IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE (COURT 1) HO HELD ON TUESDAY 4 JULY 2023 BEFORE HIS LORDSHIP JUSTICE GEORGE BUADI J

SUIT NO. E1/17/2013

ANDREWS OLATOR (Suing as a Principal	}		
Member of Nyanya Family of Lolobi Kumasi	}		
And the Usufruct Owner of the subject land	}	….	PLAINTIFF

Versus

KILLIAN AGBOVI & ANOR		}	
(All of Lolobi Kumasi)	}	….	DEFENDANTS

FINAL JUDGMENT

1 Background

Claiming to be principal member and elder of the Nyanya family of Lolobi-Kumasi, and on grounds that there are presently issues surrounding the headship of the Nyanya family following the demise of Herman Oye, the last family head, Plaintiff commenced this suit as beneficial owner of the land in dispute for these reliefs:

1 A declaration that [he] is the usufruct owner of the disputed land and farm.

2 An order of perpetual injunction restraining the Defendants, their privies, agents, grantees, workers or anyone claiming through them from interfering with the subject land in any manner whatsoever.

3 An order for the recovery by the Plaintiffs from the defendants the sum of Twenty Thousand Ghana Cedis (GH¢20,000.00) being special

damages for the items and commercial properties destroyed and or taken away by the Defendants from the land.

4 Cost incidental to the suit …

2.0 Parties' Statements of Case

2.1 Considering the core issue the court had set out for determination in this suit, Plaintiff's case that I deem relevant to sum up here is that the Nyanya family of which he claims to be a principal member owns the subject matter Adzoa land; same having been founded by his great ancestor Olator and handed down to the current generation from a long genealogy, which I deem needless to recite here.

Plaintiff avers that Seidu, a migrant of northern descent came to settle with Agbovi as a farm labourer; got married to the sister of Agbovi and has together with his progenitors remained with the Agbovis, and that during Seidu's sojourn in Lolobi, his name was corrupted to Setu instead of Seidu who left descendants including him and others, which once again I deem of no relevance to list here. Plaintiff claims that the Nyanya family has various lands whose respective gates cultivate to the exclusion of other gates within the family and that there are also some family lands reserved as a common heritage for the entire Nyanya family.

Plaintiff claims further that his late father Henry Olator has from time immemorial been cultivating portions of the wider family land now in dispute and that he, as Plaintiff follows the footsteps of his deceased father Olator whose cash crops - oil palm, cocoa, cola-nut - are still on the land, which he is in possession, use and control, and has also given portions to tenants who have cultivated yam thereon but Defendants have trespassed and threatened to take over, hence this action.

2.2 Defendants deny Plaintiff's claims; in fact, question Plaintiff's capacity to initiate the action, contending that there are no disputes surrounding the headship of Nyanya family, as Prosper Agbovi is the head and representative of the Nyanya family of Lolobi Kumasi, who a couple of years earlier sued in that capacity at the High Court.[1] Defendants aver that Plaintiff joined that said suit claiming to be head of the Nyanya family to non-suit Prosper Agbovi but failed only to craftily change his status claiming to be a principal member of the Nyanya family, which he is not. Defendants aver that there is no usufruct ownership of the Adzoa land, as the land belongs to Paul Kofi Aglago, the late father of 1st Defendant who cultivated it during his lifetime and has oil palm and cocoa farms on the land. According to Defendants, the Nyanya family lands comprise the Agbovila, Akrobor, Kpodzi, Toko, Kabomi, Adzoa, Otukakama Adawa, and Okata lands that were founded long ago by their forebear Nyanya before the arrival of Plaintiff's late father, Henry Olator who hailing from Santrokofi, came to settle with 1st Defendant's late father.

Defendant avers further that Plaintiff is not a descendant of Nyanya nor a member, as Plaintiff's late father Henry Olator was a stranger labourer doing manual work for Paul Aglagoh. Plaintiff was not a central pillar around which other Olators revolve. Therefore, Plaintiff's recitation of the genealogy of Nyanya family and its lands are a figment of his imagination. Defendants contend that it was out of love and friendship that Plaintiff's late father Henry Olator was given portions of Nyanya land at Adzoa Kabreame, Otukakama, and Kabomi to cultivate without let and that Plaintiff has cocoa farms on portions of these lands without disputation from Defendants. Defendants add that Henry Olator had a farm at Adzoa land and lived as a stranger peacefully with the Agbovi and Aglagoh.

[1] Intituled *Prosper Agbovi vs. Isaac Jantuah & 2 Ors* - Suit No. E1/02/2019

Defendants contend further that Henry Olator laid no claim to the economic trees during his lifetime nor any portion of the larger Adzoa land and that it was after the death of Henry Olator that the Plaintiff alone out of the Olators has started claiming the larger Adzoa land and its economic trees.

All the same, Defendants contend that the ownership of Adzoa land has earlier been determined by customary arbitration that Plaintiff initiated and lost. According to 1st Defendant, around 2020 Plaintiff stole oil palm fruits that he had harvested on his father's land. Plaintiff admitted the theft only after 1st Defendant had caused public announcement to be made. 1st Defendant aver that Plaintiff summoned him before Togbe Ernest Adabra, who per customary arbitration dismissed Plaintiff's claim of ownership of portions of the Adzoa land. Defendants contend that per the verdict/award of the customary arbitration, Plaintiff is *estopped* from re-litigating the said portions of the Adzoa land.

3 Issues for trial preliminary matters

At the close of pleadings, the parties per their lawyers put up varied issues that the court found to be revolving around the issue whether Plaintiff is *estopped* from commencing the action on grounds of a valid customary arbitration over the Adzoa land between the parties. The court agreed with the parties, and that on grounds of judicial economy, the court asked the parties through their lawyers to present their cases on this sole core issue for prior legal determination; i.e., whether there had been a valid customary arbitration on the subject matter Adzoa land, for which reason the Plaintiff must be *estopped* from commencing the suit.

The lawyers submitted their respective cases. In its ruling, it was observed that the Defendants have attached a document, ostensibly as proof of proceedings of

customary arbitration. Plaintiff denied the contents of the document and challenged its validity. With such denial and validity challenge, coupled with vicissitudes of affidavit evidence, the court found no legitimate basis in interpreting contents of Exhibit 1 as sufficient proof of a valid customary arbitration. The court held that:

> … the document in its present form cannot be legitimate evidence strong enough to foreclose the hearing or determination of declaration of title to the land. The preliminary legal issue is still valid, but the same has to be determined not upon affidavit evidence but [upon] a full trial limited to that issue. Let the parties file their witness statements limited only to the [sole] issue.

4.0 The evidence, finding of facts, and the applicable law

4.1 In consequence of the ruling above, and on grounds of having made the positive averment, the court imposed the burden of proof on Defendants to establish proof of the validity of the customary arbitration. Evidence Act, 1975 (NRCD 323) s. 11. Defendants sought to discharge the burden per the evidence of Togbe Ernest Adabra of Lolobi-Kumasi; the one to whom Plaintiff allegedly made the complaint, who constituted the arbitral panel to sit on Plaintiff's complaint. Togbe Ernest Adabra's witness statement was a 5-page 20-paragraph document that includes a 2-page record of the alleged arbitral proceedings marked Exhibit 1. Defendants called no further witness. Plaintiff indicated to call four witnesses at the trial, yet he called just one witness[2] after his evidence. Upon his request to dispense with calling the other two witnesses on grounds of irrelevance of their

[2] His son Andrews Olator Jnr.

statements to the sole issue under consideration, the court struck out the two witness statements of Isaac Jantuah and Richard Agbovi as withdrawn.

4.2 Capacity

The issue of plaintiff's capacity, either as member; principal member of the Nyanya family; or a beneficial or usufructuary interest holder of the Adzoa land; or as head of the Nyanya family or its representative, did not come up before the arbitral panel. I am inclined to believe that Defendants did not raise any challenge to Plaintiff's capacity; neither was capacity set down for determination here in this court. All the same, being a paramount issue of jurisdictional nature, my view is that I have the duty not to proceed with the determination of the issue set down for determination without first resolving the challenge of Plaintiff's capacity.

Based on evidence adduced including the arbitral proceedings (Exhibit 1) I find that whether as descendant of Olator, a native, subject or a stranger on Lolobi Kumasi, the plaintiff was not unknown to the Nyanya family of Lolobi Kumasi. Defendants do not deny that the Olators, spanning from Henry Olator to the plaintiff herein, as well as the other Olators have farmed and continue to farm on portions of the Adzoa lands.[3] Indeed, Defendants admit that the parties' ancestors have lived peacefully together on their relative portions of the Adzoa land.

I find that Plaintiff commenced the suit not claiming to be head, the acting head, nor the representative of the head of the Nyanya family of Lolobi Kumasi. Plaintiff's suit is on a claim that he is a "[p]rincipal member of Nyanya Family of

[3] See paras. 20, 21, and 22 of Defendants' statement of case. See also paras. 11 and 15 of Togbe Adabra's witness statement; See as well para. 1 page 2 of Exhibit 1, as well as the last sentence in para.4 page 2 of Exhibit 1

Lolobi Kumasi and [u]sufruct [o]wner of the subject [Adzoa] land". (Emphasis added). His core claim, among other ancillary land reliefs, is not one strictly for a declaration of title to the Adzoa land but one for a "declaration that [he] is the usufruct owner of the disputed land and farm". Plaintiff, in my view, is claiming to be entitled to live and enjoy the use and benefits on the said portions of Adzoa land by dint of his membership to the Nyanya family.

I find that Defendants admit that Plaintiff and his late father, in fact, all the Olators, whether as family members, natives or strangers, have for ages peacefully without let lived on portions of the Adzoa lands. Exhibit 1 amplifies these admissions. Based on these crucial admissions, I hold that Plaintiff's claim as usufructuary owner or interest holder of portions of the Adzoa land cannot be untruthful and that Plaintiff cannot be denied access to the court. Indeed, I am convinced that Plaintiff has the capacity as expressed on his writ to commence the suit for his perceived usufructuary interests in the subject matter Adzoa land. I hold that Plaintiff has a derivative right and capacity therefore to litigate his perceived claims or interest in the subject matter land. I need to add however that what remains thereafter is the requisite proof of the merits of his perceived interest or usufructuary claim in the subject matter Adzoa land.

4.3 Proof of validity of the customary arbitration

Now back to the core issue under consideration, i.e., the validity of the customary arbitration to act as legitimate *estoppel*. I make the following findings of facts. Plaintiff does not deny the fact of the conduct of the customary arbitration; he admits to be the one who initiated it three years ago before Togbe Adabra "over the ownership of Adjoa land". The parties in the suit know Togbe Adabra very well, as he lives with and among them at Lolobi-Kumasi where the subject matter

Adzoa land in dispute is located. I can describe Togbe Adabra therefore as a primary material witness whose evidence is decisive on the issue under consideration. The evidence of Plaintiff and his sole witness, particularly under cross-examination is likewise crucial. Per his evidence in chief, Togbe Adabra's stated:

> Plaintiff came to me one day with two bottles of Castle Bridge that he had heard [a] public announcement that according to 1st [D]efendant someone has taken his oil palm nuts from the farm. Plaintiff came to me to [enquire from] the [1st Defendant] why [he harvested his] palm fruits. That is, the palm fruits that the defendant harvested were from his (plaintiff) farm. Later the defendant also bought two bottles of Castle Bridge drink, and we sat on the matter.

But according to Plaintiff, the main reason he went to Togbe Adabra was for Togbe to interrogate 1st Defendant why the latter harvested his (plaintiff) oil palm fruits. I understand Plaintiff to be contending that the case he lodged with Togbe was not one for an enquiry into title and ownership of the portion of the land. Certainly, this is one of the reasons I find as Plaintiff's response at the preliminary stage to the Defendants claim of customary arbitration.

My brief legal response to this line of Plaintiff's reasoning is that the arbitral panel could not have resolved Plaintiff's complaint without considering the ownership of that portion of the Adzoa land. The law is settled that, subject to statutory interests, whoever owns a piece of land[4], has an interest in whatever is on or

[4] Whether stool land, family or clan land, or even personal land

beneath that piece of land. Besides, Plaintiff's complaint, its nature as well as the evidence before the arbitral panel or this court is not one of boundary dispute. The arbitral panel, in my view, was right when they did not limit themselves to the oil palm fruits theft but set before them the following issues for determination:

1 Whether the Adzoa land belongs to the plaintiff's ancestor (Olator …)

2 Whether the portion of the larger Adzoa lands in contention is for the plaintiff's father …

3 Whether the taking away of the oil palm fruit bunch harvested by the defendants by the plaintiff is right.

The outcome of the customary arbitration, according to Togbe Adabra in paragraph 16 of his witness statement is that:

> That at the end judgment was given in favour of 1st Defendant that since [the] portion of Adzoa land belongs to [Defendant's] father and Plaintiff was asked to refund the amount Forty Ghana Cedis (GHc40.00) being the cost of two bottles of Castle Bridge Gin as his commitment to the arbitration. That Plaintiff was also <u>fined</u> two bottles of Castle Bridge Gin for his behaviour which <u>he paid</u> and Plaintiff was asked to leave the portion of land to 1st Defendant and his brother after [plaintiff] has harvested his [food] crops – yam. (Emphasis added)

Plaintiff impugns the arbitral award and contend that it cannot be used as *estoppel* against the suit herein. One of his grounds is what I have earlier above discounted; that is, the case he took to Togbe was on oil palm fruits and not for the

determination of ownership of the land. His further ground is that the arbitration was neither recorded in writing, nor the award given in writing. Plaintiff impugns therefore Exhibit 1 that was prepared a couple of months after the arbitration. Plaintiff, further contests Exhibit 1 because it was not signed nor validated by all the arbitral panel members.

Before stating the position of the law on the matter, I deem it relevant to state what I find to be the nature and crux of Plaintiff's case his lawyer strenuously pressed during cross-examination of Togbe Adabra, chairman of the arbitral panel:

Qn How long after the oral verdict did [it] take you to prepare and sign this document – Exhibit 1?

Ans It was prepared about 4-5 months after the determination of the matter.

Qn You gave [an] oral verdict because the proceedings were not … in writing?

Ans That is so, in customary arbitration, it is usually not written down.

Qn How did you put down these contents in Exhibit 1 together in writing months after the proceedings?

Ans I did not write it alone, I called the panel members and everybody recalled what transpired, and it was written down.

Qn Did you involve the plaintiff in the writing of proceedings … after [the] defendants' request [for a written arbitral verdict]?

Ans <u>It was not a fresh matter</u> we were about to sit on, so we did not invite him (plaintiff). (Emphasis added)

Whilst endorsing the position of Togbe's responses, I find myself compelled to find and state further admission of Plaintiff under cross-examination, which in my view strongly corroborates the crux of Defendants' case. I take this path because the law is settled that it is the facts the trial judge correctly finds in a case that directs the relevant law to be applied to the facts. Furthermore, the law is settled that the evidence of an adverse party that confirms some aspects of the case of the other party particularly on a core issue like the one under consideration must be deemed crucial for the determination of that issue in favour of the party whose case had been corroborated. *Tsirifo v Dua VIII* [1959] GLR 63, p.64-65; *Osei Yaw v Domfeh* [1965] GLR 418 SC; *Asante v Bogyabi* [1966] GLR 232, SC; *Banahene v Adinkra* [1976] 1 GLR 346, CA; See also *Augustine Yaw Manu v Elizabeth Ama Nsiah* [2006] 3 MLGR 71, SC.

Customary arbitration is presently codified under Part III of the Alternative Disputes Resolution Act, 2010, Act (798) which defines customary arbitration as 'the voluntary submission of dispute, whether or not relating to a written agreement for a final binding determination". I need to state here that the rules governing the practice and procedure of customary arbitration are largely of case law despite the recent enactment of Act 798 that makes some provisions for customary arbitration. The procedures and processes of customary arbitration are largely oral and not in writing. Provisions of Act 798 on customary arbitration, predominantly are the codification of common law (case law) position, which largely is unwritten. See 1992 Constitution, art. 11 (2). Togbe Adabra, in my view, is correct in his evidence under cross-examination that customary law and its system of customary arbitration procedures know no writing. I find nothing wrong in law over the oral delivery of the verdict that was later translated into writing and signed by the chairman Togbe Adabra. Indeed, the contents of Exhibit

1 is not new, or different from the oral verdict the panel declared in the presence of Plaintiff. Plaintiff admits to having paid the customary fine after the verdict, signifying in my view the acceptance of the verdict. To this end, the absence of the signatories of the other panel members on the written arbitral proceedings does not detract, nor derogate the effectiveness or validity of the oral verdict that was earlier declared by the panel, and the resultant award Plaintiff accepted and indeed paid.

Prior to Act 798, there had not been dearth of case law on settled features of a validly concluded customary arbitration. Indeed, it has been established in *Budu II v Ceasar & Ors* [1959] GLR 410 that the prerequisites of a valid customary arbitration are: voluntary submission by the parties of their dispute to an arbitrator for the purpose of having the dispute decided informally on its merits; prior agreement by both parties to accept the award, that must not be arbitrary arrived at after hearing of both sides in a judicial manner, and the publication of the award. See also *Nyasemhwe v Afibiyesan* [1971] I GLR 27.

I reiterate here *ad nauseam*, for good reason that Plaintiff admits that about three years ago, he summoned 1st Defendant before Togbe Adabra over portions of the Adjoa land and that in pursuance of his complaint he presented two bottles of Castle Bridge Gin to Togbe to which Defendants made equal payment of same as the parties' prior commitment, indeed, voluntary submission to the conduct of the customary arbitration. Togbe Adabra constituted a six-member panel[5] for the purpose. Plaintiff admits further that he trusted the competence of Togbe and the other panel members to resolve the matter and a further promise to accept their

[5] Togbe Adabra; Simon Akortia; Peter Dutorwovor; (secretary); Charles Kwashie; Anthony Adabrah; and Mark Doh.

verdict. That was on 15 April 2020. Plaintiff admits further that after deliberation, the panel came out with their verdict in Defendants' favour. He subscribed to the verdict and indeed paid the award.

Plaintiff denied under cross-examination that the panel asked him to pay GH¢40 for the oil palm fruits he took from 1st Defendant's farm. Plaintiff, however bulged and admitted later that "[y]es, they did ask me to pay GH¢40 but the purpose was not in relation to the palm fruits". If the GH¢40 payment he made was not for the stolen oil palm fruits, the law placed on Plaintiff the duty to tell the court the purpose for which he paid the GH¢40. Plaintiff failed. Plaintiff admitted further that he paid two bottles of Castle Bridge drink the panel asked him to pay as part of the verdict.

Plaintiff admits further under cross-examination that the oil palm fruits he took were on the land known as Adjoa land, denying though that the ownership of the land where he took the oil palm fruits was determined by the panel. Per the verdict of the panel that I have referred to just above, Plaintiff cannot be correct in his denial. Indeed, the panel held that "… at the end judgment was given in favour of 1st Defendant that since [the] portion of Adzoa land belongs to [Defendant's] father". (Emphasis added). Plaintiff further admitted under cross-examination that he failed to state in his case[6] that this portion of Adzoa land had earlier been a subject matter of customary arbitration; admitting further that he is in court over the ownership of the same portion of Adzoa land.

In *Pong v Mante* [1964] GLR 593, at 594, the court per Lassey J (as he then was) described customary arbitration as:

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6 That is, his 30-paragraph statement of claim; 10-paragraph reply; and 37-paragraph witness statement.

> The … practice whereby natives of this country constitute themselves into ad hoc tribunals popularly known and called arbitrations for the purposes of amicably settling disputes informally between them or their neighbours (which) has long been recognized as an essential part of our legal system; provided all the essential characteristics of holding a valid arbitration are present … (Emphasis added)

A much more elaborate legal statement on customary arbitration, according to S.A. Brobbey in his book *The Law of Chieftaincy in Ghana*, 2008 at pages 366-367, was given in the case *Republic v Adrie; Exparte Kpordoave III* [1987-1988] GLR 624, holding 4 of the headnotes, thus:

> A customary arbitration [is] an adjudicating authority created by custom and as such a creature of the common law of Ghana. They have jurisdiction as an adjudicating authority to determine questions affecting the rights of subjects of the country and [that[] any decision of theirs [is] recognized by law as binding on the parties who submitted to its jurisdiction. The courts [are] clothed with power to enforce the decisions of such customary arbitrations and that apart, an award of a customary arbitration could operate as *estoppel per rem judicatam* …

I subscribe to learned counsel for Defendants' umbrage against Plaintiff for his failure to state in his suit the fact of the customary arbitration. I find the failure as a deliberate act. A party who seeks favour from the court must be candid. *Mumuni v Nyamekye* [2013] 58 GMLR 15 at 58-59. I find all the ingredients as spelt out by case law as evident of a valid customary arbitration here in this suit, most of which

were admitted by Plaintiff. I find that there had been a valid customary arbitration over the dispute that the parties have earlier accepted, over which Plaintiff has paid the arbitral award. Both parties are bound by the award. It is therefore not open to the Plaintiff to come to court to relitigate the same issue. It is equally not open to the trial court to ignore the arbitration award, which had been pleaded and established by evidence before the court. *Budu II v. Caesar* [1959] GLR 410; *Adai v. Anane* [1973] 1 GLR 144.

5 Conclusion

Based largely on Plaintiff's admissions, I find with ease that there had been a valid customary arbitration on the subject matter Adzoa land. I find no basis to impugn the validity of the customary arbitration. Plaintiff provided no evidence of any procedural irregularity in the customary arbitral proceedings. Plaintiff provided no such evidence. In any case, Plaintiff's suit is not for a relief or order to nullify the outcome of the customary arbitration on grounds of procedural infractions. His case is a fresh one that seeks to vindicate his usufructuary rights on the same Adzoa land, which was the subject matter of customary arbitration that he initiated before Togbe Adabre, which he lost to 1st Defendant.

I find the process free from any procedural infractions that could warrant the court's intervention. The law is settled that there is no right in a party to an arbitration to resile from a valid award once this has been made. *Oyete & Ntim v Edumawu and Aduo* (1950) 1 WALR 278. See also *Suka v Glavee* [1991] 1 GLR 195; *Kwaw v Awortwi* [1989-90] 1 GLR 190; *Nuamah v Adusei* [1989-90] I GLR 457. I hold Plaintiff bound by the outcome of the customary arbitration. I hold further that Plaintiff is *estopped* from contesting the portion of the Adzoa lands, as the same had been a subject matter of a valid adjudication under customary arbitration in favour of Defendants.

Plaintiff's case fails; it is hereby dismissed as without merit, indeed *estopped per rem judicatam*.[7]

(Sgd.) George Buadi J.

High Court (1) Ho

Lawyers:

1 Ernest Dela Akatey, Esq for Defendants

2 Benedict Kofitse, Esq. for Plaintiff

[7] The end of the judgment - *Andrews Olator v Killian Agbovi & Anor* (Suit No. E1/17/2013)