

**IN THE DISTRICT MAGISTRATE COURT HELD AT BREMAN ASIKUMA IN THE  
CENTRAL REGION OF GHANA ON THURSDAY THE 21<sup>ST</sup> DAY OF JULY, 2022,  
BEFORE HER WORSHIP EUNICE A. APALIWEN MRS.**

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**SUIT No.: CR/BA/A1/04/2021**

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**ADWOA NYARKOWAH ----- PLAINTIFF**

**VS**

**YAW OFOSU & 3ORS ----- DEFENDANTS**

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**JUDGMENT**

The plaintiff suing on her own behalf and that of her brother caused a writ of summons to be issued on their behalf for the following reliefs;

1. A declaration of title and ownership of a piece of land adjoining house number AP30 located at Apagya, Breman Asikuma bounded by the main road, house number AP 30, Desbeck Catering Services and Mr. Akwesi's plot in favour of the plaintiff and her brother.
2. Order for recovery of possession of the disputed land.
3. Perpetual injunction restraining the defendants, their assigns, privies, agents, relatives, and all those claiming authority through them from accessing or using the land without the express consent and approval of the plaintiff and her brother.

The Defendants pleaded not liable to all the reliefs. The 1<sup>st</sup> and 4<sup>th</sup> defendants also counterclaim for the following;

1. Declaration of title and ownership of the disputed land in favour of the 4<sup>th</sup> Defendant, Isaac Ofosu Marfo.

2. An order for perpetual injunction against the plaintiffs and all who may deal with the land on their behalf
3. A declaration that the rent or lease agreement between the 1st defendant and the 2nd and 3rd defendants is valid for all purposes.

The case of the plaintiff is that 1<sup>st</sup> defendant is the successor to her father, Kofi Donkor. That the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are tenants on the land in dispute. The boundaries of the land stated<sup>1</sup>. His father bought the land on which House number AP30 is situated as well as the adjoining land. Her father Kofi Donkor bought the land from Nana Amoakwa Boadu VI, hence the house and adjoining land are the personal properties of her father. That an uncle of her father, Kofi Gyasi also gave a parcel of land at Beposo in Dawurapong to him, and he cultivated cocoa. In 1973, her father gave the cocoa farm and the house with the disputed land to her, and her brother in a deed of gift executed on the 10<sup>th</sup> of October 1973. She insists that the land in dispute is not a family land<sup>2</sup>. In 1976, her father was sued for a debt he was owing which the house he had already given to them as a gift was attached for the payment of the debt<sup>3</sup>. A nephew of her father, Kojo Kontoh who claimed to have paid for the debt (to prevent house number AP 30 from being auctioned) said Kofi Donkor promised to give him some rooms in the house as compensation<sup>4</sup>. Whiles her father was alive, Kojo Kontoh summoned him before the elders of both the Presbyterian Church and Pentecost where her father agreed and released 3 rooms within house number AP 30 to Kojo Kontoh. Plaintiff also indicated that after the death of her father in 1994, Kojo Kontoh who became the successor, took over 6 rooms in the house and she petitioned the Commission on Human Rights and Administrative Justice (CHRAJ). After going into the matter, CHRAJ relied on the

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<sup>1</sup> Para 5 of plaintiff's witness statement.

<sup>2</sup> Ibid (9)

<sup>3</sup> Exhibit 5.

<sup>4</sup> Para 13 of plaintiff's witness statement,

agreement reached by the church elders. The Commission however added the living room of her father to the rooms given out already. That since the ruling by CHRAJ never made mention of the adjoining land, the 1<sup>st</sup> and 4<sup>th</sup> defendants have no right to deal with the land as theirs in whatever form. She therefore prays that; the land which is a joining AP 30 should be declared as theirs as it forms part of the house gifted to them by their father.

During cross examination, plaintiff said it was in 1986 that she and her brother went to give 'Aseda' for the house given to them as a gift by their father. She admitted that her sister has put up a store on the land in dispute. That she only got to know that the land in dispute was never part of the settlement at CHRAJ as she recently made someone to read the document and explain to her. So therefore, she is in court to claim the piece of land adjoining her father's house which forms part of the house as theirs. Plaintiff denied leading 2<sup>nd</sup> defendant to see Kojo Kontoh for a piece of the land to place her container. She also indicated that upon her return to Asikuma, she met 3<sup>rd</sup> defendant already on the land. Plaintiff insisted that the subject matter was never a family land. That her father only gave some rooms in the house to the family and another to Kojo Kontoh who helped in paying off his debt to avoid an auction sale of the house.

In the evidence of the plaintiff's second witness, who happens to be the widow of the late Kofi Donkor said the house and adjoining land was the property of her late husband. Though he gave the house to the plaintiff and her brother, an issue came up and he had to give three rooms of the house to his nephew, Kojo Kontoh.

During cross examination, witness insisted that the land on which house number AP 30 is situated as well as the adjoining land was the property of her late husband who gave same to the plaintiff and her brother. That it is never a family property.

In the defence statement of the 1<sup>st</sup> and 4<sup>th</sup> defendants, they indicated that 2<sup>nd</sup> and 3<sup>rd</sup> defendants are tenants of 4<sup>th</sup> defendant Isaac Ofosu Marfo as he is the customary successor to the late Kojo Kontoh and the landlord. The defendants, thus 1<sup>st</sup> and 4<sup>th</sup>, claim the subject matter as well as the land on which house AP 30 situated belongs to the late Nana Ansela family of Breman Asikuma. That when plaintiff and her siblings attempted to give their aseda when their father the late Op. Kofi Donkor (father of plaintiff) attempted giving the house to them, the late Yaa Taa and other family members protested. Their reasons being that the land was a family land, and the house and farms could not be given to plaintiffs. Again, that when the house was about to be sold by fifa in satisfaction of judgment debt, it was Kojo Kontoh who paid the debt to save the house from being sold so Kojo Kontoh and the family had a stake in the property. The exhibit (deed of gift) attached is invalid as the items presented by plaintiff to her father as aseda were not accepted. They also admitted that Kofi Donkoh made a gift (deed of gift dated September 1976) of a portion of the house to his wife. The 1<sup>st</sup> and 4<sup>th</sup> defendants indicated that, it was Kojo Kontoh who sent the matter to the Presbyterian Church as he was against the gift made by Kofi Donkor of the house to his children and that was where Kofi Donkor redistributed his properties. Both insisted that 1<sup>st</sup> defendant is never the successor to plaintiff's father but the 4<sup>th</sup> defendant. That 1<sup>st</sup> defendant was only acting as 4<sup>th</sup> defendant had travelled. That they have authority to rent out the space adjoining AP30 to 2<sup>nd</sup> and 3<sup>rd</sup> defendants. They contended that the late Kofi Donkor (plaintiff's father) succeeded Efua Gyapomaah and Kojo Kontoh also succeeded plaintiff's father. The 4<sup>th</sup> defendant is the successor to Kojo Kontoh and the current head of family and the manager of the disputed properties. They counterclaim as indicated above.

During cross examination, 1<sup>st</sup> defendant said Kofi Donkor was reported to the elders of the church in 1988 after the house has been given to the plaintiff and her brother. That plaintiff's father promised to give a room to Kojo Kontoh for assisting in the payment of

his debt. He also agreed that the issue before the church elders was about a room and not land. He also indicated that, the family who made the complaint to the church elders wanted a portion of the house as the house was built on a family land. He insists that when plaintiff's father wanted to put up the house, he asked that the cocoa trees on it be cut down to enable him build.

In the defence statement of the 2nd and 3rd defendant, they indicated that when 2nd defendant wanted to rent a portion of the disputed land, he approached plaintiff who led her to Kojo Kontoh who leased the land to her. 3rd defendant also claimed that he obtained the land from the late Kojo Kontoh. That they have both been on the land for over 17years with 1st defendant as their landlord. They counterclaim that the subject matter should be declared as the property of the 1st and 4th defendants. That the rent or lease agreement between them and the 1st defendant is valid for all purposes.

During cross examination, 2nd defendant said she has no idea that, the land on which her container is on belongs to Kofi Donkor. She has no idea that, no one can give what he does not have.

In evidence of Martin Yaw Donkor (DW1), he indicated that a meeting was called by Ebusuapanyin Yaw Adutwum of the intention of the children of Kofi Donkor to present gifts to thank him for presenting the house to them as a gift. That Ebusuapanyin Yaw Adutwum wanted to know if any family member had any objection to it. One Maame Attaa objected to it with the explanation that, when Kofi Donkor was in debt and the house was to be auctioned, it was her son who paid the debt so her son should be aware of the intention of Kofi Donkor's children. The meeting was postponed waiting for the arrival of Kojo Kontoh (son of Maame Attaa).

During cross examination, witness said he told plaintiff he does not know the owner of the land when she approached him. He never said the land is the property of plaintiff's father. Witness was present when plaintiff and her brother attempted presenting items to their father to thank him for giving the house to them. In another breath witness said the land in dispute was not acquired by plaintiff's father.

In the witness statement of Ebusuapanyin Kobena Obeng (DW2), he said the land in dispute is the ancestral property from the late Nana Ansela to present Isaac Ofosu Marfo. The land was a cocoa farm planted by Maame Afua Agyapomaa a sister to Kofi Donkor. That after the construction of the Oda Road and the building of the District Court, Kofi Donkor requested that a portion of his sister's farm be given to him for the construction of the house which the sister obliged<sup>5</sup>. To his best of knowledge any family member who has built a house on the stretch of land never paid any compensation for it.

During cross examination, witness insist that, though Ebusuapayin Yaw Adutwum was present at the meeting and never raised any objection, the house AP30 is a family house<sup>6</sup>. He later said the house number AP30 is the property of plaintiff's father (when further question was asked) but the adjoining land (the subject matter) belongs to the family<sup>7</sup>.

In the witness statement of the 3<sup>rd</sup> witness, he said the Asona Royal family rewarded the Abrade family headed by Ebusuapanyin Yaw Adutwum with land stretching from the disputed land with house number AP 30 to the dam site for their services.

During cross examination, witness said he was not there when Ebusuapanyin Yaw Adutwum and others were present at the Presby session and never claimed the land as family property. He insisted that, Ebusuapanyin Yaw Adutwum was the one the land

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<sup>5</sup> Para 5; 2<sup>nd</sup> witness statement

<sup>6</sup> Cross examination of 2<sup>nd</sup> witness (Q&A 7)

<sup>7</sup> Ibid (Q&A 14)

was given to. In re-examination, witness insisted land was given to Ebusuapanyin Yaw Adutwum and not his entire family.

**Facts as deduced from the evidence of the parties as well as their witnesses.**

1. The plaintiff and her brother, Kofi Donkor are the biological children of the late Kofi Donkor
2. The late Kofi Donkor was a member of the family of the 1<sup>st</sup> and 4<sup>th</sup> defendants.
3. The 4<sup>th</sup> defendant is the customary successor to Kojo Kontoh whiles 1<sup>st</sup> defendant has been acting on his behalf.
4. The late Kofi Donkor was a retired policeman who died in 1994.
5. The late Kofi Donkor built house number AP30 and executed a deed of gift of it to plaintiff and her brother Kofi Donkor.
6. The late Kofi Donkor was summoned to court by his creditor and judgment given against him.
7. Kofi Donkor could not pay his debt and his house AP30 was put up for auction by the court.
8. A nephew of Kofi Donkor called Kojo Kontoh helped him to pay off the debt to prevent the sale of the house by auction.
9. The entire family of Kofi Donkor never paid for his debt.
10. Kojo Kontoh summoned Kofi Donkor before the elders of the Presbyterian Church and Pentecost church.
11. The issue before the church elders was Kofi Donkor's refusal to honour his promise of giving a room in house number AP30 for the payment of his debt.
12. The final decision of that meeting was that some rooms should be given to Kojo Kontoh and the relatives.

13. After the death of Kofi Donkor, the plaintiff summoned Kojo Kontoh before CHRAJ claiming some rooms that have been rented out by him were not his and the matter was settled.
14. The 2nd and 3rd defendants are tenants on the disputed land as rent is paid to the 1st defendant on behalf of the 4<sup>th</sup> defendant.
15. No issue about the adjoining land was discussed either by the church elders or by CHRAJ as it was not an issue before them.

**From the evidence adduced by the parties, the following are the issues set down by the court for determination.**

1. Whether or not the piece of land as described in the writ of the plaintiff is part of house number AP30 and for that matter the property of the late Kofi Donkor.
2. Whether or not the plaintiff and her brother should be declared as the owners of subject matter which is the adjoining land to house number AP30.
3. Whether or not an order for perpetual injunction be made against the defendants and all who may deal with the land on their behalf.
4. Whether or not 4<sup>th</sup> defendant should be declared as having title to the dispute land.
5. Whether or not a perpetual injunction should be made against the plaintiffs as well as all who may deal with the land on their behalves.
6. Whether or not the rent or lease agreement entered with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by 1<sup>st</sup> defendant is valid.



**Whether or not the piece of land as described in the writ of the plaintiff is part of house number AP30 and for that matter the property of the late Kofi Donkor.**

It is settled law that the plaintiff has the burden of proving her assertion. Failure on her part means her reliefs cannot be granted. She has the duty to lead credible evidence to prove her case.

In the case of T.K Serbeh and Co Ltd v Mensah (2005-2006) SCGLR 341 at 360 – 361 “ ..... However credible a witness may be, his bare affirmation on oath or the repetition of his averments in the witness box cannot constitute proof. This is trite law. The burden of proof rest on the plaintiff and therefore the defendant is not obliged to provide evidence to show that the chattel could not be valued at the level claimed by the plaintiff”. This reaffirms the burden placed on the plaintiff to convince the court of her averment with corroborative evidence. It is not just any evidence at all but credible evidence that can be relied upon at any given time.

In land matters the position of the law is that for a person to succeed in an action for declaration of title, recovery, possession, and an injunction, that person must establish by positive evidence the **identity of the land** (emphasis mine) which is the subject matter of the action else his action shall fail for lack of certainty<sup>8</sup>. In the case of Anane and others v Donkor and another (consolidated)<sup>9</sup>, it was held that; ‘where a court grants declaration of title to land or makes an order for injunction in respect of land the subject of that declaration should be clearly identified so that an order for possession can be executed without difficulty, .....’.

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<sup>8</sup> Adjei, Dennis Dominic: Land Law, Practice and Conveyancing in Ghana. 3<sup>rd</sup> ed. Page 190.

<sup>9</sup> [1965] GLR 188.

**Evidence Decree 1975 NRCD 323, Section 11(1)** states “..... the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue”.

In the evidence of the plaintiff, she identified the land in dispute of which no objection raised by the defendants or any of the witnesses. The defendants corroborated with the description of the land. This means the plaintiff has been able to identify the land in dispute.

In order to determine whether the late Kofi Donkor was the owner of the disputed land or not, there is the need to state that the land in dispute is attached to house number AP30. This conclusion was reached by the court based on the corroborative evidence given by all the parties that the subject matter is part of the land on which house number AP30 is situated. The plaintiff claims her father bought the land and built house number AP30 on a portion of it. The 1<sup>st</sup> and 4<sup>th</sup> defendants also claim it was a cocoa farm for a sister of Kofi Donkor who allowed him to cut down the cocoa trees in order to put up the house after the road was constructed. This means the court will have to determine who is the owner of the entire land (including the one with house number AP30) to arrive at who is to be declared as having title to the disputed land thus the piece of land adjoining to House number AP30.

There is corroborative evidence that in 1976 an attempt was made by Kofi Donkor to give house number AP 30 to plaintiff and her brother as a gift. In order for the gift made to be accepted and published as custom demands, plaintiff and her brother decided to present drinks, a sheep, and other items to their father in the presence of Kofi Donkor’s matrilineal family. In attendance was the head of family Ebusuapanyin Yaw Adu Twum and members of the family. There is no evidence that the head of family raised any objection as to the ownership of the land and/or the house. What is on record is that the

mother of Kojo Kontoh raised an objection to the acceptances of the thanksgiving (Aseda) on the basis that, her son helped in paying for Kofi Donkor's debt to avoid auction of the house by the court and has not been rewarded by the debtor thus Kofi Donkor. The following is what ensued between the plaintiff and the 1st defendant during cross examination

**Q. When Op. Kojo Kontoh came he lodged a complaint with the Presbyterian Church elders as well as the Pentecost church elders that his uncle was not treating him well, thus the making of a gift of the house to his children.**

**A. I was not there but at Assin Fosu. Again, I had already gone to give the Aseda before the allege complaint made.**

This line of questions clearly indicates that, Kojo Kontoh only wanted to compel his uncle, Kofi Donkor to honour his promise of compensating him for paying his debt for him and saving the house from being auctioned by the court. At the time of the settlement before the elders of the church, Kojo Kontoh was not the head of family, but Ebusuapanyin Yaw Adutwum who was also present at that meeting. He never indicated or claimed the house or land as that of the family. What brought about the meeting or mediation before the elders of the church was to compel Kofi Donkor to give a room to his nephew Kojo Kontoh and nothing else.

In the evidence of DW1, he also corroborated the fact that, Kofi Donkor had given the house to his children, and they were there to thank him in the presence of his family members. It was at this meeting that the mother of Kojo Kontoh raised an objection saying that her son should be aware of what his uncle has done or was about doing without honouring his promise to him. At no point was the issue of ownership of the land or the house became an issue or raised. This led to Kojo Kontoh reporting his uncle Kofi Donkor to the elders of the church.

It is therefore important to refer to what transpired before the church elders (exhibit 5(a)) while Kofi Donkor was alive as parties corroborated in their evidence to the court.

There is evidence that Kojo Kontoh and Kofi Donkor presented themselves voluntarily to the elders of the church for settlement. This voluntary submission to a third person is referred to as **mediation** as they choose a neutral person to help them reach a mutual agreement.

Mediation is the process by which a third-party neutral assist disputants to reach a solution mutually satisfactory to them. **Act 798** allows parties to submit their disputes to a mediator<sup>10</sup>. The disputants appoint their own mediator. Mediation only helps to facilitates communication using a third party who is neutral to help the parties arrive at their own mutually agreeable resolution. Mediation places ownership of the process with the parties. The parties control the process. The mediator does not make decisions for the parties or find a party as liable or innocent.

In Exhibit 5(a), there was mediation between Kojo Kontoh and Kofi Donkor before the elders of the church. In attendance were the head of family of Kojo Kontoh and Kofi Donkor thus Ebusuapanyin Yaw Adu Twum as well as other family members. At the mediation, it came out that, Kofi Donkor attempted giving **his** house to his children. The intervention was for Kofi Donkor to honour his promise to his nephew by giving him a room in his house because he paid his debt for him. The content of Exhibit 5(a) clearly shows that, house number AP30 was the personally acquired property of plaintiff's father Kofi Donkor. It again indicates that Kofi Donkor build the house with his own resources. No person present at that meeting, including Kojo Kontoh, Ebusuapanyin Yaw Adu Twum and other family members raised any concern with regards to the ownership of the land used in building house number AP30. After the settlement, Kofi Donkor

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<sup>10</sup> Section 63(Arbitration Act 2010 (Act 798)).

continued to enjoy his house until he died in 1994. There is no evidence that he was questioned about the ownership of the house or the land.

Again, a petition was made by the plaintiff to the Commission of Human Rights and Administrative Justice by the plaintiff against Kojo Kontoh. The issues were that he had rented out rooms in house number AP30 of which he had no authority to do so as well as taking over a cocoa farm. The Commission after investigations upheld the terms of settlement by the church elders. Both parties accepted the outcome of the settlement by the Commission. No ownership of the land was ever in contention.

With the above discussions, there is no contrary view to suggest that the land on which house number AP30 is situated and well as the adjoining land is not the property of Kofi Donkor the father of plaintiff and her brother. The court can therefore declare same as the property of the late Kofi Donkor.

**Whether or not the plaintiff and her brother should be declared as the owners of subject matter which is the adjoining land to house number AP30.**

The plaintiffs who want to be declared as having title have the burden to prove that they have a better title to the land in dispute. They must prove their root of title and method of how they acquired their title. In **Ago Sai & others v Kpobi Tetteh Tsuru** it was said “..... this he could do by proving on the balance of probabilities the essentials of their root of title and method of acquiring title to the area in dispute,.....”. As indicated above the subject matter is the property of Kofi Donkor the father of plaintiff and her brother. They claim it was a gift given to them by their father.

Sarbah in his book **Fanti Customary law** defines a gift as a relinquishment of one’s own right and the creation of the right of another, in lands, goods, or chattels, which creation

is **only completed by the acceptance of the offer of the gift by that other** (emphasis is mine). The giving and acceptance must be proved and evidenced by such delivery or conveyance as the nature of the gifts admits.

Customarily, a gift of land is a voluntary donation of the property owned by the donor who is not with disability to the donee in the presence of witnesses who may include the family members of the donor and the donee must accept the gift by providing thanksgiving (aseda), which could be a token or substantial, in the presence of witnesses and the **thanksgiving must be accepted by the donor** (emphasis is mine) after which the interest in the property the donor intends to pass to the donee would vest in the donee<sup>11</sup>.

In the evidence of the plaintiff, her father made a gift of the house to her and her brother. An attempt was made to thank their father in the presence of his family members as custom demands. This means plaintiff and her brother accepted the gift of the house made to them by the father. As custom demands, they attempted giving their thanksgiving in order for their father Kofi Donkor to accept. This could not be as the issue of Kofi Donkor failing to give a room in his house to his nephew Kojo Kontoh was raised by his mother. This means there was no acceptance of the thanksgiving which made the gift made not complete.

It is also on record that, when Kofi Donkor was sued in court for the recovery of a debt he owed, his house (AP30) was attached. This happened after he had executed the deed of gift of the house to plaintiffs. As the intentions of Kofi Donkor to give the house to plaintiff and her brother as a gift could not go through, Exhibit.....(deed of gift) cannot be relied upon as it is invalid and of no effect.

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<sup>11</sup> His lordship Sir Dennis Dominic Adjei: Land Law, Practice and Conveyancing in Ghana. 3<sup>rd</sup> ed. Page 78.

However, as it has been established that, house number AP30 and the adjoining disputed land is the personally acquired property of Kofi Donkor, his children are the right people to take over the house **except the rooms** given out per the mediation outcome (Exhibit 5(a)). The disputed land including the house was never given to the Abradzi family or Kojo Kontoh so that his successor can succeed. Plaintiff and his brother can be declared as having title to the disputed land the subject matter in court.

**Whether or not 4th defendant should be declared as having title to the disputed land.**

Whenever a defendant also files a counterclaim, then the same standard or burden of proof would be used in evaluating and assessing the case of the defendant just as was used to evaluate and assess the case of the plaintiff against the defendant. In **Jass Co Ltd and ano v Appau and another**<sup>12</sup>. Here the defendant counterclaimed and that meant that they also assumed the position of the plaintiff in respect of their counterclaim. Having thus dismissed the claim of the plaintiff, the learned trial judge, rightly proceeded to evaluate the case of the defendants in respect of their counterclaim, using the time-tested principles as to burden of proof enunciated in **Majolagbe v Larbi**<sup>13</sup>. The 1<sup>st</sup> and 4<sup>th</sup> defendants' claim Kofi Donkor built house number AP30 on family land. They led evidence in this regard.

Family land is "land belonging to members of a particular family including the dead, the living and the unborn. It is considered as a valuable property to them. A family may acquire land through purchase or gift"<sup>14</sup>. The head of the family is the custodian of all

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<sup>12</sup> [2009] SCGLR 265 at 270-271.

<sup>13</sup> [1959] GLR 190.

<sup>14</sup> *Ibid* 29.

family properties. He has the duty of protecting each property for the benefit of the entire members. He has the capacity to sue and be sued.

In the case of **Andrews v Hayford**<sup>15</sup>, P was a member of the Twidan family of Cape Coast. He bought a piece of land at Cape Coast and built a house on a portion of the land. On P's death intestate he was survived by only two uterine brothers A and D who constituted the only members of P's immediate Twidan family. A was subsequently appointed P's customary successor. In 1952 A, with the consent and concurrence of D, sold the undeveloped portion of the land to H. A properly prepared indenture was executed by all concerned and was duly registered. No member of the wider Twidan family objected to the sale. D predeceased A. On A's death therefore one S, a member of the wider family, was appointed his successor. A year after S's death and nineteen years after the sale to H, one K, a member of the wider family, disputed H's right to the land contending that the sale by A to H was null and void because it was without the consent of the wider family. H therefore sued him for declaration of title to the land.

Held dismissing the appeal, the court said inter alia. On the evidence, members of the wider Twidan family were aware of the sale. If they, in fact, did not consent to it they should have acted timeously to set the sale aside and should not have waited for all those nineteen years. In the circumstances, the family must be held guilty of inordinate delay. It would not therefore be fair for any court of law to avoid the sale after the family had failed to repudiate it for so long.

In applying this to the evidence on record in the case before the court, the family of Kofi Donkor never claim ownership of the land on which house number AP30 is built or even the adjoining land in dispute when he was alive. After his death in 1994, there is no evidence that Kojo Kontoh or the 4th defendant and for that matter any family member

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<sup>15</sup> [1982-83] GLR 214.



of the Abradzi family initiated any process to retrieve the family property from the children of Kofi Donkor. As discussed above, what was in contention was for Kofi Donkor to honour his promise to Kojo Kontoh which was duly carried out and the relatives also benefited with some two rooms. Again, if indeed the land is a family land, when Kojo Kontoh was alive, he would have said so in his response to the petition of CHRAJ. Moreso after the death of Kofi Donkor his family has not initiated any process to claim the house and the adjoining land until plaintiffs initiated this suit. The evidence led cannot not be relied on and declare 4th defendant as having title to the land in dispute. Even if the land including the portion on which house number AP30 is built belongs to the family, it could not be fair for any court of law to declare the Abradze family as being the owners of the land after over 40years when plaintiff and her brother attempted thanking their father for the gift he made to them or even after the death of Kofi Donkor about 28years ago. The family slept on their rights if any at all. The 4th defendant who is said to be the current head of family of the Abradze family cannot be declared as having title to the house AP30 as well as the subject matter before the court.

In the case of **Tetteh v Hayford**<sup>16</sup>, A grantor, lessor or owner of land has a duty in law to defend title to land that have been granted to a lessee. This was a principle explained by Ollennu J (as he then was) in the case of **Bruce v Quarnor and others**<sup>17</sup>. "By native custom, grant of land implies an understanding by the grantor to ensure good title to the grantee. It is therefore the responsibility of the grantor where the title of the grantee to the land is challenged, or where the grantee's possession is disturbed to litigate his (grantor's) title to the land. In other words, to prove that the land, right, title or interest which he purported to grant was valid". The defendants' witness (DW3) who claims to be the original owners of the land in dispute could not avail himself to defend his title and his

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<sup>16</sup> (2012) 1 SCGLR at 417-431

<sup>17</sup> (1959) GLR 292 at 294

lessee. The best he could do was to appear as a witness. He needed to have join the suit to defend his title. His failure to do that is a great disincentive to the claim of the defendants. Again, it is worth noting that, the witness insisted that the land was given to Ebusuapanyin Yaw Adu Twum by the Royal family and not that it was given to the entire Abradze family. He repeated this same statement during re- examination.

It is settled law that where a family member builds a house on family land, the land remains a family land and the house becomes a family property with the member only retaining a life interest. Upon the death of that member, the widow and children of the man have only a right of occupation subject to good behaviour<sup>18</sup>.

In the case under consideration, the defendants thus 1st and 4th defendants could not proof that the disputed land which forms part of house number AP30 is the property of their family or for Kojo Kontoh of which 4th defendant succeeded. The house was not given to Kojo Kontoh as compensation for the debt he paid for Kofi Donkor. When Kojo Kontoh summoned his uncle Kofi Donkor before the elders of the church, his complaint was a promise that his uncle failed to fulfil which was a room in his uncle's house for the debt he paid on his behalf. If it cannot be established that the entire house was given to Kojo Kontoh by his uncle, his successor the 4<sup>th</sup> defendant cannot also claim the subject matter as his. The 4<sup>th</sup> defendant therefore cannot be declared as having title to the subject matter in court.

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<sup>18</sup> His lordship Sir Dennis Dominic Adjei: Land Law, Practice and Conveyancing in Ghana. 3rd ed. Page 72.

**Whether or not an order for perpetual injunction be made against the defendants and all who may deal with the land on their behalf.**

The law is well established that where a party's claims are for possession and perpetual injunction, he puts his title in issue. He therefore has the burden of proving his title to the land by the preponderance of probabilities. In the case of Adwubeng v Domfeh<sup>19</sup>, the issue of who should be declared as having title to the land was discussed. On appeal to the Supreme Court, plaintiff was declared as having a better title to the land in dispute. Therefore, an order for recovery of possession can only be granted if the court is satisfied that the party seeking for such an order has satisfied the burden of ownership.

From the discussion so far as evidenced above, the subject matter has been clearly identified. It has also been established that the house and adjoining land is the personally acquired property of the late Kofi Donkor and as such the plaintiff and her brother who are his children have every right to take over their father's property except the rooms given out by their father while he was alive. An order for perpetual injunction against the defendants is sustainable.

**Whether or not the rent or lease agreement entered with the 2nd and 3rd defendants by 1st defendant is valid.**

From the above discussions, the rent or lease agreement between the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and 1<sup>st</sup> defendant is void as he has no capacity to enter into any agreement with them. It has been established that the subject matter is neither for the Abradze family nor the property of Kojo Kontoh for the 4<sup>th</sup> defendant who is the current head of family to lay claim. The 4<sup>th</sup> defendant cannot therefore delegate any power to 1<sup>st</sup> defendant to

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<sup>19</sup> [1996-97] SCGLR 660.

enter into any rent agreement with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The agreement therefore entered by the 1<sup>st</sup> defendant with the 2<sup>nd</sup> and 3<sup>rd</sup> defendant is not valid and void. The 1<sup>st</sup> and 4<sup>th</sup> defendants knew very well that, the land (subject matter) occupied by the 2<sup>nd</sup> and 3<sup>rd</sup> defendant is never the property of their family, yet they went ahead to enjoy the proceeds from the rent.

In conclusion, judgment is entered in favour of the plaintiffs. The plaintiffs are declared as having title to the adjoining land to house number AP30 as the boundaries established. The reasons are that;

1. The land adjoining house number AP30 is the property of the late Kofi Donkor.
2. The plaintiff and her brother are entitled to the subject matter in dispute.
3. The defendants are only entitled to only the rooms agreed upon at the mediation with the church elders and same affirmed by CHRAJ thus a chamber and hall and 2 single rooms for the relatives.

The 4<sup>th</sup> defendant could not prove his averment as having title to the house number AP30 as well as the adjoining land. His counterclaim therefore has failed. His quest for perpetual injunction cannot be granted as he could not prove his title.

**Orders of the court.**

1. The rent or lease agreement entered between the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> defendants is void and of no effect. They are to give vacate possession to the plaintiffs.
2. The 1st and 4th defendants are refund all rent received for the past 5years from 2nd and 3rd defendants to the plaintiffs who are the children of Kofi Donkor the owner of the land.

3. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants are to vacate from the land and give vacate possession to the plaintiffs.
4. A perpetual injunction is therefore placed on the defendants, their family members, agents, privies, assigns and all who may deal with the land on their behalf from doing so.

Cost of three thousand Ghana cedis (GHC3, 000.00) against the 1<sup>st</sup> and 4<sup>th</sup> defendants and in favour of the plaintiffs.

It is high time extended family members of deceased persons, desist from capturing properties of their deceased relatives leaving the children with nothing. In as much as the law recognizes the share of the family under the Interstate Succession Law (where no Will is executed), they should refrain from taking what is not theirs as the law is not a toothless bulldog and can bite hard on such persons.

.....SGD.....

**H/W EUNICE A. APALIWEN (MRs.)**

**(MAGISTRATE)**