

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE,  
HOHOE, HELD ON TUESDAY THE 31<sup>ST</sup> DAY OF MARCH 2023 BEFORE HIS  
LORDSHIP AYITEY ARMAH-TETTEH J.

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SUIT NO E1/1/2018

EMMANUEL EKOR - PLAINTIFF

Head of KORVI KWASI Family

Kpando- Bame

V

JOACHIM TETTEH - DEFENDANT

Head of Afekewu family

Of Kpando- Bame

### J U D G M E N T

By his writ of summons dated 1 August 2017, the Plaintiff claims against the defendant as follows: -

1. A declaration that the Plaintiffs family known as Korvi Kwesi family is the owner of all that piece or parcel of land, known as Korvi land and bounded on the East by Togbe Folidze stool land, on the West by the Amegavi family land on the South by the Kundo and Nkunyaenstu family lands and on the North by Togbe Folidze stool land measuring an approximate area of 2½ miles square more or less.

2. Damages for trespass
3. An order for recovery of possession of the said land.
4. An order of Perpetual injunction(sic) restraining the defendants, their agents, workmen, assigns and privies whomsoever from entering the said parcel of land, the subject matter of this suit, remaining thereon, carrying on any work whatsoever thereon or in any manner interfering with the plaintiffs ownership and possession of the said land.
5. Any other reliefs found due.

Upon service of the Plaintiff's writ of summons and statement of claim on the defendant, he entered appearance and filed a defence denying the claim of the Plaintiff in its entirety and counter claimed as follows:

- I. Declaration of title to all that piece or parcel of land known and called Devenu land, situate lying and being at Kpando Bame within the Afekewu family land.
- II. Perpetual injunction restraining the plaintiff, his assigns, agents and anybody claiming title through him from ever laying claim to the Devenu land, the subject matter of this suit.
- III. Further or other reliefs the Honourable Court may deem appropriate.

By way of reply and defence to counter claim, the plaintiff denied the claim of the Defendant.

## **PLAINTIFF'S CASE**

The case of the Plaintiff as can be gleaned from his pleadings is that he is the head of

the Korvi Kwasi Family of Kpando Bame and he brings this action for himself and on behalf of the said family and sues the defendant in his capacity as the head of the Afekewu Family of Kpando-Bame. According to Plaintiff the land known as Korvi Kwasi land was founded by their forefather one Korvi Kwasi through hunting during the settlement of the people of Kpando Bame at their present place. That Korvi Kwasi whose mother came from Kpando Gabi and who was also the personal bodyguard of Togbui Dagadu, Chief of Kpando, migrated to Kpando Gabi with his family. He then appointed one Togbui Hlo Yawo Humphrey as the caretaker of the land. According to the Plaintiff when Korvi Kwasi died, Togbui Hlo Yawo continued to take care of the land for the descendants of Korvi Kwasi until some 30 years ago when Togbui Hlo Yawo handed over the land to the descendants of Korvi Kwasi . According to the Plaintiff, prior to his death Korvi Kwasi sold part of the land to one Edward Kofiste Tetteh. It is the case of the Plaintiff that the Afekewu family of which the defendant is the head has trespassed onto the land and laying adverse claim to it.

### **DEFENDANT'S CASE**

The case of the defendant is that there is no family at Kpando Bame known as Korvi Kwasi family. According to the Defendant the Korviwo, that is the Korvi people or the descendants of Korvi Kwasi, hailed from Kpando Dzigbe and during a hunting expedition one of their relatives by name Pitido mistakenly killed a human being for a game at Dzigbe and the family was so persecuted that they would not even allow anyone of them to cultivate on their land. That the said Pitido's wife Todze, hailed from the Afekewu family of Kpando Bame. According to Defendant by reason of Pitido's marriage to a member of Afekewu family, Pitido came to Kpando Bame with the wife and narrated the shooting incident and the subsequent events to his father-in-law. The elders of the Afekewu family then gave a piece of land known as the

Devenu land to Pitido and the wife to cultivate for their subsistence. According to Defendants when Pitido and wife were coming to settle at Kpando Bame, they came with Korvi who was the relative of Pitido. They all settled and cultivated the Devenu land. According to Defendant Tordze could not bear a child for Pitido. Pitido later got married to one Zorkaka from Kpando Bame with whom he had children. According to Defendant the said Pitido was killed in a hunting expedition and following his death, the children became afraid so, they left to settle at Kpando Gabi and Tsapke. They left their growing crops at the time under the care of one Kwasi Dewu, Appiah Kwame and others. It is the further case of the Defendant that Togbe Hlo Yawo Humphrey once laid adverse claim to the Defendant's Afekewu family land which claim resulted in chaos between the Defendant's Afekewu family and Tafala family from which Togbui Hlo Yawo Humphrey hailed from.

After close of pleadings the following issues set down in the application for directions filed by the Defendant were set down as issues for the determination of this suit.

1. Whether or not there is a family at Kpando Bame known and called Korvi Kwasi family.
2. Whether or not there is a land at Kpando-Bame known and called Korvi Kwasi land.
3. Whether or not Korvi Kwasi personally owned any land within the Afekewu family land at Kpando Bame.
4. Whether or not the defendant has trespassed onto any land belonging to Korvi Kwasi.

## **BURDEN AND STANDARD OF PROOF**

Section 14 of the Evidence Act, 1975, (NRCD 323) provides as follows: -

‘Except as otherwise provided by law, unless 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 that he is asserting.

Section 10 (1) of the Act provides as follows:

For the purposes of this Act, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.

Sections 11 (1) and (4) also provides as follows:

(1) For the purpose of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against him.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.

In the case of **Ackah v Pergah Transport Ltd & Others** [2010] SCGLR 728 at 736 the Supreme Court per Adinyira JSC opined as follows:

It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the

evidence a reasonable mind could conclude that the existence of the fact is more probable than its non-existence. This is a requirement of law of evidence under sections 10(1) and (2) and 11(1) and (4) of the Evidence Act, 1975 (NRCD 323).

In civil cases, it is trite, that the parties are required to prove their respective cases on the preponderance of probabilities.

Section 12 (1) of the Evidence Act (supra) provides as follows:

‘Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities.’

Section 12(2) explains what ‘preponderance of probabilities’ is as follows:

Preponderance of probabilities means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.

In the case of **Sagoe & Others v. Social Security and National Insurance Trust** (2012) 2 SCGLR 1093 the Supreme Court explained what Proof by preponderance probabilities as follows:

Proof by a preponderance of Probabilities ‘within the context of burden of proof as stated in section 12(2) of the Evidence Act, 1975 (NRCD 323), simply means weightier or superior evidence.

It is this burden and standard of proof as provided by the Evidence Act and explained by the decided cases that would guide me in the analysis of the evidence produced by the parties for the eventual determination of the issues in this suit.

It must be borne in mind that the burden of proof on a Plaintiff is the same on the Defendant counter claimant as was opined by *Rose Owusu JSC* in **Sasu Bamfo v Sintim** (2012) 1 SCGLR 136 at 155 as follows:

*'A counter claim is a different action in which the defendant, as a counter claimant is the plaintiff and the plaintiff in the action becomes a defendant. In the instant case where both parties were seeking declaration of title, recovery of possession and perpetual injunction in respect of the disputed piece of land, each of them bore the burden of proof and persuasion to prove conclusively, on a balance of probabilities that he was entitled to the reliefs claimed. Thus section 11(1) of the Evidence Act, 1975 (NRCD 323), enjoins the defendant in his capacity as a plaintiff in the counter claim to introduce sufficient evidence to avoid a ruling on the issue against him.'*

So, in the instant case before me where both parties were seeking declaration of title, recovery of possession and perpetual injunction in respect of the disputed piece of land, each of them bore the burden of proof and persuasion to prove conclusively, on a balance of probabilities that he was entitled to the reliefs claimed.

In proof of his case the Plaintiff testified and called 2 witnesses. And the defendant testified through his attorney and called one witness.

**ISSUE 1:** *Whether or not there is a family at Kpando Bame Known as Korvi Kwasi family.*

It is the case of the Plaintiff that he is the head of the Korvi Kwasi family of Kpando Bame and he brings this action for himself and on behalf of the said family.

On this issue the Plaintiff pleaded as follows:

1. The Plaintiff is the Head of the Korvi Kwasi family of Kpando Bame and brings

this action for himself and on behalf of the said family.

The Defendant per paragraph 1 of his statement of defence denied paragraph 1 of Plaintiff's statement of claim and pleaded as follows:

1. The defendant denies the averments contained in paragraph 1 of the statement of claim in the manner made and shall put the Plaintiff to the strictest proof of same.

Since it is the Plaintiff who claims that there is family at Kpando Bame known as Korvi Kwasi family of which he is the head, a claim the Defendant denies, it behooves the Plaintiff to lead credible and reliable evidence in support of his claim failing which the determination of this issue will not be in his favour.

In proof of this issue the Plaintiff testified as follows:

"Mr. Korvi Kosi is (sic) a citizen of Kpando- Bame ..... At one time there was big animal disturbing the peace of Kpando-Bame hence Korvi Kosi being a hunter was entrusted to kill the animal. That he took one of his sons who is (sic) also learning the hunting trade from his father was shot dead so the wife of Korvi Korsi took the rest of the children to Kpando Dzigbe as she does (sic) not want the rest of the children to end up like their brother. The (sic) it was not Kpando -Dzigbe the killing occurred as claimed by the defendant."

Plaintiff's second witness Henry Kwame Akorstu, the Regent of Kpando Bame on this issue testified as follows:

"The Korviwo as a family are my direct uncles and we are all natives of Kpando-Bame..... I am the new regent of Kpando Bame and an ancestry (sic) son from Korvi Korsi lineage and if Korvi Korsi is not from Bame then how can I become the regent of Bame."

Later under cross examination of PW2 it came to light that even though he was related



to the Korvi family, he was related to them maternally and paternally to the Tafala family of Kpando-Bame. So, it is not strange as an Ewe for him to succeed paternally as Regent of Kpando-Bame.

PW2 under cross examination said that the Ekor family was accepted as members or citizens of Kpando-Bame only in 2011 but added that it was the children of Ekor that they did know who came and introduced themselves to him and were accepted in 2011.

This is what was ensued under cross examination of PW 2

Q. The Ekor Family were accepted as members or citizens of Bame only in 2011.

A. It is so but that is not what the issue is. The children of Ekor that we did not know came to me and they introduced themselves to me and I also introduced them to the whole town and they killed a ram and celebrated.

The defendant does not deny that there is family known as the Korviwo or descendants of Korvi. His claim is that Korviwo are from Kpando Dzigbe and not from Kpando Bame.

The Defendant testified as follows:

“The plaintiff is not a native of Kpando- Bame. His forefathers hailed from Kpando-Dzigbe from the Atsyaxoe family. The Plaintiff’s grandparents migrated from Kpando-Dzigbe to Kpando–Bame Afekewu after an incident at Kpando Dzigbe. There is no family in Kpando- Bame called Korvi Kwasi family. Also there is no land called Korvi Kwasi land. I heard of Kor Korviwo but they are not indigenous people and they did not own any land at Kpando- Bame Afekewu. The junior brother of Piti Doe was called Dodzi Samani who had a son called Korvi. After the death of Dodzi Samani, his son Korvi lived with his uncle Piti Doe and his wife Todze. It happened that Piti Doe Killed somebody by shooting during hunting expeditions at his hometown Kpando-Dzigbe. This

incident generated vehement persecution against Piti Doe at his hometown to the extent that he was not allowed to even farm on the Kpando -Dzigbe lands to feed his family and himself. At the peak of the hardships and suffering of Piti Doe and his family, his wife Todze came to her father, Agordome-Tette Agblomi and others at Kpando-Bame and narrated the acute hardships they were facing at Kpando-Dzigbe. Tozde's fathers gave Tozde and her husband Piti Doe a piece of land to cultivate. Piti Doe and his family lived on this land. Later, Piti Doe's family migrated from Kpando-Dzigbe to settle with Piti Doe and his family at Kpando- Bame Afekewu..... Piti Doe was a cloth weaver which profession he engaged in whiles at Kpando-Bame. One day he was invited by a man from Kpando-Bame Anyigbe for a hunting expedition. During the hunting expedition, Piti Doe was shot dead. After the death of Piti Doe, Korvi went back to Kpando Gabi and lived there permanently..... Thereafter Piti Doe's daughters left Kpando Bame Afekewu to live with their uncles permanently at Kpando-Tsakpe Deveme."

DW1 Dickson Kofi Adjandeh testified as follows :

"In 2011, it was alleged that Koviwo came again to Bame and pleaded that they be accepted as citizens of Kpando Bame. At the community gathering before they were accepted, the Odikro Togbui Kusa who performed the libation accepting them demanded that somebody from the town should narrate their history linking them to Kpando Bame but nobody was able to do so including the plaintiff and his family. The odikro therefore poured libation for their acceptance into Kpando Bame and stated that it is strangers that grow a town and therefore they should be accepted as such. The Afekewu youth later heard the development and was never happy and therefore wrote a strong worded letter to the regent Henry Korstu which remained unanswered till today."

Defendant's Attorney tendered in evidence Exhibit 2. Exhibit 2 is a report of a committee headed " *DE-VE-NU*" *LAND OWNERSHIP AND WHETHER THE LATE KOR(KORVI) AND FOR THAT MATTER HIS CHILDREN WERE CITIZENS OF KPANDO BAME OR NOT.*

What is the probative value of Exhibit 2? From the proceedings contained in Exhibit 2, the family members of the Kor (Korvi) who were the subject of the committee were not called to testify at the committee. Persons that appeared before the committee gave vary or conflicting testimonies as to who the Korviwos are.

The committee's findings were not definite and conclusive. They are as follows:

35. The Panel of Arbitrators then informed the assembly that, with the foregoing findings, the Panel had finished its work and:

- i. That Mr. Yawo Hlo, through whom the message from the children of Korvi came to the knowledge of Kpando Bame, should notify the children of Korvi about the investigations and findings of Kpando Bame as to where they stand regarding their citizenship.
- ii. That if the children of Kor (Korvi) had any property at Kpando Bame to claim, they should do so through the proper channel, that is, through the Chief of the town.

These so-called findings are not definite on whether or not the Korviwos are from Kpando Bame or from Kpando Dzgbe and neither does the committee makes a definite finding as to the ownership of the De-Ve-Nu land whether it belongs to the Afekewus or the Koviwos.

Exhibit 2 in my view has no probative value and does not help the court in the resolution of the issue as to whether there is a family at Kpando Bame, known as Korviwo or Korvi Kwasi Family or not.

Exhibit 6 is a letter dated 22<sup>nd</sup> May, 2011 written by Kpando Bame Afekewu Youth and addressed to the Regent of Kpando Bame. Exhibit 6 expressed reservations of the youth of Kpando Bame Afekewu about the integration of the Korviwo as citizens of Kpando Bame.

The introductory part of Exhibit '6' reads as follows:

"It has come to the notice of the entire youth of Afekewu Family of Kpando Bame on the purported integration of Koviwo as citizens of Kpando Bame on Sunday, 1<sup>st</sup> May, 2011. The family of Kovi from Kpando Dzigbe came to introduce themselves as citizens of Kpando Bame and were integrated as such on Sunday, 1<sup>st</sup> MAY, 2011."

The contents of Exhibit 6 indicates that the Korviwos were indeed integrated as citizens of Kpando Bame.

The defendant in his pleading and testimony denied that there is a family at Kpando Bame known and called Korvi Kwasi family. He denied also that the Plaintiff is a native of Kpando-Bame . However his own Exhibit 3 shows that the Korvi Korsi family were made citizens of Kpando-Bame in May 2011. Again, in the oral testimony of DW1 he said the Korvi Kwasi Family or Korviwos were in May 2011 accepted as citizens of Kpando Bame albeit recently. This pieces of evidence of defendant's Attorney and DW1 corroborates the evidence of the Plaintiff that there is a family at Kpando Bame known as Korvi Kwasi family.

The law is that where the evidence of one party on an issue in a suit is corroborated by his opponent or by the witnesses of his opponent, whilst that of his opponent on the same issue stands uncorroborated even by his own witness, a court ought not to accept the uncorroborated version.

In **Manu v. Nsiah** (2005-2006) SCGLR 25 in holding 1, held that:

It is well-established rule that where the evidence of a party on a point in a suit is corroborated by witnesses of his own opponent, whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good and apparent reason the court finds the corroborated version incredible, impossible or unacceptable.

In the instant case the evidence of the defendant and his witness DW1 corroborates the evidence of the plaintiff that there is a family in Kpando Bame known as the Korvi Kwasi Family while the evidence of the Defendant on the same issue stands uncorroborated. I have no reason to prefer the uncorroborated evidence of the Defendant to the corroborated evidence of the Plaintiff. I find and hold that currently there is a family at Kpando Bame known as Korvi Kwasi family. And the Koviwos are citizens of Kpando Bame and that the Plaintiff being a member of the said family is a native of Kpando Bame.

I will discuss the remaining three issues together as they are related.

*Issue 2: Whether or not there is a land at Kpando-Bame known and called Korvi Kwasi land.*

*Issue 3: Whether or not Korvi Kwasi personally owned any land within the Afekewu family land at Kpando Bame.*

*Issue 4: Whether or not the defendant has trespassed onto any land belonging to Korvi Kwasi.*

The Plaintiff based his family's claim to the disputed land on its founding by their forefather one Korvi Kwesi through hunting during the settlement of the people of Kpando Bame at their present place. That the said Korvi Kwasi and his family migrated to Kpando Gabi and when going to Kpando Gabi made one Togbui Hloyao a caretaker of the land.

The Plaintiff testified as follows:

Mr. Korvi Korsi is (sic) a citizen of Kpando Bame and as a great hunter he was able to found a very big land as hunters are known to be land discovers. At one time there was a big animal disturbing the peace of Kpando Bame hence Korvi Korsi being a hunter was entrusted to kill the animal. That he took one of his sons who (is) was also learning the hunting trade from his father was shot dead so the wife of Korvi Korsi took the rest of the children to Kpando Dzigbe as she does (sic) not want the rest of the children to end up like their brother. That it was not Kpando-Dzigbe the killing occurred as claimed by the Defendant. The late Dagadu Anku III the then Paramount Chief of Akpini Traditional Area invited Korvi Korsi to come and help him at his palace thereby appointing him as a palace soldier (Ahenfie Police)..... while Korvi Korsi leaving his land to assume his new post as Palace Soldier he entrusted his land at Kpando-Bame into the hands of Hloyao to take care of the land and after the death of Korvi korsi, Hloyao invited the family of Korvi Korsi and asked them to provide drinks to wit palm wine, Akpeteshie and schnapps and he showed us the boundaries of the land of Korvi Korsi.

PW1 on the Plaintiff's family claim of the land testified as follows:

I am from Folidze Family one of the boundary owners of the Plaintiff's family land otherwise known as Ekorvi Kwesi land. That Korvi Kosi placed one Togbe Humphrey Yao Hlo as a caretaker of the land for about thirty (30) years without any protest from anyone whatsoever including the Defendant.

PW2 Henry Akorstu also testified as follows:

My father was Hloyao who was the caretaker of Ekorvi Family land but now deceased hence I am now the caretaker of Ekorvi family land at Kpando-Bame. The Korviwos as a family are my direct uncles and we are all natives of Kpando-Bame. That my father Hloyao told me that Korvi Kosi usually asked youth to fell palm trees and fell logs on their land whenever he come (sic) to Bame as at

that time he was living with his wife at Kpando-Dzigbe and Hloyao was the caretaker of Korvi Kosi family land.

The Defendant on the other hand claim that the disputed land is his Afekewu family property. And that they granted it to one Piti Doe and his wife called Tordzi who was a member of the Afekewu family to farm on. That later in time the said Piti Doe left Kpando-Bame and the land reverted to the Afekewu family as owners and that the land has never been the property of Korvi Kosi.

The Defendant per his lawful attorney testified as follows:

The junior brother of Piti Doe was called Dodzi Samani who had a son called Korvi. After the death of Dodzi Samani, his son Korvi lived with his uncle Piti Doe and his wife Todze. It happened that Piti Doe Killed somebody by shooting during hunting expeditions at his hometown Kpando-Dzigbe. This incident generated vehement persecution against Piti Doe at his hometown to the extent that he was not allowed to even farm on the Kpando -Dzigbe lands to feed his family and himself. At the peak of the hardships and suffering Piti Doe and his family, his wife Todze came to her father, Agordome-Tette Agblomi and others at Kpando-Bame and narrated the acute hardships they were facing at Kpando-Dzigbe . Tozde's fathers gave Tozde and her husband Piti Doe a piece of land to cultivate. Piti Doe and his family lived on this land. Later, Piti Doe's family migrated from Kpando-Dzigbe to settle with Piti Doe and his family at Kpando-Bame Afekewu..... Piti Doe was a cloth weaver which profession he engaged in whiles at Kpando-Bame. One day he was invited by a man from Kpando-Bame Anyigbe for a hunting expedition. During the hunting expedition, Piti Doe was shot dead. After the death of Piti Doe, Korvi went back to Kpando Gabi and lived there permanently..... Thereafter Piti Doe's daughters left Kpando Bame Afekewu to live with their uncles permanently at Kpando-Tsakpe Deveme."

DWI Dickson Kofi Adjandeh also testified as follows:

“I am the first grandchild of Togbui Humphrey Hloyao whom the plaintiff referred to as the caretaker of the land in dispute on behalf of the Ekorvi Kwesi family. Togbui Humphrey Hloyao was never a caretaker of the said land. I say so because there was a time the people of Kpando -Bame , Kpando Agudzi and Kpando Agbenoxoe took up a case against the state to retrieve their land that was taken over by the state to resettle all who were affected by the creation of the Volta Lake. Togbui Humphrey Hloyao was then the Regent of Kpando-Bame. He summoned all those in charge of the various family lands in Kpando-Bame to unite and fight. Each head of family identified their various family lands. The late Togbui Worlanyo Adzande was the one responsible for the land in question. Togbui Hloyao never invited or even mentioned Korvi Kwesi’s name against any piece of land. He never stated that he was in charge of that land. He identified himself for and paid for the Tafala Stool land.”

The evidence received on the ownership of the disputed land has been traditional and they seem to be conflicting. In such a situation the principle is that the court is required to evaluate the conflicting traditional evidence against undisputed evidence and events and acts of ownership in living memory adduced before the court and opt for the version of traditional evidence that is consistent with the undisputed evidence.

In the celebrated case of **Adjeibi-Kojo v. Bonsie and Another** [1957] 3 WALR 257 PC, 260 Lord Denning held as follows:

Where there is a conflict of traditional history, one side or the other must be mistaken, yet both may be honest in their beliefs. In such a case demeanour is little guide to the truth. The best way is to test the traditional history by



reference to the facts in recent years as established by evidence and by seeing which of two competing histories is the most probable.

In the recent case of **Comfort Offeibea Dadoo (Substituted By Vivian Ankrah) vrs Nii Amartey Mensah** Civil Appeal No J4/12/2019 5<sup>TH</sup> February 2020 (UNREPORTED) the SC per Doste JSC after examining previous judgments on the issue of the applicable test to assess conflicting traditional evidence, re-stated and re-emphasized the essential guidelines for assessing traditional evidence by the court. This is what he said, it is an extended quotation but for the understanding of the issue how to assess conflicting traditional evidence, I deem it necessary to quote it.

“One matter which has attracted our attention in this delivery is the issue and significance of traditional evidence. What must be appreciated is that, both parties relied basically on traditional evidence. Secondly, it must also be further appreciated that this is what they all used to procure the fixing of their boundaries and eventually their documents of title.

However, in assessing the various pieces of traditional evidence, it is worthwhile to take into consideration the admonition by Lord Denning in *Adjeibi-Kojo v Bonsie (1957) 3 WALR 257 at 260 PC*, where the distinguished legal luminary opined as follows:-

*“Once traditional history is handed down by word of mouth, it must be recognized that, in the course of transmission from generation to generation, mistakes may occur without any dishonest motives whatever. Witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago.” Emphasis*

In the celebrated case of *Adwubeng v Domfeh, [1996-97] SCGLR 660 at 671, Acquah JSC* (as he then was) posited as follows:-

*“Accordingly, a court cannot simply reject a party’s traditional evidence on such petty and trifling matters.” Emphasis*

Indeed the Privy Council in the earlier case of *Ebu v Ababio* (1956) 2 WALR 55 at 57, stated as follows:-

*“Traditional evidence has a part to play in actions for declarations of title but there are cases in which a party can succeed even if he fails to obtain a finding in his favour on the traditional evidence. “Emphasis*

Having evaluated the pieces of traditional evidence given by the parties in this case, we are now faced with applying the appropriate test that are to be applied. The Court of Appeal per Edward Wiredu JA, (as he then was) addressed these concerns in the case of *In re Adjancote Acquisition, Klu v Agyemang II* [1982-83] GLR, 852, particularly at 857 where the court unanimously set out the following as a guide.

1. *“Oral evidence of tradition is admissible in the courts of West Africa and may be relied upon to discharge the onus of proof if it is supported by the evidence of living people of facts within their own knowledge”. See Commissioner of Lands v Adagun (1937) 3 W.A.C.A 206.*
2. *“Where it appears that the evidence as to title is mainly traditional in character on each side and there is little to choose between the rival conflicting stories, the person on whom the onus of proof rests must fail in the decree he seeks”. See Kodilinye v Odu (1953) 2 W.A.C.A 336 and Abakum Effiana Family v Mbibado Effiana Family [1959] GLR 362.*
3. *“Where there is a conflict of traditional history, the best way to find out which side is probably right is by reference to recent acts in relation to the land.” See Yaw v Atta [1961] GLR 513.*
4. *“Where claims of parties to an action are based upon traditional history which conflict with each other, the best way of resolving the conflict is by paying due regard to the accepted facts in the case which are not in*

*dispute, and the traditional evidence supported by the accepted facts is the most probable case.” See Beng v Poku [1965] GLR 167*

5. *“Where the whole evidence in a case is based on oral tradition not within living memory, it is unsafe to rely on the demeanour of the witnesses to resolve conflicts in the case, see Adjeibi-Kojo v Bonsie already referred to supra”.*

Applying some of the above principles, and guidelines, the Supreme Court in a unanimous decision in the case of *Adjei v Acquah & Others [1991] 1 GLR 13*, particularly at page 19, held as follows:-

*“The law was that although traditional evidence had a part to play in actions for declaration of title, a favourable finding on its evidence was not necessarily essential to the case of the party seeking the declaration. What the authorities required was that traditional evidence had to be weighed along with recent facts to see which of the two rival stories appeared more probable. Facts established by matters and events within living memory, especially evidence of acts of exercise of ownership and possession must take precedence over mere traditional evidence.” Emphasis*

Quite recently, the Supreme Court in the case of *Achoro v Akanfela [1996-97] SCGLR 209*, particularly at 213, Acquah JSC, (as he then was) spoke with unanimity as follows:-

*“Now part of the evidence led by both parties is traditional, and the best way of evaluating traditional evidence is to test the authenticity of the rival versions against the background of positive and recent acts.” Emphasis*

Finally, in the case of *In Re Taahyen and Asaago Stools; Kumanin II (substituted by) Oppon v Anin [1998-99] SCGLR 399*, the Supreme Court held in holding one as follows:-

*“in assessing rival traditional evidence, the court must not allow itself to be*

*carried away solely by the impressive manner in which one party narrated his version, and how coherent that version is, it must rather examine the events and acts within living memory established by the evidence, paying attention to undisputed acts of ownership and possession on record; and then see which version of the traditional evidence, whether coherent or incoherent, is rendered more probable by the established acts and events. The party whose traditional evidence such established acts and events support or render more probable must succeed unless there exists, on the record of proceedings, a very cogent reason to the contrary.” Emphasis*

Based on all the above discussions, we re-state and re-emphasize the essential guidelines for assessing traditional evidence by the court as follows:-

1. The Court must be slow in being carried away by the impressive manner in which a party narrated his or her version of the traditional evidence and how coherent or methodical that is.
2. **The Court must pay particular attention to undisputed acts of overt acts of ownership and possession on record in addition to an examination of the events and acts therein within living memory which have been established by evidence.**
3. Consider which of these narratives is more probable by the established acts of ownership.
4. **Finally, the party whose traditional evidence coupled with established overt acts of ownership and possession are rendered more probable must succeed unless there exists on the record other valid reasons to the contrary.**

In applying these guidelines to the instant case, this court will have to look at recent undisturbed overt acts of ownership and or possession exercised over the subject matter

in recent times.

First, there is evidence that the Defendant's Afekewu family has been in possession since Piti Doe and has family including Korvi left Kpando Bame.

Under cross examination of PW1 who claims that the land belongs to the Plaintiff's Korvi Family testified that for the past 70 years he had not seen the Korviwos working on the land in dispute. This is what ensued under his cross examination.

Q. For the past 70 years you have not seen any member of the Ekor family working on the disputed land?

A. I have not seen them work there for the past 70 years even though the land belong to them.

PW 2 also under cross examination testified that after the Koviwos left Kpando Bame it is the Defendant's Afekewu Family that has been in possession of the land. These are the answers given under cross examination.

Q. The Ekor family left Kpando Bame for Kpando Dzigbe about 70 years ago?

A. That is not true.

Q I put it to you that even after the Ekor family left Kpando Bame, Afekewu family has been in possession of the land in dispute.

A. Yes that is true, but the land is not for them.

It is on record that Kpando-Bame has been in existence for over 300 years. Under cross examination of PW2 who is, the Regent of Kpando-Bame, this is what ensued:

Q. You will agree with me that Kpando-Bame has existed more than 300 years.

A. Yes

Q. So you agree with me that the two families have been on these lands ever since.

A. Yes

It is also in evidence that the Plaintiff who is a farmer and lives at Kpando-Bame has never farmed on the disputed land.

Plaintiff testified in his evidence in chief as follows:

“I am Emmanuel Kofi Ekor, I live at Kpando Bame and I am a farmer”

Under cross examination he testified that he is 70 and has not personally farmed on the disputed land. This is what he said:

Q. How old are you?

A. 70 years

Q. You personally have never worked on the disputed land.

A. That is so.

Even though the Plaintiff did not give any reason for not farming on the disputed land, it is strange for a 70-year-old head of family who is farmer, and living within the town where the disputed land is located and claims the disputed land belongs to his family, has never farmed on the land.

The Defendant's Afekewu Family being in possession of the disputed land is undisputed. There is no evidence how long the Afekewu have been in possession of the land but conservatively I am of the view that the Afekewu family has been in possession for more than 70 years. And this possession has been undisturbed except in 1987 when it was alleged that Togbui Hloyao entered the land allegedly on behalf of the Korvi Kwasi Family. The Afekewu family was undisturbed possession of the disputed land for over 40 years before the attempt by Togbe Hloyao and the Korvi Kwesi family to enter the land in 1987, which attempt was fiercely resisted by the Afekewu family.

In **Nartey v. Mechanical Lloyd Assembly Plant Limited** [1987-88] 2 GLR 314 it was held as follows:

There seems to be a misunderstanding of the cases which decide that a party who is in possession of land is entitled to the protection of the courts against all those who cannot prove better title. The cases show that it is not possession for a day or two, a week, a month, or even a year which suffices to bring the rule in operation. It is rather long, peaceful, undisturbed possession over a considerable period of time, long and peaceful enough to raise a presumption that the occupation of the land must have lawful origin.

Again, in **Abakam Effiana Family & Ors v. Mbibado Effiana Family & Ors** [1959] GLR 362 it was held as follows:

Where a defendant has been in long undisturbed possession of land, he is entitled to the protection of the law against all who cannot affirmatively prove a better title.

Section 48 of the Evidence Act 1971, (NRCD 323) on ownership and possession of land provides as follows:

- (1) The things a person possesses are presumed to be owned by that person.
- (2) A person who exercises acts of ownership over property is presumed to be the owner of it.

This section is a rebuttal presumption and the duty and the duty to discharge this presumption is on the Plaintiff's family which is not in possession of the disputed land.

In his book *Land Law, Practice and Conveyancing in Ghana*, third edition, the learned Author Sir Justice Denis Dominic Agyei at page 219 had this to say on the subject:

Section 48 of the Evidence Act is on the presumption that a person who possesses a property is presumed to be the owner. Similarly, a person who

exercises acts of ownership over property is presumed to be the owner. Section 48 is a rebuttable presumption and the duty to discharge the burden is on the person who is not in possession or occupation of the land. Until the person who is challenging the possessory and ownership rights of the person in possession is able to rebut the presumption, he would not be considered as the owner of the disputed land. For the law is that a person in possession of property is presumed to be the owner and can maintain an action against everyone except the true owner.

In the instant case from the evidence am satisfied that the Defendant's Afekewu Family was in undisturbed possession of the land for at least 40 years before the Plaintiff's family made an attempt to enter it in 1987, which attempt was fiercely resisted by defendant's family through Togbui Hloyao. The Plaintiff has not been able to adduce any evidence to rebut that the presumption, that even though he is not in possession his family is the owner of the land. In my view peaceful, undisturbed possession of the disputed land by Defendant's Afekewu family for over 40 years is long peaceful enough period of time to raise a presumption that the occupation of the land has a lawful origin.

Again, the Afekewu family acted as owners of the land in dispute to retrieve their lands that was taken over by the state to resettle all who were affected by the creation of the Volta Lake.

DW1 testified as follows:

"I am the first grandchild of Togbui Humphrey Hloyao whom plaintiff referred to as the caretaker of the land in dispute on behalf of the Ekorvi Kwasi Family. Togbe Humphrey Hloyao was never a caretaker of the said land. I say so because there was a time the people of Kpando Bame, Kpando Agudzi and Kpando Agbenoxoe took up a case against the state to retrieve their lands that was taken over by the state to resettle all who were affected by the creation of



the Volta Lake. Togbui Humphrey Hloyao was then the regent of Kpando Bame. He summoned all those in charge of the various family lands to unite and fight. Each head of family identified their various family lands. The late Togbui Worlanyo Adzande was the one responsible for the land in question. Togbui Hloyao never invited or even mentioned Korvi Kwasi's name against any piece of land. He never stated that he was in charge of that land. He identified himself for and paid for the Tafala Stool land.

This testimony of DW1 in respect of material facts to the issues before this court were not denied by the Plaintiff when DW1 was cross examined. The effect is that Plaintiff admits that it was Togbui Worlanyo Adzande of the Afekewu Family who put in a claim to retrieve lands in respect of the disputed land from the government and not Togbe Hloyao and Togbui Hloyao represented the Tafala Family. The law is that when a party had given evidence of a material fact and was not cross examined upon, he needs not call further evidence of that fact. See **FORI v AYIREBI** [1966] GLR 627, SC .

I find and hold that Togbui Worlanyo Adzande of the Afekewu family put a claim to retrieve land in respect of the disputed land from the government and not Togbui Hloyao. Putting in this claim to retrieve the disputed land from the government meant the Afekewu family was exercising acts of ownership of the disputed land.

Where there is a conflict of traditional history, the best way to find out which side is probably right is by reference to recent acts in relation to the land. See **Yaw v Atta** [1961] GLR 513.

I am satisfied that the narrative of the Defendant in view of the recent happenings of his family being in possession and occupation and acting as owners of the subject matter in dispute is more probable than the narrative of the Plaintiff. It is also consistent with Defendant's family granting the land to Piti Doe and his wife Todzi and Defendant's

family taking it over after Piti Doe's death and family including Korvi left Kpando Bame.

The plaintiff alleged that prior to the death of Korvi Korsi , he sold part of the land to defendant's grandfather called Edward Kofiste Tetteh.

At paragraph 8 the plaintiff pleaded as follows:

Prior to the death of Korvi Kwasi, Korvi Kwasi sold part of the land to the defendant's grandfather called Edward Kofiste Tetteh who had approached Korvi Kwasi to purchase part of Korvi Kwasi land since Edward Kofiste Tetteh had no land. The boundary of the land Korvi Kwasi sold to Edward Kofiste Tetteh is where a stream called Dego and Este streams met (sic).

In defendant's statement of defence paragraph 19 he pleaded as follows:

Defendant denies the averments contained in paragraphs 8 and 9 of the statement of claim in the manner made and shall put the plaintiff to the strictest proof of same.

In his testimony the Plaintiff himself never led any evidence to substantiate this claim that Prior to the death of Korvi Kwasi, Korvi Kwasi sold part of the land to the defendant's grandfather called Edward Kofiste Tetteh who had approached Korvi Kwasi to purchase part of Korvi Kwasi land since Edward Kofiste Tetteh had no land was only an allegation in the pleading of the Plaintiff. It is trite that pleadings are not evidence.

In **Gihoc Refrigeration & Household v Jean Hanna Assi** (2005-2006) SCGLR at 476 Dr Date-Bah JSC had this to say on averments made in pleadings but no evidence led on those averments at the hearing :

What was pleaded is not necessarily proof of the truth of the matter pleaded. I am content to limit myself to the evidence on record in this case.

See also **Hayword vrs Pullinger & Partners Ltd.**(1950) 1 ALL ER 581

It was plaintiff's witnesses PW1 and PW2 who led terse evidence on the claim of the Plaintiff that Krovi Kwasi sold a portion of the Krovi Kwasi land to defendant's grandfather called Edward Kofiste Tetteh. These two witnesses after from repeating the averment of plaintiff on oath in the witness box, plaintiff did not provide any other evidence to substantiate the claim. Indeed, PW1 and PW2 did not testify that they were eyewitnesses to the alleged transaction.

In my view the Plaintiff did not lead any credible evidence on this claim which would have established that Korvi Kwasi owned the land and as the owner sold portion to Edward Kofiste Tetteh a member of the defendant's family.

In **Dzaisu v Ghana Breweries** [2009] 6 G.M.J. 111 on the meaning of burden of persuasion and who has the burden of proving same, Adinyira , JSC held as follows:

It is a basic principle in law of evidence that the burden of persuasion on proving all facts essential to any claim lies on whosoever is making the claim. Section 10(1) of the Evidence Act, 1975, Act 323 defines burden of persuasion as follows:

(1) For the purposes of this decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.

The court further held on whether an assertion made by a party in the witness box without proof shifts the evidential burden on the other party as follows:

It is trite law that a bare assertion by a party of his pleadings in the witness box without proof did not shift the evidential burden onto the other party.....

In the instant case, when the plaintiff mounted the witness box he merely repeated what

he has pleaded in his statement of claim that Korvi Kwasi sold a portion of the land to Edward Kofiste Tetteh and nothing more. The plaintiff will be deemed not have proven this allegation

In conclusion, I find and hold that Korvi Kwasi personally did not own a land within the Afekewo family land at Kpando Bame and that there is no land at Kpando Bame known and called Korvi Kwasi land. I also find that Korvi Kwasi did not sell any land to Edward Kofitse Tetteh a member of defendant's Afekewu family.

Consequently, I dismiss Plaintiff's claim and give judgment for defendant on his counter claim as follows:

1. Declaration of title to all that piece and parcel of land known and called Devenu land, situate lying and being at Kpando Bame within the Afekewu family land and bounded as follows: on one side by the Adzande family land, on another side by Folidze and Kubie family land, on the third side by Asamani, Adzaku and Bobi family land and the fourth side by Kondo, Gbetsi, Okra and Ofori Family lands.
2. Perpetual injunction restraining the Plaintiff, his agents, and anybody claiming title through him from ever laying claim to the disputed land.
3. I award costs of Gh¢10, 000.00 in favour of the Defendant and against the Plaintiff.

**(SGD)**

**AYITEY ARMAH-TETTEH J.**  
**(JUSTICE OF THE HIGH COURT)**