CORAM: HER WORSHIP BIANCA GYAMERA-BEEKO MAGISTRATE SITTING AT THE DISTRICT COURT MAMPONG-AKWAPIM ON TUESDAY THE 4TH DAY OF MARCH, 2025

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SUIT NO: A9/29/22

COMFORT A. ANTWIWAA …… PLAINTIFF

VRS.

AMA OKRAKU ……. DEFENDANT

Parties present.

**JUDGMENT**

This matter was initiated by a writ of summon on 21st June 2022 by the Plaintiffs herein. This court, differently constituted, conducted the trial but unfortunately, the magistrate retired before she could render her judgment. On the authority of **Agyeman substituted by Banahene & Ors v Anane [2013-2014] 1 SCGLR 241** which states that a judge may exercise his discretion to adopt previous proceedings in a matter rather than beginning anew, I adopted the proceedings. It is therefore on the basis of the record of proceedings passed down to me that I shall now proceed to make a determination of this matter.

The Plaintiffs are seeking an order of this court for eviction and recovery of possession of land situate at Adompore on which the Defendant has constructed a temporary structure.

The Plaintiffs' case is they are mother and daughter who reside at Mampong. The Defendant is a family member who also lives at Mampong. The land was

gifted to 1st Plaintiff by her late husband, the father of the 2nd Plaintiff. One Adwoa Adwo, after the demise of the 1st Plaintiff's husband, pleaded with the 1st Plaintiff for her permission to erect a temporary structure on condition that when 1st Plaintiff needed the land, she would remove the structure. 1st plaintiff agreed. The Defendant subsequently sought permission from Adwoa Adwo to erect a structure besides hers. In 2021, the Plaintiff asked the Defendant and Adwoa Adwo to move their structures but they refused to do so. The matter went before the Okyeame of Mampong, Okyeame Asare where it was determined that the Defendant and Adwoa Ado should remove their structure in one year. Adwoa Adwo complied but the Defendant has refused, resulting in the present action.

For her part, the Defendant admitted that she is a family relation of the Plaintiffs. She however denied that she had erected the structure with the consent of Adwoa Adwo. She explained that rather, the structure had been constructed by her father Kwabena Nyarko, and that she used to sleep there when she was taking care of him while he was sick. She averred that the entire land was family land and that the Plaintiffs had demarcated it into two and taken the greater portion for themselves, leaving herself and her aunt, Adwoa Adwo, to occupy the smaller part. Defendant denied that Kwame Larbi had gifted the portion occupied by her to the Plaintiffs. She averred also that the Okyeame had met the Plaintiff and Adwoa Adwo, that she had not been at that meeting and that he had told her to move from the land. She refused to leave. She also averred that the 2nd Plaintiff had reported her to the Police and they had also asked her to move within a week but she refused to. Finally, she denied that Adwoa Adwo had moved from the land. She explained that Adwo

Adwo's structure had become weak and dilapidated so her grandchildren decided to dismantle it. The Defendant counterclaimed for recovery of possession.

It appears to me that the decisions of the Police and Okyeame Asare were, at best, negotiated settlements rather than binding arbitration awards. Justice Brobey in the 2nd edition of his book, Practice and Procedure in the Trial Courts & Tribunals of Ghana explains regarding such situations as follows:

> *Merely consenting to or voluntarily submitting a dispute to an arbitrator is however not conclusive to found arbitration. A reference to a third party for the purpose of seeking a solution may amount to no more than a negotiated settlement and in that event, there is no obligation to accept the decision of the third party which becomes binding only if accepted by the parties: see Manu v Kontre (supra).*

It was therefore well within the rights of the Defendant to reject the directives of the Police and the Okyeame to leave the land. This court shall therefore proceed to determine this matter as the issues in contention have not been resolved.

The sole issue for determination is

1. Whether the Plaintiffs is entitled to recovery of possession of the land which the Defendant presently occupies.

Section 14 of the Evidence Act, 1975 (Act 323) provides that

> ***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***.

In the case of Serwah v Kesse (1960) GLR 227, the Supreme Court stated that "***the general rule, of course, is that that the onus probandi lies on the party who substantially asserts the affirmative of the issue***". They laid down the following tests for who bears this burden:

"***The best tests for ascertaining on whom the burthen of proof lies are, to consider first which party would succeed if no evidence were given on either side; and, secondly, what would be the effect of striking out of the record the allegation to be proved. The onus lies on whichever party would fail, if either of these steps were pursued See Taylor on Evidence, s.365 quoted in Stroud, Judicial Dictionary (3rd. ed.) p. 1996.***"

The Plaintiffs therefore bears the burden of proof in this matter. Section 11(1) of Act 323 explains the burden of persuasion as ***the obligation of a party to introduce sufficient evidence to avoid a ruling against him on an issue***. This being a civil matter, the Plaintiffs are required to prove their case upon a preponderance of probabilities in accordance with section 12 of the Evidence Act 1975 (NRCD 323).

***Whether the Plaintiffs is entitled to recovery of possession of the land which the Defendant presently occupies.***

The Plaintiffs in this case are not seeking a declaration of title. Their action is limited to recovery of possession of the land. It is trite that a person can successfully sue another person for trespass and recovery of possession of land to which they do not have title, provided that they can prove they have been in possession of the land. In the Supreme Court decision of OSEI (substituted by) GILARD v. KORANG [2013-2014] 1 SCGLR 221, it was held as follows:

*Now in law, possession is nine points of the law and a plaintiff in possession has a good title against the whole world except one with a better title. It is the law that possession is prima facie evidence of the right to possession and it being good against the whole world except the true owner, he cannot be ousted from it".*

See also the cases of SERAPHIM v. AMUA-SAKYI [1962] 1 GLR 328 and MAJOLAGBE v. LARBI [1959] GLR 190.

It is therefore clear that if the Plaintiff can prove that they have been in possession of the land in dispute, then they are entitled to recovery of same without the need to prove that they have title to said land. What then is possession for our purposes? The Court of Appeal in TWIFO OIL PLANTATION PROJECT LIMITED v. AYISI AND OTHERS [1982-83] GLR 881 held that possession in law means two things. It could be either effective physical control or occupation evidenced by some outward act. This is sometimes called defacto possession or detention. Whether this type of possession exists is always a question of fact. Possession could also be legal possession, i.e. possession recognised and protected by law. Legal possession is characterised by *animus possidendi* together with a practical level of occupation or control of the entire subject matter ordinarily sufficient to exclude strangers from interference.

Even though the Plaintiff averred that the land belonged to Kwame Larbi who in turn gifted the land to them they did not adduce any credible evidence in support of this. The 1st plaintiff tendered a Deed of Gift marked "Exhibit A". Respectfully, this should not have been admitted into evidence because it is not stamped in accordance with the Stamp Duty Act. In any case, under cross

examination, it emerged that the said document which evidences a gift of land made to Kwame Larbi by Opanyin Gyan Kuma had been executed after the death of Opanyin Gyan Kuma. The following is an excerpt of the cross-examination proceedings.

Q: Did [*sic*] Op. Gyan Kuma did not live to see the execution of the document so how did he sign the document or make his mark?

A: Kwame Larbi is the son of Opanyin Gyan Kuma. Gyan Kuma left the land for his child Kwame Larbi and it was his children that executed the

Q: Who signed or made the mark for Gyan Kuma?

A:I do not know.

Clearly therefore, even if the deed of gift had been properly admitted into evidence, it would have virtually no probative value because it was executed after the death of the alleged donor of the gift and yet, purportedly bears the dead man's signature. It cannot be an authentic document.

The 1st Plaintiff also tendered evidence of a search conducted at the Lands Commission which showed that the land had not been registered by any other person. A site plan for a piece of land in the name of Kwame Larbi was also tendered. Respectfully, a site plan and search report are not proof of ownership of land. At best, they may be proof of *animus possiden*di as regards the land but as discussed above, *animus possidendi* ought to be accompanied with a practical level of occupation or control of the entire subject matter ordinarily sufficient to exclude strangers from interference. In the present case, there is no such level of occupation of the portion of the land in dispute by the Plaintiffs. There is therefore no proof the Plaintiffs have legal possession of the land in dispute.

There is also no proof that the Plaintiffs have physical possession of the portion of the land disputed either. The 2nd Plaintiff testified that around 2011, Adwoa Adwo pleaded with the 1st Plaintiff to give her a portion of her land to erect a structure to serve as a kitchen, and that 1st plaintiff agreed on condition that Adwo would remove the structure when asked to by the 1st Plaintiff. It is the 2nd Plaintiff's testimony that Adwo permitted the Defendant to also put up a structure. This was repeated by the 1st Plaintiff in her evidence in chief before the court but her version was that Adwo permitted the Defendant and her father to build a kitchen. These assertions were denied by the Defendant so the onus lay on the Plaintiffs to prove this by adducing sufficient evidence. Unfortunately they failed to discharge this burden as merely repeating under oath what has been stated in the writ does not amount to evidence; see the case of MAJOLAGBE v. LARBI [1959] GLR 190.

What the totality of the evidence before this court proves is that the Defendant has been in occupation of the land since 2011 without the consent of Plaintiffs. At the time this suit was instituted, the Defendant had been in physical possession of the portion she occupies for more than ten years. I therefore find that the Defendant is in *de facto* possession of the portion of the land in dispute. Since the Plaintiffs do not have title to the land, and the Defendant is in *de facto* possession, I am of the considered opinion that an order for recovery of possession cannot be made against the Defendant. Indeed, it is only a person with better title than her that can recover the land from her possession. In the circumstances, the Plaintiffs' case fails.

As the Defendant is already in possession of the land in dispute, her counter-claim for recovery of possession is not necessary and I according dismiss same.

I make no order as to costs.

SGD.

H/W BIANCA GYAMERA-BEEKO

MAGISTRATE