

IN THE DISTRICT COURT, ABURA DUNKWA, CENTRAL REGION OF GHANA  
ON 16<sup>TH</sup> MAY, 2023 BEFORE HER WORSHIP, JULIANA S.P. MENSAH, ESQ.

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SUIT NO. A1/09/2020

1. MAD. ADJOA AKYERE ..... PLAINTIFFS  
2. MRS. MARY WHITE  
ALL OF ABURA DUNKWA

VRS.

KOJO AMISSAH ..... DEFENDANT  
ABURA ODONASE

PARTIES:

1<sup>st</sup> Plaintiff - Present  
2<sup>nd</sup> Plaintiff - Absent but represented by 1<sup>st</sup> Plaintiff  
Defendant - Absent

LEGAL REPRESENTATION:

Paapa Nimaku Danquah holding Daniel Arthur's brief for Plaintiffs

Daniel Amosah holding Roland Hamilton's for Defendant

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**JUDGMENT**

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**SUMMARY**

On 3<sup>rd</sup> November, 2022 this court adopted proceedings and continued the trial of this case which commenced on 6<sup>th</sup> February 2020 under my predecessor.

The Plaintiffs, by an amended Writ of Summons, are claiming against Defendant

1. A declaration of title and ownership to a piece or parcel of land situate, being and lying at a place commonly known and called "Bobman Hotel", at Abura Dunkwa in the Abura Asebu Kwamankese District and sharing boundaries with the lands belonging to Nana Afariwaa Nyarkoh II's land, Kojo Mensah, Kofi Abban and one Kow Frimpong;
2. Damages for trespass;
3. Perpetual injunction restraining the defendant, his assigns, workmen, servants or anybody claiming through him from interfering with or carrying out any development on the land in dispute;
4. Cost involved in the prosecution of the suit,
5. Any other relief(s) that this honourable court may deem fit to order under the circumstances of the present case.

The Defendant pleaded not liable to all the reliefs.

### **PLAINTIFF'S CASE**

The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are a mother and daughter. Defendant is 1<sup>st</sup> Plaintiff's nephew.

It is 1<sup>st</sup> Plaintiff's case that the land in dispute forms part of a larger portion of land which her late mother shared among her children.

1<sup>st</sup> Plaintiff avers that she caused a portion of the disputed land to be demarcated for the 2<sup>nd</sup> Plaintiff and one Samuel Arthur. 2<sup>nd</sup> Plaintiff deposited on her land blocks and a heap of sand. Samuel also deposited a heap of sand and a pile of stones on the land and erected boundary pillars.

Plaintiff avers that before the demarcations for the two persons, she cultivated oranges interspersed with cassava and maize.

It is Plaintiff's claim that Defendant has trespassed onto Plaintiff's portion of land given to 2<sup>nd</sup> Plaintiff and Samuel and has started constructing a building foundation.

## **DEFENDANT'S CASE**

Defendant denies that the land in dispute shares boundaries with Nana Afariwa Nyarko II's and contends that the land lies at a place known as "Asokwa".

He avers that the disputed land forms part of a large tract of land allocated to three paternal and maternal siblings named as Efua Nyarko II, Adjoa Nyantakyiwa and Thomas Kwesi Adu Fabin.

Defendant avers that his mother was Adjoa Nyantekyiwaa. Efua Nayarko II and Thomas Adu Gyamfi Fabin were his maternal aunt and uncle.

Defendant contends Plaintiff clandestinely sold the disputed land to Samuel Arthur but Defendant warned Mr. Arthur to stay off the land because it does not belong to Plaintiff.

Defendant contends further that he and his uncle worked on the entire land including the disputed land during the lifetime of 1<sup>st</sup> Plaintiff's mother without any resistance from her.

Defendant avers that he is constructing a foundation on his bona fide land to deter encroachers.

## **ISSUES**

1. Whether or not the disputed land forms part of Ama Pentsiwaa's land which Plaintiff inherited
2. Whether or not Plaintiff is entitled to her claim.

## **PROOF OF CLAIM**

In law, he who asserts has the burden to adduce sufficient evidence to prove his claim.

The EVIDENCE ACT, 1975 (NRCD 323), provides in Section 11(1)(4) as follows:

*(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue. (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.*

Section 12 provides

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

*(2) "Preponderance of the probabilities" means the degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.*

Thus, Plaintiff herein must adduce sufficient evidence to prove that her claim is more probable than not.

It is noted that the 2<sup>nd</sup> Plaintiff was absent throughout the trial period but the 1<sup>st</sup> Plaintiff testified on her behalf. By law, the 1<sup>st</sup> Plaintiff could testify on behalf of the 2<sup>nd</sup> Plaintiff, so long as she has personal knowledge of the matter. 2<sup>nd</sup> Plaintiff's success or failure in her case will depend on 1<sup>st</sup> Plaintiff's testimony and not because 2<sup>nd</sup> Plaintiff did not or failed to testify. See NYAMEKYE v. ANSAH [1989-90] 2 GLR 152, CA.

In view of 1<sup>st</sup> Plaintiff having testified on behalf of 2<sup>nd</sup> Plaintiff, I have hereinafter referred to 1<sup>st</sup> Plaintiff as the Plaintiff.

The parties called two witnesses each to testify on their behalves. The Plaintiff called her brother Kojo Mensah and grandson Ebenezer Frimpong referred to as PW1 and PW2 respectively. The Defendant called his cousin Theophilus Fabin Gyamfi and his wife Janet Ogoe Acquah referred to as DW1 and DW2 respectively as his witnesses.

## **PLAINTIFF'S EVIDENCE**

Plaintiff testified that she is a member of the Twidan family and currently lives in the palace of the Odikro of Abura Dunkwa. Plaintiff moved from Kumasi to Abura Dunkwa about three decades ago upon PW1's request to her to come down to take care of their sick mother Ama Pentsiwa.

When Plaintiff came down PW1 gave her a portion of their mother's land to cultivate. Plaintiff initially cultivated plantain and cassava and then later oranges and palm fruits. Years later, Plaintiff stopped cultivating the oranges to engage in business.

Plaintiff's uncle, Kobina Abban @ J.K. Quansah, carved out a portion of Plaintiff's land for 2<sup>nd</sup> Plaintiff.

The Plaintiff, with the permission of her mother, sold portions of her grandmother's land in order to use the proceeds to take care of her mother, Ama Pentsiwa. Plaintiff sold two plots of the lands to one Sammy and an indenture evidencing the sale was executed by the then Odikro Nana Osan Kwasi VII.

Sometime later, Plaintiff employed workmen to clear the land she sold to Samuel because the land was overgrown with weeds. Before the workmen could complete the task, Defendant restrained them. Plaintiff however got the workmen to complete the task only for Defendant to dig a foundation on the land.

PW1's testimony is that he is the regent of Abura Dunkwa. According to him, his grandmother Gyanoah and her brother Kobina Nsadu owned tracts of family land. Upon the demise of these grandparents, an uncle of PW1 known as Kobina Abban alias J.K. Quansah shared Gyaanoah's land among her three daughters namely Ama Pentsiwa, Abena Dumaa and Ekuia Ansawa. He added that Abena Duma's land is in the middle and shares a straight common boundary with Ama Pentsiwaa.

Ama Pentsiwa's children are Plaintiff and PW1 whereas Nana Afariwaa Nyarko II is a direct descendant of Abena Duma. Nana Afariwa caused pineapples to be planted as a boundary feature between Ama Pentwiwa and Abena Dumaa lands. PW1 also planted mango, coconut and bamboo to mark the said boundaries.

PW1 testified that Ama Pentsiwa showed him her entire land. Sometime in 1985, she allowed PW1 to cultivate as much area of her land as he could. PW1 carved a portion of this land for 1<sup>st</sup> Plaintiff on which she initially cultivated plantain and cassava and then later oranges and oil palm plantation.

PW2 testified that, since childhood, he has known that the land in dispute forms part of a larger tract of land on which Plaintiff cultivated oranges. He is also aware that portions of the land have been given to the 2<sup>nd</sup> Plaintiff and one Sammy.

PW2 again testified that he never heard of any dispute over the land until 2019 when Defendant laid claim to the land. According to PW2, Defendant entered the land, cleared the coconut and oil palm trees and pillars, and began constructing a building.

### **DEFENDANT'S EVIDENCE**

It is the testimony of Defendant that Plaintiff's mother, Ama Pentsiwaa and Defendant's grandmother, Abena Duma are sisters.

Defendant testified that the disputed land forms part of a large tract of land allocated to three paternal and maternal siblings namely Efua Nyarko II, Adjoa Nyantakyiwa and Thomas Kwesi Adu Fabin who were the children of Abena Duma who died in 1958.

It is Defendant's testimony that he and his uncle Thomas Fabin worked on the disputed land during the lifetime of Plaintiff's mother. Defendant testified further that PW1 worked on his mother's land which shares a boundary with their land, but never on the disputed land.

It is further Defendant's testimony that after his uncle Thomas Fabin died, PW1 and other relatives tried to lease portions of Defendant's family land but Defendant was able to stop the lease. Defendant's family has been able to stop the said Samuel Arthur whom Plaintiff purportedly sold the disputed land to.

DW1 is the son of Defendant's uncle Opanyin Thomas Adu-Gyamfi. DW1 testified that the land in dispute forms part of the tract of land inherited by three siblings; Efua Nyarko, Adwoa Nyantakyiwa (Defendant's mother) and Thomas Adu-Gyamfi (DW1's father).

According to DW1, his father controlled his portion and that of Defendant's mother's land because she was not resident in town. Defendant, however, cultivated his mother's portion of the land.

It is DW1's testimony that he was shown the boundaries of his father's land and that of Defendant's mother's land and which lands share boundaries with Ama Pentsiwaa's land. He added that, as a child, he assisted Plaintiff on her farm at the time she was into orange cultivation.

DW1 testified that Defendant contracted a surveyor to demarcate the entire tract of land including the land in dispute and it was after the survey and the demise of his father that Plaintiff began to claim the disputed land. According to DW1, during the lifetime of his father, Plaintiff saw DW1 and his parents work on the disputed land without any confrontations and therefore believes Plaintiff's claim is an afterthought.

DW2, Janet Ogoe Acquah testified that she has been married to Defendant for about 30 years and had the benefit of living with her in-laws in their family house.

According to DW2, one evening a decision was taken to share Abena Duma's land among her three children. Defendant's mother was then in Kumasi but she was informed about the decision. On the following day, DW2 accompanied Abena Afaiwa II and Opanyin Adu-Gyamfi to Abena Duma's land where it was shared among the three siblings. Since then Defendant and DW2 have been working on the Adjoa Nyantakyiwa's portion of the land until the demise of the three siblings when Plaintiff began to make subtle advances to claim the disputed land.

## **FINDINGS OF FACTS**

The uncontroverted facts established that the land in dispute forms part of a larger tract of land owned by an ancestor of the parties Gyaanoah. Gyaanoah had three daughters namely Ama Pentsiwaa, Abena Duma and Ekuia Ansawaa. These daughters inherited Gyaanoah's land and each had their own distinct portion. The daughters also had their distinct lands passed on to their children.

Ama Pentsiwa's children are Plaintiff and PW1. Abena Duma's children are Nana Afarwa Nyakoah II; Thomas Adu Fabin and Adjoa Nyantakyiwa, Defendant's mother. Ekua Ansawaa's children were not named.

Before I deal with the issues I must commend Counsel for Plaintiff for filing an address in this matter. I will comment on his address later.

## ISSUE 1: WHETHER OR NOT THE DISPUTED LAND FORMS PART OF AMA PENTSIWAA'S LAND

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In JASS CO. & Anor v. Appau & Anor [2009] SCGLR 265 at 270, Dotse JSC held

*“We wish to observe that the burden of proof is always on the Plaintiff to satisfy the court on the balance of probabilities in cases like this. Thus where in a situation, the defendant has **not counterclaimed**; and the plaintiff has not been able to make out a sufficient case against the defendant, then the plaintiffs claim would be dismissed”*

In the case of Duah v. Yorkwa, [1993-94] 1 GLR 217 the Court of Appeal held that thus

*(1) the obligation or burden to adduce evidence should first be placed on the plaintiff because  
(a) ... the plaintiff should have to succeed on the strength of her own case. That presupposed that the plaintiff should lead evidence to establish her case.*

### **Description of the land in dispute**

In land matters, the law requires Plaintiff to clearly identify and describe the land in dispute. In Bedu & Ors v. Agbi & ors [1972] 2 GLR 238 the Court of Appeal, by, Archer J.A. held in (2) that *The onus was on the plaintiffs to establish the exact boundaries of the land in dispute so that any judgment in their favour would be related to a defined area; or at least they should have proved isolated acts of ownership over the disputed area.*

In the case herein, it is Plaintiff's claim that Defendant has trespassed unto her portion of land she gave out to 2<sup>nd</sup> Plaintiff and one Samuel Arthur.

Plaintiff described her land as sharing boundaries with Nana Afariwaa Nyarkoh II, Kojo Mensah, Kow Frimpong and Kofi Abban. Under cross-examination, Plaintiff asserted that Abena Dumah's land does not lie between Ama Pentsiwaa's and Ekua Ansawaa's lands. The dialogue with Plaintiff is captured as follows:

Q. – Each land is near each other

A. - Yes

Q. – Abena Dumah’s land is in the middle

A. – No

Q. – Between the sisters whose land is in the middle

A. – No one’s land is in the middle

Then

Q. – I am putting it to you that Madam Abena Duma’s land is in between that of Ama Takyiwa and Ekua Assawa.

A. – No.

Q. – I put it to you that that answer is false.

A. - No

But in paragraph 7 of PW1’s Evidence-in-chief, he describes the land as follows:

7. Abena Duma’s portion of the land was situated between the portions allocated to Ama Pentsiwa and Ekua Ansawa and so Ama Pentsiwa and Abena Dumaa shared a common boundary which boundary was straight in nature.

It is noted that PW1’s evidence corroborates the testimonies of Defendant and his witnesses. Below is how Defendant testified in paragraph 7 of his evidence in chief:

7. That Abena Duma’s portion of the land is situated between the portions allocated to Ama Pentsiwa (1<sup>st</sup> Plaintiff’s mother) and Ekua Ansawa (sister to Abena Duma and Ama Pentsiwa), meaning that Abena Duma’s land shares a common boundary with Ama Pentsiwaa and Ekua Ansawaa.

Under cross-examination, this is how DW2 also described the land:

A. – On the left is Antie Aba Akyere’s mother’s land; in the middle is the land for the grandmother of the Defendant, on the right side the land is owned by the younger grandmother of Defendant. The middle is the land in dispute.

DW2, further added “The boundary is a long one”

On the law of corroboration, Brobbey JSC said in the case of Chou Sen v. Tonado Enterprises Ltd. [2007-2008] 1 SCGLR 135 at 140:

*“One point that devastated the case of the defendants was that evidence given by their own witness. His testimony was clearly against them ... Rather, his testimony supported the case of the Plaintiff. This law on this issue is settled and it is this: When the evidence of a party remains uncorroborated but that of his opponent is corroborated even by the witness of his opponent, the court ought not to accept the uncorroborated version in preference to the corroborated one.”*

In the instant case, Plaintiff’s testimony on the position of Abena Duma’s land stands uncorroborated by PW1. PW1’s testimony rather corroborates that of Defendant’s evidence.

Now the uncontroverted evidence is that Nana Afariwa Nyarkoah II, Adjoa Nyantekyewaa and Thomas Fabin inherited from their ancestor Abena Duma. It, therefore, stands to reason that, if as Plaintiff claims, she shares boundaries with Nana Afariwa Nyarkoah II, then logically Abena Duma’s land is in the middle among the three sisters. Plaintiff clearly contradicted herself in this regard. On the strength of the above authority, I find and hold that Abena Duma’s land lies between Ama Pentsiwaa’s land and Ekua Nsawaa’s land.

Another baffling issue is the clearing of Samuel Arthur’s land. While Plaintiff testified the land was overgrown with weeds and so she had it cleared, PW2’s testified that it was Defendant who cleared the land of coconut and oil palm trees and destroyed pillars. The question on my mind is, is Plaintiff and her witness referring to the same piece of land? Either one is being charitable with the truth, or they are speaking to different pieces of land.

### **Allocation of land**

Plaintiff and PW1 testified that PW1 is the rightful person to allocate Ama Pentsiwa’s lands, however, the evidence indicates that PW1 was not involved in the allocation of the parcels of land to Samuel Arthur and 2<sup>nd</sup> Plaintiff.

Under cross-examination about Samuel Arthur, PW2 could not tell the whereabouts of Samuel Arthur. However, Defendant's evidence suggests that Samuel Arthur abandoned the land after he was informed that the land does not belong to Plaintiff.

It is Plaintiff's testimony that her mother granted her permission to sell the land to Samuel Arthur. The evidence indicates that Ama Pentsiwaa died sometime in 2006. That being the case, then the sale to Samuel Arthur might have been about 17 years ago. I am therefore of the respectful opinion that Samuel Arthur's failure to take possession of the land accounted for the weeds on the land. The period of Plaintiff's decision to clear the land and subsequent trespass is unknown, but in paragraph 8 of PW2's evidence-in-chief, he states the date as in or about 2019.

From the pieces of evidence, I am inclined to believe Defendant's assertion that Samuel Arthur has not been in possession of the disputed land because he was informed that the land does not belong to Plaintiff.

Though Plaintiff is the one claiming ownership of the land, her evidence is that PW1 who carved a portion of Ama Pentsiwa's land for her, is the rightful person to allocate Ama Pentsiwaa's lands. Yet in the instant matter, PW1 was not involved in the allocation of the pieces of land to Samuel Arthur and 2<sup>nd</sup> Plaintiff. I am therefore of the respectful opinion that PW1 is unable to confirm whether there has been a trespass by Defendant as Plaintiff claims.

In Fosua & Adu-Poku v. Dufie (Dec'd) & Adu Poku-Mensah [2009] SCGLR 310 at 347, Dotse JSC said

*"In my opinion, these are the inconsistencies and conflicts in the Plaintiffs' case which are weaknesses inherent in their entire story. In this regard, if one considers the restatement of the principle in Kodilinye v. Odu (1935) 2 WACA 336 in the case of Odametey v. Clocuh supra, it would mean that the plaintiffs had not met the standard of proof required on a balance of probabilities to require a consideration of the weaknesses, if any, in the defendant's case. ..."*

In the instant case, I find that Plaintiff's evidence is riddled with pitfalls: her own contradictions and that of her witnesses contradicting her story. These contradictions in Plaintiff's evidence have weighed unfavourably against her. On this basis, the court concludes and holds that Plaintiff has not produced sufficient evidence to convince the court that the disputed land forms part of Ama Pentsiwaa's land.

## 2. WHETHER OR NOT PLAINTIFF IS ENTITLED TO HER CLAIM

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In analysing this issue I rely heavily on the analysis of Issue 1. Before I proceed any further I wish to comment on the Address filed by Counsel for Plaintiff.

Counsel for Plaintiff submitted that Defendant and his witnesses lack credibility and requisite knowledge of the disputed land. I hold a different view in spite of a few inconsistencies.

Georgina Wood CJ in Effisah v. Ansah [2005-2006] SCGLR 943, holding 6, addressed minor inconsistencies in evidence thus

*"In the real world, evidence led at any trial which turned principally on issues of fact, and involving a fair number of witnesses, would not be entirely free from consistencies, conflicts and contradictions and the like. In evaluating evidence led at a trial, the presence of such matters per se, should not justify a wholesale rejection of the evidence to which they might relate. Thus in any given case, minor, immaterial, insignificant or non-critical inconsistencies must not be dwelt upon to deny justice to a party who had substantially discharged his or her burden of persuasion. Where inconsistencies or conflicts in the evidence were clearly reconcilable and where was a critical mass of evidence or corroborative evidence on crucial or vital matters, the court would be right to gloss over those inconsistencies"*

Generally, in the instant case, I would say that Defendant and his witnesses were rather candid and consistent with their testimonies on material issues.

For instance, DW2 testified that at the time she got married to Defendant, Plaintiff and PW1 were cultivating Ama Pentsiwa's land. DW2 also admitted that she does not know

J.K. Quansah as the one who shared the land among Gyaanoah's three daughters because JK Quansah died soon after DW2 moved in to live with Defendant's family at the palace.

Again, Defendant, DW1 and DW2 corroborated Plaintiff's testimony that she once cultivated oranges on her land. They also confirmed PW1's use of bamboo as a boundary feature but in spite of these pieces of affirmation, they insisted that the disputed land does not form part of Ama Pentsiwaa's land and that the lands inherited by Gyanoa's daughters are distinct.

From the evidence on record, I am of the respectful opinion that DW1's and DW2's knowledge about the disputed land is not deficient and I do not have any reason to doubt their testimonies.

## CONCLUSION

The law as earlier stated is that Plaintiff has the burden to establish her claim against Defendant on a Preponderance of probabilities. As explained in the Supreme Case of Sagoe & Ors v. Social Security & National Insurance Trust (SSNIT) [2012] 2 SCGLR 1093

*"Proof by a preponderance of probabilities" within the context of the burden of proof simply means weightier or superior evidence."*

Upon consideration of the entire evidence, I find that Plaintiff has failed to adduce weightier or superior evidence to establish her claim against Defendant.

In JASS CO. & Anor v. Appau & Anor, *supra*, at page 352, Dotse JSC said

*"Thus it has been established that since the plaintiffs have not made out a case sufficient enough to entitle them to reliefs, it is pointless to consider the defendant's case whether there are any weaknesses therein or not."*

On the basis of the evidence on record, I hold that Plaintiff is not entitled to her claim.

## REASONS

My reasons are first, PW1, the rightful person to allocate Ama Pentsiwaa's land, contradicted Plaintiff on the identity of the land in dispute. The evidence indicates that PW1 was not involved in the allocation of lands to the 2<sup>nd</sup> Plaintiff and Samuel Arthur. Further again, Plaintiff failed to prove that indeed an indenture was executed for Samuel Arthur, who has not been proved to have exercised acts of possession and strangely did not contest the land against Defendant. Finally, Plaintiff and her witness PW2 contradicted themselves on who cleared the disputed land creating a situation as to whether they were speaking about the same piece of land.

On the basis of the foregoing, Plaintiff's writ is dismissed.

The Defendant is awarded a cost of GHC7,000.00.

SGD: H/W JULIANA S.P. MENSAH, ESQ. (MRS)

DISTRICT MAGISTRATE