IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CIVIL APPEAL

No: J4/34/2011

22ND FEBRUARY, 2012

CORAM: AKUFFO (MS) JSC (PRESIDING)
DATE-BAH JSC
ADINYIRA (MRS) JSC
DOTSE JSC
AKOTO-BAMFO (MRS) JSC

SALOMEY SHORME TETTEH	**-**	**PLAINTIFF/RESPONDENT APPELLANT**
NII AMON TAFO	**-**	**CO-PLAINTIFF/RESPONDENT APPELLANT**
VRS;		
MARY KORKOR HAYFORD SUBSTITUTED BY STELLA LARBI &COMFORT DECKER	**-**	**DEFENDANTS/APPELLANTS RESPONDENTS**

J U D G M E N T.

JONES DOTSE JSC;

This is an appeal by the Plaintiff/Respondent/Appellant hereafter referred to as Plaintiff against the judgment of the Court of Appeal dated 22nd July 2010 which set aside a judgment of the High Court which was in favour of the plaintiff, and entered judgment in favour of the Defendants/Appellants/Respondents, hereafter referred to as the Defendants. It must be noted that, even though the Plaintiff commenced action against a Defendant, Madam Mary Korkoi, she died during the pendency of the suit, and had been substituted by her daughters, the two substituted Defendants herein.

This case commenced in the High Court, Accra where the Plaintiff issued a writ against the Defendant, Madam Mary Korkoi (deceased) claiming the following reliefs:

i. Declaration that the Land Title Certificate No. GA3929 issued by the Chief Registrar, land Title Registry, Accra to the Defendant is null and void on grounds of fraud.

ii. An order to cancel or set aside the said Land Certificate No. CA. 3929

iii. Perpetual injunction restraining the Defendant, her agents workmen etc not to have anything to do with the said land.

At the High Court the Acting Asere Mantse at all material times to the cause of the action, Nii Tafo Amon II applied to be joined as a party and was accordingly joined as a Co-plaintiff by an order of the Court.

Interestingly, both Plaintiff and Defendants claim title through the Asere Stool. Whilst plaintiff claims she acquired the land in 1978, Defendants claimed their mother acquired the land as far back as 1974, though she only got an indenture covering the land in 1983. It is therefore not surprising that the Defendants also counterclaimed for the following reliefs:-

a. A declaration that the indenture issued to the Plaintiff in respect of the disputed land after an indenture was earlier executed in her favour in 1983 is null and void.

b. A declaration that the Asere stool indeed executed a Deed of Lease on 27/7/1983 in favour of the Defendant and same was registered at Land Registry and covered with Land Certificate No. GA3929.

JUDGMENT OF THE HIGH COURT

The learned High Court Judge found for the Plaintiff on the basis that the Plaintiff's land tallied with the size of land stated in her indenture and the Title Certificate in contra distinction to the Defendant's who, according to the learned trial High Court Judge, showed inconsistencies in their land size because the size of their land as reflected in their indenture and in their Land Title Certificate did not tally.

Subsequently, the trial High Court Judge granted plaintiff's reliefs whilst she dismissed the counterclaim of the Defendants and accordingly as per plaintiff's writ set aside the Land title Certificate issued to the Defendants declaring it to be null and void.

DECISION OF COURT OF APPEAL AND GROUNDS OF APPEAL TO THIS COURT

The Defendants appealed against the decision of the High Court to the Court of Appeal which overturned the decision of the High Court and entered judgment in favour of the Defendants. It is

against this decision that the plaintiff has appealed to this court under the following grounds of appeal:

1. That, the judgment is against the weight of evidence adduced at trial."

2. The Court erred in law when it's (sic) decided that because the Plaintiff/Respondent/Appellant did not specifically claim declaration of title, her case must fail.

The Plaintiff thus prayed this court that the judgment of the Court of Appeal be reversed, and judgment entered in her favour.

MATTERS TO BE CONSIDERED WHEN A SURVEY PLAN IS ORDERED BY A COURT

Before we consider the issues raised in the two grounds of appeal filed in this case, there are some procedural issues which must be dealt with for the guidance of parties, counsel and trial court Judges, whenever an order is made for a survey plan in a land dispute.

The first one is of what relevance is the work of a Surveyor appointed by a court to assist in the determination of a land suit?

This observation must be critically considered in view of the orders made by the learned trial Judge, Ayebi J, (as he then was) on 6th April, 2005 when he appointed the Surveyor.

This is what he directed the Surveyor and the parties to do:

> *"The Regional Surveyor of the lands Commission, Greater Accra Region is hereby* ***appointed to survey the respective lands of the parties herein in this matter and then superimpose them.*** *The Plaintiff's Counsel should therefore furnish the said Regional Surveyor with his instructions plus any relevant documents by 13/4/05. Each of the parties should pay a deposit of ¢1 million cedis…?"*

Unfortunately, by the time the survey report was ready for presentation to the court, the suit which originally commenced before Beatrice Agyeman Bempah J, went back to her.

As a result, Ayebi J (as he then was) had nothing to do with this suit thereafter.

It was not surprising therefore that, both Counsel and the Court did not appreciate the important role the Surveyor's evidence could have played in helping the court determine the real issues in controversy.

From the orders made by the Court, it is clear the parties were to do the following things pursuant to the preparation of the Survey Plan:

1. The Plaintiff's counsel was to file his survey instructions to the Surveyor before the commencement of work. By parity of reasoning, since the order directed the Surveyor to survey the respective land of the parties, it is to be assumed that the Defendant was to be expected to file survey instructions as well for the Surveyor to follow and or comply with.

2. The parties were to furnish the Surveyor with any relevant documents on or by 13/4/05.

3. The parties were to make a deposit of GH¢100.00 towards the preparation of the Survey Plan.

On the part of the Surveyor, he was directed by the Court to do the following:

a. Survey the land of the parties

b. Superimpose the said lands possibly vis-à-vis the relevant documents of the parties and **the land of the parties as it is on the ground.**

We have not sighted any survey instructions filed by any of the parties in this case.

Indeed when the Surveyor testified in the case, he did not mention that any of the parties filed any survey instructions in the case. Thus, apart from the site plans and some documents of title that the Surveyor had access to from the parties, he was not specifically requested to do any other thing by the parties or their counsel.

In any case, the Surveyor, one Robert Hackman, did testify in the case about the work that he did in this case as C.W.I.

Of particular importance to the fate of this case is the composite plan that the Surveyor prepared which was tendered as Exhibit 2. We will revert to this exhibit later.

LACK OF SURVEY INSTRUCTIONS TO SURVEYOR

We have perused the evidence and cross-examination of the Surveyor and come to the conclusion that if the parties had complied with the courts directive to file survey instructions perhaps the difficulties the Surveyor encountered with some of the questions put to him under cross-examination would have been averted.

For example when the Surveyor was asked by the Defence Counsel as to what his interpretation of his own document, Exhibit 2 was, the Surveyor answered thus:-

> *"I wish I will be relieved to answer this question as it will into the arena"*
>
> *"we believe it was a reference to arena of conflict."*

Surprisingly, the learned trial Judge stated thus:

> *"The court is (sic) agree with CWI as he is to be independent of the consistent between the parties."*

Even though it is difficult to comprehend the said statement, we believe it was a tacit approval of the refusal by the Surveyor to give an honest expert opinion based on the work he has done to the court. It is generally understood that a court is not bound by the evidence given by an expert such as the Surveyor, in this case. See case of ***Sasu v White Cross Insurance Co. Ltd [1960] GLR 4 and Darbah & another v Ampah [1989-90] 1 GLR 598 (CA) at 606*** where Wuaku JA (as he then was) speaking for the court also reiterated the point that a trial Judge need not accept evidence given by an expert.

But the law is equally clear that a trial court must give good reasons why an expert evidence is to be rejected.

We believe that the court should have compelled the Surveyor to give an opinion on Exhibit 2 which he himself prepared.

Secondly, what we have also deduced from this case is that, the failure by the parties to have filed survey instructions prevented the Surveyor from dealing with issues germane to the case when he went onto the land.

For example, it should be noted that, Counsel who represent parties before the law courts have a professional duty to perform to protect and enhance the best interests of their clients.

Besides, it is they who have been professionally instructed by their clients and therefore understand the nuts and bolts of each case to enable them be determined once and for all and to let the courts of law dispose or deal with issues arising in the cases they handle. If indeed, as the evidence disclosed in this case, there have been developments on the land by both parties, then it would not have been out of place for the parties to have instructed the Surveyor to depict the wooden and or cement block structures if any on the land in dispute and show their positions vis-à-vis the land

documents claimed by each party in respect of the areas edged, as *"Green, Red, Blue and Black."*

Thirdly, the Surveyor would have been requested to indicate the portions of the land vis-à-vis the approved layout of the land from the relevant statutory Town Planning and or Metropolitan Assembly.

Fourthly, all approved roads in the lay out as it affected portions of the land claimed by the parties should have been indicated by the Surveyor on the plan if the parties and or their counsel really wanted issues to be dealt with holistically.

It should thus be noted that, in view of the massive assistance that a court determining issues of title to land and other related and ancillary reliefs would derive from Survey Plans, care and some amount of professionalism should be exhibited by Counsel whenever a Survey Plan is ordered in contested land disputes.

This is because, Counsel who is on top of his brief in a land suit, will definitely take advantage to ensure that **overt acts of ownership and possession are clearly delineated by the Surveyor on the plan to boost his or her clients chances of success.**

Thus, the request for a survey plan if properly managed, will ensure that a lot of evidence will be introduced by the party through pictorial representation as will be delineated on the plan as if the court had moved to the locus in quo.

In the instant case, it would have been perfectly legitimate for the learned trial Judge to have ordered the Surveyor to go back to the land with an order for the counsel in the case to file their survey instructions, so as to enable those instructions to aid the Surveyor in his work. Since all the above is history, we have to make do with the plan as it is and determine the success or failure of this appeal.

With the above procedural points discussed, this court now proceeds to the resolution of the appeal.

ARGUMENTS ON GROUNDS OF APPEAL

Even though the plaintiff filed two grounds of appeal as has been stated supra, learned Counsel for the plaintiff in his written statement of case argued only the omnibus ground "*that the judgment is against the weight of evidence*". This evidently meant that the second ground of appeal has been abandoned, it will thus not be considered in this judgment.

It is deemed worthwhile to consider in some detail, the facts of the case to enable them to be put in proper context.

The main issue for determination is whether Plaintiff should succeed on the basis of her claims and evidence led in support thereof at the trial court as well as her briefs before this court on appeal.

One striking observation made in the case is the clear difference in the Land Title Certificates held by Plaintiff and Defendants, GA11053 and GA3929, respectively. This difference promptly and presumptively shows that both Plaintiff and Defendants each hold title but to two different lands. This is confirmed by Plaintiff in her defence to Defendant's counterclaim. At paragraph 4, Plaintiff concedes thus:

> *"The Plaintiff further says that the Land the Asere Stool gave to the Defendant is very different from the Plaintiff's land."*

Further, the Plaintiff concedes in her defence to the counter claim that the site plan which the Asere stool prepared for the Defendants on the latter's land does not fall on Plaintiff's land. It is therefore surprising even at the initial stage for Plaintiff to seek to nullify Land Title Certificate No. GA3929, when she concedes that her land and that of Defendants are not the same. We are therefore at a loss as to why she will seek to nullify same. She should rather be concerned about producing evidence to show that the land in dispute is the one to which she holds Land Title Certificate No. GA

11053. This she failed to do at the trial court but surprisingly succeeded in her claim.

Then the next and legitimate question is which of the parties' Land Title Certificate corresponds to the land in dispute. It is the process of finding the right evidence, we believe that was what the learned trial High Court Judge sought to do but erred in the conclusion by concentrating only on the inconsistencies of DW1, the surveyor for the Asere Stool, which sadly was irrelevant.

The position of the law, following from ***Fofie V Wusu [1992-93] GBR 877*** is that it is the Plaintiff who bears the burden of establishing the identity of the land she is laying claim to. Failure to prove this identify is fatal to a claim for declaration of title.

In the above case, the Court of Appeal, Coram, Lamptey, Adjabeng and Brobbey JJA (as they were then) speaking with one voice through Lamptey JA held as follows:

> "*To succeed in an action for a declaration of title to land a party must adduce evidence to prove and establish the identity of the land in respect of which he claimed a declaration of title. On the evidence the plaintiff failed to prove the identity of the land claimed.*"

See also:

i. ***Kwabena v Atuahene [1981]GLR 136***

ii. ***Anane v Donkor [1965] GLR SC and***

iii. ***Bedu v Agbi [1972] 2 GLR 238, CA***

Let us examine whether the plaintiff discharged this basic requirement satisfactorily from the evidence on record.

In seeking to establish the identity of the land in dispute, Plaintiff traced her title to the land some 18years ago (which year pointed to 1978), and according to her she had been on the land all those years without any disturbance or interference from any person.

However, ironically, Plaintiff then admits in paragraph 8 of her statement of claim that the Defendant per her lawful attorney Stella Larbi took an action of ejectment in respect of the said land against her tenants at the District Court I, Osu, Accra, which case was still pending at the time the present suit was instituted. The assertion of non-disturbance, again, is against the backdrop of the uncontroverted evidence of Defendant that her tenants were in occupation of the land since 1973 and that it was the Defendant's husband, one Quaynor who volunteered to be a caretaker of the Defendants land as the latter was suffering from her knees and so could not visit the land frequently. Indeed, not quite long after the suit was commenced, the original Defendant died.

Of particular interest was the evidence given by the co-Plaintiff's attorney. It is apparent from the record of proceedings that, the Co-Plaintiff's attorney, one Festus, informed the court that she joined the suit at the invitation of the Plaintiff to ASSIST THE COURT. It must be noted that the attorney who joined the suit at the Plaintiff's invitation did not so join to affirmatively and conclusively support Plaintiff's claim but only to assist the court. Rightly so, in our opinion, Festus' evidence did assist the court and was determinative of whether the Plaintiff's claim succeeds or not. Of course, notice is taken of Co-plaintiff's averments where he pleaded in his statement of claim that the Asere stool has not leased the land in dispute or any piece of land around the disputed land to the defendant herein. Suffice to say, this is not the same as saying the Asere stool did lease the land in dispute to the plaintiff.

Other than confirming that both Plaintiff and Defendants were granted land by the Asere stool, and again that the Plaintiff's land is separate from that of the Defendant, Festus also had this to say as is captured in the record of proceedings:

> *"The Plaintiff's land is behind that of the Defendant's and so there is a proposed road in the Plaintiff land at one side. In respect, the Plaintiff shares boundary with the plot of the Defendant at one side. The proposed roads are now graded and so the main road has eaten into the Defendant's land."*

It is this portion of Festus' evidence which supports Defendant's claim in the case.

It is definitely surprising that the learned trial Judge ignored and did not make any reference to this in her judgment. The evidence given by the Surveyor who was tasked to survey the land in dispute and make a superimposition and to come up with a composite plan of the disputed land also finds no place in that judgment. Having been engaged by the court to help settle the dispute, one also expect that, being a neutral or non-interested party and an expert, his evidence would be comparatively cogent in determining whether Plaintiff's claims fail or not.

By the evidence of the Surveyor, the land as shown to the surveyor by Salome Tetteh on the composite plan was edged green while the land as shown on the land title registration plan of Salome was edged black. On the other hand, the land as shown to surveyor by Mary Hayford, on the composite plan is edged red while the land as shown on the land title registration plan for Mary Hayford is edged blue.

A look at the composite plan drawn by the Surveyor after superimposition, first of all, confirms the evidence of both the Plaintiff and the co-Plaintiff's attorney that both parties had different lands granted to them by the Asere stool. Further, it confirms the evidence given by the co-Plaintiff's attorney, who joined the suit at the invitation of Plaintiff that the Plaintiff's land is BEHIND that of the Defendant. Needless to say, it goes to show that both Plaintiff and Defendant hold two different Land title certificates and this is evidence of the fact that each surely has a land allotted to her. But in answer to the question as to who has properly laid claim to the land in dispute, it is the Defendant's evidence which is more convincing.

As to the fact that Defendant's land, from the surveyor's composite plan, was smaller than what she claimed, the Court of Appeal was right in following the decision in ***Nana Darko Frempong II v Mankrado K Effah [1961] GLR 205-210***. In that case which involved a land dispute between the chief of Aperade and Achiasi, the court held that estoppels could operate to prevent a party from

laying claim to a land which formed part of a bigger land, where the latter has been a subject of decision of the court. In its decision, the Privy Council, per Lord Guest held that *"where it is admitted that the lesser area lies within the larger area of land which was the subject of a decision of the Privy Council, it is immaterial whether or not the outer boundaries of that area are sufficiently clearly defined"*. Applying the reasoning of the court to the present case, the distinction made by the trial court judge that the Defendant's land on the ground which measured about 0.08 of an acre more or less did not tally with that given in the land Title Certificate as 0.113 was irrelevant and hence immaterial. Using exhibit 2 as a guide and the above decision, it is clear that the Court of Appeal was right in their review of the facts of the case.

It is again unfortunate that this distinction is what amply informed the trial court judge to find for the Plaintiff. Besides, the minimal distinction in size goes to confirm what Co-plaintiff's Attorney said, that the road may have eaten into part of the Defendant's land.

At this point, it is important to refer to Exhibit 2, which is the survey plan that was prepared and tendered by the Surveyor into evidence. The Court of Appeal was in our view quite right when it relied on the said exhibit as follows:-

> *"Plaintiff had consistently maintained that the land given to the original defendant by the stool was completely different from her land and that it was because part of her land had been reduced considerably by a proposed road that she is now laying claim to her (plaintiff's) land. Exhibit 2, (page 140) the resultant plan produced by the Court appointed Surveyor, from the superimposition of respective site plans of the parties showed the land allocated to the original defendant falls within the area in dispute numbered 116. In contrast,* ***plaintiff's land indicated in her site plan, numbered 114 and edged black is completely outside the area in dispute.*** *This is consistent with the testimony of the Surveyor. It was a grave error of law on the part of the Judge, in preferring the oral description given to the Surveyor by the plaintiff as to the position of the land she was claiming as opposed to the clear*

documentary proof contained in her land certificate." Emphasis supplied.

This Court of Appeal position is really in tandem with the overwhelming evidence on record both oral and documentary that the land in respect of which the plaintiff sued, is outside the disputed area. That being the case, and since the initial allocation of the burden of proof is on the plaintiff before it will shift to the Defendant later, it is apparent that the plaintiff has failed to discharge this burden. Sections 10 and 14 of the Evidence Act, 1975 NRCD 323. See the following cases where the Supreme Court took pains to explain sections 10 and 14 of the Evidence Act, 1975 NRCD 323 referred to supra.

1. ***Dzaisu v Ghana Breweries Ltd [2007-2008] SCGLR 539, holding 1 at 546-547 on section 14 of NRCD 323 per Sophia Adinyira JSC*** *and*
2. ***Ackah v Pergah Transport Ltd. [2010] SCGLR 728 holding 1 especially at 735-737 per Sophia Adinyira JSC on section 10 of NRCD 323***

We are therefore of the considered view that, despite the lapses in the conduct of the work of the Surveyor which arose from the inability of the parties to file survey instructions to the Surveyor, at least on the core directive that the parties show their bearings on the land and produce their relevant land documents and or site plans to the Surveyor that mandate having been done with overwhelming evidence that the plaintiff's land is outside the disputed area, the plaintiff based on the evidence and law applicable, must of necessity fail in her action. This is because it is clear that whatever the Defendant has done on her land in the area is outside the plaintiffs land. We therefore have no hesitation in dismissing the plaintiff's appeal as being completely without any merit.

NEMO DAT QUOD NON HABET

Again, as rightly found by the Court of Appeal, the Asere Stool having divested itself of its interest in the land in favour of the original Defendant long ago in 1974, per the nemo dat quod non

habet maxim, had nothing (with regard to the divested land) to convey again, and so any purported sale of the already divested land to the Plaintiff subsequently is null and void.

The Court of Appeal stated in their judgment the following statement which captures the issue of the priority of the grants to the parties.

> *"The priority of the grant to the original defendant which was well before the receipt of her new title deed dated 27th July 1983, as opposed to the grant to the Plaintiff in 4th March 1990 which was long after the original defendant started various court actions including the institution of this suit."*

The above is a correct resume of the chronology of events in this appeal. The Court of Appeal also aptly explained the dubious role played by the Asere Stool in muddying the waters.

We cannot but agree with the Court of Appeal that judicial notice is taken of problems relating to changes in succession to traditional stools and problems encountered by purchasers of land.

The Defendants were tricked into surrendering their mother's original indenture indicating the grant to her by Nii Nikoi Olai Amontia IV the Asere Mantse who had died. If that document had not been taken away, it would have shown clearly that the Defendants grant was clearly made before Plaintiff. Even with the present state of the facts, it shows clearly that the Defendant's conveyance is earlier in time to that of the plaintiff.

There is an obligation on a grantor, lessor or owner of land to ensure that any grant he purports to convey to any grantee, or lessee is guaranteed and that he will stand by to defend the interest so conveyed to any grantee or lessee.

This principle was explained by Ollennu J (as he then was) in the case of ***Bruce v Quarnor & Others [1959] GLR 292 at 294*** as follows:

> *"By native custom, grant of land implies an undertaking by the grantor to ensure good title to the grantee. It is therefore the responsibility of the grantor where the title of the grantee to the*

land is challenged, or where the grantee's possession is disturbed to litigate his (the grantor's) title to the land. In other words, to prove that the right, title, or interest which he purported to grant was valid".

It would appear that the Co-plaintiff, by joining the suit to protect or defend the plaintiff's title, did just that. But then, this court would have to consider whether on the basis of the evidence on record, the Co-plaintiff's had any title remaining in them to have conveyed to the plaintiff in any event.

This is because, there is overwhelming evidence on record that the Defendant had an earlier conveyance prior to the Plaintiff's conveyance on the assumption that the parties in this case are dealing with one and the same parcel of land.

Acquah J, (as he then was) in the unreported Ho, High Court case Suit No. L/S23/90 dated 24th October 1991 entitled ***Helen Abdallah & 4 Others – Plaintiff v Mr. and Mrs. Nunyuie – Defendants, Kwasi Degbadzor & Anr – Co-Defendants relying on the Court of Appeal*** case of ***Wordie v Awudu Bukari [1976] 2 GLR at 381***, held in the Ho High Court case as follows:

"Be that as it may, since the plaintiffs, notwithstanding their statement of claim and Exhibit A, now concede that the land belongs to the Akpomegbe family, and from my holding that Akpo sold same in his own right as his father's property, it follows that Akpo did not have title in the transaction he concluded with the late Madam Tamakloe. The principle nemo dat quod non habet therefore applies. Accordingly, although the plaintiffs Exhibit A is valid so far as the necessary legal formalities are concerned, yet it conveyed nothing to the plaintiff's mother."

This court also held on the nemo dat quod non habet maxim in the unreported consolidated suit No. 81/92 and L. 20/92 dated 16th March 2011 entitled ***Mrs. Christiana Edith Agyakwa Aboa- Plaintiff /Respondent /Respondent v Major Keelson (Rtd) - Defendant/Appellant/Appellant and Okyeame Yima & Anr -***

Plaintiff/Respondents/Respondents v Major Keelson-Defendant/Appellant/Appellant as follows:

> *"It can thus be safely concluded that, the principle nemo dat quod non habet applies whenever an owner of land who had previously divested himself of title in the land previously owned by him to another person, attempts by a subsequent transaction to convey title to the new person in respect of the same land cannot be valid. This is because an owner of land can only convey what he owns, and having already divested himself of title, the new occupant of the Begoro Stool Nana Antwi Awuah III cannot revoke what his predecessor had done."*

See also **Sasu v Amua Sakyi [1987-88] 2 GLR 221, holden 7 at pages 241** per Wuaku JA (as he then was).

It is therefore clear that, assuming the disputed land is the same parcel of land that both Plaintiff and Defendants lay claim to, on the principle of nemo dat quod non habet, the Plaintiff must still fail in his appeal. The Court of Appeal was thus right in dismissing the appeal.

CONCLUSION

In the premises, this appeal fails and is accordingly dismissed. Save for the deletion of the order contained in the last sentence on page 191 of the appeal record to wit that ***"and since the defendants are the only claimants they are entitled to be declared indisputable owners of the land"*** the entire Court of Appeal judgment of 22nd July, 2010 is hereby affirmed. The Plaintiff's case thus fails in its entirety.

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

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

(SGD) DR S. K. DATE-BAH

[JUSTICE OF THE SUPREME COURT]

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[JUSTICE OF THE SUPREME COURT]

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