

SUIT NUMBER: NR/NG/DC/A1/03/2020

BABA NANTOMAH

PLAINTIFF

V

1. MBA ASUMAH

DEFENDANTS

2. MARY NANTOMAH PER HER LAWFUL ATTORNEY, BAANI NANTOMAH

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JUDGEMENT

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**Introduction:**

The plaintiff filed this suit on 28<sup>th</sup> August 2019 against the defendants seeking the following reliefs:

1. An order of the court directing the defendants to stop interfering in the share of the plaintiff's property.
2. Recovery of possession of the land on which the defendants are claiming.
3. Perpetual Injunction be decreed restraining the defendants, their agents or assigns from interfering in the share of the plaintiff.
4. GHC10,000.00 general damages for laying an adverse claim to the plaintiff's share of his property.
5. Cost to be awarded to the plaintiff against the defendants.

The trial of this matter commenced on 10<sup>th</sup> October 2019 by His Worship Abdulai Abdul-Baki. The trial, however, was started de novo on my assumption of duty as the sitting Magistrate of this court. Counsel for the defendants did not give consent for the proceedings of the case to be adopted to enable the continuation of the trial.

The court in accordance with **Order 18 rule 1 of the District Court (Civil Procedure) Rules 2009 (C.I 59)** ordered the parties to file written statements on 16<sup>th</sup> May 2023 and the parties

duly complied with the same. The parties were further ordered to file witness statements of their respective witness on 2<sup>nd</sup> June 2023. The trial of the matter duly commenced on 4<sup>th</sup> July 2023.

### **CASE OF THE PLAINTIFF**

The plaintiff's case in summary is that the 1<sup>st</sup> Defendant is an elder of the Nayiri and the 2<sup>nd</sup> defendant is his half-sister. The plaintiff avers that their father the late Nantomah Baani was the chief of Zaraantinga before his demise. The plaintiff avers that after the death of their father, the properties of their father were shared and he and his siblings on his mother's side got their share of the properties which is the land on which the Nalerigu Police Station is currently situated. The plaintiff further avers that the said land was taken from them to build the police station without the consent of his siblings and himself. The plaintiff states that after he and his brother John Nantomah made their concerns known to the District Chief Executive at the time by the name Peter Baaga, he spoke to the Nayiri and the Nayiri gave him and his siblings another piece of land where the land which is currently under litigation is situated. He avers that the land that was given to them by the Nayiri was for only him and his siblings on his mother's side because it was through their efforts that the Nayiri gave them that land. He continued that some of his siblings who do not share a mother with him asked to be given portions of the land the Nayiri had given to them. According to the plaintiff, in the interest of peace, he agreed for portions of the land to be demarcated for them. He avers that no portion was demarcated for 2<sup>nd</sup> defendant but the 1<sup>st</sup> defendant subsequently, without the right to do so granted a portion of the land that belongs to the plaintiff to the 2<sup>nd</sup> defendant. The plaintiff described the said land which is currently under dispute as bounded on one side with Jabuni's house, on the second side with Isaac's house, on the third side with Hudu's house and on the last side with Nalerigu College of Nursing and Midwifery Road. He avers that 1<sup>st</sup> defendant is not their family head and so he could not have granted the land to the 2<sup>nd</sup> defendant.

### **CASE OF DEFENDANTS:**

The defendants filed a joint statement of defence to the claim of the plaintiff on 1<sup>st</sup> June 2023 and counterclaimed against the plaintiff as follows:

1. A declaration that the land in dispute is 2<sup>nd</sup> defendant's share of her father's estate which is bounded as follows: to the southern side by Jabuni Nantomah's house, on the western side with Isaac's house, on the northern side with John Nantomah's house and on the last eastern side with Nalerigu College of Nursing and Midwifery Road.
2. An order of perpetual injunction restraining the plaintiff and all those claiming through him from interfering with the quiet enjoyment of the 2<sup>nd</sup> Defendant's property.
3. An order of mandatory injunction directed at the plaintiff to pull down the building he has erected on the disputed plot being property of the 2<sup>nd</sup> Defendant.
4. Recovery of possession.
5. Cost, including legal fees.

The defendants save paragraphs 1, 2, 3 and 6 denied all averments in the statement of claim of the plaintiff.

The defendants aver that 1<sup>st</sup> defendant is the current head of the Naa Bariga family which includes the Zaaan Baani family, and he is also an elder of the Nayiri. The defendants say that the land which is in dispute which is described in the claim of the plaintiff and in the counterclaim of the defendants belongs to 2<sup>nd</sup> defendant, the Pukpang of their late father Baani Nantomah who was a chief of Zaraantinga. The defendants further say that the land on which the Nalerigu police station is currently situated belonged to their late father Baani Nantomah. After his death, the land was sold by Abudu Nantomah (**hereafter "PW3"**) to an auntie of theirs without the knowledge of his siblings. The defendants aver that, when they got information of the sale, the matter was reported to the Nayiri and the land was eventually returned to the family. The defendants say that subsequently, the District Chief Executive (DCE) at the time, Peter Baaga informed the family that the land had been appropriated for the purpose of building the Nalerigu Police Station. The defendants aver that the DCE informed the Nayiri that their family's land had been appropriated to build the police station and he requested that the Nayiri give the family an alternative land which the Nayiri duly did. The defendants say the alternative land that was given to the family is along the Nalerigu Nursing Training College Road. The land was divided into 10 plots which includes the land which is the subject matter of this case. The defendants say that the 10 plots were shared as follows:

1. 1<sup>st</sup> two plots were given to Nantomah Salifu and his siblings from the same mother.
2. 2<sup>nd</sup> two plots were given to Wuni Nantomah and his siblings from the same mother.
3. 3<sup>rd</sup> two plots were given to Jabuni Nantomah and his siblings from the same mother.
4. 4<sup>th</sup> two plots were reserved as the property of the family and named after their late father Baani Nantomah.
5. 5<sup>th</sup> two plots were given to the plaintiff and his siblings from the same mother.

The defendants say that apart from those listed above the other children of their father did not get a share of that land. The defendants further say that Nantomah Salifu, Wuni Nantomah, Jabuni Nantomah and Baba Nantomah sold one of the plots reserved for the family to get allocation letters and other title documentation done for the remaining 9 plots. The defendants aver that 2<sup>nd</sup> defendant petitioned Nantomah Abudu (hereafter "PW2") who is her seniormost sibling that her mother's children did not get a share of the land and that being the Pukpang of her father she should be given a portion of the land. The defendants say that PW2 took the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant, and it was finally resolved at a family meeting held in the 1<sup>st</sup> defendant's house called by the 1<sup>st</sup> defendant who is their family head that the remaining plot of land reserved for the family be given to the 2<sup>nd</sup> defendant. The defendants aver that PW2 was present at that meeting in the 1<sup>st</sup> defendant's house, and he later instructed the late Salifu Nantomah to give the land to the 2<sup>nd</sup> defendant which was duly done. The defendants say that the plaintiff sold one of the two plots of land that was given to him and his siblings on his mother's side to one Oscar Liwal. They further say that the plaintiff's brother John Nantomah also took possession of the remaining plot of land and built his house on it. The defendants aver that the plaintiff went onto the 2<sup>nd</sup> defendant's land and constructed on it without the knowledge of the 2<sup>nd</sup> defendant. When they realised that the plaintiff was constructing on the land they went and stopped him.

#### **ISSUES IDENTIFIED:**

The following issues have been identified for determination by this Court:

1. Whether or not the land, the subject matter of the suit forms part of the estate of the late Baani Nantomah (Zaarana) the late father of the plaintiff and 2<sup>nd</sup> defendant.

2. Whether or not the land, the subject matter of the suit belongs to the plaintiff as his share of his deceased father's estate.
3. Whether or not the land, the subject matter of the suit was lawfully granted to the 2<sup>nd</sup> defendant as her share of her deceased father's estate.

### **BURDEN OF PROOF:**

Before a court decides a case one way or the other, each party to the suit must adduce evidence on the issues to be determined by the court to the standard prescribed by law. In the case of Akrofi v Otenge and Anor [1989-90] 2 GLR 244 the venerable Adade JSC. held that:

*“what is proof? It is no more than credible evidence of a fact in issue. This may be given by one witness; or by several witnesses; what matters is the quality of the evidence.”*

The above legal position is supported by various provisions of NRCD 323, **Section 14 of the Evidence Act, 1975 (NRCD 323)** provides that:

*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.”*

This being a civil suit, the burden of producing evidence by both sides in the suit as well as the burden of persuasion is one to be determined on the preponderance of probabilities as defined by **Section 12 of the Evidence Act 1975 (NRCD 323) which stipulates as follows:**

*Proof by a Preponderance of Probabilities*

- (1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.*
- (2) “Preponderance of the probabilities” means that degree of certainty of belief in the mind of the tribunal of fact or the Court by which it is convinced that the existence of a fact is more probable than its non-existence.*

The defendants carry the burden of proving the facts alleged in their defence to the same degree as the burden Plaintiff carries in proving his claim against defendants.

It is also 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 and 11(1) and (4) of the Evidence Act, 1975 (N.R.C.D. 323)** provide that:

*“10. Burden of Persuasion Defined*

- (1) For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.*
- (2) The burden of persuasion may require a party*
  - (a) to raise a reasonable doubt concerning the existence or non-existence of a fact, or*
  - (b) to establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.*

*11. Burden of Producing Evidence Defined.*

- (1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.*
- (4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.*

**ANALYSIS:**

The issues identified for determination have been resolved below.

**Whether or not the land, the subject matter of the suit forms part of the estate of the late Baani Nantomah (Zaarana) the late father of the plaintiff and 2<sup>nd</sup> defendant?**

It is the plaintiff's case that when his father Baani Nantomah (Zaarana) died his properties were shared amongst his children by his senior-most brother Sandow Baani Nantomah who is now deceased. He asserts that in their custom if one dies, his eldest son is the one who is responsible for sharing his properties. The plaintiff also avers that the properties were shared based on the children of each wife of his late father. According to Plaintiff when the properties were shared, he and his siblings on his mother's side were given land at Baarichini, which is the area the Nalerigu police station is currently located. He added that the other children of his father from different mothers were also given plots of land at the location. The plaintiff avers that the exact plot of land on which the Nalerigu police station occupies was the plot given to the children of his mother's side. It is also the plaintiff's case that the land which was

apportioned to his mother's side was appropriated by the District Assembly to build the police station and upon agitation by himself and John Nantomah (**hereafter 'PW1'**) the District Chief Executive at the time intervened and asked the Nayiri to give them an alternative land and this was duly done. The alternative land given to them includes the land which is the subject matter of this suit. The plaintiff further avers that after some disagreements, his other siblings from different mothers who were also given plots at the Nalerigu police station area joined the plaintiff and PW1 to share the alternative land amongst themselves.

The lawful attorney of the 2<sup>nd</sup> defendant who testified on behalf of the 2<sup>nd</sup> defendant, in his witness statement admits that upon the demise of Baani Nantomah (Zaarana) the land on which the Nalerigu police station is situated which belonged to the late Baani Nantomah (Zaarana) was appropriated by the District Assembly to build the police station and the family was given an alternative land which was shared amongst some of the children of his late father excluding the 2<sup>nd</sup> defendant and her siblings from the same mother. He further admitted that the land in dispute is part of the alternative land which was given to the family.

Clearly, the entire land of the late Baani Nantomah at Baarichini was appropriated by the District Assembly for the purpose of building the Nalerigu police station as asserted by the lawful attorney of the 2<sup>nd</sup> defendant. It was not only the plot of land allocated to the plaintiff and his siblings on the same mother's side that was appropriated to build the police station. The lawful attorney of the 2<sup>nd</sup> defendant stated that the alternative land given to the family by Nayiri was demarcated into 10 plots. The plaintiff when he was crossexamined by counsel for the defendants stated that the alternative land was more than 10 plots. The question is, why will Nayiri replace one plot of land which was originally allocated to the plaintiff and his siblings from the same mother at Baarichini with 10 plots of land?

The evidence of both the plaintiff and the defendants clearly shows that the alternative land which was given to the plaintiff and his siblings by the Nayiri was merely to replace their late father's land situated at Baarichini which was appropriated by the District Assembly to build the police station. Therefore, it is safe to conclude that the entire alternative land which includes the disputed land, forms part of the estate of the late Baani Nantomah (Zaarana), the late father of the plaintiff and the 2<sup>nd</sup> defendant.

**Whether or not the land, the subject matter of the suit belongs to the plaintiff as his share of his deceased father's estate?**

For a plaintiff to be successful in a land suit, the plaintiff must establish his or her root of title, method of acquisition and identity of the land among others. In **Yehans International Ltd. v. Martey Tsuru Family and 1 Or., (2018)**

**JELR 68871 (SC)** Adinyira JSC held that: *"It is settled that a person claiming title has to prove: i) his root of title, ii) mode of acquisition and iii) various acts of possession exercised over the land ... This can be proved by either traditional evidence or by overt acts of ownership in respect of the land in dispute. A party who relies on a derivative title must prove the title of his grantor."* See also **Mondial Veneer (Gh.) Limited v. Amuah Gyebi XV [2011] 1 SCGLR 466.**

In **Anane and Others v Donkor and Another and Another (Consolidated) [1965] GLR 188** the Supreme Court held that *"Where a court grants declaration of title to land or makes an order for injunction in respect of land, the land the subject of that declaration should be clearly identified so that an order for possession can be executed without difficulty, and also if the order for injunction is violated the person in contempt can be punished. If the boundaries of such land are not clearly established, a judgment or order of the court will be in vain. Again, a judgment for declaration of title to land should operate as res judicata to prevent the parties relitigating the same issues in respect of the identical subject-matter, but it cannot so operate unless the subject-matter thereof is clearly identified. For these reasons a claim for declaration of title or an order for injunction must always fail if the plaintiff fails to establish positively the identity of the land to which he claims title with the land the subjectmatter of the suit."*

It flows from the above decision that in a claim for a declaration of title, recovery of possession and an injunction, the plaintiff is required to prove the identity of his land by providing positive evidence. **See also Agyei Osae & Others v Adjeifio & Others [2007-2008] SCGLR 499.** However, in the case of **Nortey v. African Institute of Journalism and Communication [20132014] 1 SCGLR 703** the Supreme Court held that *"even though the courts stipulate that the identity of a disputed land be clearly established or with certainty as a precondition for the grant of title, this does not mean mathematical certainty or exactness."*

The plaintiff clearly described the disputed land to which he is laying claim and its boundaries in his writ of summons and statement of claim as bounded on one side with



Jabuni's house, on the second side with Isaac's house, on the third side with Hudu's house and on the last side with Nalerigu College of Nursing and Midwifery Road. The defendants in their joint statement of defence and counterclaim also described the disputed land as bounded to the southern side by Jabuni Nantomah's house, on the western side by Isaac's house, on the northern side by John Nantomah's house and on the last eastern side with Nalerigu College of Nursing and Midwifery Road. From all the evidence on record, it is a fact that the plaintiff and defendants are litigating over the same parcel of land situated in Nalerigu, therefore there is no issue as to the identity of the disputed land. The court visited the disputed land and verified the identity of the said land in dispute.

The root of title to land refers to the origin or source of the plaintiff's claim to the land. It is necessary for the plaintiff to provide clear and satisfactory evidence of their root of title, including proof of ownership and boundaries.

Having perused all the evidence adduced by the plaintiff and his three witnesses, it is clear without equivocation that the plaintiff traces his root of title through his deceased father Baani Nantomah (Zaarana). It can be reasonably deduced from the plaintiff's evidence that it is the plaintiff's case that the land which is the subject matter of the suit is the share of his late father's estate allocated to him and his siblings on his mother's side. Both the plaintiff and the defendants have admitted that the land they are litigating forms part of the estate of their late father. This leads to the conclusion that the plaintiff and the 2<sup>nd</sup> defendant both claim the disputed land through their late father Baani Nantomah (Zaarana).

The burden of proof therefore lies on the plaintiff to prove to the court on the balance of probabilities how the disputed land which forms part of his deceased father's estate was vested in him.

It is provided in the **Administration of Estates Act, 1961 (Act 63) sections**

**(1), 2(1) 96(1) and 96(2)** respectively that:

*1(1) "The movable and immovable property of a deceased person shall devolve on his personal representatives with effect from the date of death.*

*2(1) The personal representatives are the representatives of the deceased person with regard to the moveable and immovable property of the deceased person.*

96(1) *A personal representative may assent to the vesting, in the form set out in the Third Schedule, in a person who, whether by devise, bequest, devolution, appropriation, or otherwise, is entitled to the vesting beneficially or as a trustee or personal representative of any estate or interest in immoveable property,*

*a) to which the testator or intestate was entitled to, or*

*b) over which the testator exercised a general power of appointment by will, and which devolved on the personal representative.”.*

96(2) *The assent shall operate to vest in that person the estate or interest to which the assent relates, and, unless a contrary intention appears, the assent shall relate back to the death of the deceased person.*

From the provisions of the Administration of Estates Act, 1961 (Act 63), immediately after the death of the father of the plaintiff and 2<sup>nd</sup> defendant, his movable and immovable properties devolved onto his personal representatives to hold in trust for the beneficiaries of his estate until the properties in the estate are vested in the beneficiaries by the personal representatives in the form specified in the Third Schedule of Act 63.

Section 108 Administration of Estates Act, 1961 (Act 63) defines personal representatives, administrator and administration as follows:

*“personal representative” means the executor, original or by representation, or the administrator for the time being, of a deceased person;*

*“administrator” means a person to whom administration is granted;*

*“administration” means, with reference to the movable and immovable property of a deceased person, letters of administration, whether general or limited, or with the will annexed or otherwise;*

Considering the above definitions, the personal representative of a deceased person who died intestate is required by law to be granted letters of administration by a court of competent jurisdiction to enable that person to administer the estate of the deceased. The plaintiff did not adduce any evidence to prove that letters of administration was granted to any person to administer the estate of their late father.

In the case of **Lambert Sackey and Anor. v. George Chidiac and Anor. (2016) JELR 107811 (HC)**, it was held that *“under the Administration of Estate Act therefore when a person dies testate or intestate, his moveable and immovable property devolves on his personal representatives who are the executors nominated by him in a Will or nominated by family and attached to a Will or in the case of death intestate applicants of an L/A. Until a vesting assent is executed by the said representatives, or those family members granted the letters of Administration, the beneficiaries or devisees have no capacity to deal with the property.”*.

It must be noted that although beneficiaries of an estate of a deceased have no capacity to deal with properties in the estate of the deceased until the property has been duly vested in them by vesting assent, they have the capacity to sue to protect their interest in the estate. This was espoused in the case of **Adisa Boya v. Zenabu Mohammed; Civil Appeal No. J4/44/2017, [2018] GHASC 7**

**(14th February 2018)**, in which Gbadegbe JSC stated that; *“Proceeding further, we are of the view that by virtue of the rules on intestacy contained in section 4(1) (a) of the Intestate Succession Law, PNDC Law 111 , following the death of the father of the defendants and their mother- the original 1st defendant, the property devolved upon the children and as such they had an immediate legal interest in the property that they are competent to defend and or sue in respect of and in any such case either the children acting together or any of them acting on behalf of the others may seek and or have an order of declaration of title made in their favor.”*.

The above principle of law was echoed by Marful-Sau JSC in the case of **Susan Bando v. Dr. Mrs. Maxwell Apeagyei Gyamfi & Anor.; Civil Appeal No. J4/16/2016, [2019] GHASC 50 (6th June 2019)** as follows:

*“In that case this court speaking through Gbadegbe, JSC, held that the defendants who were the children of the estate had immediate interest in the property and for that reason, they were competent to defend or even sue for declaration of title, notwithstanding the fact that they had not obtained any letters of administration. I wish to add that the above proposition of law is only fair and equitable in view of the interest created in estate for beneficiary children, under the Intestate Succession Act, PNDC Law 111. I therefore, entirely agree with the legal proposition enunciated by Gbadegbe JSC, and hold that even in this appeal the appellant, being a beneficiary child, was a competent party, notwithstanding the fact that she had no letters of Administration.”*.

The beneficiaries of the estate of a deceased have the capacity to sue to protect the estate from third parties or other beneficiaries who seek to waste the estate, but no beneficiary has the right to sue to claim a portion of the estate or all the estate for himself or herself unless the property has been duly vested in that beneficiary. The plaintiff did not commence this action against the defendants to protect the estate of his late father. He commenced the action for the court to declare the land in dispute as his to the exclusion of the other beneficiaries of his late father's estate. In this regard, the principle set out in *Susan Bandoh v. Dr. Mrs. Maxwell Apegyei Gyamfi & Anor.*; Civil Appeal No. J4/16/2016, [2019] GHASC 50 (6th June 2019) is not applicable.

Considering that the plaintiff could not produce a valid document in the form specified in the third schedule of Act 63 executed by a duly appointed administrator of his late father's estate vesting the land in dispute in him, I hereby conclude that the plaintiff has failed to prove his title to the land in dispute.

**Whether or not the land, the subject matter of the suit was lawfully granted to the 2<sup>nd</sup> defendant as her share of her father's estate.**

The defendants counterclaimed for a declaration of title to the disputed land in favour of the 2<sup>nd</sup> defendant. In Ghana, when a defendant files a counterclaim, they bear the burden of proving their counterclaim on the preponderance of probabilities. The defendant cannot win on the counterclaim solely because the original claim failed. Instead, they must establish their counterclaim on the strength of their own case, not the weakness of the plaintiff's case.

Like the plaintiff, the 2<sup>nd</sup> defendant traces her root of title to her late father Baani Nantomah (Zaarana). From the evidence of the 2<sup>nd</sup> defendant, she claims title to the disputed land because the land was allocated to her by PW2 after it was agreed at a family meeting called by 1<sup>st</sup> defendant in his house that the land be given to her. Considering that the 2<sup>nd</sup> defendant also claims the land as her share of her late father's estate, the burden of proof lies on her to prove to the court that the land in dispute was properly vested in her by a duly appointed administrator of her late father's estate. The 2<sup>nd</sup> defendant just like the plaintiff also failed to adduce any evidence to prove that the 1<sup>st</sup> defendant and/or PW2 were duly appointed

administrators of the estate of their late father Baani Nantomah and that the disputed land was vested in her by the administrators in accordance with the provision of section 96(1) of Act 63.

The 2<sup>nd</sup> defendant therefore failed to prove on the preponderance of probabilities that she has title to the disputed land.

## **DISPOSITION:**

After resolution of the above issues, I hereby make the following dispositions:

1. Plaintiff's action fails and I accordingly deny all the reliefs endorsed in his writ of summons.
2. The defendants' counterclaim fails, and I accordingly deny all the reliefs endorsed in the counterclaim of the defendants.

In respect of the properties of the late Baani Nantomah (Zaarana) the parties are hereby advised to appoint a suitable person or persons to apply for letters of administration for the purpose of administering the estate in accordance with the law.

The parties are warned to consider the provisions of Order 31 rule 3 of the District Court (Civil Procedure) Rules 2009 (C.I.59) which provides that:

*“Where a person who is not the executor of a will or appointed by the Court to administer the estate of a deceased person, takes possession of and administers or otherwise deals with the property of a deceased person, that person*

*(a) is subject to the same obligations and liabilities as an executor or administrator,*

*(b) commits the offence of intermeddling, and*

*(c) is liable on summary conviction to a fine of not more than five hundred penalty units or twice the value of the estate intermeddled with or to imprisonment for a term of not more than two years or both.”*

## **LEGAL REPRESENTATION**

**Lambon Samson ESQ.** holding the brief of **Sylvester Isang ESQ.** for the defendants.

**SGD**

**H/W SIMON KOFI BEDIAKO ESQ**

**MAGISTRATE**

**12/09/2023**

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