IN THE DISTRICT MAGISTRATE COURT HELD AT N.A.M.A. NSAWAM ON 28TH DAY OF JULY, 2023 BEFORE HER HONOUR SARAH NYARKOA NKANSAH **CIRCUIT COURT JUDGE SITTING AS ADDITIONAL MAGISTRATE**

SUIT NO. A1/20/19

KWABENA AGYEMANG ---------- **PLAINTIFF**
HSE. NO. A52 ASAKESU

VRS:

1. ATAA FIO ---------- **DEFENDANTS**
2. BROTHER KWADWO

PARTIES: PRESENT.

COUNSEL: FRANCIS OSEI-BONSU FOR PLAINTIFF ABSENT.

JUDGMENT

The Plaintiff took out a writ of summons and sought the following reliefs by his Amended Statement of Claim:

a. Declaration of title to all that piece/parcel of land described in the schedule below.

b. Damages for trespass.

c. An Order for Recovery of Possession of the said land.

d. An order of perpetual injunction to restrain the Defendants, their agents, assigns and/or privies from dealing with the land and or interfering with Plaintiff's use and enjoyment of the land.

e. Cost.

f. Any further Order the Court deems appropriate including but not limited to an Order directed at Defendants to demolish the structure on the land or be surcharged with the cost of demolishing same.

PLAINTIFF'S CASE

It is Plaintiff's case that, in 2003 he entered into an agreement with one Mr. E.B. Aryeetey of the Bretuo family of Chinto (deceased) to purchase a piece of land the subject matter of this dispute and same agreement was finalised in 2004. The Plaintiff continued and exhibited receipt of payment for ground rent to the family. However, according to Plaintiff, the 2nd Defendant trespassed unto the land. Plaintiff concluded that, the 1st defendant had no title whatsoever and so he cannot transfer same to the 2nd Defendant.

PW1

PW1 only testified that the Plaintiff is the owner of the land in dispute.

1ST DEFENDANT CASE

The 1st defendant claimed that the land in dispute belongs to his late father so in 2004, his sister gave a part of the land to the 2nd Defendant. 1st Defendant averred that sometime in 2018, the 2nd Defendant began developing the land but he was served with the writ of summons.

2ND DEFENDANT'S CASE

It is the 2nd Defendant's case that the land belonged to his late father and a portion was demarcated to him in 2004 by his elder sister. However, in 2018, when 2nd defendant began developing the land the Plaintiff served him with the writ of summons.

Defendants closed their case.

The legal issues to be determined are:

i. *Whether or not the Plaintiff is entitled to declaration of title to the land in dispute.*

ii. *Whether or not an order for perpetual injunction should be directed at the Defendant from interfering with the land in dispute.*

A perusal of the evidence shows that the Court shall be saddled with the responsibility of evaluating the strength of the equities of the Plaintiff and 2nd Defendant.

It is the case that the claim for the ownership of the land in dispute is narrowed down between the Plaintiff and 2nd Defendant. According to the Plaintiff he sued 1st Defendant because he had been informed that 1st Defendant was 2nd Defendant's grantor. Meanwhile it is now clear per the evidence that another person, described by the Defendants as their sister, is 2nd Defendant's grantor.

Having brought the Plaintiff and 2nd Defendant into focus, I have to state that, although 2nd Defendant did not counter claim, he is yet claiming ownership by his defence and his evidence adduced at the trial. The Court in evaluating the evidence shall hereby consider

on a preponderance of probabilities, which of the parties, that is, Plaintiff or 2nd Defendant owns the land.

It is the Plaintiff's case that he acquired the land from Mr. E.B Aryeetey to whom he paid for the land in instalments. Plaintiff has adduced that he was issued with receipts and that although his grantor promised to execute a deed in his favour, his grantor passed on and thus could not do so. The Plaintiff has indeed tendered these receipts.

The 2nd Defendant on his part has adduced that the land belonged to his deceased father and that same was granted to him by his sister. Also, that he thanked his sister with a bottle of schnapp and an amount of GH¢50.00 in the presence of 1st Defendant.

It is clear from the evidence adduced at the trial that even if the Plaintiff acquired any interest in the land at all then it would be an equitable interest since no deed was executed in his favour.

On the part of the 2nd Defendant however, the Court has cause to question his root of title. In that, the 2nd defendant has told the Court that the land originally belonged to his father who is deceased. He has now told us that the land was granted to him by his elder sister without clarifying the capacity in which his sister granted the land to him. It is trite learning that the estate of a deceased person cannot be validly disposed off by just anyone. The persons with capacity to dispose off or distribute the estate of a deceased person are the administrators, customary successors and the executors of the estate. Having mentioned that the land belonged to his deceased father, 2nd Defendant ought to

have clarified his Sister's capacity. Since the capacity of 2nd Defendant's grantor is in question it invariably puts the grant made to him in question as well.

It must be noted that 2nd Defendant's grantor initially filed a witness statement to testify as 2nd Defendant's witness. She could however not testify because she passed on. The said witness statement was never tendered into evidence and so the Court could not evaluate it as part of this judgment. The evidence of the Defence consisted of that of only the 1st and 2nd Defendants.

Now even if the Court takes it for granted that 2nd Defendant's grantor had capacity to grant him the land, another question arises and it is that; was the land successfully alienated to the 2nd Defendant? What has necessitated this question and the need to answer same is the fact that 2nd Defendant adduced that he thanked his grantor with an amount of GH¢50.00 and a bottle of schnapp. This puts the Court on notice that the grant was supposed to be a customary law grant. In which case besides the customary "aseda" that 2nd Defendant fulfilled; there ought to have been at least two witnesses. As shown from the record the only witness present was the 1st Defendant. One witness clearly falls short of the minimum number of 2 witnesses required to witness a valid customary law grant as established by the Courts in Ghana.

In the case of ***Asare v. Kumoji 2000 SCGLR 298 @ 302 the Court held Per Aikens JSC*** thus:

"with regard to customary gift intervivos, our Courts have stressed that the acceptance of the gift especially land must be made by the presentation to the donor of some token acknowledgement and gratitude in the presence of ***witnesses****. There are two ways of making such valid gift, either by conveyance where a deed of gift is granted to evidence the transaction, or orally where it is governed by customary law"(emphasis mine)*

In the present case therefore, even if 2nd Defendant's grantor had been shown to have had capacity to dispose of the said deceased person's land, then it had not been validly alienated to the 2nd Defendant due to the inadequate publicity to the minimum number of witnesses required. This is the position, of the law as has been established over the years by the Courts in Ghana. To achieve adequate publicity under customary law in Ghana, there ought to be at least two (2) witnesses.

Again, it must be noted that 1st Defendant informed the Court under cross-examination that 2nd Defendant's land is different from Plaintiff's land.

Q. You want the Court to believe that while you were building on the land you did not know the Plaintiff?

A. I know the Plaintiff he sued to come to where his land is. Where we have built our house is different form Plaintiff's land. The land in the whole area belonged to my father but his brothers sold all the land except the one we have built on.

Q. So you admit that the Plaintiff has a property on the land.

A. I do not agree.

Q. You see I am suggesting to you that you have not been truthful to this Court.

A. I agree.

At paragraph 8 2nd Defendant states as follows in his witness statement:

"(8) I put pillars on the land to demarcate the boundary between my land and the Plaintiff's land. I have attached and marked as Exhibit "1" photographs showing the pillars indicating the boundary between my land and the Plaintiff's land."

At the pleadings stage there was no indication by Defendants that their lands were different but when evidence was led, their evidence suggested that the land of second defendant was different from that of the Plaintiff. This notwithstanding the Defendants did not lead evidence to show the boundaries of 2nd Defendant purported land. That is, 2nd Defendant did not describe his land to the Court. It is indeed the case that the Defendants did not counterclaim but since 2nd Defendant was claiming ownership per his evidence, the onus was on him to have led evidence to identify the land that he claimed to own. There is no evidence on record to support the boundaries of 2nd Defendant's said land. It may be that 2nd Defendant did not counterclaim but since he made an averment of ownership he had the onus to prove same by evidence.

In ***Boakye v. Asamoah [1974] 1 GLR 38 @ 45***, the Court held that, the legal or persuasive burden is borne by the party who would lose the issue if he does not produce sufficient evidence to establish the facts to the requisite standard imposed under *section 10 of the Evidence Act, 1975 NRCD 323* that is, by a preponderance of probabilities.

The Plaintiff on his part has shown the Court the boundaries of the land he is claiming by the schedule tendered as exhibit "A1". Same had been rendered in his Amended Statement of Claim.

As noted supra, the only interest in view for either Plaintiff or 2nd Defendant would be an equitable interest, because none of the parties tendered a Deed. This notwithstanding, it is trite learning that, equitable interest in land is recognized and protected by equity as same arises from certain circumstances or agreements that may not meet the requirements for a legal interest but are still deserving of protection.

An evaluation of the entire evidence adduced at the trial leads to a greater likelihood of Plaintiff having an interest in the land he is claiming rather than otherwise.

On the part of 2nd Defendant he was unable to prove his ownership on account of a number of factors which have already been discussed supra.

Sections 11(4) and 12 of the Evidence Act, 1975 (NRCD 323) provides that the burden of proof on a party in a Civil Suit should be on a balance of probabilities.

In the case of *Adwubeng v. Domfeh [1996-97] SCGLR 660*, the Supreme Court held that:

"In all civil actions, the standard of proof is proof by the preponderance of probabilities, and there is no exception to that rule."

Upon weighing the evidence adduced by the parties at the trial, the Court hereby finds that the scale of the preponderance tilts in favour of the Plaintiff against the Defendants. As demonstrated by the evaluation of the evidence undertaken by the Court supra, it is the considered opinion of the Court that, the case of the Plaintiff is more probable than that of the Defendants. In view of same I hereby enter judgment in favour of the Plaintiff as follows:

i. Declaration of title to the parcel of land in dispute as described in the Schedule of the Amended Statement of Claim and in Exhibits "A" and 'A1'.

ii. The Defendants, their agents, assigns, privies, etc. are hereby restrained from interfering with the land described in the Schedule of the Amended Statement of Claim and in Exhibits "A" and 'A1'.

iii. Recovery of possession of the land in dispute as described in the Schedule of the Amended Statement of Claim and in Exhibits "A" and 'A1'.

There will be no order as to Cost.

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H/H SARAH NYARKOA NKANSAH
CIRCUIT COURT JUDGE SITTING
AS ADDITIONAL MAGISTRATE
28/07/2023