IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA .A. D. 2011

CORAM: ATUGUBA JSC. (PRESIDING)

DR. DATE-BAH JSC.

ANSAH JSC.

OWUSU JSC.

BONNIE JSC.

CIVIL APPEAL
J4/26/2011

30TH NOVEMBER,2011

KWADWO SASU BAMFO,
H/NO. C390/3
ASYLUM DOWN
ACCRA

PLAINTIFF/RESPONDENT/APPELLANT

VERSUS

KWESI SINTIM,
ACCRA

DEFENDANT/APPELLANT/RESPONDENT

J U D G M E N T

OWUSU JSC.

The plaintiff/Respondent/Appellant herein issued a writ against the Defendant/Appellant/Respondent herein claiming the following reliefs:

> " i. A declaration of title to all that piece/parcel of land situate lying and being at North Taifa, Accra and bounded on the North by proposed road measuring 98 feet more or less on the South by property of the Okumo Aryikwei family measuring 100 feet more or less on the West by said Okumo Aryikwei family land measuring 93 feet more or less and containing an approximate area of 0.20 Acre more or less
>
> ii. Recovery of possession
>
> iii. Damages for trespass thereto
>
> iv. Perpetual injunction restraining the Defendant, whether by himself, servants, agents, privies whomsoever from entering on and/or encroaching upon the said land (or a portion thereof) the subject matter of this suit or interfering in any manner with the Plaintiff's ownership of the said piece/parcel of land"

The parties will hereafter be referred to simply as Appellant and Respondent.

The Respondent resisted the Appellant's claim denying in his statement of Defence that the land, the subject matter of dispute was ever granted to the Appellant by the Neefu family through Numo Kpanie Mensah as the Appellant claimed.

He contented that the Lease Agreement purported to have been executed by the said Numo Kpanie Mensah and tendered in evidence at the trial as

Ex "A" was a forged document. He set up a counter-claim for the land as follows:

"a. An order that Numo Kpani Mensah in 1990 did not transfer the disputed land to plaintiff
b. Declaration of title to the land in dispute.
c. Recovery of possession
d. Perpetual injunction
e. Damages for trespass"

THE APPELLANT'S CASE

The Appellant's case is that by a leasehold Agreement dated 02-05-90 and made between Numo Kpani Mensah the accredited Head of Okumo Aryikwei family of Kwabenya also known as Aryikwei Agba family and also referred to as the Neefu family and the Appellant (therein referred to as the Lessee) the land the subject matter of the dispute as particularly described in the endorsement on the writ was leased to him for a valuable consideration for a term of ninety-nine years.
He immediately went into possession, erected a fence wall around it and entrusted same to caretakers who planted foodstuffs on part of it.

It is his contention that the Respondent unlawfully entered the land, pulled down part of the fence wall and commenced construction of a structure thereon. This caused him to lodge a formal complaint to the police and subsequently issued the writ.

THE RESPONDENT'S CASE

The Respondent in his statement of Defence also claims title to the land contending that by a lease agreement dated 10th September 2005 the Head of the Neefu family per its accredited Head of family at the time, Capt. (Rtd) M. Okai granted him a lease of 99 years of a portion of the family land i.e. the land in dispute. He also claims he went into

possession and started building operations thereon when the Appellant trespassed on the land.
At the trial, the Appellant led evidence in line with his statement of claim and tendered the lease Agreement purportedly executed between the alleged Numo Kpanie Mensah, the accredited Head of the Okumo Aryikwei alias Aryikwei Agba family also referred to as the Neefu family and the Appellant.

He called one witness, Joseph Tettey Addy whose testimony was that the Appellant bought the disputed land from Numo Kpanie Mensah who was his father's brother. That he was present when Ex "A" was executed by the said Numo Mensah, the lessor.

He identified the thumb-print of the lessor and his own signature as a witness on Ex "A".

Under cross-examination, he admitted Numo Kpanie Mensah died in 1993, to be precise on 08-01-93. He however denied that the document was executed in 1996 as it appears on the document and that the thumb-print supposed to be that of Numo Kpanie Mensah is not that of the lessor.

He however denied that the Oath of proof was sworn to in 1996, contending that same was sworn to before 1996.

The Respondent also testified, claiming ownership of the land. His evidence is that he acquired the land from Capt. (Rtd) M. Okai, acting head of the NIi Okai family in 2001. He told the court he conducted a search at the Lands Commission which revealed that the land belongs to Nii Okai family so upon inquiry he was directed to the Head of family from whom he acquired the land. He was given a document which he registered at the Lands commission. He tendered the document in evidence and same was accepted without objection and marked Ex "1". He subsequently registered same. He told the court he went into

possession and started building on the land when he was served with a writ of summons to appear in court.

His evidence is that when he visited the land he did not see anything on it.

The Respondent also called one witness whose evidence is not material as to the acquisition of the land. The witness, a mason, was engaged by the Respondent to construct a building on the land and he told the court that when he went onto the land, there was nothing on it.

The Respondent through his counsel impugned the authenticity of Ex "A" and called upon the court to subject same to forensic examination. The court however rejected counsel's application without assigning any reasons.

This is what the trial Judge said:

> **"The submission was rejected as to sending documents for forensic examination"**

In her judgment however, Her Ladyship held that the Respondent did not lead a scintilla of evidence to prove the alleged forgery and went on to say that:

> **"In fact no attempt was even made by Defendant to prove the alleged forgery."**

She therefore rejected the allegation of forgery and accepted Ex "A" as passing good title to the Appellant. Relying ton the principle of nemo dat quod non habet, she concluded that if the same family purported to sell the same land to the Respondent in 2005, it had no title in the land to have transferred to the Defendant.

Judgment was thus entered in favour of the Appellant for the reliefs claimed and the Respondent's counter-claim dismissed.

Dissatisfied with the Judgment, the Respondent appealed against same to the Court of Appeal which by a unanimous decision allowed the appeal, set aside the Judgment of the trial court and its consequential orders. The Respondent's counter-claim was allowed and judgment entered in his favour accordingly.

Dissatisfied with and aggrieved by the Judgment of the Court of Appeal the Appellant mounted this appeal against same on the following grounds:

> "a. The judgment is against the weight of evidence."
> b. the Court of Appeal erred when it held that Appellant's leasehold Agreement was a forgery."

Having indicated that additional grounds will be filed on receipt of the record of proceedings in the Notice of Appeal, the following additional grounds were filed:

> "a. The Court of Appeal erred when it held that Defendant had a registered title to the land in dispute."
>
> "b. The Court of Appeal erred when it held that P. W. 1 committed perjury."
>
> "c. the Court of Appeal erred when it failed to consider the priorities of the respective titles of the parties."

I intend to deal with counsel's submissions as canvassed in his statement of case.
Ground (b) in the Notice of Appeal and additional ground (b) as filed.

On these grounds, counsel attacked the judgment of the Court of Appeal which states that:

> "Ground (c) of the Appeal is essentially complaining that Exhibit A is not a genuine or authentic document and that the trial judge should have so held. This, according to the Appellant is because Exhibit "A" is a forgery as pleaded and testified to by the Appellant. I Agree with and endorse the submission of learned counsel for the Appellant that the learned trial Judge erred in her finding and conclusion that the Appellant had failed to prove that Exhibit "A" is a forgery or was fraudulent. That finding and conclusion by the trial Judge is clearly not supported by the evidence in the record of Appeal.

The Court of Appeal continued –

> "It is obvious that on its face and considering the evidence of Mr. Joseph Tetteh Addy (P.W.1) under cross-examination that Numo Kpanie Mensah died on 8th January, 1993 Exhibit "A" cannot be authentic but a forgery and or a fraudulent document. On the first page of Exhibit "A" (page 65 of ROA) it is there stated that, the indenture (Exhibit 'A') was executed between Numo Kpanie Mensah, then head of Neefu family of Kwabenya, Accra, on the 2nd day of May, 1990 as Lessor and the Respondent as Lessee. But on the last page of Exhibit "A" where the Oath of proof is provided, the date of the Oath of proof is clearly stated there as 7th August, 1996 (see page 66 of ROA).
>
> I can appreciate an argument that the oath of proof of an indenture may not necessarily be on the same day or date of the execution of that indenture but on whatsoever day or date the indenture is proved under oath, it must be so proved in the presence of the parties to that document, that is the parties or executors of that document must not only be present during the oath of proof ceremony but that they must also be alive on that day or date of the

proof under oath. For the significance and effect of PW1's evidence on the authenticity of Exhibit A, let me quote in full his evidence in chief which is in any case very short …."

This can be found at page 109 of the Record of Appeal.

At pages 112 to 113 of the Record of Appeal, their Lordships continued thus:

"The "within named Lessor" in Exhibit A is no other person than Nuumo Mensah. If Nuumo Mensah had died on 8th January, 1993, did he resurrect to be present to execute Exhibit A and for Exhibit A to be read and explained to him by PW1 on 7th August 1996 and to be seen physically, like Jesus Christ was seen by the apostles after His resurrection by PW1 – Mr. Addy? The Respondent called no evidence whatsoever to explain the difference in the dates of the execution of Exhibit A, to wit, 2-5-93 and the date of proof of the oath of this same Exhibit A, to wit, 7-8-96. P.W.1 did not also offer any such explanation. No other member of the Neefu family of Kwabenya, Accra was called by the Respondent to explain this serious and fatal incongruity and inconsistency in the dates in Exhibit A. It is sufficiently established and I so find and hold that PW1 committed intentional and deliberate perjury when he swore to the oath of proof of the execution of Exhibit A in August 1996. PW1 did not purge himself of that obvious, intentional and deliberate perjury in the witness box in Court but continued to commit that perjury in court insisting that Exhibit A is the deed of Nuumo Mensah (deceased). The trial Judge should have reverted her mind to this continuing perjury which is criminal of PW1 and should have called upon him (PW1) to offer a reasonable and acceptable explanation to extricate himself of that criminal conduct, failure of which PW1 should have been penalized by the trial judge making a finding that PW1 was a perjured witness and accordingly reject his evidence in its entirety, the trial Judge shirked her responsibility and curiously rather made a finding that the perjured evidence of

P.W.1 was capable of corroborating the evidence of the Respondent in respect of the execution of Exhibit A."

Counsel submitted that their Lordships in the Court of Appeal erred in these conclusions and proceeded to demonstrate how their Lordships erred.

He set out the particulars of the fraud as pleaded in the statement of Defence and counter-claim as follows:

"a. The lease agreement was not thumbprinted by the Head of family.
b. The lease was thumbprinted by the witness.
c. The document was not the deed of late Numo Kpanie Mensah."

These particulars having been denied in the Appellant's reply, the Respondent was put to strict proof of same which proof requires proof beyond reasonable doubt. Counsel cited the cases of BRUTUW VRS AFERIBA [1984 -86] 1 GLR 25 and FENUKU VRS JOHN-TEYE [2001-2002] SCGLR 985 in support.

In sum, counsel submitted that the Respondent failed to prove these particulars.

In support of his submission, counsel argued that the Respondent failed to prove that the thumbprint purporting to be that of Numo Kpanie Mensah was that of P. W. 1 who claimed to be present when Numo thumbprinted the document. That P. W. 1 having denied that assertion, the Respondent should have taken the opportunity to apply formally for P. W. 1's thumbprint to be taken for same to be sent for forensic examination to determine whether or not the thumbprint on Exhibit "A" was that of P. W. 1 under section 97 (2) of the evidence Decree (now) Act, NRCD 323. Rather, he contended that the Respondent failed to take this path but chose to fight the issue of fraud/forgery on other grounds with no bearing whatsoever on the particulars of fraud pleaded.

Counsel's case is that the Respondent failed to call the Head of family, his grantor to come and testify to the allegation of the forgery and that he knew the allegation was a 'bare allegation that could not be proven. He submitted that the Court of Appeal did not hold that Exhibit "A" was a forgery because the evidence did not establish that, as a fact, the thumbprint was not that of Numo Mensah but that of P. W. 1. Their Lordships had concluded that Exhibit "A" was forgery because though dated 2nd May, 1990, the oath of proof, was proven on 7th August 1996.

With the greatest respect to counsel the Court of Appeal did not conclude that Ex "A" was a forgery because though dated 2nd May, 1990, the Oath of proof, was proven on 7th August 1996.

Indeed from the judgment, Kanyoke J.A. did appreciate an argument that the Oath of proof may not necessarily be on the same day or date of execution of the Indenture but on whatever day or date the indenture is proved under oath, it must be so proved in the presence of the parties to that document, that is the parties or executors of that document must not only be present during the oath of proof ceremony but that they must also be alive on that day.

He concluded that Ex "A" is a forged document because Numu Kpanie Mensah who had died on 18th January 1993 could not have been present on 7thAugust, 1996.

In this case as I have already stated the court had declined the Respondent's counsel's application to subject Ex "A" to forensic examination which could have revealed whether the thumbprint is that of P. W. 1 or not.

Counsel did not appeal against the ruling neither was it raised on appeal. Why? I cannot fathom any reason.

I do not think that counsel had to wait until P. W. 1 was in the witness box and had denied that the thumbprint was not his for him (counsel) at that stage to have made his application under section 97 (2) of the Evidence Decree (ACT). The subsection reads:

> **"A person does not have a privilege under subsection (1) where the Court thinks that it is necessary to the determination of an issue, to refuse**
>
> **(a) To submit to physical examination for the purpose of discovering or recording the corporal features and other identifying characteristics, or the physical or mental condition of that person, or**
>
> **(b) To furnish or permit the taking of samples of body fluids or substances for analysis, or**
>
> **(c) To speak, write, assume a posture, make a gesture, or do any other act for the purpose of identification."**

It was desirable that the application was made timeously as such reference to the forensic Laboratory from experience takes some time and may hold up the trial unnecessarily.

In the case of FENUKU and Another VRS JOHN-TEYE and Another already referred to this court in holding 5 held that:

> **"The law regarding proof of forgery or any allegation of a criminal act in civil trial was governed by section 13(1) of the Evidence Decree which provided that the burden of persuasion required proof beyond reasonable doubt**.

If therefore, on the face of EX "A" Numo Mensah had executed it on 7th day of August 1996 in the presence of P. W. 1, the thumbprint appearing as his cannot be his as from the evidence of P. W. 1, Numo had died in

August 1993. This did not require any further proof as Ex "A" speaks for itself. In the circumstance there was no need for the Head of family to have come to testify on the allegation of forgery. The forgery allegation was proved beyond reasonable doubt.

The Court of Appeal per Kanyoke J. A. delivered itself thus:

"For the significance and effect of P. W. 1's evidence on the authenticity of Ex "A", let me quote in full his evidence in chief which is in any case very short.

P. W. 1 in the Box. Sworn: S.O.B in Ga

My full name is Joseph Tetteh Addy. I know the plaintiff herein. Yes I also know Nuumo Kpanie Mensah. He is my father's brother.

Yes I know something about the transaction between the plaintiff and this Nuumo Mensah. The plaintiff bought a piece of plot from my father in 1990 so it is the old man who gave him all the documents on the piece of land.

Yes I was there when the old man gave plaintiff all the documents. I was also there when plaintiff and Hans Mensah executed the document. I did something in the transaction. My old man does not understand English so when they say anything in English I translate. I also signed the document. Yes I signed for plaintiff**.** Yes I have identified my signature in Exhibit A**. Yes I have identified the thumbprint of Numo Hans Mensah. I was there when the thumbprint was made. I maintain that the thumbprint is that of the old man. Nuumo Kpanie Mensah"** (my emphasis)

Under cross-examination Pw1 – Mr. Addy admitted as follows at pages 33-43:

"Q. You said you were present when Nuumo Korle Mensah executed the document.

A. Yes

Q. You said Nuumo died.

A. **Yes he died 8-1-93.**

Q. You can read and write

A. Yes

Q. **And there was oath of proof evidence saying that the said Nuumo signed the document in the presence of the persons who administered the oath.**

A. **Yes he did."**

The Court of Appeal evaluated the evidence on record and concluded that Ex "A" was a forged document thus reversing the finding of the trial Judge who had held the contrary.

An appellate court would normally not interfere with findings of facts made by a trial Judge on the facts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice, was apparent in the way in which the lower tribunals had dealt with the facts.
It must be established, e.g. that the lower courts had clearly erred in the face of a crucial documentary evidence, or that principle of evidence had not been properly applied or;
See the case of ACHORO and Another VRS AKANFELA and Another [1996-97] SCGLR 209.

Achoro's case is an appeal to a second Appellate court where the lower appellate court had concurred in the findings of the trial. However the

same principle holds good where the lower appellate court had interfered with findings of the trial court for same reasons.

In the case of TUAKWA VRS BOSOM [2001 – 2002] 61 this court in unanimously dismissing the appeal held that "an appeal is by way of re-hearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial court is against the weight of evidence. In such a case although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that, on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence. In the instant case, the Court of Appeal failed to do this. After reviewing the record, the court would conclude that, on the preponderance of the probabilities, the judgment of the trial judge in favour of the defendant, i.e. the respondent, was not supported by the totality of the evidence; and the Court of Appeal therefore erred in confirming the same without any scrutiny of the record."

In the instant case, the Respondent's first ground of appeal to the Court of Appeal is that:

"a. The whole judgment is against the weight of evidence."

The court of Appeal therefore mindful of its duty, examined and scrutinized the totality of the evidence contained in the record of appeal and concluded that Ex "A" is a forged document.

The court per Kanyoke J. A. delivered itself thus:

"**As an appeal is by way of a rehearing I am entitled to examine and scrutinize the totality of the evidence before me as**

contained in the record of Appeal and come to my own decision on the admitted and undisputed facts in this case."

See AKUFFO-ADDO VRS CATHELINE [1992] 1 GLR 377.

I have carefully perused, examined and scrutinized the totality of the evidence in the record of appeal and I have no doubt in my mind that Exhibit "A" is a forged and fraudulent document. This finding is amply supported on the face of Exhibit A and the court fell into no error by so holding.

Admittedly, the Respondent failed to prove any of the particulars of the forgery/fraud as pleaded but if after evaluating and scrutinising the whole of the evidence including documents exhibited, there was evidence of fraud, the appellate court which could draw its own inference from the evidence and was in that regard in the same position as the trial court, rightly found that Ex "A" was fraudulent.

The appeal fails on this ground.

On additional ground (b) counsel argued that p. w. 1, never signed the Oath of proof and therefore committed no perjury as found by the Court of Appeal.

Perjury is defined under section 211 of the criminal offences Act, 1960 as follows:

> "A person commits perjury, if in a written or verbal statement made or verified by that person on oath before a court or a public officer, or before the president or states anything knowing that the statement is false in a material particular, or which that person does not have a reason to believe is true."

On the face of Ex "A", p. w. 1 never signed nor thumbprinted the Oath of proof as a Deponent even though the Chief Registrar has signed as the Oath having been sworn before him.

The finding of the Court of Appeal that P. W. 1 perjured himself is not supportable and therefore the Court of Appeal erred when it so held. This ground of Appeal thus succeeds.

ADDITIONAL GROUNDS (a) and (c)
These two grounds touch on the question of the registration of the respective titles of the parties. Counsel submitted that having declared Exhibit "A" a forgery, same was buried and nothing, not even the Holy Spirit, could resurrect same. Therefore their Lordships did not see the need to carefully evaluate the submissions and authorities cited by Appellant.

This statement of counsel is unfortunate as the passage of the Judgment quoted by him disproves his assertion. The passage reads as follows:

> "Let me deal firstly with the issue of the registration or non-registration of the Respondent's Leasehold Agreement – Exhibit A. In his written submission filed on the 10th day of August 2009, learned Counsel for the Respondent gracefully conceded that Exhibit A on its face does not show that it has been registered in accordance with Section 42(1) of the Land Title Registry Act, 1962 (Act 122). Having conceded this point, I thought learned Counsel for the Appellant would have been more graceful enough and in accordance with the best practice of the legal profession to further concede that the point raised by learned Counsel for the Appellant that Exhibit "A" was invalid and could not and should not have been relied upon by the trial Judge in her Judgment and therefore that the trial Judge had erred in law by relying on Exhibit A as one of the reasons for entering Judgment in favour of the Respondent. Instead, in a desperate and valiant attempt to persuade this court to uphold the decision of the trial Judge learned Counsel for the Respondent sought to circumvent the consequential legal effect of the non-registration of Exhibit "A" by circuitously making submissions on the issues of priority of registered instruments or

documents affecting land or transactions affecting land and whether or not the mere guarantee to title to that land. Learned Counsel for the respondent then cited and referred to a host or a chain of judicial decisions on these issues, such as LAMPTEY V HAMMOND (1987-88) 1 GLR 286, BOTWAY v OKINE (1987-88) 2 GLR, ARKOFUL v SEY (1980) GLR 752, BROWN v QUARSHIGAH (2003-2004) SCGLR 930 etc. In my view, in the circumstances and facts of the instant case issues of priority of registered documents or instruments affecting land and whether or not registration of such an instrument or document is a guarantee to the title of the holder of such a document as well as those judicial authorities cited by learned Counsel for the Respondent are irrelevant for a consideration of the legal effect of Exhibit A."

Counsel for the Appellant followed up with an attack on the Respondent's leasehold document submitting that mere registration of that document will not confer title on the Respondent. If therefore the title is proved to be defective, mere registration cannot cure the defect. He referred to the cases of LAMPTEY VRS HAMMOND. BOTCHWAY VRS OKINE and ARKOFUL VRS SEY already referred to.

Consequently, the Respondent's grantor had no title to convey to the Respondent after the same family had made a prior grant to the Appellant, relying on the maxim Nemo Dat Quod Non Habet.

With the greatest respect to counsel, his submission on prior grant not affected by subsequent registered grant would be tenable if the Appellant has a valid grant known or which ought to have been known by the holder of the subsequent grant.
Ex "A" apart from being a forged document as the Court of Appeal held, was not registered.

The Appellant's purported grant was not a customary one as in the case of BROWN VRS QUARSHIGAH [2003-2005] SCGLR 930 relied upon by counsel. Neither was there evidence on record to establish that the

Respondent fraudulently obtained his subsequent grant with notice of the earlier unregistered instrument even if that instrument had been a valid one.

The evidence of the Respondent is that when he entered the land he did not see any sign of human activity. This piece of evidence was corroborated by his witness p. w. 1 when he testified.

The Appellant failed to lead any evidence in support of his claim that he had gone into possession. Indeed the search the Respondent conducted, the certificate of which he tendered as Exhibit 2 did not reveal any transaction between the Neefu family and the Appellant as evidenced in Ex "A".

I would touch on Ex "2" again when I come to deal with the Respondent's counter-claim.

REGISTRATION OF INSTRUMENTS:
Under section 24(1) of the Land Registry Act, 1962 (Act 122) "**subject to subsection (2) of this section, an instrument other than (a) a WILL or (b) a judge's certificate, first executed after the commencement of this Act shall be of no effect until it is registered."**

It was evident from the face of Ex "A" that it was not registered. P. W. 1 admitted this and counsel also conceded that Exhibit "A" was not registered. For that reason, ipso facto, same was ineffective to create legal rights or liabilities or to have any legal validity or so ever.
See the cases of ASARE VRS BROBBEY [1971]2GLR, LAMPTEY VRS HAMMOND already referred to.

In the case of ASARE VRS BROBBEY, a mortgagee, who had not registered the mortgage instrument exercised the power of sale in the mortgage instrument.

The trial court held that the sale was in order, but on appeal, Archer J.A. (as he then was) delivering the Judgment of the Court of Appeal, said:

> "The Court below delivered a judgment contrary to the express provision of section 24(1) of the Land Registry Act, 1962 by conferring rights when the statute provides that no legal rights can arise from an unregistered document affecting Land. The sale ------ was therefore a nullity and the appeal should be allowed as the appellant is entitled to all the reliefs he seeks"

Since Ex "A" is not a registered Instrument there is therefore no issue of priorities of the respective titles of the parties which the Court of Appeal failed to consider. Additional ground (c) therefore fails.

I will deal with additional ground (a) when I come to consider the Respondent's counter-claim.

Counsel did not argue ground (a) in the Notice of Appeal i.e. Judgment is against the weight of evidence and I take it that he has abandoned same.

THE RESPONDENT'S COUNTER-CLAIM

A counter-claim is a different action in which the Defendant counter/claimant is the plaintiff and the plaintiff in the action becomes a defendant.

In a case where the parties are seeking declaration of titles, recovery of possession and perpetual injunction in respect of a 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.

Section 11(1) of the evidence Decree enjoins the Respondent as a plaintiff in the counter-claim to introduce sufficient evidence to avoid a ruling on the issue against him.

Section 12(1) of the Act reads as follows:

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

(2) "Preponderance of the 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.

What evidence did the Respondent herein lead in proof of his counter-claim?

He denied all the averments contained in the plaintiff/Appellant's statement of claim except that he admitted he had entered the land granted him by the Neefu family and had started building operations therefore.

He therefore pleaded the lease agreement he entered into with the Head of Neefu family in 2005. This Agreement he tendered as Ex "1" and with this he sought a declaration of title and its consequential reliefs.

The Respondent did no more than mounting the witness box and reiterating what he had stated in his statement of Defence and counter claim.

The Appellant having denied that the Neefu family granted the Respondent any land argued that even if any such land was granted him, the family had no interest in the land which they could pass on to the Respondent, having diverted itself of any interest in the land previously to the plaintiff.

With this challenge, the Respondent did not join his grantor to the suit nor call him as a witness. Failure to bring in the grantor under the circumstances is fatal.

The only witness he called, D. W. 1 the mason, did not testify to acquisition of the land.
In the case of OSAE & ORS VRS. ADJEIFIO & OTHERS [2008]4 G.M.L. 149 the Supreme Court per Brobbey J.S.C. stated that –

> "The burden of proof and persuasion remained on the appellants (plaintiffs) to prove conclusively on a balance of probabilities, the land to which they claimed a declaration of title and perpetual injunction. This burden hardly shifts. Unless and until the plaintiffs who are the appellants are able to produce evidence of relevant facts and circumstances from which it can be said that they had established a prima facie, the burden remains on them."

In the case of MAJOLAGBE VRS LARBI & OTHER OLLENU J. (as he then was) repeating his words from the case of KHOURY AND ANOTHER VRS RICHTER on the question of proof said –

> "Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on Oath, or having it repeated on Oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true"

In proof of his title, the Respondent had tendered Ex "1", the lease Agreement.

The Court of Appeal concluded however that the Respondent succeeded in establishing a superior title to the disputed land. The court arrived at this conclusion because Kanyoke J. A. was of the view that Ex "1" had been registered. This is what he said –

"It is clear on the face of Exhibit 1 that his indenture had been registered."

With due deference to Kanyoke J. A., Ex "1" on its face does not indicate that same is a registered Instrument. The instrument is rather stamped in accordance with section 12 of the stamp Act of 1965.

If the Instrument is not registered, then it is of no legal effect under section 24 (1). It cannot raise any presumption in favour of the Respondent for the burden of proof to shift to the Appellant as the Court of Appeal held.

In His Lordship's own words, "an unregistered Instrument or document affecting land has always been held to be invalid and cannot therefore form the basis of a judicial decision in a court of law. His Lordship referred to cases like THOMPSON VRS MENSAH [1957] 3 W. A. R. 240 ASARE VRS BROBBEY [1971] and HAMMOND VRS ODOI [1982-83] 2 GLR 1215.

Even if Ex "1" was registered, mere registration would not confer title on the Respondent.

Coming back to Ex "2" the search certificate, His Lordship found that the disputed land is the subject of a "lease dated 10/9/2005 from Ex-captain Felix Nii Okai to Akwasi Sintim (appellant herein)

What His Lordship overlooked is that this report is dated 11th February 2008, some six (6) days after the Respondent had testified in court.

Even though his evidence is that he conducted a search at the Lands commission to find out the rightful owners, under cross-examination when asked about copy of the search his answer was that he did not have it in court. He obtained it after he had testified in court.

At the conclusion of the trial and on the totality of the evidence, the Respondent failed to lead sufficient evidence in proof of his title to warrant entry of Judgment in his favour on the balance of probabilities on his counter-claim. He failed to discharge the burden of proof and persuasion.

The Court of Appeal should have dismissed his counter-claim as the trial court did.

Accordingly, the counterclaim is dismissed.

The Respondent sought in his counter-claim a relief for recovery of possession even though his evidence is that he has gone into possession. His evidence to that effect was not challenged. He is therefore entitled to his possessory rights. Since he is already in possession, his claim for recovery of possession is superfluous.

In the end, the Appellant's appeal succeeds partly on the issue of perjury and the court of Appeal's finding that Ex "1" is a registered Instrument. It fails on the other grounds and on those grounds same is dismissed.

It must be stated that we have come to this conclusion with some amount of difficulty because the case was poorly fought on both sides.

Counsel had fought the case without any regard for the standard of proof required of a party who claims a declaration of title to land. The cases abound on this principle. How does a party who seeks a declaration of title to land fail to join his grantor as a party to the action or call him as a witness when his title is hotly contested. His action is bound to fail

[SGD]: R. C. OWUSU(MS.)

JUSTICE OF THE SUPREME COURT

[SGD]: W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

[SGD]: DR. S. K. DATE BAH
JUSTICE OF THE SUPREME COURT

[SGD]: J. ANSAH
JUSTICE OF THE SUPREME COURT

[SGD]: P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

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