IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA

CORAM: ADINYIRA (MRS) JSC PRESIDING

YEBOAH JSC

GBADEGBE JSC

BAMFO (MRS) JSC

AKAMBA JSC

CIVIL APPEAL

NO.J4/19/2010

5TH FEBRUARY 2014

BENYAK COMPANY LTD - - - PLAINTIFF /APPELLANT

/APPELLANT

VRS.

1. PAYTELL LTD - - - DEFENDANTS/RESPONDENTS

2. KOFI AGYEMANG /RESPONDENTS

3. T. T. MENSAH

(SUBSTITUTED BY MOSES TAWIAH ARYEE)

4. LANDS COMMISSION

JUDGMENT

ANIN YEBOAH JSC

This is an appeal from the unanimous decision of the Court of Appeal, Accra, which affirmed the decision of the High Court, Accra, in favour of the defendants/respondents/respondents hereinafter simply referred to as the defendants.

The plaintiff/appellant/appellant (who for the sake of brevity shall be referred to in this appeal) as the plaintiff, issued a writ of summons against the defendants on 20/10/2003 for declaration of title to a piece or parcel of land at Kwabenya. The allegations of facts pleaded against the defendants appeared to be straightforward and simple to comprehend. The plaintiff averred that in 1999, one Ben Nyarko trading under the name and style of BENYAK VENTURES acquired over thirty (30) acres of vacant land at Kwabenya from NII NAGLESHIE ADDY-ABOASA family of Accra, the registered proprietors of the land at the Land Title Registry and NII ARYEE ANANG, head and lawful representative of the NII ODAI NTOW family of Ashonmang, Accra, original

allodial owners whose larger interest is registered at the Lands' Commission of which the land in dispute forms part.

According to the plaintiff, he traces his root of title from the two families. It was pleaded that the plaintiff went into effective possession and erected various structures thereon after taking steps to register all the relevant documents on the land from his grantors. The third defendant herein thereafter asserted ownership of the land in dispute by virtue of a transfer from the plaintiff's grantor NII ARYEE ANANG. It was pleaded that the third defendant has no such land and whatever document he had obtained from the plaintiff's grantor was fraught with fraud as the signature of the plaintiff's grantor NII ARYEE ANANG was forged or the third defendant had inserted a site plan larger than the area covered by a grant allegedly made to him by the said NII ARYEE ANANG without the knowledge and consent of the grantor. It was further given as particulars of fraud that the third defendant had colluded with officials at the Lands' Commission Secretariat to register the alleged forged documents transferring the

disputed land into the third defendant's name who subsequently transferred part of the land to the first defendant.

On the issue of trespass, the plaintiff averred that the first, second and third defendants procured thugs to demolish buildings and other structures on the land and caused damages to cement blocks, sand and other materials on the land on several occasions. The plaintiff averred further that it had to resort to legal action for declaration of title, cancellation of the title deeds registered by the fourth defendant (which is the Lands Commission, Accra) in favour of the 3rd defendant and the other usual ancillary relief of damages.

The first, second and third defendants filed a common statement of defence and stoutly denied virtually all the allegations of facts pleaded by the plaintiff in the statement of claim. It was contended by way of answer that the plaintiff's grantor had no land at the place where the land in dispute falls and that the third defendant contended that the ODAI NTOW FAMILY owned all the lands at Kwabenya and not the plaintiff's

grantor. Two judgments dated 28/04/1904 and 1980 respectively were pleaded as judgments delivered in favour of the third defendant's grantors and that the Odai Ntow family lands are known as Ashongman Lands of which Kwabenya lands forms part. The defendants further pleaded that the 3rd defendant is an elder of the Odai Ntow family of which Nii Aryee Anang was the acting head and as a member of the family, the 3rd defendant occupied the land in dispute exclusively and the plaintiff's grantor could not dispossess him of his title without the consent of the third defendant.

The third defendant stated that he had his grant from the family which was subsequently formally confirmed by an indenture dated the 26/04/1986, executed by Nii Aryee Anang and any subsequent grant by his grantor to the plaintiff could either be by mistake or through ignorance of the identity of the land which all the principal members of the family knew to be owned by the third defendant. The allegation of fraud was also stoutly denied by the defendants as well as the allegations of trespass. The third

defendant lodged a counterclaim against the plaintiff for cancellation of the Land Title Certificate issued to the plaintiff on grounds of error or mistake.

Given the nature of the pleadings, it appeared that the fourth defendant, that is, The Lands Commission was a nominal defendant but it, however, filed a statement of defence denying that it ever colluded with any person to register the title deeds of the third defendant, as alleged by the plaintiff. Some interlocutory applications in the nature of Notice to Produce etc were filed which did not materially influenced the proceedings in anyway. The suit also suffered several amendments to the statement of claim.

Given the fact this case falls within a narrow compass, few issues were unearthed. The High Court, Accra, after hearing the parties in a keenly contested manner delivered judgment on 29/06/2005 by which the court dismissed the claim of the plaintiff on the simple grounds that the plaintiff had failed to prove his claim on the preponderance of probabilities. Aggrieved by the judgment of the High Court, the plaintiff lodged an appeal to the Court of Appeal which dismissed the appeal and only reversed the finding

of the trial High Court judge that one Evans Okai Anteh had admitted witnessing or executing exhibit "3" as the said finding in its view was not supported by the evidence on record. The plaintiff has lodged this second appeal before this court to seek the reversal of the judgment of the Court of Appeal.

This appeal has been argued on several grounds and it appeared that both counsel put in a lot of industry. To appreciate the arguments fully, the grounds of appeal were stated as follows:

GROUNDS OF APPEAL

(i) Their Lordships' conclusion that the trial judge's finding that Evans Okai Anteh (PW2) identified his signature on exhibit 3 and admitted witnessing or signing it is not supported by the evidence on record is inconsistent with their

Lordships conclusion that judgment is not against the weight of the evidence on record;

(ii) Their Lordships erred when they held that the defendants had discharged the burden of proving that the land in dispute was granted to the 3rd Defendant by Nii Aryee Anang.

(iii) Their Lordships erred when they held that the plaintiff's grant (exhibit B) was not executed.

(iv) In view of the finding of their Lordships that the trial judge's finding that Evans Okai Anteh (PW 2) identified his signature on exhibit 3 and admitted witnessing or signing it is not supported by the evidence on record, Their Lordships on the available evidence on record erred in holding that the judgment of the trial court that the plaintiff had failed to discharge its burden of proof whilst the defendant had succeeded in discharging their burden of proof is not supported by the evidence on record.

(v) Their Lordships erred when they held that the judgment of the trial judge was supportable by the evidence on record.

Learned counsel for the plaintiffs in his statement of case argued grounds (i) (ii) (iv) (v) together and tried to persuade this court that the judgment of the Court of Appeal could not be affirmed as it was not supported by the evidence. Any attempt to consider the above grounds would not be comprehensible without first considering the findings made by the trial court as this is a second appeal in which the two lower courts agreed on the findings save the finding which was set aside by the Court of Appeal.

At the High Court, the learned judge before proceeding to evaluate the evidence was of the firm opinion that some matters were not in dispute. This was what he said:

"The following matters are not in dispute:

(1) That the land in dispute forms part of the land owned by the Odai Ntow Family of Ashongman.

(2) That the proper person to grant Odai Ntow Family land is Nii Aryee Anang.

(3) That the plaintiff and the 3rd defendant trace their root of title from a common grantor, Nii Aryee Anang.

(4) That whilst plaintiff traces his root of title by virtue of the grant made in 2003, Exhibit "B", the 3rd defendant traces his root of title by virtue of a grant made to him by Nii Aryee Anang in 1986, Exhibit "3"."

From the record, it appeared that all of the parties accepted the above findings from which the learned trial judge proceeded to set down the vital issues for the determination as to who owned the disputed land as between the plaintiff and the third defendant, who was the grantor of the first and second defendants. In his judgment the trial judge delivered as followed:

"In the light of the foregoing, it is clear that most important issue to determine is which of the grants, Exhibit "B" or Exhibit "3" should prevail. The fight in this case therefore is between the 3rd defendant, Mr. Theodore Tettey Mensah and the plaintiff and his witnesses, i.e. Nii Aryee Anang. Evans Okai Anteh and Anum (Land) Bill and in this case, I find the evidence of PW1 and PW2 very crucial"

Learned counsel for the plaintiff has strenuously argued not against the above direction by the learned trial judge but against Exhibit "3" and the findings made on it by the two lower courts. Before this court, learned counsel has attacked Exhibit "3" which was

tendered by the third defendant, which was the root of title that he obtained from PW1, the common grantor of the plaintiff and the 3rd defendant. Counsel for the plaintiff contended that, as Evans Okai Anteh did not admit witnessing the execution of Exhibit "3" dated the 26th of April 1986 which exhibit sought to confirm the grant made by PW1to the 3rd defendant, the Court of Appeal should have come to a different conclusion. It was further argued that during the cross-examination of Evans Okai Ante (PW2), exhibit "3" was not in evidence and learned counsel for the defendants could not have asked PW2 to identify exhibit "3" which was tendered on 13/04/2005, seven months after the cross-examination of PW2.

At the Court of Appeal it was seriously argued that the trial judge's labeling of exhibit "3" when PW2 had not even identified it as an exhibit in evidence was wrong. The learned justice of the Court of Appeal, Asare-Korang JA, who delivered the unanimous opinion of the court said as follows in answer to the submissions;

> "In this appeal counsel for the plaintiff contends that PW2's request to be shown the contents of the document on which he identified his signature was declined by counsel whereupon cross-examination of PW2 on the document being tendered in evidence. Counsel for the plaintiff cited no law which required that the document be tendered or its contents disclosed once PW2 identified his signature on it. There was therefore no call on the defendants to tender the document through PW2 or disclose its contents to him. Indeed section 74 of the Evidence Act, 1975 NRCD 323 provides:
>
> 74(1) In examining a witness concerning a writing, it is not necessary to show, read or disclose to the witness a part of the writing.
>
> (2)Where the witness is not a party, the parties to the action shall be given the opportunity, if they choose, to inspect the writing before questions concerning it is asked of the witness"

The Court of Appeal, came to the opinion that the learned trial judge failed to make proper deductions from the document on which PW2 indentified is signature. The court was, however, of the view that this error could not affect the other conclusions of the trial judge and proceeded to dismiss the ground of appeal which sought to attack exhibit "3" and the deductions made therefrom. Before us the same complaint has been made against exhibit "3". It appears that the Court of Appeal after disagreeing with the trial judge's deductions from exhibit "3" proceeded to discuss in detail the burden of proof in the case and the other evidence on record before affirming the judgment of the High Court.

We agree with the Court of Appeal's criticisms of the learned trial judge's deductions from Exhibit "3" and like the Court of Appeal it would be preferable to look at the whole evidence on record in its entirety. It must be made clear that the action was for declaration of title to land and the usual ancillary reliefs. As the allegations of facts pleaded in support of the plaintiff's reliefs were all stoutly denied, the onus of proof of title was squarely on the plaintiff.

This is so in every civil case where averments are denied as the law has settled this in authorities namely: BANK OF WEST AFRICA LTD v ACKON [1963] IGLR 176 SC, ABABIO v AKANSI [1994-95] GBR Part II 74 and DUAH v YORKWA [1993-94] IGLR 217 CA. Indeed, this court has held that the plaintiff, apart from pleading his root

of title, mode of acquisition and overt acts of membership, if any, must prove that he is entitled to the declaration sought. In AWUKU v TETTEH [2011] ISCGLR 366, this court has decided that in an action for a declaration of title to land, the onus was heavily on the plaintiff to prove his case, he could not rely on the weakness of the defendant's case. He must, indeed, show clear title. More recently in the case of MONDIAL VENEER (GH) LTD v AMUAH GYEBU XV [2011] I SCGLR 466 at 475 Her Ladyship the Chief Justice said as follows:

> "In land litigation, even where living witnesses who were directly involved in the transaction under reference are produced in court as witnesses, the law requires the person asserting title, and on whom the burden of persuasion falls, as in this

instant case, to prove the root of his title, mode of acquisition and various acts of possession exercised over the subject-matter of litigation"

See also the case of YAW KWESI v ARHIN DAVIS & OR [2007-08] SCGLR 580 where it was held as follows:

"since the plaintiff –appellant sued not only for declaration of title but also damages for trespass and order for perpetual injunction, he assumed the onerous burden of proof of title to the disputed land by the preponderance of the probabilities as required by sections 11 (1) and (4) and 12 of the Evidence Act NRCD 325 of 1975"

In this case the plaintiff ought to have proved on preponderance of probabilities that his grant by PW1 in 1999 was valid irrespective of the defence by the third defendant that in 1986 he had acquired the same land from their common grantor. It is pertinent to note that even though the plaintiff amended his statement of claim several times nowhere in the statement of claim did the plaintiff plead that he obtained his grant in 1999. This vital material fact was left out but it was, however, provided in the evidence-in-chief of the plaintiff's representative without objection from the defendants.

The learned trial judge was of the view that the third defendant, had as a member of the family already obtained a grant of the land in dispute from PW1 who in 1999 granted the same land to the plaintiff. On record, Nii Aryee Anang was not joined to the suit by any of the parties and was thus bound by any judgment the court gave as he had full knowledge of the proceedings, he, having given evidence as PW1, for the plaintiff. See AKWEI v COFIE [1952] 14 WACA 143 and FISCIAN v TETTEH 2 WALR 192. The material witness in this case was PW1 who as the common grantor of the plaintiff and third defendant could have in his evidence tilted the scales one way or the other. The learned trial judge on record evaluated his evidence. PW1 denied ever granting the land in dispute to 3rd defendant and confirmed that he had granted the land in dispute to the

plaintiff even though he admitted that the 3rd defendant was a member of his family and was at a point in time the secretary of the family. As a trial court, the learned judge evaluated the evidence of PW1, Nii Aryee Anang and catalogued several discrepancies and contradictions in his evidence and found as a fact that PW1 could not be a witness of truth. For a fuller record this was what the learned trial judge said:

> "It is instructive to note the credibility of PW1, Nii Aryee Anang. He told the court the only family member who had a piece of land from him at Kwabenya was PW2, Evans Okai Anteh but it turned out that he had given other members of the family lands at Kwabenya. He told this untruth to dislodge the 3rd defendant from Kwabenya. This finding is supported by Exhibit "12" – Lease from Nii Aryee Anang to Samuel Armah Anang – Exhibit "13" shows lease from Aryee Anang to Edmund N.A.Armah.

Learned counsel has referred us to the landmark case of OGBARMEY-TETTEH v OGBARMEY-TETTEH [1993-94] 1GLR 353, especially holding 4 on the vital evidence of a common grantor where it was held thus:

> "Where rival parties claimed property as having been granted to each by the same grantor, the evidence of the grantor in favour of one of the parties should incline
>
> a court to believe the case of the party in whose favour the grantor gave evidence unless destroyed by the other party…"

We do not doubt the soundness or accuracy of the principle of law enunciated in the above case. However, the issue is whether the evidence of the grantor (PW1) was discredited. This, could only be resolved by looking at his (PW1) evidence on record. The trial judge, whose duty was to assess the credibility or otherwise of every witness had a lot to say to discredit PW1. This evidence of PW1 was found by the Court of Appeal as not credible thereby affirming the findings of the trial court.

The trial judge proceeded to point out other pieces of evidence bothering on the official status of the third defendant as the family secretary and other matters on PW1's credibility before concluding that he found his evidence not credible. In my respected opinion, the trial judge considered the evidence of PW1 (the common grantor of the parties) in detail before making a finding of fact. This was in fulfillment of his role as a trial judge who was enjoined to make primary findings of facts and give reasons for preferring one evidence to the other. See IN RE ARYEETEY (DECD); ARYEETEY v OKWABI [1987-88] 2GLR 444, QUAYE v MARIAMU [1961] 1GLR 93 SC and NTIRI & OR v ESSIEN & OR [2001-02] SCGLR451.

The learned judge further considered the deed on which the plaintiff who sought declaration of title relied on, that is Exhibit "B". He said of the title deed of the plaintiff as follows:

> "Finally a close look at the plaintiff's purported indenture evidencing the grant of the land in dispute purported to have been executed by PW1, Nii Aryee Anang Exhibit "B" shows that it is defective. The defect is that PW1 Nii Aryee Anang did not execute Exhibit "B" since he failed to thumbprint same and as such the same cannot pass title to the plaintiff"

A cursory look at Exhibit "B" as an appellate court supports the above finding of the trial court. This finding was also endorsed by the Court of Appeal as the first appellate court. Before us nothing bas been urged on us to dislodge the crucial findings made by the learned trial judge which finding is very crucial to the title of the plaintiff who was seeking declaration of title to the land.

It was found as a fact by the two lower courts that prior to 1999 when the plaintiff obtained his grant from PW1, a prior valid grant by the same grantor (PW1) had already been made to the third defendant in 1986 which grant was made with the consent of members of the family. These findings were amply supported by the evidence which the two lower courts reviewed and drew inferences therefrom. Before this court, as the second appellate court, the plaintiff as the appellant has not sufficiently demonstrated

that the findings to the effect that the land the subject-matter of this dispute had not been granted to the third defendant as a member of his grantor's family. In law, PW1 had no title to pass to the plaintiff as he had already made a valid grant to the 3rd defendant as a member of his family of which he was the head. There is always the requirement of the law that the party claiming title must prove his root of title and that his grantor has a valid title to pass.

This court recently in AWUKU v TETTEH [2011] SCGLR 366 through Ansah JSC said as follows:

> "We believe we state the law correctly that where the appellant's title was derivative, he ought to demonstrate that the predecessor-in-title held a valid title for if the foundation was tainted, the superstructure was equally tainted"

For a subsisting valid grant made by PW1 to the 3rd defendant created an encumbrance on the land the subject-matter of the action even if was initially a customary grant. For the law was settled long ago in BRUCE v QUAYNOR & ORS [1959] GLR 292 and later in ANKRAH v OFORI & ORS [1974]1GLR 185 where it was held that:

> "A conveyance of land made in accordance with customary law was effective as from the date it was made; a deed subsequently executed by the grantor for the grantee could add to, but could not take from the effect of the grant and where there was an omission to execute the deed of conveyance that omission could not affect the grantee's title"

In this case, the grantor (PW1) after the grant, formally conveyed the land with the consent of the family to the 3rd defendant. As the land was factually and legally encumbered, the same PW1 could not have title to convey the same land to the plaintiff.

This court recently in TETTEH & OR v HAYFORD (substituted by LARBI & DECKER) [2012] I SCGLR per our brother Dotse JSC in a similar situation said at page 430 as follows:

"as rightly found by the Court of Appeal, Asere stood having divested itself in the land in favour of the original defendant long ago in 1974 (per the nemo dat quod not 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"

From the findings of the two lower courts that the land was encumbered by the already subsisting grant by the head of family (PW1) to the third defendant, there was in law no title in PW1 to pass the same land to the plaintiff. Any purported grant was therefore void for want of title in PW1 as the grantor.

These reasons appear to be sufficient to dispose of the grounds (i) (ii) (iv) and (v) which were argued together by learned counsel for the plaintiff. We therefore do not think it would serve any purpose to deal with the remaining ground of appeal which also deals with the evidence on record on which learned counsel for the plaintiff would want us to reverse in favour plaintiff's favour even though not much has been demonstrated to warrant our intervention.

For these reasons the appeal is dismissed.

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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

(SGD) N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

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JUSTICE OF THE SUPREME COURT

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