

**IN THE DISTRICT COURT HELD AT DAMBAI BEFORE HIS WORSHIP
ALHASSAN DRAMANI ESQ. ON MONDAY, 16TH JANUARY, 2023**

SUIT NO. A1/03/2023

BENYANASE FAUSTINA

PLAINTIFF

VRS

AKWASI ADDAE

DEFENDANT

PARTIES PRESENT

NO LEGAL REPRESENTATION

JUDGEMENT

The Plaintiff filed a Writ of Summons against the defendant claiming the following reliefs:

- a. Declaration of title to a parcel or piece of land situate lying and being at Dambai junction bounded on the North by property of sister Mary, on the South by the Dambai main road, on the West by property of Madam Afia and on the East by property of Kudor Kwame.
- b. An order for recovery of possession of any portion of the Plaintiff's land that has been trespassed upon.

- c. An order of perpetual injunction to restrain the Defendant, his agents, privies, servants, workers or whosoever from interfering in any manner whatsoever with the Plaintiff's ownership and enjoyment of the land.
- d. General damages.
- e. Costs.

The Defendants denied the assertions of the Plaintiff and insisted that he has a defence to plaintiff's claims.

THE CASE OF THE PLAINTIFF

The case of the Plaintiff as can be glean from her pleadings and witness statement was that sometime ago the defendant approached his late father for a piece of land to establish a provision store. According to plaintiff his father who had a plot of land at the Dambai junction gave a portion of the said land to the defendant without taking any payment for it. Plaintiff said after the demise of her father the defendant is suddenly making a claim over the land and has started developing same but was stopped by plaintiff whilst the building was at the foundation level. But the defendant has ignored her and continue to develop the land. Plaintiff testified that the head of her family, called a meeting and invited the defendant to come and justify his interest in the land. Plaintiff said at the said meeting the defendant told them that he bought the disputed land from plaintiff's late father in the presents of Asun Anane and Benyenase Kodo Kwame, who are all family members of the plaintiff. According to plaintiff defendant also produced a receipt he claimed was given to him by plaintiff's late father but she has her doubts with the document produced by the defendant.

The Plaintiff called her Auntie, Asun Deka as PW1. According to her, sometime ago the defendant approached her and told her that he saw a plot of land at the road side near the Dambai junction and when he enquired he was told that the said land belong to PW1's

brother who is also plaintiff's father. PW1 said the defendant asked her to lead him (defendant) to plaintiff's father so that together they will plead with plaintiff's father to release the said land to defendant to put up a store. PW1 added that when they went to his brother, he told them that they were all one family and readily released the land to the defendant. She denied defendant's claim that the disputed land was sold to him by plaintiff's late father.

Thereafter, the Plaintiff closed her case.

THE CASE OF THE DEFENDANT

The case of the defendant as can be discern from his pleadings and witness statement was that sometime in 1991 he wanted a piece of land to establish a provision store, and whilst in search he saw an undeveloped plot of land along the Dambai main road near the Dambai junction and upon enquiries he was told that the said land belonged to plaintiff's father. According to the defendant he sort the assistance of PW1 who is also defendant's step mother to lead him to plaintiff's father so that he will plead with plaintiff's father to release the land to him for his project. Defendant said when they approached plaintiff's father he released the land to him without any hesitation and without taking any payment from the defendant. Defendant further stated that in 1993 he built two thatch rooms on the disputed land and used one as the provision store whilst the other room was used as his living accommodation. Plaintiff added that in 1999 the plaintiff's father called him and told him that he needed some money so he wants to sell part of his land including the portion where defendant's structures were. Defendant said he agreed to buy the land so the plaintiff's father measured out the land and he paid ₵230,000.00 (two hundred and thirty thousand old Ghana cedis) to the plaintiff's father as consideration. Defendant again stated that the transaction between him and plaintiff's father was witnessed by two uncles of the plaintiff. The defendant tendered in evidence exhibit "1" receipt of the sale transaction between him and plaintiff's late father.

The Defendant in stating his case called two witnesses as DW1 and DW2.

DW1 was Ofori Sunkwa, According to him somewhere in 1999 the defendant called him and told him that the plaintiff's father wanted to sell the disputed land to him so he wanted DW1 to come and witness the sale for him. DW1 said he agreed and went with defendant to plaintiff's father. DW1 corroborated defendant's evidence that the sale was done in the presents of plaintiff's uncles namely; Agya Anane, Kobo Papa and Nyame Anthony.

DW2 testified in his witness statement that the late father of plaintiff was his brother. He said some time ago the plaintiff's father called him and told him that he has sold the disputed land to the defendant and because he was illiterate he wanted he (DW2) to come in as a witness. According to DW2 he obliged and signed the sale document as one of the witnesses for the plaintiff's father (his brother).

Thereafter, the Defendant closed his case.

The legal issues to be determined by this court are:

- i. Whether or not the Plaintiff's late father sold the disputed parcel of land to defendant.
- ii. Whether the defendant has trespassed on plaintiff's remaining plot of land.

It is trite law that for every case there is a burden of proof to be discharged and the party who bears the burden will be determined by the nature and circumstances of the case.

Sections 10-17 of our Evidence Act, 1975 (NRCD 323), state the position of the law with regard to the burden of proof.

Since the Defendant have denied Plaintiff's claim, the burden of proof was on the Plaintiff to show that where the Defendant erected his building was not sold to him by the Plaintiff's father.

In the case of In Re: Ashalley Botwe lands; Adjetey Agbosu and others Vrs. Kotey and Others (2003-04) SCGLR 420, Brobbey JSC interpreted section 11(1) of the Evidence Decree, 1975 (N.R.C.D 323) at pages 464 to 465 and held that:

"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 the 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 made 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....".

In the case of Nyikplorkpo v. Agbodotor [1987-88] 1 GLR 165

The Court of Appeal per holding 3 stated that:

"To succeed in an action for declaration of title to land, recovery of possession and for an injunction the plaintiff must establish by positive evidence the identity and the limits of the land which he claimed".

Now to issue one, whether the plaintiff's father sold the disputed plot of land to the defendant.

Judges have been advised to look with suspicion when claims are made against deceased persons. In the case of **KUSI AND KUSI v BONSU [2012] SCGLR 60 at page 67** the Supreme Court stated the principle succinctly as follows:

"... the claims the plaintiff family made against the deceased, Asante, in respect of the property were all critical assertion against the deceased in whose favour the presumption of ownership stood. These claims belonging to the class of evidence that must first be received with the greatest of caution and scrutinized carefully before being given the requisite weight. It is however, clear from the evidence that the plaintiff's family acquitted themselves creditably by discharging satisfactorily, the legal burdens placed on them...

There is no intractable rule of law that charges or claims against a dead person could not succeed without corroboration. To the contrary, the discernible principle was that a court could proceed at the uncorroborated evidence if satisfied about its truthfulness. The only rider or caution was that the court must examine the evidence critically with utmost care , weighing or sifting it thoroughly to ensure there were no loopholes or that the charge or claim did not suffer from any absurdity; or the like. A judge in receipt of uncorroborated evidence consisting in the main of charges against a deceased person would not swallow the story lock, stock and barrel, but would first view it from a suspicious stand point. If the story as presented was neither incongruous, preposterous, unreasonable, illogical nor incredible, the judge might proceed to give it the weight it deserved. The exercise would relate to the cogency or weight to be attached to the evidence given..."

See also the case of **QUARCOO V WELBECK (J4/41/2012) [2015] GHASC 107 (25 NOVEMBER 2015)**

This present case belongs to the category of cases the Supreme Court referred to in **Kusi and Kusi V Bonsu** case (supra).

At paragraphs 4 and 5 of her witness statement filed on 06th October, 2022, the plaintiff stated as follows:

4. "The defendant wanted to build and I being the plaintiff stopped him and the family members called the matter and my head of family stopped him not to build."

5. "Plaintiff says that the family members asked him (defendant) and he said plaintiff's father sold the land to him and he also added that some of the family members were present when plaintiff's father sold the land to him. Plaintiff disagreed with him and he mentioned Asun Anane and Benyenase Kodo Kwame as some of the family members who witnessed the sale transaction."

PW1 in corroborating the evidence of plaintiff stated that she was the one who led the defendant to plaintiff's father to seek for permission for defendant to stay on the disputed land as a mere licensee and that the land was never sold to the defendant.

Throughout the hearing the defendant have maintained that he bought the disputed subject matter from the plaintiff's late father. This assertion undoubtedly is a claim against a deceased person and in the case of **Kusi and Kusi V Bonsu** (supra) the Supreme Court has said that these claims belong to the class of evidence which must first be received with utmost care and scrutinized carefully. With this caution in mine I shall proceed to examine the defendant's claim that the subject matter situate lying and being at Kechenke (Dambai junction) was sold to him by plaintiff's late father.

Considering the fact that this is a claim against a deceased person's estate, particularly when the deceased died intestate there must be cogent evidence in support of the allegation that the land was sold to defendant.

In his evidence the defendant maintained that he bought the subject matter of this suit from plaintiff's father in 1999 and the sale was witnessed by persons including plaintiff's uncles (brothers of plaintiff's father).

The above assertion of the defendant was amply corroborated by DW1 and DW2. In his witness statement filed on 06/10/2022, DW2 stated as follows:

“My late brother Kudo Kofi (Benyenase Kofi) gave a land to the defendant which he did not initially sell to him. However, one day my brother called me to tell me that he has now sold the land to the defendant and since he did not attend school I should come and witness for him, which I did.”

The defendant attached to his witness statement exhibit “1” the alleged sale agreement between him and the plaintiff’s father. For the sake of clarity I shall reproduce the said exhibit “1” which was tendered in evidence by the defendant without objection. It reads as follows:

“I, Mr. Benyenase Kofi on the date of July 10th 1999 sold part of my building plot to Mr. Kwasi Addae, at the cost of two hundred and thirty thousand cedis (¢230, 000.00) at Dambai Kechenke.

The measurement is 47 by 78 and 55 by 22.”

It is apparent on the face of Exhibit “1” that same was duly executed by the seller, Benyenase Kofi (Kofi Kudo) and the buyer, Kwasi Addae. It is also significant to note that exhibit “1” (supra) was witnessed by three persons; Anthony Koo Nyame (DW2) for the seller, Opanyin Kwame Anane for the buyer and Ofori Sunkwa (DW1). It was however not clearly stated who Ofori Sunkwa had witnessed for.

The above without more suggest that the agreement was between the Plaintiff’s father and the Defendant and it was for the sale of plot of land.

The plaintiff in her evidence admitted that when the defendant was invited for a meeting with the plaintiff’s family head and other family members, the defendant produced exhibit “1” to buttress his claim that he bought the disputed land.

At paragraph 6 of her witness statement the plaintiff stated that:

“Plaintiff finally says that, she wants the court to do thorough and proper checks into the land matter so that they get their land back because they believe their late father did not sell the land to the defendant.”

In my view what the plaintiff is saying is simply that she came to court without any shred of evidence of wrong doing against the defendant, but merely base on a believe that the land was not sold to the defendant. The plaintiff therefore wants this court to conduct an enquiry and dispossess the defendant of the disputed subject matter.

In **KLAH V PHOENIX INSURANCE CO LTD [2012] 2 SCGLR 1139, page 1139**, the court held as follows:

“Where a party makes an averment capable of proof in some positive way e.g. by producing documents, descriptions 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 witnesses. He proves it by producing other evidence of facts and circumstances from which the court can be satisfied that what he avers is true.”

When the plaintiff came under cross examination by the defendant on 18/10/2022 it became even more apparent that she has no serious case against the defendant. Below were excerpts of what transpired:

Q. In your evidence you told this court that your father never sold the land to me not so.

A. Yes.

Q. How then did I get a document from your father?

A. I do not know how you managed to get that document.

Q. Do you remember that when I started the building you invited me for a meeting at your family house?

A. Yes.

Q. Do you remember that the said meeting was presided over by the Chief of Dambai, Nana Kwaku Beyennnor, your family head and other principal members of your family?

A. Yes.

Q. Do you also remember that at the said meeting I was made to produce my witnesses and the document your father gave me?

A. Yes, you called your witnesses and also produced the agreement you claim you had with my father. But I still disagreed with you, your witnesses and the document you produced.

Q. At the meeting did my witnesses testified that they indeed witnessed the sale of the subject matter between your father and I.

A. Yes, your witnesses agreed that they actually witness the sale.

Q. Do you agree with me that I had an old structure which collapsed before I started the reconstruction work on the disputed land?

A. That is true.

Q. Do you remember that after the proceedings the elders asked me to go and continue with my work because they were satisfied that I bought the land from your father.

A. Yes, they said so but they also asked you to let them go and measure the place again, to be sure you had not trespassed into my land, before you continue with your work but you refused to wait for the measurement to be carried out and went ahead with the work and that is why I brought you to court.

The encounter above clearly confirms defendant's position that he indeed bought the land from the plaintiff's father. The above also suggests that the elders of plaintiff's family after listening to him and inspecting his receipt acknowledge the fact that defendant actually bought the land from the plaintiff's father.

PW1, plaintiff's only witness did not also help plaintiff's case. Her evidence was largely hinge on the fact that neither his late brother nor defendant had informed her of the sale of the disputed land. As such she believes that the sale never took place. She however admitted that the witnesses to the sale of the disputed land as stated by defendant were his brothers. My question to PW1 is why does she think it was a must for the contracting parties to inform her of their dealings when she had no interest in the subject matter? At any rate at least two of the witnesses to the agreement were brothers of the seller (plaintiff's father)

I have critically examined the record and do not find any evidence that establishes that there was no sale transaction of the disputed land between the plaintiff's late father and defendant. I have also not found any evidence which suggest that the defendant is being untruthful, forged exhibit "1" or that exhibit "1" was unconscionable.

Generally, where parties have embodied the terms of their contract in a written document, then under the Parol Evidence Rule, oral or other evidence extrinsic to the document is not normally admissible to add to, vary, subtract from or contradict the terms of the written agreement. (**Chitty on Contracts, 2nd ed. Vol. 2 p 645**).

The Plaintiff in her evidence stated that her father never sold the disputed subject matter to the defendant. However, the Defendant stated the contrary and told the court that the

land was sold to him by plaintiff's late father and have exhibited the document that was executed between them.

In the case of **Boakye v. Asamoah [1974] 1 GLR 38 at 45**], the court held that legal or persuasive burden is borne by the party who would lose the issue if he does not produce sufficient evidence to establish the facts to the requisite standard imposed under section 10 of the Evidence Act, 1975 NRCD 323 that is, by a preponderance of probabilities.

The Plaintiff bore the legal burden and was thus required to prove her assertion. From the evidence on record the Plaintiff have woefully failed to discharge this responsibility.

The Defendant stated his case and called two witnesses, DW1 and DW2 who largely corroborated defendant's case. They maintain that they signed as witnesses to the sale agreement between the plaintiff's father and the defendant. The testimony of DW2 is quite revealing. He stated that he is a brother of the plaintiff's father and that he was invited by the plaintiff to sign the sale document because plaintiff's father said he wanted someone who was literate since the plaintiff's father himself was illiterate.

In the case of **Osei Yaw v. Domfeh [1965] GLR 418**, the Supreme Court per holding 1 stated the law as follows:

"Where the evidence of one party on an issue in a suit is corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated version in preference to the corroborated one, unless for some good reason (which must appear on the face of the judgment) the court finds the corroborated version incredible or impossible". Reference is also made to the case of **Tsrifo v. Dua VIII [1959] G.L.R. 63 @ 64-65**.

The core of the disagreement between the parties is whether the plaintiff's father during his life time sold the disputed subject matter to the defendant. The relevant statute in

respect of this issue is the Conveyancing Act 1973 (NRCD 175). Germane to our course are sections 1 and 2 of NRCD 175. They enact as follows:

Section 1-Mode of Transfer

(1) A transfer of an interest in land shall be by writing signed by the person making the transfer or by his agent duly authorized in writing unless relieved against the need for such a writing by the provisions of section 3.

(2) A transfer of an interest in land made in a manner other than as provided in this part shall confer no interest on the transferee.

Section 2- Contracts for transfer:

No Contract for the transfer of an interest in land shall be enforceable unless:

- a) It is evident in writing signed by the person against whom the contract is to be proved or by a person who was authorized to sign on behalf of such person; or
- b) It is relieved against the need for such a writing by the provision of section 3"

The meaning I gathered from these sections is that sale of land shall be evidenced in writing and signed by the transferor or his agent duly authorized in writing unless the law under section 3 of the conveyancing Act exempts it. The parties are also to ensure that they agree on the purchase price (See Justice Dennis Dominic Adjei's book: LAND LAW, PRACTICE AND CONVEYANCE IN GHANA (at pp. 60 and 61) Citing the ancient case of *Rossiter V. Miller* [1878] 3 APP case with approval, the learned author and jurist further states that under section 1 of NRCD 175, no interest shall pass to the transferee if the conveyance is not signed by the transferor or his agent authorized in writing regardless of whether the transferor or his agent signs

From the evidence adduced during the trial, it is clear that the plaintiff's father intended to sell the disputed land and the defendant agreed to purchase same. The parties further agreed at a purchase price of ₵230, 000.00 (Two Hundred and Thirty Thousand Old

Ghana Cedis) and same paid. Each of the parties appended his signature and witnessed by three witnesses.

The net effect of sections 1 and 2 of NRCD 175(supra) is that a contract of sale of land shall be in writing; and same signed by the transferor or his agent duly authorized in writing, and anything short of that, the transaction will be null and void.

The document, exhibit "1" as executed by plaintiff's father and defendant demonstrate nothing but a contract of sale. Accordingly it is quite safe to find in favour of the defendant as the transaction between plaintiff's father and defendant is in accordance with law.

The agreement entered into by the Defendant and the deceased father of plaintiff undoubtedly benefited both defendant and plaintiff's father and the family of the plaintiff. The Defendant's enjoyment of the property must therefore not be disturbed for no good reason.

I rely on the statement of Adade JSC in the case of Nartey v. Mechanical Lloyd Assembly Press Ltd [1987-1988] 2 GLR pg 314 when he stated:

'A person who comes to court, no matter what the claim is, must be able to make a good case for the court to consider, otherwise he must fail'.

In the respectful view of this court the plaintiff have failed to prove her claim that the defendant did not buy the disputed subject matter from her father.

Issue two, whether the defendant trespassed onto plaintiff's remaining plot of land.

After close of hearing the parties implore the court to visit the locus. On the basis of this the court visited the locus in quo on 21/11/2022. At the locus it was observed that the plaintiff's late father's house and a vacant piece of land is situate at the East of the disputed subject matter. The disputed subject matter is also bounded on the South West by a number of metal container shops which were being occupied by tenants of the plaintiff. To the North of the disputed subject matter is the property of Sister Mary Whilst the Southern part of the disputed land is the Dambai-Katanga main road. It was further observed that the defendant had a two bed room uncompleted structure at lintel level. Apart from the above stated structure the defendant also has some rooms on the disputed land in which he currently live with his family. It was observed further that the defendant's uncompleted structure is situate at the eastern part of plaintiff's undeveloped land. When the Town planner measured the disputed land, South West measured 76ft*50ft whilst North East measured 74ft*77ft.

During plaintiffs cross examination, she stated that when her family head and other elders sat to resolve the dispute between plaintiff and defendant they came to a conclusion that the disputed land was indeed sold to defendant by plaintiff's late father. However, the elders asked defendant to wait for them to go and measure the land but the defendant refused to wait for the measurement to be taken and went ahead to construct his building and that was why she came to court.

The defendant did not deny the above stated assertion by the plaintiff neither did he further cross examined the plaintiff on same.

In the case of **Takoradi Flour Mills V Samir Farris [2005-2006] SCGLR 882,** the Supreme Court held that where the evidence led by a party is not challenged by his opponent in cross examination and the opponent does not

tender evidence to the contrary, the facts deposed to in that evidence are deemed to have been admitted by the opponent and must be accepted by the trial Court.

In this present situation the defendant did not deny neither did he produce any contrary evidence to plaintiff's claim.

From the record I find that the defendant did not submit himself to the suggestion by the elders of plaintiff's family to have the disputed land measured in order to ascertain whether the defendant was constructing his building within the limits as contained in his exhibit "1".

The question is why was the defendant not prepared to cooperate with plaintiff's family or submit himself for the land to be measured? In my respectful view the defendant by his conduct had something hiding up his sleeves and hence not prepared to have the land measured.

Per defendant's exhibit "1" (supra) the piece of land sold to him by plaintiff's father measured 47*78 and 55*22

From the evidence above it is obvious that, on the North the defendant trespassed onto plaintiff's land by 19ft and on the East by 55ft. In a nut shell therefore, I find that the defendant trespassed on the remaining portion of plaintiff's land by 74feet.

In conclusion I find from the record that the Plaintiff's case that the disputed land was not sold to defendant is erroneous and unproved and is hereby dismissed. But her claim

for recovery of possession of the trespassed portion is granted. The plaintiff is therefore to recover possession of a total of 74ft from the defendant.

Looking at the nature of this case and the fact that the parties are members of same family, I will make no order as to cost.

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H/W ALHASSAN DRAMANI

DISTRICT MAGISTRATE

16TH JANUARY, 2023.