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

SUIT NO. A1/6/2020

1.EBUSUAPANYIN SAMUEL YANKEY
2. OMANPANYIN KWESI ::: ::: **PLAINTIFF**
3. NANA ACHEAMPONG KWAIDO
4. NANA ANOLUMITO KWAME
ALL OF ALOBANKATA

VRS:

EZEABENYA OF ALOBANKATA ::: ::: **DEFENDANT**
OF ALOBANKATA

J U D G M E N T

The plaintiffs issued a writ of summons at the District Court; Agona Nkwanta claiming against the defendant for a number of reliefs.

(1) An order directed at the defendant to demolish the structure he had constructed on 1st plaintiff Royal Ebiradze land which had been given to Oman of Elobankata for the use of Community Centre.

(2) Perpetual injunction restraining defendant, his agents, assigns and persons

claiming through him from interfering with plaintiff and the Oman of Ellobankata's ownership of the said land.

(3) Recovery of possession.

The 1st plaintiff testified on his own behalf as the head of Royal Ebiridze family of Ellobankata and that of 2nd, 3rd and 4th plaintiffs. The 2nd, 3rd and 4th plaintiff are described as elders of the Oman of Ellobankata. According to 1st plaintiff; his family granted a portion of land to the community (Oman) to use it to build a Community Centre. The community through the assistance of the then Member of Parliament (MP) built the Community Centre on the portion of the land granted to the Oman. According to the plaintiffs, the defendant subsequently trespassed on the part of the land granted to the Oman to build a structure very close to the Community centre and that the distance between the defendant's building structure and the Community Centre flouts the provision of Local Governance Act, 2016 [Act 936] and as a result the Municipal Assembly has refused to issue a building permit to defendant nevertheless defendant persisted in building the structure on portions of the land granted to the Oman and in direct violation of building regulations stated in Act 936. The plaintiff therefore prays to the court to grant their reliefs.

The defence disputed the evidence adduce by plaintiffs against him and submitted that land in dispute is distinct from the land granted to the Community to build the Community Centre and that the land in dispute was granted to the plaintiff's later father by the stool and that his late father erected the mud house on the land granted to him. The mud house fell into ruins. DW1 and DW2 further contended that the structure in issue is being built on the exact place where the mud house was located and that the

defendant with the consent of the stool is building a cement block building on the exact place where the mud house was formerly situate. The defendant's witnesses denied the assertion that 1st plaintiff is the head of Ebiradze Royal Stool family of Ellobankata and he is a member of one of the six branches of Ebiradze family and not a member of Ebiradze Royal Family of Ellobankanta. DW1 further submitted that the branches of the said Ebiradze families do not inherit each other. The defendant witnesses further contended that 2nd, 3rd and 4th plaintiffs are not elders of the Oman of Ellobankata and describe them as ordinary members of the community. The defence urged the court to dismiss the reliefs sought by the plaintiffs.

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

1. Whether or not the court has jurisdiction to make an order for demotion of the subject matter in dispute?

2. Whether or not the plaintiffs have the capacity to institute the present action against the defendant?

3. Whether or not the defendant has encroached on the portion of land granted to the community to build a Community Centre?

4. Whether or not the plaintiff are entitle to recovery of possession of the land in dispute?

5. Whether or not the plaintiff are entitle to their reliefs?

In civil cases, the plaintiff bears the burden to adduce sufficient evidence to prove her case on the preponderance of probabilities as stated at **sections 11(4) and 12(2) of**

Evidence Act, 1975 (NRCD 323). With regard to the burden of proof on the parties to the suit, it is stated in the case of **In Re Ashalley Botwe Lands; Adjetey Agbosu & Ors Vrs Kotey & Ors [2003-2004] SCGLR 420 and Sumaila Bielbiel (No.3) Vrs Adamu Dramani & Attorney-General [2012] SCGLR 371** by the Supreme Court that in general, the defendant needs not prove anything in a civil case, given that it is the plaintiff who instituted the action against him. In respect of the burden of producing evidence on the issues admitted or denied, the apex court held in the above cases that burden is not fixed but shifts from one party to the other at various stages of the trial, although the legal burden or burden of persuasion remains with the plaintiff. Brobbey JSC puts it succinctly in the case of **In Re Ashalley Botwe Lands; Adjetey Agbosu & Ors Vrs Kotey & Ors [supra]** at page 425. I reproduce:

> *" …If the court has to make a determination of a fact or of an issue and that determination depends on evaluation of facts and evidence, the defendant must realise that the determination cannot be made on nothing…The logical sequel to this is that if he leads no such facts or evidence, the court will be left with no choice but to evaluate the entire case on the basis of the evidence before the court."*

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

It would be recalled that the Honourable Chief Justice sent a circular to all Judges, Magistrate and Justice of trial court dated 31st May 2021; with reference number SCR9 on creeping practice by trial court in relating of demolition orders. In that circular, the Chief Justice admonished the Bench for granting orders for demolishing of immovable properties whether as an independent relief sought by a party in the suit or when

granting leave for Writ of Possession to issue to enforce judgment for recovery of possession. The circular is particular that an order for demolition of an immovable properly as a subject matter of dispute cannot be granted as an independent relief or as one of the methods of enforcement or execution of judgment of this court under Order 21, 22, 23 and 24 of District Court Rules, 2009 [C.I 59] or under Order 43, 44 and 45 of the High Court (Civil Procedure) Rules, 2004 [C.I 47]. The circular specified that under rules of court; it is the sole responsibly of the judgment creditor to demolish any unwanted structure on the land in dispute and not the court. Accordingly, the court finds as fact that it does not have jurisdiction to grant relief 1 sought by the plaintiff. The court therefore dismisses relief 1.

The evidence on record is conclusive that a parcel of land was granted or donated to the community and that a Community Centre has been built on it. The point of departure from the above conclusive evidence is that plaintiff alleged that the grant was made by his family and that the plot of land granted extends to where the defendant is building his structure. The contrary evidence adduced by defendant is that the land granted to the community was grant by the Stool family and that it is distinct from the land donated to the community.

The law is settled that once the interest of the plaintiff's family has been transferred through a gift or grant to the community; there was no interest left for the family to claim. The above law is based on the doctrine of **"Nemo dat quod non habet".** Therefore, whatever interest the purported Ebiradze Royal Stool family or the plaintiff family had in the land was divest when the donation was made. (**See: Dovie & Dovie V Adabunu (2005-2006) SCGLR 905 and Brown V Quarshigah (2003-2004) 2 SCGLR 930**). The land purported donated by plaintiff's family now vested in the community and held in trust for the community by the Stool. **Article 295 of 1992 Constitution** defines:

> *"stool land" includes any land or interest in, or right over, any land controlled by a stool or skin, the head of a particular community or the captain of a company, for the benefit of the subjects of that stool or the members of the community or company".*

Accordingly, the proper person to sue and be sued is the stool in respect of the land in issue and not the purported grantor family which has no interest in the land. The record does not disclose that purported encroachment of the land is known to the stool and that the stool either in conjunction with defendant or for pecuniary advantage is not interested in defending the land donated to protect the property for and on behalf of the community.

Granted that the plaintiffs are head of family and elders of the community as alleged, they sued in their personal capacities and not in a representative capacity for and on behalf of Ellobankata community. It is trite and settled law that when a person institute and action to protect family or stool property he must sue in a representative capacity; that is for and on behalf of the family or stool. Contrary to the established procedure, the plaintiffs are further seeking an order of perpetual injunction against the defendant from interfering with the plaintiffs in their personal capacities and the Oman of Ellobankata's ownership of the land in dispute. When a party to a suit seeks an order for perpetual injunction together with recovery of possession of land; then the title of land is automatically put in issue.**(See Ebusuapanyin Yaa Kwesi Vrs Arhin Davis & Ors [2006] 2 MLGR).** Accordingly, the prayer by plaintiff for an order to bar the defendant from interfering with plaintiffs renders their case inconsistent with purported ownership of the Oman for the land in dispute.

The court is of the humble opinion that the plaintiffs have not established any capacity to seek for reliefs to the land in dispute to be declared in their favour or that of the Oman of

Ellobankata. This is because; per the plaintiffs own case, the land has been donated to the community and no longer the property of 1st plaintiff's family or the plaintiff have any personal interest in the land in dispute. Capacity is fundamental in every proceeding and can therefore be raised by the Court on its own. **(See: Bimpong Buta V General Legal Council (2003-2004) 2 SCGLR 1200).**

A party who has no capacity to sue should not be given a hearing even if he has a cast iron case against the opponent. **(See: Sarkodee IV Boateng II (1982-1983) 1 GLR 715 SC and Manu V Nsiah (2005-2006) SCGLR 25)**

The law is settled that, if a party brings an action in a capacity he does not have, the writ is a nullity so are the proceedings and the judgment which would find on it.**(See: Republic V High Court Accra, Ex-parte Aryeetey (Ankrah Interested Party) (2003-2004) SCGLR 398.)**

Having failed to disclose the relevant capacity to institute the preset action; the court dismisses the suit against the defendant.

I will award cost of Gh¢5,000.00 in favour of the plaintiff against the defendant

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H/W SIDNEY BRAIMAH

(DISTRICT MAGISTRATE)

Counsel for defendant: George Agbottah Esq.