IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2015

CORAM: ATUGUBA JSC PRESIDING
DOTSE JSC
YEBOAH JSC
BENIN JSC
AKAMBA JSC

CIVIL APPEAL

NO. J4/36/2015

9TH DECEMBER 2015

TORGBUI DZOKUI II OF ZUTA SUING AS JOINT HEAD OF THE AWASIAPEDO CLAN OF AVENOR, FOR HIMSELF AND ON BEHALF OF THE MEMBER OF THE CLAN	**PLAINTIFF/RESPONDENT /APPELLANT**
VRS	
1. ATISE ADZAMLI(DECD) (SUBST. BY KWABLA ADZAMLI) **2. KWABLA ADZAMLI** **3. DOE ADZAMLI (DECD) (SUBST. BY KWABLA ADZAMLI)** **4. AYISHUEDE ADZAMLI** **5. KWAME ADZAMLI** **6. ATSU AZAMETI(DECD) (SUBST. BY KWABLA ADZAMLI)** **7. KOFI DAWORLO NEGBLE**	**DEFENDANTS/APPELLANTS /RESPONDENTS**

TOGBUI KWAO ADZOVOR **CO-DEFENDANT/APPELLANT /RESPONDENT**

JUDGMENT

DOTSE JSC:-

The Plaintiff/Respondent/ Appellant (hereinafter Plaintiff) sued the Defendants/Appellants/Respondents (hereinafter Defendants) **for a declaration of title to all that piece or parcel of land situate, lying and being at Zuta and is bounded on the one side by the property of the Agorve People; on the second side by the property of the Agorta People; on the third side by the property of the Plaintiff Family and on the last side by the property of the Korba Family, damages for trespass, recovery of possession and Perpetual injunction. The writ was filed on the 27th of May, 1992.**

It is the Plaintiff's case that the Defendants' forebears were granted a license to live and farm on the land in dispute and they abided by this arrangement till recent times when the Plaintiff's Awasiapedo Tsita Clan realised that the Defendants had assumed the role of owners of the land and were selling parcels of it. The Defendants were confronted about this turn of affairs, they apologised and admitted they had erred and asked for forgiveness.

Consequently, the Plaintiff and other principal members of the Family decided to take action to secure the remaining land, which action was by the issuance of a writ in the Circuit Court at Sogakope in the joint names of the Plaintiff and Regent Kwawu Adzovor III. Having been improperly influenced by consideration, Kwao Adzovor III filed a motion in the Circuit Court, Sogakope, dissociating himself from the suit. The Plaintiff was

therefore compelled to discontinue the matter in Sogakope and file the writ in the High Court in Ho.

In a statement of defence filed on the 11th of June 1992, the Defendants denied all the averments of the Plaintiff. They challenged the capacity of the Plaintiff to institute the action against them as he was not a paternal member of the Tsita Clan of Korve, neither were there joint Heads of the Tsita clan. The recognised and sole Head of the clan is Torgbui Kwao Adzovor IV of Korve. It was the Defendants claim that a large tract of land was founded by their ancestor Kwao Adzovor I and a portion of it was gifted to their grandmother, Dzashiyor Agbeve over 400 years ago. Dzashiyor they pleaded was a grand daughter of the founder of the land, Togbui Kwao Adzovor.

They described themselves as the fourth generation owners of the land by inheritance and had been in undisturbed possession till date. They denied that they had ever paid tolls or tributes to the Plaintiff's alleged family and the lands they sold were their bonafide property to do with as they wished. Their claim again, was that the land in dispute is called Dashiyor land whose borders they gave as bounded on one side by Akatsi Anyidzime peoples land, on the second side by Agbedrafor and Agove peoples land, on the third side by Agorta peoples land and on the fourth side by Dzokui's land. **Defendants then counter claimed for a declaration of title to the land as described above, Recovery of possession, C5,000,000 general damages for unlawful trespass and perpetual injunction restraining the Plaintiff, his agents, servants, workmen, privies and assigns from committing any further acts of unlawful trespass to the Defendants land and or challenging their title to the said Dzashiyor gifted land.**

The Co-Defendant on the 5th of June, 1992 filed an application to join the suit. This application was granted and he was joined to the suit. Co-Defendant also denied that Plaintiff was a joint Head of Family and asserted that the Defendant's land was gifted to their grandmother

Dzashiyor. He further pleaded that the Plaintiff was a stranger from Anyieveme and his father Sodzi Bluawodzo Agbozo was a member of the Letsofeawo clan. He was also gifted Tsita clan land sharing a common boundary with the Defendants and given further lands at Korve without objection from any person. He therefore counterclaimed for a declaration that:

a. The Co Defendant is the current and sole Head of the Tsita Clan of Akporkploeme Zuta in Avenor.

b. A further declaration that the Plaintiff lacks legal capacity to institute this action, not being a paternal member and Head of the Tsita Clan of Akporkploeme Zuta.

c. A declaration that the disputed land together with a larger tract of land were all originally founded by the CoDefendant's great ancestor Torgbui Kwao Adzovor I several years ago.

d. A declaration also that the now disputed portion was gifted absolutely to the Defendant's grandmother Dzashiyor by Agbeve her father and the then Head of the Akporkploeme Zuta Clan of Tsita several years ago.

e. A declaration that there is no clan known and called Awasiapedo Tsita Clan at Akporkploeme Zuta of which Plaintiff is a joint Head with CoDefendant.

f. Perpetual injunction restraining the Plaintiff, his agents, servants, workmen, privies and assigns from further challenging and interfering with the Defendant's title and enjoyment of their inherited gifted land of Dzashiyor their grandmother.

After over a decade, the trial of the matter eventually commenced and was concluded with the delivery of judgment in 2009. The gap of almost twelve

years before the commencement of trial is not apparent on the record and the reasons for this delay cannot be ascertained.

The evidence led was largely oral and the only documentary evidence tendered during the trial was the Survey Map ordered to be drawn up by Acquah J, (as he then was)

Judgment was entered for the Plaintiff on all his reliefs and aggrieved by that decision the Defendants filed an appeal, initially on the omnibus ground that the judgment was against the weight of evidence. It seems from the record that the Defendants sought, and were granted leave to amend their grounds of appeal and on the 25th of February, 2011, their Counsel filed new grounds which he entitled "Amended Grounds of Appeal."

The Court of Appeal in a unanimous decision set aside the judgment of the High Court and entered judgment for the Defendants on their counterclaim. The CoDefendant did not file an appeal and the Court of Appeal declined to make any orders regarding his counterclaim. **It is against this judgment of the Court of Appeal that the Plaintiff has filed this present appeal to the Supreme Court on the following grounds.**

i. The Court of Appeal woefully failed to adequately consider the totality of the evidence of the Plaintiff /Respondent/Appellant thereby occasioning substantial mis –carriage of justice.

ii. Since the Respondents were unable to prove that a valid customary gift had been made to them, acceptance of the long use of the land as evidence of a gift was erroneous as that evidence was contrary or inconsistent with the custom of the Ewe People as established or proven on the evidence before the court.
iii. The identity of the land in dispute was clear on the evidence and the

exhibits (the site plan) tendered in court. The Court of Appeal therefore erred in dismissing the Appellant's claim for a declaration of title simply because he could not clearly show his boundaries in his evidence.

iv. Having found that the land in dispute, whether or not accurately described by the plaintiff/Respondent/Appellant, belonged to the Tsita Clan, the Court of Appeal erred when it failed to address itself to the central question of whether by Ewe custom, the Defendants/Appellants/Respondents who are obviously strangers could, by reason only of their long stay on the land, validly acquire absolute ownership thereof with a right of alienation to other strangers for physical development.

It is now settled that an appeal is by way of rehearing and an appellate Court ought to put itself in the same position as the trial court. **Assibey v Gbomittah & Commander Osei [2012] 2 SCGLR 800. See also Tuakwa v Bosom [2001-200] SCGLR** In the case of **Bonney v Bonney [1992-93] 2 GBR 779**, however the Supreme Court sounds a note of warning by holding thus

> *"...The argument that an appeal is by way of rehearing and therefore the appellate court was entitled to make its own mind on the facts and draw inferences from them might well be so but an appeal court ought not under any circumstances interfere with findings of fact by the trial judge except where they were clearly shown to be wrong, or that the judge did not take all the circumstances and evidence into account, or had misapprehended some evidence or had drawn wrong inferences without any evidence in support or had not taken proper advantage of his having seen or heard in support of the witnesses".*

See also **Fosua & Adu-Poku v Adu Poku Mensah[2009] SCGLR 310.**

In his written submission on behalf of the Plaintiff, Counsel argues that the Court of Appeal would have come to a different conclusion if it had totally considered the case of the Plaintiff in its entirety, i.e. the pleadings, oral evidence and Exh CE 1 which is the map drawn up by the surveyor. He submitted that there was no basis for the finding by the Court of Appeal that apart from Agorve, Agorta and Akatsi lands, the boundaries pleaded by the Plaintiff cannot be identified with the land described by the Plaintiff in his statement of claim.
I will reproduce below the finding by the Court of Appeal which has so aggrieved the plaintiff

> *"in the present case, the Plaintiff described the land in dispute in his statement of claims bounded on one side by the property of the Agorve PEople; on the second side by the property of the Agorta People; on the third side by the property of the Plaintiff Family and on the last side by the property of the Korba Family of Akatsi. In his testimony in court however, he described the land claimed by him as bounded on one side by Akatsi Anyidzime people's land, on another by Agorta People's land and on yet another side by Mornume peoples land. It is noted that, like the Anane v Donkor case where apart from three boundary owners, the land described in the writ of summons could not be identified with the land shown on the plan tendered, in the present case, apart from Agorve, Agorta and Akatsi lands, the boundaries pleaded by the Plaintiff cannot be identified with the land described by the Plaintiff in his Statement of claim*"

With all due respect, the learned Court of Appeal judges allowed themselves to be led astray by the untenable arguments of Counsel for the Defendants that the Plaintiff described a different set of boundaries in his evidence to that which he gave in his Statement of claim. In the first place, the Defendants and Co Defendant were equally inconsistent in the description of their boundaries in their evidence.

If the logic of the Court of Appeal is to be followed, then the Defendants will also fail in their counterclaim. Their Counsel in his address to this court conceded the point but made a three sixty degree turn to say that the matter be remitted to the High Court for a trial de novo. I would think not! This is because Exhibit CE 1 clearly identifies all the lands shown by the respective parties as belonging to them. There is no doubt about the identity of the land in Exhibit CE1 and the Court of Appeal was therefore wrong in applying the Anane v Donkor case which applied to a land which could not even be identified on a drawn up plan. It is clearly distinguishable from the present case where Exh CE 1 has competently captured the respective lands of the parties. This court ought to reject the finding by the Court of Appeal that the inconsistency in the description of the boundaries of the land is fatal to the claim of the Plaintiff. In the case of ***Effisah v Ansah [2005-2006] SCGLR*** Wood JSC (as she then was) held

> *"In the real world, evidence led at any trial which turns principally on issues of fact, and involving fair number of witnesses, would not be entirely free from inconsistencies, conflicts or contradictions and the like. In evaluating evidence led at a trial, the presence of such matters per se, should not justify a wholesale rejection of the evidence to which they might relate. Thus in any given case, minor, immaterial and insignificant or non critical inconsistencies must not be dwelt upon to deny justice to a party who has substantially discharged his or her burden of persuasion... Where inconsistencies or conflicts in the evidence are clearly reconcilable and there is a critical mass of evidence or corroborative evidence on crucial or vital matters, the court would be right to gloss over these inconsistencies"*

See also the unanimous decision of this court in the case of ***Jass Co. Ltd. & Anr. v Appau & Anr. [2009] SCGLR 265***, holding 2 thereof, where the Court held as follows:-

“The Courts have consistently refused to declare title in any claim for land when the land cannot or has not been clearly identified. As a matter of fact, the contention that a party must prove the identity of the disputed land with certainty to enable a court decree title in the party does not mean mathematical identity or certainty.”

In the instant case, it is my view that the Exhibit CE1 has realigned the evidence over matters which are more than a century old and so cannot upset the Plaintiff's case as he has put across through his evidence. On the whole of the evidence put across, the identity of the land is not in doubt and the Court of Appeal errred in holding otherwise.

The determination of this whole case turned on whether or not the Defendants were on the land as licensees or through inheritance by the gift of land to their grandmother. As stated earlier, the only piece of documentary evidence was Exhibit CE 1, the survey plan. The remaining evidence was oral and traditional. Both the trial court and the Court of Appeal cautioned on when the Court had to rely on conflicting traditional evidence to make a finding.

The trial High Court cautioned itself thus;

"The problem with traditional history are varied. Some of these are because they are oral and handed down from generation to generation, details are often lost in the memory of time. The faintest ink, it is said is sharper than the sharpest memory, there is the possibility of intentionally fabricating "new history" to serve a selfish end. It is possible for the truth to be lost with time, The new generation may be completely ignorant of the historical truth and pursue falsehood with such zeal and vigour as can mislead the court. It is for the above reasons that there is the need to be very cautious whenever the court is confronted with choosing between conflicting

traditional history. In the case of In re Adjancote Acquisition, Klu v Agyemang II [1982-83] 2 GLR 852 the court of Appeal had the opportunity to revisit and review this problem and the earlier authorities on the point and came out with useful guidelines..."

The court held that

1. The guiding principle on which the courts had treated and accepted traditional evidence as sufficient to establish title to land were that

(i) Oral evidence of tradition was admissible and might be relied upon to discharge the onus of proof if it was supported by evidence of living people of facts within their knowledge.

(ii) Where it appeared that the evidence as to title was mainly traditional in character on each side, and there was little to choose between rival conflicting stories, the person on whom the onus of proof rested must fail in the decree being sought.

(iii) Where there was a conflict of traditional history the best way to find out which side was probably right was by reference to recent acts in relation to the land.

(iv) where claims of parties to an action were based upon traditional history which conflicted with each other, the best way of resolving the conflict was by paying due regard to the accepted facts in the case which were not in dispute, and the traditional evidence supported by the accepted facts was the most probable.

(v) Where the whole evidence in a case is based on oral tradition not within living memory, it was unsafe to rely on the demeanour of the witnesses to resolve the conflict in the case

(vi) Where the admission of one party established that the other party had been in long and undisturbed possession and occupation of the disputed land, the party making the admission assumed the onus to prove that such possession was inconsistent with ownership. The law was such that a person in possession and occupation was entitled to the protection of the law against the whole world except the true owner or someone who could prove a better title.

(vii) In a claim for title to land, where none was able to show title because of want of evidence, or that the evidence was confusing and conflicting, the safest guide to determining the rights of the parties was by reference to possession."

See also this courts decision in the case of ***Achoro & Anr v Akanfela & Anr. [1996-97] SCGLR 209***, holding 1, where the court set out in detail the evaluation of traditional evidence where there are rival versions these have to be tested against background of positive and recent acts. See also Adjeibi-Kojo v Bonsie [1957] 3 WALR 257 PC where it was held that, it was well settled that where in a land suit, the evidence as to the title to the disputed land was traditional and conflicting (as in the instant case) the surest guide was to test such evidence in the light of recent acts to see which was preferable.

The Court of Appeal noted the fact that the Trial Court had cautioned itself on conflicts in traditional history before coming to the conclusion that the land belonged to the Plaintiff's Family. The Court of Appeal however made the finding that the Defendants had been on the land for over 200 years before the suit therefore the long possession was consistent with a gift. I am of the view that the Court of Appeal erred in that respect.

The trial judge found that the evidence of long possession had been rebutted. The court of Appeal gave no reason for not accepting the finding of fact of the trial judge but rather held that the long possession was consistent with a gift.

I have cited the case of **Bonney v Bonney** supra on when an appellate court can disturb a finding of fact. See also ***Achoro & Anr v Akanfela & Anr*** already referred to supra, holding 2 thereof, Obeng v Assemblies of God Church, Ghana [2010] SCGLR, 300, holding 2 thereof, ***Gregroy v Tandoh & Anr [2010] SCGLR 971.***

The combined effect of all these cases is that, the primary findings of fact made by the trial court and supported by evidence on record is better than an appellate court, like the Court of Appeal who failed to give any convincing, compelling and reasonable basis for setting aside the primary findings made by the trial court.

Unless the appellate court, showed clear signs of perverse reasoning, these findings by the trial court as happened in this case should not be disturbed.

Besides the evidence led does not support the nature of a gift, especially as the Defendants insist that Dzashiyor was a maternal member of the Tsita clan from whom the defendant derives title.

The plea of a gift, having completely failed on the evidence as found by the trial court, the defendants claim to ownership of the land fell through. There was sufficient evidence on record to back the trial courts conclusion, because Agbeve, the father of Dzashiyour, who was said to have gifted the land to her, was not the person who originally founded this land.

Agbevor, himself, inherited this land by customary law, and it was not his self acquired property and could not have gifted this land away without the consent of the clan.

In Exhibit CE1, the Plaintiff's land measures five hundred and fifty two point 8 acres. The Defendant's land shown was Three Hundred and thirty four point three two acres, The disputed area is One Hundred and Thirty seven acres. The Defendants had led evidence that a piece of Dzashiyor's land was carved out for Dzokui I from who Plaintiff descended. They were steadfast in their allegation that the land carved out for Dzokui from their grandmother's land was smaller than what was left for their ancestress. This is not borne out by Exhibit CE1. It has been held that where there was in existence a written document and conflicting oral evidence over a transaction, the court was to lean favourably towards the documentary evidence especially if it was authentic and the oral evidence conflicting.

For the reasons given above, the appeal succeeds, the judgment of the court of Appeal is set aside and that of the High Court delivered on the 25th day of February 2009 is restored.

(SGD) V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN

JUSTICE OF THE SUPREM

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

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