IN THE DISTRICT COURT HELD IN THE WESTERN REGION ON FRIDAY AT AGONA AHANTA ON THE 21ST OF APRIL 2023 BEFORE HIS WORSHIP SIDNEY BRAIMAH DISTRICT MAGISTRATE

SUIT NO: A1/18/2019

NANA NWINWANWINWA IV

DIVISIONAL CHIEF OF HOTOPO

VRS

MAAME YANKEH

JUDGMENT

The writ of summon that initiated this action was issued in this court on the 8th of March, 2019. The reliefs sought as endorsed on the writ of summons caused to issue against the defendant state the following:

1. Declaration of title to the piece of land lying and situate at Bokoro and bounded by the land of Alhaji, the rubblish dump and the land of Banyin Nketsiah.

2. Recovery of possession.

3. General damages for trespass.

4. Perpetual injunction restraining the defendant, his workmen, assigns, privies from dealing with the said land.

On the orders of the court the parties filed pleading under Order 18 of District Court Rules, 2009 [C.I 59]. Close of pleadings commenced after the filing of Reply on the 4/10/19.

It would also be recalled from the record of proceedings that this matter commenced before my brother His Worship Emmanuel K Boadu in April 2019 and upon series of adoption of record of proceedings before four other Magistrates; same has culminated in the present judgment. At the hearing, both parties elected not testify but were represented by their respective Attorneys (See exhibits A and 1). The plaintiff called four witnesses. The defendant called a single witness.

The evidence adduced in support of the case for the plaintiff is that an ancestor of the plaintiff known as Nana Nwinwanwinwa I and the family migrated from Techiman, to initially settled at Mpinstsin and subsequently at Mbodoba where they broke the virgin forest at the present day Hotopo and Bokoro are situate. Persistent harassments from their enemies compelled them to migrate to Ehera Mountains. The family later migrated Ehera Mountains to Peti Aworo and finally settled at Bete-po. The name 'Bete-po' was later corrupted to Hotopo. According to the plaintiff, Bokoro lands traditionally form part of Hotopo stool land.

It is the case for the plaintiff that his family has exercised unfettered and undisturbed possession of Bokoro lands from the time they broke the virgin forest and had exercised unfettered rights on the said stool land including but not limited making many grants people and corporate entities like Norplam, African Manganese Company Ltd and Zoomlion among others. Plaintiff further asserted that defendant is a member of Ekissi

family, that originally migrated from Kamfakrom where they were hounded out by their opponents for attempting to usurp the stool from the rightful owner where after upon reaching Ewusiejoe; they inquired of the ownership of Bokoro lands and they were informed that same belong to Chief of Hotopo, Nana Nwinwanwinwa II. The plaintiff submitted that Bokoro was well settled with plaintiff's family and Nigerians among others before the arrival of defendant's family in 1957. Subsequently, upon petition by Ekissi family to Nana Nwinwanwinwaa II for grant of land, they were permitted to settle at Bokoro subject to terms and condition stated in exhibit B.

According to plaintiff, the land in dispute is a vacant land used by the community as a rubbish dump and that it soon came to the notice to PW3 and other members of plaintiff's family that defendant had trespassed unto the land in dispute and was developing same without the consent of plaintiff. PW3 and one Isaac Adjei confronted defendant and admonished her for taking possession of the land in dispute without consent of the plaintiff. In reply, defendant promised to appear before plaintiff and pay the necessary amount of money to purchase the land in dispute. Subsequently, PW3 and Isaac Adjei negotiated with defendant and her son for the price for the land in dispute, until she resiled from the negotiation and began to lay adverse claim to the land in dispute. The defendant proceeded to declare her family as the Royal family in Bokoro and asserted title of her family in the land in dispute as the original settlers and owners of Bokoro lands. Plaintiff contested the claim by defendant and countered that Bokoro had never had a proper chief so-called as it had never attained the status of sub-division stool under the Divisional Stool of Hotopo. (See exhibit C). The plaintiff contended that the stool is currently in the process of installing an Odikro at Bokoro. Plaintiff denies the defendant or her family's claim to the land in dispute.

At the close of the case for plaintiff; the defendant, through her Attorney submitted that he is the nephew of defendant and that his forebears and that of the defendant namely

Opanyin Kojo and Opanyin Awuno Ansah originally broke the forest around the area presently known as Bokoro and subsequently installed chiefs until the passing of their latest chief Nana Kojo Ebunza III. According to the Attorney for the defendant, the recognition of the occupation of Bokoro stool by Nana Kojo Ebunza III was published in Daily Graphic and also confirmed in a recommendation letter from Nana Nwinwanwianwa II to Ahanta Traditional Council to urge it to accept Nana Kojo Ebunza III as a member of the Traditional Council. (See exhibits 2 and 2A). Defendant's Attorney further contended that his family through Nana Kojo Ebunza III made many acts of ownership by allocating and selling many plots of land at Bokoro. (See exhibits 3 series). The land in dispute, according to Defendant's Attorney had been in the possession of Maame Kwame Ekuba where she raised all her children and same was later inherited by defendant. The Attorney for defendant further submitted that he was born on the land in dispute about 42 years ago and that the defendant built a mud house on the land in dispute and used it as a kitchen. He also submitted that one Emmanuel Ansah also built a bathhouse and toilet on the land in dispute in 2005. Exhibit 4 is the photograph of the toilet erected on the land in dispute. The mud house used as a kitchen subsequently collapsed and that defendant granted that portion of land to one Ezekiel Acquah to build on it. Defendant submitted that any claim asserted by plaintiff to the land in dispute is statute barred under the Limitation Decree (NRCD 54). The defendant denied the claim by plaintiff to the land in dispute.

At the close of the hearing, the following issues were set down for determination by the court:

1. Whether or not Bokoro land originally forms part of Hotopo Stool lands.

2. Whether or not Plaintiff and his predecessors have been making grants of Bokoro lands from time immemorial.

3. Whether or not the Defendant has trespassed unto the land in dispute.

4. Whether or not the plaintiff is a estopped from claiming the disputed land as stool land.

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 NRCD 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)**

Before evaluating the evidence on record, the court takes notice of the record of customary arbitration held at Arbitration Court in Busia on 20th of November, 2018 between Ebusuapayin Maliwosem, Ebusapayin Pra Kojo, Ebusuapayin Abraham, Kofi Micheal and Mr Baidoo and Paa Kojo (PW4). The record of proceeding contained in exhibit 5 reveals that the plaintiff and PW3 voluntarily appeared before the panel of arbitrators and submitted to the arbitration committee as principals of PW4 and Mr Baidoo whereafter the hearing, the arbitration award was against plaintiff and PW3. The participation and the published arbitral award have been established by the admissions by Plaintiff's Attorney, PW3 and PW4 on the record albeit the assertions by counsel for the plaintiff that it lacks the jurisdiction to entertain the matter and that the award was procured by fraud. It is important to note that although the subject-matter of the arbitration was a land in Bokoro; it was not the land in dispute in this suit. The parties before the arbitration are the same parties before this court. Accordingly, no issue of estoppel per rem judicatem arises. Again, the pronouncements by panel members in the said arbitration are not binding on this court.

The record of proceeding is patent that apart from the documentary evidence admitted in evidence, the bulk of the remaining evidence is oral and traditional evidence. It is therefore not surprising that the traditional evidence adduced by the parties is conflicting. Accordingly, the court cautions itself in relying on oral and traditional evidence and in this particular instance; where evidence is intrinsically laced with matters bordering on chieftaincy disputes.

It is legion that that the problem with traditional history is that they are varied mainly due to the fact that they are handed down from generation to generation and details are often lost in the memory of time. There is the possibility of intentionally fabricating narrative to serve a selfish end. It is also possible for the truth to be lost with time and the new generation may be completely ignorant of the historical truth and pursue falsehood with such zeal and vigour as can mislead the court. Hence, the need to for caution whenever the court is confronted with choosing between conflicting traditional history. In the case of In re **Adjancote Acquisition, Klu v Agyemang II [1982-83] 2 GLR 852** the Court of Appeal set out with useful guidelines in considering traditional and oral evidence. In that case the Court of Appeal.

1. The guiding principle on which the courts had treated and accepted traditional evidence as sufficient to establish title to land were that:

(i) Oral evidence of tradition was admissible and might be relied upon to discharge the onus of proof if it was supported by
evidence of living people of facts within their knowledge.

(ii) Where it appeared that the evidence as to title was mainly traditional in character on each side, and there was little to choose between rival conflicting stories, the person on whom the onus of proof rested must fail in the decree being sought.

(iii) Where there was a conflict of traditional history the best way to find out which side was probably right was by reference to recent acts in relation to the land.

(iv) Where claims of parties to an action were based upon traditional history which conflicted with each other, the best way of resolving the conflict was by paying due regard to the accepted facts in the case which were not in dispute, and the traditional evidence supported by the accepted facts was the most probable.

(v) Where the whole evidence in a case is based on oral tradition not within living memory, it was unsafe to rely on the demeanour of the witnesses to resolve the conflict in the case.

(vi) Where the admission of one party established that the other party had been in long and undisturbed possession and occupation of the disputed land, the party making the admission assumed the onus to prove that such possession was inconsistent with ownership. The law was such that a person in possession and occupation was entitled to the protection of the law against the whole world except the true owner or someone who could prove a better title.

(vii) In a claim for title to land, where none was able to show title because of want of evidence, or that the evidence was confusing and conflicting, the safest guide to determining the rights of the parties was by reference to possession."

In reliance on the guideline stated above, the court further relies on holdings in **Achoro**

& Anr v Akanfela & Anr. [1996-97] SCGLR 209, where the court set out in detail the evaluation of traditional evidence where there are rival versions these have to be tested against background of positive and recent acts. Again, in **Adjeibi-Kojo v Bonsie [1957] 3 WALR 257 PC** it was held that, it was well settled that where in a land suit, the evidence as to the title to the disputed land was traditional and conflicting the surest guide was to test such evidence in the light of recent acts to see which was preferable.

In asserting its version of traditional history, plaintiff, through his Attorney and witnesses submitted that Bokoro stool land has always been attached to Hotopo stool land as Bokoro had never had a chief Plaintiff contended that the Chief of Hotopo had since time immemorial granted Bokoro land as stool land. Plaintiff relies on exhibit C which shows the list of subdivision stool under Divisional Stool of Hotopo of which Bokoro is notoriously absent as a subdivision and as such the authority to grant Bokoro stool land falls on the Divisional Stool. Plaintiff further submitted that it is that authority which made it possible for plaintiff family to grant a portion of Bokoro stool land to defendant's family when they migrated from Kanfakrom.

On the record, PW4, is a member of a faction of defendant's family. He testified that as a witness to his family's migration from Kanfakrom to Bokoro in 1957 as a child. PW4 submitted that on arrival at Bokoro, his family applied to Nana Nwinwanwinwa II for parcel of land to settle on and same was granted. The grant of land to Ekrissi family was corroborated by the evidence adduced by PW3, Plaintiff's Attorney and exhibit B. PW4 did not however specify whether the land in dispute forms part of the land granted to his family by Nana Nwinwanwinwa II. PW4 also testified that he acquired his plot of land from the plaintiff but the defendant did not acquire her land from plaintiff. PW4's narrative of traditional history is disputed by pleadings filed by defendant in her pleading and the witness statement adopted as the evidence in chief for Defendant's Attorney. In his narrative, defendant Attorney submitted that it was rather defendant's

family that broke the virgin forest and founded Bokoro and thereafter introduced themselves to Nana Nwinwanwinwa I to inform him of the breaking of the forest. Defendant's Attorney further asserted that defendant's family has been in occupation of the land in dispute for many generations and that defendant has been in personal possession for over 35 year amidst many overt acts of ownership. The defendant averred that she inherited the land in dispute from her late grandmother Maame Kwame Ekuba who obtained same from the Chief of Bokoro one Nana Kojo Ebunza whose overt acts of ownership in respect of the land in Bokoro was acknowledged by all and sundry. The defendant denied the claims by plaintiff.

Under cross-examination, counsel for plaintiff successful compelled defendant Attorney to admit that defendant's family migrated from Kanfakrom to Bokoro in 1959 albeit that a section of the defendant family had early on established Bokoro and that it was those family members who granted the new arrivals a portion of land. The admission by defendant Attorney strongly validated the historic narrative adduced by plaintiff in part.

On the other hand, the court takes notice of the content of exhibit B which stated that Nana Nwinwanwianwa II installed one Willian Kwesi, a member of defendant's family an Odikro of Bokoro seven years after their migration to Bokoro from Kanfakrom. In the same document, William Kwesi is referred to as Nana Kojo Ebunza III or Nana Abunza III. Again, PW4, under cross-examination referred to William Kwesi as Rome Kwesi or Nana Abunza. Further reference to Nana Kojo Abunza III was made in Exhibit 2A. Exhibit 2A is a letter written by Nana Nwinwanwinwa II on the 14th of February, 1974 to Ahanta Traditional Council recommending Nana Ebunza III, the Odikro of Bokoro as a member of the Traditional Council. Exhibit 2A was identified and authenticated by Plaintiff Attorney under cross-examination. The record again shows

that the said Nana Kojo Abunza III alienated plots of land in Bokoro by issuing plot allocation notes in 1987 and 1989.(See exhibits 3 series). The capacity of Nana Kojo Abunza III to sell land at Bokoro is corroborated by PW4 except that he could only do so with the consent and concurrence of the Divisional Stool of Hotopo. It is trite law that corroborative evidence by opponents attracts much weight. In Tonado Enterprise & Ors Vrs Chou Sen Lim (2007-8) SCGLR 135, it held that:

"Where the evidence of a party remains uncorroborated but that of his opponent is corroborated even by his witness of his opponent, the court ought not to accept the uncorroborated one. The only exception to this rule is where the court has or finds a reason to reject the corroborated evidence"

The court finds no reason to reject the corroborative evidence adduced by plaintiff in place of the uncorroborative and conflicted evidence adduced by defendant.

The relevancy of the capacity of Nana Kojo Abunza III to grant land in Bokoro whether in his personal capacity or as Odikro or subject to ratification of Divisional Stool is of significant probative value given that its relates to the issue as to whether the Hotopo Stool made direct grants of Bokoro land or through appointed agents, a caretaker or Odikro. It would also assist the court in determining whether the claim by defendant that the land in dispute was granted to her family by Nana Kojo Abunza III is reasonably plausible.

On the issue, the court finds that the capacity to grant Bokoro land by Nana Kojo Abunza III has been corroborated by PW4 and exhibit 3 series. The record further shows that the authenticity of the exhibits B, 2 series and 3 series were not challenged except for the weight that the court ought to attach to them. In **Duah v. Yarkwa (1993-94) G.L.R. 217**, the Supreme Court held that whenever there was in existence a written document and conflicting oral evidence, the practice of the court was to lean

favourably towards the documentary evidence, especially if it was authentic and the oral evidence was conflicting.

The court therefore dismisses the assertion that the said Nana Kojo Abunza III, also known as William Kwesi, or Rome Kwesi was a mere caretaker. Granted without admitting that Nana Kojo Abunza III was a mere caretaker without more, what was he taking care of? Is it not to take care of stools or land in the absence of or in the interest of the true owner? The court takes cognizance of the well-established customary practice where a stool that owns land has an Odikro who is a caretaker of its land and though the caretaker may deal with the land, he cannot make grants by himself unless such grants are endorsed and ratified by the occupant of the stool and his councilors. **[See Nuamah (No 2) v Appiah-Nkyi (No 2) (2017-2020) 1 SCGLR 1045]**

On the evidence, the court on the balance, makes the following finding of facts; that defendant's family migrated from Kanfakron about 70 years ago and settled at Bokoro; that plaintiff's ancestor Nana Nwimwanwinwa II Chief of Hotopo installed Nana Kojo Abunza as an Odikiro of Bokoro and that the said Nana Kojo Abunza III made grants of land in his capacity as Odikro.

The rejection of the traditional evidence in respect of investiture of Nana Kojo Abunzi as an Odikro and that he did not have the capacity to sell land in Bokoro does not necessarily mean that the plaintiff's case should fail. In the case of In Re Taahyen and Asaago Stools; Kumanin II (substituted by) **Oppon v Anin [1998-99] SCGLR 399**, the Supreme Court held that

"The party whose traditional evidence such established acts and events support or render more probable must succeed unless there exist on the record of proceedings a very cogent reason to the contrary. And the presumption of title raised by acts of possession and ownership appears now as section 48 of Evidence Decree, 1975 [NRCD

323]. If follows from the provision that a party can succeed in his claim if traditional evidence is rejected".

Having joined issues with plaintiff in respect of the settlement of land on the Ekrissi family at Bokoro on arrival from Kanfakrom in general and the ownership of the land in dispute in particular; the burden falls on plaintiff authenticate his version of history with recent acts of ownership in respect of Bokoro lands in general and by inference assert his title to the land in dispute in particular. Accordingly, the plaintiff is required to adduce evidence in support of his root of title pertaining to recent acts of ownership and possession including and not limited to his personal or family's earlier successful litigation in defence of the land he is claiming. Bare averments and bare assertions of facts will not suffice as proof.

It is therefore regrettable that plaintiff could not establish with sufficient evidence any of the purported undisputed grants of Bokoro land by his family, Attorney, PW3 as head of his family or the Divisional Stool of Hotopo. Plaintiff's Attorney could not also establish any of the purported grants of Bokoro lands to any of the corporate entities stated in paragraph 8 of his witness statement even though such grants are capable of positive proof. It is trite that grant of land to corporate bodies like Norpalm is usually evidenced and characterised by documentary evidence in the form of lease. Plaintiff did not also make any reference to any historical antecedence in respect of possession or previous acts of ownership of the land in dispute or call any of the undisputed boundary ownership of the land in dispute as independent witnesses to corroborate his assertion as the grantor of all Bokoro land in the face of the allegation by defendant that her family granted one of the undisputed boundary land to the land in dispute to Banyin Nketsiah. In **Nuamah v Adusei & Ors [1989-90] 1 GLR 457** the court reiterated the legal principle that boundary owners can be material witnesses to establish overt

acts of ownership and evidence of people who knew the state of affairs on the land in dispute.

On the converse, plaintiff Attorney made admissions of acts of possession and ownership by defendant and her family on the land in dispute. I reproduce the relevant portion of the cross-examination:

Q. Where does the defendant live at Bokoro?

A. She lives behind a garden.

Q. You know the disputed land used to be a rubbish dump?

A. It is only a small portion of it but Alhaji now owns that portion.

Q. It was the defendant's family that created that rubbish dump.

A. It is not true. **The fact that you decide to throw rubbish behind your house does not mean you own land or created it.**

Q. Defendant's family has a toilet facility on a portion of the disputed land.

A. That is why we are in court because **they have foundation and other things on the land without our permission.**

Q. Are you saying that the toilet facility is under or already constructed?

A. Per the picture it's already constructed.

Under cross-examination, PW4 also corroborated the evidence adduced by defendant Attorney that land in dispute is close to the house of defendant and that she had erected

a toilet on the land in dispute and that prior to that the land was used to prepare palm oil. The evidence adduced by plaintiff Attorney and PW4 supported the evidence adduced by defendant that she is in possession of the land in dispute and that plaintiff had not been possession of the land in dispute. If defendant did not have any rights over the land, how was she able stop the dumping of rubbish on the plot of land sufficiently enough to dig foundations and erect toilet facility on the land in dispute?

The effect of the defendant's possession of the land in dispute in law has been clarified in **Summey v Yohuno [1962] 1 GLR 160, SC; Barko v Mustapha [1964] GLR SC 78 and Gilard v Korand [2013-14] SCGLR 221.** In the latter case, the court held as follows:

"Now in law, possession is nine points of the law and a plaintiff in possession has a good title against the whole world except one with a better title. It is the law that possession is prima facie evidence of the right to possession and it being good against the whole world except the true owner, he cannot be ousted from it."

Having scrutinized the totality of the evidence offered by the plaintiff and applying all the test of veracity therewith, the court finds the case put forward by plaintiff to be inconsistent, uncorroborative, not reasonably probable. Accordingly, the plaintiff must fail on all the issues raised for determination.

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¢5,000.00 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.

(SGD.)

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For HIS WORSHIP SIDNEY BRAIMAH.

(DISTRICT MAGISTRATE)

Counsel for plaintiff: Mr. Emmanuel Arthur

Counsel for defendant: Mr. Philip Otchere Darko