute, unqualified and unanswerable defence against the claims of any prior equitable owner. However, in order for the plea to be successfully invoked, the party relying on it had to prove that he had: a) acted in good faith; b) paid consideration in money; c) the legal estate properly vested in him; and d) no notice, actual or constructive of other encumbrances on the property”**.

In the opinion of the Court, the 2nd Defendant had constructive notice of the fact that the land was encumbered and therefore cannot be said to be a bona fide purchaser for value without notice. Both 2nd Defendant and his witness, 2DW1 both admitted under cross-examination that when they went onto the land it had already been

graded. In fact, the 2nd Defendant further added that when he realized that the land had already been cleared, he went to see 1DW1 who assured him that the land was not encumbered and advised that he begun exercising overt acts of ownership which he complied with. By this admission, the 2nd Defendant could be said to have constructive notice that the land he purchased from Kofi Boateng was somewhat encumbered which should have caused him to relent on developing the land.

In the Supreme Court case of **KUSI & KUSI v BONSU [2010] SCGLR 60**, the law as clearly summed up in the judgment of the majority through Justice Georgina Wood (CJ) at page 88 thus: **“it is trite learning that any person desirous of acquiring property ought to properly investigate the root of title of his vendor... in our view the steps they took are not adequate steps of a prudent purchaser of this particular property. Indeed, had they extended their search to the Lands Department, Kumasi, the Statutory body that kept official records of land in Kumasi, they would have known that the land was encumbered.”**

The 2nd Defendant averred that his uncle was in search of land to buy and enquiries led him to Kofi Boateng, 2DW1, who informed him that he had land which he was selling. After inspecting the land and consulting Akua Kyeiwaa (1DW1), he made payment for the land to Kofi Boateng. That was all the due diligence the 2nd Defendant conducted before purchasing the land. A prudent purchaser would have further investigated to find out the reason his vendor after purchasing the land was so desirous of selling same within such a short period. To the extent that 2nd Defendant went to see 1DW1, Akua Kyeiwaa, when he was purchasing the land from Kofi Boateng and not the 1st Defendant seems to suggest that he apprehended that the land he was purchasing from Kofi Boateng could be encumbered. Moreso, after purchasing the land from Kofi Boateng he was informed by the Plaintiff that the land was not the bona fide property of 1st Defendant, Kofi Boateng’s vendor and

thus he should go for a refund of his money as the land was encumbered. The 2nd defendant with this warning notwithstanding went ahead and commenced building on the land when he had clearly been put on notice of the defective title he had acquired from his vendor.

It is the opinion of the Court that the whole sale of the land was unlawful as the 1st Defendant sold the land which formed part of the late father's estate without letters of administration; she had no capacity to transfer the land. The court would advise the 2nd Defendant to take the 1st Defendant and Kofi Boateng on for a refund of the money expended on the land. The Court further advises the Plaintiff, 1st Defendant together with their other siblings to take steps to procure letters of administration to administer the estate of their late father and distribute same in accordance with law.

CONCLUSION

In conclusion the Plaintiff succeeds in his claim for declaration of title to land. I further make a declaration that the land in dispute was the self-acquired property of the late Kwaku Anane and make an order against the defendants for recovery of same and perpetual injunction restraining the Defendants and their agents, privies from claiming or interfering with Plaintiff and all children of Op. Kwaku Anane enjoyment of the land. I further award cost of GHC 1000.00 in favour of the Plaintiff against the Defendants.

SGD

H/W JOSEPHINE SARFO (MRS)