

**IN THE SUPERIOR COURT OF JUDICATURE  
IN THE HIGH COURT OF JUSTICE (COURT 1) HO HELD ON MONDAY 16  
JANUARY 2023 BEFORE JUSTICE GEORGE BUADI, J**

---

SUIT NO. E1/18/2009

1	CHRISTIAN KODZO ASHIGBUI	}	
2	DZAHI DZIVENU	}	
3	GABU DEGBOR	}	
4	EDMUND VICTOR KOFI GABU	}	
	(All of Atsiavishie's House, Atsiavi)	}	PLAINTIFFS

*Versus*

1	GIFTY REJOICE KWAMI VOEGBORLO	}	
	(Substituted by Dela Voegborlo)	}	
	Per his law attorney Michael Kobla Voegborlo	}	1 <sup>ST</sup> DEFENDANT
2	SCANCOM LIMITED	}	2 <sup>ND</sup> DEFENDANT

---

**JUDGMENT AFTER TRIAL**

---

**1 Background**

It has been over 14 years ago, that is, on 26 November 2008 that Plaintiffs, claiming to be the representatives of the Lafe Clan of Atiavi on behalf of the Clan commenced this action by a writ of summons in this court against Defendants for the following reliefs:

- i Declaration of title to all that piece or parcel of land known as Atsiavi Lands and bounded as follows:
  - On one side by the properties of Gefuawo and Tsofuawo
  - On the 2<sup>nd</sup> side by the property of Tsofuawo and the Keta Lagoon
  - On the 3<sup>rd</sup> and 4<sup>th</sup> sides by the property of Seviawo.

- ii Damages for trespass
- iii Recovery of possession
- iv Injunction

## 2 Parties' statements of case

Plaintiffs claim that the Clan owns the parcel of land situate at Atiavi, known as Atiavi land with boundary description as stated above; claiming to have owned the land from time immemorial, cultivating food crops and palm trees. They claim further that their ownership and title to the land have been confirmed by several court judgments under which they had enjoyed use of the land without hindrance until in September 2007 when an agent contractor of the 2<sup>nd</sup> Defendant trespassed onto the land at Agbodokor constructing a cellular telecom transmission site for 2<sup>nd</sup> Defendant who rebuffed their protests and demands to stop work on the land. 2<sup>nd</sup> Defendant response was that it had obtained a lease of the piece of land from the 1<sup>st</sup> Defendant. Plaintiffs avers that their Clan does not know 1<sup>st</sup> Defendant; neither does 1<sup>st</sup> Defendant has title to the land to grant to 2<sup>nd</sup> Defendant.

In his amended statement of defence, 1<sup>st</sup> Defendant denies the Plaintiffs claim; indeed, denying that the land on which 2<sup>nd</sup> Defendant has constructed the cell mast with his permission is the subject matter of court judgments that the Plaintiffs claim to have secured over the land. 1<sup>st</sup> Defendant further denies that Plaintiffs had been exercising acts of long ownership of the land According to 1<sup>st</sup> Defendant, the disputed land belonged to the Tuvorga family and that it was auctioned under a judgment in a case titled *Torgbuiga Horsu & Kotoka v Kudaya Mensah and Dagadu Khokoe*, which his late father Torgbi Tsili II bought at the said public auction and issued with a Certificate of Purchase.

1<sup>st</sup> Defendant states that his late father Torgbi Tsili II after the purchase released the land back to the Tuvorga family who in appreciation of his father's redemptive intervention granted a portion thereof to his late father with the following boundary dimensions: "measuring "101 ft. in the South by grantor's land; measuring 403 ft in the North by grantor's land; measuring 604 ft; in the West by grantor's land; measuring 607 ft. by grantor's land in the East".

1<sup>st</sup> Defendant avers that since the grant, his late father had quietly possessed the land in dispute until he died in 1967 and that his successors including him have quietly possessed the land, including a third party who had been permitted to farm on the land for over 20 years. 1<sup>st</sup> Defendant claims further that he constructed a house on the land around 1997 without challenge by Plaintiffs. According to 1<sup>st</sup> Defendant, Plaintiffs are *estopped* from challenging his right to the land in dispute, and that, by long possession of the land by his late father and successors including himself, Plaintiffs are not only estopped but also that their interest in the land is statute-barred.

2<sup>nd</sup> Defendant does not admit nor deny Plaintiffs' claims, averring however to demand proof thereof at the trial. Though admitting the construction of the mast on the disputed land, the 2<sup>nd</sup> Defendant avers that it was upon a lease by the 1<sup>st</sup> Defendant for a consideration without notice of the Plaintiffs' interest in the land. It denies trespass, contending that the Plaintiffs have no valid case against her.

### **3 Issues the court set down for trial**

At the close of pleadings, the court on application set down these issues for trial:

- i Whether or not the land in question is the property of the plaintiffs.

- ii Whether or not the land in question was acquired by Togbi Tsili II
- iii Whether or not the plaintiffs' action is statute-barred.
- iv Whether or not Torgbui Tsili II and his successors including 1<sup>st</sup> Defendant have been in undisturbed possession of the land in dispute since 1948.<sup>1</sup>

#### **4 Fact findings, assessment of the evidence, and the applicable law**

After the directions for trial, the court<sup>2</sup> set 14 October 2011 for the hearing but was consistently adjourned without the hearing for close to two years. On 7 October 2013, Justice NCA Agbevor J (as he then was) took over the court. Due to the death of some of the parties and the persistent absenteeism of the lawyers, Justice Agbevor continued adjourning proceedings. On 5 December 2016, over three years after his assumption of the court, Agbevor J directed the parties to file their witness statement and pretrial checklist in accordance with the new rules of court procedure for taking evidence in a hearing – C.I. 87. Indeed, as of Agbevor J's last sitting on 15 October 2018, the hearing was yet to commence. His Lordship Justice Kyeremanteng J (deceased) took over the suit and commenced hearing on 4 April 2019. I took over hearing on 10 March 2020. On 3 June 2020, I adopted the record of proceedings. It was just the evidence in chief of the 2<sup>nd</sup> Plaintiff as well as the early part of the cross-examination of 2<sup>nd</sup> Plaintiff by lawyer for 1<sup>st</sup> Defendant.

Thus, the suit was heard per the witness statements the parties filed as directed by the court. Plaintiffs' case is per the sole evidence of 2<sup>nd</sup> Plaintiff Dzah Dzivenu. It is contained in a 3-page 20-paragraph statement. Attached thereto is a series of

---

<sup>1</sup> As additional issue filed by 1<sup>st</sup> Defendant.

<sup>2</sup> Presided over by A.K Abada J (Rtd)

court judgements marked Exhibits A, B, C, D, E, and G.<sup>3</sup> 1<sup>st</sup> Defendant's case is per the testimony of his substitute Michael Kobla Voegborlo in an amended witness statement he filed on 5 July 2021. It is a 2-page 13-paragraph statement that is attached with Exhibits 1, 2, 3, and 4, which replaced two witness statements that he earlier filed.<sup>4</sup> His case is supported by the witness statement of Paul Dotse Gagadosu, the head of the Tuvorga family, which is contained in a 2-page 13-paragraph statement he filed on 26 April 2017 and a further 2-page 6-paragraph witness statement he filed on 4 March 2021 upon the leave of the court, attached with a total 29-page document marked variously as Exhibits 5, 6, and 7.

2<sup>nd</sup> Defendant did not contest the suit, as it did not file any witness statement after its statement of defense; neither did its lawyers cross-examine the evidence of any of the parties, particularly the Plaintiffs though they chose to be present most at the trial; choosing therefore to peg on the fence, watching and waiting for the outcome of the suit to attorn tenancy to whoever the court adjudges at the end of the trial as the owner of the piece of land on which it has constructed its cell mast.

This is a land suit that seeks for declaration of title to land, but there was no order of the court for a composite site plan that could, as usual, have depicted the areas, location and size of the land over which the parties are contesting. In fact, whilst Plaintiff had put up for declaration of title of what appears to be a large extract of land that its forebears, allegedly have possessed since time immemorial, which they claim further to have been a subject matter of a series of court judgments, 1<sup>st</sup> Defendant's defence to the suit relates to what appears to be a small piece of land

---

<sup>3</sup> Filed on 10 July 2017. The requisite pretrial checklist was filed curiously on 19 Oct. 2017

<sup>4</sup> It has to be noted that 1<sup>st</sup> Defendant's earlier two witness statements filed on 26 April 2017 and on 29 April 2021 were discarded upon leave.

measuring a little over a hundred feet square that he had granted to 2<sup>nd</sup> Defendant for purposes of construction of a telecom mast base, which he claims form an integral part of land his forebears secured from the Tuvorga family. According to 1<sup>st</sup> Defendant, this piece of land is not a subject matter unrelated to nor affected by any of the court judgments Plaintiffs claim to have secured over the land.

All the same, being a claim for a declaration of title to land, the duty is on the Plaintiffs to establish satisfactory proof not only of their root of title, indeed title that is superior to Defendants, but also evidence of a clear identity of the land, and most importantly, evidence of possession, directly or indirectly of the area and the extent of the land they claim as covered by positive court judgements unto which Defendants have allegedly trespassed. See *Akoto II vs Kavege* [1984-85] 2 GLR 365 (Holding 2); *Mondial Veneer (Gh) Ltd vs. Amuah Gyebi XV* [2011] SCGLR 466 (Holding 4); *Conca Eng. Co vs. Moses* [1984-86] 2 GLR 319 (Holding 4). Indeed, failure to establish proof of any of the indicators above spells doom for a claim of declaration of title to land. See *Tetteh & Anor v. Hayford* (2012) 44 GMJ 11; *Anane & Anor v. Donkor & Anor (Consolidated)* [1965] GLR 188.

From the evidence adduced at the trial, I find that Plaintiffs' case seems so steeped and overly grounded on the series of court judgments they have secured allegedly over title to the Atiavi lands that they claim covers or affects the piece of land in dispute. I find that there are many divisions or units of settlements on the Atiavi land and that the disputed land where the communication mast had been built, which is the cause of Plaintiffs' action is at Lokoprignonu and at Agbodokor both of which are on Atiavi land. Indeed, the site or location of the cell mast is also known as Agblegor land and partly on Agbodokor land within Atiavi land. The ownership of the land on which the 2<sup>nd</sup> Defendant had constructed its cell mast is the issue before the court to determine; indeed, the cause of action of the Plaintiffs.

1<sup>st</sup> Defendant claim is that, that particular piece of land belongs to the Tuvorga family, not the Lafe Clan, and that it is not covered by the serial judgments that Plaintiffs claim to have secured over Atiavi lands. Plaintiffs deny this claim, contending that the judgments “related to this particular land and the whole of Atiavi land”.

I have looked at these judgments Exhibits A - G that begin from the judgment of the Native Court ‘B’ Anyako delivered on 22 August 1949, and an appeal thereon by the Native Appeal Court of the Anlo State delivered on 24 January 1950 that varied the Anyako decision, culminating in a further appeal to the Native Court of the Anlo State Keta, which on 30 November 1954 set aside the variation on grounds of fraud and conspiracy. Further appeal to the Supreme Court of the Gold Coast Eastern Judicial Division (Lands Division) Accra was not successful. The parties in the suit have always been the Lawe/Lafe Clan of Atiavi against Chief Tsili and Others of Glime Atiavi.

The parties in the aforesaid judgments started all over again at the High Court, Ho over damages for trespass to land at Atiavi, particularly the right to fell and sell oil palm trees. The Lafe Clan relied on the 1948 judgment of the Anyarko Native Court ‘B’. On 23 October 1959, the High Court, Ho presided by Simpson J delivered judgment in favour of the Lafe Clan dismissing the counterclaim of Chief Tsili and Others including one Peter Vorgbolor. I find also that an appeal against the decision of Simpson J was dismissed by the Supreme Court in its judgment dated 21 April 1964. Ordinarily, where a party had secured a judgment in its favour in respect of a larger piece of land, the judgment operates as an *estoppel* against any subsequent suit involving any portion within the land, the subject matter of the judgment. *Robertson v Reindorf* [1971] 2 GLR 289 (Holding 1). I find

that the parties here in this suit are related to the parties in the earlier suits and thus deemed to have a privity of interest in these judgments.

All the same, I find that the suit involving the Tuvorga family that culminated in the judicial sale of their land and purchase thereof by Togbe Tsili preceded the court judgments the Plaintiffs tendered. In fact, 1<sup>st</sup> Defendant testified per paragraph 5 of his witness statement that a “portion of Tuvorga family land was auctioned [after a judgment held at Keta on 22 November 1929] to pay the debt and Chief Tsili paid on their behalf”. Besides, Paul Kwasi Dotse Gagadosu (DW1), the current head of the Tuvorga family per paragraph 10 of his witness statement corroborated this fact, that:

Our family land was once sold under an auction as ordered by the court in 1948 and Chief Tsili bought it and paid [£417] however the principal members of our family raised that money and refunded it and the Tuvorga family rewarded [Chief Tsili] by giving him this piece of land.<sup>5</sup>

2<sup>nd</sup> Plaintiff who testified for the Plaintiffs admit the just above crucial portions of both 1<sup>st</sup> Defendant’s case and his witness (DW1); that is, one Tuvorga bought the land in dispute from a man called Amegbor Adzamlala under a judicial sale. The plaintiffs’ contention, however, is that Tuvorga “only have the right to farm but not title to the portion on which you farm”. The meaning I ascribe to this assertion is that Tuvorga family’s right over the land was limited strictly to farming. I find also that fact of the Defendant’s claim of a judicial sale by auction is supported by

---

<sup>5</sup> See para. 10 of Gagadosu’s witness statement filed on 26 April 2017.



a Certificate of Purchase (Exhibit 1) that vests the portion of the Tuvorga family land in Chief Tsili:

[T]he right, title and interest of the Tuvorga family of Atiavi in the messuages, lands and tenements ... in all piece of land commonly called Agblego land situate lying and being at Atiave in the Keta District ...

I reiterate here that according to DW1, their Tuvorga family later on raised the amount and refunded same to Togbe Tsili and carved a portion of the family land including the portion in dispute to Togbe Tsili. I reiterate also that the 1929 judgment that culminated in the judicial auction sale of portions of the Tuvorga family in 1948 precede all the judgments that Plaintiffs claim affect the Atiavi land including the subject matter in dispute. Besides, the contents of Exhibit 1 and their meaning, *ipso facto*, go beyond Plaintiffs' admission and avoidance that Tuvorga family's right to the land is limited solely to farming but not the title to the land. The claim, indeed, the admission also suggests to me that Plaintiffs Lafa Clan were not unaware of the suit that commenced in 1929 and the subsequent judicial sale in 1948 of the land in the said suit. I find that the Tuvorga family land, the subject matter of the judicial sale Exhibit 1 is located within the Atiavi land, and that the 1929 suit over the Tuvorga family land and its subsequent judicial sale in 1948 in particular, I reiterate, preceded the judgments the court declared and conferred on the Clan as to title over Atiavi lands.

I need to point out specifically that 2<sup>nd</sup> Plaintiff admitted under cross-examination that he is aware that "this same land was the subject matter of a 1929 judgment at Keta entitled *Kudaye-Mensah Vrs. Dagadu Hokoe*". Besides, Plaintiffs were not unaware of the judicial sale of the subject matter land in issue or portions thereof

as evidenced by the Certificate of Purchase in 1948 - Exhibit 1. Indeed, as recent as 1977, in a suit titled *Johnson Amegatse v. Akpagli Afetsi Agbodo Fiase and Besa Gagadosu*, the District Court, Abor confirmed the judicial sale and purchase thereof of the Tuvorga family land by Chief Tsili who I reiterate bears relationship or privity of interest with 1<sup>st</sup> Defendant. These are some of the relevantly interesting pieces of evidence I find during cross-examination of 2<sup>nd</sup> Plaintiff by lawyer for 1<sup>st</sup> Defendant in relation to the 1977 suit:

Qn. Do you know Kojovi Sedzagla Dzivenu.

Ans. Yes, I do; that is my biological father.

Qn. He testified on behalf of the Plaintiffs in the ... case entitled Johnson Amegather v. Akpabli Afetsi in August. Are you aware?

Ans. Yes, I am aware.

Qn. **I am suggesting to you that the Plaintiff for which he testified lost the case.**

Ans. **That is correct.**

Qn. **The land in dispute in that suit is the same as on the land in dispute.**

Ans. **That is correct**, but that was not between the LC, but between the Bamiawo and Kleviawo. (Emphasis added)

Plaintiffs not only admit knowledge of this quite recent suit but also admit the crucial fact of privity of interest of the suit and that of this present one. I am wondering the absolute silence or inaction of the Lafe Clan over the claim of Tuvorga family in portions of the Atiavi lands in the 1929 suit, the loss of Tuvorga family in that suit and the eventual judicial sale of the land and its purchase thereof by Chief Tsili in 1948. What could the Lafe Clan have done? Firstly, they could

have joined the 1929 suit to protect their interest in that part of the Atiavi land on grounds per their claim that the Tuvorga family's interest in the land is limited only to farming rights. Secondly, and most importantly, the Lafe Clan could have raised a challenge to the judicial sale.

I find no evidence of a joinder or even a botched attempt of joinder by the Plaintiffs to the 1929 *Kudaye-Mensah Vrs. Dagadu Hokoe* suit. Neither do I find at the trial of the instant suit any evidence that the Lafe Clan raised a challenge particularly to the judicial sale of the Tuvorga family land on grounds ostensibly of their alleged exclusive traditional title over Atiavi lands. If they were not a party in the 1977 suit, I find that they were not unaware of the suit, as one of their members indeed testified in that suit. With such knowledge that "[t]he land in dispute in that suit is the same as the one in dispute" one expected the Clan to have joined the suit.

The fact also is that the party the Clan supported and testified for lost the suit. Having failed to do any of the above obviously to protect the integrity of the Atiavi land, the presumption is that the Lafe Clan's acclaimed title and ownership of the Atiavi land did not include portions of the subject matter land in the 1929 suit that led to the eventual judicial sale and purchase in 1948 by Chief Tsili II who the Plaintiffs do not deny is survived by the 1<sup>st</sup> Defendant.

Beyond all these historical facts of ownership of the Atiavi land including the land claimed by the Tuvorga family, DW1, the current head of the Tuvorga family added in his testimony that it was his family that granted portions of the family land to the Keta District Assembly (KDA) for the construction of the market, Clinic, Post Office, and a lorry park. He added that the KDA in consideration paid royalties to the Tuvorga family. Plaintiffs denied these instances of recent acts of ownership of the Tuvorga family over portions of the Atiavi lands including the

portion in dispute, claiming that they rather granted these pieces of land to the KDA. Plaintiffs failed to support the claims with proof. On the other hand, I find proof of some of DW1 assertions of recent acts of ownership in Exhibit 6 series.<sup>6</sup> In the face of Exhibit 6 series, the obvious conclusion is that the judgments that Plaintiffs seem to rely on over the Atiavi lands do not relate to or cover the disputed land. My view is that the Plaintiffs have failed to provide the requisite crucial link to make me believe their version of the of ownership of the Atiavi land.

Beyond all these is also the fact of adverse possession of the piece of land by the Tuvorga family by their failure or default to notify Plaintiffs about the 1929 land suit and the loss of the suit and the land thereof per a judicial sale thereof in 1948. In protecting their so-called title to the Atiavi land in the face of what amounted to a clear adverse possession or claim of the land, the law required the Plaintiffs not to have sat on their rights over this long period that it had been established here that they did since particularly 1929 extending to 1948. The Limitation Act, 1972 (NRCD 54) s.10 provides that:

#### 10. Recovery of land

(1) A person shall not bring an action to recover a land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to a person through whom the first mentioned claims to that person.

(2) A right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run.

---

<sup>6</sup> Pieces of evidence of recent acts of ownership by the Tuvorga family.

(6) On the expiration of the period fixed by this Act for a person to bring an action to recover land, the title of that person to the land is extinguished.

The cardinal principle of law on the burden of proof as provided in the Evidence Act, 1975 (NRCD 323) sections 11, 12, 14 and 17 coupled with a plethora of precedential case law is that a party who makes an averment or assertion that is denied by his opponent has the burden not just by a repeated recitals on oath, nor by incessant suggestions of the claim by his lawyer to the opposing party, but rather to establish proof of the claim per other pieces of evidence that the averment he made was true. Indeed, the burden of proof shifts unto his opponent to displace or explain away that assertion only where the party has succeeded in leading some form of credible evidence on the issue. *Bank of West Africa Ltd v. Ackun* [1963] 1 GLR 176 SC. The standard test of proof in all these is just on a balance of probabilities. My view on this standard test in this suit is that the Plaintiffs have failed in their mandatory duty to produce credible evidence in support of the case.

## **5 Conclusion**

In conclusion, indeed as regards specifically to the issues set down for trial, based on the primary facts I have found, I hold that the land in question cannot be the property of the Plaintiffs. Plaintiffs have failed to lead evidence that the Tuvorga family had only farming rights and nothing more. Plaintiffs also failed to lead evidence that judgments they tended – Exhibits A - G over the Atiavi lands covers, includes or affect the subject matter piece of land in dispute. I find on the other hand that it is satisfactorily proven that the subject matter land had been acquired by Togbi Tsili II under a judicial sale by auction as in Exhibit 1. It is also sufficiently established in this suit that Togbe Tsili whose descendants include 1<sup>st</sup> Defendant has been in effective possession of the land in dispute since the purchase of the

land in 1948 from the Tuvorga family, and that he including 1<sup>st</sup> Defendant in particular had been exercising acts of ownership over the land in issue without challenge from Plaintiffs who claim to be holding exclusive title to Atiavi land.

Indeed, by the long unchallenged possession and exercise of recent acts of ownership over portions of the land including the portion in dispute, I hold that the Plaintiffs are *estopped* by conduct from raising any form of challenge to 1<sup>st</sup> Defendant's title and ownership of the subject matter land. Besides, within the facts I have found, I hold in equanimity that the Plaintiffs' action is statute-barred under the Limitation Act *id.* In essence therefore I dismiss Plaintiffs' suit, indeed refusing all the reliefs they seek thereunder as without merit, indeed suffering a dearth of the requisite mandatory proofs.<sup>7</sup>

**(Sgd.) George Buadi, J.**

High Court (1) Ho

**Lawyers:**

- 1 SMK Dzikunu, Esq. for the Plaintiffs.
- 2 Vincent Garr, Esq. for the 1<sup>st</sup> Defendant.
- 3 Joel Annor-Afari, Esq. for the 2<sup>nd</sup> Defendant.

---

<sup>7</sup> End of the judgment – *Christian K. Ashigbui & 3 Ors v. Gifty Rejoice Kwami Voegborlo (substituted by Dela Voegborlo) & Anor* (Suit No. E1/18/2009).