IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA- GHANA

CORAM: AKUFFO, J.S.C (PRESIDING)
DATE-BAH, J.S.C.
ADINYIRA (MRS), J.S.C.
OWUSU, J.S.C
DOTSE, J.S.C.

CIVIL APPEAL
NO. J4/18/2008
21ST JANUARY, 2009

JAAS CO. LIMITED	**-**	**PLAINTIFF/APPELLANT**
TOGBE HORNOMENU	**-**	**CO-PLAINTIFF/APPELLANT**
VRS		
1. EDWARD APAU	**-**	**DEFENDANT/RESPONDENT**
2. MADAM AKUA ACHEMPOMAA	**-**	**CO-DEFENDANT/RESPONDENT**

JUDGMENT

JONES DOTSE (J.S.C)

The facts in this appeal admit of no controversy whatsoever.

The Plaintiff/Appellant and Co-Plaintiff/Appellants hereinafter referred to as the 1st and 2nd Appellants claimed in their amended writ of summons in the High Court, against the Defendant/Respondent and later the Co-Defendant/Respondent hereinafter also referred to as the 1st and 2nd Respondents respectively, the following reliefs:

1. "Declaration of title to all that piece of land at North Odorkor measuring on the North West by 300 feet more or less, South East by 70 feet more or less, North East by 70 feet more or less and South West by 70 feet more or less.
2. Damages for trespass.
3. Recovery of Possession and

4. Injunction".

The 1st Appellant's claim is that, he purchased this piece of land for valuable consideration from the 2nd Appellant. The 1st Appellant further contended that his vendor, the 2nd Appellant, was adjudged victorious in Civil Appeal No. 25/80 entitled

ASHALEY OKOE

VRS

TOGBE HAHORMENE III & ANOR.

and declared to be the absolute owner of all the land. The Appellants also claimed that the land in dispute before the High Court forms part of the land in respect of the Civil Appeal referred to supra.

The Appellants, provoked by the entry of the 1st Respondent on to the land, initiated the action against him in the High Court claiming the reliefs referred to supra. The 1st Respondent, later joined by the 2nd Respondent upon an order of the High Court, also filed a counterclaim and claimed to have purchased the land from its original owners the Asere stool.

After trial, the High Court Accra, presided over by Lutterodt J, as she then was, dismissed the Appellants' claims before the court and gave judgment to the Respondents on their counterclaim.

Out of abundance of caution, this is what Lutterodt J, said in her judgment delivered on 31-7-91:

> "Ordinarily the dismissal of the Plaintiffs' claim should have ended the matter and left the defendants in possession possibly until another challenger emerges. But, because of their counterclaim I would proceed to determine whether or not they are entitled to the reliefs sought. The co-defendant acquired title from the defendant.
>
> I think they each succeeded in establishing a prima facie case of title to the land in dispute. We do not only have their respective

deeds but the evidence of their grantor showing the land was validly granted by him with the consent and concurrence of the accredited elders of the Asere Stool of Nikoi Olai, those whose signatures are needed".

With the above words, the High Court declared title in the land to the Respondents as well as perpetually restraining the Appellants from interfering with the Respondents' title to the land.

Aggrieved by the said decision, the Appellants appealed to the Court of Appeal, which by a split decision delivered on 20th February 1997 dismissed the appeal with Lamptey J.A dissenting, whilst Benin and Essilfie-Bondzie JJA, upheld the High Court decision.

Justice Essifie-Bondzie dismissed the appeal and upheld the judgment granted the Respondents on their counterclaim.

Justice Benin on the other hand dismissed the appeal but upheld the judgment in respect of the counterclaim to the 1st Respondent only, and dismissed the 2nd Respondent's counterclaim.

Justice Lamptey dismissed both the Appellants claims as well as the Respondents claims and ordered a re-trial.

It is against this judgment of the Court of Appeal that the Appellants have further lodged the instant appeal to this court with the following as the grounds of appeal.

GROUNDS OF APPEAL

1. The judgment of His Lordship Mr Justice Benin in favour of defendant and that of His Lordship Mr. Justice Essilfie-Bondzie in favour of the defendant and co-defendant were against the weight of evidence.

2. In view of the fact that the trial in the High Court was unsatisfactory His Lordship Mr Justice Benin and His Lordship Mr. Justice Essilfie-Bondzie erred in law in not ordering a retrial of the whole suit before differently constituted HIGH COURT.
3. Both the defendant and the Co-defendant's documents were spurious; they also failed to prove their title as set out in their counter-claim. His Lordship Mr. Justice Benin and His Lordship Mr. Justice Essilfie-Bondzie erred in law in not dismissing the claim of both defendant and co-defendant and ordering a retrial of the suit.
4. Further grounds of appeal to be filed when record of proceedings is ready.

No additional grounds of appeal have been filed in this appeal.

When the time for reception of arguments was due, Learned Counsel for the Appellant, in his written statement of case abandoned grounds 1 and 3 and argued only ground 2 which deals with the issue of ordering a retrial before the High Court, differently constituted.

In his written submission, Learned Counsel for the Appellants dwelt on certain observations by Lamptey J.A in his dissenting judgment. These are:

1. That it was wrong for the learned trial judge to have entered judgment for the defendants on their counterclaim when there was infact only one defendant and a co-defendant.
2. That there are obvious and apparent conflicts in the pleadings and oral testimony of the defendants on the issue of the description of the land in the counterclaim.
3. That in a situation such as existed in the instant appeal, fresh evidence ought to be have been led by ordering a survey plan to be drawn up to identify the suit land with certainty.

Based on the above submissions, learned counsel for the Appellants stated that the trial in the High Court was unsatisfactory and invited this court to order a retrial for all the issues in controversy to be resolved once and for all.

In his very brief but incisive written submissions, learned counsel for the Respondents stated as follows:

1. That since all three Justices of Appeal, like their counterpart in the High Court found no merit whatsoever in the claims of the Appellants and dismissed same, no useful purpose would be served by a retrial. Learned counsel further stated that, Justices Benin and Essilfie-Bondzie found no cause to order a retrial because they found absolutely no merit in the Appellants case.
2. That the title of the 1st Respondent, having been positively proved and validly declared by both the High Court and the Court of Appeal as being meritorious, the problem if any that exists between any uncertainty in the description of the 1st Respondents land as per the counterclaim can easily be sorted out between the 1st and 2nd Respondents. This is because, the 2nd Respondent derived title from the 1st Respondent and both are blood relations.
3. That under the circumstances it will be extremely burdensome on the parties to order a retrial.

We have carefully evaluated and assessed the submissions of learned counsel for the Appellant and Respondents vis-à-vis the entire appeal record as well as the case law on the subject matter.

We wish to observe that, the burden of proof is always put on the Plaintiff to satisfy the court on a balance of probabilities in cases like this.

Thus, if in a situation, the defendant has not counterclaimed, and the Plaintiff has not been able to make out a sufficient case against the defendant, then his claims will be dismissed. See case of Odametey v. Clocuh [1989 -90] 1GLR, 15 holding 1.

This is perhaps why the learned trial judge stated on page 71 lines 1-3 of the appeal record that:

> "Ordinarily the dismissal of the Plaintiff's claim should have ended the matter and left the defendants in possession possibly until another challenger emerges. But because of their counterclaim I would proceed to determine whether or not they are entitled to the reliefs sought".

Thus, whenever a defendant also files a counterclaim, then the same standard or burden of proof will be used in evaluating and assessing the case of the defendant just as it was used to evaluate and assess the case of the Plaintiff against the defendant.

In the instant appeal, the defendants counterclaimed and this meant that they also assumed the position of Plaintiff in respect of their counterclaim.

Having thus dismissed the claims of the Appellants, the learned trial judge in our view proceeded to evaluate the case of the Respondents in respect of their counterclaim using the time tested principles enunciated long ago in Majolagbe vs. Larbi [1959] 1 GLR 190, at 191.

But before we evaluate the Respondent's case, let us apply to the Appellant's case the same litmus test that is required in law. In the statement of claim, the 1st Appellant contended that he purchased the plot of land in dispute for valuable consideration from the 2nd Appellant in or about 1980. On page 37 of the appeal record the 1st Appellant, represented by Joseph Awuley Ashong, testified that the company purchased the land in dispute from the 2nd Appellant. He then proceeded to tender exhibits A & B which are the site plan and the receipts covering the transaction. During cross-examination of the Plaintiff therein, herein 1st Appellant the representative stated on page 38 lines 30-36 as follows:-

Q. "Is it true the land was granted you by co-Plaintiff in 1980?

A. Yes, that is true.

Q. Did he give you a conveyance in 1980?

A. I was given a site plan.

Q. You know why he did not give you a document of transfer in 1980

A. I do not know that one".

However, when the 2nd Appellant testified on page 44 of the appeal record, he confirmed that he sold the disputed land to the 1st Appellant company and also established the fact that he successfully litigated with one Ashalley Okoe up to the Supreme Court and tendered the said judgment as Exhibit C. This confirmed the fact that portions of the land which he sold to the 1st Appellant company formed part of his land covered in Exhibit C.

For some strange and inexplicable reasons, the 2nd Appellant herein, therein co-Plaintiff, denied having ever passed on to the 1st Appellant Exhibit B, which is the site plan contrary to earlier assertions by the 1st Appellant.
Out of abundance of caution, these are the question and answer session on page 45 lines 24 – 30 of the appeal record when the 2nd Appellant testified under cross-examination.

Q. "You had the land surveyed.
A Yes
Q. You have given a document to the Plaintiff.
A. I have given him a site plan.
Q. Examine Exhibit "B" is that the site plan you gave.
A. Not at all, what I gave him bore my name".

We have observed that, in their quest to prove their title, the 1st Appellant's based their proof of title principally on Exhibits A and B. Since this is a land transaction, Exhibit B is of paramount importance because it is the site plan of the disputed land whilst Exhibit A with all its legal imperfections is the land purchase receipt.

What must be noted is that, Exhibit A does not contain the description of the land that had been sold to the 1st Appellant, reference page 73 of the appeal record.

The only exhibit that sought to create any certainty and linkage about the identity of the disputed land bought by the 1st Appellant from the 2nd Appellant is exhibit B, the site plan tendered by 1st Appellant as the document given him by the 2nd Appellant upon the purchase.

However, this is the site plan, exhibit B, which was given to the 2nd Appellant to examine and after examination he declared conclusively that, it is not the document that he gave to the 1st Appellant.

By that singular statement, the 2nd Appellant has dealt a devastating blow to the case of the 1st Appellant which was already weak. The result was that the case collapsed and cannot by any stretch of human ingenuity be redeemable.

This being the case, the conclusion reached by the learned trial judge and the majority of the Court of Appeal decision in dismissing the Appellants claims is in complete accord not only with the facts of the case as they appear on the record of appeal, but also in law.

This is because, our courts have consistently refused to declare title in any suit for land, when the land cannot or has not been clearly identified.
See cases such as

1. BEDU
   VS
   AGBI, [1972] 2 GLR 238
2. ANANE & ORS
   VS

DONKOR & ORS [1965] GLR 188 where Ollennu JSC put the matter succinctly as follows:-

> "where a court grants declaration of title to land or makes an order for injunction in respect of land, the land subject matter of that declaration should be clearly identified so that an order for possession can be executed without difficulty".

The 1st Appellant, in our considered opinion failed to lead that kind of evidence to satisfy the trial court that on their own strength and not on the weaknesses in the opponents case it has been able to make out a case sufficient to convince the court on a balance of probabilities.

Under the circumstances, this court is of the opinion that no useful purpose would be served in ordering a retrial of the Appellants' case which has been destroyed from the foundation stage.

In our estimation, whenever an issue arises as to whether an appellate court should consider the issue of ordering a retrial in a civil case, the primary consideration is whether any useful purpose would be served by any such directive.

Learned counsel for the Appellant submits that a survey plan should have been ordered to delineate the exact boundaries of the disputed land. That might very well be the issue. However, what document or documents would be used for such an exercise on behalf of the Appellant?

This is because the 2nd Appellant from whom the 1st Appellant derived title has completely denied authorship and knowledge of Exhibit B.

In the absence of any descriptions on Exhibit A, the purchase receipt, it will be a wild goose chase if a retrial would be ordered. No useful purpose would be served, and since the courts exist to make reasonable, useful and purposive decisions that will accord with common sense and sound principles of law, it stands to reason that the invitation to this court for a retrial should be rejected.

In the same vein, when we consider the pleadings, the evidence that has been led and the documents of title that have been tendered by the Respondents, we get the picture that they have been able to clearly identify the land that they claim as per their counterclaim.

Out of abundance of caution, we refer to the following documents that had been tendered by the Respondents during the trial at the High Court.

1. Exhibit 1 - This is an Indenture that had been made on 2nd February, 1979 between Nii Nikoi Olai Amontia IV the then occupant of the Asere Stool and the 1st Respondent, herein.

2. Exhibit 2 - This is also an Indenture that had been made on 2nd August, 1979 between Nii Nikoi Olai Amontia IV and the 1st Respondent herein.

3. Exhibit 3 - This is a Search from the Lands Commission dated 1st February, 1985 indicating that land covered by a site plan exhibited therein is owned by the Asere Stool whose occupant at the time was Nii Nikoi Olai Amontia IV.

4. Exhibit 4 - This is also another Search result indicating that a search had been conducted from the Lands Registry dated 1st November, 1984 confirming the title of the Respondents' vendors.

5. Exhibit 5 - This is an Indenture dated 14th November, 1979 and made between the 1st Respondent and the 2nd Respondent who is reputed to be a niece to the 1st Respondent.

As we have already stated, the 1st Respondent tendered exhibits 1 and 2 to support his oral testimony given on page 53, lines 32-37 where he testified as follows:-

> "I purchased the land in question from NiKoi Olai Nii Amontia IV. He is a divisional Chief of the Asere Stool. This was in 1978/79. The land is situate at North Odorkor. I do not know that area is also called Alealu. It measures 70 feet by 200 ft for the two plots".

The 2nd Respondent confirmed in all material particulars the evidence of the 1st Respondent when she testified on page 57 lines 40 – 46.

Finally we take note of the confirmatory evidence of D.W.1 NiKoi Olai Amantia IV on page 60, lines 27 – 33 of the appeal record, when he testified as follows:-

> "I granted the land to the Defendant in my capacity as Asere Manche. I have seen Exhibits "1 and 2". They bear my signature in my capacity as Asere Manche the grantor. I made the grant in 1978. He paid for the documentation after he has paid the necessary customary drinks."

Having considered all the above pieces of evidence and Exhibit 1, 2 and 5 we come to the irreversible conclusion that the Respondents have been able to prove their counterclaim on a balance of probabilities.

For example, when one considers the extent of Exhibits 1 and 2, which are Instruments executed between Nii NiKoi Olai Amontia IV and the 1st Respondent, on the one hand, and Exhibit 5, the Instrument executed between he 1st Respondent and his niece the 2nd Respondent, it is clear that 1st Respondent conveyed to 2nd Respondent portions of his land already conveyed to him by the Asere Stool per NiKoi Olai Amontia.

It is therefore our considered opinion that the learned trial judge and the majority decision of the Court of Appeal were right when they decreed title to the Respondents as regards their counterclaim.

As a matter of fact, the contention that a party must prove the identity of the Suit land with certainty to enable a court decree title does not mean mathematical identity or certainty.

It is enough, such as in the instant appeal when the Respondents have been able to establish the identity of land purchased from the Asere Stool by the 1st Respondent and that conveyed to the 2nd Respondent by the 1st Respondent. In a situation like this, whenever there is a boundary dispute between he 1st Respondent and the 2nd Respondent, or any third party, they can do so by reference to Exhibit 1, 2, and 5 which are legally recognizable Instruments that touch and affect land.

Before we conclude this judgment, there is some other legal issue that has arisen and ought to be raised and dealt with by this court.

This is the principle of law that findings of fact made by a trial judge who heard and observed witnesses when they testified before him or her are generally not departed from by an appellate court except when those findings are clearly unsupportable, having regard to the evidence on record, as has been stated by the Supreme Court in the case of
ACHORO & ANOR
VRS
AKANFELA ANOR. [1996-97] SCGLR 209, holding 2 where the principle was re-emphasized as follows:-
"In an appeal against findings of facts to a second appellate court like (the Supreme Court) where the lower appellate court had concurred in the findings of the trial court, especially in a dispute, the subject matter of which was peculiarly within the bosom of the two lower courts or tribunal, this court would not interfere with the concurrent findings of the two lower courts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice was apparnt in the way in which the lower tribunals had dealt with the facts. It must be established eg that the lower courts had clearly

erred in the face of a crucial documentary evidence, or that a principle of evidence had not been properly applied; or , that the findings was so based on erroneous proposition of the law that if that proposition be corrected, the finding would disappear. It must be demonstrated that the judgments of the Courts below were clearly wrong".

The following cases also depict the application of the above principle.

1. **THOMAS**
   VS
   THOMAS, [1947] AER 582
2. **AKUFO ADDO**
   VS
   CATHLINE, [1992] 1 GLR 377
   per Osei Nwere J.S.C

3. **ASANTE**
   VS
   CFAO [1961] GLR 125 P.C
   holding 3 thereof

4. **NTIRI & ANOR**
   VRS
   ESSIEN & ANOR [2001-2002] SCGLR 451
5. **POWELL**
   VS
   STREATHAM MANOR NURSING HOME [1935] A.C. 243 at 250 H.L

Basing ourselves on the above decided local and English authorities, we are of the firm opinion that an appellate court should be slow in dismissing findings and conclusions reached by a trial court based on the observations made during the trial of the case as a result of the advantages enjoyed in seeing, hearing and

observing the demeanour of the witnesses by the trial court. Any attempt by an appellate court such as ours to come to different conclusions on the facts and not on the law must be based on strong evidence which is apparent from the appeal record. Just as was stated in the ACHORO vs AKANFELA case already referred to supra.

In the instant appeal, we find that there is absolutely no basis whatsoever to depart from the concurrent findings of fact and conclusions reached by the learned trial judge and the lower appellate court.
We therefore find the observations made by Lamptey J.A. as he then was about the reference to the "Appellants" by the learned trial judge as plaintiffs instead of referring to them as plaintiff and Co- Plaintiff as too petty and devoid of any merit deserving attention from this court.

The result is that, this court dismisses the appeal lodged against the Court of Appeal decision of 20th February 1997, for the following reasons.

1. The Appellants have woefully failed to prove their case to the satisfaction of the Court and their claims stand dismissed by this court.
2. The Respondents have been able on a balance of probabilities to establish and prove their counterclaim to the satisfaction of this court. The court accordingly affirms title to the Respondents.
3. Since no useful purpose will be served in ordering a retrial (because the Appellants have not been able to establish the certainty about their land) the invitation extended to this court to order a retrial is hereby rejected.

The appeal is accordingly dismissed.

J. V. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

I agree

S. A. B. AKUFFO (MS)
(JUSTICE OF THE SUPREME COURT)

I agree

DR. S. K. DATE-BAH
(JUSTICE OF THE SUPREME COURT)

I agree

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

I agree

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