IN THE DISTRICT COURT, AGONA AHANTA IN THE WESTERN REGION HELD ON WEDNESDAY THE 22ND DAY OF MARCH, 2023. BEFORE HIS WORSHIP SIDNEY BRAIMAH – DISTRICT MAGISTRATE

WR/AA/DC/A1/6/2022

EBUSUAPAYIN MBRAYIE SUING FOR HIMSELF AND ON BEHALF OF NANA EWIAMANLE ASAMAGAMA STOOL OF AKWIDAA ::: ::: **PLAINTIFF**

VRS

BADU BAELE OF AKWIDAA OF AKWIDAA ::: ::: **DEFENDANT**

J U D G M E N T

The endorsement on the writ of summons issued at the instance of the plaintiff at this court claims the reliefs stated below against the defendant.

(1) Recovery of possession of all piece or parcel of land situate and being at Akwidaa measuring 50ft X 60ft and shared common boundaries with Arko Borlo, Kakra and a refuse dump on another side.

(2) Special damages for trespass.

(3) Perpetual injunction restraining defendant himself, his worker, his agents, assigns and privies from having any dealing on the land.

Upon service of the writ of summons and statement of claim, counsel for the plaintiff raised a preliminary legal issue in respect of the capacity of the plaintiff under Order 1 rule 4(2) of District Court Rule, 2009 [C.I 59]. The court disagreed with the submissions raised by counsel for the defendant and dismissed the application.

In his written statement and witness statement filed at the court, plaintiff averred that he is the head of Nana Ewiamanle Asamagama Royal Stool family (hereinafter known as Ewiamanle family) in Akwidaa. Plaintiff submitted that sometime in 2021 he noticed that somebody was developing a portion of his family land and that he caused announcement to be made at the local FM station to instruct the unknown developer to disclose his or her identity to him. In default of appearance and disclosure of the identity of the unknown to him as instructed; plaintiff caused a signpost with the words "Stop Work" to be planted on the land in issue. Thereafter, defendant introduced herself as the person who was developing the land in issue and that all the invitations subsequently extended to defendant to engage her in respect of the land in issue came to naught. Plaintiff contended that the land in issue is his family land and that defendant is not a member of his family and therefore has no interest or right to develop it without the consent and concurrence of the family of which he is the head. According to plaintiff, the intransigence of the defendant to honour the invitation by plaintiff's family caused the family to institute the present action against her.

In her defence, defendant submitted that she is a member of Nana Borlo Kofi family of Akwidaa (hereinafter known as Borlo family) and that the land in issue forms part of a large tract of land granted to her family over 200 years ago by Nana Akulo Numa Royal family (hereinafter known as Akulo family) and that her family has been in undisputed

and unfettered possession thereafter. Defendant contended that a member of plaintiff's family was recently enstooled as the Chief of Akwidaa and thereafter plaintiff's family began to lay adverse to all land in Akwidaa as stool lands. Defendant asserted that her family land is not stool land and that she had been on continuous occupation of the land in issue for more than 20 years until the plaintiff started laying adverse claim to the land in issue and that she has been building an uncompleted building on the land for the past 15 years. The defendant denies the allegations and reliefs sought by the plaintiff and further submit that plaintiff has no capacity to mount the present action against her and that the action is statute barred.

On the record, the following issues are raised for determination:

1. Whether or not the land in dispute belongs to plaintiff's family?

2. Whether or not the plaintiff is entitled to recovery of possession from the defendants?

3. Whether or not the present action is statute barred?

4. Whether or not the plaintiff is entitled to special damages for trespass?

5. Whether or not the plaintiff is entitled to his reliefs?

In civil case, a party who asserts assumes the burden of proof. The court in the case of **Yorkwa v Duah [1992-93] GBR 272** explained the legal requirements in **sections 11, 12 and 13 of the Evidence Act, 1975 (NRCD 323),** on the burden to adduce evidence and burden of persuasion which together constitute the standard of proof, Brobbey JSC, in that case held:

> *"I am of the view that the expression burden of persuasion should be interpreted to mean the quality, quantum, amount, degree or extent of evidence the litigant is*

obliged to adduce in order to satisfy the requirement of proving a situation or fact. The burden of persuasion differs from the burden of producing evidence... the burden of producing evidence means the duty or obligation lying on a litigant to lead evidence. In other words these latter sections cover which of the litigating parties should be the first to lead evidence before the other's evidence is led..."

Accordingly, the plaintiff who is the proponent of this case has the obligation to lead evidence in order to avoid a ruling being made against him. The rules of evidence are also trite that the burden of proof may shift from the plaintiff who bore the primary duty to the other. It is not necessarily borne throughout the case with a Plaintiff or Defendant. This legal principle is stated at **section 14 of NRCD 323**. It states that:

"Except as otherwise provided, unless and until it 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".

In reference to the above statutory provision; the Supreme Court in the case of **Re Ashalley Botwe Lands; Adjetey Agbosu v Kotey [2003-2004] SCGLR 420** held at holding 5 that:

"It is trite learning that by the statutory provisions of the Evidence Decree 1975 MRCD 323, the burden of producing evidence in any given case is not fixed, but shifts from party to party at various stages of the trial, depending on the issue(s) asserted"

In the discharge of the burden of proof; the courts have in legion of cases reiterated that it is the quality of evidence that proves and discharge the burden on the person who assumes the burden of proof and not the number of witnesses called. **(See Akrofi v Otenge [1989-1990] 2 GLR 244, Baah Ltd v Sule Brothers [1971] 1 GRL 110; Bisi v**

Tabiri [1987-88] 1 GLR 360; Gyamfi v Bada [1963] 2 GRL 596 and Takoradi Flour Mills v Samir Faris [2005-2006] SCGLR 882.

What amounts to prove in law was espoused in **Majolagbe v Larbi [1959] GLR 190 at 192** explained what amounts to prove in law. I reproduce:

> *"Proof in law is the establishment of facts by proper legal means. Where a party makes averment capable of proof in some positive way, e.g. by producing documents, description 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 his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he asserts is true".***(See Zabrama v Segbedzi [1991] 2GLR 221).**

Another legal requirement in land cases as in the instant case is that the plaintiffs must succeed on the strength of his own case and not on the weakness in the case of the defendant. **(See Tanoh v Abban-Mensah and Ors Part 1 (1992/93) GBR 308 C.A**)

On the reliefs sought, the plaintiff did not seek declaration of title to the land in dispute but sought trespass, recovery of possession and perpetual injunction. It is trite that where a party makes claim for damages for trespass, and injunction, the title to the particular land is automatically put in issue. In **Nkyi XI v. Kumah** [1959] G.L.R. 281, C.A. the court reiterated the legal principle stated by the Judicial Committee of the Privy Council in the case of **Kponuglo & Ors. v. Koddadja 2 WACA 24**. I refer:

> *"Where in an action for trespass a defendant, as in this case, pleads ownership of the land (i.e. that he has a better right to possession of the land than the plaintiff has) the plaintiff's title is put in issue; and the plaintiff cannot succeed unless he proves a right to possession which is superior to that of the defendant.*

Consequently, in an action for trespass, if it is proved that the plaintiff has no title at all to the land, and that the defendant's entry is upon permission of the true owner, the plaintiff's claim must fail".

Accordingly, the law enjoined the plaintiff to establish his family's title to the land in dispute on the preponderance of probability. It is settled judicial opinion that a person claiming title to land has to prove his root of title, mode of acquisition and various acts of possession exercised over the disputed land. **(See Mondial Veneer (GH) Ltd v Amuah Gyebu XV [2011] 1SCGLR 466).** The proof can be established either by traditional evidence or by overt acts of ownership in respect of the land in dispute. Again a party who relies on a derivatory title must prove the title of his grantor **(See Awukuv Tetteh [2011] 1SCGLR 366).** Further, to prove ownership through possession, the possession must be long, peaceful and uninterrupted. **(See also Akoto v Kavege [1984-86] 2GLR 365).**

Accordingly, the plaintiff is required to adduce evidence in support of his root of title pertaining to acts of ownership and possession including and not limited to his personal or family's earlier successful litigation in defence of the land in dispute.

It is patent of the face of the pleadings filed by plaintiff and the witness statement filed that the plaintiff is silent on the mode of acquisition and roots of his family's title to the land in dispute. At paragraphs 7 and 9 of Statement of Claim and paragraphs 8 and 10 of witness statement adopted as evidence-in-chief for plaintiff; deposed simpliciter that plaintiff's family is the owner of large parcel of land of which the land in dispute forms a portion. The plaintiff also deposed at paragraph 8 in the witness statement that the land in dispute was granted to one Ekuabasabea and her husband by the late Nana Ewiamanle I. The rules governing pleadings imposes on the plaintiff the duty to depose to material facts in respect of acquisition and ownership of the purported ownership of

the land in dispute (See Order 18 rule 3 of C.I 59). On the face of the Statement of claim; the court finds the material facts deposed on the issue of the title of the plaintiff's family to be general and vague to material facts relating to mode of title to the land in dispute; roots of title and any recent acts of possession.

The defendant denied that afore-stated averments in the Statement of Claim in paragraph 3 of the Statement of Defence. Defendant and her witnesses including DW1; a member of Borlo family and DW2, the head of Akulo family denied the assertions by plaintiff that land in dispute belongs to his family. Having categorically denied same, the burden of proof lies on the plaintiff to adduce sufficient evidence to assert is family's title to the land in dispute. On the above burden, counsel for defendant submitted in his address that in the light of the denial rendered by defendant of plaintiff's family title to the land in dispute, plaintiff woefully failed to assume his obligation under the law to proof his family's title to the land in dispute. Counsel contended it is incumbent of plaintiff to establish his family's title and or call credible witnesses to establish matter capable of positive proof and that mere repetition of averment under oath does not constitute proof in law. Counsel relied on **T. K Serbeh & Co. Ltd v. Mensah [2005-2006] SCGLR 341 at 360 and Majolagbi v. Larbi [1959] GLR 190.**

It would be recalled that the crux of the defence is that the land in dispute forms part of a parcel of land granted to Borlo family by Akulo family over 200 years ago. The record shows that plaintiff did not exercise an option to file a reply to contest those material facts in the face of denial of his family's title to the land in dispute. Under cross-examination; plaintiff denied that the land in dispute forms part of the parcel of land granted to Borlo family but admitted that he is litigating with the Akolu family to recover the parcel of land. In cross-examining DW2, plaintiff again made admissions

that the land in dispute forms part of a large tract of land granted to Borlo family centuries ago. I refer to the relevant portion of the cross-examination of DW2.

Q. Which particular people sat down and granted the land to Nana Borlo Kofi?

A. Nana Akolunuma and his elders.

Q. Which of the Nana Akulonuma are you referring to? Is it Nana Akolunuma I, II or III?

A. The traditional history passed on to us is that Nana Akolunuma granted the land in dispute to Nana Borlo Kofi?

Q. It is Nana Ewiamanle and his chiefs who granted the land in dispute to Nana Borlo Kofi.

A. It is not true.

Q. Why was the land in dispute granted to Nana Borlo Kofi?

A. It was granted to Nana Borlo Kofi to stay and farm on it. Nana Borlo Kofi lived on part of the land and cultivated the rest. In his absence, his descendant, the defendant occupied it.

Q. It is not true. The land was granted to him to rear livestock and poultry.

A. I do not know whether he reared livestock on the land. It was a long time ago. All I know is that the defendant later took possession of the land in dispute.

Q. Nana Kofi Borlo was granted the land by Nana Ewiamale to farm on the land.

A. It is not correct;

Q. If that were not so, then on whose land did Nana Neeba and Selekyi cultivate their coconut?

A. They did not plan any coconut on the land.

On the above exchanges between plaintiff and DW1, they are consensus ad idem on the material fact that the land in dispute forms part of the land granted to Nana Borlo Kofi when he migrated to Akwidaa many years ago. The only point of divergence of evidence between them is the issue of which family granted the parcel of land to Nana Borlo Kofi. The law is that where a person with allodial title or a lesser title in land grants a parcel to settler family or groups to occupy and take possession thereof, they acquire usufructuary title to the land they reduce into their possession. I refer to the case of **Oppong Kofi & Others v. Attibrukusu III (2011) 1 SCGLR 176**. I quote the ratio in extenso for emphasis:

> *"It held that the customary law principle that a person or group of persons can reduce portions of land to their possession and thereafter claim ownership of it applies only to a number of the family who occupy land belonging to the family. Where members of a different family migrate from one place to a totally different place and they are given land i.e. settlement area, it is to be assumed, and it is indeed common sense, that the settlers would be confined within the settlement area. If the settlers stray outside the settlement area, they become trespassers of the area they have taken without authority, given that the land outside the*

settlement area is presumed to belong to the original owners. Again, where the settlement area is not clearly defined, the boundary can reasonably be ascertained from a reasonable distance from the boundaries of the settlement area. Finally, members of the original settlers who originally owned the settlement area have the right to develop and occupy areas outside the settlement area. Occupation outside the settlement area can be done by farming and building thereon. Such acquisitions are rights, which settlers do not have and cannot have by reasons of the fact that they are strangers to the original family that owns the land. The settler acquires usufructuary, determinable, or possessory title of the area of their grant".

In the instant case, the admission by parties and their witnesses that the land in dispute is part of the large parcel of land granted to defendant's ancestor Nana Kofi Borlo by the then Chief of Akwidaa many centuries ago whether by Nana Ewiamanle or Nana Akulonuma means therefore that no issue of trespass outside the grant arises. Therefore, granted without admitting that plaintiff's family granted a large parcel of land including the land in dispute to defendant's family, Borlo family by occupying the land and farming on it acquires usufructuary title in accordance with custom and the grantor stool or family cannot dispossess the family from the land except where the family has denied the stool of its allodial title and has been given a hearing or has abandoned the land for a considerable period of time. (**See Oblee v. Armah and Affipong (1958)3 WALR 484).**

It is instructive to note that the admission by plaintiff that the land in dispute was granted to Nana Borlo Kofi is at variance with paragraph 10 of his witness statement that his family has been in unfettered possession of the land in dispute for centuries. It is trite law that where a party adduced evidence that is at variance to his or her pleadings whilst that of his opponent is consistent with his or her pleading; that

evidence is not reliable. The legal effect of evidence that is at variance with pleading is to make the evidence weak and unreliable (See Appiah v. Takyi [1982-83] GLR 1 C.A and Odametey Vrs Clocuh [1989-90] 1 GLR 331, S.C).

It is settled law that a witness whose evidence on oath is materially in conflict on the same issue is not worthy of belief especially when they are not reconcilable to the body of evidence on the record.(See section 80(2) of NRCD 323)

The admission by plaintiff under cross-examination that land on which defendant has her mud brick house was not granted to her by plaintiff or his family and that plaintiff had never challenged her occupation of that plot of land. That admission created a rebuttable presumption of ownership in defendant on a land which plaintiff is claiming title. In his response, plaintiff explained his failure to challenge defendant for her occupation of his alleged family land on the grounds that she was only occupying a mud house and that as soon as she started building the sandcrete house he challenged her. I refer to the relevant portion of the plaintiff's cross-examination:

Q. Can you tell the court how many years the defendant had lived in the current place as you know it.

A. The defendant lived in her old place for about 15 years. She is building a new house and she has not moved into it yet.

Q. I am putting it to you that defendant does not have any other land apart from where she is currently residing which you have known for the past 15 years.

A. It is not correct.

Q. And the building she is now putting up is a completed building she been living in for more than 15 years.

A. It is not true, If she had completed the building, I would not have summoned her.....

Q. I am putting to you that the defendant never came to you for the land she is occupying for the past 15 years.

A. It is true that she did not come to me for land. Because the old house. We call you when you start building a cement block house.

On the exchanges stated above, the only logical and deductible inference that is drawable is that the defendant has her sandcrete building on the same plot of land on which she had occupied for the last 15 years with notice to plaintiff. The record is also conclusive that the defendant either by herself or jointly with her late mother applied to the plaintiff family, or that plaintiff's family ever challenged the possession of the land on which she occupies. The court finds that explanation by plaintiff that his family permitted the entry to their family land to people who only build mudhouse but would assert their title when the person build a sancrete house. The court finds the assertion highly improbable. It is not reasonable for a family to permit open possession and overt acts of possession like building a mud house on their family land without their consent for over 15 year. Again, if the plaintiff is contending that the land on which defendant is/has built the sandcrete house and the mud house are distinct and yet both lands belong to his family, then why is he not applying to the court for recovery of possession of both plots of land in the face of open denial of his family's purported title? On the facts, the court finds it reasonable probable that plaintiff or his family did not contest

the defendant's occupation for the past 15 years because he knew he did not have the capacity to challenge her occupation. The admitted acts of ownership and the long undisturbed and unfettered possession of the land in dispute by defendant vests in her rebuttable presumption of ownership in her favour and shifts the evidential and legal burden on plaintiff rebut the presumed facts.

On the evidence, the court finds that the plaintiff corroborated the evidence adduced by the defendant in respect of her root of title to the land in dispute granted to her family. On the contrary the plaintiff woefully failed to discharge the evidential and persuasive burden on his to establish his family's title to the land in dispute on the balance of probabilities. The record is bereft of any cogent evidence in respect of the plaintiff's root of title to the land in dispute; the mode of acquisition of the land in dispute by his family or recent act of ownership or possession to cement his traditional evidence relating to the subject matter in dispute.

The court is of the humble opinion that the evidence adduced by plaintiff to support his claim is immaterial and of very little probative value. The court there finds as fact the plaintiff is not able to adduce sufficient evidence to establish his family's title to the land in dispute. Having failed to established issue 1, the court shall not proceed to determine the other issues raised for determination. The court accordingly dismisses the reliefs sought by plaintiff. The court restrains the plaintiff, himself, his family, his heirs, assigns, successors, servants and agents from doing any act that may interfere with the quiet enjoyment of the defendant in the land in dispute.

In assessing cost, the court inter alia, takes into consideration, the number and reasons for adjournments, processes filed and the period of litigation. Accordingly, the court awards cost of Gh¢3000.00 against the plaintiff. Interest thereof will be at the prevailing bank rate and same will take effect from today until the entire amount is fully paid.

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H/W SIDNEY BRAIMAH

(DISTRICT MAGISTRATE)