CORAM: HIS WORSHIP MR. MAWUKOENYA NUTEKPOR (DISTRICT MAGISTRATE), SITTING AT THE DISTRICT COURT, BOLGATANGA IN THE UPPER EAST REGION OF GHANA, ON MONDAY, THE 19TH DAY OF FEBRUARY, 2024.

SUIT NO. UE/BG/DC/A1/2/2017

ABUKARI NAAB
SUING AS THE HEAD OF FAMILY
OF DAA'S FAMILY OF SHEAGA
SHEAGA-UER

PLAINTIFF

VRS.

1. **KUMKETI MOARE** SUBSTITUTED BY **BOAYIR-ZOR KUMKETI** OF SHEAGA
2. **OSMAN PAARE**
   OF H/NO. SG10, SHEAGA

DEFENDANTS

TIME: 09:45AM

PLAINTIFF PRESENT
DEFENDANTS PRESENT

MOHAMMED TAHIRU NAMBE, ESQ. FOR PLAINTIFF ABSENT
ISSAHAKU TAHIRU LAWAL, ESQ. FOR DEFENDANTS PRESENT

JUDGMENT

Introduction

1. This matter was commenced in this court on 10th April, 2017. The delay in the determination of this matter is due to some antecedents such as change of lawyers by the parties, amendment of processes by the parties, the passing away of one of the parties which took several months before he was

substituted. Besides, the trial in this case started before another Magistrate who was transferred from this court in December 2021. There is a saying that everything that has a beginning has an ending. Indeed, the Holy Bible says in Ecclesiastes 3:1 (NIV) that "*There is a time for everything, and a season for every activity under the heavens*." The journey by Plaintiff to seek justice or redress before this court which started about seven (7) years ago has come to an end today.

2. By an amended Writ of Summons and Particulars of Claim filed on the 15th September, 2017 and further amendment by substitution of 1st Defendant filed on 25th April, 2022, the Plaintiff claims against the Defendants as follows: -

   a. A declaration that all that piece of land beside Fountain Gate Chapel, Sheaga Assembly lying on the Namoligu-Sheaga Primary Road covering an area of half acre and occupied by 1st Defendant is the property of Daa family.

   b. An order for the 1st Defendant to vacate the land in dispute.

   c. Any other reliefs the Court deems fit.

3. Also, on the 24th day of October, 2017, the Defendants filed their defence and counterclaim against the Plaintiff as follows:

   a. A declaration of title to all that piece of land situate at Sheaga bound to the North by farmlands belonging to Namoligu Community; bound to the South by the Namoligu-Sheaga Primary School Road, bound to the East by the Dakuoryin family land, and bound to the West by farmlands belonging to the people of Namoligu Community containing a Hill.

   b. Possession of the land in dispute.

c. An order of perpetual injunction restraining the plaintiff, his customary successors, assigns, privies and workmen from interfering with the defendants and their families ownership, possession and used of the land in dispute.

d. Costs.

Plaintiff's Case

4. The Plaintiff says his family are the allodial title owners to the land in dispute and have allocated several lands surrounding the land in dispute including Fountain Gate Chapel, Sheaga Primary School etc. The plaintiff says the 1st Defendant's families were settlers in Samawol family land prior to settling on plaintiff family lands. The plaintiff says somewhere in 2012 the 1st Defendant requested for land to put up a temporal structure on the land in dispute. The plaintiff says upon the request he demarcated all that piece of land beside Fountain Gate Chapel, Sheaga Assembly lying on the Namoligu-Sheaga Primary Road covering an area of half acre to the 1st Defendant. The plaintiff says he performed some customary rituals to conclude the transaction. The plaintiff says he informed the 1st Defendant expressly that the land had not been transferred and for that reason no documentation was done.

5. The plaintiff avers that all was cordial until June, 2016, when he discovered that the Defendant had some issues with the adjoining land belonging to the Fountain Gate Chapel. The plaintiff approached the 1st Defendant and to his shock and dismay, 1st Defendant refused to acknowledge title of the plaintiff's family. The plaintiff says he reported the matter to the chief of Sheaga who mediated upon the matter and ruled in plaintiff's favour. The plaintiff says further that the mediation was audio recorded as evidence to prevent any future aggression by the 1st Defendant. The plaintiff says after the matter had been resolved all was cordial until April, 2017 when he discovered that the 1st Defendant had repeated his disobedience by burying his deceased wife on the land in dispute. The plaintiff reported the matter to

the Sheaga chief who claimed that he had authorized the 1st Defendant to bury his deceased wife on the land in dispute.

6. The plaintiff says the chief of Sheaga had no authority to instruct 1st Defendant to bury a body in the disputed land because he has no title nor does he have authority from the District Assembly. The plaintiff says the conduct of the 1st Defendant is an affront to the title of the plaintiff's family. The plaintiff says he is not aware of the 2nd Defendant's interest in the land and that 2nd Defendant's brother and sister in-law were given various plots of land by his family. The plaintiff says further that the 2nd Defendant family had a dispute with plaintiff family several years ago and the said dispute was resolved after the 2nd Defendant apologized to plaintiff's family upon the death of 2nd Defendant's father. The plaintiff says the 2nd Defendant entry into the case is to resurrect old wounds. Wherefore Plaintiff prays for the above-stated reliefs.

Defendants' Case

7. Defendants vehemently deny Plaintiff's claim and say that he is not entitled to his claims at all. Defendants aver that the eldest male in the Daa family is Namua Naab; and that 1st Defendant is the plaintiff's nephew or plaintiff's brother. The defendants aver that they belong to a common ancestor with the plaintiff called Daa whose great grandson was the late Chief Ar-ung. The Defendants aver that they are sons of their ancestor chief Ar-ung who had 2 sons namely Nyere and Nyeboo whose descendants are defendants and plaintiff respectively. The Defendants aver that the land in dispute was Nyere's share of the Chief Ar-ung's family land which was shared among the two sons. Defendants aver that the then head of family named Yamga granted the land in dispute to the 1st Defendant. The Defendants aver further that the plaintiff acknowledged 2nd Defendant's title to the land when he asked the 1st Defendant to go and seek the consent of 2nd Defendant before settling on the disputed land. Defendants aver that the 2nd defendant's family was the farm owner of the land in dispute before it was granted to 1st Defendant. The Defendants aver that the land occupied by the Fountain Gate

Chapel belongs to the 2nd Defendant's family whilst part of the Sheaga Primary School land also belongs to the Dakuoryin family. 2nd Defendant avers that the elders of the family met and decided to grant that portion of land to the 1st Defendant. 1st Defendant avers that his dwelling house was built on the land in dispute in 2006 after it was granted to him as a member of the Daa family by the 2nd defendant's family who were then farming on the said land.

8. The defendants aver that all that piece of land bound to the North by land belonging to the people of Namoligu Community, to the South by the Sheaga Namoligu Road, to the West by Land belonging to the people of Namoligu community containing a Hill and to the East by the Dakuoryin family land was granted to the 1st Defendant by the late Yamga (acting as the then head of family in consultation with the principal elders of the family) and Yin performed all the customary rituals before granting him the land. The defendants aver that it was Osman, Kpengba and Yin who demarcated the land for Yin to perform the customary rituals, upon the instructions of the late Yamga at a time when plaintiff had no authority in the Daa family. Defendants aver that Yamga granted portions of the land to Fountain Gate Chapel to build their church. The defendants aver that Fountain Gate Chapel approached the 2nd defendant's family to request for additional land to put up a school and their request for additional land was declined by 2nd defendant's family. The defendants aver that the plaintiff acting as the then Regent of Sheaga pleaded with the 2nd defendant's family to grant portions of their land to Fountain Gate Chapel and his plea was also rejected. 1st Defendant avers that plaintiff reported the dispute between plaintiff and 1st Defendant to the chief and the chief never ruled on the matter but rather referred the dispute to the paramount chief of Talensi Traditional Council for resolution. 1st Defendant avers that the paramount Chief of Talensi Traditional Council told parties to go back and live as they used to live, which they did.

9. The Defendants aver that plaintiff (as a member of the family) was informed about the death and intended burial of 1st Defendant's wife but

he never raised any objection to it; and that the plaintiff rather reported to the police who declined to stop the burial upon seeing that the corpse was decomposing. Defendants aver that the chief of Sheaga is entitled to protect the health and safety of the entire community by ensuring that decomposing corpses are buried timeously. The 1st defendant avers that the land in dispute is family land and being a member of the Daa family he is entitled to stay and or burry his dead relatives on the family land. Defendants aver further the chief of Sheaga is the Custodian of all customary lands emanating from the stool and no valid alienation or grant of land could be made without the consent of the chief. The defendants therefore counterclaim against the plaintiff for the reliefs as stated above.

Issues

10. The issues for determination in this case are as follows:

    a. Whether or not 1st Defendant is a licensee on the land in dispute.

    b. Which of the conflicting traditional history or evidence of the Plaintiff and Defendants is more probable or should this court prefers to the other?

    c. Whether or not the land in dispute belongs to Plaintiff's family or Defendants' family.

    d. Whether or not the Defendants are entitled to their counterclaim.

Burden of Proof

11. The obligations or duties of parties to lead evidence; and to persuade the court, as to the credibility of his or her 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. These are 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) provides 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."

12. 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.**

13. 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 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. 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."

14. 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 that 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)".

15. Also, 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 Air Namibia (Pty) Ltd. V. Micon Travel & Tour & 2 Ors, [2015] 91 G.M.J, page 177, Majolagbe v Larbi & others (1959) GLR 190-195 and Klutse v. Nelson [1965] GLR 537

Evaluation of evidence, discussion of issues and legal analysis

16. Plaintiff testified himself and called three other witnesses. The evidence of the witnesses in effect supported the plaintiff's case. The Defendants also testified themselves and called two witnesses. The evidence of the witnesses in effect supported the defendants' case. I will now proceed to discuss the issue of whether or not 1st Defendant is a licensee on the land in dispute. **Section 281 of the Land Act, 2020 (Act 1036)** defines a licence as a permission other than easement or profit given by a proprietor of land or of an interest in land which allows the person granted the permission to do certain acts in relation to the land which would otherwise be a trespass. In his book, **Land Law, Practice and Conveyancing in Ghana, 3rd Edition, Page 372, Sir Dennis Dominic Adjei (JA)** states that: A bare license is usually created orally or in writing and does not create an interest in land. No consideration is given by the licensee to the licensor and it could be revoked at any time subject to the licensor giving the licensee reasonable notice.

17. In the instant case, Plaintiff said he granted a licence or permission to the 1st Defendant to occupy or put a temporary structure on the land in dispute in 2012. And they were all living in peace till the 1st Defendant buried his late wife on the land in dispute. The 1st Defendant however denied this allegation and it the duty of the Plaintiff's to provide sufficient or cogent evidence to convince this court that he granted permission to 1st Defendant to settle on the land in dispute. Unfortunately, the Plaintiff has failed to provide sufficient evidence to satisfy this court that he granted a licence to the 1st Defendant to put a temporary structure on the land in dispute. Thus plaintiff's evidence in respect of the issue licence is a repetition of his pleadings on oath without more. Assuming without holding that the 1st

Defendant is a licensee on the land in dispute pursuant to the permissions granted to him by the plaintiff, Plaintiff would not have come to this court if the 1st Defendant had not buried his late wife on the land in dispute under the authority of the then chief of Sheaga.

18. I will now proceed to address the following issues together: Which of the conflicting traditional history or evidence of the Plaintiff and Defendants is more probable or should this court prefers to the other? and Whether or not the land in dispute belongs to Plaintiff's family or Defendants' family. The evidence of the parties in this case also borders on traditional evidence. This is because both parties referred to events or matters that happened in some time past concerning the land in dispute before and after their birth. What then is Traditional Evidence? **In re Asere Stool: Nikoi Olai Amontia lV (substituted by Tafo Amon ll) v Akotia Oworsika lll (substituted by Laryea Ayiku ll) [2005-2006] SCGLR 637,** the court explained Traditional evidence as follows:

"By its nature, traditional evidence is hearsay evidence. It is evidence of the history of events which happened some time past, concerning a person's pedigree, origin, migration, land, family, stool, etc passed on generally by oral tradition from generation to generation."

19. Also in **Ricketts v Addo (Consolidated) [1975] 2 GLR 158**, the court stated as follows:

"*Traditional evidence in causes relating to pedigree, inheritance, boundaries of land and family land transactions, etc. was admissible as an exception to the hearsay rule. The relator of such evidence is entitled to testify not only on matters occurring before his birth but also to matters which had happened during his time."*

20. **In Hilodjie v George [2005-2006] SCGLR 974,** In what appeared to be an elaboration of what constitutes traditional evidence, the Supreme Court stated in that case (in holding 1) that:

"*Therefore, findings and decisions of courts of competent jurisdiction, may appropriately qualify as evidence of facts in living memory.* ***But evidently in land litigation, proven uninterrupted and unchallenged acts of possession, in the absence of some cogent evidence on record to the contrary****, as, for example, an unreserved acceptance of crucial parts of the other side's oral history, cannot be ignored or denied the deserved weight, given that, in the first place, by the clear provision of section 48 of the Evidence Decree, 1975 (NRCD 323), such acts raise a presumption of ownership."*

21. **In Adjeibi- Kojo v Bonsie [1957] 3 WALR 257, PC** , the court stated as follows:

"*The most satisfactory method of testing the traditional history is by examining it in* ***the light of such more recent facts*** *as can be established by evidence in order to establish which of two conflicting statements of tradition is more probably correct."*

22. **In Kwesi Yaw v Kwaw Atta [1961] GLR 513,** it was held that where there is a conflict of traditional history the best way to find out which side is probably right is **by reference to recent acts in relation to the land**. In the instant case, the fact that the plaintiff is in possession of the land is enough to prove that his evidence of tradition is probably right. See also **Achoro v Akanfela [1996-97] SCGLR 209** where it was held that the best way of evaluating traditional evidence was to test the authenticity of the rival versions against the background of **positive and recent acts.**

23. See also the following authorities on Traditional evidence: Ago Sai and Others v Kpobi Tetteh Tsuru lll [2010] SCGLR 763, In re Taahyen & Asaago Stools; Kumanin ll v Anin [1988-89] SCGLR 399, Adwubeng v Domfeh [1996-97] SCGLR 660, Kodie Stool; Adowaa v Osei [1998-99] SCGLR 23and In re Krobo Stool; (No 1); Nyamekye (No 1) v Opoku [2000] SCGLR 347.

From the above authorities, the duty of this court is to examine the conflicting evidence of the parties against positive and recent acts as well as undisturbed possession.

24. It is a trite learning that facts established by matters and events within living memory especially evidence of acts of ownership and possession must take precedence over mere traditional evidence. Besides, where there is a conflict of traditional history the best way to find out which side is probably right is by reference to positive and recent acts in relation to the land. See the cases of **Adjei v Acquah [1991] 1 GLR 13, Kwesi Yaw v Kwaw Atta (*supra*) and Hilodjie v George [2005-2006] SCGLR 974.** From the evidence the court found as fact that the 1st Defendant built a dwelling house on the land in dispute and has been living there with his family for more than a decade now. The court also found as a fact from the evidence that the land in dispute used to be called "Paare Kukurig" and that the name came about because of one Kooda Paare, 2nd Defendant ancestor who once lived on the land in dispute. Indeed, the 2nd Defendant testified in his evidence in chief that historically the land in dispute used to be called "Paare Garig" meaning Paare's kraal. The place was name after one Kooda Paare who once lived on the land in dispute. The name of the place was later changed to "Paare Kukurig" meaning Paare's hill because the said land was situated on a hill. It is noteworthy that that two of the Plaintiff's witnesses confirmed this evidence of the 2nd Defendant when they testified during cross examination by Defendants lawyer. Thus, PW1-Daniel Daboo Zoogah during cross examination by counsel for Defendants on 17th January 2019 testified as follows:

Q. Have you ever heard of a place called Paare Kukurig?

A. Yes.

Q. What does the term Paare Kukurig mean?

A. A land higher than the normal land or small hill.

Q. And you know of a man called Paare.

A. I only grew up to hear that.

Q I suggest to you that the said Paare is the 2nd Defendant's ancestor.

A. It is true.

25. Also, on 3rd July, 2019 during cross examination of PW3-Jeremiah Yamalga by Counsel for Defendants, the following transpired:

Q. You know the land in dispute has a popular name

A. Yes

Q. What is the name?

A. It is Paare Kukurig

Q. I put it to you that the name Paare Kukurig is as a result of 2nd Defendant's ancestors who once settled there?

A. It is so.

26. So having examined the conflicting evidence of the parties in the light of positive and recent acts, acts of ownership as well as undisturbed possession by Defendants and their families for than a decade, the fact that the land in dispute was named after 2nd Defendant's ancestor who once lived on the said land, this court holds that the traditional evidence or the history of the Defendants regarding the land in dispute is more probable than that of the Plaintiff.

27. 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)"****.*

28. In the instant case, the Defendants counterclaimed against the Plaintiff for the land in dispute. They therefore have a burden of proof to discharge. But having examined the evidence of the parties on record as well as the above analysis under issues one to three *supra*, this court is of the considered opinion that the defendants have established the existence of facts contained in their counterclaim by the preponderance of the probabilities. The Defendants counterclaim is accordingly upheld or granted.

Conclusion

29. Having examined the whole evidence adduced by the Plaintiff and the Defendants on record in accordance with the foregoing authorities as well as the analysis, the court holds as follows that:

a. Plaintiff's action fails. Thus, plaintiff has failed to prove to the satisfaction of this court that the land in dispute belongs to him or his family. Plaintiff action is accordingly dismissed.

b. Defendants' counterclaim is granted or upheld. Thus, the Defendants have established the existence of the facts contained in their counterclaim by the preponderance of the probabilities and the Defendants or their family are declared the owner of the land in dispute which is currently occupied by the 1st Defendant.

c. Since the Defendants are in possession or occupation of the land in dispute, there is no need to make an order for recovery of possession.

d. The Plaintiff, his customary successors, assigns, privies, agents, workmen and all those claiming through him is/are perpetually restrained from interfering with the defendants and their families' ownership, possession and use of the land in dispute.

e. Cost of Four Thousand Ghana Cedis (**GHC4,000.00**) is awarded against the Plaintiff in favour of the Defendants.

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