IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE LAND COURT 7 SITTING IN ACCRA ON MONDAY THE 19TH DAY OF DECEMBER, 2022 BEFORE HIS LORDSHIP EMMANUEL AMO YARTEY (J)

SUIT NO. LDT00059/16

VICTOR ODARTEI MILLS … PLAINTIFF

VRS

DR. NII KOTEY DJANE … DEFENDANT

PARTIES: PRESENT

J U D G M E N T

The case of the Plaintiff as captured by his Amended Statement of Claim is that he is a Consultant in Project Management with the United Nations and lives at East Legon, Accra.

The Defendant is the President and Founder of ILMA Institute of Science & Technology, and resident at La-Bawaleshie, East Legon, Accra.

Plaintiff states that by an indenture of lease was made the 24th day of August 1998, between Moufid El-Adas as "lessor" of the one part and him as "lessee" of the other part in respect of all that piece or parcel of land situate, lying and being at Nungua New Town, Accra, was demised unto the lessee for the residue of the term of ninety-nine (99) years granted the lessor by a lease made the 1st day of May 1978, between Nii

Odai Ayiku IV, Nungua Mantse and the lessor, subject to the rent thereby reserved and to the covenants, agreements and conditions herein contained. The indenture of lease has been duly presented at the Lands Commission, indexed, marked and stamped as LVB10504/07.

The Plaintiff states categorically that, soon after the acquisition of the land, he erected corner pillars thereon to secure and/or demarcate its extent and boundaries, and has been in uninterrupted and undisturbed possession of the land ever since, and also that he has exercised overt acts of ownership over same by excavating a foundation, platform and the construction of a wooden structure without any challenge, let or hindrance whatsoever from any stool, family and/or person(s) let alone Defendant. Plaintiff states that it was only sometime in the year 2007, that an unidentified trespasser forcefully entered unto the land and demolished the wooden structure.

The Plaintiff avers that his grantor Moufid El-Adas, had registered his Title Deed at the Land Title Registry as No.3755/1978, after the site plan was duly plotted. Albeit, he had also been presented with Land Certificate No. GA11502 in Land Register Vol.53, Folio 487. It is the Plaintiff's case that his title to the land was registered after the Land Title Registry had complied with all statutory provisions and published notice of his application for title registration as provided for in Section 11 of the Land Title Registration Law 1986, PNDCL 152, and Section 6 of the Land Title Registration Regulations, 1986, L1.1341.

Plaintiff further stated that on 20th October, 2012 he had a tip off that Defendant had actually entered unto the land and destroyed the entire foundation with the pillars, and this compelled him to lodge a complaint at the East Legon Police Station on October 21st , 2012. At the Police Station, Defendant claimed rival ownership of the land, and allegedly disclosed that he had in sometime past erected a fence wall around the land, and also he was responsible for the demolition of the wooden structure. The Police advised that since both of us were asserting title to the land, it was prudent that a resolution of the matter be sought and/or determined in a court of competent jurisdiction.

The Plaintiff avers that, the Police advice notwithstanding, Defendant is persisting in his blatant and apparent trespassory activities on the land, in such indecent haste and frenzy with a prime view of stealing a march on him, although he has repeatedly warned Defendant to desist from so doing.

The Plaintiff avers also that, after the acquisition of the land from the Nungua Mantse, his lessor immediately thereafter went into possession and built a fence wall around it, and had continued to remain in possession since 1978.

In the premises, Plaintiff will contend that by reason of the adverse possession of the land by his lessor for up to and over twelve (12) years, Defendant alleged rival ownership and/or challenge against him is statute barred, and also that he will plead the Limitation Act, 1972(NRCD 54).

The Plaintiff will also contend that, the registration of his lessor's title in the land constituted notice to the whole world, inclusive of Defendant, and also that Defendant cannot pretend to be unaware of his adverse claim. More significantly, having regularly and lawfully procured a Land Certificate, his lessor's title in the land is indefeasible.

The Plaintiff will further contend that, he is the bona fide owner of the land without notice of any encumbrance whatsoever, and that same was regularly conveyed to him by Moufid El-Adas (his lessor), and also that, if Defendant had made any diligent enquiries, he would have been put on alert of Plaintiff's prior interest in and/or title to the land.

The Plaintiff will furthermore contend that the incidence of his lessor's possession and ownership of the land notwithstanding, and having been in continuous, uninterrupted and undisturbed possession of same all this while, Defendant is estopped by his own conduct from challenging his title to the land; or more so purport to have been made a grant of the same parcel of land by any stool, family and/or person(s), and also that, his presence on the land is unjustified, unlawful and illegal.

The Plaintiff will yet contend that, Defendant having stood by and allowed him to develop the land, by excavating a foundation, platform and the construction of a wooden structure without any protestation, Defendant is guilty of conduct which is tantamount to laches and fraudulent acquiescence.

The Plaintiff maintains that Defendant has no interest in and/or title to the land, and he is bent on continuing with his unlawful and illegal activities on the land, unless he is specifically restrained by the Court from so doing.

The Plaintiff maintains that Defendant has no interest in and /or title to the land and he is bent on continuing with his unlawful and illegal activities on the land, unless he is specifically restrained by the Court from so doing.

Based on these facts the Plaintiff claims against the Defendant the following reliefs:

i. A declaration of title to all that piece and/or parcel of land situate, lying and being at Nungua, Newtown, Accra more particularly described in a schedule comprised in the Statement of Claim.

ii. Recovery of possession.

iii. Damages for trespass.

iv. Perpetual injunction restraining Defendant, by himself, agents, assigns, privies, workmen, servants and however described from interfering, dealing with or having anything to do in any manner whatsoever with the land, subject-matter of this suit.

SCHEDULE

ALL THAT PIECE OF LAND situate, lying and being at Nungua New Town, Accra in the Greater Accra Region of the Republic of Ghana bounded on the North-East by a proposed road measuring 110 feet more or less on the South-East land measuring 100 feet more or less on the South-West by lessor's land measuring 150 feet more or less and on the North-West by the lessor's land measuring 100 feet more or less and covering an approximate area of 0.34 acres.

Per his Amended Statement of Defence the Defendant pleaded as follows:

"1. Save as hereinafter expressly admitted, the Defendant denies each and every allegations contained in the Plaintiff's Statement of Claim as if the same were set out in extenso and denied seriatim.

2. The Defendant is not in a position to admit or deny paragraph 1 of the Plaintiff's Statement of Claim.

3. Paragraph 2 of the Plaintiff's Statement of Claim is admitted.

4. Paragraph 3 of the Plaintiff's Statement of Claim is denied.

5. In further denial of paragraph 3 of Plaintiff's Statement of Claim, the Defendant says that the land the subject matter of this suit is his legitimate property and same is situate at La-Bawaleshie.

6. Further, the Defendant says that La-Bawaleshie also known as East Legon lands belong to Nikoi Tse We family of Klanaa Quarter, La and that Bawaleshie is a village under La, and that Nikoi Tse We family of Klanaa Quarter is the customary owner in possession of La-Bawaleshie also known as East Legon lands since time immemorial.

7. The Defendant says that La-Bawaleshie is under La and that Nungua Stool is not the owner of La-Bawaleshie lands and that any purported grant of any portion of La-Bawaleshie lands by Nii Odai Ayiku IV is null and void in that Nungua Stool has no interest whatsoever in La-Bawaleshie lands let alone convey same to anybody.

8. Paragraphs 4 and 5 of the Plaintiff's Statement of Claim are denied.

9. Further, the Defendant avers that the land the subject matter of this suit forms part and parcel of a large parcel or piece of land, leased to him by Kotey Amli III, head and lawful representative of Nikoi Tse We family of Klanaa Quarter, La.

10. The Defendant avers that the land in dispute does not fall within the land that Nii Odai Ayiku IV wrongly and falsely granted to Plaintiff's grantor.

11. The Defendant avers that La-Bawaleshie lands neither belongs to Nungua Stool nor Nii Odai Ayiku IV and that they cannot convey La-Bawaleshie lands to Plaintiff's grantor or anybody.

12. The Defendant avers that his grantor obtained judgment in respect of Bawaleshie/Oteele lands against Rebecca Kuffour.

13. The Defendant avers that at the material time that the land was leased to him, it was bushy and or overgrown with bush and upon the said larger parcel of land which the land in dispute forms part and parcel, he took immediate possession of same, cleared it and constructed fence wall around the parameters of the land.

14. The Defendant states that he remained in undisputed possession of the land till Ben Jonah and Henry McBryn trespassed on a portion of his lawfully acquired property and they destroyed a portion of his fence wall and commenced building project on a portion of the larger piece of land which the land in dispute forms part and parcel of.

15. The Defendant avers that he consequently instituted an action at the High Court, Accra against Ben Jonah and Henry McBryn and later, Alhaji Alpha Mush applied and was joined as a party to the suit entitled:

Suit No. BL/114/2005

Nana Dr. Osae Yaw I [Ni Kotey Djane] … Plaintiff
H/No. 22, Christian Centre Road
Bawaleshie, East Legon

V

Ben Jonah and 4 others … Defendants

16. The Defendant avers that the land in dispute was the subject matter of a judgment delivered by the High Court, Land Division in his favor in the said suit BL114/2005 mentioned in paragraph-supra.

17. The Defendant says that Plaintiff and his grantor [Moufid El-Adas] knew very well of the pendency of the said Suit No. BL 114/05 but folded their arms when ownership of the land in dispute was being fought by parties in the said Suit No. BL 114/05.

18. Accordingly, the Defendant contended that both Plaintiff and his grantor [Moufid El-Adas] are stopped from claiming ownership of the land in dispute of which he the Defendant has been in possession of.

19. Paragraph 5 of the Plaintiff's Statement of Claim is denied and in further denial, the Defendant says that the land the subject matter of this suit of which he has been in possession of ever since it was granted to him belongs to Nikoi Tse We family of La Klanaa Quarter and that any purported registration of any portion of La Klanaa Quarter land in the name of Moufid El-Adas is a nullity.

20. Further, the Defendant says that all the La Klanaa Quarter lands belong to Nikoi Tse We family of the Klanaa Quarter whose head is Nii Kotey Amli III who is Defendant's father.

21. The Defendant avers that a search conducted by him as well as the Police at the Lands Commission revealed that the land in dispute belongs to him.

22. The Defendant says that Nii Odai Ayiku IV is not a chief and that he had long been destooled before he purportedly granted Klanaa Quarter land which does not belong to Nungua Stool and of which Nungua Stool has no interest in same to convey.

23. The Defendant says that in all the Gold Coast Chief List in respect of Nungua, there is no place or village under Nungua known as Nungua Newtown.

24. Paragraph 6 of the Plaintiff's Statement of Claim is vehemently denied and in further denial, the Defendant says that the Plaintiff's alleged Land Title Certificate is a nullity in that it was obtained during the pendency of two separate suits involving the Plaintiff at the High Court, Accra and the said two suits are:

1. **<u>Suit No. BL 549/07</u>**

Victor Mills - Plaintiff

V

Alpha Musah - Defendant

2. **<u>Suit No. 160/2002</u>**

1. Alpha Musah } **Plaintiffs**

2. Alhaji Aminu Sanaa

V

1. Benard Osei } **Defendants**

2. Odartei Mills

and that the Defendant has copies of the Court processes in respect of the said suit supra.

25. Save that Plaintiff knew of the fact that Defendant has been in undisputed possession of the land ever since the land was granted to the Defendant and the fact that Plaintiff reported the Defendant to the Police and told the Police that Ayebi J [as he then was] gave judgment in his favour which was duly executed in respect of the land against Ben Jonah and McBryn before they later set it aside, paragraph 7 of the Plaintiff's Statement of Claim is denied.

26. The Defendant avers that the said judgment delivered by Ayebi J [as he then was] was set aside, the case preceded at the High Court, Land Division and final judgment was eventually given in his favour in the said Suit No. BL 114/05.

27. The Defendant states that when he and the Plaintiff met at the Police Station, he showed the said judgment delivered in his favour both to the Police and the Plaintiff.

28. Paragraph 7 of the Plaintiff's Statement of Claim is vehemently denied and in further denial, the Defendant states that the allegations in paragraph 7 of the Plaintiff's Statement of Claim are palpably false.

29. Paragraphs 8 and 9 of the Plaintiff's Statement of Claim are denied.

30. Paragraphs 10, 11, 12 and 13 of the Plaintiff's Statement of Claim are denied.

31. The Defendant emphatically reiterates that ever since the land in dispute was granted to him by Nikoi Tse We family of the Klanaa Quarter, La he took immediate possession of same and remains in possession up to date.

32. Wherefore the Defendant states that Plaintiff is not entitled to his claim and or at all."

On the 1st day of February 2013, the Plaintiff filed his Reply and pleaded as follows:

"1. Save and insofar as the same consist of admissions, Plaintiff joins issues generally with the Defendant on his Statement of Defence.

2. In reply to paragraphs 5, 6, 7, 9, 17 & 18, of the Statement of Defence, Plaintiff states rather categorically that, in Suit No. L502/96 intituled Nii Kotey Amli v Moufid El-Adas, the High Court of Justice, presided over by Her Ladyship, Mrs. Justice Vida Akoto-Bamfo (JA) as she then was, sitting as an additional High Court Judge, decreed judgment against Defendant's grantor (Nii Kotey Amli), and in favour of my grantor (Moufid El-Adas), in respect of my grantor's title to the parcel of land, subject-matter of this suit. In the premises, Plaintiff will

contend that, Defendant is stopped per rem judicata from challenging his interest in and/or title to the land.

3. In response to paragraphs 10, 12, 13, 14, 15, 16, 23 & 24, Plaintiff avers that, to the extent that neither his good self nor his grantor, were parties to the action between Nii Kotey Amli III & Rebecca Kuffour, and Suit No. BL/114/05 intituled Nana Dr. Osae Yaw I, Nii Kotey Djanie v Ben Jonah & 4 Ors.; he is not bound by any judgment as delivered in those matters, and also that he is not estopped from claiming ownership of the land.

4. By reason of the matters aforesaid, Plaintiff will also contend in further answer to paragraph 17 that, having complied with all statutory provisions and the publication of notices of his application for title registration, the registration of his grantor's title in the land is not a nullity.

5. Save as hereinbefore, expressly or by necessary admitted, Plaintiff denies each and every other material allegation of fact contained in the Statement of Defence, as if the same were set out in extenso and traversed seriatim."

At the Application for Directions Stage the following issues were set down for trial.

i. Whether or not Plaintiff's indenture of lease made the 24th day of August 1998 between Moufid El-Adas as "lessor" of the one part and Victor Odartei Mills as "lessee" of the other part in respect of all that piece or parcel of land, subject-matter of this suit has been duly presented at the Lands Commission, marked and stamped as LVB11263/07.

ii. Whether or not in accordance with the Land Title Registration Law 1986 (PNDCL 152), Plaintiff's grantor has been regularly issued with Land Title Certificate No. GA11502, as proprietor of all that piece or parcel of land, subject-matter of this suit.

iii. Whether or not Plaintiff's grantor having been regularly issued with Land Title Certificate No. GA11502, his interest in and/or title to the land is indefeasible.

iv. Whether or not the registration of Plaintiff's grantor's title in the land, constituted notice to the whole world inclusive of the Defendant.

v. Whether or not Plaintiff's grantor's possession of the land since 1978, and by reason of his adverse possession of the land, for upwards of over twelve (12) years, Defendant's alleged rival ownership and/or challenge against Plaintiff is statute barred, by virtue of the Limitation Act 1972 (NRCD54).

vi. Whether or not by incidence of Plaintiff's grantor's continuous, uninterrupted and undisturbed possession of the land all this while, Defendant is estopped by his own conduct from challenging Plaintiff's title to the land.

vii. Whether or not Plaintiff is the bona fide owner and/or purchaser of the land from Moufid El-Adas without notice of any encumbrance whatsoever.

viii. Whether or not Defendant having stood by and allowed Plaintiff to develop the land by excavating a foundation, platform and the construction of a wooden structure without any protestation, Defendant is guilty of conduct tantamount to laches and fraudulent acquiescence.

ix. Whether or not by reason of the judgment in Suit No. L502/96 intituled Nii Kotey Amli III v Moufid El-Adas, Defendant is estopped per res judicata from challenging Plaintiff's interest in and/or title to the land.

x. Whether or not Defendant has ever been in possession of the land whether or not a search conducted by Defendant at the Lands Commission revealed that the land in dispute belonged to him.

xi. Whether or not by reason of the judgment in Suit No. BL/114/05 intituled Nana Dr. Osae Yaw/Nii Kotey Diane v. Ben Jonah & 4 Ors., Plaintiff is estopped from claiming ownership of the land.

xii. Whether or not the registration of Plaintiff's grantor's title in the land, and the issuance of the Land Certificate thereof is a nullity.

xiii. Whether or not the activities of Defendant on the land constitutes trespass.

xiv. Any other issues arising out of the pleadings.

ADDITIONAL ISSUES

1. Whether or not Bawaleshie is a village under La.
2. Whether or not Nikoi Tse We family of Klanaa Quarter is the customary owner in possession of Bawaleshie lands.
3. Whether or not La Bawaleshie lands belong to Nungua Stool.
4. Whether or not the grant of La Bawaleshie land by Nii Odai Ayiku IV is null and void.
5. Whether or not in the Gold Coast Chief List, there is any village under Nungua known as New Nungua.
6. That the Court makes an order for composite plans to be drawn to ascertain as to whether the land in dispute falls within the land granted to Moufid El-Adas (Plaintiff's grantor)
7. That both Plaintiff and Defendants be made to deposit their grantors' proprietary site plans or title deeds as well as their respective title deeds to be used for drawing of composite plans.

In prosecuting his claim the Plaintiff testified that he is a Project Management Consultant and works with the UN as a Consultant.

The Plaintiff testified that per an indenture dated 10th August 1998 he acquired the subject land from one Moufid El-Adas. And that the subject land is located at an area known as Nungua Newtown now known as East Legon.

Plaintiff continued that his grantor acquired the subject land from Nii Odai Ayiku, the Nungua Mantse.

He tendered a copy of his grantor's indenture as Exhibit A and his Land Title Certificate as Exhibit B.

It is the evidence of Plaintiff that after the acquisition of the subject land, he erected pillars to mark the boundaries of the land, dug a foundation and proceeded to put up a platform and subsequently raised pillars on same.

He further told the Court he has a wooden structure on the land.

And that the wooden structure was occupied by his supervisor who also traded in front of the structure.

A copy of Plaintiff's indenture was admitted in evidence as Exhibit C subject to the production of the original.

According to the Plaintiff the Defendant in the company of others went to destroy some of his properties on the subject land for which reason he lodged a complaint with the Police.

At the Police Station they were advised to seek for redress in the appropriate forum since both were claiming ownership to the land.

Plaintiff tendered a copy of his Land Certificate covering the subject land as Exhibit D.

Plaintiff further tendered a judgment his grantor obtained against one Nii Kotey Amli as Exhibit E,

The Plaintiff subsequently tendered an indenture according to him covers the subject land as Exhibit F.

Plaintiff testified that Exhibit J is the indenture covering the subject land and not Exhibit C.

In contesting Plaintiff's claim the Defendant testified that the land in dispute is located at La Bawaleshie also known as East Legon and that same belongs to the La Klanaa Quarter which falls under the La Stool.

It is his evidence that the subject land belongs to him per a Deed executed in his favour by Nii Kotey Amli III, the head and lawful representative of the La Klanaa Quarter who is his biological father.

He tendered a copy of the Deed of Lease as Exhibit 4.

He thereafter caused his Title Deeds to be registered at the Lands Commission.

See Exhibit 5, a Search Report from the Lands Commission.

He continued that after the acquisition of the subject land in 1997 he took possession of same and that at the time the land was bushy.

He constructed a fence wall around the land without any challenge from anyone until the year 2001 when the Defendants in Suit No. BL 114/05 trespassed unto a portion of the land and destroyed a portion of his fence, for which conduct resulted in a Court action and judgment entered in his favour.

He tendered a copy of the Gold Coast Chief List showing that Bawaleshie is a village under La as Exhibit 6.

He also tendered various Judgments in support of his case.

According to the Defendant even though the Plaintiff claim his grantor obtained Judgment against Nii Kotey Amli, that Judgment does not cover the land in dispute.

And that the land in dispute falls outside the land granted to the Plaintiff's grantor.

And that to the knowledge of the Plaintiff's grantor he obtained judgment against his grantees but the grantor never appeared in Court to defend his said grantees though he was aware of the said case.

He tendered Exhibit 8, a copy of a Judgment his grantor obtained against one Rebecca Kuffour in respect of a large tract of land which includes the land in dispute.

He tendered a copy of the said judgment as Exhibit 8.

In the circumstance the Defendant contends that Plaintiff's Land Certificate is a nullity.

Plaintiff continued that Nikoi Tse We Family of the La Klanaa Quarter is the customary owner in possession of all La Bawalashie Oteele lands and that same does not belong to Nungua for them to grant same.

He tendered Exhibit 1A, a copy of the indenture executed between Nii Odai Ayiku IV and Moufid El-Adas.

APPLICABLE LAW

The burden of persuasion lies on the party making a claim, see: **Sebastian Dzasu and 92 Ors V Ghana Breweries Ltd 16 MLRG [2008] 128 and Owusu v Tabiri [1987-88] GLR 287.**

In **Takoradi Flour Mills v Samir Farms [2005-6] SCGLR 882**, it was held:

> *"It is sufficient to state that this being a civil suit, the rules of evidence require that the Plaintiff produces sufficient evidence to make out his claim on a preponderance of probabilities, as defined in Section 12 (2) of the Evidence Decree, 1975 (NRCD 323). In assessing the balance of probabilities, all the evidence, be it that of the Plaintiff or the Defendant, must be considered and the party in whose favour the balance tilts is the person whose case is the most probable of the rival versions and is deserving of a favourable verdict…"*

See also **Bank of West Africa Ltd v Ackon [1963] GLR 176 (holding 2); Fosua and Adu Poku v Adu Poku Mensah [2009] SCGLR 310 (at 312) Yaa Kwesi v Arhin Davis [2007-2008] SCGLR 580 and Section II(1), (4) and 12, Evidence Act, 1975 (NRCD 323).**

The above evidential configuration however is discharged the moment the Plaintiff is able to adduce sufficient evidence to elicit a ruling on title in his favour; in the absence of counterbalance evidence from the Defendant. On "Allocation of Burden of Persuasion", Section 14 of NRCD 323 also provides:

> *"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."*

Section 17 (1) and (2), NRCD 323 also provides:

> *"(1) Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof.*
>
> *(2) Except as otherwise provided by law, the burden of producing evidence of a particular fact is initially on the party with the burden of persuasion as to that fact".*

The burden of persuasion was on the Plaintiff per Section 14, NRCD 323. He had the initial burden of producing evidence per Sections (17) (2) and 11 (1) NRCD (323). The quality or degree of the evidence required is stipulated in Section 10 (1) and (2) and Section 12(1) and (2) of NRCD 323.

In the case under consideration the parties are fighting over a parcel of land.

An action for declaration of title to land, recovery of possessing of land and perpetual injunction, among others, as the instant suit, is first and foremost a civil action, and carries with it the same evidential burden as every civil case. The Plaintiffs were required by section 11(1) of the Evidence Act, 1975, (NRCD 323), to adduce admissible and credible evidence in support of the reliefs sought. In ***Owusu v Tabiri & Anor [1987-88] 1 GLR 287, (holding 7)*** it was held:

> *"It was the principle of law that he who asserts must prove and must win his case on the strength of his own case and not on the weakness of the defence…"*

The Plaintiffs burden of proof was discharged if they led evidence to persuade the tribunal of fact that what they assert is more probable than not. In other words, they were obliged to prove their case by preponderance of probabilities; as required by section 12 (1) of the Evidence Act. A Plaintiff however has no duty to prove his case with arithmetic exactness, or beyond reasonable doubt.

In explanation of the standard of proof, it was held in ***Bisi v Tabiri & Anor (1985-88) 1 GLR 386, (holding 2), SC***, as follows:

> *"The standard of proof required of a Plaintiff in a civil action was to lead such evidence as would tilt in his favour the balance of probabilities on the particular issue."*

Having explained the duty cast on the Plaintiffs, in particular, it is of moment to note that the actual mode of presenting evidence in discharging the burden must also conform to the law. The case of ***Majolagbi v Larbi & Ors [1959] GLR 190***, has long shown us the path to follow. Notice must however be taken of the principle of the mode of proof of assertions as straightened out by the Court of Appeal in ***Zabrama v Segbefia [1991] 2 GLR 223***.

The discharge of the burden of proof must encompass proof of the nature of their acquisition, the identity of their land and the fact of possession, or right to possession. An action for declaration of title to land, recovery of possession or perpetual injunction ought to fail if the Plaintiff is unable to lead credible and admissible evidence to prove that he/she properly acquired the land from the appropriate grantor.

See: ***Kponuglo v Kodadja [1933] 2 WACA24 at 25 and Acquah v Pergah Transport Limited & Ors [2010] SCGLR 728***.

Secondly, the action cannot succeed unless the Plaintiff leads evidence to establish the identity of the land acquired as being the same as the land claimed. See ***Anane v Donkor [1963] GLR 188, SC; Bedu & Ors v Agbi & Ors [1972] 2 GLR 226.***

There is evidence before me that the parties are fighting over a parcel of land.

It is therefore the duty of a Plaintiff or a Defendant who counterclaims to adduce credible and admissible evidence to establish the nature and mode of acquisition, identity of his/her land and the act of possession or right to possession. [Emphasis supplied]

The Supreme Court in **Yaa Kwesi v Arhin Davis & Anor. [2007/08] SCGLR 580** held per holding one (1) as follows:

> *"Since the Plaintiff sued not only for declaration of title but also for damages for trespass and an order for perpetual injunction, he assumed the onerous burden of proof of title to the disputed land by the preponderance of probabilities required by Section 11(1) and (4) and 12 of the Evidence Decree 1971 NRCD 323) or risk the prospect of losing his case."*

Throughout the trial the Defendant maintained that the location of his land is totally different from the land claimed by the Plaintiff.

It is my considered view that since the location of the land is in dispute there was the need for a superimposition of the respective site plans of the parties to establish the location of the land to enable the Court establish the location and identity of the subject matter in issue.

It is trite law that a Plaintiff in an action for declaration of title to land, recovery of possession and perpetual injunction has the duty of establishing by positive evidence (a) the identity of the land claimed, and (b) that the land claimed is the same as the subject matter of the suit.

In **Anane v Donkor [1965] GLR 188, SC**, it was held, holding (1)

> *"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 claimed with the land the subject matter of his suit".*

In **Nyiklorkpo v Agbedetor [1987-88] 1 GLR 165, holding (3)** it was held:

"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…"

In the case of **Bedu v Agbi [1972] 2 GLR 226, CA,** it was also held:

"The onus was on the Plaintiffs to establish the exact boundaries of the land in dispute so that any judgment in their favour would be related to a defined area; or at least they should have proved isolated acts of ownership over the land. They failed to do either of these and the trial court was right in holding that they had not discharged the onus of proof".

This therefore called for an expert's advice since the identity and location of the land in dispute is crucial to the determination of the instant action.

NATURE AND EFFECT OF EXPERT EVIDENCE

In producing a composite plan, the Survey Department of the Lands Commission provided expert evidence to the court. The court is not bound by such expert evidence; even though it often provide immense assistance to the Court.

In **Fenuku v John-Teye [2001-2002] SCGLR 985, at 990 holding b** it was held:

"The principle of law regarding expert evidence was that the judge need not accept any of the evidence offered. The judge was only to be assisted by such expert evidence to arrive at a conclusion of his own after examining the whole of the evidence before him. The expert evidence is only a guide to arrive at the conclusion."

CONSEQUENCES OF ABSENCE OF A COMPOSITE PLAN WHERE THE PLAINTIFF RESISTED ITS PRODUCTION

Where the absence of a survey plan makes the identity of the land claimed in relation to the land in dispute uncertain, the Plaintiff who bore the primary burden of proving the identity of his land with the land claimed must bear the consequences of resisting or failing to ensure the preparation of a surveyor's plan.

It was accordingly held in **Yaa Kwesi v Arhin Davis & Abor [2007-2008] 1 SCGLR 580 at 586:**

> *"It was also part of the contention of the Plaintiff that the first Defendant, while tracing his root of title from Basia Aya, failed to show the identity, the extent and position of the land.*
>
> *It is difficult to comprehend the force of this argument… by unwittingly resisting the application for the appointment of a surveyor and the making of a plan, the Plaintiff failed to acknowledge its effect to his own detriment. He failed to realize that as the Plaintiff claiming in a land litigation it was he who bore the primary responsibility or the burden of producing evidence on the issue of a surveyors plan to strengthen his case.*
>
> *If this had been done, the entire land he claims as his own to the exclusion of the Defendants would have been clear on the evidence. We do not appreciate the legal or moral basis for the Plaintiff's attack against the Defendants on the issue of the extent of the disputed land."*

In Yawson (substituted by) Tulasi & Anor v Mensah & Mensah [2011] 1 GLR 568 at 572, it was also held:

> *"As both parties were not contesting the issue of title from the evidence and the pleadings but the issue of boundary it is imperative that clear findings on this ought to have been made by the learned trial judge… but when a boundary dispute is in issue with an adjourning land, a court of law is bound to ascertain the exact boundaries of the parties. This could be done if parties had met the surveyor who was enjoined by the order of the court to carry out the survey work."*

This Court in the presence or absence of a surveyor's report (Composite Plan) is obliged to determine the identity of the subject land and use same to determine the reliefs before it.

In this regard the Court appointed a surveyor to conduct the said exercise.

A copy of the surveyor's report was tendered as Exhibit CE1.

The Court witness, CW1 testified as follows when he was cross-examined by Counsel for the parties:

"Q: The last adjourned date I specifically asked you whether you are the one who drew up the composite plan. Do you remember that?

A: Yes.

Q: So what is your answer.

A: I prepared it.

Q: Let us go to the legend, you said the land surveyed as showed by the Plaintiff is the one edged what.

A: Red.

Q: And the land has showed on the site plan for the Plaintiff is edged what.

A: Green.

Q: The land surveyed as showed by the Plaintiff has numerals P1, P2, P3, & P4. Correct?

A: Yes. [Emphasis supplied]

Q: And the land as showed on the site plan of the Plaintiff is shewn as what.

A: It is edged Green. We did not label it. [Emphasis supplied]

Q: So where exactly is it situate in the composite plan. The one edged Green.

A: A portion of it overlaps the site shown on the ground, a bigger size fall on the land on western part of the land showed on the ground. The other portion falls on the road showed on the ground

Q: Is there any indication of a road on the composite plan from your legend.

A: No. but that is what is on the ground.

Q: Can you physically point to the land you were describing shortly.

A: Yes. It is the one coloured Green. [Emphasis supplied]

Q: And you are also saying that the land shewn on the parcel plan for the Plaintiff is edged what.

A: Cyan. [Emphasis supplied]

Q: And that is squarely in the land surveyed as shewn by the Plaintiff edged Red. Correct?

A: Almost but not exactly.

Q: You say almost can you explain almost as you understand it.

A: The parcel plan we received from the Plaintiff a portion of it falls outside the site showed on the ground by the Plaintiff. And also the site showed on the ground is bigger than the size on the Plaintiff parcel plan.

Q: I want to believe that these occurrences are not novel i.e. the land surveyed as showed by a party on the ground would be significantly smaller or bigger than what is shewn on the parcel plan.

A: That is true.

Q: And the land surveyed as shewn by the representative of the Defendant is edged what.

A: Purple.

Q: And that is depicted by the numerals D1, D2, D3, D4 & D5. Correct?

A: Yes. [Emphasis supplied]

Q: And the land as shewn on the site plan for Defendant is edged Yellow.

A: Yes. [Emphasis supplied]

Q: And the land as shewn on the site plan for the Klanaa Quarter is edged Black.

A: Yes.

Q: And it is more than obvious that the land surveyed as shewn by the representative of the Defendant is bigger than the land shewn on the site plan for Defendant. Correct?

A: Correct.

Q: And also that the land shewn on the site plan for Defendant also falls outside unto what you call the road. Correct?

A: No. Part of it.

Q: The area of dispute the subject matter of dispute in this litigation are not separate and distinct. Is that right?

A: That is true. So they are fighting over the same land on the ground.

Q: And the area of dispute as shewn on the ground is what you have hatched Black.

A: Yes.

Q: With an approximate area 0.32 acre. Correct?

A: Yes.

Q: It cannot be the case if the Defendant should tell this Court from the composite plan that his land is separate and distinct from that of the Plaintiff.

A: True. Because both parties showed the same piece of land.

Q: The composite plan you drew was borne out of the indenture, site plan and parcel plan presented to you by the parties more so Plaintiff. Correct?

A: Yes. We actually used only the site plans.

Q: And you as a Government surveyor trained in your field of work did not find anything wrong with the site plans as presented to you by both parties i.e. you did not question the authenticity of the site plans.

A: No. We used what we received from the Court.

Q: And from your field work there is no structure on the land in dispute.

A: No. It is bushy.

Q: Both Plaintiff and Defendant's representative were adamant that the parcel of land on their site plans is what they showed to you on the ground preparatory to the drawing of the composite plan. Correct?

A: What they showed on the ground we later superimposed the site plans received from the Court on it. On the ground we did not talk about site plans.

Q: You will agree with me that the disputed area as hatched is far away from Moulfid El-Adas land.

A: Yes. [Emphasis supplied]

Q: So the disputed land does not fall within Moulfid El-Adas land at all.

A: Yes. [Emphasis supplied]

Q: It is true that the Defendant constructed a fence around the disputed land as indicated by you.

A: Yes. [Emphasis supplied]

Q: The Plaintiff's site plan marked Green only covers a small portion of the disputed land. Is that correct?

A: Yes.

Q: It is true that Defendant's site plan covers about 90% of the disputed land.

A: I got almost 70%.

Q: It is equally true that the dispute land falls within the Klanaa Quarter land.

A: It falls outside.

Q: Take a look at Exhibit CE1.

A: Yes. It falls within the Klanaa land."

In the case under consideration whiles the Defendant traces his root of title to the Nikoi Tse We Family of the La Klanaa Quarter of La, the Plaintiff traces his root of title to the Nungua Stool through Moufid El-Adas.

In the case of **Egyir v Hayfron [1982] JELR 67522**, the Court held the best person to prove the title of a grantee is the grantor.

Surprisingly the parties failed to call their grantors in support of their respective cases.

However the site plans of their grantors were superimposed by CW1 in the composite plan, Exhibit CE1.

There is evidence before me that the disputed land is far away from Moufid El- Adas's land, the Plaintiff's grantor.

This was what transpired when the CE1, the Court's Surveyor was cross-examined by Counsel for the Defendant.

> *"Q: You will agree with me that the disputed land as hatched is far away from Moufid El-Adas land.*
>
> *A: Yes.*
>
> *Q: So the disputed land does not fall within Moufid El-Adas land at all.*
>
> *A: Yes."*

There is further evidence before me that the disputed land falls within Klanaa Quarter lands and not Nungua.

This is the testimony of the CW1 respecting same.

> *"Q: It is equally true that the disputed land falls within the Klanaa Quarter land.*
>
> *A: It falls outside.*
>
> *Q: Take a look at Exhibit CE1.*
>
> *A: Yes. It falls within the Klanaa land."*

In the circumstance I hold that the subject land forms part of the Klanaa Quarter lands and not Nungua lands.

It is salient to note that the Plaintiff tendered Exhibit C, his indenture covering the subject land, subject to the production of the original.

Exhibit C was numbered LVB112632/2007.

The Plaintiff subsequently withdrew Exhibit C and replaced same with Exhibit F, another indenture with LVB No. 10504/2007.

In this regard the Plaintiff testified as follows when he was led in evidence by his Counsel.

"Q: You recall that on the last adjourned date you produced an original of the indenture of the lease executed between Moufid El-Adas and yourself in respect of the subject land in dispute?

A: Yes.

Q: And you were in the process of tendering a photocopy of that document and the photocopy of the site plan attached to the photocopy was not that legible and you were ordered by the Court to have another one prepared.

A: Yes.

Q: Do you have a more legible one of the photocopy of that document.

A: Yes.

Q: Is that it.

A: Yes."

This give birth to Exhibit F a photocopy of Exhibit C.

Exhibits C and F which are the original and photocopy.

However a look at same depicts both have different Land Valuation Board's numbers whiles the original Exhibit C is numbered 11263/07 the photocopy Exhibit F is numbered 10504/07.

The Court was never told how come the original and the photocopy have different Land Valuation Board numbers.

In prove of his claim the Plaintiff relied on a Land Certificate, Exhibit D.

A look at Exhibit D, the Land Certificate depicts it is coming from the Land Title Registry. The Land Certificate no doubt was procured under the Land Title Registration Law PNDCL 152 as repealed by the Land Act, Act 1086.

By Section 119 of the Land Act (Act 1086) the right of a registered proprietor of land acquired for valuable consideration shall be indefeasible.

An indefeasible title means a complete assurance to all adverse claims on mere production of the certificate.

Her Ladyship, Mrs. Georgina Wood in the case of **Amegshie v Okine [1992] 2 GLR, 319** held that the certificate raises a rebuttable presumption and not a conclusive presumption of the holder's title.

The certificate can therefore be challenged provided evidence is led in proof of its irregularity.

By Section 20 of the Evidence Act (NRCD 323) a rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact. The duty of producing evidence to question the validity of the certificate lies on the party challenging it.

In the case under consideration the Defendants contend Exhibits "A" and "B" were fraudulently procured.

The Supreme Court in the case of **Awuku v Tetteh [2011] 1 SCGLR @ 366** held:

> *"Even if the appellant has registered his document of title, the registration per se would not confer title on a person, what matters was the underlying facts. In the instant case the evidence showed that the title of the appellant was null and void and that state no amount of registration would save it and clothe it with validity".*

Anin Yeboah JSC (as he then was) put the issue to rest in the case of **Yawson v Mensah [2012] 38 MLRG 21** when he said *"a Land Title Certificate is prima facie evidence of title to property, its foundation or root must be shown to be in no doubt at all."*

There is evidence before me that the subject land is located at Bawalashie a village under La belonging to the Nikoi Tse We Family of Klanaa Quartey who are the customary owners in possession of La-Bawaleshie also known as East Legon.

There is further evidence before me that the Defendant acquired the subject land from the said family.

The necessary inference is that acquiring the subject land from the Nungua Stool who do not own the subject land makes the Plaintiff's acquisition of same from them invalid and I accordingly hold same as such.

On the issue of whether or not La Bawalashie falls under La or Nungua, the Defendant tendered the Gold Coast Chief List as Exhibit 7.

A look at same depicts the subject land falls under La and not Nungua.

In **Odonkor v Amratey [1992] 1 GLR 577 at 603** the Supreme Court per Wiredu JSC (as he then was) held:

> *"…in Exhibit C, the Gold Coast Chief List, Eastern Region tendered in evidence in the present proceedings dated 1934-35, Haatso is officially recorded as village No. 4 under the Osu Mantse."*

The above holding by the Supreme Court per Wiredu JSC (as he then was) is aptly applicable to the instant case. Under a (Labadi) as No. 45 Bawaleshie. It is patently evident that Bawaleshie is a village under La Stool. Bawaleshie had been captured herein as a village under La (Labadi) Stool.

Under cross-examination, the Plaintiff admitted that Bawaleshie is also known as Oteele, a village under La and that Bawaleshie lands fall under La. The Plaintiff was cross-examined by Counsel for the Defendant in the instant case as follows:

"Q: Are you aware that La Bawaleshie also known as Oteele is a village under La.

A: Yes.

Q: And you know as a matter of fact that La Bawaleshie lands falls under La.

A: Yes."

In **Achoro & Anor v Akanfela & Anor [1996-97] SCGLR 209 at 214** where the Supreme Court held:

> *"…for the law is settled that where the witness of a party supports the evidence of that party's opponent on material issues, such as in the instant case, the party who called the witness should lose the contest on that material issue.* See **Trifo v Duah VII [1959] GLR 6; and Banahene v Adinkra [1976] 1 GLR 346 CA."**

There is further evidence before me that the Plaintiff admitted that the whole area where the disputed land lies is known as La Bawaleshie. Plaintiff even admitted that the Defendant told him that the land falls within his family land. The Plaintiff was further cross-examined as follows:

"Q: When you told him that he should go to Court the Defendant responded that since he is in possession of the land there is no need to go to Court.

A: Yes and I said you owned the land so he should go to Court.

Q: Again he told you that the land falls within Nikoi Tse Family of La Klanaa Quarter.

A: Yes, and I said it is not true.

Q: Where the land is, is known as La Bawaleshie.

A: In the document we saw yesterday, it was La Bawaleshie.

Q: I am putting it to you that La Bawaleshie land is situate at Eastern part of the University of Ghana Legon that is why the area is called Bawaleshie or East Legon interchangeably.

A: Yes the names are used interchangeable."

The Defendant further tendered a Search Report as Exhibit 5. The search shows the land belongs to the Defendant and not the Plaintiff.

Paragraph 3(b) of Exhibit 5 reads:

"Lease dated 26th November, 1997 from: Nii Kotey Amli III to Nii Kotey Djane."

Exhibit 5 is an Official Search coming from the Lands Commission.

There is no evidence before me that same was fraudulently procured for which reason I presume same to be authentic.

See Section 151 of the Evidence Act, 1975, NRCD 323.

There is evidence before me that the parties relied on various judgments in support of the respective cases.

These were the answers the Defendant gave during cross-examination:

"Q: On the last adjourned date my question to you was whether your father Nii Kotey Amli III now deceased, your grantor was in litigation with Moufid El-Adas in respect of this parcel of land, how say you.

A: Nii Kotey Amli III, my biological father had litigation with Moufid El-Adas, Plaintiff's grantor and <u>that land was different from the land in dispute</u>, however in a recent Civil Appeal Case No. H1/232/2015, the Court of Appeal affirmed the judgment in Suit No. BL/114/2005 meaning the case Counsel is referring to has been quashed. I have a copy of that judgment." [Emphasis supplied]

Q: Do you maintain that the land for which judgment was decreed in favour of the Defendant in the litigation with your late father, a portion of that land is what was leased off to Plaintiff by Moufid El-Adas.

A: No. That land does not form part of what was purportedly granted him, Moufid El-Adas by Nii Odai Ayiku." [Emphasis Supplied]

The findings of fact, establishing that the land belong to any of the parties family are relevant facts that they could legitimately be used as proof of their acquisition of the subject land.

In ***Nana Akoto III v Nana Kwasi Agyemang [1962] 1 GLR 524, at 529, SC***, it was held:

> *"The law does not prevent a judgment from being used as a relevant fact from which the court may draw a conclusion in favour of the person who tendered it."*

In **Reindorf & Ankrah v Amadu Braimah & Kukei [1962] 1 GLR 508-523**, the Supreme Court held:

> *"Primary facts which a trial judge may find as having been proved to his satisfaction are those necessary to establish the claim of a party, or in some cases the defence, and which have been alleged on the one side and controverted on the other.*

In the words of ***Lord Denning L.J, in British Launderers' Research Association v Borough of Hendon Rating Authority [1949] 1. K. 462***:

> *"Primary facts are facts which are observed by witnesses and proved by oral testimony or facts proved by the production of a thing itself, such as original documents"*

It is my candid view that the Defendant is entitled to rely on the facts in the tendered judgments in support of the present suit. It is concrete evidence that this Court can rely on. That rule is well established in **Nana Akoto III v Nana Kwesi Agyemang [1962] 1 GLR 524.**

It is salient to note as already stated in this judgment, CW1, the surveyor testified that the land granted Plaintiff does not fall within the land granted to his grantor, Moufid El-Adas.

This piece of evidence clearly corroborates Defendant's story that the said judgment does not cover the land in dispute.

The Defendant further tendered a Judgment his late father obtained against one Rebecca Kuffour in respect of a large tract of land within which the disputed land forms part of it.

I have noticed one development this Court cannot gloss over.

A copy of the indenture of the Plaintiff's grantor was tendered in evidence as Exhibit 1A.

Same was executed on 1st May, 1978. The lease was for a term of 99 years.

Exhibit F is a copy of the Plaintiff's indenture. Same was executed on 24th day of August 1998.

The necessary inference is that at the time the Plaintiff's grantor allegedly granted the land to him he had only 78 years left on the said lease.

Surprisingly the grantor granted him a 99 years lease.

There is no evidence before me that the Plaintiff gave any explanation for the above.

At least the Plaintiff could have called his grantor to explain since the Plaintiff told the Court his grantor is alive.

This was what he told the Court during cross examination:

"Q: Your lessor Moufid El-Adas is he alive.

A: Yes."

It is my candid opinion that Plaintiff's grantor is a material witness to the success of his case but he failed to call as a witness.

I say so because the law is that the best person to prove the title of a grantee is the grantor.

See the case of **Hayfron v Egyir [1984-86] 1 FLR 570**.

I must say that he would have been the best person to tell the Court how come the disputed land is located far away from the land granted to him by the Nungua Stool.

In the circumstance I hold that the failure of the Plaintiff to call his grantor is fatal to the success of his case.

There is evidence before me that the Deed of Lease which gave birth to Plaintiff's Land Certificate as can be found in Exhibit D bore the same wording and same LVB Number. Exhibit C bore LVB 11263, (2) The Deed of Lease bore the same LVB 11263; (3) both Exhibit C and the Deed of Lease bore the same wording.

Also Exhibit F bore the same wording as Exhibits C and D.

There is no dispute that it is Exhibit C which gave birth to Land Title Certificate No. GA 31027 volume 53, Folio 1450 as patently evident in Exhibit D and same was also pleaded by the Plaintiff in paragraph 6 of his Amended Statement of Claim.

There is evidence before me that the Plaintiff's Land Title Certificate tendered in evidence by him as Exhibit D was issued during the pendency of two suits in which the Plaintiff in the instant case was involved. With regard to the said suits, the Plaintiff was cross-examined as follows:

> *"Q: Look at this Writ of Summons. It is a Writ issued by you against Mallam Musah. Is that not correct?*
>
> *A: Yes.*

The Writ of Summons was admitted in evidence as Exhibit 1."

> *Q: It is true that you brought action at the High Court in respect of this very land. Is that correct?*
>
> *A: Yes.*

Q: Look at this document. It (sic) that a copy of the Writ that you issued against the Alfa Musa.

A: Yes.

The Writ of Summons and the Statement of Claim in Suit No. 549/2007 was admitted in evidence and marked as Exhibit 2.

Q: You said you issued two Writs against Alpha Musa.

A: Yes.

Q: Look at this document that document is a judgment delivered by Justice Dapaah against you in respect of an action you brought against Alpha Musa, is that correct?

A: Yes.

The judgment in Suit No. BL.563/2007 dated on the 9th day of February, 2009 was admitted in evidence as Exhibit 3.

Q: It is also correct isn't it that Alpha Musa brought an action against you and one Bernard Osei, is that correct.

A: Yes.

The process being Court Note in Suit No. L60/2002 dated 8th July, 2002 was admitted in evidence as Exhibit 4.

Q: It is true isn't it when Alpha Musa obtained judgment against you, you appealed against the judgment is that correct?

A: Correct.

Q: Look at this document that is the Notice of Appeal, is that it?

A: Yes."

It is salient to note that Plaintiff's own witness Enos Agroh (PW1) admitted under cross-examination that there was a dispute between Plaintiff and Alpha Musa in respect of the land the subject matter of this suit.

PW1 was cross-examined as follows:

> *"Q: Are you aware that there was a dispute between the Plaintiff and Alpha Musa in Court.*
>
> *A: Yes, my lord.*
>
> *Q: In respect of which land.*
>
> *A: The same land."*

Significantly the Defendant in the instant case obtained judgment against Alpha Musa and four (4) others in respect of the land the subject matter of this suit at an Accra High Court Land Division entitled:

Suit No. BL 114/2005

Nana Dr. Osae Yaw … Plaintiff

v

1. **Ben Jonah**
2. **Henry Mcbryn**
3. **Gelenn Jonah**
4. **Yaw Boakye**
5. **Alfa Musa**

Defendants

The above Judgment was tendered in evidence by the Defendant as Exhibit 6. In Exhibit 6 particularly page 11 the learned High Court Judge found that Nii Odai Ayiku IV was destooled. The learned trial Judge also granted the reliefs of declaration of title and other allied reliefs in favour of the Defendant who was the Plaintiff in Exhibit 6. I must state that the 1st to 4th Defendants were grantees of Moufid El-Adas but Moufid El-Adas failed to join the action or testified. In the circumstances I hold that Moufid

El-Adas is therefore bound by Exhibit 6 as well as the Court of Appeal Judgment in Civil Appeal No. H1/232/2015 (unreported).

See **Rep v High Court, Ex Parte Sam Okudzeto & 5 Others (Samuel Adjei Mensah & Anor - interested Parties) [2019-2020] 1 SCGLR 824 at 836** where the Supreme Court speaking with one voice through Anim Yeboah JSC (as he then was) held:

> *"… The legal effect of the Judgment so delivered which binds the grantors also binds the grantees. If the grantees, the Applicants herein, had been sued as parties in the action and the grantors Ashong Miotse Family had knowledge of the suit but did not join, they equally would have been bound by the Judgment.*

See the case of **Akwei v Cofie [1952] 14 WACA 142 and Fiscian v Tetteh 2 WALR 192"**

There is evidence before me that the Defendant in the instant case obtained Judgment against Alpha Musa and others who earlier defeated the Plaintiff in a legal contest with regard to ownership of this very land which is the subject matter in dispute. In his evidence the Defendant asserted that he earlier obtained judgment against Ben Jonah and Others. The Defendant was led in evidence by his lawyer as follows:

> *"Q: Again at the last adjourned date you said that you obtained judgment against Ben Jonah and Others in respect of the disputed land; before final judgment was given in your favour tell the Court, what happened in that case.*
>
> *A: I first sent Ben Jonah and Others to Court. I obtained Default Judgment before Justice Ayebi and I went into execution of the Judgment on the 14th day of May, 2007, Nearly two (2) years after, the judgment was given it was set aside by Justice Dzakpasu and a retrial was made before Justice Ocran."*

A copy of the Judgment delivered by Justice Ocran was tendered as Exhibit 6.

A look at same depicts judgment was entered in favour of the Plaintiff against the Defendants including Alfa Musa who also before the said judgment had obtained

judgment against the Plaintiff in this suit in respect of the same land. These were the answers the Plaintiff gave during cross-examination by Counsel for Defendant.

> *"Q: It is true that you brought action against Alpha Musa at the High Court in respect of this very land, is that correct?*
>
> *A: Yes. [Emphasis supplied]*

There is no evidence before me that the judgment Alfa Musa obtained against the Plaintiff in respect of the subject land has been set aside.

I therefore wonder why the Plaintiff is even in Court claiming title to the same land.

In sum I hold that Plaintiff's Exhibit D, the Land Certificate is null and void since per the evidence on record he is not the owner of the subject land.

In **Awuku v Tetteh [2011] 1 SCGLR 366 holding 4** it was held:

> *"4. Even if the Appellant had registered his document of title, registration per se would not confer title on a person; what mattered was the underlying facts.*
>
> *In the instant case, the evidence showed that the title of the Appellants was null and void and in that state, no amount of registration would save it and cloth it with validity."*

In the circumstance I hereby order the Land Title Registry to expunge same from their records.

Counsel for the Plaintiff addressed issues (5), (10), (11), (13), (15), (16), (17), (18) & (19) together i.e.

(5) Whether or not the Plaintiff's grantor's possession of the land since 1978, and by reason of his adverse possession of the land for upwards of over twelve(12) years, Defendant's alleged rival ownership and/or challenge against Plaintiff is statute barred, by virtue of the Limitation Act 1972(NRCD54)?

(10) Whether or not Defendant has ever been in possession of the land?

(11) Whether or not a search conducted by the Defendant at the Lands Commission revealed that the land in dispute belonged to him?

(13) Whether or not the registration of Plaintiff's grantor's title in the land and the issuance of the Land Certificate thereof is a nullity?

(15) Whether or not Bawaleshie is a village under La?

(16) Whether or not Nikoi Tse We family of Klanaa Quarter is the customary owner in possession of Bawaleshie lands?

(17) Whether or not La Bawaleshie lands belong to Nungua Stool?

(18) Whether or not the grant of La Bawaleshie land by Nii Odai Ayiku IV is null and void and

(19) Whether or not in the Gold Coast Chief List, there is any village under Nungua known as New Nungua?

Counsel submits that our laws set the limits of time that parties involved in a dispute are to initiate legal proceedings from the date of an alleged wrong. And that the proponents of the statute of limitations argue that for practical reasons, it is most equitable to limit the initiation of legal proceedings to a reasonable period after the event. Counsel continued that it is obvious that Plaintiff's cause of action for the reliefs endorsed thereon is backed by Section 10 of Statute of Limitation Act 1972 (NRCD 54) and as such Defendant's claim of ownership of the land is statute barred.

On actions to recover land, Section 10 (1-7) of the Act provides:

"10 Recovery of Land

(1) A person shall not bring an action to recover a land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to a person through whom the first mentioned claims to that person.

(2) *A right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run.*

(3) *Where a right of action to recover land has accrued, and before the right* of action is barred, the land ceased to be in adverse possession, the right of *action does not accrue until the land is again taken into adverse possession.*

(4) *For the purpose of this Act, a person is in possession of a land by reason only of having made a formal entry in the land.*

(5) *For the purposes of this act, a continual or any other claim on or near a land does not preserve a right of action to recover the land.*

(6) *On the expiration of the period fixed by this Act for a person to bring an action to recover land, the title of that person to the land is extinguished.*

(7) *For the purpose of this section "adverse possession" means possession of a person in whose favour the period of limitation can run."*

It is trite learning that issues on limitation of actions is a matter of law, and where it is found that an action is barred, this Court would not have to determine the action on its merits. The question of limitation is very important and fundamental when raised.

See **Assi v Attorney General Civil Appeal No. J4/4/17/2016**, where the Supreme Court speaking through Dotse JSC in determining whether or not the Plaintiff's action which he commenced against the Defendant was statute barred concluded as follows; *"if indeed it is (statute barred), then there is no need to look at the merits of the case since the statute of limitation is a venerable shield that can be used to ward off indolent and piece meal litigators"*

The Courts have in a number of cases discussed the necessity for a party seeking to rely on limitation to specifically plead it, in tandem with Order II rule 8 (1) of C.I. 47.

See **Amankwa v. Nsiah [1994-95] GBR 758, Dolphyme v Speedline Stevedoring Co. Ltd. [1997-98] 1GLR 786 SC**.

See also **Bassil v. Kabbara [1966] GLR 102** where it was held that *"the statute of limitation may be pleaded by the title or by making such averments in the pleading as would evince an intention to invoke the statute".*

Again in the more recent decision of the Supreme Court in **Kwaku Ameyaw v Dr. Francis Osafo Mensah & Anor. [2021] DLCA10779,** the Court opined about the application of the statute of limitation to cases; *"the short answer as was held by this Court in* ***Lartey v Netey [2010-2012]1 GLR 370 (GIHOC Refrigeration Household Products Ltd. v Hanna Assi [2005-2006] SCGLR 458; Hanna Assi (No.2) v GIHOC Refrigeration & Household Product Ltd (No.2) [2007-2008] SCG LR 160 & Amuzu v Oklikah [1997-98]1GLR 89,SC*** *is that the Limitations Act being a statute, it is the duty of the Court to apply the law to the facts of the case even if the parties are not aware of it, or irrespective of how the parties wrongly perceived the law."*

The Plaintiff pleaded in paragraphs 3, 4 & 9 of the Amended Statement of Claim as follows:

"3. By an indenture of lease made the 24th day of August 1998, between Moufid El- Adas as "lessor" of the one part and Victor Odartei Mills as "lessee" of the other part, all that piece or parcel of land situate, lying and being at Nungua New Town, Accra, was demised unto the lessee for the residue of the term of ninety-nine (99) years granted the lessor by a lease made the is day of May 1978, between Nii Odai Ayiku IV, Nungua Mantse and the lessor, subject to the rent thereby reserved and to the covenants, agreements and conditions herein contained. The indenture of lease has been duly presented at the Lands Commission, indexed, marked and stamped as LVBI0504/07.

4. Plaintiff states rather categorically that, soon after the acquisition of the land, he erected corner pillars thereon to secure and/or demarcate its extent and boundaries, and has been in uninterrupted and undisturbed possession of the land ever since, and also that he has exercised overt acts of ownership over same by excavating a foundation, platform and the construction of a wooden structure without any

challenge, let or hindrance whatsoever from any stool, family and/or person(s) let alone Defendant. In fact, it was only sometime in the year 2007, that an unidentified trespasser forcefully entered unto the land and demolished the wooden structure.

9. *Plaintiff avers also that, after the acquisition of the land from the Nungua Mantse, his lessor immediately thereafter went into possession and built a fence wall around it, and had continued to remain in possession since 1978. In the premises, Plaintiff will contend that by reason of the adverse possession of the land by his lessor for up to… and over twelve (12) years, Defendant's alleged rival ownership and/or challenge against him is statute barred, and also that he will plead the Limitation Act, 1972 (NRCD 54)"*

Plaintiff in his evidence-in-chief on 25th day of June 2015 at pages 1-4 testified as follows:

"Q: Do you know the Defendant, Dr. Nii Kotey Djane?

A: Yes.

Q: When and how did you get to know him?

A: It started with my acquisition of a piece of land by an indenture of lease. This was when he trespassed on the piece of land that I had acquired in East Legon.

Q: Can you recollect the year?

A: In 2012.

Q: This parcel of land, how and when did you acquire it?

A: By an indenture of lease dated 24/08/98 between Moufid El-Adas and Victor Odartei Mills, that is me. I acquired this piece of land situated in Nungua New Town, Accra. This piece of land had been acquired by Moufid El-Adas on a 99 year lease, and so by my acquisition I was to own it for the rest of the period because he had acquired it 20 years earlier at least in 1978.

Q: At the time you acquired this parcel of land, that area was called Nungua New Town.

A: Yes.

Q: At the time you acquired this piece or parcel of land, the area was called Nungua Newtown. Is it still called Nungua New Town?

A: Yes (sic). I know the area is now called East Lego.

Q: You just told the Court that you acquired the land from Moufid El-Adas.

A: Yes.

Q: And that Moufid El-Adas also acquired the land sometime in 1978?

A: Yes.

Q: Do you know how Moufid El-Adas acquired the land?

A: Yes. I know that the land was acquired from Nii Odai Ayiku, Nungua Mantse.

Q: Have you per chance sighted any instrument or document to that effect about this acquisition?

A: Yes. I have seen Land Title Certificate from Moufid El-Adas that states that the land was acquired from Nii Adai Ayiku IV,Nungua Mantse.

Q: Is there any document covering the transaction?

A: Yes. There is a Land Title document that states this clearly.

Q: Take a look at this document, can you identify it?

A: Yes I can.

Q: What is it?

A: This is the indenture between Nii Odai Ayiku IV and my grantor tendered and marked Exhibit A. (witness asked to read preamble of the document).

Q: You also spoke of a Land Certificate from your lessor, Moufid El-Adas.

A: Yes.

Q: Also have a look at this document, can you identify it?

A: Yes I can.

Q: What is it?

A: It is the indenture dated 24th day of August 1998 between Moufid El-Adas and Victor Odartei Mills.

Q: This is a photocopy, where is the original.

A: Yes I have. (exhibit shown to him), the original is with my lessor. Tendered and marked as Exhibit B. (witness is shown) this is the indenture dated 24/08/98 between Moufid El-Adas and myself. I have the original. (witness asks to bring original) tendered and marked Exhibit C."

Again, Plaintiff in his evidence-in-chief on 09/03/16, testified as follows;

"Q: When did you acquire your land?

A: I think 1998.

Q: What about Moufid El-Adas, do you know when he acquired his land?

A: Yes it was in 1972 I think but I want to look at the document. (reads Exhibit A), is day of November 1978.

Q: And when did you say or recall the challenge of the Defendant as to your ownership or presence on the land, in which year?

A: My lord if I may refer to the document. In 2011, thereabout.

Q: From 1978 to 2011, how many years is that?

A: 33 years.

Q: What about from 1998 to 2011 when you had your grant, how many years is that?

A: 13 years"

I must state that a careful reading of Section 10 of NRCD 54 on recovery of land is explicit that, the section only applies to land held in adverse possession. The Section 10 (3) of the Act reads:

> *"Where a right of action to recover land has accrued, and before the right of action is barred, the land ceases to be in adverse possession, the right of action does not accrue until the land is again taken into adverse possession".*

In Black's Law Dictionary, 9th Edition by Brian A. Garner, Adverse possession is defined as;

> *"The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open, notorious."*

The Shorter Oxford Dictionary (Deluxe Edition), defines the term as, *"the occupation of land to which another person has title with the intention of possessing it as one's own."*

Counsel for the Plaintiff contends that the evidence on record is unequivocal that Plaintiff's grantor and as such Plaintiff has been in undisturbed possession of the disputed land for over thirty-three (33) years, and have engaged in acts of ownerships such as building a fence wall, a wooden structure, raising platforms, digging foundation and raising corner pillars among other structures on the land. Plaintiff also testified that after acquiring the disputed land from his grantor Moufid El-Adas, in 1998, he was in actual and/or constructive possession of the disputed land through the presence of his workers and caretaker who were at all material times in effective occupation of the land, and his possession was undisturbed and uninterrupted for a continuous period of well over thirteen (13) years, until sometime in the year 2011 when Defendant forcefully entered unto the land to destroy his properties and lay an adverse claim. Altogether, Plaintiff through his grantor had been in continuous and free possession and occupation of the land for well over thirty-three (33) years.

Possession of land in law includes the exercise of physical control of the land and the intention by a person to exercise exclusive possession and also prevent others from owning the land.

In **Binga Dugbartey Sarpor v. Ekow Bosomprah [2020] DLSC992** the Supreme Court was ad idem with the Court of Appeal on its definition of possession as stated in its judgment thus;

> *"Possession of land in law includes the exercise of physical control of the land and the intention by a person to exercise exclusive possession and also prevent others from owning the land. The evidence on record is clear that the Respondent had exercised control over the land in dispute for over 20 years as found by the trial judge From the Appellant's own pleadings, he instituted this action when the Respondent started fencing the land in dispute. The evidence is thus clear that the Respondent was physically in possession and also through her agents. The evidence is that she even sought to prevent others from taking over the land by fencing the land."*

Plaintiff pleaded in paragraphs 4, 7, 9, 12 & 13 of the Amended Statement of Claim as follows:

"4. Plaintiff states rather categorically that, soon after the acquisition of the land, he erected corner pillars thereon to secure and/or demarcate its extent and boundaries, and has been in uninterrupted and undisturbed possession of the land ever since and also that he has exercised overt acts of ownership over same by excavating a foundation, platform and the construction of a wooden structure without any challenge, let or hindrance whatsoever from any stool, family and/or person(s)let alone Defendant. In fact, it was only sometime in the year 2007, that an unidentified trespasser forcefully entered unto the land and demolished the wooden structure.

7. On 20/10/12, Plaintiff had a tip off that Defendant had actually entered unto the land, destroyed the entire foundation with the pillars, and this compelled him to lodge a complaint at East-Legon Police Station on 21/10/12. At the Police Station, Defendant claimed rival ownership of the land, and allegedly disclosed that he had in sometime past erected a fence wall around the land, and also that he was responsible for the demolition of the wooden structure The police

advised that since both of them were asserting title to the land, it was prudent that a resolution of the matter be sought and/or determined in a Court of competent jurisdiction.

9. Plaintiff avers also that, after the acquisition of the land from the Nungua Mantse, his lessor immediately thereafter went into possession and built a fence wall around it, and had continued to remain in possession since 1978. In the premises, Plaintiff will contend that by reason of the adverse possession of the land by his lessor for up to and over twelve (12) years, Defendant's alleged rival ownership and or challenge against him is statute barred, and also that he will plead the Limitation Act, 1972 (NRCD 54).

12. Plaintiff will furthermore contend that the incidence of his lessor's possession and ownership of the land notwithstanding, and having been in continuous, uninterrupted and undisturbed possession of same all this while, Defendant is estopped by his own conduct from challenging his title to the land; or more so purport to have been made a grant of the same parcel of land by any stool, family and/ or person(s), and also that, his presence on the land is unjustified, unlawful and illegal.

13. Plaintiff will yet contend that, Defendant having stood by and allowed him to develop the land, by excavating a foundation, platform and the construction of a wooden structure without any protestation, Defendant is guilty of conduct which is tantamount to laches and fraudulent acquiescence."

Again, Plaintiff testified in his evidence-in-chief on 25/06/15 at page 5, as follows:

"Q: After you acquired the land, what did you do?

A: I first proceeded to erect pillars to mark the boundaries of the land to demarcate the land and I even went further to excavate the foundation and proceeded to build the platform and subsequently raised pillars on the platform. I also built a wooden structure on the plot of land.

Q: What for?

A: I engaged the services of a young man to supervise the land for me and to alert me in case there was a trespasser.

Q: What was the wooden structure used for?

A: It was used by the supervisor. He actually lived in the wooden structure, he also sold a few things in front of the wooden structure."

Plaintiff further testified in his evidence-in-chief on 09/02/16 at pages 1-3 as follows:

"Q: When you acquired the land, what did you do subsequently?

A: Subsequently, I presented the indenture to the Lands Commission who then marked and stamped it, I then went on to erect pillars at the corners of the land as part of the process of securing the land and proceeded to excavate a foundation and a platform and then went on to erect pillars at various points of the platform. And then we went on to erect a wooden structure commonly known as kiosk on the piece of land. The person from whom I had acquired the land showed me a document which was from land title registry which was a land title certificate he had acquired in respect of the land. Subsequently, I also proceeded to present my document, the indenture, to the land title registry from whom eventually I obtained a land title certificate. Prior to my obtaining the land title certificate, some persons I did not know entered the land and destroyed the wooden structure which I had earlier referred to.

Q: You spoke about having erected a wooden structure on the land, what exactly was this wooden structure used for?

A: This was meant to be used by a caretaker who I hired to stay in the wooden structure and to stay on the land to look after my property for me.

Q: And you said you had information that unknown persons had entered the land and destroyed the wooden structure, what did you do when you heard this?

A: I went to the piece of land and made inquiries, the caretaker who had come to find the wooden structure demolished could not tell me who the people were. After that incident, nothing much happened for a long period of time. This incident actually took place in the year 2007. In October 2012, 1 got information again that there were people on the plot of land who were engaged in the demolishing and destruction of the foundation and platform I had erected several years before and were destroying all the properties I had on the piece of land. I rushed to the place and found three gentlemen busily engaged in destroying my property. I inquired from them why they were doing this and who had engaged them to do this, they mentioned the name of the Defendant. Upon which I rushed to the East Legon Police Station and made a complaint to the Police. The Police asked one of their officers who was incidentally armed to accompany me to the piece of land. The Police when we got to the piece of land managed to dissuade them from continuing with their activity. They had managed to destroy a few columns and had managed to extract the iron rods from the pillars, had loaded these iron rods unto a mini truck which was then taken away. We then went back to the Police Station where I made a formal complaint and the leader of the team and I were asked to come back the following day. The following day, I went back to the Police Station and the Defendant sent his people to the Police Station. The Police advised both parties that given the fact that both parties were claiming ownership of the piece of land, it will be advisable to take the matter to a competent Court to resolve the matter.

Q: What was the actual physical state of the land when you acquired the parcel of land in 1998?

A: When I acquired it, the land was bare and Moufid El-Adas, the person who sold the land to me had constructed a wall i.e. half a wall along the side facing the road. The Defendant also claimed at the Police Station he was the one who constructed part of the wall earlier.

Q: Aside the fence wall which you said your lessor had built partially around the land, was there any other thing on the land when you acquired same?

A: There were pillars at the corners demarcating the plot of land.

Q: These pillars you just spoke about, who did they belong to?

A: They belong to Moufid El-Adas."

According to Counsel from the above, it is evident that Plaintiff had been in physical possession and occupation of the land through his grantor who had built a fence wall on the land since 1978. Plaintiff continued in possession by constructing a wooden structure, digging a foundation platform and erecting corner pillar which Defendant and his agents destroyed and other overt acts on the land confirming Plaintiff's possession and depicting Defendant's act of trespass. The activities on the land are a manifest indication to any prospective purchaser and adverse ownership claimant that the land is encumbered. Admittedly, being in physical possession of the land through his grantor for over thirty (30) years does not necessarily bestow on Plaintiff a better title to the land than the Defendant. Long periods of possession of land does not guarantee title nor does it by itself estop another person from challenging one's title to the land. For Plaintiff to succeed on his plea of limitation, he is required by law to show adverse possession of the land. The twelve (12) years limitation period does not run unless the person against whom a suit is instituted for the recovery of land is in adverse possession of same. The term "adverse possession" was explained by Atuguba JSC in **Din v Musah Baako [2007-2008]1 SCGLR 686@699,**when he stated;

> *"The law as we understand it is that if a squatter takes possession of land belonging to another and remains in possession for twelve (12) years to the exclusion of the owner, that represents adverse possession and accordingly at the end of twelve (12) years the title of the owner is extinguished. That is the plain meaning of the statutory provisions, which I have quoted and no authority has been cited to us."*

In **Adietey Adjei v Nmai Boi [2013-2014] 2 SCGIR 1474** in explaining adverse possession, Her Ladyship Sophia Adinyira JSC had this to say:

"Adverse possession must be open, visible and unchallenged so that it gives notice to the legal/ paper owner that someone was asserting a claim adverse to his. And Section 10 of the Limitation Act, 1972 (NRCD 54) has reflected substantially the provisions of the English Statute of Limitation and the common law. Under the present law, the person claiming to be in possession must show either (i) discontinuance by the paper owner followed by possession; or (ii) dispossession or as it was sometimes called 'ouster' of the paper owner. Clearly possession concurrent with the paper owner was insufficient. If a squatter took possession of land belonging to another and remained in possession for twelve years to the exclusion of the owner, that would represent adverse possession and, accordingly, at the end of twelve years, the title of the owner would be extinguished. In the circumstances, assuming the Defendants' title was bad, their adverse possession of the land for a period of twelve years and over, had conferred on them possessory rights by virtue of Section 10 of the Limitation Act, 1972 (NRCD 54). The interest acquired by prescription or under the Limitation Act, 1972 (NRCD 54) was an overriding interest, which was further protected under the Land Title Registration Act, 1986 (PNDCL 152).

Aside establishing acts of ownership and physical possession, Plaintiff's reliance on the plea of adverse possession and defence of limitation is required to establish their root of title. Thus, a squatter who lays no adverse claim or a licensee cannot rely on the plea of adverse possession and limitation but only someone whose claim of possessory title in the land is adverse to that of the true owner.

In **Amidu & Anor. v. Alawiye & Ors. in Suit No. J4/54/2018(Unreported)** the Supreme Court in a Judgment dated 24th July 2019, per Pwamang JSC, expatiated on the above salutary principle as follows:

> *"The Defendants in their statement of case submitted that squatters can acquire title to land after 12 years of occupation. That is an erroneous statement of the law. The legal definition of a squatter in Black's Law Dictionary 8th Edition, 2004 is "A person who settles on property without any legal claim or title". The difference in law between a squatter and a trespasser is that whereas a trespasser enters onto a land and claims an*

interest in it that is inconsistent with the rights of the true owner, a squatter does not claim any interest in the land he is in occupation of. Therefore, possession by squatters is not adverse to the title of the true owner so a squatter cannot succeed on a defence of limitation."

Counsel for Plaintiff submits that in his pleadings and evidence on record, Plaintiff established his root of title to and acquisition of the land as opposed to the adverse claim by the Defendant. Plaintiff pleaded in paragraphs 3, 5 & 6 of the Amended Statement of Claim as follows:

"3. By an indenture of lease made the 24th day of August 1998, between Moufid El-Adas as 'lessor' of the one part and Victor Odartei Mills as 'lessee' of the other part, all that piece or parcel of land situate, lying and being at Nungua New Town, Accra, was demised unto the lessee for the residue of the term of ninety-nine (99) years granted the lessor by a lease made the 1st day of May 1978, between Nii Odai Ayiku IV, Nungua Mantse and the lessor, subject to the rent thereby reserved and to the covenants, agreements and conditions herein contained. The indenture of lease has been duly presented at the Lands Commission, indexed, marked and stamped as LVBI0504/07.

5. Plaintiff asseverates that, his grantor Moufid El-Adas, had registered his title deed at the Land Title Registry as No.3755/1978, after the site plan was duly plotted. Albeit, he had also been presented with Land Certificate No. GA11- 502 in Land Register Vol.53, Folio 487, and also that his title to the land was registered after the Land Title Registry had complied with all statutory provisions and published notice of his application for title registration as provided for in Section 11 of the Land Title Registration Law 1986, PNDCL 152, and Section 6 of the Land Title Registration Regulations, 1986, L.I. 1341.

6. Plaintiff says that, he has also been presented with Land Title Certificate No.GA3l027 in Land Register Vol. 53, Folio1450, and also that he was issued with a certificate after the Land Title Registry had similarly complied with all statutory provisions and published notice of his application for registration."

Counsel states that Plaintiff on 25/06/15 in his evidence-in-chief at pages 1-4 testified as follows:

"Q: This parcel of land, how and when did you acquire it?

A: By an indenture of lease dated 24/08/98 between Moufid El-Adas and Victor Odartei Mills, that is me. I acquired this piece of land situated in Nungua New Town, Accra. This piece of land had been acquired by my grantor Moufid El-Adas on a 99 year lease, and so by my acquisition I was to own it for the rest of the period because he had acquired it 20 years earlier at least in 1978.

Q: At the time you acquired this parcel of land, that area was called Nungua New Town.

A: Yes.

Q: At the time you acquired this piece or parcel of land, the area was called Nungua Newtown. Is it still called Nungua New Town?

A: Yes. (sic)I know the area is now called East Legon.

Q: You just told the Court that you acquired the land from Moufid El-Adas.

A: Yes.

Q: And that Moufid El-Adas also acquired the land sometime in 1978?

A: Yes.

Q: Do you know how Moufid El-Adas acquired the land?

A: Yes. I know that the land was acquired from Nii Odai Ayiku, Nungua Mantse.

Q: Have you per chance sighted any instrument or document to that effect about this acquisition?

A: Yes. I have seen land title certificate from Moufid El-Adas that states that the land was acquired from Nii Adai Ayiku IV, Nungua Mantse.

Q: Is there any document covering the transaction?

A: Yes. There is a land title document that states this clearly.

Q: Take a look at this document, can you identify it?

A: Yes I can.

Q: What is it?

A: This is the indenture between Nii Odai Ayiku IV and my grantor tendered and marked Exhibit A. (witness asked to read preamble of the document).

Q: You also spoke of a Land Certificate from your lessor, Moufid El-Adas.

A: Yes.

Q: Have you per chance sighted that Land Certificate?

A: Yes.

Q: Also have a look at this document, can you identify it?

A: Yes I can.

Q: What is it?

A: It is the indenture dated 24th day of August 1998 between Moufid El-Adas and Victor Odartei Mills.

Q: This is a photocopy, where is the original

A: Yes I have. (Exhibit shown to him), the original is with my lessor. Tendered and marked as Exhibit B. (witness is shown) this is the indenture dated 24/08/98 between Moufid El-Adas and myself. I have the original. (witness asks to bring original) tendered and marked Exhibit C.

See also cross-examination of Defendant on 24/07/19 at page 2.

"Q: In what year exactly was the land demised to you?

A: In 1997.

Q: At all material times your grantor has been Nii Kotey Amli III, your biological father.

A: Absolutely.

Q: You have sighted Plaintiff's title deeds in this Court, have you?

A: Yes I have sighted Plaintiff's title deeds which I maintain is not proper because it is in breach of Section 12(2) of the Land Title Registration Law. Moreover, the certificate was issued during the pendency of several suits some of which had been tendered in this matter and the valuation number LVBII263/07 on the indenture attached to the certificate Exhibit D. The number was fictitiously used. It belongs to one Mr. S.N.A Mensah and the land that is connected to this particular number is situate at East Pantang and not Oteele and or La Bawaleshie hence the certificate not being proper.

Q: You also know for a fact that at all material times Plaintiff's grantor was Moufid El-Adas.

A: I do not know that. That is the claim of the Plaintiff.

Q: I am putting it to you that Plaintiff's grantor was and still remains Moufid El-Adas.

A: That is Plaintiff's claim.

Q: At least you have sighted the lease dated the 01/05/78 on the Plaintiff's bundle of documents filed in this Court.

A: Yes I have.

Q: You have also sighted Plaintiff's lease dated 24/08/98 between Moufid El-Adas as lessor and Plaintiff as lessee.

A: I have sighted two documents with the same date and I wish to refer to Exhibits D and F. These are identical documents. The only difference are the land valuation numbers. One is LVB11263/07 and the other is LVB10504/07."

Again, see cross-examination of Defendant on 12/02/20 at page 2.

Q: You also know for a fact that Plaintiff has said in this Court that his grantor registered his title deeds in respect of the larger portion of the land in 1978 and has been issued with a Land Certificate regularly by the Land Title Registry.

A: I know for a fact that Moufid El-Adas grantor of Plaintiff has several land title certificates all emanating from the Deed of 1978 that Counsel mentioned and they were fraudulently procured.

According to Counsel per the evidence adduced, Plaintiff has demonstrated his root of title and acquisition of the land in dispute and indeed both parties claim an interest in the land which is inconsistent and/or adverse to the rights of each other, whoever is the true owner. Most importantly, Plaintiff has established possessory rights in addition to his adverse claim and as such qualifies to be described as having been in adverse possession in terms of Section 10 of NRCD 54. From the evidence, particularly Exhibit A, the indenture of lease between Nii Odai Ayiku IV and Moufid El-Adas, Plaintiff's grantor dated 01/05/78, and Exhibit B, an indenture of lease between Plaintiff's grantor and himself dated 24/08/98, covering the disputed land, Plaintiff's grantor acquired the land in 1973 and conveyed the residue of his interest to Plaintiff in 1998, and until sometime in 2011/12 when Defendant trespassed on the land, Plaintiff had been in possession and had demonstrated acts of possession to that effect. Plaintiff remained in adverse possession well after the judgment in Suit No. L502/96 intituled, Nii Kotey Amli v Moufid El-Adas which decreed title to the disputed land in his grantor, continued in possession when the land was allegedly granted to Defendant in 1997, up and until 2011/12 when Defendant forcibly entered unto the land, destroyed the foundation platform and wooden structure claiming ownership by way of an indenture dated 26/11/97 executed between Nii Kotey Amli III, Head and Lawful Representative of La Klanaa Quarter and himself. At the time this supposed transaction took place, Plaintiff was in active possession. We make bold to state, there was ample evidence of Plaintiff's possession of the land at the time of Defendant's supposed acquisition. And that it has been well established by a number

of decided cases that where a purchaser of land had the opportunity of seeing evidence of possession no matter how slight on any part of the land he intended to purchase, but he fails to investigate the authority behind the adverse possession he is fixed with notice of the adverse possessor.

See **Western Hard wood Enterprises Ltd. v West African Enterprises Ltd. [1998-1999] SCGLR 105.**

Counsel further submits that detailed analysis of the totality of evidence on record shows that Plaintiff through his grantor has been in adverse possession of the land since 1978 until 2011 i.e. approximately thirty-three (33) years when Defendant forcefully entered the land. And that Plaintiff's grantor Moufid El-Adas was granted the land in 1978 by Nii Odai Ayiku IV, Mantse and occupant of the Nungua Stool with the consent and concurrence of the principal elders and councilors of the Nungua Stool whose consent and concurrence are requisite under the Ga customary law in the disposition of Nungua Stool lands, went into immediate possession and passed on the residue of his lease period and possession to Plaintiff who continued in possession from 1998.Moreover,the alleged grant of the disputed land from Nii Kotey Amli III to Defendant in 1997 was nineteen (19) years from 1978, thirteen (13) years from 1998 to 2011 when Defendant forcefully entered the land and thirty-three(33) years from 1978 to 2011.

Per the stated reasons Counsel prayed the Court to enter judgment for the Plaintiff.

It is trite law that no action shall be brought by any person after the expiration of twelve (12) years from the date the cause of action accrued to recover possession of land and it shall be applicable to that person's successor's in title.

The limitation period shall start running from the time the person who is in adverse possession or who is being claimed against took possession of the property.

See Section 10 (1) and (2) of the Limitation Decree, 1972 (NRCD 54).

It is salient to know that limitation is a right and a person claiming benefit under the law must specifically plead it. In the case of **Dolphyne (No. 3) v Speedline Stevedoring Co. Ltd and Another** the Supreme Court in explaining the requirement stated that limitation must be specifically pleaded stated that:

> *"The Limitation Decree, 1972 (NRCD 54), was essentially a special plea which must be pleaded as required by the High Court (Civil Procedure) Rules, 1954 (LN 140 A). If not pleaded, it could not be adverted to in submissions to the Court; and the Court would not of its own motion take notice that an action was out of time."*

The cases in which the Court *suo motu* raised the issue of limitation have ceased to be good law as some of them have been specifically overruled.

In the recent Supreme Court decision in **Binga Dugbartey Sarpor v Ekow Bosomprah [2020] DLSC9922** the Court commented on when and how the statute of Limitation becomes applicable.

Per Kulendi JSC the Court stated as follows:

> *"From the above, it is evident that the Applicant has been in possession of the land for over 20 years. The Appellant being in possession of the land for over 20 years does not give the Appellant a better title to the land than the Respondent. Long period of possession of land does not guarantee title nor does it by itself estop another from challenging the title to the land.*
>
> *For the Appellant to succeed in his plea of limitation, he must demonstrate that he is by law, in adverse possession of the land. Section 10 (2) (3) and (7) of the Statute of Limitation Act, 1972 (NRCD 54) states as follows:*
>
> *"10(2) a right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run.*
>
> *(3) where a right of action to recover land has accrued, and before the right of action is barred, the land ceased to be in adverse possession, the right of action does not accrue until the land is again taken into adverse possession.*

(7) *For the purpose of this section "adverse possession" means possession of a person in whose favour the period of limitation can run"*

From the above, the 12 years limitation period does not run unless the person against whom a suit is instituted for the recovery of land is in adverse possession of same."

Also in the case of **Adjetey Adjei v Nmai Boi [2013-2014] 2 SCGLR 1974** Her Ladyship Sophia Adinyira JSC in explaining adverse possession, had this to say:

"Adverse possession must be open, visible and unchallenged so that it gives notice to the legal/paper owner that someone was asserting a claim adverse to his. And section 10 of the Limitation Act, 1972 (NRCD 54) has reflected substantially the provisions of the English Statute of Limitation and the Common Law. Under the present law, the person claiming to be in possession must show either (i) discontinuance by the paper owner followed by possession; or (iii) dispossession or as it was sometimes called 'ouster' of the paper owner. Clearly possession concurrent with the paper owner was insufficient. If a squatter took possession of land belonging to another and remained in possession for twelve years to the exclusion of the owner, that would represent adverse possession and, accordingly, at the end of twelve years, the title of the owner would be extinguished. In the circumstances, assuming the Defendants' title was bad, their adverse possession of the land for a period of twelve years and over, had conferred on them possessory rights by virtue of Section 10 of the Limitation Act, 1972 (NRCD 54). The interest acquired by prescription or under the Limitation Act, 1972 (NRCD 54), was an overriding interest, which was further protected under the Land Title Registration Act, 1986 (PNDCL 152)."

"Where a right of action to recover land has accrued, and before the right of action is barred, the land ceases to be in adverse possession, the right of action does not accrue until the land is again taken into adverse possession."

The Plaintiff further pleaded that he is a purchaser for value without notice.

To claim to be a bona fide purchaser is to claim to have made the purchase in good faith. What amounts to good faith in the acquisition of land has often been discussed

by the Courts in cases where the issue as to whether a party is entitled to the protection of the Land Development (Protection of Purchasers) Act, 1960, (Act 2), has arisen for consideration.

The expression ***"good faith"*** is not defined in Act 2, but concerning what it might mean, Apaloo JSC, as he then was, observed in the case of **Dove v Wuta-Ofei [1966] GLR. 299**, that it was:

> *"only natural, that the Act should require that the purchaser, to avail himself of the statutory protection, should have acted honestly and reasonably at the date of the original acquisition of the land, and having so acted should have believed in the validity of his title."*

This view appears to have been endorsed by Francois JA, as he then was, when, in the case of **Ayitey v Mantey [1984-86] 1 GLR 552**, he acknowledged that the expression had been accepted to mean an honest belief in the validity of a party's title even though it turned out by subsequent adjudication to be an erroneous view. He underscored, as Apaloo JSC had suggested in Dove v Wuta-Ofei, that the good faith to be examined must relate to the time of acquisition of the land, which was a matter of fact for the trial Judge.

In the latter case of **Amua-Sekyi and Another v Sasu and Another [1984-86] 2 GLR 479**, Francois did not consider the Defendant to have acted in good faith when he defied signs as to the risk he was taking and continued with this building activity. His Lordship considered that the Defendant in that case was reckless and took a gamble in continuing with his building project.

In **Dzade v Aboagye [1982-83] GLR 209**, Edusei JA while considering the opinion of the trial judge as to the good faith of the Defendant, had reflected on the evidence on record as follows:

> *"When the Defendant went to the Osu Mantse for the execution of the so-called conveyance, did he honestly believe that he had acquired a valid title to the land? Did the Defendant satisfy himself that there had been no previous grant of the land? He*

says that he did not make a search; he says he did not have the document given him stamped and registered. He says he acquired the land in 1976 but this action was commenced on 16th March 1978. I ask again, what precluded him from stamping and registering the document before completion of the building? The Osu Mantsu, Nii Nortei Owuo III who was the Defendant's only witness, said that no records of previous grants made by the Osu Stool were kept by the Stool, and this is my view should have put the Defendant on his guard to make a search."

The trial Judge in that case had viewed with suspicion the Defendant's conduct in starting his building even before he had obtained a building permit, and he had described the Defendant's attitude as one of "*Let's get a building on the land first and that would take care of everything".* This view of the trial Judge was endorsed by Edusie JA, who went further to observe that the Defendant could not honestly have believed that he had title to the land. His Lordship was certain that the construction of the building by the Defendant was not done in good faith, that there was *mala fide* on his part and that he had to suffer for his conduct.

It is important to be reminded that the plea of bona fide purchaser for value without notice, if established, constitutes an absolute defence and for that reason, the onus is firmly on the party who resorts to it to establish it convincingly.

In the recent Supreme Court case of **Hydrafoam Estates (Ghana) Limited v Owusu [2013-2014] SCGLR 117**, the Plaintiffs, like the Defendant in the present case, had relied on the plea not as a defence or shield, as was the case in many of the Act 2 cases reviewed above, but as a sword or a basis for judicial relief. In that case, regarding how a party relying on the plea could establish that he had been prudent as a purchaser, the Supreme Court per Anin-Yeboah JSC, emphasized:

"Even though the facts of each particular was may determine how prudent a purchaser of land must act under such circumstances, we think that at least, official searches at the Lands Commission in this case would have clearly established that the land was not designated as the property of the Plaintiff's vendor. An official search in the Lands

Commission to make enquiries as to the official records covering the land would have alerted the Plaintiffs about the ownership of the disputed property. The fact that they were not professionals but were laymen, in our view, did not take away the necessity to be prudent under the circumstances".

The 1st Plaintiff in that case claimed to have derived his title from a Judgment, which was a Default Judgment which had subsequently been set aside, and on this, the Supreme Court observed as follows:

"In these proceedings, the hard facts conclusively establish that no effort was made to conduct proper investigations. A certified true copy of a Default Judgment could not under the circumstances be accepted as a basis for the plea of bona fide purchaser for value without notice of any adverse title. In any case, the Default Judgment was subsequently set aside, it not being final, in every respect.

We are of the opinion that the Plaintiffs as purchasers were not prudent in the whole transaction when they limited themselves to only the Default Judgment. No investigations were done to further their desire to acquire good title to the land".

Now, it is clear to me, from a review of the authorities, that for a purchaser of land to be considered to have made his acquisition in good faith or to have conducted himself as a prudent purchaser, he must have acted honestly and reasonably in making the acquisition. It must be evident from his conduct that he honestly and reasonably believed in the validity of his title, and failure to conduct official searches at the Lands Commission would undermine any claim on his part that he reasonably believed in the validity of his title. The conduct must be relevant in making a determination as to his honesty or the reasonableness of his belief, is his conduct during and about the time of the original acquisition.

Indications that the purchaser was aware or should have been aware that he was taking a risk in making the acquisition and yet went ahead with the acquisition would be evidence of bad faith. Circumstances suggesting recklessness on his part in making the acquisition could defeat his claim of having acted in good faith. A purchaser who,

as in the Hydrafoam Estates Ltd. Case (supra), fails to conduct an official search about ownership of the land he intends acquiring, for example, will not find it easy establishing that he acted in good faith or was prudent in making his acquisition. And a purchaser will find it difficult to persuade the Court about good faith on his part where he develops the acquired land in circumstances which suggest that he was trying to steal a march on some other party. Commencing constructional works when a building permit has not been procured, for example, would provide evidence of trying to steal a march or trying to overreach another party."

Throughout the trial the Plaintiff maintained that he and his grantor have been in possession of the subject land since 1978 and till date without any challenge from anyone.

And that assuming the land belongs to the Defendant they have been in adverse possession of the subject land since 1978 till date. Thus 44 years.

If I may ask, should the forty-four (44) years of the Plaintiff's stay on the disputed property ripe into adverse possession assuming his claim is true.

It is my considered view that unfortunately the principle of adverse possession cannot come to the aid of the Defendants.

I say so because the position of the law is that possession however long does not ripe into ownership.

The decided cases on this fact are legion. In the case of **Osei (substituted by) Gilard v. Korang (2013-2014) 1 SCGLR** the Supreme Court had this to say:

> *"The evidence Act, 1975, NRCD 323 provided in Section 48(2) that "(2) A person who exercises acts of ownership over property is presumed to be the owner of it. But possession, cannot ripe into ownership no matter how long it had been held or had"*

In the case of **Saaka v Dahali (1984-86) 2GLR 774** the Court of Appeal came to the same conclusion, when their Lordships held that:

"Long possession per so does not avail the possessor against a claimant, if the claimant was the true owner or could show that he or she derived title from the true owners"

There is evidence before me that the Defendant asserted that he is the owner in possession of the disputed land.

He testified as follows:

"Q: Who is the owner of the land in dispute in respect of which an action had been brought by the Plaintiff?

A: I am the legitimate owner of the land in dispute.

Q: Please tell the Court how you came to be the owner of the land?

A: I became the owner of the land by virtue of a deed executed in my favour by Nii Kotey Amli III, the head and lawful representative of the La Klanaa Quarter, who is also my biological father.

Q: Look at this document, is that the deed of lease granted to you by Nii Kotey Amli Ill, the head of Klanaa Quarter.

A: Yes, it is."

The Defendant in his testimony said that upon acquiring the subject land which was overgrown with bush, he took immediate possession of the same, cleared it and constructed a fence wall around the perimeters of the subject land.

The Defendant was led in evidence by his Counsel as follows:

"Q: Upon acquiring the land what did you do?

A: I cleared it as it was overgrown with bush. I then erected a fence wall around the perimeters and went into immediate possession."

Significantly, the above evidence adduced by the Defendant was corroborated by Plaintiff's own Witnesses-Enos Agroh (PW1) and Legodzo Asiwome (PW2) to the effect that when they went to the land at the instance of the Plaintiff, there was an

existing fence wall, a portion of which was broken. The evidence was elicited through cross-examination of PW2 (Legodzo Asiwome) as follows:

"Q: Did you see any fence wall on the land?

A: We saw bricks and a broken wall on it.

Q: Do you know who constructed the wall which was broken?

A: No my Lord.

Q: From your own evidence the wall was there before you allegedly went on the land?

A: Yes my Lord.

Q: I am putting it to you that the land belonged to the Defendant.

A: I cannot tell.

Q: Up to date that wall is still there.

A: It is not the land.

Q: Have you ever been to the land recently?

A: Yes my Lord.

Q: I am putting it to you that you are not truthful to the Court when you say that the fence wall was not on the land.

A: The broken wall we saw on the land is not the same as it is now.

Q: So which fence wall is on the land as we speak today?

A: A block fence wall.

Q: And you know that that fence wall belonged to the Defendant?

A: I do not know."

PW1 (Enos Agroh) in his evidence as well as evidence elicited through cross-examination of him said that when he and his boys went to the land they saw fence wall on one side of the land. In his evidence-in-chief he testified as follows:

"Q: You know why Mr. Mills is in Court with the Defendant?

A: Yes I know.

Q: What is it that you know between them?

A: The Plaintiff called me to build a house for him at Christian Centre behind A & C Shopping Mall. When we met he gave me architectural drawing, electricals, and the site plan. <u>When we went to the site, one side of the plot had been fenced with burnt bricks and part of it was broken</u>." [Emphasis supplied]

PW2 admitted that at the material time that they went to the land, there was a fence wall on the land. The evidence was elicited through cross-examination of the Plaintiff as follows:

"Q: You know as a matter of fact that there was a fence wall on a portion of the land in dispute?

A: Yes as I said the last time there have been a fence wall on one side of the plot and part of it was broken before we entered the land."

Thus it is abundantly clear that PW1 and PW2's testimony corroborated the Defendant's evidence to the effect that he had long been in possession of the subject land before Plaintiff sent PW1 and PW2 to the land. The above much revealing answer by PW1 and PW2 which amply corroborated that Defendant's assertion that he was already in possession of the land before Plaintiff did.

See **Re Asere Stool, Nikoi Olai Amontia IV substituted by Tafo Amon II) v. Akotia Oworsika III (substituted by Laryea Ayiku III [2005-2006] SCGLR 637** particularly part 1 of holding 2 where the Supreme Court held:

"2. Where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish that fact than by relying on such admission, which is an example of estoppel by conduct. It is a rule whereby a party is precluded from denying the existence some state of facts which he had formerly asserted. That type of proof is a salutary rule of evidence based on common sense and expediency."

Again, See **Asante v. Bogyabi [1966] GLR 323 at 240** where the Supreme Court held:

"Where admissions relevant to matters in issue between parties to a case are made by one side, supporting the other, as appears to be so in the instant case on appeal, then it seems to me right to say that that side in whose favour the admission are made is entitled to succeed and not the other."

This clearly depicts that once the Defendant is in possession of the land he deserves the protection of the Court.

In **Adjei v Acquah [1991] 1 GLR 13 SC** it was held at page 29 that:

"The basis of this Law is derived from established principle that possession is a good title against the whole world save the true owner or someone claiming through the owner. Such possession is entitled to the protection of the Courts."

See **Wiredu v MIM Timber Co. Ltd [1963] 2 GLR 167 at 168 SC**"

See also the case of **Amankwa v Nsiah part 2 [1994-95] GBR 758 at 772** where Acquah J.A. (as he then was) said:

"… for possession is nine points of the law, and a Defendant in possession who has no counterclaim only has to plead that he is in possession. In such situation, as Lord Fitz Gerald said in ***Danfor v McAnnity [1883] App. Cas. 456 HL.***

"....The Plaintiff could succeed only on the strength of his own title and could not found his claim on the weakness of the Defendants. For the law respected possession and deemed it lawful until some Claimant established in proof that he had a title to the land and a right of entry to oust the Defendants. The party who sought to change the possession should first

show a legal title to it in himself. Indeed the presumption of ownership raised by the fact of possession has received statutory recognition in Section 48 of our Evidence Decree 1975 NRCD 323 wherein it provided:

"48 (1) The things which a person possesses are presumed to be owned by him.

(1) A person who exercises acts of ownership over property is presumed to be the owner of it."

Again, See **Osei (substituted by) Gillard v Korang [2013 – 2014] 1 SCGLR 221 at 234 t**he Supreme Court speaking through Ansah JSC said:

"In the present appeal, the stark fact is that the Plaintiff-Appellant was in possession of the house just as was the sixth Defendant witness. Now in law, possession is nine-tenths 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 ownership and it being good against the whole world except the true owner, he cannot be ousted from it: See **Summey v Yohuno [1962] 1 GLR 160, SC**; and **Barko v Mustapha [1964] GLR 78, SC."**

In the light of the above evidence which eloquently established that the Defendant had long been in possession of the subject land before Plaintiff sent PW1 and PW2 to the said land coupled with the cases cited supra, I hold that the Plaintiff's attempt to invoke Limitation Act collapses.

Plaintiff alleged his grantor put up the wall during cross-examination as follows:

"Q: What is the actual physical of the land when you acquired it?

A: The time I acquired it the land was bare and Moufid El-Adas who sold the land to me had constructed a half a perimeter wall not along all sides but one side facing the street and the other side facing the other street. <u>The Defendant also told me at the Police Station that he had also constructed part of the wall earlier</u>." [Emphasis supplied]

Under the fiery heat of cross-examination, the Defendant contested that Moufid El-Adas never constructed fence wall on the disputed land. With regard to this the Plaintiff was cross-examined as follows:

> *"Q: It is true isn't it that Moufid El-Adas never put any structure on this land?*
>
> *A: Moufid El-Adas never put up any structure on this land."*

In the light of the above answer given under cross-examination by the Plaintiff, there is no shadow of doubt that Moufid El-Adas never built any fence wall on the disputed land.

In fact the Plaintiff failed to call his said grantor in prove of his claim.

There is further evidence before me depicting that the subject land is registered in the name of the Defendant.

See Exhibit 5, a Search Report from the Lands Commission.

This clearly depicts that if the Plaintiff had conducted a search at the Lands Commission same would have revealed that the subject land belongs to the Defendant.

l hold that the Plaintiff cannot therefore claim to be a purchaser for value without notice.

In the case of **Gihoc Refrigeration & Household Products Ltd v Jean Hanna Assi [2005-2006] SCGLR 458**, the Supreme Court held:

> *"A person who acquires possessory title by virtue of the Limitation Act can maintain an action for possession against everybody including the original owner whose title became extinct as a result of adverse possession.*
>
> *A person who has been in adverse possession of a land for twelve years & more could maintain an action for possession in terms of Section 10(1) and (6) of the Limitation Act, NRCD 54. Adverse Possession could be used as both a sword and a shield."*

Per the totality of the evidence led I hold that statute limitation cannot however protect the Plaintiff in this case as discussed in this judgment.

This brings the Court to issues 9 and 12.

" (9) whether or not by reason of the judgment in Suit No. L502/96 intituled Nii Kotey Amli III v Moufid El-Adas, Defendant is estopped per res judicata from challenging Plaintiff's interest in and/or title to the land and

(12) Whether or not by reason of the judgment in Suit No. BL/114/05 intituled Nana Dr. Osae Yaw (Nii Kotey Djane v Ben Jonah & 4ors, Plaintiff is estopped from claiming ownership of the land?"

The Black's Law Dictionary (eighth ed.) defines, "*Res Judicata as a doctrine barring the same parties from litigating a second suit on the same transaction or any other claim arising from the same transaction or series of transactions or that could have been raised but was not raised in the first suit. For the proper invocation of the doctrine, these elements must exist:*

(1) there must be an earlier decision on the issue,

(2) a final judgment on the merits; and

(3) the involvement of the same parties or parties in privity with the original parties."

In **Justice Quave v Koiwah Investment Co. Ltd & 3ors [2019] DLSC 5258**, the Supreme Court held;

"It is trite learning that related to the principle of cause of action and issue estoppel is the doctrine of abuse of process, commonly referred to as the rule in **Henderson v Henderson[1843] Hare 100**,whose essence was set out in the case of **Barrow v Bankside Agency Ltd. [1996]1WLR 257 at 260**, as follows:

> *"The rule in **Henderson v Henderson [1843] Hare 100** is very well known. It requires the parties, when a matter becomes a subject of litigation between them in a Court of competent jurisdiction, to bring their whole case before the Court so that all aspects of it may be finally decided (subject, of course to any appeal) once and for all. In the*

absence of special circumstances, the parties cannot return to the Court to advance arguments, claims or defences which there could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a Defendant should not be oppressed by successive suits when one will do. That is the abuse at which the rule is directed. On the above principle of law the case of ***Greenhalgh v Mallard [1947]2 All ER 255****, is very instructive and throws more light on the estoppel issues raised in this case at page 257 of the report the Court observed that res judicata: "is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised, that it would be an abuse of the process of the Court to allow a new proceeding to be started in."*

This principle of law has been applied by this Court in several cases, such as **Brown v Ntiri (Williams Claimant) [2005-2006] SCGLR 247 and Dahabieh v SA Turqui & Bros [2001-20-02] SCGLR 498**, where the Court stated at page 507 of the report that:

"It is well settled under the rule of estoppel that if a Court of competent jurisdiction has tried and disposed of a case, the parties themselves and their privies cannot, thereafter, bring an action on the same claim or issue. The rule covers matters actually dealt with in the previous litigation as well as those matters which properly belonged to that litigation and could have been brought up for determination but were not raised." [Emphasis supplied]

The Plaintiff pleaded in paragraph 3 of his Amended Statement of Claim, thus;

"3. By an indenture of lease made the 24th day of August 1998, between Moufid El-Adas as "lessor" of the one part and Victor Odartei Mills as "lessee" of the other part, all that piece or parcel of land situate, lying and being at Nungua New Town, Accra, was demised unto the lessee for the residue of the term of ninety-

nine (99) years granted the lessor by a lease made the 1st day of May 1978, between Nii Odai Ayiku IV, Nungua Mantse and the lessor, subject to the rent thereby reserved and to the covenants, agreements and conditions herein contained. The indenture of lease has been duly presented at the Lands Commission, indexed, marked and stamped as LVBI0504/07.

Plaintiff again pleaded in paragraph 2 of his Reply to Defendant's Statement of Defence;

"2. In reply to paragraphs 5, 6, 7, 9, 17 &18 of the Statement of Defence Plaintiff states rather categorically that, in Suit No. L502/96 intituled Nii Kotey Amli v Moufid El-Adas the High Court of Justice, presided over by her Ladyship, Mrs. Justice Vida Akoto-Bamfo (JA) as she then was, sitting as an additional High Court Judge, decreed judgment against Defendant's grantor (Nii Kotey Amli), and in favour of my grantor (Moufid El-Adas) in respect of my grantor's title to the parcel of land, subject -matter of this suit. In the premises, Plaintiff will contend that Defendant is estopped per rem judicata from challenging his interest in and/or title to the land"

Again, Plaintiff testified in his evidence-in-chief as follows;

Q: Do you recall ever whether your lessor had anything to do with this Nii Kotey Amli III.

A: Yes. I think he had earlier issues with the bigger plot of land which includes the piece of land that we are talking about in this Court.

Q: Do you know what this issue was?

A: It was about claim to ownership of land of which the piece of land we are talking about in this Court is part.

Q: Was that claim of ownership between your lessor and Nii Kotey Amli III settled in any form or manner that you remember?

A: Yes.

Q: How was it resolved?

A: It was resolved in favour of Moufid El- Adas in the Court of law."

Plaintiff further testified in his evidence-in-chief on 09/03/ 16 at pages 1-2 as follows:

"Q: You spoke about the judgment in a case or action instituted between Moufid El-Adas, your lessor and Nii Kotey Amli.

A: Yes I did.

Q: And you also told the Court that the judgment went in favour of your lessor. Is that so?

A: That is so.

Q: Have you sighted a copy of this judgment that you speak about?

A: Yes I have: (Judgment is tendered in evidence and marked Exhibit E)"

It is salient to note though Defendant admits there was a litigation between their grantors, he insisted that the subject land in that suit is distinct, separate and different from the one in dispute.

There were the answers he gave doing cross-examination:

"Q: You also know for a fact that Moufid El-Adas was strewn in litigation with your grantor Nii Kotey Amli in respect of the larger tract of land out of which a portion was hived off or delimited to Plaintiff.

A: It is true that Moufid El-Adas litigated with my grantor, my biological father but on a different land other than the land in dispute. Moufid El-Adas has no land and so such cannot give any land. He cannot give what he does not have. The same applies to Nii Odai Ayiku, the grantor of Moufid El-Adas. He has no land at Oteele/La Bawaleshie and as such cannot grant La Bawaleshie/Oteele lands. [Emphasis supplied]

Q: *And that case, Moufid El-Adas was decreed as title owner of the parcel of land in dispute.*

A: *Yes he was decreed owner but it was not about this land in dispute."*

There is further evidence before me that per the evidence of CW1, the Court's appointed surveyor, the disputed land does not form part of Plaintiff's grantor's land.

In the circumstance I hold that the plea of rejuidcata does not apply in this case.

In conclusion I hold that a critical evaluation of the evidence on record depicts the Plaintiff failed to prove his claim for which reason I dismiss same accordingly.

Cost of GH¢40,000 against the Plaintiff in favour of the Defendant as agreed by Counsel for the parties.

(SGD)

EMMANUEL AMO YARTEY (J)

COUNSEL:

KWADWO BOAMAH BOAKYE FOR FRANK DAVIES FOR PLAINTIFF PRESENT

OBED WORDU FOR PROSPER NYAHE FOR THE DEFENDANT PRESENT