



*creating any third party rights and or interest in the land described in (a) above by way of sale, collateral, security, mortgage, novation, sub-lease or in any manner whatsoever.*

*c. in the alternative to (b) above an order for the purported grantees of Defendant or occupants of the Plaintiff's land by any means to attorney tenancy to Plaintiff or demolition of their structures on the land at the cost of the Defendant.*

*d. general damages for trespass and costs incidental to the suit.*

## **THE BRIEF FACTS OF THE CASE**

It is the case of the Plaintiff a Lawyer by Profession that he lives in Winneba whilst the Defendant is the Head of Family and the stool caretaker of the Royal Twidan Family of Gomoa Pomadze.

Plaintiff avers that sometime in 2004, he acquired a land at Gomoa Pomadze from the Royal Twidan Family of Gomoa Pomadze represented by the then Ebusuapanyin Kwesi Tawiah and the then stool occupant Nana Kwesi Arhin for a fee and the transaction was covered by documents. The Plaintiff further avers that before the indenture was executed, Ebusuapanyin Kwesi Tawiah passed on and the indenture was executed by Nana Kwesi Arhin, the then Chief of Gomoa Pomadze and the successor of the Ebusuapanyin Kwesi Twidan (the Defendant herein).

The Plaintiff avers that he took immediate control and possession of the land, and erected corner pillars on the land. The Plaintiff then described his land as follows:

“All that property situated at Pomadze, Winneba in the Central Region of the Republic of Ghana bounded on the North by the property of the Royal Twidan family of Pomadze measuring two thousand two hundred (2200) feet more or less, on the West

by the Winneba-Swedru road and measuring two thousand two hundred (2200) feet more or less, on the south by the Royal Twidan family of Pomadze and measuring two thousand two hundred (2200) feet more or less on the East by the Royal Twidan family of Pomadze and measuring two thousand two hundred (2200) feet more or less and covering area of one hundred and eleven (111) acres more or less.”

According to the Plaintiff, he has seen some activities on the land for the past four years. The Plaintiff avers that, upon enquiry he found that the Defendant was responsible for alienation of portions of the land to third parties leading to development activities on the land.

#### **THE CASE FOR THE DEFENDANT**

**The Defendant was duly served with all the processes and was even present when direction was taken but failed to file response to the Plaintiff’s Writ and Statement of Claim neither did he file any witness statement.**

#### **ISSUES FOR TRIAL:**

1. Whether or not Plaintiff is entitled to his claims.
2. Whether or not the Defendant and his predecessors had transferred the interest in the land in dispute to Plaintiff and cannot re-alienate same to third parties.
3. Any other issues flowing from the pleadings.

*The main issue for determination is issue 2 -- WHETHER OR NOT the Defendant and his predecessors had transferred the interest in the land in dispute to Plaintiff and cannot re-alienate same to third parties.*

#### **THE BURDEN OF PROOF IN A CIVIL ACTION**

The law of proof in Ghana is regulated by the Evidence Act 1975 NRCD 323 and the common law established by sound legal opinions of the Superior Courts in Ghana and in other jurisdictions. The general position is captured in the principle ‘who alleges must prove’. This position of the law has been affirmed by **Kpegah J. A.** (as he then was) in the case of **ZABRAMA VRS. SEGBEDZI (1991) 2 GLR 221 at 224** as follows:

*“.....a person who makes an averment or assertion, which is denied by his opponent, has the burden to establish that his averment or assertion is true. And he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred. The nature of each averment or assertion determines the degree and nature of the burden”.*

This position is provided by **Section 14 of the Evidence Act 1975 NRCD 323** which provides that;

*“Except as otherwise provided by law, unless and until it is shifted, a party has the burden of persuasion as to each fact the existence or non – existence of which is essential to the claim or defence he is asserting”.*

Also, **Sections 10, 11, 12, and 14 of the Evidence Act 1975**, sets out the standard of proof in any civil discourse. **Section 10 (1) and (2) of the EVIDENCE ACT, 1975**<sup>1</sup> defines the burden of persuasion thus:

- (1) *For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.*

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<sup>1</sup>(NRCD 323)

(2) *The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.*

**Also, Section 11(1)(4) of NRCD 323 deals with the burden of producing evidence and defines same thus:**

(1) *For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.*

(4) *In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence.*

**Again, Section 12(1)(2) NRCD 323 provides for the Proof by a Preponderance of the Probabilities thus,**

(1) *Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.*

(2) *"Preponderance of the probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.*

**SEE ZABRAMA VRS. SEGBEDZI<sup>2</sup> AND MAJOLAGBE VRS. LARBI AND ORS<sup>3</sup>**

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<sup>2</sup>[1991] 2 GLR 223

<sup>3</sup>[1959] GLR 190 – 195

## **THE EVIDENCE, THE ANALYSIS AND THE APPLICABLE LAW**

The Plaintiff in his evidence informed the court that sometime in 2004, he acquired the land in dispute at Gomoa Pomadze from the Royal Twidan Family of Gomoa Pomadze represented by the then Ebusuapanyin Kwesi Tawiah and the then stool occupant Nana Kwesi Arhin for a fee and the transaction was covered by documents. The Plaintiff further avers that before the indenture was executed, Ebusuapanyin Kwesi Tawiah passed on and the indenture was executed by Nana Kwesi Arhin, the then Chief of Gomoa Pomadze and the successor of the Ebusuapanyin Kwesi Arhin (the Defendant herein). See Exhibit 'A' being the receipt covering the amount paid for the land, Exhibit 'B' and 'C' are documents and leasehold agreements including site plans covering the land.

The Plaintiff also described his land in paragraph 4 of his witness statement or examination in chief and same is unchallenged.

Interestingly, the Defendant was in court during the trial and opted to cross examine the Plaintiff. In fact the only question the Defendant asked the Plaintiff by way of cross examination was:

**Q: Do you know Abusuapanyin Kwaku Attah?**

**A: That is you.**

It is trite that family land can be alienated by the head of family and principal members of the family. Even the head of family can solely alienate land belonging to the family same is voidable unlike that of a chief which is void if done without the principal elders of the stool. It is therefore not surprising that the head of family can sue and be sued to

maintain interest in land. See: KWAN VRS. NYIENI AND ANOTHER<sup>4</sup>The family setting therefore operates in a company or corporate – like with perpetuity in succession unless the family but becomes extinct. It is also the reason why transactions entered with past head and principal members will bind present and future generation till expiration.

SEE: CHOU SEN LIN VRS. TORNADO ENTERPRISES LTD<sup>5</sup> AND AGYEIWAA VRS. P&T CORPORATION<sup>6</sup>

In the instant case before this court, I find that the Plaintiff duly acquired one hundred and eleven (111) acres belonging to the Defendant's family, of which he is the head of family. Therefore until the expiration of the terms of the leasehold agreement, the Defendant cannot by himself or on behalf of the family, further alienate lands the Plaintiff has already acquired without any recourse to him or his consent.

Also, the family had already sold the land to the Plaintiff and he is the sole person with the right to pass on his interest in the res litiga because the family has no interest to pass unto third parties.

This principle is explicit in the Court of Appeal case of AMEFINU VRS. ODAMETEY AND OTHER<sup>7</sup>PER SOWAH, KINGSLEY-NYINAH AND ANNAN JJ.A. among others when the court stated thus:

**"Now it is an elementary principle of law that nemo dat quod non habet, in other words a vendor of land can give no better title than he possessed himself, and if the Stool had as a fact sold to the Plaintiff as he alleges in 1914 .**

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<sup>4</sup>[1959] GLR 67

<sup>5</sup>[2007 – 2008 ] 1 SCGLR 135 @ 140

<sup>6</sup>[ 2007 – 2008] 2 SCGLR 985 @ 990 – 991.

<sup>7</sup>[1977] 2 GLR 135-145

**. . a subsequent conveyance by the same Stool of the same piece of land to another party, i.e., the Defendant would clearly not avail the latter."**

**SEE:**

**1. KODILINYE VRS. ODU (1935) 2 W.A.C.A. 336 AT 337-338**

**2. RICKETTS VRS. ADDO [1975] 2 G.L.R. 158 AT 166, C.A. PER AMISSAH J.A.**

**3. NARTEY VRS. MECHANICAL LLOYD ASSEMBLY PLANT LTD. [1987-88] 2 G.L.R. 314 S.C.**

**From the foregoing the Plaintiff led evidence on the balance of the preponderance of the probabilities to establish his claims.**

**Accordingly, judgment is entered against the Defendant in favour of the Plaintiff for the following reliefs:**

a. Declaration of title to all that piece of land situate lying and being at Pomadze, Winneba in the Central Region of the Republic of Ghana bounded on the North by the property of the Royal Twidan Family of Pomadze measuring two thousand two hundred (2200) feet more or less, on the West by the Winneba-Swedru road and measuring two thousand two hundred (2200) feet more or less, on the south by the property of the Royal Twidan family of Pomadze and measuring two thousand two hundred (2200) feet more or less on the East by the property by the Royal Twidan family of Pomadze and measuring two thousand two hundred (2200) feet more or less and covering area of one hundred and eleven (111) acres more or less.

b. Recovery of possession and perpetual injunction restraining the Defendant his agents, assigns, hirelings, privies, and/or any person(s) claiming under or through him in any manner whatsoever.

There will be no order as to cost and damages for trespass as Plaintiff says he is waiving all issues of cost and damages as the Defendant and his family were his grantor having obtained the land through his predecessors at the time the Defendant was a principal elder and now the head of family.

(SGD.)

**JUSTICE ABOAGYE TANDOH  
HIGH COURT JUDGE.**

**COUNSEL**

**NO LEGAL REPRESENTATION FOR THE PLAINTIFF.**

**NO LEGAL REPRESENTATION FOR THE DEFENDANT.**

/MK/

