

**IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE
HELD IN CAPE COAST ON 21ST JULY, 2023
BEFORE HIS LORDSHIP JUSTICE EMMANUEL ATSU LODOH**

E1/05/2018

1. THERESA AKOROBO KOFI

PLAINTIFF

REPRESENTED BY:

MARY ASANTEWAA

H/NO. NF 36, ADDOTEY ALLOTEY

ABLEKUMA FANK MILK-ACCRA

VRS

2. CHARLES ADAMS OHEMENG

DEFENDANT

PROPRIETOR

STAR OF DAVID SCHOOL COMPLEX

SANDIMA JUNCTION, MELLI-KASOA

JUDGEMENT

Introduction

Counsel for and on behalf of the Plaintiff took out the instant writ of summons on 19th July, 2017 against the Defendant. However, proceedings in this matter went cold until the plaintiff on 22nd May, 2020 filed a notice of intention to proceed for the continuation of this matter. Following the resurrection of the matter, Plaintiff amended his Writ of Summons and Statement of Claim. Thus per an Amended statement of claim filed on 9th November, 2020 the plaintiff seeks the following reliefs against the Defendant:

1. Declaration of Title and Recovery of possession to ALL THAT PARCEL OF LAND situate lying and being at NYANYANO in the Central Region of the Republic of Ghana and bounded on the North by Lessor's Land measuring 2,000 feet more or less on the East by Lessor's Land measuring 3,090 feet more or less on the South by Lessor's Land measuring 2,000 feet more or less on the West by Lessor's Land measuring 2,810 feet more or less and containing an approximate area of 135.45 Acres more or less as the same time is more particularly delineated on the Plan attached hereto and thereon shown edged Pink.
2. Perpetual injunction restraining the Defendant, his agents, assigns, representatives, workmen, heirs, successors, or any other persons claiming right or title through him howsoever described from entering upon or dealing in any manner with the said land.
3. Damages for Trespass.
4. General Damages
5. Cost

Counter-Claim

The Defendant on his part filed a Statement of Defence on 19th October, 2018, subsequently amended it and then filed a new defence on 20th January, 2021. This amended statement of defence did not however survive the tenure of this case and was

finally amended on 18th November, 2022. Thus, per the Amended Statement of Defence filed on 18th November, 2022 the Defendant counter-claimed against the plaintiff as follows:

1. A declaration of title to the parcel of land described in paragraph 10 of the Statement of Defence.
2. Recovery of possession
3. Damages for trespass
4. Perpetual injunction restraining the Plaintiff, by herself, agents, servants, personal representatives, assigns, workmen, administrators, privies or however from dealing with or having anything to do with the Defendant's land in dispute.
5. Cost, including solicitor's legal fees.

Brief Case of the Plaintiff

The case of the Plaintiff is expressed in a 10 paragraphed Amended Statement of Claim filed on 9th November, 2020. According to the Plaintiff she acquired the disputed land from a company known as 21st Century Construction Limited per an agreement dated 10th July, 2007. She contends that her vendor, that is, 21st Century Construction Limited, had earlier acquired land, inclusive of the disputed property for 99 years in 1997, from the Gomoa Nyanyano Stool, following which the residue of the interest was transferred to her by her vendor in July, 2007.

The plaintiff contended further that after she acquired the land she cleared the land and built a wall around it. But sometime in 2013 she observed some activity on her property including the destruction of parts of the property which led her to report the matter to the Ghana Police Service, Kasoa who subsequently charged the defendant with trespass and causing damage.

The Plaintiff further stated that the police in their investigations found that the disputed land was duly registered at the Lands Commission by her vendor who had good title to transfer to her. That the Trial Circuit Court therefore ordered the Defendant to desist from engaging in any activity on the disputed land, but the Defendant continues to remain in possession notwithstanding the demands she made to the Defendant to vacate the land.

Case of the Defendant

The case of the Defendant is amplified in his Amended Statement of Defence filed on 18th November, 2022. He denied the antecedents of the Plaintiff's claim and stated that a search conducted at the Registry of Registrar General's Department revealed that 21st Century Construction Company Limited was incorporated on 16th September, 2013 with 18th September, 2013 being the date of commencement business. Therefore 21st Century Construction Company Limited was not in existence in 1997 as alleged by the Plaintiff.

In respect of his acquisition of the disputed land, the Defendant states that he acquired the land from the Gomoa Nyanyano Stool which was at the time occupied by Nana Dr. Obeng Wiabo V, Chief of Gomoa Nyanyano. He contended further that the size of the land he acquired was 0.62 of an acre, which he described in paragraph 10 of his amended statement of claim. The Defendant in paragraph 11, 12 and 13 of his amended statement of defence pleaded matters I find necessary to reproduce infra:

11. The Defendant will say that he has good root of title in that by a judgment in a transferred Suit No. 11/1959 in the case of Nana Wiabo IV, Ohene of Nyanyano and two (2) others vrs Issiw V, Odefey of Senya and Anor, the Court held that Nana Wiabo IV was only in possession of the land

generally known as Nyanayno Stool lands but returned to make Declarations of title in the Nyanyano Stool.

12. That on appeal against the decision of the Lower Court, by Nana Wiabo IV, Ohene of Nyanayano at the Court of Appeal in Civil Appeal No. 80/63, the Court of Appeal reversed the decision of the Lower Court in Suit No. 11/1950 and by its judgment dated the 12th of January, 1970, granted a declaration of title in ALL THAT lands known as Nyanyano Stool Lands to the Nyanyano Stool.
13. That further by the Stool Lands Boundary Settlement Commission Judgment in Enquiry No. 7/79 published in the Lands and Concessions bulletin of 25th day of October, 1985, the Land part of which is described in paragraph 10 supra was declared by the Stool Lands Commission as Land belonging to the Nyanyano Stool.

Issues for Determination

On 21st January, 2021 the court set down the issues contained in the Application for Directions filed on 8th December, 2020 and the Notice of Additional Issues filed on 20th January, 2021 as the issues for trial. The real issues in controversy contained in these processes are as follows:

Application for Directions

1. Whether or not 21st Century Construction Company Ltd in 1997 had as lease from the Nana Obeng Wiabo, the Chief of Gomoa Nyanyano in the Central Region.
2. Whether or not the Plaintiff's land was curved out of the larger land of 21st Century Construction Company.

Additional issues

Whether or not the land granted to Plaintiff by 21st Century Construction Company Ltd. is the same land part of which the Defendant occupies.

The Trial

The Plaintiff testified through their attorney Mr. Ken Sulley Wormie. He relied on his witness statement filed on 16th February, 2021. The Plaintiff did not call any witnesses. The Defendant testified during the trial and relied on his witness statement filed on 8th February, 2021. The Defendant called one witness in the person of Kwame Otoo (DW1). He relied on his witness statement filed on 13th July, 2022.

Evaluation of Evidence

This is an action affecting land in which both parties have claimed and counter-claimed for a declaration of title to the disputed land. It is trite law that in civil action where both parties seek reliefs from the court, both the claimant and counter-claimant each bear the burden of proving their respective claims. This principle without doubt springs from the rule that a counter-claim is treated as separate and distinct action. The duty of a defendant who has counter-claimed is expressed in the case of **Aryeh & Akakpo v Ayaa Iddrisu [2010] SCGLR 891 at 901** as follows:

“A party who has counter-claimed bears the burden of proving his counter-claim on the preponderance of the probabilities and will not win on that issue only because the original claim failed. The party wins on the counter-claim on the strength of his own case and not on the weakness of his opponent’s case”.

Undisputed facts

There is no dispute that the original owner of the disputed land, which is a stool land, is the Gomoa Nyanyano Stool in the Central Region of Ghana. There is also no dispute

that at the material time of the alleged grants a certain Nana Dr. Obeng Wiabo V was the occupant of the stool. Indeed whereas the plaintiff alleged that the disputed land was granted to their grantors by the said Nana Dr. Obeng Wiabo V. The defendant case is that the said Nana Dr. Obeng Wiabo V directly granted the disputed land to them. Thus based on these facts I will springboard my resolutions of the issues in controversy.

Issue 1

Whether or not 21st Century Construction Company Ltd in 1997 had as lease from the Nana Obeng Wiabo, the Chief of Gomoa Nyanyano in the Central Region

The first issue to be determined by the court is whether or not 21st Century Construction Company Ltd in 1997 had as lease from the Nana Obeng Wiabo, the Chief of Gomoa Nyanyano in the Central Region.

This issue to my mind is central to the case of the Plaintiff since they trace their root of title through the 21st Century Construction Company Ltd. The imperativeness of the plaintiff to put before the court incidents of title in order to succeed in an action for declaration of title was echoed in the case of **Akoto II v Kavege [1984-86] 2 GLR at 371**. The Court of Appeal per Francois JSC held as follows:

“The suit being one for a declaration of title, the plaintiffs have an onerous burden to discharge. This is trite law and would have necessitated no further comment but for the procedure adopted by the plaintiffs of throwing this burden to the winds. No root of title was disclosed. Neither the tradition of acquisition of an inherited estate nor the incidents of purchase, if acquired by sale, were divulged. No clear and positive acts of unchallenged and sustained possession or of substantial user emerged from the evidence. The boundaries of the land were not established. No boundary neighbours were called to testify to the ownership of the adjoining lands.”

As stated earlier, the case of the Plaintiff as pleaded is that it acquired the unexpired interest in the disputed land by an agreement with 21st Century Construction Ltd. on 10th July, 2007. That the said 21st Century Construction Ltd. had earlier per a deed of conveyance dated 24th July, 1997 acquired interest in lands inclusive of the disputed land located at Kasoa in the Central Region of Ghana.

In proof of her title the Plaintiff's attorney tendered an unregistered deed between the Plaintiff and 21st Century Construction Company Limited (Exhibit "B"). The Plaintiff also tendered a search report conducted in respect of lands granted to 21st Century construction Company Limited by Nana Obeng Wiabo V, Chief of Gomoa Nyanyano, in the Central Region of Ghana (Exhibit "D"). It is also useful to note that a registered Deed of Conveyance between 21st Century Construction Company Limited and Nana Obeng Wiabo V executed on 26th July, 1997 was attached to the search report.

It is interesting to also note that the unchallenged evidence of the plaintiff was that the search report was commissioned by the Ghana Police Service, Cape Coast and dated 5th February, 2021. Secondly, the authenticity of the search report, and the fact that it was referable to the disputed land also remained unchallenged. Accordingly, in the absence of evidence and challenge to the contrary, I do not find Exhibit "B" as self-serving. I will also lean on principles regarding the legal effect of failing to cross-examine on evidence put before the court as the basis for accepting these documents as credible. In the unreported case of **Evelyn Frimpomaa Owusu v James Owusu (H1/144/2010)** delivered **on 17th March, 2011**, the Court of Appeal stated the legal effect of failure to cross-examine as follows:

"Cross-examination among other things, affords the party doing the cross-examination the opportunity to put up his case across. He does this by putting to his opponents or his

opponent's witness so much of his case as relates to that witness, or by putting the witness that aspect of his own case in which that witness has any share or interest. Where, for example, the testimony of the plaintiff on an issue is not exactly what the position of the defendant on that issue is, counsel for the defendant is obliged by his cross-examination to indicate how much of the testimony he accepts, and how much of it he disputes or rejects and he will also put forward what the defendant's position on the issue is going to be. If in a situation like this, counsel for the defendant keeps quiet about the plaintiff's testimony or fails to ask questions about it, he will be taken to accept the plaintiff's statement in its entirety".

An examination of the search report will disclose the following information:

1. This site is not a State Land
2. The whole site falls within Judgment dated 21st December, 1961 in favour of Nana Wiabo IV & 2 others (plotted by Court order of mandamus dated 8th March, 2017).
3. The whole site also falls within a Lease dated 26th July, 1997 between Nana Obeng Wiabo on one part and 21st Century construction Company Ltd. on the other part.

These are the instruments the Plaintiff put before this court to show that their grantors were legal owners of the disputed land and therefore had power to alienate same. The question however is whether or not these instruments have any probative value or sufficient in establishing the case of the plaintiff.

It is my considered view that in land cases it is of utmost importance that the identity of the land claimed by a party be proven with some degree of certainty. This is usually done with the aid of approved site plans. This imperative become more dire, particular

in cases such as the instant one where the parties are claiming title through a common grantor or for that matter, stool.

The Defendant at paragraph 9 and 10 of this amended statement of defence stated as follows:

9. In further denial to paragraph 7 of the statement of claim the Defendant will contend that he is the owner of a parcel of land a total area of 0.62 acre which he acquired from the Gomoa Nyannyano stool, occupied by Nana Dr. Obeng Wiabo V, Chief of Gomoa Nyanayno.
10. The Defendant states that the land described hereunder is the extent of the he[sic] acquired from Gomoa Nyanyano Stool, aforesaid.

The usefulness of these documents which include a site plan was explained in the case unreported Supreme Court case of **Aku-Brown v Lanquaye with suit number J4/4/2016) and delivered on 29 June 2016** (reported by Ghana Legal Information Institute (citation [2016] GHASC 64) stated that:

“Using plans to identify subject-matter land for purposes of declaration of title and associated reliefs has been approved by the courts in the cases of Laryea v Oforiwah [1984-86] 2 GLR 410 CA and Agbosu v Kotey [2003-2004] SCGLR 420 SC. Using plans to identify subject-matter land for purposes of declaration of title and associated reliefs has been approved by the courts.

In times past identity of land claimed in litigation was established by reference to physical features such as streams, prominent trees, mountains and lands of established boundary owners. Those features cannot be more accurate than plans prepared with the

use of modern scientific instruments and capable of being transposed unto the ground with ease. A plan tendered in evidence or otherwise accepted by parties in proceedings in court which clearly delimits land claimed constitutes sufficient proof of identity of the land for purposes of the reliefs of declaration of title, injunction, and possession”.

In an earlier case of **Anane v Donkor [1965] GLR 188**. At page 192 of the report the eminent jurists said as follows:

“Where a court grants declaration of title to land or makes an order for injunction in respect of land, the land the subject of that declaration should be clearly identified so that an order for possession can be executed without difficulty and also if the order for injunction is violated the person in contempt can be punished. If the boundaries of such land are not clearly established, a judgment or order of the court will be in vain. Again, a judgment for declaration of title to land should operate as res judicata to prevent the parties relitigating the same issue in respect of the identical subject matter but it cannot so operate unless the subject matter thereof is clearly identified.”

However, the tendering of these documents per se does not discharge the burden placed on the plaintiff. This is essentially because the defendant defence is that the disputed land belongs to them. It is thus important to my mind that the plaintiff established the identity of the land he acquired from 21st Construction Company Ltd, but also lead evidence in support their claim that the disputed was a subset of the land acquired by their grantors that was curved out and granted to them.

This issue dovetails into the second issue which is whether or not the Plaintiff’s land was curved out of the larger land of 21st Century Construction Company. For the moment however, given the preponderance of evidence led by the plaintiff to show that they acquired the land from 21st Century limited, and given the almost unchallenged

evidence in respect of the plaintiff's acquisition of the disputed land from 21st Century Construction Limited, I find that the plaintiff has put before this court evidence in the nature of instruments affecting land, to establish on the balance of probabilities that the indeed acquired the disputed land from 21st Century Construction Limited, who had a prior grant from the Gomoa Nyannano stool.

My reasons for concluding that the transaction between the Nana Obeing Wiabo V and the 21st Century Construction Company did in fact take place is supported by the evidence of the Defendant own witness (DW1) who tendered a Writ of Summons (Exhibit "7") in a matter between Nana Obeng Wiabo V (as plaintiff) and 21st Century (as 1st Defendant) in 2009, with one of the reliefs being sought by plaintiff an order of the "court revoking any title documents prepared by the Plaintiff into the name of the 1st Defendant". This to all intent and purposes meant that a grant was made which was subsequently sought to be revoked.

Unfortunately, the judgment of the court in that case was not tendered. Be that as it may, the pleadings contained in the statement of claim attached to Exhibit "7" are at best allegations against the defendant made by persons who are not parties or witnesses in this matter and cannot be relied upon as it sins against the hearsay rules in proof of the contents against the plaintiff.

The Defendant also tendered the incorporation documents of the Plaintiff and suggests that the Plaintiff was incorporated in 2013 and not 1997. DW1, the grand nephew of Nana OBeng Wiabo V. in paragraph 6 of his witness statement stated as follows:

6. It has however turned out that 21st Century Construction Company Limited was registered just in 2013. I will tender in evidence of the fact that 21st Century

Construction Co. Ltd was registered just about nine years ago. See exhibits '2', '2a', '3', '4', '5', '6a', '6b', '6c', '6d', '6e', '6d', '6g', '6h', '6j', '6k'.

Unfortunately, the defendant, if they thought this was their smoking gun, in my considered view, triggered their own self –destruct when they also tendered into evidence the statement of claim in the case intituled Nana Obeng Wiabo V. v. (1) 21st Century Construction Limited and (2) Kofi Asmah in which their alleged grantor stated in paragraph 2, 3 and 5 of their pleadings as follows:

2. The first Defendant is a registered limited liability company and purports to be undertaking estate development.
3. The 2nd Defendant is the Managing Director of the first defendant company.
5. Plaintiff and his elders negotiated with the second and an agreement was reached and same was reduced into writing and duly executed on the 26th of July, 1997.

DW1 at paragraph of his witness statement also stated that Nana Obeng Wiabo V granted about three hundred acres of land to Kofi Asmah, who to all intent and purposes represented 21st Century Company Limited. I find therefore from their own showing that their evidence that the plaintiff was a non-existent entity in 1997 as not credibly and secondly as stated earlier, the defendant failed to put before this court evidence to challenge the plaintiff's claim that the Gomoa Nyananyo stool granted their grantors land, portions of which form the subject matter of this suit.

Issue 2

Whether or not the Plaintiff's land was curved out of the larger land of 21st Century Construction Company

The reason why I have curved out this issue as the most important for the case of the plaintiff is that the defendant did not challenge the antecedents of the plaintiffs claim. Their case is simply that the land that the Plaintiff is claiming was granted to them by the occupant of the Gomoa Nyanyano stool, that is, Nana Dr. Obeng Wiabo V. So the question is whether or not the disputed land as claimed by the Plaintiff and Defendant are uniquely different or the same?

In order to effectively deal with the question, the court called to its aid, with the agreement of the parties, the Survey and Mapping Division of the Lands Commission, Cape Coast which was appointed as the court expert to conduct an inspection of the disputed land and respond to pertinent questions posed by both counsels in their respective survey instructions.

The court expert on 18th May, 2023 duly tendered his report inclusive of the composite plan which was admitted into evidence as Exhibit “CE1”. One of the critical questions posed by counsel for the plaintiff touched on the relationship between the plaintiff’s grantor’s land, the land claimed by the Plaintiff and the land claimed by the defendant.

Below are the responses given by the court expert during cross-examination by counsel for the plaintiff.

Q. Per Exhibit “CE 1” plaintiff’s land falls squarely within her grantors’ land.
Am I right?

A. That is so.

Further cross-examination continued as follows:

Q. Does the defendant's alleged land also fall squarely on the Plaintiff's grantor's land?

A. Yes.

I also find from the examination of the composite plan that the area shown on the ground by the Defendant and that conveyed by his site plan fall within the area owned by the plaintiff's grantor edged yellow on the composite plan.

As stated earlier, the case of the Defendant is essentially that he acquired the disputed land from Nana Obeng Wiabo V. My understanding of this matter vis a vis the case of the plaintiff therefore is that whereas plaintiff acquired the disputed land as a assignor (that is a residue of lease entered between the stool (as lessors) and 21st Century (as lessee), the defendant is saying he acquired his land directly from the stool as a lessee, both from the same grantor.

The Defendant's evidence which reflects this understanding regarding his acquisition of the disputed land is captured in paragraph 2, 3, 4 and 5 of his witness statement. Same is reproduced as follows:

2. Somewhere in the year 1999 I acquired a parcel of land of four (4) plots from Nana Obeng Wiabo V to support a school that I had earlier established at Millennium city. The land on which I have established my school there is no dispute about the land. The plaintiff is also not claiming the land either. I purchased the land on which I have my school earlier than on which I have started a church building.
3. The land on which I have established my school is also situate at millennium city. Annexed herewith is a photograph of the school known as Star of David Preparatory School and marked Exhibit "1". I purchased

the land from Nana Obeng Wiabo V. That land consists of four plots. I purchased the school building in 1998.

4. With regards to the land on which stands the church building, I purchased same from the said Nana Obeng Wiabo V. The church building is at the lintel level. See exhibit "2" annexed herewith. The acreage is 0.62 acres or 0.25 Hectare. It is covered by an indenture, see exhibit '3'. It includes the site plan. I purchased the land in 1999. It was largely a forest area. Then in 2000 I had my indenture on the land.
5. The Plaintiff whom I never met anywhere has of late disturbing my ownership of the land. She claims she purchased the land on which stands my church building from 21st Century Construction Company Limited.

During cross-examination the Defendant testified that his land was distinct from the land granted to him by Nana Nana Obeng Wiabo V. His responses during cross-examination by counsel for the plaintiff were as follows:

Q. You also said you purchased the land in 1998. Am I right?

A. Yes

Q. In other words Nana Obeng Wiabo is your guarantor

A. Yes

Q. The date on your indenture as part of Exhibit "D" is 26th July, 1997. Am I right?

A. Yes

Q. The said indenture is also executed between Nana Wiabo V and 21st Century. Am I right?

A. That is so

- Q. I put it to you that the disputed land was sold to 21st Century on 26th July, 1997. Am I right?
- A. That is not true. Before the land was sold to me the said Nana appointed his personal surveyor to the land to demarcate the area he sold to us. Thereafter he made it known to us that there are other lands he had sold to 21st Century
- Q. This is Exhibit "B". Per the search report paragraph 3 indicates that the disputed property falls within a lease dated 26th July, 1997 between Nana Obeng Wiabo on one part and 21st Century Construction Company Limited on the other part. I put it to you.
- A. That is what is written on the search report

Clearly, if the evidence of the Defendant is to be believed, the question that begs to be answered is how the entire area captured in the composite plan as claimed by the Defendant, still remained in the name of the 21st Century Construction Limited as contained in the search report as at 2021.

In an attempt to answer the question DW1 stated in paragraph 5 of his witness statement as follows:

5. That the land claimed by Kofi Asmah is on the right and that of Charles Ohemang Adams on the left. There is a road between the two lands. The land claimed by the Defendant was given him by Nana Obeng Wiabo V.

Respectfully, this answer in my considered view did more damage than good to the case of the defendant. My understanding of the evidence of DW1 is that a road separates the Plaintiff's grantor's land from that of the defendant. This also means a claim that the land being claimed by the Defendant did form part of the land granted to

the 21st Century Construction Limited. An examination of the composite plan will however illustrate a different story. That is the disputed land lies within the four corners of the land owned by 21st Century Construction Limited.

Now the question which arises is whether Defendant acquired the disputed land before 21st Century Construction Limited from Nana Obeng Wiabo V., since the disputed land falls within the property of 21st Century Construction Ltd.

This question is key because of the *Nemo dat quod non habet* rule. The rule on the legal effect of subsequent sale was explained in the Supreme Court case of **Brown v Quarshiegah [2003-2004] SCGL 930** per Professor Kludze, JSC (as he then was) at page 956 stated as follows:

“In the present case the evidence clearly shows that the land was validly granted to the defendant by the then Mantse of Mpoase on behalf of the Sempe Stool in 1961, the Mpoase Stool, like the Sempe Stool had been divested of all interest in the property. Therefore, both stools were incompetent to grant the same land subsequently to the plaintiff. The stools had no interest in the land to grant, as they had divested themselves of their interests therein by the grant to the defendant: nemo dat quod non habet”.

The settled evidence on record is that per a conveyance dated 26th July, 1997, Nana Obeng Wiabo V granted lands to 21st Century Limited (see Exhibit “D”). The evidence of the Defendant is that he acquired his land from Nana Obeng Wiabo V. in the year 1999.

Indeed the evidence of DW1 was also that at the time he went to demarcate the land for the Defendant, he informed the defendant that the land granted to 21st Century Construction limited was to the right of the Defendant. This therefore means that the

Defendant was informed that an earlier grant of land had been made out to 21st Century Construction Limited. The net effect of all these pieces of evidence is that the disputed land was acquired by 21st Century Construction Limited long before the defendant from the same stool.

Exhibit “D” will also show per the conveyance attached that the deed was registered in 1997 with Land Registry number 1584/99 and file number Esc/DC 715/97. Whereas that the conveyance between Nana Obeng Diabo and the defendant bore stamps dated 2021 and no visible Land Registry number.

Thus in terms of prior grants the Gomoa Nyanyano Stool cannot purport to subsequently sell the same land to the defendant because they had earlier divested itself of any interest in the land within the time limited by the lease. Again in terms of priorities, since they trace their title through the same source, the Plaintiff’s grantor registered his deed much earlier than the Defendant, that is, if the defendant even registered it at all and therefore their title ought to prevail over that of the defendant.

In the case of **Ernestina Opokuah v Emmanuel Osei Kissi and the Chief Registrar**, reported by Judy law with citation number (2021) JELR 109022 (SC) with suit numberd J4/21/2020 and delivered on 19th May, 2021 the Supreme Court stated as follows in respect of conflicting grants from the same vendor and priorities:

“Even if we consider the small overlap of the site plan in the documents of title of the plaintiff, since the parties trace title from the same source, it is easy to determine whose grant has priority and ought to prevail. The plaintiff’s predecessor-in-title got his grant from the Onamrokor Adain Family on 8th March, 1995 and it was registered as No. AR/809/2004 (See page 102 of the

ROA) whereas the 1st defendant's predecessor-in-title got his document on 30TH December, 1965 from the same Onamrokor Adain Family and it is registered as No. 416/1967 (See page 158 of the ROA). Thus, after the family made the grant of the land in 1965, it divested itself of any interest and on the principle of *nemo dat quod non habet*, the family had nothing to grant to the plaintiff's predecessor-in-title in 1995. Furthermore, in the case of *Nartey v. Mechanical Lloyd Assembly Plant* [1987-88] 2 GLR 314. S.C it was held at holding (4) of the Headnote of the Report as follows;

"(4) Per Adade, Taylor and Wuaku JJ.S.C. Since exhibit F was registered in 1979 but the appellant's document, exhibit B, was registered in 1976, and by the provisions of section 26 (1) and (5) of Act 122 each of those instruments would take effect from the date of its registration, the appellant's document would have priority over it."

Since the registration of the 1st defendant's predecessor-in-title was earlier in time, 1967, it enjoys priority over the instrument of the plaintiff's predecessor-in-title which was registered in 1995. So, on the score of the registration under Act 122, the 1st defendant's title still prevails over that of the plaintiff".

Before I bring closure to this matter however, I find it necessary to make finding in respect of the exact lands being claimed by the parties.

Disputed area

As indicated earlier, I will elevate the disclosures contained in the site plan over any oral evidence in respect of the identity of the respective lands claimed by the parties. An examination of the composite plan will show that the site plan of the plaintiff superimposed on the composite plan covers the area highlighted between points 2,3, 5,

and 6, even though the area claimed on the ground by the Plaintiff extends beyond this point.

A further examination of the site plan will reveal that the defendants site plan as superimposed on the site plan covers an area marked to the north of the area marked 1 to 4. Thus the actual area of dispute per the respective site plans of the parties is the area marked 1, 2, 3, and 4 on the composite plan (area edged magenta) and includes portions of the defendants building edged green on the composite plan, and nothing more. This finding therefore means that interest in the other areas claimed by the Plaintiff on the ground based on the evidence before me and indeed the entirety of the Defendant's land still remains in 21st Century Limited who is not a party to this action

Since the court cannot give a party that which has not been proven to be theirs, I am of the considered view that the Plaintiff is only entitled to beyond recover the area limited by his site plan, which is the area between points 1, 2, 3, and 4 of the composite site plan, and measuring as follows:

- (a) 1-2 is 52, 21 feet
- (b) 2-3 is 203, 45 feet
- (c) 3-4 is 38, 24 feet.

Consequently, I further find that the Plaintiff cannot claim any part of the disputed land lying beyond points 1, 2, 3 and 4 against the Defendant.

Damages

The Plaintiff is also claiming damages for trespass. The first question is whether or not he is entitled to this claim. My view is that the Plaintiff being the one in possession of the land is entitled to damages for trespass against the defendant because portions of his

land had been trespassed upon by the defendant who had erected a building thereon. In the case of **Sam v Noah [1982-83] GLR 1122**, Osei-Hwere J. (as then was) stated as follows:

“An action for trespass arises where there is a disturbance of possession and the right of action in trespass essentially lies in the person in actual possession”.

The next question is how damages to trespass to land are to be assessed. In this regard I will lean on the dicta expressed in the case of **Ayisi v Asibery III and others [1964] GLR 695 @ 709**. In this case the High Court per Apaloo JSC stated at page 694 of the report as follows:

“As far as the assessment of damages for trespass is concerned, I am to exercise my own discretion and in quantifying the damages, I think I ought to take into consideration not only the extent of the land on which the trespass has been committed by the individual defendants, but also the length of time the syndicate have been wrongfully kept out of the land. The Miriwasan defendants alone richly deserve to be condemned to pay exemplary damages to the plaintiff but in view of the fact that they would lose their farms by reason of this judgment, I do not propose to award against them more than ordinary damages”.

Unfortunately, no evidence was led by Plaintiff in proof of quantum of damages. I will accordingly award damages taking into consideration the fact that the defendant had changed the nature of the disputed land, which will require funds to in the event that the plaintiff wishes make modifications. I will also take into consideration the amount of time the defendant had kept the plaintiff out of the benefit of the utilisation of the portions of his land. In total I find an amount of Twenty thousand Cedis (GH¢20,000.00) as a reasonable amount.

Conclusion

In conclusion, I find that the plaintiff has established his claim against the defendant on the balance of probabilities and therefore he is entitled to recover same albeit with some modifications. I further find that the Defendant has failed to establish his claim against the defendant accordingly, his claim against the plaintiff is accordingly dismissed.

I hereby enter judgment for the Plaintiff against the Defendant as follows:

- (1) Plaintiff is hereby declared owner of the piece of land described on his indenture as follows:

“ALL THAT PIECE OR PARCEL OF LAND lying and situate at Gomoa Nyanyano SECTOR 4 BLOCK “A” in the Gomoa District in the Central Region of the Republic of Ghana which said land is known as PLOT NOS. 181, 182, 183 & 184 bounded on the North by Plot nos. 179, 180 by distance of 220.0 feet more or less; on the East by Proposed Road by distance of 160.0 feet more or less; on the South by Plot nos. 185, 186 by distance of 220.0 feet more or less on the West by Proposed Road by distance of 160.0 feet more or less containing an approximate total area of 0.81 acres or 0.33 hectares more or less which said piece of land is more particularly delineated on the site plan attached hereto and thereon shown edged pink which shows the relevant measurements.”

2. Perpetual injunction is hereby ordered restraining the Defendant, his agents, assigns, representatives, workmen, heirs, successors, or any other persons claiming right or title through him howsoever described from entering upon or dealing in any manner with the said land referred to in (1).

3. Plaintiff is hereby award an amount of Twenty thousand Cedis (GH¢20, 000.00) as damages for trespass against the defendant.
4. Cost of six thousand Ghana cedis (GH¢6,000.00).

(SGD)

Emmanuel Atsu Lodoh, J
(Justice of the High Court)

Lawyers

Joseph Kwodwo Amankwaa, Esq. Counsel for Plaintiff

Kojo Anan, Esq. Counsel for the Defendant.