

IN THE SUPERIOR COURT OF JUDICATURE

**IN THE HIGH COURT OF JUSTICE HELD AT ASSIN FOSO IN THE CENTRAL
REGION ON FRIDAY THE 14TH DAY OF JULY, 2023 BEFORE HIS LORDSHIP
JUSTICE JOHN BOSCO NABARESE**

SUIT N^o E1/06/2022

GLADYS OPOKU	~~	PLAINTIFF
HOUSE N ^o OQ5A		
OFFICIAL QUARTERS		
POST OFFICE JUNCTION		
ASSIN FOSO		

VERSUS

SOLOMON BOATENG	~~	DEFENDANT
DAMS FAMILY CLINIC		
POST OFFICE JUNCTION		
ASSIN FOSO		

JUDGMENT

The plaintiff, by her amended writ of summons filed on 24th day of May, 2022, is claiming against the defendant the following reliefs:

- a) Declaration of title to ALL THAT piece or leased land containing an approximate area of 0.56 acres at ASSIN FOSO in the Central Region of the Republic of Ghana bounded on the North-East by State land measuring 96feet*

more or less on the East by State land and measuring 240feet more or less on the South-West by the main Kumasi to Cape Coast Road measuring 100feet more or less on the North-West by State land measuring 255feet more or less.

aa) Declaration of title to ALL THAT PIECE OR PARCEL OF LAND situate at Assin Fosu in the Central Region of the Republic of Ghana the boundaries where of commencing at PJ is together with all further bearings hereinafter mentioned is referred to the Meridian 1° West longitude from survey pillar marked SGC.3/23/2002 to GO.1, runs bearings of 220° 30 for a distance of 240 feet from GO.2 – GO.3, thence on a bearing of 300° 00 for a distance of 100feet from GO.3 – GO.4, thence on a bearing of 41° 00 for a distance of 255feet from GO.4 – GO.1,, thence on a bearing of 130° 00 of 329° 00 for a distance of 82feet being the point of commencement and containing an approximate area of 0.56 Acre.

b) A declaration that the land in dispute is public land and it is the Lands Commission acting for and on behalf of the President of the Republic of Ghana that manages the piece or parcel of land in dispute.

c) Recovery of possession.

d) General damages

e) Perpetual injunction restraining the defendant, his assigns, privies, farm hands and all who claim through defendant from laying claim to or having anything to do with the parcel of building plot at Assin Foso described in claims (a) above.

f) Any further orders that this Honorable Court may deem fit.

It is obvious that relief (c) is a repetition of relief (aa). The case of the plaintiff, as can be gleaned from the amended statement of claim is that the parcel of land in dispute was leased to her by the Lands Commission for residential use for a period of 99 years and the lease was dated 26th March, 2008. According to the plaintiff the piece or parcel of

land has an approximate area of 0.56 acres and is situate in Assin Foso in the Assin Central Municipality. The land has the following boundaries:

On the North-East by State land measuring 96feet more or less, on the East by State land measuring 240 feet more or less; on the South West by the main Kumasi to Cape Coast road measuring 100feet more or less and on the North West by state land measuring 255 feet more or less.

The plaintiff said the lease was registered at the Registry of the Office of the Lands Commission, Central Region, on 5th May, 2008 as Deed No CR 2410 and Serial No 457/08. The plaintiff maintained that she has been in possession of the land in dispute and has enjoyed peaceful possession without let or hindrance for several years, until recently when the defendant started his acts of trespass. She even stated that she has put up a residential building on the land and she is occupying same. The plaintiff contended that the ownership of the land in dispute was the subject matter of a suit Number A1/19/07 between her and one Kofi Atta, then the defendant, at the District Magistrate Court, Assin Fosu, where judgment was delivered on 18th October, 2007 in her favour. She stated further that, after the said judgment she obtained a stool lease dated 6th May, 2005 from Nana Kwaku Apotae III and Nana Asiedu Munko II. She indicated that it was after obtaining the stool lease that she learnt that the land leased to her was State land, and as such she contacted the Lands Commission, Cape Coast, who prepared a lease for her. The plaintiff said numerous efforts to resolve a boundary dispute towards the southern end of her land between the parties amicably have failed. Hence this action claiming the reliefs against the defendant endorsed on the writ of summons.

The defendant, in his amended statement of defence stated that the land on which his clinic known as DAMS Family Clinic is situated, shares boundary with the residential

property of that of the plaintiff. According to the defendant, he has on a parcel of land which measures about 0.06 acres situate, lying and being at Assin Fosu, the boundaries of which commence from a survey pillar SGC3 2002 20 and is 580.48feet on a bearing of 266°59' 38" which bearing together with all further bearings hereinafter mentioned is referred to meridian 1° West longitude to a pillar marked SGC F647 20 1 then on the bearing of 219° 49' for a distance of 201.15feet to a pillar marked SGC F647 20 2 then on the bearing of 316° 29' 42" for a distance of 34.39feet to a pillar marked SGC F647 203 then on the bearing of 038° 14' 10" for a distance of 69.54feet to a pillar marked SGC F647 204 then on a bearing of 126° 09' 39" for a distance of 36.04feet to a pillar marked SGC F647 2011 the point of commencement thus enclosing an area of 0.06 acres more or less.

The defendant said he acquired his parcel of land from one Opanyin Kofi Atta of Assin Fosu, sometime in 2009-2010 and he took possession of some by constructing a washroom and his clinic on it, to the notice of the plaintiff, whose land shares boundary with that of his land. The defendant said he does not know how the plaintiff came to own the disputed land since it is the plaintiff who has refused to accept the boundary line between his parcel of land on which his clinic has been built and that of the plaintiff's land. Furthermore, the defendant stated that in March 2021, when the plaintiff started laying claim to a portion of his land, she unlawfully destroyed the visitors washroom to his clinic, a structure he put up since 2010. It is the contention of the defendant that there have been various interventions to resolve amicably the boundary dispute between them but these interventions have proved futile due to the refusal of the plaintiff to accept the designated boundary line. These interventions included those by the Assin Fosu District Assembly, who brought a team of surveyors, and the plaintiff called her own surveyor, who worked together to demarcate the plaintiff's land using her own site plan, and the matter was put to rest. However,

sometime thereafter, the plaintiff reneged on the demarcated boundary line by the team of surveyors brought by the Assin Foso District Assembly and her own surveyor and then resorted to the intervention of chiefs to do the demarcation which then defendant said he refused to accept that. The defendant even stated that the parties agreed to use an independent surveyor outside the Assin Fosu District, and one lawyer Francis Boa Essilfie brought a surveyor from Cape Coast, who demarcated the land from the plaintiff's own fence wall using the plaintiff's own site plan, and yet again, the plaintiff refused to accept the demarcation done.

It is the case of the defendant that the plaintiff has constructed a fence wall on the northern or north eastern part of her land and it is there that the measurement in feet which appears on her site plan.

According to the defendant, the remaining portion of land after the boundary demarcation was done, is what the plaintiff is claiming should be added to her land. The defendant said if there was any judgment against anybody, same does not affect or cover his parcel of land. The defendant said relief (aa) endorsed on plaintiff's amended writ of summons was recently demarcated by the plaintiff during the pendency of the suit. The defendant, thus is of the view that the plaintiff is not entitled to any of the reliefs being sought.

The following were the issues set down for trial;

- 1. Whether or not plaintiff is entitled to her claims.*
- 2. Whether or not plaintiff has trespassed onto defendant's parcel of land*
- 3. Whether or not the piece of land trespassed upon belongs to the plaintiff or defendant*
- 4. Any other issues arising from the pleadings.*

For the sake of convenience, the issues shall be determined together. The plaintiff testified herself and subpoenaed the Lands Commission, Cape Coast who sent a representative to give evidence on plaintiff's behalf. There is no doubt that the plaintiff and the defendant are adjoining boundary owners. They both have their properties on the land that is situate at Post Office junction area, Assin Foso, and along the main Cape Coast – Kumasi road. The controversy between them is about the exact location of their boundary line.

Although the plaintiff's claim is worded in the form of a declaration of title, the real issue between the parties, as revealed by the evidence produced appears to be the usual boundary dispute between two adjoining owners. The plaintiff did not put the whole of her land into dispute and neither did the defendant. The facts of this case reveal that the plaintiff's complaint which brought the parties to this court was that the defendant had trespassed upon her portion of the Northern and North-East boundary of her land which has led to numerous disagreements, and a couple of such issues ending up at the Police Station.

The defendant on the other hand, insisted that the plaintiff has constructed a fence wall on the northern and north east part of her land, but there is a remaining portion after the boundary mark, which the plaintiff is claiming as part of her land, but which the plaintiff's site plan doesn't cover to that extent. The plaintiff tendered in evidence Exhibits GLO "B" – Stool lease, and Exhibit GLO "C" – lease granted by Lands Commission, in support of her claim. Thus, the true issue is therefore as to ownership, not of either the plaintiff's whole land or that of the defendant but of the area of land that is beyond the immediate vicinity of the fence wall constructed on the northern and north east side of plaintiff's land.

The most effective way of resolving this issue was to find out the whereabouts of their common boundary. In this regard the evidence of their common grantor or vendor, one Opanyin Kofi Atta, or a representative of Kusuntire Stool Land was required to establish the common boundary of the plaintiff's land and that of the defendant abutting each other. No eye witness has also been called to testify to the extent of land acquired by the parties. And under cross-examination, when the plaintiff's first witness, being the representative from the Lands Commission, Cape Coast, was asked by counsel for the defendant whether he had personally visited the land that Exhibit GLO "E" covers, he categorically answered "NO". As a result, PW1 stated that he could not tell whether or not Exhibit GLO "E" covers the area in dispute. In paragraph 15 of plaintiff's reply filed on 11th March, 2022 she answered thus:

"15... Plaintiff says even though she has constructed a fence wall on the Northern or North-East part of her land, the measurement of her land should not commence from the wall as the reference point since plaintiff's parcel of land is bigger than what is indicated on the government lease."

But it is the plaintiff who has tendered Exhibit GLO "C", the government lease granted to her, in support of her case and even went further to tender the whole file from the Lands Commission, Exhibit GLO "E", after calling a representative from the Lands Commission to testify for her. Is it the case of the plaintiff that the said Exhibit GLO "C" or GLO "B" for that matter, that describes the exact size of her land is not genuine or authentic? Or is she of the view that the land is no longer State land that has been leased to her?

If the plaintiff is of the view that the size of her land has been reduced by the State in Exhibit GLO “C”, which I believe not, and she has been much aware of that, going by the evidence, what prevented the plaintiff from taking any step to have such a situation rectified before she tendered same in evidence? And to even proof that what the plaintiff stated in her pleadings could not be substantiated in her evidence, it is the same size of land that has been described in her Exhibit GLO “B”, which she said she obtained from her grantors being Nana Kwaku Apotae III and Nana Asiedu Munko II, which size approximates an area of 0.56 acres. Both Exhibits GLO ‘B’ and Exhibit GLO ‘C’ tendered in evidence by the plaintiff show the same measurements of the area of the land leased to the plaintiff.

The plaintiff even pleaded in paragraph 8 of her reply that the State land portion of the parcel of land was carved out by the Lands Commission and she was granted that portion of the land, implying that the portion that is not covered by the government lease, she does not have title to that portion.

The law is settled that whenever there was documentary evidence and oral evidence in respect of a transaction, the court would consider both oral and the documentary evidence and often lean favourably towards the documentary evidence, especially where the documentary evidence was found to be authentic and the oral evidence conflicting.

See: 1. DUAH V. YORKWA [1993-94] 1 GLR 217

**2. FOSUA & ADU-POKU V. DUFIE (DECEASED) & ADU-POKU MENSAH
[2009] SCGLR 310**

In the case under consideration, since Exhibit GLO 'B' and Exhibit GLO 'C' which the plaintiff signed describe the same size of land in the various schedules to cover an approximate area of 0.56 acres, and the exact measurements of the building plot being 96feet by 240 feet by 100 feet by 255 feet, the documentary evidence in the form of Exhibits GLO "B" and GLO"C" should prevail over the oral evidence of the plaintiff that her plot size has been reduced. And whoever reduced plaintiff's land size is not borne out by the evidence.

See: 1. ATADI V. LADZEKPO [1981] GLR 218 CA

**2. REPUBLIC V. NANA AKUAMOAHI BOATENG II EX PARTE DANSOAH
[1982-83] 2GLR 913 SC**

The plaintiff cannot claim what she has no title to. There is evidence also that both the plaintiff and the defendant have had some misunderstandings as regards where their common boundary is, and this has resulted in reports being made to the police. Both parties have indicated in their evidence, that there have been various interventions by surveyors to resolve this boundary problem, but on such occasions, the plaintiff refused to accept the demarcations done. For instance, when the parties engaged surveyors from the Assin Fosu District Assembly to demarcate their common boundary, the plaintiff objected to the demarcation exercise. Again, an independent surveyor was brought from Cape Coast to do the demarcation of the boundary, the plaintiff objected to the demarcation exercise and stopped the work, even though her site plan was being used to carry out the exercise.

According to the plaintiff the reason for her refusal to accept the various demarcation exercises was that the Surveyors all wanted to use her fence wall constructed on the Northern or North – East part of the land as the reference point and that would have

reduced the size of her land. But as to how much the size of plaintiff's land would have been reduced to, the plaintiff could not tell the court. And this is someone, who under cross examination told the court that she was not a professional surveyor but a businesswoman. The various experts even used the site plan of the plaintiff for the demarcation exercises, and yet she flatly refused to co-operate for peace to prevail. The plaintiff cannot use ocular proof to determine her boundary line and the size of her land. This has to be done by qualified surveyors, but she refused to accept their services, culminating in disagreements between the two parties over their boundary line. I think that building a fence wall by a land owner is partly to secure and protect his land from trespassers or encroachers. The common sense approach, which in my layman's view, the surveyors adopted in the demarcation exercise, was to commence from the fence wall on the boundary using the site plans of the parties as guide.

One cannot go beyond his boundary and build a fence wall, otherwise he may be trespassing unto some other person's plot. For this reason the plaintiff's land cannot be said to extend beyond her fence wall, otherwise it would even have been captured by the Exhibits she tendered in court, which do not cover any additional land belonging to the plaintiff. It is the plaintiff who has consistently refused to accept the demarcated boundary between the two adjoining lands, after using her site plan and that of the defendant to do so. As to whether the plaintiff purchased the land twice is neither here nor there and that erroneous impression that her land has been reduced in size in Exhibit GLO "C" is not borne out by the evidence.

Now a comment on the other Exhibits tendered by the plaintiff.

Exhibit GLO 'A' is an incomplete judgment that cannot be said to be valid. It does not satisfy the requirements of authentication as provided for under section 136 of the Evidence Act, 1975 (NRCD 323), which states that:

“136 (1) where the relevancy of evidence depends upon its authentication 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.”

Thus, exhibit GLO ‘A’ has not been shown by evidence or other showing sufficient to support a finding that it is a true judgment of the Magistrate whose signature does not appear on it and worse of all, it is even made up of only four pages, without knowing how the issues were resolved by the court. It is invalid and hereby rejected.

With Exhibits GLO ‘D’, GLO ‘D1’, GLO ‘D2’ and GLO ‘D3’, they are merely evidence of payment and the payment has been done regarding the land leased to the plaintiff. There are no qualms about that.

It must be observed that I am taken aback by the overall tone of the written address by counsel for the plaintiff. He obviously failed to address the issues at stake, but rather went searching for information which does not exist on the evidence. Learned counsel was addressing the issue of capacity of the defendant’s grantor which never featured anywhere during the trial. The defendant has neither counterclaimed nor has any grantor or vendor of the defendant been joined to the suit to either challenge the capacity of the plaintiff’s grant, or has any witness of the defendant, when there is no such witness, or defendant himself, testified against the plaintiff that such capacity to grant any land to the defendant existed.

What must be noted is that it is the plaintiff who instituted the action and not the defendant or any grantor of the defendant. The law is settled that a person without

capacity cannot be given a hearing in court even though he may have an iron cast case. Capacity to institute an action is a precondition to the institution of an action in court.

See: SARKODIE I V. BOATENG II [1982-83] GLR 715

It is mind-boggling therefore for learned counsel for the plaintiff to be addressing issues which were neither joined at the application for direction stage, nor raised during the trial for consideration. I will therefore take learned counsel for the plaintiff's written address with a pinch of salt.

Now on the consideration of exhibits '1', '2' and '3' tendered in evidence by the defendant, let me state that I consider those documents to be invalid since they cannot carry an interest in land in accordance with the Land Act, 2020, (Act 1036). They do not seek to transfer whatever title the grantor or vendor had in the plot to the defendant. It is to be understood that Exhibit 1, for instance is an enforceable contract for the sale of the plot, it is not a negotiable document under Act 1036 (supra). It may be termed as self-serving document and has no probative value, especially where the facts contained therein were challenged or disputed under cross-examination.

See: AGBOSU AND OTHERS V. KOTey AND OTHERS [2003-2004] SCGLR 420

On the declaration of title to land, it is established that a party who wants a declaration of title to land has a duty to establish the identity of the land. In **FOFIE V. WUSU [1992-93] GLR 877**, it was held that;

"To succeed in an action for declaration of title to land a party must adduce evidence to prove and establish the identity of the land in respect of which he

claimed a declaration of title. On the evidence the plaintiff failed to prove the identity of the land claimed."

See: 1. KWABENA V. ATUAHENE [1981] GLR 136

2. ANANE V. DONKOR [1965] GLR 188

3. BEDU V. AGBI [1972] 2GLR 238 CA

4. TETTEY V. HAYFORD [2012] 1 SCGLR 417

In the instant case, the plaintiff has not established the identity of the land, though not necessarily with mathematical precision. The land that the plaintiff is claiming, apart from merely stating that her land had been reduced in size, nothing else was said in prove of that claim. Going by Exhibits GLO 'B' and GLO 'C', no such thing had occurred. If there is any vacant piece or parcel of land beyond the description given in Exhibits GLO 'B' and GLO 'C', the plaintiff, to say the least, would be engaged in speculations to defeat the documentary evidence, such speculation would be needless in the face of Exhibits GLO 'B' and GLO 'C'. I am therefore not convinced that relief (aa) or relief (c) in the amended writ of summons is necessarily different from the land described in Exhibits GLO 'B' and GLO 'C'. This is especially so when there is no evidence that the co-ordinates referred to in the amended writ of summons are referable to a piece of land different from that described in Exhibits GLO 'B' and GLO 'C'.

In my view, there is therefore no evidence to back the claim that the land as described in reliefs (aa) and/or (c) are not the same as claimed by the plaintiff in relief (a), measuring the same size of land with approximate area of 0.56 acre.

Thus, on the totality of the evidence, I find that the plaintiff has been unable to establish her title to any area besides her pleaded facts, for which she is urging the court for a

declaration of title. Though plaintiff and defendant share a common boundary, there is no evidence that the defendant has trespassed unto the plaintiff's land for which she seeks recovery of possession and for damages. Under sections 11 (1) and (4), and 12 and 14 of the Evidence Act, 1975, (NRCD 323) and also relying on a plethora of legal authorities, including but not limited to **ACKAH V. PERGAH TRANSPORT LTD [2010] SCGLR 729**, which provides *inter alia*, "that a party who bears the burden of proof is to produce the required evidence on the facts in issue that has the quality of credibility, short of which his claim may fail," there is no doubt that plaintiff's claim must fail.

As in the case of **YORMEVU V. AWUTE AND OTHERS [1987-88] 1GLR 9**, cited by learned counsel for the defendant, it was held in holding (3) of the headnote that;

"It was settled law that when after the close of a case the judge came to the conclusion that the plaintiff's case was weak and that of the defendant's too was weak, the judge could not prefer the plaintiff's weak case to that of the defendant, and it would be wrong to grant to the plaintiff the reliefs he sought. Where the defendant did not call any evidence at all the position would not be different unless there was a counterclaim. In which case the evidence which would be required from the defendant would be the same evidence to establish the counterclaim and not evidence in rebuttal of the plaintiff's claim."

Therefore, in conclusion, the plaintiff's weak case cannot and will not be preferred to that of the defendant's, who equally has a weak case. In that regard, all the reliefs being sought by the plaintiff are hereby dismissed.

(SGD)

JOHN BOSCO NABARESE, J

(JUSTICE OF THE HIGH COURT)

COUNSEL

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|--------------------|----|-------------------|
| 1. D.K BREFO | -- | FOR THE PLAINTIFF |
| 2. PHILIP M. YOUNG | -- | FOR THE DEFENDANT |