

CORAM: HIS WORSHIP MAWUKOENYA NUTEKPOR (DISTRICT MAGISTRATE), SITTING AT THE DISTRICT COURT, BOLGATANGA IN THE UPPER EAST REGION OF GHANA, ON WEDNESDAY, THE 29TH DAY OF NOVEMBER, 2023.

SUIT NO. UE/BG/DC/A1/04/2019

**ATAMPUGBIRE HENRY AYINEMI & 2 OTHERS
ALL OF BOLGTANGA.**

PLAINTIFFS

VRS.

**FAILATU HARUNA & 10 OTHERS
ALL OF BOGATANGA**

DEFENDANTS

TIME: 09:17AM

PLAINTIFFS PRESENT

11TH DEFENDANT'S LAWFUL ATTORNEY PRESENT

**1ST DEFENDANTS ABSENT BUT REPRESENTED BY MOSES
NYAABIRE**

**5TH DEFENDANTS ABSENT BUT REPRESENTED BY SOLOMON
AYAMGA**

2ND, 3RD, 4TH, 6TH, 7TH, 8TH, 9TH AND 10TH DEFENDANTS ABSENT

AFOKO AMOAK, ESQ. FOR PLAINTIFFS PRESENT

**MOHAMMED TAHIRU NAMBE, ESQ. FOR THE DEFFENDANTS
ABSENT**

JUDGMENT

Introduction

1. By an amended Writ of Summons and Particulars of Claim filed on 21st August, 2019, the Plaintiffs claim against the Defendants as follows: -

- a. An order compelling the defendants to remove their containers or structures they kept in front of plaintiffs' houses situated at Dapoore-Tindongo opposite the Bolgatanga Sport Stadium.
 - b. Inconvenience cost plaintiffs
 - c. Cost.
2. Also, on the 24th day of September, 2019, the Defendants filed their defence and counterclaim against the Plaintiffs as follows:
- a. A declaration of Title to all that piece of land situated at Bukere, Bolgatanga bounded to the North by Abilba's house, bounded to South by Azonsolum Guest House, bounded to the West by Agandaa Ayamga's house and bounded to the East by the Road linking to the market to soe.
 - b. A Perpetual Injunction Restraining the Plaintiffs, their workmen or agents, assigns and customary successors from interfering with the quiet enjoyment and use of the said land by the defendants.
 - c. Possession of the said land.
 - d. General Damages for trespass.
 - e. Cost.

Plaintiffs' Case

3. The Plaintiffs say they are the owners of plot numbers 563,564 and 562 respectively situated at Dapoore-Tindongo, a section in Bolgatanga. The plaintiffs aver that the space left in front of their houses is the only access to their houses and also reserved as buffer between their houses and the major

road which run through the area. The plaintiffs further avers that the Defendants started putting up their containers in front of their houses which plaintiffs told them to stop but they refused and plaintiffs reported the matter to the Bolgatanga Police.

4. The plaintiffs contend that the police together with the Regional Surveyors came to the place and identify the space in dispute. The plaintiffs further contend that they were made to produce their lease documents and upon inspection it was discovered that the space belong to them and that it was reserved as buffer between their houses and the major road and that no one should put any structure there. The plaintiffs say that when the warning was given to the defendants they refused and continued and they reported the defendants to the Bolgatanga Municipal Assembly to intervene. Plaintiffs says that upon the report they presented to the Municipal Assembly, the Building inspectorates went and gave notice for them to remove their containers and which deadline has elapsed and the defendants are still squatting on the land. It is the Plaintiffs case that the tittle to their plots have never been in dispute before any court. The plaintiff aver that upon all the warning issued to the defendants, the defendants are still adamant unless they are compel by the Honorable court they will not remove their containers or structures from the land .The plaintiffs therefore claim for the above-mentioned reliefs.

Defendants' Case

5. Defendants vehemently deny Plaintiffs' claim and aver that the Plaintiffs' are not entitled to their claims. Defendants say that the 11th Defendant is the head of the Apasibanga family of Bukere in the Bolgatanga Municipality of Ghana and the rest of Defendants are Business people resident in Bolgatanga. The defendants aver that the Municipal Assembly is the Authority mandated by law to determine areas reserved as buffer zones by roads and how to use of such buffers zones. The defendants aver that the plaintiffs lack capacity to mount the instant suit. The defendants aver that their containers were put on the land before 1st and 2nd plaintiffs built their

houses. The defendants aver that 3rd plaintiff rented the space in front of his house front 11th defendant's family for use as a motor mechanics shop. The defendants aver that 1st plaintiff fraudulently exceed the boundaries of land allegedly granted to Apegyine Atampugbire and trespassed onto 11th defendant's family land. The defendants aver that 1st plaintiff is constructing a storey building on the space alleged to be reserved as a buffer. The defendants aver that the defendants have permits to use the land for their respective businesses.

6. The defendants aver that their ancestor called Akulwoko first settled on all that piece of land situate at Bukere, Bolgatanga bounded to the North by Abilba's house, bounded to the South by Azonsolum Guest House, bounded to the West by Agandaa Ayamga's house and bounded to the East by the Road linking the Bolga market to soe. The defendants aver that Akulwoko had 5 sons named Afour, Ayelmune, Anambanga, Agorigo and Apokate. The defendant aver that the demise of Akulwoko the land in dispute was inherited by Afour who had five sons named Akumpeliga, Abulukom, Ayeebe, Apasibanga and Akuure. The defendants aver further that the death of Afour the land in dispute was inherited by Apasiganga who cultivated same until his demise. The defendants aver that Akoto inherited the disputed land from Apsiganga and cultivated same until his death. The defendants aver that upon the demise of Akoto, Apasibanga and Akalunga respectively each inherited the land in dispute during their lifetimes. The defendants aver that Akallunga was childless and during his lifetime, his sister called Asanwunge gave birth to Agana and Agambire from the father's house although she was not married. The defendants aver that Agana and Agambire were given the disputed land to cultivate by their uncle Akaluga during his lifetime. The defendants aver that Agana and Agambire shared the disputed land equally among themselves. The defendants aver that the land in dispute was vested in the government in trust for and on behalf of the allodial title holders. The defendants aver that the land in dispute was returned by the government to the allodial title holders and allodial title holders have since been in possession of the disputed land. The defendants aver that the allodial title holders have not granted any portion of the

disputed land to any of the plaintiffs. They therefore counterclaim against the Plaintiffs for the above-stated reliefs.

Burden of Proof

7. The obligations or duties of parties to lead evidence; and to persuade the court, as to the credibility of their allegations are covered both by statute and plethora of authorities. Under sections 10, 11, 12 and 14 of the Evidence Act 1975 (NRCD 323) the burden of who has the responsibility to lead evidence is clearly set out. Thus is burdens of leading evidence and the burden of persuading a tribunal by leading credible evidence. Sections 11(1)(4) and 14 of the Evidence Act, 1975 (NRCD 323) provide as follows:

11(1) For 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.

14 Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting.”

8. Thus there are two parts to the duty to discharge the burden of proof. Thus, the twin burdens of proof and standard of proof contained in the provisions are: (a) There is the burden of leading evidence to back an assertion; and (b) the burden of persuasion i.e. leading evidence of sufficient standard to persuade a tribunal to rule in one’s favour. **See the case of Isaac Alormenu vs. Ghana Cocoa Board, Civil Appeal No. J4/86/2022, delivered on 8th February 2023.**

9. In the case of **In re Ashalley Botwe Lands; Adjetey Agbosu & Ors v Kotey & Ors [2003-2004] SCGLR 420, at pp. 464-465**, Brobbey JSC explained the law on burden of proof thus:

“The effect of sections 11(1) and 14 and similar sections in the Evidence Decree, 1975 may be described as follows: A litigant who is a defendant in a civil case does not need to prove anything: the plaintiff who took the defendant to court has to prove what he claims he is entitled to from the defendant. At the same time, if the court has to make a determination of a fact or of an issue, and that determination depends on evaluation of facts and evidence, the defendant must realize that the determination cannot be made on nothing. If the defendant desires the determination to be made⁴ in his favour, then he has the duty to help his own cause or case by adducing before the court such facts or evidence that will induce the determination to be made in his favour. The logical sequel to this is that if he leads no such facts or evidence, the court will be left with no choice but to evaluate the entire case on the basis of evidence before the court, which may turn out to be only the evidence of the plaintiff.”

10. In **Ackah v Pergah Transport Ltd., 2010] SCGLR 728**, Sophia Adinyira JSC stated on the burden of proof at p.736 as follows:

“It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witness, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the minds the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more reasonable than its non-existence. This is a requirement of the law on evidence under Section 10(1) and (2) and 11(1) and (4) of the Evidence Act, 1975 (NRCD 323)”.

Evaluation of evidence, discussion of issues and legal analysis

11. The issues for determination are (a) whether or not the Defendants containers or structures blocked Plaintiffs from accessing their houses and (b) whether or not the space between Plaintiffs houses and the road passing the area is a buffer and space reserved for road expansion.
12. The Plaintiffs testified themselves and called one witness (Samuel Kwame Tete) from Bolgatanga Municipal Assembly as PW1. They tendered in evidence the following documents: Lease dated 4th July 1978 as **Exhibit A**, Police Report dated 5th April, 2019 as **Exhibit B**, Receipt dated 22/07/1982 as **Exhibit C**, A Letter from Lands Commission, Bolga as **Exhibit D**, Photographs of the “REMOVE SIGN” purportedly written on the Defendants’ Structures by the Bolgatanga Municipal Assembly as **Exhibit E Series**, Deed of Assignment dated 7th July 2014 as **Exhibit F** and A Lease dated 20th June, 1998 as **Exhibit G**.
13. The Defendants on the other hand testified through the 11th defendant’s Lawful Attorney and one Solomon Ayamga as DW1. Their evidence is similar to the brief facts of their case as stated above. They tendered in evidence Power of Attorney as **Exhibit 1** and an Agreement as **Exhibit 2**.
14. From the evidence on record, the Plaintiffs claim that the Defendants put containers and structures in front of their houses which blocked access to their houses. It is their case that the space between their houses and the road is a buffer and space reserved for road expansion. It is also their case that they reported the matter to the Bolgatanga Municipal Assembly (BMA) who notified the Defendants to move but they refused hence the commencement of this suit. Thus, 1st Plaintiff under cross examination by counsel for defendant on 1st September 2020, the following transpired:

“Q. I put it to you that none of the defendants is occupying plots No. 563?”

A. My complaint to the court is that they are impeding access to plot No. 563.

Q. I put it to you that, the District Assembly is the appropriate authority to determine who occupies that part you claimed is impeding access to your property.

A. Yes , the District Assembly gives permit to such places, but before I came to this court I petitioned the BDA since 2014, and since 2018 up till date, they are served with notices to quit yet they refused, hence my coming to court.

Q. Did you sue the District Assembly nuisance?

A. No I did not.

Q. I suggest to you that, the defendant were placed where they occupied by the 1st to 10th defendants by Bolgatanga District Assembly?

A. I have no evidence to that effect. And even if there is the same BDA revoked their permits since 2 years ago.

Q. Have you exhibited a copy of the revoked permits by the BDA?

A. Yes.

Q. Which documents shows the BDA has revoked their permits?

A. Yes, exhibit "E"

Q. The said exhibit does it have a letter head from the BDA?

A, It has not but, it is an inscription asking them to quit.

Q. That, writing can be put there by anybody at all who is not an employee of the BDA?

A. It was not done by any other person but by the works department of the BDA.

Q. I put it to you that, that writing was not put by the BDA works department?

A. It was done by the works department.

Q. I put it to you that the District Chief Executive did not authorize persons to go and write those words?

A. It was the works department that wrote them.”

Also, on the 23rd September, 2020, the 1st Plaintiff under cross examination by the Counsel for the Defendants he testified as follows:

“Q. I further put it to you that, the land occupied by the defendants is not your Land?

A It is true but it is a buffer.

Q. I further put it to you that, the appropriate authority to determine the usage of the buffer is the District Assembly?

A Yes it is right.”

15. On 11th November 2020, 2nd Plaintiff under cross examination by Counsel for Defendants, he testified as follows:

“Q. I put it to you that, the portion of land occupied by defendants is not part of your land?

A They blocked our way that is why we said they should move.

Q. I put it further to you that, the appropriate authority to ensure the defendants do not block your way is the District Assembly?

A. The matter was sent to the District Assembly and the DA wrote them, yet they said they will not leave.

Q. Did you attach a copy of the letter you alleged DA wrote?

A. Yes, it is here.

Q. I put it to you that, there is no letter like that in this court?

A. There is a letter.

Q. I finally put it to you that, it is the District Assembly that should have sued the defendants to leave the land?

A. We went to the District Assembly but they did not tell us anything.”

16. On the 13th day of January 2021, 3rd Plaintiff under cross examination by counsel for Defendants, he testified as follows:

“Q. None of the defendants sitting here occupied no space in front of your house, it is your own father’s shop that is there?

A. They occupied the route to my house.

Q. Can you be more specific with their numbers?

A. About four (4) of them.

Q. Can you mention their names?

A. Yes (1). Amariya Baba, (2) Gifty, (3) Erica and (4) Umu Tahiru.

Q. What have they occupied the route with?

A. Containers and stores.

Q. What are the dimensions of your land or house?

A. It is 100x85.

Q. It is not possible for all the four (4) containers to occupy the front of your house?

A. I lived there and they are about four (4) containers blocking the entrance.

Q. I further put it to that, your allegations are not true?

A. It is true, even as I speak there are two (2) buildings with two (2) containers blocking the entrance.

Q. I put it to you that, these names you mentioned, they occupied adjacent lands to your house?

A. Where they occupy is a buffer and blocking my entrance.

Q. I put it to you that, you never asked any of the defendants to remove their container in front of your house?

A. I did.

Q. I further put it to you that, as an individual you never reported the defendants to the Bolgatanga Municipal Assembly?

A. I did.

Q. You said in paragraph 7 of your statement that the Bolgatanga Municipal Assembly had the mandate to plan - Bolga Township?

A. Yes.

Q. I put it to you that, it is the Bolgatanga Municipal Assembly that ought to remove the container in front of your house?

A. We reported to Bolgatanga Municipal Assembly, but they refused their orders that is why we are in court.

Q. I finally put it to you that, if you complaint to the Bolgatanga Municipal Assembly you would have proved that with your documents?

A. I did and the Bolgatanga Municipal Assembly gave their dead line to vacate, but they did not.

Q. You never wrote a letter to the Bolgatanga Municipal Assembly complaining about the defendants?

A. I gave a verbal compliant to the Bolgatanga Municipal Assembly.”

17. Furthermore, Plaintiffs’ witness subpoenaed from the Bolgatanga Municipal Assembly (One Samuel Kwame Tete) testified in his evidence in chief as follows:

“Sometime in the year 2018 the plaintiffs wrote a petition to the Assembly in which they complained that the Defendants had blocked access to their homes by developing structures in the easements abutting their homes and the road. We carried out an inspection of the site and found that the Defendants had actually got structures which inhibited the Plaintiffs from having access to their homes. We ordered the Defendants to remove their structures by imprinting the “REMOVE” order on their Structures. The Defendants followed up to the Assembly after the REMOVE sign had been inscribed on their structures but they still did not remove their structures. According to the Land Use and Spatial Planning Act, 2016 (Act 925) sections 113, 117, 121 of the MMDA’s no person shall carry any development of land within the municipality without a planning permit. The Defendants were advised to stop any development without permit. The REMOVE sign was planted but they refused and kept on. They were also warned about the statutory distance that is supposed to be between any two homes and between the house and the road. But they ignored all advice.”

18. Also, on the 12th day of August, 2022, the Plaintiff’s witness from the Assembly under cross examination by counsel for Defendants, he testified as follows:

“Q. I put it to you that the containers belonging to the defendants are located on a no man’s land.

A. Per the answers I gave, some of the containers are on the road reservation and the buffer. The road reserves we leave it for expansion of the road and buffer is the space left for people to walk on.

Q. You would agree with me that both reserve and the buffer are being controlled by the Assembly.

A. Yes because anything to be put on the buffer or the reserve Assembly must look at A for consideration.

Q. You would agree with me further if there were anybody like institution that will challenge where the containers are located, it is the Bolga Municipal Assembly?

A. I agree with you. And that is why the plaintiffs wrote to the Assembly to take action.”

19. It is noteworthy that the Municipal Assembly is mandated by law to regulate putting up of structures by given out building permit as well as prohibit putting up of structures that do not conform to approved plan for the area in issue. Any person who fails to obtain permit before putting up a building or put up a structure contrary to the approved plan for the area will face the consequences of his or her action. **Sections 91 and 94 of the Local Governance Act, 2016 (Act 936)** provides as follows:

“Permit to carry out physical development

91. (1) A person shall not carry out a physical development in a District except with the prior written approval in the form of a written Permit issued by the District Planning Authority.

(2) A District Planning Authority may approve an application Referred to in subsection (1), before the adoption of an approved District Development Plan for the district.

(3) A District Planning Authority shall consult public agencies and local communities as may be prescribed by Regulations issued by the Minister in the determination of an application for a permit to develop prior to the adoption of an approved District Development Plan.

Enforcement in respect of unauthorised development

94. (1) Where (a) a physical development has been carried out without a permit or is being carried out without a permit, or (b) conditions incorporated in a permit are not complied with, a District Planning Authority shall give written notice in the form that shall be prescribed by Regulations, to the owner of the land to require that owner on or before a date specified in the notice to show cause in writing addressed to the District Planning Authority why the unauthorised physical development should not be prohibited, altered, abated, recovered or demolished.

(2) If the owner of the land fails to show sufficient cause why the development should not be prohibited, altered, abated, removed or demolished, the District Planning Authority may carry out the prohibition, abatement, alteration, removal or demolition and recover any expenses incurred from the owner of the land as if it were a debt due to the District Planning Authority.

(3) A District Planning Authority may issue an enforcement notice that demands the immediate stoppage of work that is being carried out contrary to this Act or the terms of an approved development plan.

(4) A person who fails to comply with a notice to stop work commits an offence and is liable on summary conviction to a fine of not less than two hundred penalty units and not more than four hundred penalty units or to a term of imprisonment of not less than three months and not more than six months or to both the fine and term of imprisonment and in the case of a continuing offence to an additional fine of not more than four penalty units for each day that the contravention continues, after written notice has been served on the offender.

See also sections 113 and 117, 118, 119 and 121 of the Land Use and Spatial Planning Act, 2016 (Act 925).

20.If indeed the Defendants put up structures or containers on the buffer or the space reserved for road expansion or put up a structure contrary to the approved plan for the area as well as without a building permit, the

Assembly is authorized to take appropriate action against them in accordance the provisions Acts 925 and 936 as stated *supra*. In order words, putting up structures or containers on a buffer or a place reserved for a road, the Assembly which Plaintiffs' claim they have notified is the appropriate institution to take action against the Defendants.

21. Plaintiffs claim access to their houses have been blocked which defendants denied. It is the responsibility of the Plaintiffs to prove to the satisfaction of this court that access roads or ways to their houses have been blocked. Unfortunately, the Plaintiffs failed to convince this court with sufficient evidence that the Defendants blocked access roads or ways to their houses with their structures or containers. The court finds as a fact the plaintiffs have been having access to their houses and living in their houses.
22. Besides, the fact that BMA fails to take any action against the Defendants demonstrate that the Defendants are not on the space reserved as a buffer or reserved for road expansion and nor do they blocked Plaintiffs access or entrance to their houses.
23. For the foregoing reasons, this court holds that the plaintiffs' action fails. Thus, the Plaintiffs have failed to establish the existence of the facts contained in their claim by the preponderance of the probabilities. Plaintiffs' action is accordingly dismissed.
24. The next issue to consider is whether or not the Defendants are entitled to their counterclaim. It is a well-established principle of law that a defendant who files a counterclaim has the same burden of proof as a plaintiff. In the case of **Nortey (No.2) V. African Institute of Journalism and Communication & Others (No.2) [2013-2014] 1 SCGLR 703**, the principle was stated thus,

“Without any doubt, a defendant who files a counterclaim assumes the same burden as a plaintiff in the substantive action if he/she has to succeed. This is because a counterclaim is a distinct and separate action on its own which must also be proved according to the same

standard of proof prescribed by sections 11 and 14 of NRCD 323, the Evidence Act (1975)”.

25. In the instant case, the Defendants counterclaimed against the Plaintiffs for the land in dispute. They therefore have a burden of proof to discharge. The Defendants claim for the land in issue has been denied by the Plaintiffs. The Defendants evidence in support of their case is a repetition of their defence or pleading without more. It is a settled principle of law that a bare assertion or merely repeating a party’s pleadings in the witness box without more does not constitute proof. In **Klah V. Phoenix Insurance Co. Ltd [2012] 2 SCGLR 1139**, this principle was reiterated:

“Where a party makes an averment capable of proof in some positive way e.g. by producing documents, description of things, reference to other facts, instances 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 **Majolagbe v Larbi & others (1959) GLR 190-195, Klutse v. Nelson [1965] GLR 537, and Air Namibia (Pty) Ltd. V. Micon Travel & Tour & 2 Ors, [2015] 91 G.M.J @page 177.**

26. So having examined the evidence of the parties on record this court is of the considered opinion that the defendants have failed to establish the existence of facts contained in their counterclaim by the preponderance of the probabilities that the land as described in their counterclaim belong to them. The Defendants counterclaim for the land as described in their counterclaim is accordingly dismissed.

Conclusion

27. Having examined the whole evidence adduced by the Plaintiffs and the Defendants on record and from the foregoing authorities as well as the analysis, the court holds as follows.

- a. Plaintiffs have failed to convince this court that the Defendants have blocked access ways to their houses by preponderance of the probabilities as the plaintiffs have been accessing and living in their various houses. Besides, the Bolgatanga Municipal Assembly is the appropriate institution to take necessary action against the Defendants if their containers or structures are on the buffer or the space reserved for road expansion.
- b. The Defendants counterclaim is dismissed.
- c. There is no order as to costs.

(SGD.)
H/W MAWUKOENYA NUTEKPOR
(DISTRICT MAGISTRATE)