

IN THE SUPERIOR COURT OF JUDICATURE

**IN THE HIGH COURT OF JUSTICE HELD AT ASSIN FOSO IN THE CENTRAL
REGION OF THE REPUBLIC OF GHANA ON WEDNESDAY THE 5TH DAY OF
JULY, 2023 BEFORE HIS LORDSHIP JUSTICE JOHN BOSCO NABARESE**

SUIT № LS/04/98

AMA AKYERE

(SUBSTITUTED BY TIMOTHY EDUFUL)

(SUBSTITUTED BY SAMUEL OPPONG)

~ ~ **PLAINTIFF**

VERSUS

KOJO KONIN a.k.a PAUL KOJO KWANING

~ ~ **DEFENDANT**

JUDGMENT

This case has an unusual chequered history. The action was instituted on 19th November, 1998 by the original plaintiff Ama Akyere per her lawful Attorney Timothy Eduful, against the defendant. For various reasons, the case had been pending until judgment is now being delivered. All parties in the case, including their counsel, and even the Court itself, have to share in the blame for this chequered history.

Be that as it may the plaintiff who sued per her lawful attorney, by her amended writ of summons filed on 24th October, 2017, claimed against the defendant the following reliefs:

- a. *A declaration of title to all that piece or parcel of land situate, being and lying at Ntiako and bounded by the farms of Kofi Ketu, Yaa Saara, Maame Komfo and Attadensu Forest, Maame Tinagya and Yaw Esuah, the land currently being farmed by tenant farmers Kwesi Kwarfo and Kobina Donkor.*
- b. *A declaration of title to all that piece or parcel of land situate, being and lying at Ntiako and bounded by the farms of Maame Tinagya, Kwabena Donkor, Kwesi Kwafo and farmed by a tenant called Kofi Ketu.*
- c. *An order of perpetual injunction restraining the Defendant and his agents, assigns, and or servants and all those claiming through him from in any way dealing with or interfering with plaintiff's quiet enjoyment and possession of the lands described in paragraphs (a) and (b) supra.*
- d. *Costs*
- e. *Any other relief(s) deem fit.*

In her amended statement of claim, the plaintiff described the lands in dispute as forming part of a large tract of land called Ntiako and, that the said large tract of land was broken by her uncle called Bugyei several years ago with the properties of Kweku Anne, Kweku Arhin, Maame Komfo, Maame Tinagya, Nana Asua Panin, Yaw Donkoh, Yaa Sarah, Toku, Assin Edubease to Homaho Road and Attadensu Forest as boundaries. The plaintiff stated that after the death of her uncle Bugyei, he was succeeded in the following manner:- Kweku Frimpong, Kwame Aboagye @ Joshua Aboagye and then herself. She said after the virgin forest was broken by the said Bugyei, he cultivated cocoa plantation, but with time the cocoa died off. According to the plaintiff during the reign of Kwame Aboagye, he re-cultivated cocoa plantation and granted portions of the land to Kojo Anaafi and Abena Kyiaa, who are mother and uncle of the defendant. The plaintiff further said Kwame Aboagye gave portions of the

said land to two tenant farmers such as Kobena Donkoh and Akwesi Kwaful on Abunu basis, which was evidenced in writing.

It is also the contention of the plaintiff that Kwame Aboagye gave portions of the land to the children of Bugyei i.e Opanyin Dankwa (Bugyei's son). He also gave portions to her (plaintiff), including other family members such as Kojo Anaafi whose land is farmed by Kojo Paintil, Kofi Saara and Abena Akyea (parents of the defendant), whose land is farmed by Kofi Kwansa, Ama Sekyiwaa (wife of Kwame Aboagye) farmed by Atta John and Aboagye's son Esuah. She stated that the portion retained by Kwame Aboagye is bounded by the farms of Kofi Ketu, Yaa Saara, Maame Komfo and Attadensu Forest, Maame Tinagya and Yaw Esuah, which land is being farmed by Kwesi Kwarfo and Kobina Donkor as tenant farmers. The plaintiff's land granted to her by Kwame Aboagye is bounded by the farm of Maame Tinagyaa, Kwabena Donkor, Kwesi Kwarfo, and the tenant on the land is Kofi Ketu.

The plaintiff maintained that after the distribution, the tenant farmers rendered account to those on whose portion the respective tenant farmers were working. She stated that after the death of Kwame Aboagye, she took over the portion of land farmed by Kwame Aboagye after succeeding him, whilst also farming on her portion given her during the distribution. The plaintiff stated that during the month of February 1998, the defendant came to her and requested for a portion of the cocoa plantation for her personal use, and she refused, stating that the defendant's mother Abena Kyiaa and his uncle Kojo Anaafi had already been granted a portion of the said land during the reign of Kwame Aboagye a.k.a Joshua Aboagye. The defendant not satisfied with the refusal summoned her at the palace of the chief of Fanti Nyankumasi, where her vital witness called Kojo Bih was not allowed by the adjudication panel to give evidence. The plaintiff said the adjudication panel also refused to allow her next witness to come to the proceedings

because the witness was not a material witness, and then went ahead and gave their decision.

The plaintiff said she protested and the adjudicators then made the award to the effect that she should go for her portion of her land whilst the defendant should go for the land originally granted to her mother Abena Kyiaa.

It is the case of the plaintiff that the defendant protested to this arrangement and had made it impossible for her to enjoy the produce from her own farm. Hence this action.

In his amended statement of defence, the defendant indicated that it was Nana Akwesi Bugyei who broke the virginity of the disputed land, and said the disputed land shares boundaries with the properties of Akwesi Essuah, Akwesi Fobih, Maame Tenagyaa, Yaw Toku, Yaw Ahimen, Kwame Opoku, Yaa Saara, Kweku Anneh, Kofi Aboagye, Kwaku Bioh, the Attandensu Forest, Akwesi Kwarteng and Akwesi Bugyei, which is further divided into two by the road from Assin Edubiase to Assin Homaho.

The defendant stated that Nana Akwesi Bugyei was succeeded by Kwaku Frimpong @ Francis Akuoko and thereafter by Kojo Anaafi, and after he died, he (defendant) succeeded him. According to the defendant, the line of succession of the plaintiff is rather Yaw Korankye, Kwame Aboagye, Ama Akyere and Samuel Oppong, who took over the deceased farms at Nyetina and the environs of Assin Kwaata. The defendant asserted that the cocoa plantation cultivated by Nana Akwesi Bugyei is still existing at Ntiako and that Kwame Aboagye never re-cultivated any portion of the disputed land with cocoa and neither was any portion thereof granted to Kojo Anaafi and Abena Kyiaa. He said Kwame Aboagye only acted as a caretaker of the disputed land and during his tenure of office he granted portions thereof to Kwabena Donkoh, Akwesi Kwaful, Kofi Ketu, Yaw Akromah and Opanyin Otwey. The defendant contended that Kwame Aboagye died in 1980 and that he never gave a portion of the disputed land to

Nana Kwesi Bugyei's children, who requested for a portion of cocoa farm in the year 1992. The defendant further denied that Kwame Aboagye gave portion of the disputed land to Nana Bugyei's son called Yaw Essuah. He also denied that he gave portion of the disputed land to Opanyin Kofi Saara, Abena Kyiaa, Kojo Anaafi and Ama Sekyiwaa. He said Kwame Aboagye never gave a portion of the disputed land to Opanyin Kofi Saara, alias Kofi Aboagye or Ama Akyere, but that Opanyin Kofi Aboagye shares common boundary with Nana Akwesi, Bugyei and others.

It is the case of the defendant that it was in September 1992 that he requested for the release of the disputed land by virtue of his inheritance to the estate of Nana Akwesi Bugyei, which the plaintiff refused same. He then summoned the plaintiff before the chief of Fanti Nyankumasi, and that throughout the entire arbitration, one Kojo Bih sat in and did not project himself as a witness for the plaintiff. The defendant stated that all the witnesses called by the plaintiff during the arbitration were allowed to testify and it was the plaintiff who requested the panel of arbitrators to give their verdict after the plaintiff's last witness, one Adwoa Fordjour, had failed on three occasions to appear to give evidence. He said the plaintiff never protested against the verdict of the arbitrators, which was to the effect that he should take possession of Nana Akwesi Bugyei's properties at Ntiako.

Defendant thus counterclaims against the plaintiff as follows:

- i. Recovery of possession of the disputed land*
- ii. An order of perpetual injunction restraining the plaintiff, her agents, etc lawfully claiming through the plaintiff from having anything to do with the disputed land.*

At the close of pleadings, the issues and additional issues set down on 15th October, 2021 for trial were;

- a. *Whether or not the virgin forest of the disputed land was broken by Nana Bugyei defendant's ancestor.*
- b. *Whether or not the defendant is the successor in line of Nana Akwesi Bugyei.*
- c. *Whether or not the plaintiff's succession is from the line of Yaw Korankye or Nana Akwesi Bugyei.*
- d. *Whether or not there is a binding arbitral award between the parties concerning the land in dispute which declared the defendant to be the rightful owner of the land.*

Additional issues:

- i. *Whether or not during the reign of Kwame Aboagye, he re-cultivated cocoa plantation.*
- ii. *Whether or not during the reign of Kwame Aboagye, he granted portions of the land in dispute to Kojo Anaafi and Abena Akyia.*
- iii. *Whether or not Kwesi Bugyei is an ancestor of the plaintiff and thus the plaintiff is a successor in line.*
- iv. *Whether or not the land being claimed by the plaintiff is different from the land described by the defendant in his pleadings.*

The plaintiff's substitute testified himself and called two witnesses. It is the case of the plaintiff that the land in dispute forms part of a large tract of land called Ntiako, the virgin forest of which large tract of land was broken by an uncle of the plaintiff called Kwesi Bugyei several years ago. He said the land shares boundaries with the properties of Kweku Anne, Kweku Arhin, Maame Komfo, Tinagyaa, Nana Asua Panin, Yaw Donkoh, Yaa Sarah, Toku, Assin Edubease to Homaho Road and Attendensu Forest.

According to the plaintiff's substitute, on the death of Kwesi Bugyei, he was succeeded in the following manner: Kweku Frimpong, Kwame Aboagye alias Joshua Aboagye and the original plaintiff, Ama Akyere. He stated that it was when Kwame Aboagye became successor that he re-cultivated the cocoa plantations and granted portions of the land to Kojo Anaafi and Abena Akyia, who are the mother and uncle of the defendant, and also gave portions to Kobina Donkoh and Akwesi Kwaful as tenant farmers to work on Abunu basis. He tendered in evidence a memorandum of farming agreements and they were marked as Exhibits "A", "A1", "A2" and "A3" respectively.

As regards the arbitral proceedings, the plaintiff said they were inconclusive when the defendant lodged his complaint before the paramount chief of Nyankumasi, and yet the elders without properly listening to the side of the plaintiff went ahead and decided the matter which was protested by the plaintiff.

On his part, the defendant stated that he is the successor in title to Akwesi Bugyei, and the plaintiff is the successor in title to Yaw Korankye, and that their ancestors have a common heritage. He said their great grandmothers were Nana Kromaah, who gave birth to Yaw Korankye and the other was Nana Animah who gave birth to Nana Akwesi Bugyei. He stated that both men were farmers, with Nana Yaw Korankye having had all his farms, cocoa plantation and food crop farms at Nyetina within the environs of Assin Kwaata, and that of Nana Bugyei having had his farms in three places, namely; Nyetina, Akwesi-Akwesiso and Ntiako, now called Kwaful krom. According to the defendant, the two men; Yaw Korankye and Nana Akwesi Bugyei both stated that after their death, all their properties should be succeeded by their various sisters, and their descendants, that of Nana Yaw Korankye should be succeeded by his sister Kate Affumwaa and that of Nana Bugyei by her sister Nana Ofeiwaa and her descendants, and this arrangement has subsisted with no person crossing over to inherit from the other side.

The defendant said Yaw Korankye died first and his nephew Kwame Aboagye a.k.a Joshua Aboagye succeeded him. He said Nana Akwesi Bugyei died sometime thereafter and he was also succeeded by his nephew Francis Akuoko a.k.a Kweku Frimpong. He also stated that the virgin forest at Ntiako, being the disputed land was broken by Nana Akwesi Bugyei, and he also mentioned the boundary neighbours as Akwesi Fobi, Maame Tenagyaa, Akwesi Fobi again, Yaw Toku, Yaw Aheni, Kwame Opoku, Yaa Sarah, Kwaku Anneh, Kofi Aboagye, Kweku Bioh, Attendensu Forest, Akwesi Kwarteng and Akwesi Bugyei. The defendant also contended that Kwaku Frimpong died within three and half years after succeeding his uncle Akwesi Bugyei, and he was also succeeded by his nephew Kojo Anaafi, who was a businessman at Cape Coast, who authorised Kwame Aboagye who was the caretaker, to give his late grandfather Bugyei's farmland at Ntiako to tenant farmers such as Akwasi Kwiful, Yaw Akroma, Kofi Ketu to farm on Abunu basis. The defendant stated that there was an initial objection to Kwame Aboagye granting the land to tenant farmers by Kojo Anaafi's sister Abena Akyia, and Kojo Anaafi had to come down from Cape Coast to Assin Kwaata and on meeting his sister Abena Kyiah he talked to her into agreeing that he wanted the tenants to occupy the land in order to avoid people trespassing onto the land.

The defendant further stated that one Opanyin Kojo Painstil from Asikuma Baako also farmed at the boundaries of Kwaku Anneh, Kofi Aboagye, Kwaku Bioh and part of Attendensu forest to avoid trespass onto Nana Akwesi Bugyei's land.

The evidence of the defendant was that the plaintiff and her section of the family were laying claim over the lands of Akwesi Bugyei, having succeeded Kwame Aboagye when he died on 14th April, 1980. Together with her brother Kojo Danquah, they said it was Kwame Aboagye who led tenant farmers onto the land, and so the land belongs to Kwame Aboagye. The defendant admitted having summoned the plaintiff's family before the late Omanhene of Attendensu, Nana Tsibu Asare, as a result of the claim by

the plaintiff's family, and the elders pronounced that Ama Akyere, the original plaintiff was liable, after going through the case. He was then pacified with a bottle of Schnapps and compensated with GHC 5.00 over his victory. The defendant is therefore of the view that by this arbitral award the plaintiff is estopped from raising this matter again in this court.

The defendant then ended his evidence by stating that after the death of Ama Akyere, she was succeeded by the substituted plaintiff, who is now in control of Nana Yaw Korankye's cocoa farms and his lands, without him interfering with the plaintiff's substitute rights over the said properties.

Viewed from the pleadings, it appears the most important questions which the court has to determine are;

1. *Whether or not the plaintiff succession is from the line of Yaw Korankye or Nana Akwesi Bugyei*
2. *Whether or not the land being claimed by the plaintiff is different from the land described by the defendant in his pleadings, and*
3. *Whether or not there is a binding arbitral award between the parties concerning the land in dispute which declared the defendant to be the rightful owner of the land.*

The other issues shall however be decided alongside these main issues, but not in any particular order.

It is now common learning that in an action for declaration of title, the onus of proof is upon the plaintiff to show clear title. So also is the case of a defendant who files a counterclaim in the substantive action if he is to succeed. Thus, sections 11 of the Evidence Act, 1995 (N.R.C.D 323), provides; "...the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue."

It is also provided in Section 14 of N.R.C.D 323 (supra) that: “...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.”

The law fixes upon a party the burden of proving certain fact in issue as a condition of giving the party judgment, and this burden must be satisfactorily discharged.

In the case of **ACKAH V. PERGAH TRANSPORT [2010] SCGLR, 729**, the Supreme Court said at page 731 of the report (headnote), which I quote in part, that; “It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail...”

See: MALM V. LUTTERODT [1963] 1GLR 1

In the instant case, the plaintiff must establish his title to the disputed land having claimed for a declaration of title to the disputed land and other ancillary reliefs, and the defendant, having counterclaimed for recovery of possession of the disputed land and for perpetual injunction, he has put his title in issue and must also lead evidence in proof of his counterclaim. This proof must however be “by a preponderance of probabilities” within the context of the burden of proof as stated in section 12 (2) of N.R.C.D 323 (supra)

See: SAGOE & OTHERS V. SOCIAL SECURITY AND NATIONAL INSURANCE TRUST (SSNIT) [2012] 2 SCGLR 1093

There is no doubt that the evidence has established that the disputed land is situate at Ntiako, which land forms part of a large tract of land at Ntiako (which the defendant stated is now being referred to as Kwaful krom), which virgin forest was first broken by one Nana Akwesi Bugyei who cultivated cocoa on it. It is also clear on the evidence, by

exhibits "A", "A1", "A2" and "A3", that portions of the land were granted to tenant farmers on "*abunu*" basis by Kwame Aboagye @ Joshua Aboagye and Opanyin Kwadwo Dankwa, who was described by the plaintiff as "very irresponsible". The evidence came to light during cross-examination of the plaintiff by counsel for the defendant, as follows;

"Q: You told this court that Kojo Danquah could not succeed Kojo Anaafi his brother because he was very irresponsible.

A: Yes he was irresponsible."

Some of the tenant farmers granted portions of the disputed land were PW1, one Kwesi Kwarfo and Yaw Akroma.

In her written submission counsel for the defendant sought to suggest that the court should not attach any weight to Exhibits "A", "A2" and "A3". Regarding Exhibit "A", counsel stated that the parties to the transaction themselves did not sign the document, and neither did any of their witnesses also set their mark on the document. On Exhibit "A2", counsel submitted that the land in issue is situate at Asamang village via Homaho which village has no bearing on the disputed land at Ntiako. Indeed, when the plaintiff was questioned in respect of Exhibit "A2" this was his response;

Q: The land being granted in Exhibit "A2" is at Asamang Village. Do you know Asamang Village.

A: I do not know of a place called Asamang, but the land in dispute is at Ntiako.

As regards Exhibit "A3", the land was granted to tenant farmers by the "*irresponsible Opanyin Dankwa*". And when plaintiff was asked by counsel for the defendant that the transaction was between Opanyin Kojo Dankwah and Isaac Donkor and not from Kwame Aboagye as claimed by the plaintiff, he responded that the original plaintiff,

Ama Akyere, being the elder sister of Kojo Dankwah authorised him to make grants to prospective grantees. But this is the person who the plaintiff described as being “irresponsible” and yet he wants this court to believe that he was given the authority by Ama Akyere, to grant portions of the disputed land to tenant farmers. This is indeed absurd, to say the least.

A closer look at Exhibit “A” shows that it was allegedly or purportedly executed on 11th May, 1984, and Exhibit “A3” on 15th May, 1998. In his evidence in-chief, the defendant said that Joshua Aboagye @ Kwame Aboagye died on the 14th April, 1980 after being succeeded by Ama Akyere, and she and her brother Kojo Danquah took over the farms saying that it was Kwame Aboagye who granted the farms to tenants farmers, as such they belong to Kwame Aboagye. The defendant further stated that his uncle, Kojo Anaafi and his sister Abena Kyiah, being his mother summoned Ama Akyere and his brother Kojo Danquah before the chief of Assin Kwaata and his elders, but during the settlement, the matter ended abruptly without any resolution. His mother Abena Kyiah later died on 4th April, 1983, followed by his uncle Kojo Anaafi about five and half years later, and he, the defendant succeeded him as indicated in the Letters of Administration, Exhibit “PKK1”. The defendant’s evidence also disclosed that in 1992, Abena Attah Animah and Akwesi Danquah, two children of Nana Akwesi Bugyei approached the chief of Assin Kwaata, Nana Ampong, to demand a portion of their late father, Akwesi Bugyei’s farm. This led to the invitation of Ama Akyere and her brother Kojo Danquah by Nana Ampong and the request put before them. They then responded that they could not assign any portion of the farm to the said two children without seeking the consent of the defendant. The defendant said he was by then at Foso Training College and he sought permission and attended the call by Nana Ampong and he agreed to give Yaw Akroma’s cocoa farm to them for their personal use.

This piece of evidence by the defendant was not challenged and neither was it discredited under cross-examination of the defendant. If that was the situation, it can be inferred that after having obtained letters of Administration after the death of Kwadwo Anaafi, both Ama Akyere and Kojo Danquah came to the realization that they could not, by themselves, grant Nana Akwesi Bugyei's lands to his children without seeking the consent of the defendant. It is not surprising therefore, under cross-examination, PW1 said that when Kojo Danquah @ Kodie succeeded Ama Akyere, he directed that Yaw Akroma should account to the children of Akwesi Bugyei.

As regards the probative value of Exhibits 'A', "A1", "A2" and "A3", it can be said that they only try to show that the parties entered into *abunu* tenancy agreement and nothing more. Their effect is only to indicate that there was a tenancy agreement between the parties on *abunu* basis. It is even of no consequence if they were not exhibited and evidence was adduced to the satisfaction of the court that the parties had entered into a tenancy agreement on *abunu* basis.

The settled position is that customary law knows no writing, and no document is even required to effectuate such a transfer of interest in land. What must be noted however is that, though Exhibits "A" "A1" "A2" and "A3" offend the mandatory provisions of section 4 of the **Illiterates Protection Ordinance, Cap 262**, by the absence of any jurat, PW1 and PW2, by their evidence clearly understood and appreciated fully the contents of those documents and were abiding by the terms of such an agreement. That is not to say that the exhibits satisfy the requirement of the law. Far from that!

See: DUODU AND OTHERS V. ADOMAKO & ADOMAKO [2012] 1 SCGLR 198

Now this brings me to the circumstances under which these *abunu* tenancy agreements were entered into.

Under cross-examination, the defendant denied that it was as a result of Kwame Aboagye succeeding to the land in dispute that made him grant those lands to tenant farmers as of right. The defendant maintained that Kwame Aboagye was only a care taker of the lands. The defendant also denied under cross-examination that after Kwame Aboagye assumed control over the land he shared it among the family members who were entitled to the land.

It appears to me that the plaintiff did not do enough to discredit the evidence of the defendant that Kwame Aboagye was only a care taker of the land in dispute. In fact, the defendant said his mother Abena Akyea raised issue with the control of the land by Kwame Aboagye, and protested the attempt by Kwame Aboagye to grant the land to tenant farmers. As a result Kwame Aboagye went to Cape Coast, where Kojo Anaafi was running or operating two stores, to inform him about the objection of the defendant's mother to the grant of the land to tenant farmers. This made Kojo Anaafi to come to Assin Kwaata to meet his sister Abena Akyea and Joshua Aboagye, and Kojo Anaafi talked to Abena Akyeah into agreeing that tenants could cultivate the land in order to avoid people trespassing unto it.

The defendant further said her mother was a nursing mother then and she could not cultivate all the vast land and she then instructed Kwame Joshua a.k.a Kwame Aboagye to give out the land to tenant farmers on *abunu* basis. In addition, the defendant stated that under Abena Akyeah's instructions, a portion of the land was left for Abena Akyeah to cultivate her food crops, whilst the tenant farmers planted their cocoa seedlings. The defendant even said that it was his mother Abena Akyaah who gave the tenant farmers food crop seedlings to plant on their first prepared farms including plantain suckers, cocoyam tubers, cassava sticks, among other crops. He also indicated that Kwame Joshua a.k.a Kwame Aboagye told Abena Akyaah his mother to inform her brother Kojo Anaafi to find someone to occupy the boundaries of part of the

Attendansu forest, and the farms of Kwaku Anneh, Kofi Aboagye, and Kwaku Bioh. This request made Kojo Anaafi to give three cedis (¢ 3.00.00) to Abena Akyeah who gave same to Akwesi Kwaful, a tenant farmer, who bought Opanyin Kojo Paintsil from Asikuma Baako to farm along those boundaries.

The defendant's testimony is in consonance with the *abunu* tenancy under which a landowner either cultivates a farm on his own land and thereafter hands it over to another person to maintain or provides that other person with money and/or labour to cultivate the farm.

See: KWARTENG V. AGYAKO [1968] GLR 292

LAMPTEY ALIAS NKPA V. FANYIE [1989-90] 1 GLR 286

PW1 even testified that when he was sent unto the land by Kwame Aboagye, he continued with the cultivation of the land started by Akwesi Bugyei, but later had to cut down cocoa trees and re-planted new trees. As to how the proceeds were being shared, I find that the tenant farmers were accounting to Kojo Anaafi through Kwame Aboagye. Indeed when questioned under cross-examination regarding who receives the proceeds, this was PW1's answer;

Q: Because Abena Akyaa predeceased Kojo Anaafi, it was impossible for her to receive proceeds from Kojo Paintsil as you claim in your evidence.

A: We were accounting to Kojo Anaafi, Abena Akyea never received the proceeds personally.

I therefore find that the evidence of the defendant is credible and reasonable, that when Kwame Aboagye wanted to grant the land to tenant farmers, and Abena Akyeah protested, his brother had to intervene and talk to Abena Akyeah to permit Kwame Aboagye do so to avoid trespass onto the land. It is through that intervention which then gave way to Kwame Aboagye to continue to grant land to tenant farmers on the

instructions of Kojo Anaafi and her sister Abena Akyaah, and not on the authority of Kwame Aboagye himself.

I disagree with the submission by counsel for the plaintiff to the effect that it was because Abena Akyaah knew that Kwame Aboagye had authority over the land that made her to inform Kwame Aboagye for permission to give her a portion to cultivate. That view is not borne out by the evidence. It was when Abena Akyea raised issue with the control of the land by Kwame Aboagye by his attempt to send tenant farmers unto the land, and after Kojo Anaafi was informed he came from Cape Coast and met Abena Akyea and Kwame Aboagye and they came to an understanding that tenant farmers be allowed to cultivate the land to prevent trespassers unto it that Abena Akyea then requested for portions to be left for her to cultivate for her sustenance.

The request was directed to Kojo Anaafi and the tenant farmers, as well as Kwame Aboagye. This is reasonable because the tenant farmers and Kwame Aboagye were staying at Assin Kwaata, whereas Kojo Anaafi was in Cape Coast operating his stores.

Thus, it is clear that Kwame Aboagye was a caretaker of the disputed land. As caretaker, Kwame Aboagye was supposed to protect the title of the owner, being Kojo Anaafi, who had succeeded to the disputed land. In fact Kojo Anaafi could not make a valid alienation of any portion of the land without informing Kwame Aboagye since it was Kwame Aboagye who was on the ground and was probably acquainted with the boundaries of the land and the extent to which grants had already been made.

See: BIRIMPONG V. BAWUAH [1991] 2 GLR 20

So on the basis of that both Abena Akyea and Kojo Anaafi could even witness tenancy agreements entered into by various tenant farmers. I do not accept the evidence of the plaintiff under cross-examination that Kwame Aboagye could do anything he wanted

as of right. The inherited property was owned by the family, and as such, it is indivisible and cannot be dealt with as if it were personal property.

See: KOOMA @ AIKINS V. EKUA @ HAYFRON & OTHERS [1997-98] 1GLR 831

Now to the issue of the line of succession from Akwesi Bugyei section of the family and that of Yaw Korankye, whose mothers were uterine sisters, namely Amoakoa and Anima respectively. Akwesi Bugyei and Yaw Korankye were therefore cousins.

The question was then put to the plaintiff on this issue by counsel for the defendant, and he responded thus:

Q: Can you tell the court the line of succession of Kwesi Bugyei

A: They are Kweku Frimpong, and he was succeeded by Kwame Aboagye @ Kwame Joshua. Then Ama Akyere my grandmother succeeded Kwame Aboagye @ Kwame Joshua. I then succeeded my grandmother Ama Akyere.

Q: Your testimony that Kwame Aboagye and Ama Akyere and yourself succeeded Kwaku Frimpong is not true.

A: It is true. Yaw Korankye was the only child of his parents, so after his death he was succeeded by Kwame Korankye and Akwesi Bugyei, and Kwaku Frimpong, who was a timber merchant and he was invited to succeed Akwesi Bugyei and when Kweku Frimpong died Kwame Aboagye @ Kwame Joshua the only nephew then succeeded Kweku Frimpong.

The defendant was also cross-examined on this issue as follows:

Q: I put it to you that the line of succession in respect of Akwesi Bugyei has been from Kweku Frimpong, Kwame Aboagye and the original plaintiff Ama Akyere

A: *It is not true. The line of succession of Yaw Korankye is Kwame Aboagye, Ama Akyere, and then Samuel Oppong, the substituted plaintiff. From Akwesi Bugyei you have Kweku Frimpong, Kojo Anaafi and Paul Kojo Kwaning i.e myself.*

Indeed, both the plaintiff and the defendant were at *ad idem* when they both agreed that Akwesi Bugyei was succeeded by Kweku Frimpong. Their disagreement was that whereas the plaintiff stated that Kweku Frimpong was succeeded by Kwame Aboagye, the defendant however said Kweku Frimpong was succeeded by his uncle Kojo Anaafi. The defendant even stated in an answer under cross-examination by counsel for the plaintiff that every one of them i.e the plaintiff or himself, stays at his own predecessors house and farms on their predecessor's land. This evidence came out clearly when the plaintiff was being cross-examined by counsel for the defendant:

Q: *Kwesi Bugyei, did he put up a house*

A: *Yes, he built a house and even put up one house for the sister Kate.*

Q: *Does the defendant live in Kwesi Bugyei's house*

A: *Yes, he lives in the said house.*

Q: *Where you are living, was it put up by Yaw Korankye.*

A: *I am living in Kate's house that was built for her by Kwesi Bugyei*

Q: *You did not dispute that Yaw Korankye put up a house*

A: *Yes he did so*

Q: *Who lives in that house*

A: *My brother Eduful lives in that house*

It must be observed that Timothy Eduful (who is the same person as Eduful) as mentioned under cross-examination, was the immediate substitute after the demise of the original plaintiff Ama Akyere, and when he also died the present plaintiff substitute took over to prosecute the case.

When the plaintiff was asked to mention the names of three persons from Kwesi Bugyei's section of the family that have inherited from Yaw Korankye's side, his answer was categorical: "There is none".

If that is the case, then an inference can be drawn from the evidence that there has been no cross-sectional succession between the two cousins; Yaw Korankye and Akwesi Bugyei. I accept the version stated by the defendant that each of them stays in his predecessor's house and farms on his predecessors land. The evidence of the defendant on this issue is more reasonable and probable than that of the plaintiff and therefore more satisfactory. So therefore because the line of succession of the defendant is from Akwesi Bugyei to Kweku Frimpong, to Kojo Anaafi and then to the defendant, that probably informed Kwame Joshua @ Kwame Aboagye to tell Abena Kyiaah to inform his brother Kojo Anaafi to find tenant farmers to farm along the boundaries of the Attendansu forest, etc. and she gave an amount of three cedis (C 3.00) that was then given through her to Akwesi Kwaful, a tenant farmer who brought in Opanyin Kojo Paintsil to farm at the boundaries to prevent trespassers

It must be said that DW1 even confirmed in his evidence that Yaw Korankye and Akwesi Bugyei had their individual farms that have passed to their respective successors without one crossing over to the other side to inherit.

The issue of whether or not the land in dispute is the same land being claimed by either party was also raised for determination. The rival parties to the action made claims to the same land and as such there cannot in point of procedure and substance be any

obligation on either of them to prove the boundaries of the land in dispute. The various descriptions of the land by the parties in their pleadings, commencing with that of the plaintiff are set out in the amended writ of summons as follows:

“ (a) A declaration of title to all that piece or parcel of land situate, being and lying at Ntiako and bounded by the farms of Kofi Ketu, Yaw Saara, Maame Komfo and Attendansu forest, Maame Tinagya and Yaw Essuah. The land is currently farmed by tenant farmers called Kwesi Kwafo and Kobina Donkor.”

“ (b) A declaration of title to all that piece or parcel of land situate, being and lying at Ntiako and bounded by the farms of Maame Tinagyaa, Kwabena Donkor, Kwesi Kwafo and farmed by a tenant called Kofi Ketu”

The defendant’s description from his amended statement of defence is that:

“...the disputed land shares boundaries with the landed properties of Akwesi Essuah, Akwesi Fobih, Maame Tenagyaa, Akwesi Fobih again, Yaw Toku, Yaw Ahimen, Kwame Opoku, Yaa Saara, Kweku Anneh, Kofi Aboagye, Kweku Bioh, the Attendansu forest, Akwesi Kwarteng and Akwesi Baagyei. The disputed land is further divided into two by the road from Assin Edubiase to Assin Homaho.”

Reading the two descriptions put up by the parties to this dispute, the land appears to be the same apart from the fact that the description given by the defendant related more to the entire virgin forest broken by Akwesi Bugyei at Ntiako. There can be no credible dispute that the action herein is being contested by the parties in respect of the same area. Indeed, in their respective evidence the parties left no one in doubt that they were litigating over the same piece of land. That being the case, there is not much substance in any contention to the contrary. In the light of the absence of any dispute over the

identity of the disputed land, I find that the lands being claimed by the plaintiff are the same lands described by the defendant in his pleadings.

The defendant however tendered exhibits “PKK2”, or “A4” and “PKK3” in evidence in support of his claim to the land. For unexplained reasons, the defendant who disclosed his source of the said exhibits, being from one Kwaku Korankye, was not called or invited to testify, the exhibits having been disputed under cross-examination as being genuine or authentic. I must say that the two exhibits present their own evidential challenges. It appears, as a result of that, counsel for the defendant did not comment on them in her written address. Section 136 of N.R.C.D 323 (supra) provides the necessary guide or test for authenticity or genuineness of exhibits. It provides that:

“136 (1) Where the relevancy of evidence depends upon its authenticity or identity, so that authentication or identification is required as a condition precedent to admission, that requirement is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims.”

Acceptable or permissible means of authentication includes authentication by testimony of a witness with knowledge, authentication by admission; authentication by non-expert opinion on writing or authentication by comparison by court witness.

As stated supra, doubts have been cast on the credibility of the two exhibits during cross-examination and as such the defendant was obliged to lead further evidence to satisfy the court as to their authenticity as required. No witness was called by the defendant from Kwame Aboagye’s family, especially Kwaku Korankye, from whom the defendant stated he obtained the two documents, and where the defendant said he got the original documents to make photocopies. The said Kwaku Korankye should have been called to testify on the veracity of the said exhibits, particularly when issue was raised about thumbprint on Exhibit “PKK2” or “A4”. Kwaku Korankye would have

dispelled all doubts about the said Exhibits. Since one of the means of authentication accorded recognition under N.R.C.D 323 is authentication by comparison by the court, I have examined Exhibit "PKK2" or "A4" and observed Exhibit "PKK2" has a thumbprint but no name listed against the thumbprint. Exhibit "A4" however has no thumbprint. There is also no signature or mark on the section for commissioner for oaths on the two documents. The evidence also is clear that Exhibits "PKK2" or "A4" and Exhibit "PKK3" were all procured for the purpose of this case. Therefore, in the light of any evidence that would demonstrate that the two exhibits were indeed genuine and that would also assuage the lingering doubts about them, no premium could be attached to Exhibits "PKK2" or "A4" and Exhibit "PKK3" as same are invalid.

Let me now tackle the issue of the arbitral proceedings that the plaintiff claimed were inconclusive. According to the plaintiff it was when the defendant requested for a portion of the cocoa plantation for his personal use in 1998 from Ama Akyere, the original plaintiff and he was refused that the defendant lodged a complaint with the Paramount Chief of Nyankomase, whereupon during the proceedings, 'Kojo Bi' PW2, plaintiffs vital witness was not allowed to testify. Kojo Bi, @ Stephen Donkor's testimony during the trial on this issue never indicated that he was a witness for the plaintiff and neither was he not allowed to testify for the plaintiff before the elders at the Nyankomasi Chief's palace during the settlement of the matter. The plaintiff said that during the settlement the elders told the plaintiff to go for her land. And when asked by counsel for the defendant which land did the elders direct the defendant to also go for, the plaintiff answered that he did not hear anything of the sort. When pressed further that if the elders told Ama Akyere to go for the land belonging to Akwesi Bugyei, she could have equally gone for the land of the defendant because it also belongs to Akwesi Bugyei. The plaintiff then responded that it is Akwesi Bugyei's

land that was divided and given to the defendant's uncle and the defendant is on that land presently.

It is noted that the law reports are replete with cases on the pre-requisites of a valid customary arbitration and negotiated settlement. These include:

- i. Voluntary submission by the parties of their dispute to an arbitrator for the purpose of having the dispute decided informally, but on the merits.*
- ii. Prior agreement by both parties to accept the award, and*
- iii. Publication of the award.*

See: MANU V. KONTRE [1965] GLR 375, SC

BUDU II V. CEASAR [1959] GLR 410.

DONKOR V. ISIFU [1963] 1 GLR 418, SC

From these authorities it is settled that where the settlement does not measure up to a valid arbitration, it is usually described as a negotiated settlement.

In **TWUMASI V. BADU [1957] 2 WALR 204**, the court held that the essential difference between a binding arbitration and reference to a third party for the purposes of seeking a negotiated settlement is the presence or otherwise of a prior agreement to be bound by the decision of the arbitrator. The court held further that whether the prior agreement exists or not is a question of fact to be determined by the evidence. The case of **ZOGLI V. GANYO [1977] 1 GLR, 297, CA**, cited by counsel for the defendant, also discussed the difference between a binding arbitration and a negotiated settlement. The Court of Appeal held in the case "that another essential difference is that the result of a negotiated settlement is not binding until it was accepted by both parties. Once the award is accepted, it is binding on the parties and it makes no difference if one party were to change his mind later"

See also: 1. ADAI V. ANANE [1963] 1 GLR 144

USSHER V. KPANYINLI II [1989-90] 2 GLR 13, CA

It was held **in FORDWOUR V. NIMO [1962] 1GLR 305** that for an arbitration to be effective and binding on the parties it should be a final one in the sense that the subject matter is certain.

In the instant case if one is to go by the evidence of the plaintiff and his witnesses, and even that of the defendant, if there was any valid arbitration, the subject matter being the land was not pronounced upon with certainty by the panel of arbitrators. If the elders declared that the plaintiff only should go for her land and nothing was said about the defendant then no final decision on the matter was reached. The award therefore cannot be held to have had a binding effect on the parties. It appears to me that what took place before Nananom was a negotiated settlement, which did not satisfy any prior agreement by both parties to accept the award.

The defendant, having realized that Ama Akyere and her brother Kojo Danquah were laying claim over the lands of Akwesi Bugyei, summoned them before the elders at Attendensu, but there appears not to have been a specific pronouncement on the matter, though some kind of award was made. No witness was called from the Nyankomasi Chief's palace to testify in support or against the said arbitration apart from the parties themselves who gave contrary opinions on it.

As stated earlier, a prior agreement to be bound by an arbitration award cannot be displaced by a subsequent act. Whilst the arbitration proceedings were before Nananom, the plaintiff proceeded to court to issue a writ, and when the defendant was prevailed upon to have the mater settled out of court, he stated to Nananom to allow the court to settle it since it was the plaintiff who took the action in court. It is now

settled law that even payment of a fee is not conclusive evidence of a binding arbitration since it could be equally consistent with giving a present, according to custom, to those who attempt reconciliation.

See: GYESIWA V. MENSAH, WEST AFRICAN COURT OF APPEAL, 10TH DECEMBER, 1947, Unreported.

On the evidence, I therefore find that the arbitration or negotiated settlement was inconclusive and as such the plaintiff is not estopped from challenging the validity of the said arbitral award.

Finally, I must point out some conflicts, contradictions and discrepancies in the evidence of the plaintiff, especially when he was being cross-examined. For instance, he was questioned thus:

Q: I put it to you that Ama Akyere succeeded Yaw Korankye even though the elder brothers were alive

A: That is not true and I have evidence to support that. It is not Ama Akyere who succeeded Yaw Korankye but it was Kwame Aboagye instead. Yaw Korankye was the only son of the mother, and Kwesi Bugyei was a chief of Assin Kwaata and since Kwesi Bugyei was already a chief, he could not succeed Yaw Korankye. So Kwame Aboagye who happens to be the nephew of Kwesi Bugyei was made successor to Yaw Korankye. (emphasis mine)

It follows that Kwame Aboagye who was the nephew of Kwesi Bugyei was made the successor to Yaw Korankye. This evidence certainly conflicts with the plaintiff's evidence on oath, regarding his line of succession from Akwesi Bugyei, who broke the virgin forest of the land in dispute. It also came out clearly during cross-examination of the plaintiff that there has been no person from Akwesi Bugyei's section of the family to have ever inherited anything from Yaw Korankye's side. Then again, under cross-

examination, when the plaintiff was asked who the defendant succeeded, he responded that the defendant never succeeded anyone, and that it was the defendant's mother who succeeded Kojo Anaafi. When the plaintiff was then pushed to the wall that the defendant's mother Abena Akyea who died before Kojo Anaafi could not have succeeded Kojo Anaafi, then the plaintiff changed his story by stating that it was Adwoa Fordjour, the sister of Abena Akyea, who succeeded Kojo Anaafi.

It is understandable that the plaintiff did not want to mention that it was the defendant who succeeded Kojo Anaafi, his uncle, but his answer only expose the incredible nature of his evidence and therefore incapable of supporting his case, over that of the defendant's in respect of the disputed land.

It is clear that there are some conflicts, contradictions that may be glossed over, such as PW1's testimony that it was incorrect to hold that the land in dispute was originally cultivated by Akwesi Bugyei or that of PW2 stating that the land did not belong exclusively to Akwesi Bugyei, but that as a chief he only had his name on it, or the defendant and his first witness giving different figures as regards the arbitration monetary award

These slips may be overlooked, because on the evidence there is no doubt that the land in dispute was originally cultivated by Akwesi Bugyei for his exclusive use.

See: EFFISAH V. ANSAH [2005-2006] SCGLR 943

SARKODIE V. FKA COMPANY LTD [2009] 7GMJ 185 SC.

To conclude, on the totality of the evidence, and by sections 11(4) and 12 (1) of NRCD 323, I am of the view that the plaintiff has been unable to produce sufficient evidence for a ruling to be made in his favour concerning the disputed lands claimed in her amended writ of summons. The self-acquired farms by Akwesi Bugyei who died

intestate, the right of beneficial enjoyment of the lands vests solely in his line of succession, from Kweku Frimpong, to Kojo Anaafi and then to the defendant.

Learned counsel for the plaintiff submitted that whilst the defendant stated that it was Kojo Anaafi after succeeding Kweku Frimpong, who authorised Kwame Aboagye to be the caretaker, DW1 rather said when Kweku Frimpong was in control of the land that he asked Kwame Aboagye to look for tenant farmers to be on the land. It is the view of learned counsel that these are contradictions that weaken the case of the defendant. I must say I disagree with counsel for the plaintiff on this matter. As I have already indicated in this judgment, the authority to grant land to tenant farmers came from Kojo Anaafi with the consent of his sister Abena Akyea, who had protested to Kwame Aboagye sending tenant farmers onto the land. Even if it was the case that it was Kweku Frimpong who authorised Kwame Aboagye to grant land to tenant farmers, he succeeded Akwesi Bugyei before Kojo Anaafi and the two came from the same lineage, as contended by the defendant.

It therefore makes little difference and therefore either of them could have granted the authority to Kwame Aboagye to so act since Kweku Frimpong was a timber Merchant at Wassa and Kojo Anaafi was plying his trade in Cape Coast, and both of them not resident at Assin Kwaata, like Kwame Aboagye. Though Kwame Aboagye may seem to be in possession of the land and undertaking acts of ownership, he was doing so under the instructions of Kojo Anaafi, the true owner, with the consent and concurrence of Abena Akyea.

From the foregoing, having traced his lineage from Akwesi Bugyei through Kweku Frimpong and Kojo Anaafi, it is proper that the defendant being the successor of Kojo Anaafi must inherit the properties of Akwesi Bugyei.

On balance therefore, the defendant has been able to prove his counterclaim on the preponderance of probabilities. He is therefore entitled to judgment on his counterclaim.

All the reliefs being sought by the plaintiff which have been endorsed on his amended writ of summons are hereby dismissed. The defendant, on the other hand succeeds on his counterclaim.

Thus, judgment is hereby entered for the defendant for recovery of possession of the disputed land from the plaintiff. The plaintiff, her assigns, agents, or any person or person(s) claiming through the plaintiff are perpetually restrained from having anything to do with the disputed land.

(SGD)

JOHN BOSCO NABARESE

(JUSTICE OF THE HIGH COURT)

COUNSEL

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|------------------------|----|-------------------|
| 1. DANIEL ARTHUR | -- | FOR THE PLAINTIFF |
| 2. K. O AMPONSA DADZIE | -- | FOR THE DEFENDANT |