IN THE SUPERIOR COURT OF JUDICATURE,

IN THE HIGH COURT OF JUSTICE, LAND DIVISION

HELD IN ACCRA THIS FRIDAY THE 19TH DAY OF JULY 2024

BEFORE HIS LORDSHIP WILLIAM APPIAH TWUMASI(J)

SUIT NO: LD/0487/2019

1. **GLADYS KORKOR COMMEY** … **PLAINTIFFS**
2. **THEODORA TSOTSO COMMEY**

   Suing for and on behalf of the grandchildren

   Of their siblings

   H/No. SW 83

   Tema New Town

VRS.

1. **DANIEL TETTEH COMMEY** … **DEFENDANTS**

   H/No. 9 A Awudum

   Tema New Town
2. **U.T PROPERTIES LTD.**

   East Legon, Accra

PARTIES: 1ST PLAINTIFF REPRESENTED BY EBENEZER MENSAH ANNAN PRESENT

2ND PLAINTIFF REPRESENTED BY PAUL QUANSAH ANORBAH PRESENT

1ST DEFENDANT PRESENT

2ND DEFENDANT REPRESENTED BY EMMANUEL TAKY ASHONG PRESENT

JUDGMENT

The Plaintiffs sued for and on behalf of the grandchildren (without mentioning the name of their grandmother for whom they were suing, claiming per the Amended Writ of Summons, the following reliefs;

a. A declaration that the sale of the disputed land to the 2nd Defendant is illegal and to that extent null and void.

b. An order setting aside the sale of the portions of the land by the 1st Defendant to the 2nd Defendant.

c. Recovery of 51.3608 acres of the disputed land by the Plaintiffs as their share of the land.

d. Damages for trespass.

e. Perpetual injunction restraining the Defendants, their workmen, assigns, privies from dealing with the said land and or further alienating any part of the land.

f. Cost inclusive of legal fees.

g. Any other relief(s) this Honorable Court may deem fit.

FACTS

The facts of this case are that the disputed land was originally acquired by Nii Annang Nkpa and that the land was allegedly divided and shared amongst three branches of the Nii Annang Nkpa family namely. The Amar Kofi Branch, the Kwei Kumah Mensah Branch and Alokoto Commey Branch.

Alokoto Commey married two (2) women, Afieye Odonkor and Antie Atemele and the Plaintiffs and the 1st Defendant are the grandchildren of Alokoto Commey being the grandchildren of Afieye Odonkor, the wife of the late Alokoto Commey.

According to the Plaintiffs, it was also decided that the land would also be shared amongst the members of each branch of the three branches of the Nii Annang Nkpa family and that it is the portion that ought to have been shared amongst the Alokoto Commey Branch of the family that resulted in the present action.

According to the Plaintiffs, the Alokoto Commey branch of the Nii Annang Nkpa family was entitled to 116.21 acres of the large tract of Nii Annang Nkpa's land and that 15 acres of the land was sold for documentation on the land and other purposes and 37.012 was also given to the offsprings of Antie Atemele, the other wife of their late grandfather, Alokoto Commey but it is the remaining portion of 63acres to be shared amongst five offsprings of the other wife of the late Alokoto Commey, namely Afieye Odonkor that has brought about this dispute.

It is the case of the Plaintiffs that, although they and the 1st Defendant are grandchildren of the late Afieye Odonkor, the 1st Defendant has denied them a portion of the land because they are females and since by the customary inheritance law of his people the Plaintiffs who are females are not members of the family. The 1st Defendant has failed

and/or refused to give them a portion of their share of the family land and has without their consent and/or authority sold 45 acres of their common land to the 2nd Defendant.

Whilst not disputing that the Plaintiffs are members of the Alokoto Commey family, the 1st Defendant states however that contrary to the Plaintiffs claim that the land in dispute was given to be shared between members of his father's branch of the Annang Nkpa family, the land was entrusted to him as the head of that branch of Annang Nkpa family, to hold same in trust for himself and the rest of the family.

In the case of the 2nd Defendant, its case is that it negotiated for the sale of the 45acre parcel of the land acquired from the Annang Nkpa family but later on, its search showed that the 1st Defendant had been gifted the land. It therefore approached the 1st Defendant who then executed the deed of transfer to it.

The 2nd Defendant states that at worst it is a purchaser of value without notice of any defect in its vendor's title.

At the end of pleadings, the following issues were set down for trial by the Court, differently constituted for determination by the Court.

ISSUES

a) Whether the sharing of the land the subject matter of the dispute which was originally owned by the Nii Annang Nkpa family became the property of the respective branch families and no longer the family property of Nii Nkpa family.

b) Whether the land in dispute is divisible amongst the individual members of the branch families of Nii Annang Nkpa including the Alokoto Commey branch family.

c) Whether the Plaintiff, by virtue of the fact that they are female members of the Nii Annang Nkpa family are precluded from owning portions of the subject matter of the dispute.

d) Whether the 1st Defendant's sale of portions of land in dispute to the 2nd Defendant was unlawful and invalid.

e) Whether in purchasing the land from the 1st Defendant, the 2nd Defendant undertook the necessary enquiries and due diligence, entitling it to be considered as a *bona fide* purchaser for value without notice.

f) Whether or not the 2nd Defendant is entitled to the defences of laches and acquiescence against Plaintiffs in respect of the land the subject matter of dispute.

RESOLUTION OF THE ISSUES

It is the law of evidence as can be seen from the decisions of the Supreme Court in the case of **Fatal v. Wooley (2007-2008) SCGLR** especially per dictum of **Wood CJ** that in determining the issues set down at the Application for directions stage, (especially in a case like this where a different judge other than the one who set down the issues for trial is the one writing the judgment, the judge is not bound to strictly follow all the issues that were set down at Application for Directions stage.

He may add new issues, abandon some of them or even set down new issues for trial so long as these new issues are central or core to the determination of the case.

After evaluating the entire case and particularly after reading the address of Counsel for the 1st Defendant in which the question of capacity of the Plaintiffs to initiate the case was

raised by him, prompting Counsel for the Plaintiffs to address same in his own written address it became necessary to discuss that particular issue.

Learned Counsel for the 1st Defendant had argued that on the face of the writ although the Plaintiffs were claiming to have sued in the representative capacity but they did not endorse the said representative capacity on the face of the writ and because of that their action cannot be sustained.

This prompted the Plaintiffs Counsel to write almost six (6) pages of legal arguments as to why in his view it is the duty of this Court to amend the title of the case so that the Plaintiffs will be properly clothed with capacity to initiate the action in the first place.

This then means that Counsel for the Plaintiffs concedes that the Writ as initiated by the Plaintiffs was not proper since it did not endorse the representative capacity of the Plaintiffs on the face of it.

It is now settled law that if a Plaintiff sues in a representative capacity without endorsing such a representative capacity on the face of the Writ the Writ becomes ineffectual.

Counsel for the Plaintiffs cited many decided authorities to show that this Court has an inherent jurisdiction to amend the title of the writ to reflect the fact that indeed Plaintiff sued in a representative capacity.

In particular, Counsel cited to me the Supreme Court cases of

i) **Dove v Wuta-Offei (1966) GLR 299**
ii) **Ghana Ports and Harbours Authority v. Issoufou (1993-94)1GLR 24** and most recent one.
iii) **Obeng and Ors, v. Assemblies of God Church (2010) SCGLR 300**

All of which were to the effect that, where it has been shown, as in this case that a Plaintiff has indeed sued in a representative capacity and such a representative capacity has been shown from the pleadings and the evidence of the Plaintiff, notwithstanding that the said representative capacity has not been endorsed on the face of the Writ, the Court by invoking its inherent jurisdiction and with the view of doing substantial justice to the Plaintiff, can amend the Writ to reflect such a representative capacity.

I have read all the authorities cited to me by learned Counsel for the Plaintiffs. I find to be very interesting why Counsel has denied to shift his own responsibility of seeking leave from the Court in order to amend the title than to wait for the Court to be called upon to do so.

On the authority of **Yeboah vrs. Bafour (1976) GLR**, the law is that even pleadings may be amended at any stage of the proceedings even on appeal.

Accordingly, once Counsel for the Plaintiffs became aware of the defect in the Plaintiffs' title, he should have brought an application to amend same instead of writing to raise it at this stage of the proceedings that is at the address stage.

But having said all these and considering the Supreme Court case of **Dove V. Wuta-Offei** supra, I am inclined to grant the prayer of Counsel for the Plaintiffs and hold that the title of the suit may be amended by this Court to reflect that the Plaintiffs indeed initiated their action in a representative capacity.

In **Dove V. Wuta-Offei** supra, the husband had sued in respect of a property that was jointly acquired by him and his wife but there was no evidence before the Court that the wife had transferred her portion of the jointly owned property to the husband so as to clothe him with the requisite capacity to sue in respect of the entire property and the Defendant wanted to use this to get Judgment in his favour.

In the Supreme Court, **Apaloo JSC** after a thorough analysis of the case posited as follows;

> *"It certainly has nothing to do with the merits of the case and shows plainly that the Defendant is looking for a stick to beat the Plaintiff with. True, there is no evidence that the Plaintiff's wife assigned her interest to the Plaintiff.*
>
> *That being the case, the objection of the Defendant becomes one of procedure rather than of substance. In my opinion, that objection can be made by amending the title of the suit by adding to the name of the Plaintiff the words "for himself and on behalf of his wife Mrs. Ofei". That would put an end to the objection and will obviate any necessity of the Plaintiff's wife bringing an action of her own to seek protection in respect of the part of the building that lies on her plot. I believe this Court has often expressed itself as having a duty to avoid multiplicity of suits"*

This dictum of **Apaloo JSC** (as he then was) was relied upon by **Kwame Gyamfi Osei J,** in the case of **ACP Estate Ltd. V. Nii Dodoo Amponsah & Ors. (Unreported) Suit No. LD147/2016** dated 10th March 2023 to similarly amend the title of the said suit when it became obvious that although the Defendant had counterclaimed in that suit in a representative capacity yet that capacity had not been endorsed on the face of their counterclaim.

I note that this case was also cited to me by Counsel for the Plaintiffs and that although it is only of persuasive effect, not only does the ratio in it respecting the conduct of the title of a suit in persuasive but also that my brother Gyamfi Osei J. had himself relied on a Supreme Court decision in the **Dove V. Wuta-Offei** case supra.

To conclude on the question of capacity therefore, I will agree with learned Counsel for the Plaintiffs and amend the title of the suit in the following manner.

1. **GLADYS KORKOR COMMEY**
2. **THEODORA TSOTSOO COMMEY**

   (Suing for themselves and on behalf of the Grandchildren of Afieye Odonkor all being the grandchildren of Alokoto Commey) of
   H/No. SW83 Tema, New Town.

It is believed that just as **Apaloo JSC** (as he then was) stated in the Wuta-Offei case supra, this will avoid a multiplicity of suits by same Plaintiffs and in respect of the same subject, matter land.

Having resolved the issue of capacity which the Plaintiffs first issue, the Court was bound to discuss anyway as a procedural issue as wrongfully submitted by Counsel for the Plaintiffs in his address because once capacity is raised as an issue it must be the first issue to be determined as held in **Duah v. Yarkwa (1993-94).**

I now go ahead to discuss the other issues and I will start with issue B.

Issue B; Whether or not the land in dispute is divisible amongst the individual members of the Branch families of the Nii Annang Nkpa family which include the Alokoto Commey Branch family.

The principle of law is that it is the duty of the party who asserts in affirmative have to prove that point in issue.

Takoradi Flour Mills v. Samir Fario (2005-2006) SCGLR 882.

See also John Dramani Mahama v Nana Akuffo-Addo & Anor (2021) 9944 per Anin Yeboah JSC.

Relying on the authorities above mentioned, it was the Plaintiffs who bore the burden to prove this particular assertion that the large tract of land which was originally acquired

by the late Nii Nkpa was meant to be divided amongst the various branches of the Nii Annang Nkpa family.

According to the evidence of Ebenezer Annang who testified for the Plaintiffs, stated that the large tract of land that was acquired by the late Annang Nkpa was not only to be shared amongst the three main branches of the family namely Amar Kofi Branch, Kwei Kumah branch and the Alokoto Commey branch, but the various branches and of the larger Nii Annang Nkpa family were also to share same amongst their various members.

According to the Plaintiffs, they and the 1st Defendant are members of the Alokoto Commey branch and that they are entitled to a share of the larger land that was shared amongst the three branches of the Nii Nkpa family.

The Plaintiff sought reliance on the Supreme Court judgment in the unreported case of **Korkor Mensah v. Robert Tettey Mensah & Anor. (Unreported) Civil Appeal No. J4/38/2018 dated 12th December 2018** (which judgment is in respect of this same land and which was tendered in evidence without objection by the Plaintiffs representative, same was accordingly admitted in evidence and marked as **Exhibit "F".**

It is important to state that in **Exhibit 'F'** the Plaintiff therein (just as in this case) was the daughter of the original owner of this same land, i.e. Nii Annang Nkpa and she had gone to Court over similar claims as the Plaintiffs have also sought in this case.

On the question of whether the land was divisible amongst the three branches of the Nii Annang Nkpa family, the Supreme Court affirmed the decision of the earlier Court of Appeal decision which had been appealed.

See page 7 of **Exhibit "F"** where the Supreme Court held as follows,

"We are satisfied that the findings of fact being challenged by the appellant are amply supported by the evidence on record and do not therefore feel able to disturb same"

So, what were these findings of fact that the Court of Appeal had made? The Court of Appeal in its judgment which decision affirmed the decision of the trial High Court Judgment made the following findings;

a. That the question that the customary law position amongst the Ga-dangbe People that a woman can inherit but she cannot take a male's property cannot be a proper customary law position that women do not take care of the property of males because customary law is a question of law and not fact,

b. That the partitioning of a family property is a question grounded in law particularly the repealed Conveyancing Act, (NRCD 175);

c. That in the case of Nii Annang Nkpa family land, the land has already been shared amongst the three branches of the family with two of the branches already getting their portions (see pg. 20 of **Exhibit "E"**)

In the light of the discussions the submission of learned counsel for the 2nd Defendant that there has not been any judicial decision that the three branches of the Nii Annang Nkpa family land were to share the disputed land is untenable.

From the discussions in the immediately preceding paragraph, I resolve **Issue B** in favour of the Plaintiff and against the Defendant and hold that the Nii Annang Nkpa land was not only tunable but indeed it has already been divided amongst the family.

ISSUE A; Whether the sharing of the land the subject matter of the dispute which was originally owned by the Nii Annang Nkpa family became the property of the

respective branch families and no longer the family property of Nii Annang Nkpa family.

On this issue, the onus of proof was on the Plaintiff to show that after the division of the land amongst the three branches each branch becomes the owner of its own share of the land.

For answers to whether after the division of the land amongst the three branches of the family the land still retained its family character, I refer to the judgment of the Court of Appeal Exhibit "E" which affirmed the earlier decision of the trial High Court, the Court of Appeal at page 13 of **Exhibit "E"** said as follows;

> *"From the evidence on record, the land was shared during the third generation and the original people who the land was shared amongst are deceased. If the land has been shared amongst are deceased. If the land had been shared amongst the three branches of the family, then the family character of the land is affected, so to speak"*

The Court of Appeal quoted extensively *"from the judgement of the trial High Court and has held that the land had moved from ancestral property to property of the current members in the family"* and the Court of Appeal affirmed this decision of the trial High Court Judge and as already stated, the Supreme Court in its own judgment, **Exhibit "F"** also affirmed these findings that were made by the trial High Court judge and affirmed by the Court of Appeal.

To conclude on **Issue A,** I hold that indeed after the division of the original land acquired by Nii Annang Nkpa among the three branches of the families the land lost its family character.

ISSUE C; Whether the Plaintiffs by virtue of the fact that they are female members of Nii Annang Nkpa family are precluded from owning portions of the land the subject matter of the dispute.

On this particular issue, it is the 1st Defendant who bore the onus of proof because his evidence is that not only was he to hold the land in trust for himself and his branch of the family as family head but that the Plaintiffs who are females are not entitled to inherit their own portions of the family's land.

It appears that his case is almost on all fours with the earlier case of **Korkor Mensah v. Robert Tettey Mensah** save that here, the Plaintiff/Respondent was only one woman as against the present case where the two (2) Plaintiffs are both women.

It can be seen that in the Korkor Mensah case supra, the Defendants therein just as the 1st Defendant herein had argued that the Plaintiff/Respondent being a female member of the family was not entitled to inherit the family property.

This was however shot down by the trial High Court which was incidentally presided over by a lady and therefore on appeal the appellants had argued that the presiding judge being a woman had misdirected herself and decided the case on emotions and gender bias instead of considering the matter on its merits.

The Court of Appeal roundly rejected this argument by learned Counsel for the Defendant/Appellant and held that the trial High Court Judge *"went through the issues set down for trial and came to right conclusion."* (Again the page 20 of **Exhibit "E"**)

At page 21 of **Exhibit "E"** the Court of Appeal quoted extensively from the 1992 constitution with the decision of the Supreme Court in **Soonboon Seo v. Gateway Worship Center (2009) SCGLR 278** to conclude that all Courts are to apply the 1992 constitution and thereafter the trial High Court was right in holding that the position

taken by the Appellant in denying the Plaintiff/Respondent right to inherit her share of the family's land only on the basis of her gender was unconstitutional.

Again, as stated earlier, this aspect of the Court of Appeal decision was also affirmed by the Supreme Court and thus there is no doubt whatsoever that the Plaintiffs just like the 1st Defendant or for that matter any male member of the family were duly entitled to the share of the family property.

I therefore rule **Issue C** too in favour of the Plaintiff and against the Defendants particularly the 1st Defendant.

ISSUE D; Whether the 1st Defendant's sale of land to the 2nd Defendant was unlawful and invalid.

It appears to me that the answer to this question is not far-fetched. This Court has already said that per the earlier judgment of the Apex Court in this case that the land in dispute was divisible amongst members of the family because based on the earlier judgment of the Supreme Court in **Korkor Mensah v. Robert Tettey Mensah**, the Nii Annang Nkpa land was jointly inheritable and thus divisible amongst the Plaintiffs and the 1st Defendant and therefore the land ought to have been so divided between them before any of them could on his or her own deal with his portion in his/her own right.

Now, the gist of the 2nd Defendant's case is that it dealt with the 1st Defendant for the transfer of the land to it on the basis that the land was a family land and the 1st Defendant dealt with the land as the head of the said family.

But going by the deed of indenture that was entered into between the 1st Defendant and the 2nd Defendant as correctly submitted by learned Counsel for the Plaintiff nowhere in the said indenture particularly the recitals thereof did the 1st Defendant give any hint that

he was selling the land in his representative as the head of his branch family of the larger Annang Nkpa family.

Again, the 2nd Defendant admitted in cross examination that the Plaintiffs were not in anyway involved (not even as ordinary witnesses) in the transaction between it and the 1st Defendant.

There is a legal principle that a transfer of family land by the head of the family only is not fatal/null/void but only voidable and the other members of the family who desire to set aside such a transaction must act timeously.

But in the case under consideration, however, as we have already found the land was not a family land, it is between the Plaintiff and their branches the 1st Defendant and therefore the 1st Defendant alone had no authority/power to deal with the land alone the way it did by transferring the entire land to the 2nd Defendant without the express permission or even knowledge of the Plaintiffs.

The conclusion I came to therefore was that the sale of the land to the 2nd Defendant by the 1st Defendant was a nullity as the 1st Defendant alone had no requisite capacity to have sold the land to the 2nd Defendant.

I therefore resolve **Issue D** in favour of the Plaintiffs and against the Defendants.

ISSUE E; Whether in purchasing the land from the 1st Defendant, the 2nd Defendant undertook the necessary enquiries and due diligence entitling it to be a *bona fide* purchaser for value without notice.

The 2nd Defendant had insisted that it legally and legitimately acquired the subject matter land from the 1st Defendant who acted as the head of the Alokoto Commey Branch of the Nii Annang Nkpa large family. But it has also argued that if that defence does not avail

it, its other defence is that it is purchaser for value without any notice of the defect in its vendors title so the onus is on it to show that indeed it is a purchaser for value without notice.

The settled rule of practice is that any person who desires to acquire any property must properly investigate the root of title of his vendor. This was the decision of the Supreme Court in the case of **Kusi & Kusi v. Bonsu (2010) SCGLR 60** where **Wood CJ** stated the above position in clarifying the requirement of the plea of purchaser for value without notice of any defect in the title of his vendor.

What this principle therefore means is that before purchasing any land the purchaser must thoroughly investigate the title of his vendor and that such an investigation must be done on the land itself by asking questions from people on adjoining lands, people living on the land etc.

It can be seen clearly from this case that the 2nd Defendant did not carry out any such investigations about the title of his vendor the 1st Defendant, before proceeding with the purchase and I therefore hold that a plea of the defence of purchaser for value without notice does not surely avail the 2nd Defendant and I resolve **Issue E** too in favour of the Plaintiff and against the Defendants particularly the 2nd Defendant.

ISSUE "F"; Whether the 2nd Defendant is entitled to the defences of laches and acquiescence against the Plaintiffs in respect of the land the subject matter of the dispute.

After the defence of purchaser for value without notice had failed, the 2nd Defendant, his other line of defence was that the Plaintiffs are estopped by laches and acquiescence.

As correctly submitted by learned counsel for the Plaintiffs the authorities are to the effect that a party who is using acquiescence as a shield must prove the following;

a) That he has entered the other's land in an honest but not an erroneous belief that he had a right to do so.

b) That he had spent money to develop the land;

c) That his entry should have been known to the true owner who instead of protesting/resisting him had rather encouraged him to do so by remaining silent and not drawing his attention to the error,

d) It is otherwise unconscionable to allow the true owner to recover the land.

See **Nii Boi V. Adu (1964) GLR 410** Supreme Court.

Apart from these legal requirements stated above as conditions that will qualify for the defence of acquiescence to be established, the Supreme Court in **Nii Boi V. Adu** Supra also stated *"…Estoppel by laches arises where a party's legal right is in fringed upon but for a reasonably long period, he fails to protest leading the one who infringed upon the right to believe that he would never complain…"*

To the question that estoppel per acquiescence can also be said to be present where the party has spent money developing the land, as the 2nd Defendant is claiming in this case. My humble view that such a claim alone cannot avail such a party; he must further show that the other party knew about his presence on the land but he did not protest but he was rather fraudulently encouraged by the other party to do so.

See also **Amonoo v. Dee (1975) 1 GLR 305.**

In this particular case, the 2nd Defendant was not able to prove that;

a) Its entry onto the land was in an honest but erroneous belief that the land belonged to the 1st Defendant because it has always insisted that it knew that the land was a family land yet it dealt with 1st Defendant as if the land were his personal land.
b) Its entry onto the land was known to the Plaintiff who also encouraged it to spend money to develop same.

In conclusion I hold that on the preponderance of the probabilities, the Plaintiffs were able to prove their case against the Defendants and I accordingly enter judgment against Defendants and in favour of the Plaintiff.

(SGD)

WILLIAM APPIAH TWUMASI (J)

COUNSEL: **SETH NYAABA FOR THE PLAINTIFFS**
NICK AFESI FOR THE 1ST DEFENDANT
CHRISTOPHER AKWESI FOR THE 2ND DEFENDANT