

**IN THE DISTRICT COURT 2, TAMALE
HELD ON MONDAY 13TH FEBRUARY, 2023
BEFORE HIS WORSHIP D. ANNAN ESQ.**

SUIT NO. A9/5/22

BETWEEN

MOHAMMED YUSSIF

-

PLAINTIFF

AND

AYISHETU MUSAH

-

DEFENDANT

JUDGMENT

INTRODUCTION

1. This judgment relates to the sale of a landed property.

2. The plaintiff instituted this action as the new owner of H/No. 360 Choggu-Yapalsi Extension Block C, Tamale. The defendant is described as the spouse of Mr. Issah Amadu Baba, the previous owner of the aforesaid property. On 2nd November, 2021 the plaintiff took out a writ of summons against the defendant for the following reliefs:

- “a. A declaration that the defendant’s stay in H/No. 360 Choggu-Yapalsi Extension Block C, Tamale in the peculiar circumstances is illegal.
- b. A mandatory order directed at the defendant to vacate from the plaintiff’s property, forthwith.
- c. Any other equitable remedy as this Honourable Court may deem fit.”
3. Upon being served with the said writ, the defendant filed a Motion on Notice for Stay of Proceedings on grounds that defendant had filed an application at the High Court to enforce her right of equal access to the property in dispute under articles 22(3)(a) and 33(1) of the 1992 Constitution. On 21st April, 2022 counsel for defendant/applicant in the aforementioned application withdrew the application and same was struck out. Subsequently, defendant was ordered to file her defence.
4. In her defence, defendant disputed the claim of plaintiff basically emphasizing that the property is a jointly acquired property during her marriage with Mr. Issah Amadu Baba. On 10th May, 2022 plaintiff also filed a reply disputing defendant’s defence. In his reply, plaintiff contended that the defendant knew of the sale as well as use of the proceeds thereof.
5. The respective cases of the parties are detailed below.

PLAINTIFF’S CASE

6. The plaintiff’s case is that on 19th June, 2021 an agreement was executed between himself and the defendant’s husband (Mr. Baba), in which it was expressly stated that the Mr. Baba and his family were to vacate the property in August 2021. Plaintiff contended that the defendant’s husband has move out of the property, but defendant is adamant on moving. Plaintiff averred that the defendant reported the matter to the Gulkpegu palace and made some demands where he (plaintiff) was appealed to, to

undertake various developmental activities including painting of rooms in the new house acquired by the defendant's husband. He indicated that the developmental activities costed over GHS2,000.00. Plaintiff stated further that despite putting the said rooms in the manner the defendant wanted, she would still not move in. In his reply, plaintiff stated that defendant knew about the sale and the use of the proceeds thereof. Plaintiff argued that the actions of the defendant is intended to overreach and outsmart his peaceful enjoyment of the property he acquired from the defendant's husband. Hence, this instant action.

Plaintiff's Witnesses

7. Plaintiff did not testify. He called two witnesses in support of his case. First, the said Mr. Issah Amadu Baba (PW1) and second, Mr. Fuesini Alhassan (PW2), the Safihi-Naa of the Gulkpegu Skin.

8. In his evidence, Mr. Baba averred that he sold the property in dispute to the plaintiff in order for him to take care of some pressing issues including paying the school fees of their daughter, Kamilat, who is currently at the University of Cape Coast, paying medical bills of their first son and using the rest of the proceeds on their new house at Changnayili, Nyankpala Road. He added that per the agreement entered into on 19th June, 2021, plaintiff had performed his part of the agreement and he (PW1) has also transferred same to plaintiff. He confirmed that the agreement was for him and his family to move to their new matrimonial home at Changnayili, but defendant has failed not move. He confirmed that at the palace of the Gulkpegu Skin, plaintiff was asked to voluntarily undertake some activities at the new house at Changnayili which included painting the rooms to the satisfaction of defendant. He added that the rooms are presently in the state as defendant wants, yet the defendant has refused to join him.

9. PW2 testified to the effect that defendant lodged the complaint at the Gulkpegu palace claiming that the husband had sold their matrimonial house and that the new owner, the plaintiff, was ejecting her and the children. He indicated that upon investigation, it was established that the property in dispute was in the name of the husband and therefore advised defendant to move out. However, defendant made some demands. According to PW2, defendant complained that the new house was still uncompleted to her satisfaction, particularly her side/rooms of the new house. PW2 stated he and the Digon-Naa were sent to the new house to verify defendant's claim and they noted that the indeed the defendant's side of the house needed plastering and painting to complete. So the Nba-Wulana appealed to the plaintiff to have that done, which plaintiff undertook at an additional cost. Upon completion, they went to see it and called defendant to inform her to move in.

DEFENDANT'S CASE

10. Defendant, on her part, averred that she is still married to Mr. Baba and that their marriage has subsisted over 28years and blessed with five children. She added that throughout the marriage, she engaged in numerous trades: seamstress, dealer in palm oil and now has a grocery "provision" shop to support the marriage. She averred that the husband acquired a piece of land, but later found out that same had been allocated to someone by the chiefs. Through her efforts, a new land was allocated by the chiefs. She indicated that the new land was issued in the name of the husband. She tendered a copy of the new allocation as Exhibit 1. She stated that she had contributed both in cash and in kind toward erecting a property on the said land intended as their matrimonial home, thus the property in dispute. She tendered in evidence Exhibit 2, a picture showing herself and the children at the construction of their matrimonial home. She indicated that by operation of law, she is a joint owner of the property and that the husband could not deal with the property without her consent and

concurrence. Defendant indicated further at paragraph 8 of her witness statement that within the first quarter of 2021, her husband evinced the intention to sell the property but she resisted it. She contended that she was not part of the dealings between plaintiff and the husband and neither did she receive any money from the sale. She contended further that aside lodging a complaint at the Gulkpegu palace due to plaintiff's threats to eject her, there was no agreement for plaintiff to undertake the developmental activities in the new house for her use.

11. Defendant did not call any witness in support of her case.

ISSUES FOR DETERMINATION

12. The issues borne out of the facts are:

- a. Whether or not the property in dispute is a jointly acquired property of the defendant and Mr. Issah Amadu Baba (the husband)?*
- b. Whether or not the sale of the property in dispute should be set aside?*

BURDEN OF PROOF

13. In civil cases, the general rule is that the party who in his pleadings or his writ 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) & (2) of NRCD 323.

14. It is when the claimant has established an assertion on the preponderance of probabilities that the burden shifts onto the other party, failing which an unfavourable ruling will be made against him, see s. 14 of NRCD 323 and the case of **Ababio v Akwasi III [1995-1996] GBR 774**.

ANALYSIS OF THE ISSUES

Issue a

15. Issue a, *whether or not the property in dispute is a jointly acquired property of the defendant and Mr. Issah Amadu Baba (the husband)?* The law regarding properties acquired during the subsistence of a marriage is that such properties are presumed to be jointly acquired, unless evidence is led to the contrary, see the recent case of **Peter Adjei v Magaret Adjei [2021] DLSC 10156** per His Lordship Appau JSC (delivering the majority decision) where he recounted in detail this position as well as the exceptions thereof.

16. From the evidence, PW1 admitted that the land on which the disputed property was built was acquired in 2005, after the earlier allocation (in 2003) had been taken by the true owner. PW1 also admitted that defendant contributed in kind in constructing the disputed property. There is also no doubt to the effect that the marriage between PW1 and defendant is subsisting. They have been marriage for over 28years.

17. In effect, I have no hesitation at all in concluding that the property in dispute was jointly acquired by the defendant and PW1 during their marriage, see **Peter Adjei v Magaret Adjei (supra)**.

Issue b

18. With *issue a* determined, the next issue to be considered is *whether or not the disposal of the property in dispute should be set aside?* Regarding this issue, the law is that where a property is jointly acquired by a couple during marriage, for which a valuable consideration was paid, the spouses shall be deemed to be parties irrespective of the person in whose name the property was acquired unless a contrary intention is expressed in the conveyance, see ss. 38(3) and (4) of the Lands Act, 2020 [Act 1036]. Further, a spouse shall not deal with a property jointly acquired during marriage for valuable consideration without the written consent of the other spouse, but *such consent shall not be unreasonably withheld*, see of s. 47 of Act 1036.
19. The law on disposal of property or interest in land have been developed to include that where the person who sold it does not have a title/right to it, he does not transfer anything thereof. Thus, the *nemo dat quod non habet* principle. It has been further held that where the property is alienated or sold by a principal party without the consent or concurrence of the other principal party (or parties), the alienation or sale is voidable at the instance of the other party (or parties) acting timeously, see the cases of **Kwan v Nyieni [1959] GLR 67, CA, Dotwaah v Afriyie [1965] GLR 257, SC** and **Dora Boateng v Mackeown Investment Ltd. [2020] DLSC 8525**.
20. From the above the law is clear that where no consent is given, then the other party is to act timeously to set aside the sale. More importantly, the consent should not be unreasonably withheld.
21. In the instant case, the plaintiff contended that the defendant was in the known of the sale as well as the proceeds thereof. According to PW1, the money from the sale was used to pay the school fees of their daughter, Kamilat, who is presently at the University of Cape Coast, pay medical bills of their first son and the rest of the

proceeds on the new house at Changnayili, Nyankpala Road. Notwithstanding this, defendant lodged a complaint at the Gulkpegu palace where plaintiff spent over GHS2,000.00 in plastering and painting the rooms of the new house purposefully to meet the satisfaction of defendant, yet defendant would not move. This was confirmed by PW1 and PW2. PW1 stated in particular he is expecting the defendant to move in with him to the new house at Changnayili.

22. Defendant, on her part, contended that in the first quarter of 2021, her husband (PW1) evinced the intention of selling the property, but she resisted it. She claimed that she was not aware of the sale, neither did she give her consent. She also indicated that she has no knowledge of how the proceeds were used by the husband. Also, she did not receive any money out of the sale. Lastly, she indicated that although she reported the matter to the Gulkpegu palace, she did not agree to the plaintiff spending extra on the new house for her use.

23. Let me at this stage touch briefly on the evidence of PW1 in light of what the defendant is asserting. Below is an extract of PW1 under cross-examination:

“Q: Are you aware that by virtue of her marriage to you, she is a joint owner of the matrimonial home?

A: Yes.

Q: You testified in this court that you sold the matrimonial home to the plaintiff?

A: Yes.

Q: The defendant was not a party to this transaction?

A: Yes.

Q: And she neither consented nor concurred to this transaction?

A: Yes.”

24. With the above, I wonder the intent of PW1. Is he trying to set aside the sale? Is he not the same person expecting his wife to join him at the new house? Why then did both of them (defendant and PW1) allow the plaintiff to carry out the extra work on the new house? What was the purpose of that? The answer according to PW1 was that it was to meet the defendant’s satisfaction, since defendant complained that the new house was not fully completed. In effect, I do not think that PW1 expects this transaction to be set aside after all the above. An attempt to artfully benefit from his own dealings will not be countenanced by this court, see **Akrofi v Otenge & Anor. [1989-90] 2 GLR 244**. As the proverb goes, he cannot eat his cake and still have it.

25. Regarding the defendant, I find that she is unreasonably withholding her consent. The reasons are that she knew about the husband’s intention of selling the property in dispute. According to her, the husband (PW1) informed her about the intention of selling the property sometime in the first quarter of 2021. The actual sale or agreement took place in June 2021. She indicated that she resisted it, but failed to show how or lead any evidence to that effect. The husband (PW1) stated clearly that he needed to sell the house to attend to some pressing matters, which included paying the school fees of their daughter, Kamilat, who is presently at the University of Cape Coast, paying medical bills of their first son and using the rest of the proceeds on the new

house, all these the defendant was aware. He (PW1), subsequently, moved into this new house and informed defendant to join him, but defendant is adamant. Defendant, on her part, reported the matter to the Gulkpegu palace due to the threats of plaintiff in ejecting her. In my opinion, at the time defendant reported the matter to the palace, the sale of the property in dispute was still voidable and she could have insisted on same. Rather, at the palace, she made demands. According to PW2, defendant, "still made some demands". From the evidence, I find that defendant complained about some of the rooms in the new house not been completed and demanded same to be done. Here, in my opinion, defendant shifted her position. The question is, why would the plaintiff spend extra on the new house, after the sale agreement had been executed or that the defendant was rejecting or setting aside the sale? I find that the plaintiff spent extra because the defendant demanded completion of the rooms which were her side of the new house, at least to her satisfaction. If indeed she did not mention this at the palace, why then did the palace investigate her assertion? When that assertion was verified, then the plaintiff was appealed to, to work on it. I find that if defendant really intended to resist or set aside the sale, then she should have prohibited the plaintiff from spending extra on the new house. She, however, allowed the plaintiff to spend extra on the new house to meet her demands, but will not move in. As to not receiving any money from the sale, I am curious, is she consenting to the sale and therefore making a demand or just stating a fact? With all these, I am of the opinion that defendant shifted her position at the Gulkpegu palace. I, therefore, conclude that defendant is simply withholding consent, without a valid reason, see s. 47 of Act 1036. I will, therefore, not set aside the sale.

CONCLUSION

26. In effect, I hereby enter judgment in favour of the plaintiff as follows:

- a. I declare that the defendant's continuous stay in H/No. 360 Choggu-Yapalsi Extension Block C, Tamale is wrongful.
- b. The defendant is hereby ordered to vacate the said property, forthwith. In essence, plaintiff is at liberty to recover possession of the said property.
- c. No order as to costs.

H/W D. ANNAN ESQ.

[MAGISTRATE]

MOHAMMED MUSAH ESQ. FOR THE PLAINTIFF

PAUL K. A. CHINATRA ESQ. FOR THE DEFENDANT

References:

1. *ss. 11(4), 12(1) & (2) and 14 of NRCD 323.*
2. *Faibi v State Hotels Corporation [1968] GLR 471*
3. *In re Ashalley Botwe Lands; Adjetey Agbosu & Ors. v. Kotey & Ors. [2003-2004] SCGLR 420*
4. *Ababio v Akwasi III [1995-1996] GBR 774*
5. *Peter Adjei v Magaret Adjei [2021] DLSC 10156*
6. *Kwan v Nyieni [1959] GLR 67, CA,*
7. *Dotwaah v Afriyie [1965] GLR 257, SC*
8. *Dora Boateng v Mackeown Investment Ltd. [2020] DLSC 8525*
9. *Malm v Lutterodt [1963] 1 GLR 1*
10. *Akrofi v Otenge & Anor. [1989-90] 2 GLR 244*