IN THE HIGH COURT HELD IN CAPE COAST ON THURSDAY, THE 24TH DAY OF NOVEMBER, 2022, BEFORE HER LADYSHIP MALIKE AWO WOANYAH DEY (HIGH COURT JUDGE)

SUIT NO: E1/38/05

ANDREW AMPOMAH DANKWA ---------- PLAINTIFFS

KWAKU ANKOMA

VS.

1. NANA KWAME AMAKYE ---------- DEFENDANTS

SUBSTITUTED BY KWAME AMPONG

2. KWAKU DAMPTEY

SUBSTITUTED BY KWAME NOAH

PLAINTIFFS PRESENT

DEFENDANTS PRESENT

ROLAND A.K. HAMILTON FOR THE PLAINTIFFS

ISAAC AGGREY FYNN FOR DEFENDANTS

JUDGMENT

This case has a chequered history and has gone through the hands of about five judges before I took over. There have been several substitutions and amendments of pleadings by parties on both sides. That notwithstanding, the trial has ended, and I am pleased to deliver the judgment of the court.

It was a suit filed in the registry of this court on the 1st day of December 2004 by the plaintiffs herein praying for certain reliefs against the defendants. The plaintiffs amended the writ and accompanying statement of claim with the following reliefs;

1) A declaration of title to all that piece or parcel of land situate being and lying at Assin Beraku at a place known as Kwaku Kro and bounded as follows, Kwame Mensah's land, Chiano Stool, Kwadwo Ayigbe's land, Nana Bueku's land, Kwame Nyame's land, Kwame Annor's (Mugu) land, Abena Frimpomaa's land, Kwaku Nsowa's land, Kwaku Damptey's land and Kwame Fesu's land.
2) Damages for trespass
3) An order for accounts of all cocoa harvested by the 2nd defendant from 1999 to date of judgment.
4) Recovery of possession
5) Perpetual Injunction restraining the defendants, their agents assigns, servants and anybody claiming through them from having anything to do with the land in dispute.

The plaintiffs' case is that they are farmers and live in Assin Beraku. The 1st defendant, who was substituted about three times, was a chief of Assin Beraku, whilst the 2nd defendant, now substituted by his son Kwame Noah was also a farmer resident in the same village. The land in dispute belonged to the plaintiffs' father, Kweku Roman. He broke the virgin forest in the 1950s and planted cocoa and food crops. However, sometime in 1971, the 2nd defendant trespassed unto portions of the land and cut down the cocoa trees. Thus Kweku Roman summoned him before the Omanhene's palace at Assin Manso, and at arbitration, the panel found him liable. At the arbitration, the 1st defendant testified to support Kweku Roman. As a result of the arbitration, the 2nd defendant was ordered to pay 57 cedis. After that, Kweku Roman sued the 2nd defendant at the Assin Fosu District court to recover the said amount, and he was ordered to pay the amount.

In 1994 Kwaku Roman gifted the land to his children in the presence of his customary successor, Kofi Kuma, the plaintiffs' mother, Abena Frimpomaa, Opanin Baffour, and they performed "Aseda" with a bottle of schnapps. When the plaintiffs entered the land, they saw one Kweku Fanti cultivating it. Thus they confronted him. Kweku Fanti told them that the 2nd defendant's brother, Adu Baffoe, asked him to cultivate the land. The case ended up at the 1st defendant's palace, and there, the 1st defendant acknowledged that the land belonged to the plaintiffs' father and that they should take possession of it. From that time, Kwaku Fanti started atoning tenancy to the plaintiffs. Not long after, the 1st defendant told Kwaku Fanti that any proceeds from the farm should rather be shared with him and not the plaintiffs. Thus the 1st defendant collected half share of the proceeds. The plaintiffs confronted him, and he returned the money and said he had washed his hands off the land. Later, the 1st defendant turned round and gave the land to a prison officer named Okine. When they confronted the said Okine, he abandoned the land.

In 1999, the 1st defendant went onto the land again and allocated it to the 2nd defendant, a stranger from Gomoa Tarkwa, to be cultivated and shared on an "Abunu" basis. Upon hearing about the allocation the 1st defendant had done, the plaintiffs confronted him, but he got the police to arrest them on trumped-up charges. Dissatisfied with the turn of events, the plaintiffs decided to institute this suit against them.

Initially, the defendants entered an appearance by the same lawyer and filed one single defence. However, when the 1st and 2nd defendants, together with their lawyer, died and were substituted, the 2nd defendant's substitute engaged the services of another lawyer from the same chambers who filed an amended statement of defence on his behalf. Though the 1st defendant was also substituted, they abandoned the case and did not lead any evidence before the court.

The substitute of the original 2nd defendant with leave of the court amended the statement of defence about three times, the last of which was filed on 22nd January 2015. In it, he claimed that Nana Kofi Mensah, who was substituted for the original

first defendant, was not the Odikro of Assin Beraku. He had no interest in the land since he only prayed the court be given the opportunity to settle the matter out of court. In that same amended statement of defence, the 2nd defendant claimed that he lives at Kweku Kor and the land in dispute belongs to the Assin Beraku stool. He claimed to be a tenant farmer of the land and that the stool, as far back as 1934, put his ancestor on the land. He also averred that on the death of the original 2nd defendant, his uncle Kweku Damptey also known as Kobina Badu and the allodial owners of the land, the Royal Asona family of Assin Beraku decided to reduce the oral grant to him into writing and prepared a tenancy agreement to that effect. He further averred that the land in dispute was a secondary forest broken by his ancestor as far back as 1934 during the reign of Nana Kweku Ansah I of Assin Beraku, with the Omanhene of Assin Apimanim being Nana Koohia Nkyi. His ancestor named the place Kweku kor, and thus they have been in possession of the land for all the while without let and hindrance. Therefore, the plaintiffs are estopped by the Limitation Decree.

Significantly, he claimed that the plaintiffs' father, Kweku Roman had no cocoa farm in the disputed area. He also averred that Kweku Roman rather trespassed onto the land and was summoned before the Omanhene's palace. However, the Omanhene could not go into the matter because he fell ill. Upon his death, Kweku Roman took action against the 2nd defendant's father at the District Court Assin Foso to enforce an arbitration award touching on the disputed land, and the court granted same. When his father was served with the court's orders, he applied to set aside the award. He told the court that with the leave of the court he would tender processes filed in the District Court Assin Fosu, and would show the evidence of one Okyeame Yaw Gyenin. Upon advice, his father took action against the plaintiffs' father at the Assin Fosu District court in 1972, and the court ordered a survey plan to be drawn, and same was carried out. However, the matter was not concluded due to the intransigence of Kweku Roman's lawyer.

On the death of Kweku Roman, the plaintiffs took another action against Nana Amakye at the District Court and the original 2nd defendant seeking for a declaration of title of a parcel of land known as Kwekukor with stated boundaries which were different from the lands granted to his ancestors. That action was resisted because the value of the disputed property was higher than the jurisdiction of the court, and the court ruled against the ancestor of the 2nd defendant. An appeal was lodged at the High Court, and the appellate court ruled that a plan be produced in addition to a valuation report. After that, the plaintiffs instituted this action in the High Court. He stated that the plaintiffs do not have any land in the disputed area because it forms part of the land belonging to the Assin Apimanim Traditional council, with Nana K. Nkyi being the head of the stool with the 1st defendant being its caretaker.

The 2nd defendant also claimed that Kweku Fanti was put on the land by his uncle Kweku Adu Baffoe in 1988. He further asserted that the nature of the tenancy agreement between Kweku Fanti and his uncle Adu Baffoe brought a dispute between him and his father. The matter finally ended before the chief of Assin Beraku. The chief ruled that neither his father nor his uncle had any authority to enter into a tenancy agreement with a stranger without recourse to the chief. Therefore he annulled the tenancy arrangement reached with Kweku Fanti and attached the farmland to the Assin Beraku stool. He finally claimed that in 1994 the plaintiffs forcibly extracted portions of the tenancy due from Kwaku Fanti, which was paid to them, and the chief of Assin Beraku requested Kweku Fanti not to pay any rent to the plaintiffs as they were not the owners of the land.

The 2nd defendant did not counterclaim for any relief.

Given the amended statement of defence filed, the plaintiffs also amended their reply dated 19th February 2015 and denied all the averments of the 2nd defendant. They stated that their father was the one who broke the virgin forest of the land and exercised control over it by farming on it. The people of Assin Beraku named it Kwekukor because before it was reduced into possession by the late Kweku Roman,

a hunter who hunted in that forest was likely to come home with at least one Kwekuo, ie. Monkey. They also stated that the land in respect of which they sued in the District Court is the same in the instant suit. They also said that Kweku Fanti became their tenant when Nana Amakye mistakenly gave the land out to Kweku Fanti. When he realised and acknowledged it, he gave the money he had collected from him to Kweku Roman's children.

From the issues filed first on 9th February 2005 and further on 10th May 2012 plus additional issues filed the court finds the following issues relevant for the determination of the suit;

1. Whether or not the virgin forest of the disputed land was broken by Kwaku Roman or Kobina Badu.
2. Whether Kwekukor was founded by the 2nd defendant's ancestor.
3. Whether there was an arbitration over the land in dispute between Kwaku Roman and Kwaku Damptey, which went in favour of Kwaku Roman.
4. Whether or not Kweku Roman gifted the land to the plaintiffs
5. Whether Kweku Fanti had been atoning tenancy to Kweku Roman and after his death the plaintiffs or they were tenants of Kwaku Damptey

Before I proceed further, I must say that I have been assisted by the eruditely written submissions filed by counsel for both parties.

BURDEN OF PROOF

In section 11 (1) of the Evidence Act, 1975, NRCD 323 is stated as follows;

''For the purpose 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.''

Additionally, section 14 of the same Act states 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.

These are the evidential rules that must guide the court in a case like this in determining which party wins the case. These rules must therefore be satisfied by a party who raises an issue essential to the success of his case.

Per the law, the plaintiff carries the evidential burden and must lead evidence such that on all the evidence, a reasonable mind would conclude that the existence of the facts alleged was more probable than its non-existence.

In the case of ***Bisi v Tabiri and Another [1987-88] 1GLR 386,*** it was held that

"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. The demand for strict proof of pleadings had however never been taken to call for an inflexible proof either beyond reasonable doubt or with mathematical precision as would fit a jigsaw puzzle. Preponderance of evidence became the trier's belief in the preponderance of probability but probability denoted an element of doubt or uncertainty and recognised that where there were two choices it was sufficient if the choice recognised and selected was more probable than the choice rejected."

It must also be borne in mind that the defendants have not counterclaimed for any relief in this court; thus, as held in **Malm vs Lutherodt [1963] 1 GLR 1 SC, "the defendant in an action for declaration of title assumes a legal burden of proof only when he counterclaims for declaration of title in his favour."** Thus the defendant bears no legal burden of proof.

In order to succeed in this action, the plaintiffs must prove their root of title, boundaries, possession or right of possession since it is evident that the defendants have denied their averments. See the case of **Francis Assumaning and 64 Ors v Divestiture Implementation and Anor [2008] 3 GMJ 35 SC.**

In the case of Ebusuapanyin Yaa Kwasi v Arhin Davies and Anor 2005, the court held that **"it is trite that this suit being essentially for a declaration of title the plaintiff was bound to establish his root of title."**

Additionally, in the case of **Agyei Osae and Others v Adjeifio and Others [2007-2008] SCGLR 499,** the Supreme Court held that to succeed in an action for declaration of title, recovery of possession and an injunction, the plaintiff must establish by positive evidence the identity of his land which is the subject matter of the action else his action shall fail for lack of certainty. Some other authorities are Bissah v Gyampoh [1964] GLR 81, Jass Company Ltd v Appau [2009] 2GLR 365 and Nyikplokor v Agbodotor [1987-88] I GLR 17.

In the case of **Bedu and Ors v Agbi and Ors [1972] 2 GLR 226**, the court held that

"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 disputed area." Thus where a plaintiff fails to do that, a trial court would be right in holding that he had not discharged the onus of proof placed on him by the law and would not be entitled to judgment.

Where the plaintiff establishes all these elements, he must then show that he has exercised overt acts of ownership over the land, that he has been in possession of the land since it was acquired, or that his ancestors broke the virgin forest. It should be noted that the plaintiff's task becomes easier when he is in possession of the land or where it is clear that he has exercised acts of ownership over the land for a long time. See the case of **Majolagbe v Larbi and Ors (1959) 1 WACA 253 at 516.** On the other hand, discharging the burden placed on him becomes an onerous one when the defendant is in physical possession of the land, as in this case. In that vein, the plaintiff should show that he has been in constructive possession of the land. Wills in the Law of Evidence 3rd Edition states as follows;

The acts of enjoyment from which the ownership of real property may be inferred are very various, for instance, the cutting of timber, the repairing of fences or banks, the perambulation of boundaries of a manor Parish, the taking of wreck on the foreshore, and the granting to others of licenses or leases under which possession is taken and held, also the receipt of rent from tenants of the property; for all these acts are fractions of that sum total of enjoyment which characterises dominion.

Nevertheless, it ought to be noted that there is a legion of cases that hold that possession alone is insufficient proof of title where another person can prove a better title. See the case of Yartey and Oko v. Construction and Furniture West Africa Ltd and 2 Ors [1962] GLR 86. Therefore, the fact that the defendant, as in this case, is in physical possession of the disputed land and has cultivated on it is not conclusive of ownership.

In the case Payilini v Anquandah 1947 12 WACA 284 at 286, the court held.'

"In this country where land may be in the occupation of persons who are not owners but for generations may have right of occupation as licensees or customary tenants or under other conditions known to local custom, the reversion nevertheless being in the owner, it is essential that the nature and origin of the tenure of the occupiers should determine. Mere occupation even for long periods is not itself sufficient to establish ownership."

I intend to deal with the issues seriatim, and where they dovetail, I shall discuss them together. In the opinion of the court, the 1st three issues should be discussed together because they dovetail.

1. **WHETHER OR NOT THE VIRGIN FOREST OF THE DISPUTED LAND WAS BROKEN BY KWAKU ROMAN OR KOBINA BADU.**
2. **WHETHER KWEKUKOR WAS FOUNDED BY THE 2ND DEFENDANT'S ANCESTOR.**

3. **WHETHER THERE WAS AN ARBITRATION OVER THE LAND IN DISPUTE BETWEEN KWAKU ROMAN AND KWAKU DAMPTEY, WHICH WENT IN FAVOUR OF KWAKU ROMAN.**

Before I proceed, the following ought to be noted.

- One undisputed fact is that the plaintiffs and the defendants are largely litigating over the same farmland.
- I also find per the composite plan drawn per the order of a court and tendered by the 2nd defendant, the 2nd defendant's father's cottage lies outside the land being claimed by the plaintiffs but is part of the land being claimed by the 2nd defendant. Since it is not part of the land being claimed by the plaintiffs, it means they acknowledge the existence of the said cottage.
- Also, I find as a fact that not only does the 2nd defendant have a cottage outside the disputed land but he also has cocoa farms on different portions of the land being claimed by the plaintiffs. It is also not in doubt that the original first defendant's land also shares a boundary with the disputed land per the map drawn.

The plaintiffs who bore the burden of proof testified through the 2nd plaintiff and narrated precisely what was in their statement of claim. He traced their root of title through their father, Kweku ROMAN, who he testified broke the virgin forest between 1950 to 1960 and cultivated plantain, cocoa yam, cocoa and other food crops. He emphasised that the 2nd defendant's father, Kwaku Damnuti, cut down his father's cocoa trees, resulting in him being summoned before the chief's palace at Assin Manso. He was found liable and ordered to pay, and when he refused to pay, his father sued him at the District Court Assin Fosu, where he was ordered to pay. He tendered Exhibit A series (Court proceedings) to support his assertion. Counsel for the defendants also tendered a document (evidence of Okyeame Yaw Gyenim) through him on 16th April 2015, labelled Exhibit 1. By way of comment, that exhibit 1 is different from Exhibit 1, tendered by the 2nd defendant when he mounted the box,

which is the purported tenancy agreement of 1962. The marking by the court of that document as exhibit 1 was in error. That said, the plaintiff testified that their father gifted the land to them, and they performed "Aseda" in the presence of witnesses.

In Exhibit "A", a series of documents from the District Court Assin Foso, the court entered judgment for Kweku Roman and asked the 2nd defendant's father to pay the amount. However, the 2nd defendant challenged them on this evidence and said it never happened. The document, which was tendered without objection, established beyond dispute that in the said case, the 2nd defendant's father admitted that he trespassed unto the land and thus paid the said amount.

Under cross-examination, the 2nd plaintiff vehemently denied that the land belonged to Assin Beraku stool. When asked how his father came by the land, he said he was a citizen of Assin Beraku and broke the virgin forest of the land. Still, under cross-examination, he told the court that he was a relative of the original 1st defendant, Nana Amakye.

The testimony of the plaintiff's witness, Pw1 Akwasi Duodu, also re-emphasised the trespass by the original 2nd defendant, who, in granting land to Kwaku Fanti, had trespassed on the plaintiffs' father's land and cut down his cocoa trees. The case went before the Assin Manso Palace and an inspection of the land was done involving one Okyeame Yaw Gennin, Opanyin Roman and his elders and Kweku Damnuti and his elders. After that, the plaintiff's father returned to the village and said that he had been given the verdict and was asked to recover his land. Later, he also obtained a grant from the 1st plaintiff and his father and planted cocoa on the land and accounted to the plaintiff's father when he was alive but when he died he accounted to the plaintiffs herein. He mentioned other boundary owners as Kwame Nane alias Kwame Annor and Opanyin Kwabena Ayigbe. However, under cross-examination, he told the court that in 1971 when the incident of trespass happened, he was only ten years old.

Pw2 Anthony Baah also corroborated the 2nd plaintiff's evidence. He testified that one day Nana Amakye sent one Kwame Foso to Kweku Fante to collect proceeds from a cocoa farm at Kwekukro for him. The plaintiffs and their siblings went to Nana Amakye's palace and told him the money was from their father's cocoa farm. Nana Amakye, therefore, called a meeting at which he was present when the plaintiff explained that it was the same land in respect of which the 2nd defendant's father was summoned at Assin Manso palace. Significantly, he testified that at the said arbitration, the 1st defendant testified for the plaintiffs' father and Kwaku Damptey (also called Damnti) per the record was found liable. Nana Amakye, therefore, agreed with the plaintiffs and his siblings. He also confirmed that when the proceeds were given to the original first defendant, he admitted that the land belonged to the plaintiffs' father and therefore gave the money to him, and he then gave it to the plaintiffs.

However, one significant question that the 2nd plaintiff answered in the proceedings of 12th January 2015 was as follows;

Q: How did your father come to own the land?

A: My father is a citizen of Breku, and he broke the virgin forest.

The plaintiffs did not lead evidence on who originally discovered the land. Since it is established that their father, Opanyin Kweku Roman was a citizen of Assin Beraku, it means that he was on the land because of his citizenship, as testified to by the 2nd plaintiff himself. Furthermore, they did not lead any evidence as to the land being their family land from time immemorial save to say that their father went unto the land in 1950. Additionally, per his Exhibit A4, which was also tendered through him as Exhibit 1 by counsel for the defendant, the witness in that case by name Opanyin Yaw Gyenin testified that the plaintiff's father's land was at Kwakukro situated on Breku Stool land. For emphasis, I would like to quote the said evidence: "**I am called Okyeame Yaw Gyenin** … **One day, the plaintiffs summoned the 2nd defendant**

before the Omanhene of Manso over 30 years ago. The case was that he had cut down his cocoa trees. The cocoa farm is at Kwekukor on Breku stool land. The adjoining land owners are the parties' parents."

It must also be noted that in their amended reply filed on 19th February 2015, paragraph 5 reads as follows;

Paragraph 7 is denied, and in further answer, it is contended that the virgin forest was broken by the plaintiffs' father, Kweku Roman, who exercised control over it by farming on it. It was the people of Assin Beraku who named it as Kwekukor because before it was reduced into possession by the late Kweku Roman, a hunter who hunted in that forest was likely to come home with at least one "Kwekuo," i.e. monkey.

This paragraph clearly shows that before the plaintiffs' father reduced the forest into farmland, the people of Assin Beraku had already named the place Kwekukor. That is an important statement that tends to support the defendant's assertion that the land belongs to the people of Breku and the stool, for that matter. I say so because, going by the plaintiffs' pleading, the people of Breku would only name the place if it belonged to them. Since by their documents and pleadings there is an admission that before their father even broke the virgin forest the place was already called Kwekukor, this court cannot gloss over that evidence.

Thus though the plaintiffs insisted that the land is not stool land, the oral and documentary evidence led by the 2nd plaintiff himself and his witness proves that the said land on which the 2nd defendant's father was accused of cutting down the cocoa trees is located on Breku stool land more so when his testimony is that his father broke the virgin forest just in the 1950s. Thus as a fact, this court finds that the land in contention is Breku Stool land.

It is, however, the opinion of the court that the mere fact that the land is stool land does not mean that the plaintiffs' father could not have broken the disputed land's virgin forest. That is because the position of the law is that a member of a family or a

subject of a stool could cultivate a portion of the family or stool land as of right and acquire the customary freehold interest in the land so cultivated.

In his book Contemporary Trends in the Law of Immovable Property in Ghana, the learned author Yaw D Oppong at, page 134, states;

'The customary freehold has over the years been known as interest in land which, for example, a member of a community, which holds the allodial title to land may acquire in vacant virgin communal land by exercising his inherent right to develop such vacant virgin communal land by either farming or building on it.

He goes on to state that;

"The freehold is an interest which prevails against the whole world, including the allodial title which gave birth to it. The position of the law has always been that the allodial land in which the customary freehold is acquired should be originally vacant virgin communal land. It implies that where the land is in the possession of another member of the community owning the allodial title or a stranger grantee of the community, a customary freehold cannot be acquired or created in the land either as of right by a subject of the stool or a stranger by way of a grant founded on contract."

Flowing from this, it means even if the land is stool land, as has been found as a fact in this case, once it is established that the plaintiffs' father was a citizen of Beraku by reason of which he first carved out that vacant portion which the people of Beraku called Kwakukor as a subject of the stool, the stool cannot seek to alienate the said land to another person.

The pertinent question is, has the plaintiffs established by cogent and reliable evidence that their father carved out that portion of the land and reduced it for his exclusive use before the purported grant to the 2nd defendant's father by the stool?

The evidence of PW2 concerning what he claimed transpired at the Assin Manso palace leaves much to be desired because, per his own showing, he was only ten years old when the case about the 2nd defendant's father's trespass took place and when he came to court he only relied on what he claimed Opanyin Roman came back to say.

PW3's evidence must also be taken with a pinch of salt because though he said he was not present when the arbitration took place, he later told the court that he used to live with Opanyin Roman, and that was how he got to know. Then he again said he was in the lawyer's office when he heard about it. He told the court that Nana Amakye testified for Opanyin Kweku Roman when the issue came up at the Assin Manso palace. Though they pleaded that fact, the 2nd plaintiff had not said so in his evidence before the court. He also sought to say that Nana Amakye returned the money to the children in his presence but later claimed that the plaintiffs had sued Nana Amakye because their father's Cocoa money was with him. When it was suggested to him that the 1st defendant had caused the plaintiffs' arrest because they went to collect monies from Kwaku Fanti, he said it was because they did not speak well when they went to the palace. It also came to light that the plaintiffs are his mother's sister's children; therefore, it seems he only came to the court to support his cousins or brothers.

Nonetheless, it is worthy to note that documentary evidence in the form of Exhibit A4, which is also the same as the document tendered by counsel for the defendant through the 2nd plaintiff concerning the testimony of Opanyin Yaw Gyennin, one of the principal witnesses to that arbitration at the Manso palace seems to have been accepted as part of the 2nd defendant's case since his lawyer made it clear to the 2nd plaintiff under cross-examination that from that document, the misunderstanding was a boundary dispute and that the adjoining land owners were the parties' parents. Thus this court cannot ignore the said document but accept that document as the truth of what happened. Therefore relying on the said document, which was admitted without objection, there is evidence to support the fact that as of 1970, when the plaintiffs' father took the 2nd defendant's father before the Assin Manso palace, he had already

cultivated the land and his cocoa trees had been cut down the reason for which the defendant was directed to compensate him at the arbitration. Though the 2nd defendant disputed this fact under cross-examination, he later admitted that the said arbitral award was given in one of his answers. The defendant gave an explanation under cross-examination which had left this court baffled in respect of his tenancy arrangement when he answered questions thus;

Q*: And it is through exhibit 1 that your father derives ownership over the disputed land, not so?*

A: That is so.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Q: I am putting it to you that the date you allege Exhibit 1 was prepared is false.

A: It is not false. The document was prepared in 1962. In 1980 there was a war, so all the documents in the chief's palace got burnt. So he called those who were living on the stool lands should bring their documents. So my father sent the photocopy of his document to him so the chief said he would not accept photocopies of the documents, but rather he would allow his typewriter to retype those documents for it to be genuine.

Q; If that is so how come this document is dated September 1999?

A: So it was in 1999 that the document was retyped by the letter writer.

Not much weight can be attached to the said Exhibit 1 admitted by this court on 11th May 2021, tendered by the 2nd defendant because a document alleged to have been executed in 1962 was retyped in 1999. A critical look at it shows that Kwame Noah was a witness on his father's side. That puts the document's authenticity in issue, which the 2nd defendant has not satisfactorily explained. That document cannot be relied on to hold that the 2nd defendant's father had a tenancy arrangement with the original first defendant as far back as 1962.

In the case of **Okai v Mawu and Another [1976] 1GLR 265**, it was held that a document is presumed to have been made on the date appearing on its face.

Therefore, I agree with counsel for the plaintiffs that the said document was made in anticipation of the suit before this court and cannot be relied upon as cogent evidence to show the purported tenancy agreement between the 2nd defendants father and the Breku stool.

Having established that their father had a cocoa farm on the land as far back as 1971 and the fact that the tenancy agreement between the 2nd defendant's father and the 1st defendant chief cannot be relied on, I am more tilted to accept that the plaintiffs' father being a citizen of Beraku and also related to the 1st defendant thus a member of the ruling family, was on the disputed land and was the one who had reduced the vacant virgin land into his possession by planting cocoa on same in the 1950s. It is, therefore, the finding of this court that though this court finds that the land is stool land, the court also finds that the plaintiff's father was the first to reduce that forest into his possession by farming on it and also succeeded in substantiating their claim that the 2nd defendant's father trespassed unto the land and was mulcted in costs at an arbitration at the Assin Manso palace. The court also finds that there was an arbitration which went in favour of the plaintiffs' father per the documentary evidence produced before this court.

That trespass which counsel for the 2nd defendant believed happened because the parties shared boundaries, is highly probable because, per the composite plan, the 2nd defendant's father's cottage, as found by this court, is outside the disputed land being claimed by the plaintiffs. It ought to be noted that in the description of their land, the plaintiffs mentioned Kwaku Damptey as sharing boundaries with the disputed land. That cottage mentioned by the 2nd defendant clearly falls outside the land being claimed by the plaintiffs and is close to Kwame Foso and Nana Amakye's land.

Having been on the land before the purported agreement was entered into by the 1st defendant in 1999 but backdated to read 1962, Nana Amakye and the 2nd defendant's father, Kweku Damnuti, the plaintiffs' father, cannot be ousted from it because the stool cannot alienate land already taken up by a member of the said stool family or a citizen of same.

At page 139 of his book, already mentioned supra, the learned author Yaw Oppong speaks about the incidents of the customary freehold as follows;

The rights and liabilities attaching to the customary freehold, as outlined by Da Rocha and Lodoh, may be summarised mutatis mutandis as follows;

Security of tenure: When the customary freehold comes into existence, the community has no power to grant any conflicting right to anyone in that land unless with the consent of the customary freeholder. Any purported alienation or disposition by the allodial owner without the consent of the customary freeholder is of no effect and does not bind him. Any attempt by the allodial owner of his grantee to enter the land held by the customary freeholder amounts to trespass. The customary freeholder can sue the community for declaration of title, damages for trespass and recovery of possession.

He further cited the case of **Ashiemoa vs Bani and Another decided by Ollenu J as** follows;

"There is no native custom which deprives a subject of his ownership, possession and occupation of stool land which he has acquired by cultivation. Learned counsel further submitted that the claim made by the plaintiff in this case is a claim to stool land made by a subject adverse to the title of the stool of which he is subject. Counsel submitted that a subject is not entitled to make such a claim against the stool. In support of that submission he cited the case of Ohimen v Adjei. With due respect to learned counsel, I must point out that one of the important points decided in the case cited is that a subject can successfully maintain an action for the declaration as

against the stool, of the subject's usufructuary title to stool land. The case decided further that the stool has no right without the prior consent and concurrence of the subject to alienate or otherwise deal with land over which that subject enjoys, or has acquired, a usufructuary title."

See also the cases of Ohimen vs Adjei & Another 1957 2 WALR 275.

Saaka V Dahali [1984-86] 2GLR 774, CA.

Besides, as already stated, this court finds that per the plan tendered, the 2nd defendant's father's cottage falls outside the disputed land.

WHETHER OR NOT KWEKU ROMAN GIFTED THE LAND TO THE PLAINTIFFS

The plaintiffs asserted that their father, Kwaku Roman, gifted the land in question before he died in the presence of witnesses. When the 2nd defendant testified, he told the court that their father gifted the land to his children, namely Andrew Ampomah Dankwa, Joseph Afum, Yaw Donkor, Efua Kesewa, Abena Ntriwa Ama Hema and Abena Saah and the witnesses to the said gift which was witnessed by Kofi Kuma, Yaw Amponsah and Kwame Safo and their mother, Abena Frimpomaa. They performed Aseda with one bottle of schnapps. This evidence was not contested under cross-examination. Thus the court deems it as the truth.

WHETHER KWEKU FANTI HAD BEEN ATONING TENANCY TO KWEKU ROMAN AND AFTER HIS DEATH THE PLAINTIFFS OR THEY WERE TENANTS OF KWAKU DAMPTEY

Per the plaintiffs' pleadings and the evidence of the 2nd plaintiff, it is contended that some time ago, they found out that Kweku Fanti had trespassed onto the land, and when they confronted him, he told them that it was one Adu Baffoe who gave him the land. They, therefore, confronted the said Adu Baffoe. He then said he would inform the original 1st defendant Nana Amakye. At the palace, Adu Baffoe claimed the land

was his, and they also said the land belonged to their father. The chief then told them to work on the land. Thereafter, Kweku Fanti became their tenant in terms of sharing the proceeds between them. Sometime later, Kweku Fanti informed them that the chief had collected part of the proceeds. When they confronted the chief, he returned the money after consulting his elders.

Under cross-examination, 2nd plaintiff was insistent that the land on which Kweku Fanti worked belonged to them and not to the stool thus;

Q: I am suggesting to you that the area Kweku Fanti cultivated which was given to him by Baffoe fell within the land of Kweku Damptey and not within your land.

A: It fell within my father's land.

It must also be noted that when the 2nd defendant was cross-examined, he admitted to the tenancy of Kofi Fanti to the plaintiffs as follows;

Q: You will agree with me that Nana Amakye ruled that your uncle Adu Baffoe had no capacity to give any land to Kweku Fanti?

A: The name is Kwame Adubrafour. But it is so that the chief ruled that Adubrafour gave land to Kweku Fanti but my father stated that he should not have given the land to him because it is stool land.

Q: I am putting it to you that Kweku Fanti has a son called Budu who is currently farming on the land of Kweku Fanti and attorns to the plaintiffs.

A: I am aware. The plaintiffs and Kweku Fanti's son have divided Kweku Fanti's cocoa farm.

From these answers, one can see that even after the death of Kweku Fanti, his son atoned tenancy to the plaintiffs herein, which their witness has also confirmed. Indeed DW1 the Kyimdomhemaa who claimed that their head of family showed her all the lands when she returned to Bereku admitted under cross-examination that Kweku Fanti's son atones tenancy to the plaintiffs. Though under cross-examination, counsel

for the defendants sought to suggest to the plaintiffs and their witnesses that the tolls being collected include tolls from the disputed land, they made it clear that it was not in respect of their father's land. I, therefore, hold that the said Kweku Fanti had been a tenant to the plaintiffs, and that was why when the chief Nana Amakye took the proceeds from the said Kweku Fanti, it was returned to them by the chief. It ought to be noted that it was the same Kweku Fanti who, after a became a tenant to the plaintiffs, informed them that one Addo Kweku Fanti and Damptey were demarcating the land and when they confronted him and Okai abandoned the land after the police investigated the issue. This evidence was not challenged under cross-examination. Thus, it shall be taken as the truth.

It must also be noted that counsel for the 2nd defendant, when he cross-examined PW2 stated thus;

Q: You should agree with me that the 2nd defendant has a very big cocoa farm on the disputed land.

A: He has a cocoa farm on the land in dispute. The plaintiffs asked the defendants to come for an arrangement, and others went but the defendants have refused, that is why they have been sued.

Q: You will agree with me that the plaintiff has sued the defendants simply because they are on plaintiffs' land which they have refused to account to them.

A: That is so.

This conversation above shows that the land belongs to the plaintiffs, and the defendants know about it, and all the plaintiffs are seeking from the 2nd defendant is to atone tenancy to them and nothing more.

Having analysed the entire evidence, this court is of the opinion that the cottage of the 2nd defendant may have been there, but the 1st defendant only purported to grant the land to the 2nd defendant after the land was gifted to the plaintiffs. That accounts for

the tenancy agreement that was entered into in 1999 but backdated to 1964. Because if he had entered the land when the plaintiffs' father was alive he would have confronted them.

There is also evidence that they have trespassed unto the land of the plaintiffs and the court would decide the value to be awarded based on the acreage of the land and the years the 2nd defendant has been on the land. I also take into account the fact that the 2nd defendant is a farmer and award damages of ten thousand Ghana Cedis (GHC10,000.00).

On the totality of the evidence, the plaintiffs have provided weightier evidence as compared to the defendant who though called some of his boundary owners sought to put in a document which was fraught with some legal difficulties as to when he actually came unto that portion of the land.

In view of the conclusion above, judgement is hereby entered for the plaintiffs in terms of reliefs i), ii) iv) and v) in the following manner

i) A declaration of title to all that piece or parcel of land situate being and lying at Assin Beraku at a place known as Kwaku Kro and bounded as follows, Kwame Mensah's land, Chiano Stool, Kwadwo Ayigbe's land, Nana Bueku's land, Kwame Nyame's land, Kwame Annor's (Mugu) land, Abena Frimpomaa's land, Kwaku Nsowa's land, Kwaku Damptey's land and Kwame Fesu's land.

ii) Damages for trespass in the sum of ten thousand Ghana cedis (GHC10,000.00)

iv) Recovery of possession

v) Perpetual Injunction restraining the defendants, their agents assigns, servants and anybody claiming through them from having anything to do with the land in dispute.

In respect of relief iii) this court is of the opinion that since the 2nd defendant was under the impression that the stool owned the land and has been paying tolls to the stool for all these years then the justice of the matter will require that they be saved from that burden.

Costs of GHC 5000 against the 2nd defendant in favour of the plaintiffs.

MALIKE AWO WOANYAH DEY
JUSTICE OF THE HIGH COURT
CAPE COAST