IN THE DISTRICT COURT HELD AT DZODZE ON TUESDAY THE 7TH OF FEBRUARY ,2023 BEFORE HIS WORSHIP NELSON DELASI AWUKU, DISTRICT MAGISTRATE.

Suit No. A1/32/18

KWAKU FIADOR & 2 ORS.	}	**PLAINTIFFS**
VRS		
PROSPER GADZI & ANOR.	}	**DEFENDANT**

JUDGMENT

PARTIES

PLAINTIFFS PRESENT

DEFENDANTS PRESENT

LEGAL REPRESENTATION

GODWIN KPORBLE FOR PLAINTIFFS PRESENT

CASE OF PLAINTIFFS:

Per a writ of summons and statement of claim filed on the 7th of May, 2018 and 17th May,2018, the plaintiffs prayed for the following reliefs;

1. Declaration of title, ownership and recovery of possession of all that piece of land situate, lying and being at Huive and bounded as follows;

   - On one side by the property of Vincent Deku

- On another side by the property of Prosper Gadzi
- On another side by the property of Mawutor Kukubor
- On the last side by the property of Paul Gadzi

2. Perpetual injunction restraining the defendants by themselves, their agents, assigns, workmen and privies from entering the disputed land.

3. General damages for trespass.

By an amended writ of summons filed on 25th June,2018 the plaintiffs amended their writ and substituted their reliefs with an *order of the Court to enforce the customary arbitration award by Torgbui Gbordzor VII, Dufia of Klenormadi-Weta.*

CASE OF THE PLAINTIFFS

It is the case of the plaintiffs that the land, the subject matter of this suit was founded by their great grandfather Torgbui Gbodzor which land they inherited by succession through their father Kordzovi Fiador.

The Plaintiffs assert that since the demise of their father fifteen years ago, they continued cultivating the land and have been plucking coconut from trees situated on same planted by their late father.

The plaintiffs assert that on the 15th day of December, 2017, the Defendants trespassed on the land by putting gravels on same and has been claiming ownership.

The plaintiffs assert that after several attempts to restrain the defendants had proved futile, they summoned them at the Arbitration Court of Torgbui Gbordzor VII of Klenormadi which matter was heard and judgment was delivered in their favour.

The plaintiffs assert further that the defendants failed to abide by the terms of the award and went ahead to cultivate the land, which led to this action.

THE CASE OF DEFENDANTS

By an amended statement of defence filed on 25th September,2018, the defendants state that even though the matter was arbitrated upon at Torgbui Gbordzor's arbitration, they expressed their dissatisfaction to the said award.

The defendants assert that since they expressed their dissatisfaction to the arbitration award, they cannot abide by the terms.

The defendants assert that they acquired the land through succession as the direct descendants of Torgbui Apedzi who is the son of Torgbui Gbordzor the original owner of the land and have been in possession of the land for years.

The defendants therefore counterclaimed for the following reliefs;

a. *An order of the court setting aside the arbitration award published by Torgbui Gbordzor VII and his elders of Klenormadi – Weta on 21st January, 2018 since same was not held in a judicial manner as prescribed by law.*
b. *A declaration of title and ownership of the piece of land as described in their statement of defence.*
c. *General damages for trespass*
d. *Recovery of possession*
e. *An order of perpetual injunction against the plaintiffs, their agents, assigns, servants, workmen and privies restraining them from having anything whatsoever to do with the land in dispute or any portions thereof and particularly from continuing with their illegal and unlawful acts thereon and from interfering with the ownership, possession, control,*

cultivation, development, enjoyment and alienation of the said piece of land or any portions thereof by the defendants and other members of their family, their agents, servants, workmen, successors, privies and assigns.

REPLY AND DEFENCE TO COUNTERCLAIM

In a reply to the amended statement of defence and counterclaim, the plaintiffs denied all the assertions in the defence of the defendants and reiterated the averments in their statement of claim.

The plaintiffs asserted that if the defendants knew that the matter was not held in a judicial manner, why did they not raise an objection but allowed the process to go through to the publication of an award. The defendants also contended against the claim by the defendants that, their writ was frivolous, vexatious, without merits and should be dismissed with cost.

ISSUES

From the pleadings filed by both parties, the following issues were set down;

1. Whether the arbitration award by Torgbui Gbordzor is valid and binding on the parties?
2. Whether or not the arbitration award breaches the principles of natural justice and should be set aside?

BURDEN OF PROOF

The plaintiff who asserts usually has the burden of proving same on a preponderance of probabilities. Preponderance of probabilities according to section 12(2) of the Evidence Act (NRCD 323) means;

"that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence"

Where the plaintiff has been able to lead sufficient evidence in support of his case, then it behoves upon the defendant to lead sufficient evidence in rebuttal or risk being ruled against on the issues.

Under section 11(4) of NRCD 323, a party discharges the burden of producing evidence when the party produces sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.

In **Okudzeto Ablakwa (No. 2) v. Attorney General & Obetsebi Lamptey (No. 2) [2012] 2 SCGLR 845**, the Supreme Court in dealing with the burden of proof held as follows;

"he who asserts assumes the onus of proof. The effect of that principle is the same as what has been codified in the Evidence Act, 1975 (NRCD 323), s 17 (a)…What this rule literally means is that if a person goes to Court to make an allegation, the onus is on him to lead evidence to prove that allegation, unless the allegation is admitted. If he fails to do that, the ruling on that allegation will go against him. Stated more explicitly, a party cannot win a case in Court if the case is based on an allegation which he fails to prove or establish".

Where the defendant has filed a counterclaim, per the rules of Court he becomes a plaintiff with respect to the counterclaim and the same burden that is placed on the plaintiff is also placed on the defendant with respect to the counterclaim.

Failure by the defendant to lead sufficient evidence in support of his claim will lead to the counterclaim being dismissed.

The Court is also mindful of one of the cardinal duties of a Court in evaluating evidence led during trial which is for the Court to assess all the evidence on record in order to determine in whose favour the balance of probabilities should lie. See the cases of **Adwubeng v. Domfeh [1996-97] SCGLR 660 and Takoradi Flour Mills v. Samir Faris [2005-2006] SCGLR 882.**

SUMMARY OF EVIDENCE

The plaintiffs testified through the 2nd Plaintiff and called two other witnesses namely Torgbui Adele, who described himself as a sub chief to Torgbui Huive for Torgbui Gbordzor of Klenormadi (PW1) and Gabriel Nusano, who stated that he is the secretary to Torgbui Gbordzor (PW2).

The plaintiffs also tendered into evidence Exhibit A – Copy of the arbitration award from Torgbui Gbordzor's Arbitration Court.

The defendants on the other hand testified through the 2nd Defendant and called as their other witnesses Dickson Hukporti (DW1), Yawoo Dogbe (DW2) and Anthony Kuatudor (DW3).

PROCEDURAL HISTORY

This suit commenced originally before His Worship Lawrence Buenor Buer and was later taken over by His Worship Derrick Pardon Eshun and Her Worship Rejoyce Aseye Gadagoe.

Proceedings were adopted before me on 5th July, 2022 and hearing continued with the evidence of DW3.

ANALYSIS

Issue 1- Whether the arbitration award by Torgbui Gbordzor is valid and binding on the parties?

It is the assertion of the plaintiffs that there is a judgment delivered by the Torgbui Gbordzor Arbitration court which they seek to enforce.

Exhibit A tendered by the plaintiffs is a copy of the judgment dated 25th January, 2018 by the Arbitration Court of Torgbui Gbordzor.

The defendants did not deny taking part in the arbitration proceedings and the existence of the award tendered in evidence by the plaintiffs but stated in paragraphs 11 and 12 of their amended statement of defence that they expressed dissatisfaction to the award and as such cannot abide by its terms.

In the case of **Pastor Yaw Boateng (No. 2) v. Kwadjo Manu (No.2) & Another [2007-2008] SCGLR 1117** it was held that, *"when both parties to an arbitration voluntarily submit to the arbitration, give evidence with their witnesses, pay the customary fee as well as the inspection fee and costs awarded, a valid arbitration had been held and the award would be binding on the parties to it".* **See also SOLOMON TACCKIE AND AGBO BANNERMAN (SUING AS JOINT HEADS OF THE TACKIE AND BANNERMAN THOMPSON FAMILIES) vs. JOHN NETTEY (SUBSTITUTED BY FRED BIBI AYIMEH) AND SAMPSON KOFI BADU [2021] DLSC 10172 at page 41 per DOTSE, JSC and Budu II vrs Caesar & Ors. [1959] GLR 410.**

Section 90(1) and (3) of the Alternative Dispute Resolution Act, 2010 (Act 798) provides that; a report of a dispute by a party to a qualified person followed by a request to that qualified person to help resolve the dispute shall constitute a submission to customary arbitration and the payment by the parties of an arbitration fee or token demanded by

the arbitrator in customary arbitration constitutes consent to submit and an appointment of the arbitrator.

Section 109 of Act 798 states that; an award in customary arbitration

a. is binding between the parties and a person claiming through and under them and
b. need not be registered in a court to be binding.

The defendants as earlier stated do not contest that they submitted to the arbitration by Torgbui Gbordzor but have prayed for the award to be set aside because they alleged it was not held in a judicial manner.

The question as to whether there is a ground for the award to be set aside is addressed under issue two (2).

Issue (2) - Whether or not the arbitration award should be set aside?

Section 112 of the Alternative Dispute Resolution Act, 2010 (Act 798) states that;

"(1) A party aggrieved by an award may apply to the nearest District Court, Circuit Court or High Court to set aside the award on the grounds that the award

a. was made in breach of the rules of natural justice
b. constitutes a miscarriage of justice, or
c. is in contradiction with the known customs of the area concerned.

(2) An application under subsection (1) shall be made to the court within three months of the award, and on notice to the other party to the arbitration".

In the case of **In Re Sekyedumase Stool; Nyame v. Kese @ Konto [1998-99] SCGLR 476** it was held that, *"where a party to a suit admits the existence of an arbitration, the award of which had gone against him, the issue of estoppel per rem judicatem can be raised to estop him*

from reopening the subject matter of the arbitration unless he is able to establish the invalidity of the award, and in such a situation the validity or otherwise of the award must be determined as a preliminary issue".

The defendants filed an amended statement of defence on 25th September,2018 and included a counterclaim to their defence in which they prayed for the arbitration award published by the Torgbui Gbordzor Arbitration panel to be set aside as null and void since it was not held in a judicial manner as prescribed by law.

The defendants did not provide in their pleadings further particulars to enable the court come to terms as to whether their contention against the proceedings is on the grounds of lack of natural justice, miscarriage of justice or that the award was in contravention with the known customs of their area.

However, in the case of **Pastor Yaw Boateng (No. 2) v. Kwadjo Manu (No.2) & Another [2007-2008] SCGLR 1117** it was held that, for an arbitration award to be valid and binding, there must be evidence of voluntary submission by the parties, that evidence was given by the parties and their witnesses and that the parties paid the customary fee as well as the inspection fee.

In Exhibit A attached by the plaintiffs, the verdict of the arbitration panel in their award stated as follows;

"The above dispute was brought to the Court on the 18th December, 2017 and was sited and heard on the 30th December, 2017 at Klenormadi and the two parties were asked to provide the materials needed for the site locus inspection on the 14th January, 2018 which they obliged.

After the inspection by nine (9) panel members and later gone to private consultation, the verdict was published in favour of the plaintiffs on 21st January, 2018 on the following grounds;

1) *Through fact founded and research conducted by the panel members together with the statements and cross examination from the parties, it is undeniable fact, the parties are maternal descendants of Torgbui Gbordzor who is the sole custodian of Huive lands and the Community at large.*
2) *That the parties have their individual family lands from time in memorial.*
3) *That the panel members found it difficult to understand the actual rational behind the defendant's encroaching upon the farm land of the plaintiffs.*
4) *That the defendant was warned seriously to desist from molesting the plaintiffs from the peaceful enjoyment of their inherited family lands.*
5) *That all expenses incurred in pursuing the case by the plaintiffs being Four Hundred Ghana Cedis (GHS 400.00) to be paid by the defendants before defendants should be allowed to build on the building plot that share a compound with Mr. Cornelius Ametsi and the late Mr. Paul Gadzi.*
6) *That the building plot and farm land under dispute was a bonafide property of the plaintiffs acquired by heritage with no interference from any quarters.*
7) *Finally, the panel warned and advised the parties to adhere and comply with the verdict passed in order to allow peace, harmony and tranquility prevail within the families accordingly".*

Exhibit A did not capture the record of proceedings particularly in relation to the cross examination of the parties. The details of the investigations and consultations that PW2 claimed were made by the panel was also not captured. In the circumstance it could not be ascertained which people were consulted and who else gave evidence in the matter.

PW3, Gabriel Nusano, Secretary to the Torgbui Gbordzor panel under cross examination on 3rd August, 2018 before this court differently constituted however stated as follows;

Q. Since when have you been a secretary to Torgbui Gbordzor?

A. Since 1979

Q. During our case did you act like the secretary?

A. Yes I did

Q. How many times did you sit on this case before going to inspect the land?

A. Twice. The third was when we published the award.

Q. I am putting it to you that you sat on the case only once?

A. It is not so

Q. In your arbitration did you seek a witness from the plaintiffs?

A. None of the parties called any witness

Q. Do you remember you asked 1st defendant if he had a witness to call?

A. Yes and both parties could not provide any

Q. When 1st defendant told you that the land was given to him by the family, did you call any member of the family to come and testify to this?

A. We asked but he could not produce any

Q. I am putting it to you that you did not ask the defendant to call a witness?

A. It is not true for you to say this

Q. The person you claimed you did your investigation from before passing your judgment, did the person come to testify?

A. No we did our investigation on the evidence adduced before us.

On one occasion, PW2 states that the panel did investigations and consultations before coming out with a verdict but yet on another occasion he states that the panel relied on the evidence before it, which evidence he did not mention and was also not indicated in the award.

From the pleadings and evidence given by the parties there appears to be no dispute about the fact that both parties submitted to the arbitration. On the issue of witnesses, PW3 stated that none of the parties called a witness because they failed to do that when given the opportunity.

The award as attached did not provide sufficient evidence on the hearing. There was also no evidence on record on which people were consulted by the panel as indicated by PW2 and the parties did not have the opportunity to also cross examine such person(s).

In effect since there was no detailed record of proceedings and the award attached did not also provide the information on evidence obtained, it leaves the court in no doubt in coming to an emphatic conclusion that due process was not followed by the panel in obtaining evidence and in arriving at the award.

However, under Section 112 (2) of the Alternative Dispute Resolution Act, 2010 (Act 798) "an application to set aside an award or judgment shall be made to the court within three months of the award, and on notice to the other party to the arbitration".

On the face of Exhibit A, the award was made on 21st January, 2018. The Defendants failed to take any action with regard to that. It took a writ issued by the plaintiffs four months after for them to file a statement of defence without any counterclaim.

It was in their amended statement of defence filed on 25th September, 2018, eight (8) months after the publication of the award that a prayer to set aside the arbitration award was included in the counterclaim.

On the 20th of August, 2019 when the 2nd Defendant was asked under cross examination why they did not appeal against the award if they were dissatisfied, the following was the response;

Q. Why did you not appeal against the decision of the elders when you were dissatisfied?

A. We decided to appeal when you instituted this present action.

Q. It is not true that you had any intention of appealing against the decision otherwise 1st defendant would not have trespassed onto our land?

A. Not true. We have been in possession.

In the case of **Standard Bank Offshore Trust Company Limited v National Investment Bank Ltd. & Ors. *Civil Appeal No. J4/63/2016 dated 21st June, 2017*** the court declared that; *"where a rule is mandatory by the use of the expression 'shall'. It should be so regarded in view of Section 42 of the Interpretation Act, 2009 (Act 792) and that where a court finds it necessary to express 'shall' as discretional only, it must be forthcoming with reasons before deciding to exercise discretion to waive non-compliance".*

Under section 112(2) of Act 798, an application to set aside a customary arbitration award is mandatorily required to be done within three (3) months of the award.

Other factors may account for the Defendants' inability to apply within time but the mandate of this court is well cut out for it in terms of its application of statutes.

The matter has been treated in the **Republic v. High Court (Fast Track Division) Accra; Ex parte National Lottery Authority (Ghana Lotto Operators Association & Others Interested Parties) 2009 SCGLR 390 at 402 where Date – Bah JSC** stoutly stated that;

"No judge has authority to grant immunity to a party from consequences of breaching an Act of Parliament".

Whether the arbitration award could be enforced against the other defendants?

Section 111 of the Alternative Dispute Resolution Act, 2010 (Act 798) states in relation to the enforcement of customary awards that, *"an award may be enforced in the same manner as a judgment of the Court".*

For the purposes of record and enforcement of a customary arbitration award, the award may be registered at the nearest District Court, Circuit Court or High Court as appropriate. **Section 110 of the Alternative Dispute Resolution Act, 2010 (Act 798).**

From the 1st plaintiff's own testimony, the 2nd defendant was not a party to the summons before the Arbitration Panel. Under cross examination by the 2nd Defendant on 5th July, 2018, the 1st Plaintiff stated as follows;

Q. Did you sue the two of us before Torgbui Gbordzor?
A. No. I sued only 1st Defendant

Q. Why did you add myself and 3rd Defendant to the suit?

A. Before Torgbui Gbordzor you told the panel that you were supporting 1st defendant and after that arbitration you were the one who planted cassava on the land.

Q. So you sued me because I said I was supporting 1st Defendant?

A. Yes

In his evidence-in-chief, the 2nd Defendant who described himself as a cousin of the first recounted developments that transpired at the Arbitration panel as follows;

"The 2nd Plaintiff testified and 1st Defendant testified. The parties were not allowed to call witnesses in support of their case and were not allowed to cross examine each other. The land was inspected by the Panel. The Elders erred".

The evidence by the 2nd Defendant is a testament to the fact that it was within his notice that the subject matter was under litigation before the panel and he was present at the proceedings at least on some occasions.

The position of the law is that, a person who stands by and allows another having the same interest as his to persue an action is estopped from bringing subsequent action on the same interest. **See the case of Atta Panyin and Another v. Asamani II [1961] GLR 305 (HC).**

CONCLUSION

The defendants have not disputed the fact that there was an arbitration before the Torgbui Gbordzor panel and that there was the publication of an award or judgment.

The effect of the admission stated above gives credence to the existence of a binding award which has already dealt with the issue of declaration of title and that the 1st defendant who was a party to the Arbitration and the other defendants by virtue of conduct are estopped from re-litigating the issue.

The defendants counterclaim to have the award set aside also fails due to non-compliance with statute.

In effect, the arbitration award which has not been set aside remains binding on the parties and the plaintiffs' application to have same enforced is accordingly granted.

Cost of Three thousand cedis (GH₵3,000.00) is awarded to the Plaintiffs.

NELSON DELASI AWUKU

MAGISTRATE