

IN THE DISTRICT COURT TWO TAMALE
HELD ON MONDAY 31ST JULY, 2023
BEFORE HIS WORSHIP D. ANNAN ESQ.

SUIT NO. A1/9/22

BETWEEN

ABDUL RAHAMAN SULEMANA

-

PLAINTIFF

AND

1. ABDUL SAMIN ABDUL RAHAMAN

-

DEFENDANTS

2. HUMEIMA ABDUL RAHAMAN

JUDGMENT

1. This is judgment relates to land.
2. The plaintiff described himself as an Islamic Teacher while the defendants are described as younger siblings of the plaintiff. Thus, parties are of the same father but different mothers.

3. On 17th May, 2022, plaintiff took out a Writ of Summons against the defendants. This court granted plaintiff leave to file an amended Statement of Claim. However, plaintiff failed to do so. By law, failure to amend Writ of Summons or Statement of Claim upon grant of leave, can be cured by looking at the substance rather than the form, see the cases of **Mumuni v Nyamkye [2013] 58 GMJ at 61-62, CA** and **Republic v High Court, Accra, Ex parte Allgate Co. Ltd. [2007-2008] SCGLR 1041**. In **Mumuni v Nyamkye (supra)**, the Court held per Ayebi JA that, "The leave granted the plaintiff to amend his writ by the addition of a claim for declaration of title is acknowledged. The failure to effect the amendment was a default on the part of his new counsel who did not digest fully the brief he took over. It is not the practice of the courts to visit the sins or omissions of counsel on the client who is unlettered in law. Since the Rules of Court mandate the courts to interpret the rules liberally and beneficially in order to do substantial justice to the parties, I am of the view that there is sufficient justification for this court to amend the Writ of Summons as if the order of the trial court had been duly carried out by the plaintiff" I must point out that the amendment granted the plaintiff in this case had to do with the description of the defendants as his siblings. Defendants were described as plaintiff's brother's or late brother's siblings. All other pleadings remained the same. Hence, I shall cloth myself with Or. 1 rule 1 of the District Court (Civil Procedure) Rules 2009, (CI 59) similar to the other Rules of Court and **Mumuni v Nyamkye (supra)**, in holding that the Statement of Claim is so amended to reflect that defendants are '*plaintiff's younger siblings*'.
4. Per his Writ of Summons, the plaintiff claims against the defendants the following reliefs:
- a. A declaration that all that piece of land described as House No. 132, situate and lying at Ward A Residential Area is the property of the plaintiff.
 - b. An order of perpetual injunction restraining the defendants from trespassing onto the property of the plaintiff.

- c. General damages against the defendants for trespassing on plaintiff's property.
 - d. Any other relief(s) this Honourable Courts deems fit.
- 5. The defendants refuted plaintiff's claim saying that the disputed property is a family property. Defendants in their defence and counterclaim filed on 18th July, 2022 prayed for the following:
 - a. A declaration that the disputed property is a family property and all the children of Abdul Rahman Nabila as beneficiaries.
 - b. An order canceling any indenture the plaintiff possesses respecting the disputed house.
 - c. An order of perpetual injunction restraining the plaintiff and his privies from claiming ownership of the disputed house.
 - d. An order directing the plaintiff to account to the defendants the rents he collected from the room and store, effective 1st August, 2016.
 - e. Any other relief as the justice of the case dictates.
- 6. Subsequent to the above, the defendants filed an application for interlocutory injunction to restrain the plaintiff from disposing of the said property. This court granted the said application. Parties were ordered to file their respective witness statements. The respective case of each party is summarized below.

PLAINTIFF'S CASE

- 7. Plaintiff testified through one, Mueze Sulemana, who was described as plaintiff's lawful attorney. He submitted that the property in dispute was first owned by one Alhassan Dagomba. The said Alhassan Dagomba by a statutory declaration dated 4th January, 1988 transferred his interest to the plaintiff. Subsequently, a deed of

assignment was executed on 7th January, 1988 between Alhassan Dagomba and the plaintiff herein. Plaintiff contended that the said transaction was executed with the full knowledge of his father when he was alive. Plaintiff maintained that he did not distribute any portion of the property to the defendants. He added that the defendants had prior to filing this case sent the matter to CHRAJ demanding for their share of rent collected by him (the plaintiff). Plaintiff claims that the actions of the defendants are misplaced, hence this action to bring finality to the issues.

8. The plaintiff tendered in evidence the following exhibits in support of his case:
 - a. Exhibit A - Statutory Declaration transferring ownership to Plaintiff dated 4th January, 1988.
 - b. Exhibit B – Copy of the Deed of Assignment dated 7th January, 1988.
9. Plaintiff did not call any witness. In fact, plaintiff abandoned calling the Regional Director, Lands Commission, Tamale to testify although a subpoena was issued.

DEFENDANTS' CASE

10. 1st defendant testified for himself and on behalf of the 2nd defendant. According to him, the disputed house belongs to their late father, Abdul Rahaman Nabila. He explained that their father died interstate and was survived by five children, of which parties herein are siblings. He gave the history of the disputed house as being built by one Fuseini Nabila, who later gave it to their grandmother, Naina Nabila. He explained that upon the death of his grandmother, his father Abdul Rahaman Nabila took charge of the house. He added that after the demise of his father, defendants continued to live in the disputed house without let or hinderance by the plaintiff.

11. 1st defendant submitted that their father at one point gave the house documents to the late family head, Alhaji Saani, to be given to one Afa Ajura in exchange for another house, to allow for the expansion of the Anbariya Mosque. He described that the house at the time of the intended exchange was a thatch house with 4 rooms. He averred that his relatives, Abdulai and Baba, were those who fetched water and thatch for the construction of the house. It was submitted that one Alhaji Abdul Rahman Sabari roofed the disputed building with zinc roofing sheets and built additional 8 rooms with concrete blocks to facilitate the exchange. However, that exchange did not go through, saying that the one to carry out the exchange, Amolga, refused because he realized that the house was a family house. It was further submitted that the said Alhaji Abdul Rahman Sabari gave up his own house in exchange and temporarily occupied the disputed house. 1st defendant added that Alhaji Abdul Rahman Sabari and Afa Ajura returned the disputed house to their father. He further submitted that at the time of the intended exchange, the plaintiff was in Saudi Arabi schooling, such that plaintiff never built or added any room to the disputed house. Rather, the plaintiff took over the house as being the eldest brother upon the death of their father. 1st defendant claims that plaintiff released to defendants 3 rooms and 2 stores and an agreement was executed to that effect, dated 13th January, 2011. He contended that plaintiff told the tenants in the 3 rooms and 2 stores that, he (1st defendant) is the owner and as such the plaintiff is estopped from claiming that the dispute house belongs to him or that he acquired it personally. He also argued that plaintiff in August 2016 took rent from one of the rooms and the store, despite objection to same. Hence, defendants reported the matter to CHRAJ to prevent the plaintiff from claiming the house as his bonafide property. Defendants averred that the actions of the plaintiff are aimed at overreaching them, hence their counterclaim.

12. The defendants tendered in evidence the following:

- a. Exhibit 1 – Copy of Plaintiff’s Power of Attorney.
- b. Exhibit 2 - Copy of the agreement executed by the plaintiff and 1st defendant, described as “Right of Ownership” dated 13/1/11.
- c. Exhibit 3 – Copy of the Tenancy Agreement between 1st defendant and a tenant for the period 1/6/12 to 1/6/13.
- d. Exhibit 4 – Copy of Tenancy Agreement between 1st defendant and a tenant for the period 1/6/12 to 30/7/14.
- e. Exhibit 5 – Rent Agreement between 1st defendant and a tenant for the period 1/10/13 to 1/10/16.
- f. Exhibit 6 – Tenancy Agreement between 1st defendant and a tenant for the period 10/1/16 to 10/1/19.
- g. Exhibit 7 – Copy of CHRAJ’s letter to plaintiff to comment and for mediation dated 31/3/22.

Defendants’ Witnesses

13. Defendants called two witnesses in support of the above evidence. DW1, Baba Alhassan, indicated that he stayed in the said house for 2 years. He added that at the time he was staying in the house, at about six years old, plaintiff was by then in Saudi Arabia schooling. DW2, Abdulai Fuseini, added that he and others fetched water and thatch for roofing of the disputed house.

ISSUES FOR DETERMINATION

14. The issues borne out by the facts are:

- a. *What is the effect of the Power of Attorney tendered by counsel of the defendant?*
- b. *Whether or not the House No. 132, situate and lying at Ward A Residential Area is the bonafide property of the plaintiff or a family property?*

- c. *Whether or not Deed of Assignment bearing the name of the plaintiff was obtained by fraud?*
- d. *Whether or not Defendants' Exhibit 2, titled 'Right of Ownership' was obtained by fraud?*
- e. *Whether or not the plaintiff is to account for rent collected from August 2016?*

BURDEN OF PROOF

15. In civil cases, the general rule is that the party who in his pleadings raises issues essential to the success of his case assumes the onus of proof on the balance of probabilities. See the cases of **Faibi v State Hotels Corporation [1968] GLR 471** and **In re Ashalley Botwe Lands; Adjetey Agbosu & Ors. v. Kotey & Ors. [2003-2004] SCGLR 420**. The Evidence Act, 1975 (NRCD 323) uses the expression 'burden of persuasion' and in section 14 that expression has been defined as relating to, 'each fact the existence or non-existence of which is essential to the claim or defence he is asserting.' See also ss. 11(4) and 12(1) and (2) of NRCD 323 and **Sarkodie v FKA Company Ltd. [2009] SCGLR 65**.
16. With regards to what is required of the plaintiff in land properties, the law is that he must succeed on the strength of his own case and not on the weakness of the defendant's case, see **Odametey v Clocuh [1989-90] 1 GLR 14, SC**. In **Kodilinye v Odu [1935] 2 WACA 336**, the court puts it simply that, "in case of doubt, ...the party who asserts must lose."
17. Where there is claim and a counterclaim, the Supreme Court speaking through His Lordship Ansah JSC in the case **Osei v Korang [2013] 58 GMJ 1**, stated as follows:

“... each party bears [the] onus of proof as to which side has a claim of title against his/her adversary, for a counter claimant is as good as a plaintiff in respect of a property which should he assays to make his/her own.”

18. Where a party pleads fraud in civil case, the law regarding the proof of the criminal act is that of proof beyond reasonable doubt. Section 13(1) of NRCD 323 provides, “In a civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond reasonable doubt.” See also the cases of **Aryeh & Akakpo v Ayaa Iddrisu [2010] SCGLR 891 at 903** and **Sasu Bamfo v Sintim [2012] 1 SCGLR 136 at 148**.

ANALYSIS OF THE ISSUES

Issue a.

19. Issue a regards, *what is the effect of the Power of Attorney tendered by counsel of the defendant?* This issue has come up because from the evidence, the below questions were asked by counsel for defendant:

“Q: You are testifying on behalf of plaintiff, not so?

A: Yes.

Q: And your authority to testify for him is based on the power of attorney given to you?

A: Yes.

Q: Have a look at this document, is that the power of attorney?

A: Yes.

Q: We want to tender it through him?

B/C: Any objection.

CoP: No.

B/C: Power of attorney is marked as Exhibit 1.

Q: On the basis of the authority of the power of attorney, you prepared the witness statement?

A: That is so.”

20. Based on the above, counsel for defendant submitted in his written address that because Exhibit 1 is unstamped, it is defective and same must be thrown out. He cited the cases of **Lizori Limited v Mrs. Evelyn Boye & Anor. [2013] DLSC 2753** and **Woodhouse Ltd. v Airtel Ghana Ltd. [2018] DLSC 4524** in support of his argument. He added that since Exhibit 1 is inadmissible, everything that followed therefrom including exhibits and witness statement should be expunged.

21. Counsel for the plaintiff, on his part, in his written address contended that witness, Mueze Sulemana, who is the son of the plaintiff signed the witness statement titled/captioned, ‘WITNESS STATEMENT OF PLAINTIFF’S ATTORNEY’. To him, the title/caption of the witness statement was an error. Again, it was the defendants

who caused Exhibit 1 to be filed, therefore, counsel for defendant could not turn round to have same expunge together with the evidence that flowed therefrom. He urged the court to look at the substance but not the form. He support his argument with the case of **Mary Tetterley Bill & 5 Ors. and Robert Alexander A. Colley v Emmanuel Abeka Bil [2006] DLSC 2426** in which Atuguba JSC (as he then was) delivering the judgment of the Supreme Court held that:

“This objection is rather puzzling. The co-plaintiff as stated supra was called as ‘the fourth plaintiff witness’ and was proceeding to testify in that capacity, and not as a co-plaintiff when counsel raised the objection. It is trite law that unless incompetent, a party can testify as a witness, see s. 58 and 59 of NRCD 323. No allegation of incompetence arising from those provisions is made against the co-plaintiff as a witness, to wit: the fourth plaintiff witness. That being so, objection could be taken if he purported to testify on matters that ought to have been pleaded by the plaintiffs but have not been pleaded. Even then, such objection could not be based on competence but on admissibility of evidence.”

22. Counsel for the plaintiff maintained that the said title/caption created the erroneous impression that plaintiff had a power of attorney, but the content of the witness statement never mentioned or referred to the power of attorney. He recounted paragraphs 1 and 2 of the said witness statement as follows: *“1. My name is Mueze Sulemana and I am the son of the plaintiff in respect of this case in court. 2. The plaintiff is an Islamic Cleric with Anbariya Institute whilst the defendants are his siblings.”*. In effect, he urged the court to disregard the submissions of counsel for defendant and to look at the substance over the form.

23. The law on the effect of an unstamped documents has been decided in a number of cases, the recent one being: **Theophilus Teiko Tagoe The Nugua Stool v Dr. Prempeh Benjamin Amartey Mensah [2023] DLSC 15111** which also cited the earlier decisions in the cases of **Lizori Limited v Mrs. Evelyn Boye & Anor. (supra)** and **Woodhouse Ltd. v Airtel Ghana Ltd. (supra)**, stating that,

“The provision in section 32 of Act 689 was so clear and unambiguous and required no interpretation. Either the document had 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 was no discretion to admit it in the first place and order the party to pay the duty and penalty after judgment.”

24. From the evidence, the power of attorney tendered as Exhibit 1 is unstamped. It follows that once the power of attorney was unstamped, then same must be excluded. The issue then is, on the exclusion of Exhibit 1, should the court proceed to expunge the evidence that flowed therefrom? This, counsel for plaintiff argued that it was the defendant who caused Exhibit 1 to be tendered and now wants same to be excluded as being inadmissible. They, in doing their case, never sought to tender the said power of attorney and that they do not see why they should suffer for same. Again, the content of the witness statement did not refer to the power of attorney, save that the title/caption read, “WITNESS STATEMENT OF PLAINTIFF’S ATTORNEY”. Hence, this court should look at the substance but not the form.

25. I am unable to agree with counsel for the plaintiff on his submissions. In our instant case, the issue is whether the plaintiff’s attorney was clothed with legal authority? I must say that the argument of counsel for plaintiff makes some sense in that he did not tender Exhibit 1, defendant did, yet defendant wants same to be rendered

inadmissible and everything flowing from same. Yes, to some extent it makes sense, but the evidence and law state otherwise. The evidence points to the fact that the plaintiff was testifying on the basis that he has a power of attorney, see paragraph 19 of this judgment which recounted that part of the cross-examination. The law is that once the power of attorney is unstamped, it is inadmissible and has to be excluded. In effect, the very foundation upon which the evidence was given, including the exhibits is wrong in law and therefore nothing can be put on it, see the cases of **Theophilus Teiko Tagoe, The Nugua Stool v Dr. Prempeh Benjamin Amartey Mensah (supra)**, **Mossi v Bagyina [1993] I GLR 337** and **Asante-Appiah v Amponsah @ Mansah [2009] SCGLR 90**. Particularly in **Asante-Appiah v Amponsah (supra)**, although the recent case in **Florini Luca & Anor. v Mr. Samir & Anor. [2021] DLSC 10155** struck down the mode in which the power of attorney therein was executed, the court did not strike down the effect of the power of attorney found to be defective. At page 95, the apex court held that, “the plaintiff himself never testified in the action. *In view of the conclusion that the power of attorney was invalid and the one who relied on it had no capacity and therefore his evidence was inadmissible, the plaintiff was left in a situation as if no one represented him. The case of the plaintiff was thus reduced to mere pleadings filed on his behalf.*”

26. In effect, I find that Exhibit 1 is defective and same is inadmissible. Likewise, everything flowing therefrom is inadmissible. What is left for the plaintiff is his pleading and the cross-examination his counsel conducted.

Issues b, c and d.

27. I will now consider issues b, c and d together. Thus, (b) *whether or not the House No. 132, situate and lying at Ward A Residential Area is the bonafide property of the plaintiff or a family property*, (c) *whether or not Deed of Assignment bearing the name of the plaintiff was obtained by fraud* and (d) *whether or not Defendants' Exhibit 2 titled 'Right of Ownership' was obtained by fraud?*

28. First and foremost, for an action that relates to a family property, there are plethora of cases which support the legal position that any family member may bring an action, especially where the head of family will not make a move to save or protect it, see **Kwan v Nyieni [1959] GLR 67** and **Anane v Agyemang & 7 Ors. [2014] 75 GMJ at 37-38**. The law adds that 'anyone with an interest in an estate, such as a beneficiary, could take an action in respect of the estate where there was no formal grant of letters of administration ...provided the action taken was aimed at protecting the estate from being wasted', see In **Re Appau (Dec'd) Appau v Ocansey [1993-94] 1 GLR 146** and **Adisa Boya v Mohammed Alias Mujeeb [2018] DLSC 4225**. In effect, the actions of the defendants herein are in no way barred since they seek, in their opinion, to protect the property of their family.

29. The question, however, is this, is the property in dispute for the family or the plaintiff? As earlier pointed out, he who asserts must prove. Now, with regard to proof of one's claim or allegation, the Supreme Court in the case **Okudzeto Ablakwa (No. 2) v. Attorney-General & Obetsebi-Lamprey (No. 2) [2012] 2 SCGLR 845 at page 867** held as follows:

"...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.”

30. Let me also rehash what was stated in **Majolagbe v. Larbi [1959] GLR 190** regarding proof of an allegation. The learned judge, Ollenu J. (as he then was) stated at page 192 that, “where a party makes an averment capable of proof in some positive way...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 avers is true*”. See also the case of **Klah v. Phoenix Insurance Company Limited [2012] 2 SCGLR 1139**.

31. The law is also that the trial court has to decide which set of facts or whose version of the facts or which party should be believed or disbelieved, i.e. which of the varying or conflicting versions of the party’s stories, facts or evidence is credible, see **Ntim v Essien [2001-2002] SCGLR 451**. It should be noted that documentary evidence is presumed to take precedence over oral evidence, see **Abbey & Others v Antwi V [2010] SCGLR 17**. On reliance of family history (oral/traditional evidence), the legal principle was stated in the case of **Ago Sai & Others v Kpobi Tetteh Tsuru III [2010] SCGLR 762**. At page 771, Atuguba JSC (as he then was) stated, “It is worn-out principle that where in a land suit, the evidence as to title to the land is traditional and conflicting, the surest guide is to test such evidence in the light of recent acts to see which is preferable, see **Adjeibi-Kojo v Bonsie [1957] 2 WALR 257** and **In re Adjancote Acquisition: Klu v Agyemang II [1982-83] 2 GLR 852, CA**. *The defendant’s case has been clearly supported by documentary evidence, open and physical acts of ownership with regard to the land and some independent witnesses such as the second*

defendant's witness, the chief of Ashalley Botwe, who shares a boundary with Ogbojo village. *All these in law strengthen the defendant's case against that of the plaintiff.*"

32. It is also important to mention the legal principle espoused by the Supreme Court in the case of **Ofori Agyekum v Akua Bio [2016] DLSC 2858**, where Benin JSC (as he then was) stated that, it is a normal Ghanaian practice for members of an extended family to live in the self-acquired property of a member of the said family. That, however, does not diffuse the title of the owner or convert the property into a family property. However, in **Amoyaw v Amoyaw & Anor. [1999-2000] 2 GLR 124, CA**, where a member of a family builds on a family property, the said member shall only enjoy the property for life and upon his death, shall devolve to the family. Similarly, an improvement to the family property does not convert it into a personal property.
33. As indicated earlier, where a party alleges fraud in a civil case, he has to prove that beyond reasonable doubt, see s. 13(1) of NRCD 323 and **Sasu Bamfo v Sintim (supra)**. In **Aryeh & Akakpo v Ayaa Iddrisu (supra)** the law also requires that, "A party who seeks to lead evidence to prove forgery in a civil trial must specifically plead the particulars of the forgery." In **in Re Agyekum (Dec'd): Agyekum & Ors. v Tackie & Ors. [2005-2006] SCGLR 851 at 855**, the Supreme Court speaking through Dr. Twum JSC (as he then was) stated, "Where fraud is alleged, it is a different matter; for fraud vitiates every act or deed put forward as supporting a transaction or even a judgment of a court. But where fraud is alleged ... they must be pleaded with great particularity. *Vague allegations of uncommon, unusual or even unconscionable dispositions of his own property by a testator induced by logic rather than facts properly pleaded should be ignored.*" However, where the particulars are not provided but there is sufficient evidence to the said allegation, the court must consider it, thus looking at the

substance rather than the form, see **Hanna Assi (No. 2) v GIHOC Refrigeration and Household Products Ltd. (No. 2) [2007-2008] SCGLR 16.**

34. Based on the above, the legal burden to establish the property in dispute belongs him falls on the plaintiff, more particularly where the defendant has disputed his claim, see **Okudzeto Ablakwa (No. 2) v. Attorney-General & Obetsebi-Lamprey (No. 2) (supra)**. Failing which, an unfavourable ruling shall be entered against him. Where plaintiff succeeds, the burden then shifts to the defendants to establish that the property in dispute belongs to the family, see **Ababio v Akwasi III (supra)**. Regarding forgery as alleged by either party, they must prove that beyond reasonable doubt, see **Sasu Bamfo v Sintim (supra)**.

35. As earlier determined in issue a, the plaintiff is left with his pleadings so filed and the cross-examination by his counsel. In **Poku v. Frimpong [1972] 1 GLR 230 @ 236** per Azu Crabbe pleading was defined as:

“The pleadings consist of the statement of claim delivered by the plaintiff; the statement of defence, which is the answer of the defendant; the reply, which is the plaintiff's answer to the defence; and all subsequent pleadings, which are rarely delivered, such as the rejoinder, the surrejoinder, the rebutter and the surrebutter.”

36. Or. 82 of the High Court (Civil Procedure Rules), 2004 (CI 47) also defines pleadings as, “the formal allegations by the parties to a law suit of their respective claims and defences with the intended purpose of providing notice of what is to be expected at the trial.”

37. Plaintiff in his pleadings averred that the land in dispute was gifted to him about 30years ago through a deed of assignment by the late Alhassan Dagomba. Copy of the

assignment was filed as part of the discoveries. In the said deed the disputed house was first acquired by Ibrahim Dagomba from the Government of Ghana sometime in 1954. Later on Ibrahim Dagomba assigned his interest to Alhassan Dagomba in 1956. The said Alhassan Dagomba then gifted the land with property on it to Sulemana Abudurahamani. Sulemana Abudurahamani, therein, is described as son of Alhassan Dagomba. Plaintiff also contended under cross-examination that he was gifted the said property from his maternal family to which Alhassan Dagomba belongs. This is what ensued when 1st defendant was under cross-examination:

“Q: The house in dispute was originally built by Ibrahim Dagomba in the 1950’s?

A: We do not know of any Ibrahim Dagomba in our family. Our parents never told us or mentioned his name.

Q: I am putting it to you that the said Ibrahim Dagomba later transferred his interest to Alhassan Dagomba on 4/5/1959.

A: We do not know about this.

Q: Later the said Alhassan Dagomba gave it to the plaintiff on 7/1/1988?

A: These people are not part of our family. We do not know them.

Q: You see none of them transferred their interest to Fuseini Nabila or your grandmother?

A: It was an ordinary land when my uncle bought it.

Q: The said Alhassan Dagomba is the plaintiff's maternal uncle?

A: The house is not a maternal property.

Q: The house was transferred to the plaintiff when he returned from Saudi Arabia in 1988?

A: That is not true."

38. 1st defendant also alluded to the fact that neither he nor 2nd defendant was born when the property in dispute was built. Yet, he recounted that the said property was first acquired by their uncle, Fuseini Nabila who later gave same to their grandmother, Naina Nabila. Defendants evidence is that upon the death of Naina Nabila, their father Abdul Rahaman Nabila took charge of the house. To them, plaintiff neither bought the said house or built any part of the disputed building. They submitted that the deed of assignment bearing the name of the plaintiff is a forgery.

39. Defendants gave the history to the disputed property as being built by Fuseini Nabila and he later gave it to their grandmother, Naina Nabila. They explained that upon the death of their grandmother, their father Abdul Rahaman Nabila took charge of the house. They added that after the demise of their father, defendants continued to live in the disputed house without any hinderance. They submitted that their father at one point gave the house documents to the late family head, Alhaji Saani, to be given to one Afa Ajura in exchange for another house, to allow for the expansion of the Anbariya Mosque. They explained that the house at the time of the intended exchange was a thatch house with 4 rooms. They submitted further that their relatives, Baba Alhassan (DW1) and Abdulai Fuseini (DW2), were those who fetched water and

thatch for the construction of the house. DW2 averred that one Alhaji Abdul Rahman Sabari roofed it with zinc roofing sheets and built additional 8 rooms with concrete blocks to facilitate the exchange. However, that exchange did not go through, in that the one to carry out the exchange, Amolga, refused, because he realized that the house was a family house. DW2 stated further that the said Alhaji Abdul Rahman Sabari gave up his house in the exchange and temporarily occupied the disputed house. He added that Alhaji Abdul Rahman Sabari and Afa Ajura returned the disputed house to their father. In effect, Defendants maintained that at the time of the intended exchange, the plaintiff was in Saudi Arabi schooling, such that plaintiff could not have built any single room or added any room to it or bought the disputed house. Rather, the plaintiff took over the house as being the eldest brother upon the death of their father.

40. It must be stated that DW2, Baba Alhassan, is not a biological son of the parties' father, but he used the term father as in his father is Fuseini Nabila.

41. Below is what ensued when DW1 was under cross-examination:

"Q: Since you have admitted that you were not there when the house was built, I am putting it to you that you are not in the position to tell who built the house?

A: What I know is that my mother told me the story about the house."

42. From the above, the evidence of DW1 is hearsay and same is inadmissible, without more, see s. 116 and 117 of NRCD 323. When DW2 was being cross-examined, below is an extract of what ensued:

"Q: Can you approximate the year you were born?

A: It was around or during Kwame Nkrumah's era.

Q: *Can you tell the court what year the house in dispute was built?*

A: *I cannot tell.*

Q: *Can you approximate how old you were when the property was built?*

A: *I cannot tell.*

Q: *In your witness statement, you alleged that the house was built by your father, how did you come by that information?*

A: *I was one of the labourers for the building.*

Q: *So at the time you were helping build the house, how old were you?*

A: *I cannot tell.*

...

Q: *Yet you want this court to believe that you know who built the house?*

A: *Yes, it was my father who built the house.*

Q: *You alleged your father built the house, do you have any documentation to that effect?*

A: No.

...

Q: *I am putting it to you that for a period of over 30yrs the plaintiff has on the record his name as the land belonging to him?*

A: *It is not in plaintiff's name, plaintiff has changed the document.*

Q: *How do you know that the plaintiff has changed the document?*

A: *I know on record that it is my father's name that is on the document.*

Q: *You are being dishonest to the court because you have told the court that there is no document with your father's name on it?*

A: *Initially the documents were with our elder brother, Alhaji Saani, who is deceased, plaintiff got the document from our brother and changed the name.*

Q: *In what year did Alhaji Saani die?*

A: *Almost 2 years now.*

Q: *I am putting it to you the statutory document in respect of the land was executed in favour of the plaintiff in 1988 about 34yrs before you said your brother died?*

A: *That is not true.*

Q: Do you have any documentation that at any point in time Alhaji Sabari was the owner of the house in dispute?

A: I do not have such document."

43. At this point, let me mention that defendants at paragraph 6(i) of their Statement of Defence pleaded forgery. They, however, failed to particularize it. Defendants claim that plaintiff took the documents from Alhaji Saani when the intended exchange failed. Defendants, however, failed to lead any evidence to the contrary that the Deed of Assignment was forged or never executed. All that defendants said was that plaintiff has changed the documents. In fact, the very evidence to test whether or not the said Deed of Assignment was forged or never executed caused to be expunged by the defendants themselves. At the least, if the said documents of the disputed house were given to Alhaji Saani, who died just two years ago, where is the trace of that document as compared to deed of assignment dated as far back as 1988? Also, at what time did the documents changed to Alhaji Sabari's name? Defendants failed or never produced the said documents or discoveries of the disputed land. As noted by Dr. Twum JSC (as he then was) stated **in Re Agyekum (Dec'd): Agyekum & Ors. v Tackie & Ors. (supra)**, "...Vague allegations of uncommon, unusual or even unconscionable dispositions ... induced by logic rather than facts properly pleaded should be ignored." On that note, the issue on whether or not Deed of Assignment bearing the name of the plaintiff was obtained by fraud, fails.

44. Similarly, plaintiff argued that defendants' Exhibit 2 titled 'Right of Ownership' was obtained by fraud. He did not plead it. This only came up during the trial. Below is an extract of what ensued when 1st defendant was under cross-examination:

“Q: According to your paragraph 6 of your witness statement, the house was built by Fuseini Nabila, who gave it to Naina Nabila?

A: That is so.

Q: *I am putting it to you that none of the names mentioned reflected on the records of the property?*

A: *That is not true.*

Q: *I am putting it to you that in your evidence you have not provided alternative records to contrast plaintiff's documents?*

A: *Our witness is CHRAJ and the part of the property shared to us by the plaintiff, who even signed it.*

Q: *Are you making reference to Exhibit 2?*

A: Yes.

Q: *I am putting it to you that Exhibit 2 does not transfer ownership of the property to you?*

A: *That is the right of ownership that indicated the names of the individuals that he is in possession or entitled to part of the property and it is in my name.*

Q: *I am putting it to you the right of ownership does not mention the name of 2nd defendant?*

A: *It stated my name and my sister, so she represented my sisters.*

Q: *Show this court the part of the agreement that indicate it was shared to you and your sister?*

A: *It is not stated, but when the property was being transferred to me, plaintiff told me that the transfer was to me and my sisters. Because, I alone cannot take the property that was transferred to us.*

Q: *I am putting it to you that the said Exhibit 2 does not mention the plot no. or house number being shared?*

A: *Yes, it is not there. But when it was shared I was the one taking rent and plaintiff told the tenants to make payments to me.*

Q: *I am putting it to you that Exhibit 2 is a forgery, plaintiff was not involved in it?*

A: *I have the original where the plaintiff signed and I also signed.*

Q: *I am putting it to you that the signature was not signed by the plaintiff?*

A: *That is plaintiff's signature. If granted the opportunity, I can bring the original.*

Q: *I am putting it to you that you created Exhibit 2 to illegally collect rent from unsuspecting tenants?*

A: *That is not true.*

...

Q: *I am putting it to you that your other siblings do not have tenancy agreement with the other tenants?*

A: *It is so because I am the only man amongst the other siblings. So they asked that I use my name for the tenancy agreement.*

...

Q: *I am putting it to you that plaintiff allowed you to take rent in 2011 just for a temporal period?*

A: *I never took rent from the tenant, it was until when the property was shared to us.*

...

Q: *When your father passed, there has never been a family gathering to share the property?*

A: *That is so, because plaintiff being the 2nd born happens to be the senior most, everything was under his care. And he was advised to give us our share whenever the need be.*

Q: *I am putting it to you that the family did not gather to share the property, because the building has always being the property of the plaintiff?*

A: *The family gathered with regards to the property in dispute. There are even 3 prominent people amongst us, Afa Tanko, Afa Shairu and Alhaji Saani and the witnesses that are yet to testify in this court, they were there.*

Q: *So based on your answer, you agree with me that the property was never shared?*

A: *The gathering was after the Right of Ownership was given to us by the plaintiff.*

Q: *I am putting it to you that if they were sharing, your oldest sister, Amama Abdul Rahaman would also be a beneficiary?*

A: *It was only I and the 2nd defendant who requested for our part and plaintiff gave it to us.*

Q: *I am putting it to you that if the property was family property, Jalia Abdul Rahaman will also have a share?*

A: *When we requested for our share, Jalia as at then was going and she said that she was not in need of her part as at then and she was under the care of the plaintiff."*

45. From the above, Exhibit 2 was admitted without any objection. Again, counsel for plaintiff contended that it was the plaintiff who allowed the 1st defendant control over the 3 rooms and 2 stores, as a temporal measure. On that note, I am of the opinion, counsel for plaintiff failed to lead evidence beyond reasonable doubt that Exhibit 2 was not executed by the plaintiff. Accordingly, in answering whether or not the defendants' Exhibit 2 titled, 'Right of Ownership' was obtained by fraud, I find that Exhibit 2 is not a forged document.

46. Further to the evidence above, the defendants contended that the plaintiff executed Exhibit 2, Right of Ownership, in which 3 rooms and 2 stores was given to 1st defendant and to which 1st defendant is to collect rent. In the said Exhibit 2 the preamble states, *"I, Alhaji Sulemana Nablah, on behalf of the entire family of Abdul Rahaman Nabla wish to confer on Abdul Samiw Abdul Rahaman, the right of ownership of the following..."* Let me state here that the plaintiff is also known as Alhaji Sulemana Nablah. Subsequent to Exhibit 2, 1st defendant then rented out the rooms/stores per Exhibits 3, 4, 5 and 6. Defendants heavily relied on Exhibit 2 saying that given ownership and having collected rent from same, plaintiff is, therefore, estopped from holding himself as bonafide owner of the disputed house, see s. 26 of NRCD 323.

47. Exhibit 2 when read in full does not seek to administer the entire estate of the late Abdul Rahaman Nabila, their father. This is because, Exhibit 2 does not mention the other siblings as benefiting from the property. The court is, therefore, unable to accept the interpretation of the 1st defendant that the 3 rooms and 2 stores were given to him and to the other siblings. Who took what? As he himself puts it, Jalia was not around, Amama has never requested for her share. It is only 1st and 2nd defendants that requested for theirs. Even with that, Exhibit 2 only mentioned the 1st defendant. Exhibit 2 seeks to suggest that by a mutual agreement between the plaintiff and the 1st defendant, the 1st defendant is to take ownership of the 3 rooms and the 2 stores. Again in Exhibit 2, plaintiff is seen as acting on behalf of the entire family of his father to which defendants are part. This is the ambiguous part. If indeed the property belongs to you, why then seek to suggest that you are acting on behalf of your father's family? I, however, find that there is no ambiguity to the effect that plaintiff indeed gave ownership of the 3 rooms and 2 stores to the 1st defendant.

48. Having determined that Deed of Assignment and Exhibit 2 are not fraudulent documents, I find on the totality of the evidence that the said property was gifted to the plaintiff in 1988, on his return from Saudi Arabia. The Deed of Assignment stated that the house had 16 bedrooms as at that time. Defendants failed to establish with consistency how the document changed to plaintiff's name. Defendants never led any sufficient evidence which controverted the said deed. All that they relied on was Exhibit 2. Again, if the plaintiff had surreptitiously changed the documents, where is that of the defendants, particularly the one given to Alhaji Saani or bearing the name of Alhaji Sabari? Would a search not have revealed the history of the disputed property, considering the date on the Deed of Assignment? The evidence of the defendants that Fuseini Nabila built it, transferred it to Naina Nabila, then to Abdul Rahaman Nabila and then plaintiff took over without any documentary proof, when they the defendants alleged that there is some form documentary proof but failed to submit any, leaves their evidence more improbable, see **Ntim v Essien (supra)**. As earlier posited, each party is to succeed on the strength of his own case, see **Odametey v Clocuh (supra)**. In fact, the deed of assignment tells the ownership of the disputed house. The documentary evidence together with the long period of ownership by the plaintiff, in my opinion, is more credible than the oral evidence of the defendants, see **Abbey & Others v Antwi V (supra)** and **Ago Sai & Others v Kpobi Tetteh Tsuru III (supra)**. More so, even if Afa Ajura or Alhaji Sulemana Sabari made improvements to the building or that DW2 contributed to the building, it still did not change the property from the bonafide property of the plaintiff into a family one, see **Amoyaw v Amoyaw & Anor. (supra)** and **Ofori Agyekum v Akua Bio (supra)**. Exhibit 2, in my opinion, regards part of the disputed building and does not convert the entire property into a family house.

Issue e

49. Issue d is, *whether or not the plaintiff is to account for rent collected from August 2016?*

Having determined that the entire property belongs to the plaintiff, but plaintiff has given ownership of part of same, I find that there is no ambiguity with that. The fact here, however, is that per the said Exhibit 2, plaintiff gave ownership to the 1st defendant. It never mentioned 2nd defendant or the other siblings. Since plaintiff is seen as giving ownership of the said 3 rooms and 2 stores to 1st defendant, it is a binding agreement between the parties therein and I shall hold it against them. This is a simple contract.

50. In brief, I hold that the disputed property was gifted to the plaintiff. However, in the course of time, plaintiff has allowed the 1st defendant ownership over the 3 rooms and 2 stores. His actions are binding on him and therefore estopped from resiling from it, see s. 26 of NRCDC 323. Unfortunately, the said agreement mentioned the 1st defendant, but not the 2nd defendant or any of the other siblings. Accordingly, the 1st defendant to continue enjoying the said 3 rooms and 2 stores for life, see the case of **Amoyaw v Amoyaw & Anor. (supra)**. Upon 1st defendant's death, the said 3 rooms and 2 stores shall revert to plaintiff or his estate.

51. Defendants alleged further that the plaintiff in August 2016 collected rent from one of the rooms and stores. The rent per room is GHS50.00 and rent per store is GHS250.00. Since the said rooms and stores are for the benefit of the 1st defendant, the plaintiff is to account for the rent so taken from the said room and store since August 2016. I am, however, unable to make a definite assessment since there was no evidence as to the period of the rent. Nothing was said about a tenant in occupation from 2016 to 2017 or 2018 or till date.

CONCLUSION

52. In conclusion, plaintiff succeeds in part. Thus, I declare that all that piece of land described as House No. 132, situate and lying at Ward A Residential Area is his bonafide property. Plaintiff's claim for interlocutory injunction to restrain the defendants from trespassing is refused, since the plaintiff himself allowed 1st defendant possession of the said 3 rooms and 2 stores. Also, I shall not award damages for trespass as claimed by the plaintiff.

53. The defendants' counterclaim succeeds in part. Thus, the plaintiff to account for the rent collected from the said room and store since August, 2016. I am unable to make a definite assessment since there was no evidence to that effect. The 1st defendant to continue enjoying the said 3 rooms and 2 stores for life. The other reliefs claimed by the defendants, thus *a*, *b* and *c* per their counterclaim are dismissed.

54. No order as to costs.

H/W D. ANNAN ESQ.

[MAGISTRATE]

SHEIKH-ARIF ABDULLAH ESQ. WITH IAN A. ADAGWINE ESQ. FOR PLAINTIFF
MOHAMMED ALHASSAN ESQ. WITH SALISU B. ISSIFU ESQ. FOR THE
DEFENDANTS

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2. s. 32 of Stamp Duty Act, 2005 (Act 689)

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4. *Republic v High Court, Accra, Ex parte Allgate Co. Ltd.* [2007-2008] SCGLR 1041
5. *Faibi v State Hotels Corporation* [1968] GLR 471
6. *In re Ashalley Botwe Lands; Adjetey Agbosu & Ors. v. Kotey & Ors.* [2003-2004] SCGLR 420
7. *Sarkodie v FKA Company Ltd.* [2009] SCGLR 65
8. *Odametey v Clocuh* [1989-90] 1 GLR 14, SC.
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12. *Sasu Bamfo v Sintim* [2012] 1 SCGLR 136 at 148.
13. *Lizori Limited v Mrs. Evelyn Boye & Anor.* [2013] DLSC 2753
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17. *Mossi v Bagyina* [1993] 1 GLR 337
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21. *In Re Appau (Dec'd) Appau v Ocansey* [1993-94] 1 GLR 146
22. *Adisa Boya v Mohammed Alias Mujeeb* [2018] DLSC 4225
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30. *In re Adjancote Acquisition: Klu v Agyemang II* [1982-83] 2 GLR 852, CA.
31. *Ofori Agyekum v Akua Bio* [2016] DLSC 2858
32. *Amoyaw v Amoyaw & Anor.* [1999-2000] 2 GLR 124, CA
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34. *Hanna Assi (No. 2) v GIHOC Refrigeration and Household Products Ltd. (No. 2)* [2007-2008] SCGLR 16
35. *Poku v. Frimpong* [1972] 1 GLR 230 @ 236
36. *Or. 82 of the High Court (Civil Procedure Rules), 2004* (CI 47)
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