IN THE DISTRICT COURT SEKONDI HELD ON THURSDAY THE 27TH DAY OF APRIL, 2023 BEFORE HER WORSHIP MRS. ROSEMARY EDITH HAYFORD, DISTRICT MAGISTRATE

SUIT NO. A1/21/2019

MISS FLORENCE SOWAH ……. PLAINTIFF

VRS

VIC ……. DEFENDANTS

JOHN MENSAH

J U D G M E N T

By a writ of summons filed on the 8th of May, 2019, Plaintiff initially commenced the action against the 1st Defendant claiming the following reliefs:

a. *A declaration of title to Plot No. 94D situate at Kweikuma Layout bounded on all sides by proposed lanes and plot no. 94D*

b. *Recovery of possession*

c. *Damages for Trespass*

d. *Perpetual Injunction restraining the Defendant either by herself, her agents, privies, assigns, workmen etc from having anything to do with the land the subject matter of this suit.*

On the 5th of July, 2019 the court suo moto joined John Mensah as the 2nd Defendant to the action when it came to its attention that the proper person to have been sued was the 2nd Defendant. Parties were ordered to file their pleadings, following which their various witness statements were also filed. At the close of the case the counsel for the parties were ordered to file their written addresses but both failed to file same.

Plaintiff's Case

The crux of Plaintiff's claim is that she acquired plot no. 94D situate at Kweikuma Layout from the Kukordu Ebiradze Stool Family of Fijai then represented by Opanyin Kojo Korasten Amaning sometime in 1993. After the payment of the consideration for the land, the transaction was reduced into writing and executed by the plaintiff and the family. According to Plaintiff, she took possession of the land and constructed foundation structures for her building. She also planted plantain and other crops on the other portion of the land. It is the case of the Plaintiff that during the processing of the document, litigation arose on the land between the stool family and another family and so all developments on the land of the family were seized and the processing of the document halted. Plaintiff avers that she was then working with the Ghana Health Service and was transferred to several towns throughout Ghana and so for most of the years in service she was out of Kweikuma where the land is situated. On her return, she organized some workers to work on the land but the defendants came to confront them claiming that she had also purchased the land. Defendants then caused the destruction of the Plaintiff's foundation structure and crops on the land and has sold out the land to another person who is developing same. Hence this suit.

Defendants' Case

The defendants per their statement of defence filed on 10/9/2020 denied the claims of the plaintiff and averred that the 2nd Defendant lawfully acquired the disputed land

from the Stool of Fijai then occupied by Nana Kobina Angu II sometime in 1992 but completed the documentation in 1995 as a result of protracted litigation between the Fijai Stool and a family at Kweikuma over lands situate at Kweikuma. The 2nd Defendant contends that the said ligation ended in favour of the Fijai stool which was declared owners of all land situate at Kweikuma and it was after the said judgement that the Fijai Stool executed a lease which has been registered at the Lands Commission. 2nd Defendant avers that the disputed land was acquired through the assistance of the stepfather of 1st Defendant who worked then with the Lands Commission at Sekondi. He contends that at the time the land was acquired it was vacant and had no structure on same. The 2nd defendant avers that he deposited building materials on the plot to the visibility of all persons and has been paying all out-going rents and rates to date.

2nd Defendant further avers that just as he was about to commence the construction, Plaintiff emerged from nowhere to dig a foundation on the plot and constructed a corner wall on one side of the plot. According to the defendants, they quickly stopped the Plaintiff who sued at the District Court Sekondi but her case was thrown out as she did not have any title to the disputed plot. It is the case of the 2nd Defendant that he got sick a few years ago and decided to dispose of the said land to take care of his medical bills as such he has assigned his interest in the plot to one Isaac Richard Duker who has also since registered his interest and has also been paying all ground rent on the land. The said assignee has also constructed his building to the roofing level. The Defendants have counter-claimed as follows:

a) *Declaration that plot No. 94D is the lawful property of Isaac Richard Duker the assignee of 2nd Defendant*

b) *General damages for trespass*

c) *Perpetual injunction restraining the Plaintiff, either by herself, her servants, agents, workmen, assigns etc from having anything to do with the disputed plot of land*

d) *Cost inclusive of legal cost*

Issues Set Down for Trial

At the close of pleadings, the following issues were set down for trial:

a. Whether or not the disputed land belongs to the Plaintiff or the assignee of the 2nd defendant

b. Whether or not the Plaintiff is entitled to her claim.

c. Whether or not the Defendants are entitled to their counterclaim.

BURDEN OF PROOF

The standard burden and persuasion of proof in civil matters including land are captured under sections 11(4) and 12(1) of the Evidence Act 1975 (NRCD 323). The relevant provisions provide:

"11(4) In other circumstances the burden of producing evidence requires a party to produce 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….

12(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities."

In land matters, the person asserting title must prove his root of title strictly, among others. In the case of **Mondial Veneer (Gh) Ltd v Amuah Gyebu XV (2011) SCGLR 466 at page 468 (**holding 4), the Supreme Court held that:

"In land litigation, even where living witnesses involved in the transaction, had been produced in court as witnesses, the law would require the person asserting title and on

who bore the burden of persuasion... to prove the root of title, mode of acquisition and various acts of possession exercised over the disputed land. It is only where the party had succeeded in establishing those facts, on the balance of probabilities, that the party would be entitled to the claim"

In **Deliman Oil Company Ltd v HFC Bank Ghana Limited (2016) 92 G.M.J.** 1, the Court of Appeal, sitting in Tamale, in its judgment delivered by Ackah-Yensu JA at page 8 said the following:

"Title is the means by which a person establishes his right to land. A person's title indicates by what means he claims to be the owner of land. Title to land may take the form of possession or it may take the form of a document or a series of documents…"

ANALYSIS AND DECISION OF THE COURT

Before I delve into the issues, it must be noted that even though the burden is on the plaintiff to prove her case, the Defendants have also set up a counter-claim, therefore they equally have the burden to prove their case on the balance of probabilities.

The Plaintiff in proving her case stated that she acquired the disputed land from the Kokodu Ebiradze stool family of Fijai sometime in 1993. According to the Plaintiff after the payment of the consideration an instrument was executed in her favour, however, there was litigation within the family as a result of which she could not process the said document. Plaintiff tendered **Exhibit "A"** the indenture in evidence. The Defendants on the other hand through the attorney of the 2nd Defendant also stated that the 2nd Defendant acquired the disputed land in 1992 from the Fijai Stool occupied by Nana Kobina Angu II but documentation could only be completed in 1995 because of protracted litigation between the Fijai Stool and a family at Kweikuma where the disputed land is situated.

Exhibit "A" tendered by the plaintiff is dated 1993 and executed between Opanyin Kojo Koratsen, the Regent of Kukordu Ebiradze Stool family of Fijai. The oath of proof is dated August, 2019. This document is not stamped nor registered. Plaintiff says this was because there was an injunction placed on documents being processed as a result of the litigation. PW1 is the stool secretary of the grantors of the plaintiff. He also confirmed that there was litigation on the disputed land which made it impossible for the Plaintiff to register her documents. He further stated that he became the stool secretary in 1992 after the court appeal judgment that went in his family's favour. Furthermore the land was given to the Plaintiff in 1993 and at the time he was the secretary. Under cross-examination when he was pushed further that as the secretary then he might have signed the document of the plaintiff since he was then the stool secretary, he now changes his evidence that he was the deputy secretary and not the substantive. Below is what transpired

Q. *You claim to be the stool Secretary for the Fijai Stool, is that correct?*

A. *Yes, it is true*

Q. *When did you become the stool Secretary?*

A. *It was in 1992 when we had the judgment from the Appeals Court*

Q. *And you have been the stool secretary till date. Is that correct?*

A. *Yes*

Q. *When was the land in dispute granted to the Plaintiff according to you?*

A. *That was 1993*

Q. *So at that time you were then the secretary?*

A. *Yes*

Q. *So you signed her indenture as then Stool Secretary?*

A. *I wasn't*

Q *Can you explain why as the secretary from 1992 you did not sign an indenture executed in 1993?*

A. *I was under my elderly people. There was somebody before me so I was understudying so I was not allowed to sign indentures*

Q. *Now is it your case that when you were purportedly appointed the stool secretary, there was already a stool secretary is that what you are saying?*

A. *Yes, there was, the name was late Eshun so I was the deputy to him*

Q. *So you will change your case to say that you were appointed a Deputy Secretary in 1992 instead of a secretary – do you want to change your case now?*

A. *Yes*

Q. *And so the indenture to the plaintiff was signed by the said Mr. Eshun, is that correct as one of the signatories?*

A. *Yes*

Q. *I am putting it to you that no Mr. Eshun as a stool secretary signed the indenture of the plaintiff*

A. *Late Eshun and Opanyin Kworanten and another man were signing the indenture*

The position of the witness changes from secretary to deputy secretary, this is clearly an afterthought. PW1 further said it was signed by one Mr. Eshun. However, a look at Exhibit A, the indenture does not show any name as Eshun being the stool secretary. Again, if the assertion of PW1 is that the litigation ended in 1992 and the land was granted to the Plaintiff in 1993 after the litigation, it means that the Plaintiff should have

been able to stamp and register her document in 1993 since the litigation ended in 1992. But to date same has not been registered. I shall discuss the effect of the non-registration later in this judgment.

The Defendants on the hand through the 2nd Defendant's attorney stated that they acquired the land in 1992 but the documentation regarding the acquisition could only be effected in 1995 as a result of litigation in respect of the disputed land. Further, the defendants claim that after the acquisition, they deposited building materials including sand, gravel, iron rods, lumber, etc on the land. Just when they were about to commence the construction of the building, the Plaintiff emerged from nowhere and quickly dug foundation trenches on a small part of the land. Defendants claim when this came to their attention, the 2nd Defendant confronted Plaintiff whereupon Plaintiff sued the 2nd Defendant's representative at the district court differently constituted. Plaintiff vehemently denies this claim and therefore the defendant assumed the burden to prove this averment. However, all that the attorney of the 2nd Defendant did was to mount the box and repeat the same averment. In the case of **Majolagbe v Larbi & Others [1959] 190 at 192** proof in law was defined as **"the establishment of facts by proper legal means……..by producing documents, description of things, reference to other facts, instances or circumstances……..by producing other evidence of facts and circumstances from which the court can be satisfied that he (a part) avers is true"**; sufficiency of evidence, therefore, compels the tendering of relevant evidence which has such weight, credibility, cogency, and consistency that a court must prefer it over the evidence of the other contesting party. In this case, however, the acts of going to court which is capable of proof should have been proved by the defendants by producing cogent evidence to support their claim but they failed. Defendants however tendered **Exhibit 2**, the indenture that was executed for the 2nd Defendant when the land was acquired. This document is stamped and registered and

dated 1995. I believe this is the right time for me to discuss the effect of the two documents presented by the parties. The Plaintiff claims she acquired her land in 1993 however her document appears defective as it is not stamped or registered. However, that of the 2nd defendant dated 1995 is stamped and registered. By the said registration, it gave the 2nd Defendant the legal right of a registered proprietor of a parcel of land which is indefeasible and could be held by him together with the rights and privileges attached to the parcel of land free from all other interests and claims only subject to the interests or other encumbrances. See **Section 119 of the Land Act, 2020, Act 1036**

By **section 229(5)** of **Act 1036** *(supra)* an instrument shall (except as otherwise expressly provided in Sections 227, 228, 231 and this section) take effect from the date of registration of the instrument.

Therefore, of the two documents which one has priority over the other?

Section 124 of Act 1036 stipulates as follows:

"*Priority of registered interest*

124 (1) Rights derived from instruments recorded in the land registered shall have priority according to the order in which the instruments were presented to the Registry irrespective of the dates on the instruments and despite the fact that an entry in the land register may have been delayed

(2) Subsection (1) does not apply where there is fraud, notice, or mistake"

The current position of the law on priority of instruments is in tandem with sections 26(1) and (5) of the repealed Land Registry Act, 1962 (Act 122). It is to the effect that an instrument concerning land takes effect from the date of its registration against any other instrument affecting the same land. Put differently, the first in time to register his or her document shall have priority over the other irrespective of the dates captured on

same except where the person who registered the instrument first had prior notice of the existence of the other or the person perpetuated fraud or that there was a mistake. The same principles were expressed in the case of **Amuzu v OKlikah [1998-99[SCGLR 141** which was decided under the repealed **Land Registry Act, 1962 (Act 122)**. The supreme court per **Aikins JSC** (as he then was) held at holding one that

> *"(1) the Land Registry Act, 1962 (Act 122), did not abolish the equitable doctrines of notice and fraud; neither did it confer on a registered instrument a state-guaranteed title. Consequently, a later instrument (such as exhibit B in the instant case) could only obtain priority over an earlier one by registration under section 24(1) of Act 122 if it was obtained without notice and fraud of the earlier unregistered instrument. Since, in the instant case, the plaintiff had actual notice that the land was in some way encumbered, he would be held to have constructive notice of the earlier grant to the defendant. The Court of Appeal had erred in holding otherwise."*

In the instant case, the Plaintiff claims to have acquired the disputed land in 1993 however her document is not registered. Defendants claim they acquired theirs in 1992 but their instrument was registered in 1995. It is clear that the defendants were the first to have registered their indenture in 1995 and so that takes priority over the Plaintiff's document which is not registered. Did the defendants have any notice of the existence of the Plaintiff at the time of the acquisition or registration? It is the case of the Plaintiff that after she acquired the disputed land she constructed a foundation and because of transfers in respect of her work she could never complete same until recently when she saw work was being done on the disputed land. The Defendants on the other hand aver that when they purchased the same, it was vacant and had no structure whatsoever on the land. They deposited building materials on the said land to the visibility of all persons and they have been paying all out-going rents and rates from that time till date. They have even assigned the land to another person and the said

person has started construction on the disputed land. Plaintiff tendered **Exhibits B, C**, and **D** to show that her foundation works were destroyed. I have critically looked at the said exhibits and I find that the pictures show people constructing rather than destroying them. The attorney of 2nd Defendant confirmed that indeed Plaintiff constructed the foundation but it was after they had acquired the same and not before. What the court finds curious is the attitude of the Plaintiff and the length of time it has taken her to try and get her land secured if indeed she claims ownership. She claimed that she could not register the land because there was litigation. However, her own witness stated under cross-examination stated that the said litigation ended in 1992 which implies that from 1993 to date (30 good years) Plaintiff could have stamped and registered the same if she was so minded and diligent enough. It is only for educational purposes that I have spent time on the effect of Plaintiff's failure to register her indenture because the said exhibit A is simply inadmissible for non-compliance with the Stamp Duty Act 2005, Act 689.

Section 19 of Stamp Duty Act 2005, Act 689 provides

> **"***19. Conveyance other than a sale*
>
> *(1) An instrument and a decree or an order of a court by which property is transferred to or vested in a person, other than through a sale shall be charged with duty as a conveyance on sale or transfer on sale of that property for a consideration equal to the value of that property***.'**

Section 281 of the **Land Act 2020, Act 1036** interprets conveyance as following

> *"Conveyance includes a document in writing* ***by which an interest in land is transferred,*** *an oral grant under customary law this duly recorded in accordance with*

this Act, a lease, disclaimer, release and any other assurance of property or of an interest in property by an instrument, except a will"

Black's Law Dictionary, Deluxe Ninth Edition also defines Conveyance

"***The voluntary transfer of a right or of property***"

Section 19 of Act 689 talks specifically about a decree or order **by which property is transferred or vested** in a person and same operates as conveyance.

In respect of **Exhibit A**, which is an indenture executed by Opanyin Kojo Koratsen Amaning Regent of Kukrordu Ebiradze Stool Family of Fijai and Miss Florence Sowah, it is an instrument that is transferring an interest in land to the plaintiff. This falls squarely within section 19 of the Stamp Duty Act, **Act 689** which stipulates that such a document shall be charged with duty as a conveyance. In effect, it must be stamped. The Supreme Court in the case of **Woodhouse Limited v Airtel Ghana, Civil Appeal No. J4/08/2018 unreported, dated 12th December 2018** speaking through **BAFFOE-BONNIE, JSC** relying on the case of **Lizori Ltd v Mrs. Evely Boye**, Civil Appeal No J4/8/2012 dated 26th July 2013 where Bennin JSC, stated that:

*"**This provision is so clear and unambiguous and requires no interpretation. Either the document has been stamped and appropriate duty paid in accordance with the law in force at the time it was executed or it should not be admitted in evidence. There is no discretion to admit it in the first place and ask the party to pay the duty and penalty after judgment**."*

Applying the above to the instant case, it is clear from **Exhibit A** that the indenture is unstamped and the same ought not to have been admitted into evidence. **S. A. Brobbey** in his **book Practice & Procedure in the Trial Courts & Tribunals, 2nd Edition** stated on page 167 as follows

> *"The general rule is that if inadmissible evidence is received in the course of the trial (with or without objection), it is the duty of the court to reject it when giving judgment. If it is not so rejected, it would be rejected on appeal, since it is the duty of the court to arrive at its decision upon legal evidence only. See:* **Tormekpey v Ahiable [1975] 2 GLR 432, CA** which was applied in **Amoah v Arthur [1987-88] 2 GLR 87, CA.**

Being fortified with the above, I hereby accordingly reject Exhibit A as inadmissible.

Having rejected the Plaintiff's indenture, I wish to point out that the evidence before the court does not only suggest that the 2nd Defendant was able to register his document amidst the alleged protracted litigation, but they have also subsequently exercised several acts of ownership. The Defendants tendered **Exhibits 3 series (3A - 3J)** in support of these acts. These are various receipts of payments from 1995 to 2018 from SAEMA (Taxpayer's Receipt), the Lands Commission Secretariat (full payment of processing fees), and the Administrator of Stool Lands (Ground rent from 1995-2018). It must be noted that even when the 2nd defendant assigned his interest in the disputed land to his assignee, the said assignee has also been able to register the said land, and yet the Plaintiff still dwells on the fact that there is litigation on the land. The Defendants tendered **Exhibit 4**, the deed of assignment from the 2nd Defendant to the assignee Isaac Richard Duker in 2018. Subsequently said assignee has also been paying the statutory payments in respect of the disputed land. **Exhibits 5 series (5A – 5D)** were tendered in support. Clearly, in terms of equitable rights in the disputed property, the defendants have discharged the burden placed on them, in addition to convincing the court of their legal rights in the subject matter property.

Having analyzed the totality of the evidence and on the preponderance of probabilities, I find that there is no evidence to show that the 2nd defendant was aware of any prior interest (if any) of the Plaintiff at the time of purchase and registration of his instrument since the land was vacant and unencumbered at the time they acquired same.

Therefore, the prior registration of the 2nd defendant's indenture gave him a prior interest. I do not also find any fraud perpetuated. I further find that the assignment from the 2nd Defendant to his assignee Isaac Richard Duker is valid. In the circumstance, I hold that the disputed land is the lawful property of the 2nd Defendant's assignee. The Plaintiff's action fails while the counterclaim of the Defendants succeeds. I proceed to make my final orders below

DECISION

Judgment in favour of the Defendants against the Plaintiff as follows:

a) *Declaration that plot No. 94D is the lawful property of Isaac Richard Duker the assignee of 2nd Defendant*

b) *General damages of GH₵2,000 against the Plaintiff*

c) *Perpetual injunction restraining the Plaintiff, either by herself, her servants, agents, workmen, assigns etc from having anything to do with the disputed plot of land*

d) *Cost of GH₵3, 000.00 is awarded against the Plaintiff.*

(SGD)

H/W ROSEMARY EDITH HAYFORD

DISTRICT MAGISTRATE

COUNSEL:

J. E. K. ABEKAH ESQ FOR THE PLAINTIFF

F. F. FAIDOO ESQ FOR THE DEFENDENT