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

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**CORAM: WOOD (MRS.) CJ, (PRESIDING)**
**ANSAH, JSC**
**YEBOAH, JSC**
**BONNIE, JSC**
**AKAMBA, JSC**

**CIVIL APPEAL**
**NO. J4/47/2013**

**26TH FEBRUARY, 2014**

**ABED NORTEY … PLAINTIFF/ RESPONDENT**
SUING FOR HIMSELF **/APPELLANT**
AND ON BEHALF OF OSUWEM
FAMILY OF PRAMPRAM

**VRS**

**1. AFRICAN INSTITUTE OF JOURNALISM**
**& COMMUNICATION … DEFENDANT**

**2. STEPHEN NARTEY … DEFENDANT/APPELLANT/**
**RESPONDENT**

**3. DANIEL NARTEY … DEFENDANT/APPELLANT/**
**RESPONDENT**

# JUDGEMENT

## AKAMBA JSC;

On 14th June 2012, the Court of Appeal by a unanimous decision overturned the judgment of the High Court Accra which had granted the reliefs sought by the plaintiff/respondent/appellant who shall hereinafter be referred to simply as the plaintiff. Aggrieved by this outcome, the plaintiff has filed the present appeal to this court.

**BRIEF FACTS**

The plaintiff commenced the action by writ initially against the 1st defendant/appellant/respondent (hereinafter simply referred as 1st respondent). The 2nd and 3rd respondents were later joined to the suit. The crux of the plaintiff's claim was for a declaration of title to lands described as Oshiokpo lands covering an approximate area of 777.696 acres as land belonging to the Osuwem Family of Prampram which family plaintiff represents. The respondents denied the plaintiffs claims and by their amended statement of defence and counterclaim sought a declaration of title to the land known as Nii Nartey Borboryo family lands at Oshiokpo at Dahwenya measuring approximately 1,561.932 acres or 632.114 hectares more or less.

The dispute at the trial high court was litigated between the plaintiff and the 2nd and 3rd respondents with the 1st respondent as a nominal defendant. Also at the trial, the 1st respondent institute did not give evidence but merely relied on the 2nd and 3rd respondents being the grantors of the disputed land to the institute. The trial court at the close of hearing entered judgment for the plaintiff on his claims as afore mentioned

On appeal by the 2nd and 3rd respondents, the Court of Appeal reversed the decision of the High Court which it set aside and upheld the counterclaim by the respondents in its entirety. As a result, judgment was entered for the 2nd and 3rd respondents.

**GROUNDS OF APPEAL**

In this court, the plaintiff has filed the following grounds of appeal against the decision of the court of appeal, namely:

(i) The learned justices of the Court of Appeal erred in law by failing to consider adequately or at all the case of the plaintiff/respondent/appellant.
(ii) The learned justices of the Court of Appeal erred in law in holding that the plaintiff had relied on exhibit B and B1 as the root of his family's title to land.
(iii) The learned justices of the Court of Appeal erred in law in holding that exhibit A had no probative value.
(iv) The learned justices of the Court of Appeal erred in law in holding that the trial judge did not evaluate exhibits 4, 5, 6 and 11.
(v) The learned justices of the Court of Appeal erred in law in holding that the 2nd and 3rd defendants had proved their counterclaim.
(vi) The judgment is against the weight of evidence.

**ANALYSIS OF GROUNDS**

**Grounds (i), (ii), (iii) and (vi).**

The appellants have spelt out specific instances or complaints of dissatisfaction with findings of fact and the law allegedly made by the Court of Appeal in the grounds (i) to (v) (supra). They have also included a general or omnibus ground (vi) which in the circumstance appears superfluous. This may well be within the appellant's options in his desire to leave no stone unturned to articulate forcefully his displeasure about the appellate court's decision which went against him. Be that as it may, we would consider grounds (i) to (iii) and (vi) together since they bear on the common accusation of failure to evaluate the facts and law in relation the plaintiff's case adequately.

In his arguments in support of these grounds the plaintiff urged that the court of appeal did not deal fairly and impartially in its evaluation of the submissions made on its behalf in support of their claim. Plaintiff emphasized that the judgment of the court gives one the impression that consideration was given only to

arguments advanced by the respondents herein whilst the arguments by the plaintiff were totally ignored. Such one sided judgment could not have done justice to the parties and ought to be set aside, plaintiff urged. Plaintiff gave as an example that whereas it might be true that his (plaintiff's) description of the boundaries of the land in dispute did not tally with his description of the boundaries in either the writ or statement of claim, yet it appeared there was no dispute concerning the boundaries to warrant the position taken by the appellate court.

This, according to plaintiff was because the only denial of the boundaries given by the plaintiff in paragraph 4 of his statement of claim is that made in paragraph 5 of the statement of defence of the 1st respondent who was only a nominal defendant. The plaintiff further argued that the two main protagonists in the suit the 2nd and 3rd respondents did not mention paragraph 4 of the statement of claim nor deny it hence no issue was joined between the parties on the issue of boundaries. The argument concluded that it was wrong therefore for the appellate court to arrive at the determination that issue was joined on the question of the boundaries of the land and to proceed to dismiss the plaintiff's claim on that basis.

This court has stated in numerous cases such as Tuakwa v Bosom (2001-2002) SCGLR 61 @ 65; Quarcoopome v Sanyo Electric Trading Co. Ltd (2009) SCGLR 213 @ 229; Oppong v Anarfi (2011) SCGLR 556 that an appeal is by way of re-hearing, particularly where the appellant alleges as in the omnibus ground that the decision of the trial court is against the weight of evidence. In such a case it is incumbent on an appellate court such as this, 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 probabilities, that the conclusions of the trial judge are reasonably or amply supported by the evidence.

It would be convenient to determine first the plaintiff's claim that no issue was joined on the identity of the boundaries of the respective claims of the parties. It is only upon being satisfied that issues had been joined that consideration can be

given as to whether the plaintiff's duty to lead evidence in proof of the identity of the land had been satisfied.

Frankly speaking the record does not support the plaintiff's denial on the point. The plaintiff pleaded in his amended statement of claim filed pursuant to order of 22/08/2007 (see page 53 to 56 of ROA) in its paragraph 9 (1) as follows:

*"9 (i). Declaration of title to all that piece or parcel of land known as the Oshiokpo lands bounded on the North-East by the lessor's land measuring a total distance of 2,047.2 feet, 1032.1 feet and 2,359 feet respectively more or less on the North-West by the Lessor's land measuring a total distance of 1878.7 feet, 3178.2 feet and 2,176 feet respectively more or less on the South-East by Lessors land measuring a total distance of 1,936.7 feet, 1949.1 feet 1,767.7 feet and 4,727.8 feet respectively more or less and on the South-West by Lessor's land measuring a total distance of 4,690.0 feet and 1,481.8 respectively covering an approximate area of 777.696 acres as land belonging to the Osuwem family of Prampram.*

*(ii) Recovery of possession of the entire land.*

*(iii). Damages for trespass ……."*

The 2nd and 3rd respondents in their amended statement pursuant to order for leave of court to amend dated 11/01/10 averred in their paragraph 22 as captured from page 118 to 121 of the record of appeal (ROA) that:

*" 22. The 2nd and 3rd defendants aver therefore that in view of the above averments and historical facts they maintain that the Oshiokpo lands at Dawhenya the subject of this suit is for their family the Nii Nartey Borboryoe family and they deny vehemently paragraphs 7, 8, and 9 of the statement of claim and contend that the Plaintiff cannot and should not be entitled to his relief."*

The averments quoted above clearly belie the obviously misleading and unjustified assertions by the plaintiff that no issue was joined from the pleadings by the 2nd and 3rd respondents on his claim for a declaration of title to the disputed land. The pleadings quoted above clearly establish that issue was joined

between the plaintiff and the 2nd and 3rd respondents on their respective claims. Primarily, issue having thus been joined, the plaintiff assumed the obligation to establish a requisite degree of belief concerning his claim in the mind of the tribunal of fact or the court as provided by section 10 (1) of NRCD 323. The plaintiff's situation in this presentation is further compounded by his own ambivalence, evident in his arguments in support of his ground A in this appeal when he stated at page 6 of his written submission filed on 14/6/2013 that:

"*One example will suffice. It may <u>be true that the plaintiff described the boundaries of the land in dispute that did not tally with his description of the boundaries in either the writ or the statement of claim.</u> But there appeared to be no dispute concerning the boundaries of the land in dispute."*

This tacit admission by plaintiff's counsel of their failure to tally their evidence at the trial to the description of their boundaries given in the writ or statement of claim on the one part and his assumption at the same time that there was apparently no dispute concerning the boundaries was only meant as a ruse to excuse him from his obligation to lead credible and reliable evidence in proof of his boundaries. Unfortunately for the plaintiff, his position is not borne by the record which rather states the contrary.

In an action for declaration of title to land, recovery of possession and injunction, a plaintiff must establish by positive evidence the identity and limits of the land he claims. (See Agyei Osae & Ors vs Adjeifio & Ors (2007-2008) SCGLR 499).

In any case since the plaintiff is seeking a declaration of title to land and other reliefs, he will succeed only if he is able to establish the identity of the land in question satisfactorily according to law so as to entitle him to the reliefs. The onus of proof required by law as regards the identity of land would be discharged by meeting the conditions clearly stated in this court's decision in **Tetteh v Hayford (2012) SCGLR 417** citing the case of **Kwabena v Atuahene (1981) GLR 136** thus: (i) the plaintiff has to establish positively the identity of the land to which he claimed title subject matter of the suit.

(ii) Plaintiff also has to establish all his boundaries

(iii) Where there is no properly oriented plan drawn to scale, which made compass bearings vague and uncertain, the court would hold that the plaintiff had not discharged the onus of proof of his title.

The reasons why the disputed land subject of the claim must be clearly identified are well stated by Ollennu JSC (as he then was) in **Anane v Donkor (1965) GLR 188 at p 192** as follows: "*Where a court grants declaration of title to land or makes an order for injunction in respect of land, the land the subject of that declaration should be clearly identified so that an order for possession can be executed without difficulty, and also if the order for injunction is violated, the person in contempt can be punished. If the boundaries of such land are not clearly established, a judgment or order of the court will be in vain. Again, a judgment for declaration of title to land should operate as res judicata to prevent the parties re-litigating the same issues in respect of the identical subject matter, but it cannot so operate unless the subject matter thereof is clearly identified. For these reasons a claim for declaration of title or an order for injunction must always fail if the plaintiff fails to establish positively the identity of the land to which he claims title with the land the subject matter of the suit.*"

In the present suit, the plaintiff's description of the dimensions of his family land totaling approximately **777.69 acres** is a far cry from the land totaling approximately **1,561.93 acres or 632.114 hectares** claimed by the 2nd and 3rd respondents. Equally different are the boundary features of the disputants. The plaintiff by his pleadings claimed that all sides of his family land were bounded by the lessor's land. The plaintiff was therefore enjoined by law to provide positive proof of the identity of his land which he claimed to be bounded by the lessor's land. It is equally essential that the land be clearly identified by the plaintiff and/or his witnesses including adjoining boundary owners such as the lessor mentioned in the pleadings. At the trial, the plaintiff testified in his evidence in chief that the land claimed by him shared its 'Northern boundary with the Tema – Aflao road, to the East the boundary feature is the Norpendor river and Sanpendor; to the West the Kpone Bebiako We; to the South is the Polalo to the sea.' (See page 149 of the ROA). The evidence of Nelson Martey a witness who testified for the plaintiff as PW1 gave the eastern boundary to be rather with the

river Lalui and not Norpendor as given by the plaintiff himself. Of course both Norpendor and Lalui are not the same as the unknown lessor's land as pleaded. The testimonies of Plaintiff and PW1 were contrary to or in conflict with their own pleadings. The PW1 gave the following boundaries at page 188 of the ROA namely: "*… to the East, the land share boundary with the river by name Lalui, and at the Western side, it shares boundary with Kpone Bediako family. And at the North, it shares boundary with Ada Aflao road and at the Southern end, it shares boundary with the sea."* Thus as between the boundary features of the land claimed by the plaintiff and that narrated by Nelson Martey (PW1) there is an obvious difference. There is further difference bothering on inadequacy in the boundary features given by yet another witness for the plaintiff named Okyeame Okom PW2. He simply described the boundaries of the Oshiokpo land as follows: *" when you cross our river called Lalui, when you cross the mountain of the Osu people, then we share boundary with Kpone."*

Even though the plaintiff in his pleadings averred that his land was surrounded by the Lessor's land, no evidence was led as to the identity of the lessor in question and no one answering to the name of a lessor was called to testify as an adjoining boundary owner. Significantly when the plaintiff testified in court he deviated from giving the identity of the lessor and rather gave the names of rivers such as Norpendor and other families such as Kpone Bediako family as his boundary feature and owner respectively. If indeed plaintiff shared boundary with such families as Kpone Bediako family, the failure to plead such fact and to lead evidence thereon adds to the plaintiff's woes. Even though the courts stipulate that the identity of a disputed land be clearly established or with certainty as a precondition for the grant of title, this does not mean mathematical certainty or exactness. The stipulation calls for a common sense approach to providing proof which demands that material witnesses would not be left out. In the instant case it is obvious that the mention of the Kpone Bediako family as an adjoining boundary owner with the plaintiff makes that family a material witness for the plaintiff such that the failure to call any member of that family to testify is fatal to the discharge of the evidential burden on the plaintiff. This is because of the basic principle of the law of evidence that a party who bears the burden of proof is to

produce the required evidence of the facts in issue that have the quality of credibility short of which his claim may fail. This court pointed out in **Ackah v Pergah Transport Ltd (2010) SCGLR 731** the various methods of producing evidence which include the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the tribunal or court.

Three issues arise from the evidence led by the plaintiff in support of his claim. First by testifying about different boundary features and owners other than those pleaded, the plaintiff was seeking the damnation and disapproval of this court as clearly stated in **Dam vs Addo (1962) 2 GLR 200, SC.** .

Secondly and equally significant is that such shifting sands between the plaintiff's evidence and his pleadings invites the application of the rule that where there is a departure from pleadings at a trial by one party whereas the other's evidence accorded with his pleadings, the latter's was as a rule preferable, as exemplified by the case of **Appiah v Takyi (1982-83) GLR 1**. For obvious reasons, I will conclude this point when considering the respondent's evidence in support of their counterclaim later.

The last issue is that, having enumerated his new boundaries to include boundary owners he was bound to fail should he decline to call such owner/s who are material witnesses to testify because the onus was on him to prove his boundaries on the preponderance of probabilities as held in the case of **Owusu v Tabiri (1987-1988) 1 GLR 287.**

These serious failings or short comings on the part of the plaintiff can only result in complete disbelief in his cause and no wonder the court of appeal doubted the trial court's conclusion to the contrary on the issue. There is therefore no merit in this ground of appeal and it is dismissed.

Ordinarily with the failure of the plaintiff to establish the identity and ownership of the land claimed, the grounds impugning specific lapses become superfluous.

However, in order that justice will be seem to be done to all issues worthy of consideration we will deal with the remaining issues as appropriate.

**Ground (iii) Exhibit A – The learned Justices of the Court of Appeal erred in law that exhibit A had no probative value.**

The plaintiff tendered exhibit A a site plan which bears the same endorsements as in the writ of summons in apparent proof of his claim to the land, i.e. his root of title. Exhibit A is however not dated. It is also not signed by the Director of Survey or his representative. This is contrary to **section 3 (1) of L.I.1444, the Survey (Supervision and Approval of Plans) Regulations, 1989** which makes it mandatory for plans of any parcel of land attached to any instrument for the registration of such instruments to be approved by the Director of Survey or any official surveyor authorized in that behalf.

This stark infringement of the statutory requirement renders the exhibit A of no probative value as rightly determined by the Court of Appeal. Notwithstanding that the exhibit A was accepted in evidence without any objection, it could not constitute evidence for the purpose for which it was tendered since it infringed the Instrument. This is so because our courts have a duty to ensure compliance with statutes including subsidiary legislations like the LI 1444 in this case. (**See Ex Parte National Lottery Authority (2009) SCGLR 390 at 402**).

**Ground (ii) - Exhibit B and B1 –** the Court of Appeal erred in law in holding that the plaintiff had relied on exhibit B and B1 as the root of his family's title to land.

These two exhibits equally present their own evidential challenges for the plaintiff who placed premium on them. They are photocopies of original documents from Prampram Traditional Council which according to the plaintiff were found in Numo Nuettey Tetteh Kojo's box or his possession after the original got burnt. A document or a writing needed as evidence must be relevant to the issue in trial. Such document cannot be relevant unless it is genuine or authentic. Section 136 of NRCD 323 provides the necessary guide or test for authenticity or genuineness. It provides that *"where the relevancy of evidence depends on its authenticity or identity, so that authentication or identification is required as a condition*

*precedent to admission, that requirement is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims."* Acceptable or permissive means of authentication includes authentication by testimony of a witness with knowledge; authentication by admission; authentication by non expert opinion on writing or authentication by comparison by court or witness. The plaintiff testified to his belief that two fire outbreaks at the Prampram Traditional Council in the late 70's could probably have affected the originals of the two exhibits. Doubts having been cast on the credibility of the two exhibits during cross examination, the plaintiff was obliged to lead further evidence to satisfy a tribunal as to their authenticity as required.

No witness was called from the Prampram Traditional Council the alleged authors of the original documents to testify on the veracity of the said exhibits particularly when issue was raised about apparent recent pen signature marks on the documents.

They would also have dispelled all doubts about the two fires which allegedly engulfed their premises. Since one of the means of authentication accorded recognition under NRCD 323 is authentication by comparison by the court I have examined exhibit B and observed the fresh signature appended against the name of Nene Osrabeng II who is listed as No 6 of the witnesses from different clans. Another apparent insertion is a fresh X mark also in blue ink against the name of Numo A Fordi - Lower Town. There is a further fresh ink X mark against No 3 Numo Dokutse under the title Ablewankor. Lastly there is no evidence of any thumbprints of the persons listed on both exhibits B and B1 against which the X marks were made. Finally and equally grievious is the total absence of a jurat, which is a legal requirement, since most of the participants listed on the documents were obviously illiterate. This offends the mandatory provisions of section 4 of the Illiterates Protection Ordinance, Cap 262. This is so because the matters required to be complied with must be evident on the face of the document or letter. The conditions to be fulfilled under section 4 of Cap 262 by persons writing letters and other documents for illiterates, whether gratuitously or for reward are: (i) that the writer should clearly and correctly read over and explain the letter or document or cause same to be read over and explained to

the illiterate person. (ii) Cause the illiterate person to write his signature or make his mark at the foot of the letter or other document or to touch the pen with which the mark is made at the foot of the letter or other document. (iii) Clearly write his full name and address on the letter or other document as writer there of; and (iv) state on the letter of document the nature and amount of the reward, if any charged. On the face of these two exhibits i.e. B and B1, there is nothing to show compliance with the Cap 262. This court in the case of **In re Kodie Stool; Adowaa v Osei (1998-1999) SCGLR 23 in holding 2** stated that without strict fulfillment of the section, any document allegedly executed by an illiterate person, had no probative value and was to all intents and purposes invalid.

In any case the present case does not qualify for an exception to the strict requirements of the law as stated in **Duodu vs Adomako & Adomako (2012) 1 SCGLR 198 at 201.**

Therefore, in the light of any evidence that would demonstrate that the two exhibits were indeed genuine and that would also assuage the lingering doubts about them as well as the failure to comply with the Illiterates Protection Act, 1912 Cap 262, no premium could be attached to exhibits B and B1 as same are invalid. We have no hesitation in affirming the findings and conclusions of the appellate court on this ground for the reasons given above as same are consistent with the evidence adduced. This ground of appeal fails and is dismissed.

**Ground (iv) - The learned justices of the Court of Appeal erred in law in holding that the trial judge did not evaluate exhibits 4, 5, 6 and 11**

The arguments on this ground are primarily about the apparent failure to give due considerations to exhibits 4, 5, 6 and 11 that were put in evidence. As stated in **Barclays Bank Ghana Ltd vs Sakari (1996-1997) SCGLR 639** "*where the findings were based on undisputed facts and documents, as in the instant case, the appellate court was in decidedly the same position as the lower courts and could examine those facts and materials to see whether the lower courts' findings were justified in terms of the legal decisions and principles."* The exhibits 4, 5, 6 and 11 would thus be examined in the context of the ground of appeal.

Exhibits 4, 5, 6 were tendered by the 3rd respondent in support of the counterclaim filed by the respondents. Madam Bernice Oye Bempong is the Regional Registrar of the Prampram Traditional Council who testified as DW 2. She tendered exhibits 11 to 13 being correspondences from the council. I will consider the exhibits in some detail. The exhibits 4 and 5 are excerpts from the Archives attesting to the fact that Kwaku Nartey, son of Nii Nartey Borboryo was enstooled as Nokotoma of Oshiokpo. Exhibits 4, 5 and 10 are all extracts obtained from official sources, to wit, the Public Records and Archives Administration Department. These records are properly admitted under section 148 of NRCD 323 being authenticated public reports and records. The plaintiff did not object to the tendering of these documents in accord with section 6 of NRCD 323.

The trial judge however in apparent resort to order 58 rule 5 of CI 47, the High Court Civil Procedure Rules 2004 decided to exclude them, a measure which seems arbitrary and perhaps a measure of discipline.

Quite significantly, order 58 rule 5 is inapplicable to exclude exhibits 4, 5, and 10. The said order applies to "a plan, photograph or model". The archival excerpts under consideration are not "a plan, photograph or model". Trial judges must appreciate that the general governing principles as recognized by the rules of court in adopting disclosures as a measure is to encourage realistic assessment of the case, shorten the length of the hearing if the matter went to trial and to enable explanatory evidence from other witnesses to be called without delaying the proceedings. Put in another way, they are intended to eliminate surprise and to avoid unnecessary trials. They are not intended to exclude crucial material regularly obtained. Besides, having deployed exhibits 4, 5 and 6 in evidence in apparent response to or in rebuttal of the plaintiffs evidence and falling within the operative rules, a court of justice is obliged to give due consideration to the exhibits for whatever they are worth. The trial judge thus misdirected himself in rejecting exhibits 4, 5 and 6 and thereby depriving the respondents the benefits of due consideration thereof. The court of appeal was thus right in its holding that the trial judge failed to evaluate the said documents as to their probative value due to their unjustified exclusion.

**Exhibit 6** is a conveyance entered between the 2nd and 3rd respondents and the Nii Nartey Family of Boeboyoe Oshiokpo made on 30th July 2001. There being nothing irregular about this exhibit on the face of it the court was obliged to consider same for what it was worth.

**Exhibit 11** is a letter originating from the registrar, Prampram Traditional Council dated 16th November 1990 inviting the Secretary of the leaders Meeting of the Methodist Church Prampram for a deliberation on the acquisition of a piece of land. It is signed by Nene Afutu Nartey II, Acting President of the Prampram Traditional Council. Exhibit 12 is a correspondence dated 14th May 1991 from Nene Tettey Osraban III to the Registrar of the Prampram Traditional Council complaining about the latter's delay in defraying debts owed to the chief. Exhibit 13 is also a letter dated 2nd November 1966 written at the direction of Nene Annorkwei, Paramount Chief of Prampram to the Administrator of the State Farms Dahwenya. The exhibits 12 and 13 were tendered to show that the signatures of the then secretary of Prampram Traditional Council and those of Nene Osraben and Nene Afutu Nartey were different from those on Exhibit B and B1. Exhibit 11 was tendered to show that the signature of Nene Afutu Nartey II is different from the signature of Nene Afutu Nartey, Mankralo of Prampram on exhibit B1. In the absence of further evidence showing that the references in both documents are to the same person, the respondents had failed in their endeavour to contradict or disprove the document. Since authentication by comparison by a court is one of the permissible means of authentication under section 141 of NRCD 323 and having carefully examined the exhibits under consideration make the following analysis. Exhibit B1 is dated 15/04/74 whilst exhibit 11 was made on 16th November 1990 some sixteen years later. The titles of the chief/s are different. One is Nene Afutu Nartey, Mankralo of Prampram and the other is Nene Afutu Nartey II, Acting President. Could it be the same Mankralo who had become Nene Afutu Nartey II, Acting President in 1990? The fact that one is simply Nene Afutu Nartey without more whilst the other is Nene Afutu Nartey II raises questions. This is because the term or title of a succession whether first or second usually obtains after the demise of a previous title holder of the same name. As long as there are gaps and/or doubts in the exhibits about the identities

of the persons named, a court of justice may be hesitant to rely on those documents as they stand to state categorically that the signatures are different, since it is uncertain whether it is the same persons in issue. A similar argument goes for the signature of Nene Osrabeng. On exhibit B, there is the name of a Nene Osrabeng II whose fresh signature captured in blue ink has been discussed supra. The exhibit 12 on the other hand was signed by Nene Tettey Osraban III. Whereas the 'Nene' who signed exhibit B was second in his succession the 'Nene' who signed exhibit 12 was the third in succession. Even then the spellings of the two names are different. Yet exhibit 12 is intended to show that the signature on exhibit B is a forgery because the signatures on the two documents were different. The trial judge was therefore right in placing no value on exhibit 12 because it had failed to establish any forgery as claimed.

In conclusion, exhibits 11, 12 and 13 showed no nexus to the issue of forgery in respect to the signatures of certain persons named in exhibit B, hence have thus no probative value. The other remaining exhibits namely exhibits 4, 5 and 6 ought to have been properly evaluated by the trial judge which he failed to do. Thus as far as exhibits 4, 5 and 6 were concerned the trial court was obliged to give consideration to them in his evaluations. The Court of Appeal was therefore right in its determination that the trial judge was wrong in failing to consider exhibits 4, 5 and 6.

**(v) The learned justices of the Court of Appeal erred in law in holding that the 2nd and 3rd defendants had proved their counterclaim.**

The plaintiff's attacks on the court of appeal for concluding that the 2nd and 3rd respondents had proved their counterclaim was premised on the contention that the reasons advanced by the appellate court for preferring the evidence of the respondents are not cogent enough and are based on wrong interpretation of the evidence and the law. In a nutshell no good reasons were given for rejecting the findings of fact made by the trial court. Plaintiff argued that the court of appeal's reliance on exhibits 2, 2A, 2C, 4, 5, 11, 12, and 13 merely because they had passed the admissibility test was incorrect since the exhibits had to be further evaluated as to their probative significance. The argument of counsel is misconceived

because apart from exhibits 11, 12 and 13 which did not pass the test of relevancy the others contributed to make the existence of the respondents' claim more probable as would emerge in the discussion below.

It is important to preface this discussion with a consideration of section 51 of NRCD 323 which states in section 51 (3) that *"No evidence is admissible except relevant evidence."* As to what constitutes relevant evidence the same is answered by section 51 (1) thus: "… *'relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, which makes the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence".*

Throwing further light on the section the Commentary to the Evidence Decree states in part that "*The Decree clarifies the law on this subject by defining relevance and limiting its meaning to the existence of a logical connection, based on human understanding and experience, between evidence offered and the fact to be proved. Matters of remoteness, redundancy, prejudice, confusion, surprise, waste of time and other matters of policy are dealt with separately, not as matters of relevancy, but as matters which at times indicate that evidence, even though relevant, ought to be excluded…….It is enough that the evidence has some effect on the probability of the existence of the fact to be proved. To be relevant the evidence need not be sufficient to support a finding of fact. As Prof. McCormick has said, 'A brick is not a wall. To be relevant the evidence need only constitute a part not the whole of what is needed."*

Exhibits 2, 2A, 2C, 4, 5, 11, 12 and 13 would be considered as to whether the plaintiff's criticism has any basis. In the light of the conclusions in respect to exhibits 11, 12, and 13 to the effect that they had failed to establish the necessary nexus for which they were offered no consideration can be given to them. We will limit consideration to the remaining exhibits so long as the plaintiff's challenge goes.

Exhibits 2, 2A to 2D were tendered by Daniel Nartey, 3rd respondent (See page 225 of ROA) being pictures taken to show dilapidated structures or ruins, water reservoir and stone quarry left behind by their great grandfather. The 3rd respondent was cross examined on the exhibits 2, 2A to 2D without contradictions on the import of the pictures. There was a suggestion for the court to move to the locus for which the witness expressed his willingness and readiness to point out all the items photographed to the court on the ground. The locus visit was not pursued beyond the suggestion. Let me state that locus inspection is an exceptional undertaking and not the norm in the trial process. Locus inspection becomes necessary where there is a material issue which could not be resolved except by visual inspection.

The primary purpose of the visit to the locus is to clear doubts which arise during the hearing and not to find evidence in support or to destroy the case of one party or the other. It is therefore not granted for any flimsy reason but to help resolve a conflict which visual inspection would help unravel. Such instance may arise when the identity of the land or any physical feature of it is in dispute and which a visit to the land would resolve, would be a proper exercise of the court's discretion. In the instant appeal and given the circumstances under consideration, no locus inspection was necessary. We will deal with the concluding part on exhibits 2, 2A to 2D together with the testimony of the 3rd respondent here below.

The Exhibit 4, as indicated earlier in this presentation is an official extract from the National Archives tendered to show that the great grandfather of the respondents J.B Nartey (alias Nartey Borboryoe of Klay tribe) was a regent. Exhibit 5 is also an extract from the National Archives evidencing that the great grandfather of the respondents was a Nukutoman, the equivalent of Mantse. Without any doubt, a defendant who files a counterclaim assumes the same burden as a plaintiff in the substantive action if he/she is to succeed. This is because a counterclaim is a distinct and separate action on its own which must also be proved according to the same standard of proof prescribed by sections 11 and 14 of NRCD 323 the Evidence Act (1975). The respondents evidence in proof of their counterclaim were based on family history falling under the exception to

the hearsay rules captured in sections 128 and 129 both of the NRCD 323 of 1975. The respondents led evidence to show that their claim to the much bigger land than that claimed by the plaintiff was by settlement through their great grandfather the late Nii Nartey Borboyoe who first settled on the Oshiokpo lands at Dawhenya in 1872. The respondents also tendered documentary historical evidence from the National Archives (exhibits 4 and 5) to show that their great grand father was a Nokotoma of Oshiokpo.

The 3rd respondent who testified for the respondents led oral evidence on their great grand father's settlement upon the land. At page 224 to 225 of the Record of Appeal (ROA) he stated as follows:

"*I earlier on indicated that the people of Prampram acquired land through farming, rearing of cattle and settlement. And our great grandfather, he settled at Oshiokpo, and he named it Oshiokpo. And the meaning of Oshiokpo is that, "you left your doves behind." Because he was rearing doves, but when he was coming, he left them behind. And the rest of the old village or township is still there. And the poultry farms or the cattle ranches which they used in the past are still in existence. And the water reservoir for which they used to feed the animals are also in existence. The mango trees and other things are also still there. That indicates that the village is for us."*

In support of the testimony above, the 3rd respondent tendered exhibits 2, 2A to 2D being pictures of the activities described in the oral testimony. Quite apart from placing reliance on exhibits 2, 2A to 2D the 3rd respondent's testified concerning the ruins and remnants on the land quoted supra which testimony was not discredited under cross examination. Assuming therefore that the aforesaid exhibits (2 to 2D series) failed the test of admissibility the court still had before it the oral testimony of the 3rd respondent and other witnesses to evaluate. The 3rd respondent also testified as to their recent acts of possession independent of the existence of the old trees and ruins on the land. These include the grant of portions of the land to African Institute of Journalism the 1st respondents, First Star Academy and Manaterris Limited which grants are evidenced by exhibits 3, 3A and 3B. Significantly also the 3rd respondent testified

to their boundaries in line with their pleadings as claimed by the respondents. To the north they share boundaries with Aden and Darpoh family at a village called Ososhi, where there is a stream called Santodor. At the West, they still share boundary with Aden and Darpoh family at the location of Edmundo Farms. At the Southern end they still share boundaries with Aden and Darpoh family while to the East their boundary is a lagoon called Laluea. The respondents called DW3 Nene Kweku Dampoh, the Chief of Dawhenya and a boundary owner who corroborated sharing boundary with respondents.

In conclusion, the respondents led sufficient evidence to clearly identify their land which accorded with their pleadings. This is unlike the plaintiff who failed to call significant and material witnesses even after leading evidence contrary to his own pleadings. This, on the principle relied upon in **Appiah v Takyi (1982-83) GLR 1,** which we affirm, makes us prefer the respondent's evidence in proof of their claim because it was in line with their pleadings.

In our view therefore, the respondents have on the whole succeeded in leading sufficient evidence in proof of their counterclaim on the preponderance of probabilities as rightly determined by the appellate court. In the event the appeal fails and is dismissed. The decision of the Court of Appeal is affirmed.

**(SGD)** J.B. AKAMBA

**JUSTICE OF THE SUPREME COURT**

**(SGD) G. T. WOOD (MRS)**

**CHIEF JUSTICE**

**(SGD) J. ANSAH**

**JUSTICE OF THE SUPREME COURT**

**(SGD) ANIN YEBOAH**

**JUSTICE OF THE SUPREME COURT**

**(SGD) P. BAFFOE BONNIE**

**JUSTICE OF THE SUPREME COURT**

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