

IN THE DISTRICT COURT
AGONA SWEDRU - A.D. 2023
BEFORE HIS HONOUR ISAAC APEATU

Civil Suit No A1/02/2023

16th June, 2023

HANNAH MENSAH @ ESI AWOYO

Plaintiff

VERSUS

KOBENA EBO

.....

Defendant

JUDGMENT

This is a suit filed for declaration of title in respect of a piece of land situate at Yaabem in Agona Swedru which boundary has been described in the writ of summons. The Plaintiff traced her source of title to the land to one Kofie Owuayem. According to her, the said Kofie Owuayem acquired the land and put up a building on it. That the land belongs to her having passed on through a line of successors to her. That the even though the Defendant is aware of this fact, he has caused the building to be demolished and is hastily constructing a new one in its place. Tried as she did, the defendant would not budge. Unable to get the Defendant to abate his trespassory acts, the Plaintiffs filed a writ of summons on the 11th day of August, 2022 and sought the following reliefs:

- a. Declaration of title and recovery of possession of the land described in paragraph 3 of the statement of claim
- b. Perpetual injunction restraining the Defendant, his agents, servants, workmen, privies, assigns and all those deriving any authority from her to desist from having any dealings on the disputed land.
- c. An order directed at the Defendant to demolish any structure or building erected on Plaintiff's land forthwith.
- d. General damages for trespass
- e. Costs
- f. Any further relief the honourable court may deem appropriate.

In a Statement of Claim filed alongside the Writ of Summons, the Plaintiff averred to the effect that she is a Prophetess at Apostles Church branch No.2 and a customary successor of the late Kofie Owuayem. That the Defendant is a member of Apostle Church branch No. 1 and a grandnephew of the late Kofie Owuayem. That the late Kofie Owuayem acquired a parcel of land from the late Sub-Chief Kojo Yeboah on the 18th of August 1937. That the land is situated at Yaabem area at Agona Swedru in the Agona West Municipality of the Central Region of the Republic of Ghana referred from peg D823/ 17/2 for a distance of 4985.25 feet more or less on a bearing of 144.0 degrees to Peg A1 and commencing from Peg A1 is bounded on the North by S.R. Quarm and W.Y. Eduful's property measuring 104.4 feet more or less on a bearing of 093 degrees 49', thence to Peg A2 on the East by Eduful Road measuring 75.9 feet more or less on a bearing of 178.02 degrees, thence to Peg A3 on the South by Central Market Bebianeha Road measuring 109.5 feet more or less on a bearing of 271.22 degrees, thence to Peg A4 on the West by Keelson's property measuring 80.3 feet more or less on a bearing of 001.56, closing to Peg A1 containing an approximate area of 0.19 acre more or less. That the late Kofie Owuayem was put in immediate vacant possession of the land by his grantor and he constructed a house comprising of 7 rooms in all, numbered H/ No. YB 3/ 12 Yaabem, Agona Swedru. That the late Kofie

Owuayem entrusted the property to his three siblings namely; Abena Twiwaa, Ekua Afoa and Prophetess Ekua Kuma while he was away at his Cocoa farm at Akyem Osinase where he later died. That the property was tenanted by only Abena Twiwaa owing to challenges in her marriage. That after the demise of Abena Twiwaa, Prophetess Ekua Kuma succeeded her who was also later succeeded by Ama Kaya a daughter of Abena Twiwaa. That she was appointed the successor of Ama Kaya in the same line of customary succession. That she has exercised all customary responsibilities and functions as the trustee of the property of Kofie Owuayem on behalf of the household and herself since her appointment. That she has been recognised as the customary successor by all and sundry including the Defendant who, although living in the property, always reported incidents concerning the property to no other person than her for which she always intervened promptly and responsibly. That the two old houses on the property have been demolished by the Defendant and construction is hastily going on there even without a valid building permit. That several efforts have been made by the Plaintiff to bring an amicable resolution to this but all efforts have proved futile.

When the case was called in court, the Defendant failed to make an appearance. The court ordered that hearing notices be served on him to appear. Notices were duly served on the defendant severally by the Plaintiff which were duly proved to have been served on the defendant. Yet, he failed to appear in court or file any processes in defence of the Plaintiff's claims. Upon his failure to comply with the orders of the court and further failing to appear before the court upon the service of series of notices on him, the court assumed that the Defendant did not intend to mount any defence to the action and proceeded with the trial.

At the close of filing of written statements, the issues which the Court tabled for determination in this matter are:

1. Whether or not the land located at Yaabem, the subject of this dispute was

acquired by Kofie Owuayem.

2. Whether or not the said Kofie Owuayem entered into possession and put up a building on the land.
3. Whether or not Kofie Owuayem entrusted the property into the care of his female siblings while he was away on his cocoa farm.
4. Whether or not the Plaintiff is the successor-in-line to the late Kofie Owuayem and to the land in dispute.
5. Whether or not the Plaintiff has exercised control over the property as such customary successor on behalf of her household.
6. Whether or not the Defendant was entitled to enter into possession of the land and demolish the building thereon and to commence building on the land without the consent of the Plaintiff.
7. Whether or not Plaintiff is entitled to the claims as endorsed on her Writ of summons.

As I stated above, this is a case for declaration of title to land. As such, the Plaintiff bore the onerous burden to prove all that she asserted. It has been held by the Supreme Court in the case of **Abbey and others v Antwi V [2010] SCGLR 17** to the effect that in an action for declaration of title to land, the Plaintiff must prove on the preponderance of probabilities acquisition either by purchase or traditional evidence, or clear and positive acts of unchallenged and sustained possession or substantial user of the disputed land. Further reference can be made from the cases of **Odoi v Hammond [1971] 1 GLR 375 at 382, CA; Akoto II v Kanage (1984-86) 2 GLR 365 at 371, CA.**

The Evidence Act, 1975 (NRCD 323) states among others that the onus of producing evidence of a particular fact in civil cases is on the party against whom a finding of fact would be made in the absence of further proof: see Section 17(a) and (b) of NRCD 323. Section 17(a) and (b) of NRCD 323 therefore reads:

17. Allocation of burden of producing evidence

Except as otherwise provided by law,

- (a) the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof;
- (b) the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact.

It is also a basic principle of 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 a fact is more reasonable than its non-existence. This is the requirement of the law on evidence under sections 10 (1) and (2) and 11(1) and (4) of the Evidence Act, 1975 (NRCD 323).

The burden of producing evidence has been defined in Section 11 (1) of the NRCD 323 as follows;

“11 (1) For the purpose of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party”.

This burden to produce evidence is thus not static but could shift from party to party at various stages of the trial depending on the issue asserted. This provision on the shifting of the burden of proof is contained in Section 14 of NRCD 323 thus:

“14 Except as otherwise provided by law, unless 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 that party is asserting”.

This position of the law on evidence is confirmed in the case of **In Re Ashalley Botwe Lands, Adjetey Agbosu and others v Kotey and others [2003-2004] SCGLR 420 at page 425** where the Supreme Court per Brobbey JSC held that under the provisions of the Evidence Decree, 1975 (NRCD 323), the burden of producing evidence in any given case was not fixed but shifted from party to party at various

stages of the trial depending on the issues asserted and/or denied. And unless the burden shifts, the Plaintiff bears the burden of proof on all matters raised by the Claim and the standard of proof is on the balance or preponderance of probabilities.

It is also settled law that when the burden of proof is cast upon a plaintiff he/she must prove his/her case and win on the strength of the case presented and not on the weakness of the defendant's case. This principle was first established by the case of **Kodilinye v Odu (1935) 2 WACA 336** but has been commented on and shaped in succeeding cases. In the case of **Asare v Appau II [1984-86] 1 GLR 599, CA**, it was stated that:

“...the common run of land suits in the courts had, as the plaintiff, a person who claimed title to land, suing as the defendant, a person in possession of the land. Such a defendant needed not, and usually did not, seek any relief in the proceedings, being content with things as they were. In that event, the plaintiff must rely on the strength of his own case, i.e. prove his title and not rely on the weakness of his opponent's, i.e. lack of title in the defendant, so that if the plaintiff failed to prove that he was entitled to have a declaration made of his title to the land, the action ought to be dismissed, leaving the defendant in possession of the land.” See

Banga v Djanie [1989-90] 1 GLR 510, CA

It however bears emphasizing that where the Plaintiff was able to lead cogent evidence to establish title to the land without any further evidence, that raises a rebuttable presumption in his favour which ought to be dislodged by superior evidence. And that onus to dislodge the presumption is on the party against whom a ruling will be made if no evidence is led.

I have stated the obligations of proof placed on the parties. Having done so, I wish to run through highlights of the evidence led in the case. As I stated above, the Defendant did not make an appearance in court to defend the claims made against

him by the Plaintiff despite the notices served on him. That notwithstanding, the Plaintiff was duty bound to prove her claims in terms of the standard of proof by a preponderance of probabilities to have judgment entered on the reliefs she claimed in her Writ of Summons. Plaintiff therefore led evidence in proof of the averments she had made. She then called two other witnesses in support of her case. The Plaintiff's evidence is to the effect that she is a Prophetess at Apostles Church branch No.2 and a customary successor of the late Kofie Owuayem. That the Defendant is a member of Apostles Church branch No. 1 and grandnephew of the late Kofie Owuayem. That the late Kofie Owuayem acquired a parcel of land from the late Sub-Chief Kojo Yeboah on the 18th of August 1937. That the land situated at Yaabem area at Agona Swedru in the Agona West Municipality and gave the boundaries as containing an approximate area of 0.19 acre more or less. She attached as exhibit A, a site plan of the said land. That the late Kofie Owuayem was put in immediate vacant possession of the land by his grantor and he constructed a house comprising of 7 rooms in all, numbered H/ No. YB 3/ 12 Yaabem, Agona Swedru.

It was the further evidence of the Plaintiff that the late Kofie Owuayem entrusted the property to his three siblings namely; Abena Twiwaa, Ekua Afoa and Prophetess Ekua Kuma while he was away at his Cocoa farm at Akyem Osinase where he later died. That the property was tenanted by only Abena Twiwaa owing to challenges in her marriage and eventually succeeded Kofie Owuayem, upon his death. That after the demise of Abena Twiwaa, Prophetess Ekua Kuma succeeded her who was also later succeeded by Ama Kaya, a daughter of Abena Twiwaa. That all the above-named persons were in charge of Kofi Owuayem's house numbered H/ No. YB 3/ 12 Yaabem, Agona Swedru during their lifetime. That she was appointed the successor of Ama Kaya in the same line of customary succession and exercised all customary responsibilities and functions as the trustee of the property of Kofie Owuayem on behalf of the household and herself since her appointment. That she has been recognised as the customary successor by all and sundry including the Defendant

who, although living in the Property, always reported incidents concerning the property to no other person than to her (Plaintiff) for which she always intervened promptly and responsibly. That the two old houses on the property have been demolished by the Defendant and construction is hastily going on there even without a valid building permit. She attached as exhibit B series photographs of the said building. By reason of the matters aforesaid, the Plaintiff claimed as per the endorsement on her writ of summons.

At the close of the evidence for the Plaintiffs, the Defendant did not appear to cross-examine her. The witnesses for the Plaintiff also gave evidence in turns. However, no one appeared to cross-examine them on the testimonies given. As I have stated above, the Defendant continued to absent himself from appearing before the court to participate in the proceedings even though hearing notices were duly served on him to appear. In his continued absence, and after several warnings on the Defendant to appear without success, this court brought proceedings to an end having deemed it that the Defendant did not have any defence to the claims and gave its judgment. This line of action taken by this court is in line with the principle enunciated in a number of cases that where opportunity is offered to a party and he fails to take it, the court may go ahead to make a determination his failure notwithstanding. In the case of **Republic v Circuit Court; Dzakah [1984-86] 1 GLR 741** it was held that where the opportunity is given a party to appear in court and he fails to appear, he cannot raise a claim later that he was not heard. In such a case the party who fails to appear can be said to have deliberately abstained from taking advantage of an opportunity to be heard and no breach of the audi alteram partem rule can be said to have occurred. Earlier, the High Court in Sekondi had rightly held in the case of **Republic v Judicial Committee of Ahanta Traditional Council; Ex parte Bosomakora II [1982-83] GLR 231** as stated on the headnote that:

“In the instant case, hearing notices were served on the applicant on two separate occasions and yet he failed to appear. These showed that

the applicant was given sufficient notice and was aware of the hearing date. He could not therefore complain that the case was tried without him.”

This principle of law has been affirmed in recent cases of the Supreme Court: **Republic v High Court (Human Rights Division), Accra; Ex Parte Akita [2010] SCGLR 374; Republic v High Court (Fast Track Division) Accra, Ex Parte Ayikai (Akosoku IV – Interested Party) [2015-2016] 1 SCGLR 289.**

Having been fortified in my belief that the action taken by this court was in line with the law as enunciated above, I proceed to determine the issues raised for determination per the evidence available to the court. As I stated above, the only evidence available to the court was the evidence of the Plaintiff and her witnesses. The Defendant did not lead any evidence on his own. Be that as it may, this Court is enjoined to arrive at a decision on the evidence available, however inadequate. As was held in the case of **Yoguo v Agyekum [1966] GLR 482 at 505**, where some evidence of title is given by the plaintiff in a title case, no matter how indefinite or insufficient it may be, if not rebutted by a better or superior type of evidence, the trial court is perfectly entitled to consider it, and what credence or weight it decides to attach to it is entirely a matter for it. If it believes or accepts the particular piece of evidence on an issue of fact, its decision cannot be questioned unless it is based on a wrong principle of law. It has been held in a line of cases including **Abbey and others v Antwi V [supra]** that in an action for declaration of title to land such as this one, the Plaintiff, in order to succeed, must prove on the preponderance of probabilities acquisition of the land either by purchase or traditional evidence, or clear and positive acts of unchallenged and sustained possession or substantial user of the disputed land. Mention should also be made of the principle that a Plaintiff succeeds on the strength of the case presented and not on the weakness of the defendant’s case. So as I stated above, notwithstanding Defendant’s failure to lead any evidence in rebuttal of the claims made against him by the Plaintiff, yet the

Plaintiffs was under obligation to prove her case to warrant judgment being granted on his reliefs.

The Plaintiff had stated in her written statement of claim that the late Kofie Owuayem acquired a parcel of land from the late Sub-Chief Kojo Yeboah on the 18th of August 1937. She attached a site plan which was marked as Exhibit A. I do not know what the site plan was meant to do. If it was meant to describe the location of the land, that was in order. However, if it was meant to prove title to the land, then I'm afraid that in law, it lacked the potency to prove title to land. This is because as has been held in a line of judicial decisions, building plans, building permits, receipts and site plans are not documents of title. They do not confer title to land on an individual. A receipt is mostly issued to provide a purchaser or a customer with a proof of payment. It only confirms receipt of payment. It does not on its own transfer title to land. A site plan as well only depicts a piece of land on paper. It does not transfer title to land. See the case of **Kotey v Koteley [2005-06] SCGLR 368**. So, without more, Exhibit A is not an instrument affecting land. It therefore does not carry the potency to transfer title in land.

Despite not tendering any documentary proof of title to the land, I am of the view that the Plaintiff succeeded in proving title to the land through other equally important means. I think that the Plaintiffs led sufficient evidence to establish undisputed acts of possession of the house prior to its demolishing by the Defendant. The first point worthy of note is that the Plaintiff proved that she is a customary successor in line to the property and controlled the property to the knowledge of all including the Defendant. The Plaintiff asserted that Opanyin Owuayem constructed a house numbered H/ No. YB 3/ 12 Yaabem, Agona Swedru which comprised of 7 bedrooms. That the late Kofie Owuayem entrusted the property to his three siblings whose names she gave as Abena Twiwaa, Ekua Afoa and Prophetess Ekua Kuma. That at this time Opanyin Owuayem was away at his Cocoa farm at Akyem Osinase.

That he died later at this place. That the property was tenanted by only Abena Twiwaa who eventually succeeded Kofie Owuayem upon his death. That upon the death of Abena Twiwaa, Prophetess Ekua Kuma succeeded. That Ekua Kuma was also succeeded by Ama Kaya who was a daughter of Abena Twiwaa. That upon the death of Ama Kaya, she was appointed as the customary successor in the same line of customary succession. That as customary successor, she exercised all customary responsibilities and functions as the trustee of the property of Kofie Owuayem on behalf of the household and herself and that she has been recognised as the customary successor by all and sundry including the Defendant. However, the Defendant pulled down the building without recourse to her.

Plaintiff called witnesses who attested to her title to the land as customary successor. Of particular interest and relevance is the testimony of PW2 who gave his name as Ebenezer Andrew Koomson. He claimed that the late Owuayem was his uncle and corroborated to a large extent, the Plaintiff's assertions that the property belonged to Opanyin Owuayem and that after a series of successions to the property, the Plaintiff was appointed as customary successor in-line to the property. He also affirmed that the plaintiff exercised control over the property to the knowledge of the Defendant.

These assertions made by the Plaintiff and corroborated by the head of family were not challenged by the Defendant in anyway. It is therefore deemed as accepted as a fact. This court thus finds as a fact that the land was acquired by Opanyin Owuayem who gave it to his sisters. That upon his death, his sisters took turns to inherit and possess the property and upon their death, their successors inherited and possessed the building on the land. I also accept that the Plaintiff is a customary successor in-line to the property and prior to the building being demolished by the Defendant, was in possession and control thereof.

I therefore find baffling that the Defendant has trespassed onto the property and demolished the building thereon without recourse to the plaintiff who is the customary successor. The law has always been that succession to individuals and properties was governed by the *lex situs*. Since the parties are from Agona Abodom, succession must conform to Fanti customary law. It is also trite that the self-acquired property of a deceased intestate becomes family property and it is the immediate family of the deceased which takes the property. This is often called the "inheriting group". Ollennu in his book **The Law of Testate and Intestate Succession in Ghana** at page 229 puts it this way:

“It cannot be overemphasized that it is the family and not an individual who inherits and becomes owner of the self-acquired property of a deceased member of the family.”

This means that the family as a whole acquires title of ownership to the property. However, the family as owner always, and invariably, appoints a member of the family called the “successor” to administer the property for and on behalf of the family. Such successor is variously described as a trustee or caretaker of the family with powers to control and manage the property: see **Ahorklui v Ahorklui, High Court (Land Division) Accra, 1 June 1959; reported in Ollennu (1959) PCLLG 212; and Khoury v Tamakloe (1950) DC (Land) '48-'51, 201.**

Speaking to the peculiar features of a successor under customary law, S. K. B. Asante, in his **Property Law and Social Goals in Ghana 1844-1966** at pages 156-157 observed:

“Aside from these powers and obligations in respect of the deceased’s estate, a successor represents the person of his predecessor in a very real sense; indeed he may be described as the extension of the descendant’s legal persona. Thus the deceased’s children become the children of the successor, so does the predecessor’s wife, in the technical sense at least. A successor may cohabit with the predecessor’s wife if the wife so desires,

but in any case, he is under an obligation to maintain and support her while she remains unmarried. Where his means permits, a successor is expected to honour the personal and moral commitments of his predecessor.”

The general law of custom among the Akans in this country, as stated briefly above, was that property acquired by a person who died intestate belonged to the family. Customary law dictated that the personal property of a deceased intestate became family property and it was the customary successor who took care or held it as trustee for the entire family. Though such successor held the property in his personal capacity, such successor was not the owner of the property. See the case of **Mills v. Addy [1958] 3 WALR 357**. So, in custom, the property which Opanyin Owuayem acquired became family property and it was the customary successor i.e. the Plaintiff who had authority to administer same. I think that that demolishing was done without any basis at all. Even though the Defendant has demolished the building, the land remains part of the estate of Opanyin Owuayem which in law belongs to the customary successor being the Plaintiff.

On the available evidence, I find plaintiff’s claim to the property proved. I find that the land was acquired by Opanyin Kofie Owuayem in 1937 from Opanyin Kojo Yeboah. I find that Opanyin Kofie Owuayem went into possession of the land and built a seven bedroom house on it. I find that upon the death of Opanyin Owuayem, the Plaintiff was appointed as successor in-line to the property and exercised control and possession over the property. I find that the Defendant has demolished the building put up by Opanyin Owuayem without the consent of the Plaintiff who is the customary successor and owner thereof. I find that Defendant has no title to the disputed land and his demolishing of the building thereon was done without any claim of right. Having made the findings above, I hold that the Plaintiff was able to prove on a preponderance of probabilities her claims. From the foregoing and on the totality of the evidence, the Plaintiff was able to discharge the burden of proof on her.

She has been able to satisfy me on all the evidence and she succeeds on her reliefs accordingly.

It is trite law that when trespass to land was proved or admitted, damages flowed as a matter of legal consequence. See **Hassan v Karssardjian Construction Limited, Tamale (1964) GLR 370**. It has also been held that proof of title was not required in order to succeed on a claim for damages because the law did not require that a person in possession could not have the possessory remedy of damages unless he/she proved title. Trespass was a wrong to possession and one of the known remedies for trespass was damages. There is undisputed evidence of acts of trespass committed by the Defendant. The Defendant is said to have demolished the building belonging to the Plaintiff as customary successor. That act of demolishing the building could not have been done lawfully since the building was not Defendant's. Such acts perpetrated without recourse to law have been condemned and punished by the courts. So, in the case of **Mahama v. Kotia & Others [1989-90] 2 GLR 24**, where the Plaintiff sued the Defendants for the demolition of her building, the Court of Appeal held that in addition to the replacement value of the building, the Plaintiff was also entitled to damages for being deprived of the use of her building. Also in the case of **Ayisi v. Asibey III & Others [1964] GLR 695 @ 696-7**, the Supreme Court held that even in damages for trespass, exemplary damages could be awarded in addition to the normal nominal and actual damages suffered. The Court held as follows:

“In assessing damages for trespass consideration should be taken not only of the extent of the land on which the trespass had been committed by the individual defendants, but also the length of time that the plaintiff had been wrongfully kept off the land....”

From the unchallenged evidence led by the Plaintiff in this case, I hold that Defendant committed gross acts of trespass against the Plaintiff by demolishing the seven roomed house. As such the Plaintiff is entitled to damages for trespass for deprivation of use of the building.

On the totality of the evidence on record, the Plaintiff succeeded in proving his claims against the Defendants. I enter judgment for the Plaintiff in terms as follows:

- i) Judgment is hereby entered for the Plaintiff on the reliefs endorsed on her Writ of Summons. I hereby declare title to the piece of land described in paragraph 3 of Plaintiff's writ of summons in the Plaintiff and order recovery of possession of the said land as prayed.
- ii) It is further ordered that the Defendant by himself, his assigns, agents, privies, and representatives be and are hereby restrained from having anything to do with the disputed land which has been declared the property of the Plaintiff herein.
- iii) I enter judgment for the Plaintiff on her claim for damages for trespass. General damages were normally said to be at large and their quantification was peculiarly within the province of the court. Given the nature of the trespass, named above, I would award a reasonable sum of GH¢20,000 as general damages against the Defendant.
- iv) I decline to make any orders in respect of relief c on the writ of summons as it is not within the court's remit to make an order to demolish any structure. Title to the land has been declared in the Plaintiff. It is not for the court to order or direct her as to how to recover possession of the land. That claim is thus dismissed as unmerited.
- v) The Defendants failed to prove the claims as endorsed on their counterclaim. The claims as endorsed thereon are dismissed in their entirety as unproven.

Given the nature of the claims and the length of time taken to conclude the hearing, I assess cost of GH¢5,000 against the Defendant in favour of the Plaintiff to cater for the expenses incurred in prosecuting the case.

HIS HONOUR ISAAC APEATU
DISTRICT MAGISTRATE