

IN THE SUPERIOR COURT OF JUDICATURE,
IN THE HIGH COURT OF JUSTICE,
HO – VOLTA REGION,
A.D. 2023.

CORAM: CHARITY ASEM (MRS), J.

SUIT NO. E12/11/2022
DATE: 17TH MAY, 2023

MERCY FIAGBEDU
OF SOMANYA SUING FOR HERSELF
PLAINTIFF/RESPONDENT
AND ON BEHALF OF HER SIBLINGS

}

VRS.

1. RICHISON NONOKUADZI
2. CLEMENCE DOKPLI
3. GERSHON-KING KUADZI
ALL OF AGBLEDOME-AZITA

}

DEFENDANTS/APPELLANTS

JUDGEMENT

This is an appeal from the decision of the District Court Anloga; entered on the 25/10/2019 as appears on page 142-153 of the record of appeal.

In the Notice of Appeal filed on 2-12-19 and additional grounds filed with leave of the court on the 24/11/2012 the defendants/appellants has attacked the judgement of the District Court on the following grounds.

- 1) The Trial Magistrate erred in law by relying on extraneous practice.
- 2) The Trial Magistrate did not consider the principle of estoppel by leaches and conduct.

Additional ground 1 being the omnibus ground;

i) That the judgment is against the weight of evidence on record.

When the appeal was put before this court for hearing, the directive for written submissions were made.

Before going further to discuss the merits of this appeal, it is just and appropriate to chronicle the facts of this case leading to the instant appeal.

The plaintiff/respondent who I will now refer as plaintiff sued the defendants/appellants also to be referred as defendants in this appeal for a declaration of title to the disputed land situate at Anloga. From her statement of claim found at pages 9 and 10 of the record of appeal, plaintiff case a can be gleaned thereof, was that the subject matter of disputed formed part of a tract of land originally owned by her great grandfather called Togbui Esse. According to her, her great grandfather gave portion to his female children namely Kosonde and Ameka. And her grandmother was Kosonde, whose share of land was inherited by her father Miheso Fiagbedu after the death of Kosonde. She continued that after the death of her father his properties devolved unto her and other siblings. According to plaintiff, the land in dispute was entrusted to the care of Mathew Dedzo of Agbledomi for many years. After his death his daughter Charity Dedzo who is plaintiff's, cousin became the caretaker of the land who also farmed the land without hindrance. According to plaintiff resistance came from defendants when she decided to put up a house on the land. Defendant/Appellants restrained her workmen from entering onto the land without justification. Plaintiff/Respondent said she summoned the defendants/appellants before one Togbui Azansi Arbitral Court for arbitration but the defendants/appellants refused to attend. When it was clear defendants will not stop their unlawful acts she sued them before the court for the reliefs endorsed thereon.

On the side of the defendants/appellants, a statement of defence was filed and counter-claim put up as appears at pages 11-12 of the record of appeal. It is their case also that the land formed part of the larger land that was founded by Togbui Esse of Dzita. They said plaintiff/respondent is not a descendant of Togbui Esse. That Kosonde through whom she traces her lineage to Togbui Esse was not the child of the said Esse. That Kosonde did not own any land for it to be inherited by her son Fiagbedu after her death. According to the defendant/appellants one Togbui Klege Esse gave the land to one Mathew Dedzo who farmed the land for a long time, and upon his death, his daughter Charity Dedzo cultivated it until the plaintiff/respondent trespassed to build thereon.

According to the defendants/appellants Mathew Dedzo was entrusted with the disputed land by Klege Esse and was on crop sharing agreement with Klege's wife so also Charity Dedzo.

After full trial, the trial Magistrate in her honest believe found on the strength of the plaintiff/respondent's evidence granted her reliefs. See page 153 of the record of appeal and stated therein that, the defendants/appellants have failed to establish with certainty, the identity of the land they counter-claimed for and the counter-claim failed. Further that, plaintiff/respondent has on the balance of probabilities proved her claims to the land in dispute and so entitled to judgment on her reliefs.

Being aggrieved, the defendants/appellants appealed to the High Court on the grounds set out in the Notice of Appeal at page 155-156 of the record of appeal for the court to overturn the decision of the District Court.

The court therefore on the 12/01/2012 directed the lawyers to file written legal submissions when the appeal was heard. The directive was complied with and date for judgment was fixed.

On the 18/01/23 this court was to deliver its judgment. It come to my attention that all along the 1st & 2nd appellants are deceased. They were dead long before the appeal was

filed on their behalf. Counsel for the appellant when confronted, told the court that he did not know this fact that 1st & 2nd defendants/appellants were dead. That he has been dealing with the 3rd defendant/appellant all along on behalf of the parties. He prayed the court to be granted time to put his house in order as he was uncertain when the 1st and 2nd defendants passed. This led to several adjournments but counsel was unable to do anything until 19/04/2023 when he sent word to the court through his learned colleague Senanu Afagbe counsel for plaintiff/respondent that the court can proceed to deal with the appeal in the manner it considers just.

The court took the position to determine whether or not the appeal is proper before the court.

From the record of appeal page 106, appears the evidence in chief of the 3rd defendant/appellant herein. In his opening remarks, he told the court the 2nd defendant is his nephew, the 1st defendant is deceased. From careful perusal of the record of appeal there was no directive for the defendants to substitute the deceased 1st defendant neither did 2nd defendant appear to contest the claims of the plaintiff before his death. Also, the death of 2nd defendant was never recorded as far as my search of the record of appeal revealed. But the fact remains that the two died during the pendency of the trial at the District Court Anloga and long before the matter was decided as thence the appeal presented.

It is further noted that the defendants filed a joint statement of defence and counter-claim. The trial court ought to have ordered the substitution of the deceased before the case proceeded. But I realized that the defendants had legal representation unlike the plaintiff/respondent herein who was without legal representation at the time. Am not too sure why the legal lens failed their lawyer on this point?

In view of the foregoing the court will hold the view that, the failure of the defence to substitute both 1st & 2nd defendants after their death meant the action in so far as their

interest died. Also that when 3rd defendant/appellant testified on the 18/07/2018 he had no authority to do so on behalf of the dead. The court noted that the disputed property is not a family property. The defendants were sued in their individual personal capacities as persons who resisted plaintiffs' occupation of the disputed land and claimed same as theirs.

The view of the court however in the respect of the 3rd defendant/appellant is that he is proper before the court presently regarding whatever interest he may have in the land.

In the case of *Mumumi & Others Vs. Adanu & Others* (2006) GHACA 3 (Civil Appeal No. H1/262/2004) dated 26/07/2006. CA. decided that, "*Actions Involving nominal or representative parties shall survive the death of a party and a known and identified deceased party must be replaced and substituted by a living person for the continuation of the suit*".

It is not denied that the 1st and 2nd defendants died during the pending of the trial at the District Court long before the court delivered judgment on the 25/10/2019. 1st & 2nd defendants (deceased) were not substituted by any living person to continue and defend their interest in the matter. Though the 3rd defendant/appellant testified he had no authority to do so on behalf of the two (2) deceased individuals.

I have carefully studied the reliefs endorsed by the plaintiff before the District Court against the defendants likewise the defence filed thereto. The litigation was in respect of individual claim of ownership to land. It has no family connotation or interest.

In view of the foregoing, the present appeal filed for and on behalf of the 1st & 2nd defendants/appellants deceased is null void. And for the above reason I dismiss any claim mounted before this court in the present appeal on their behalf as without lawful authority.

I will however examine the appeal on behalf of the 3rd defendant/appellant herein try to fish out his interest in the disputed property.

Being aggrieved by the decision of the District Court Anloga presided over by Her Worship Rosemary Baah on the 25/10/2019 3rd defendant appealed to this court.

3rd defendant/appellant's evidence and claim of interest in the disputed land appear at pages 106-108.

In review of the 3rd defendant's evidence in chief this court found no satisfactory evidence of interest in the disputed subject matter land. According to him the stories he told the court as to ownership are what his great grandfather told him. These historical antecedents were carefully considered by the trial Magistrate and found no merit in it.

Above all the 3rd defendant himself from his narrations has never cultivated the land. And the portion he claimed to have been given to put up his house is not the present location of land in dispute. Furthermore, he does not trace his lineage to Dedzo Mathew nor Charity Dedzo who were entrusted with the disputed site in trust for the plaintiff and her other siblings. My immediate intuition is so far as possession of the disputed land is concerned should have been raised by Charity Dedzo and not the defendants who have for many years had nothing to do with it.

On the 10/11/2021 when the 3rd defendant/appellant deposed to facts as having the authority and consent of 1st and 2nd defendants/appellants he was acting on behalf of the dead. He knew all the while that they were not living humans. These acts were meant to deceive the court and unsuspecting plaintiff/appellant until found out and exposed. I saw that the 3rd defendant travelled thus far because the plaintiff is very old, and unrepresented until the appeal proceedings.

From the written submissions filed by counsel for 3rd defendant/appellant herein, on 25/02/2013, Learned Counsel abandoned all the initial grounds of appeal and argued only the 1 additional ground - **That the judgment is against the weight of evidence on record.**

I am glad that, Counsel for appellant is aware that the cardinal burden of the appellant herein is to properly demonstrated to the appellate court the lapses in the judgement being appealed against see *Djan Vs. Musah Baako* (2007-2008) 1 SCGLR 686. Which he cited in support of his case. It was held that;

“It is incumbent on a party who alleges that a judgment or ruling is against the weight of evidence to demonstrate from the judgment or ruling the lapses in same.”

Indeed, there is no gain saying the fact that the role of the appellate court in determining the omnibus ground of appeal has been decided in a myriad of cases.

***Akufo Addo Vs. Catherine* (1992) 1 GLR.**

***Kwamina Kosah Vs. Attorney General & 2 Ors* (2018) 121 GMJ 49.**

***Abbey Vs. Antwi* (2011) 26 GMJ 151.**

***Aryeh & Akakpo Vs. Ayaa Idrisu* (2010) SC GLR 891 etc.**

Also, in the case of *OTR (Gh) Ltd Vs. BB Motors CA.* held that, “where an appellant claims that judgement of the trial court is against the weight of evidence adduced at the trial, the burden is on him to show that the judgement was in fact against the weight of evidence”.

It is apparent from the review of the authorities above and the submissions made by Learned Counsel for 3rd appellant that, appellant has not demonstrated any interest be it legal or equitable in the disputed land. And has failed to show the pieces of evidence on the record which the trial court failed to appreciate or which even though appreciated, the trial court failed to attach any import to it in its decision.

Apart from counsel for appellant stating that the plaintiff/respondent failed to describe the land thoroughly, he did not show from their description which portion forms 3rd defendant’s land and where his interest lay at the disputed site. Though the plaintiff was chastised for holding herself out as the descendent of Togbui Esse’s daughter Kosonde, the assertion was later abandoned.

The decision of the trial Magistrate has set out clearly and not saddled with inelegancies to be accused of judicial notice taken wrongly.

For the above reasons, this court has no satisfactory, or cogent reason to interfere with the decision of the District Court Anloga dated the 25/10/2019 which I hereby affirm. Accordingly, the appeal is dismissed.

I will award cost of GH¢4,000.00 against the 3rd defendant/appellant herein.

Firstly, to enable the plaintiff/respondent settle part of her legal fees. And secondly for her inconvenience as an aged person.

(SGD.) CHARITY A. ASEM (MRS)
(JUSTICE OF THE HIGH COURT)

LEGAL REPRESENTATION

SENANU AFAGBE FOR PLAINTIFF/RESPONDENT - ABSENT

EMIL ATSU AGBAKPE FOR THE DEFENDANT/APPELLANTS - PRESENT

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