IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2015

:

CORAM: WOOD (MRS) CJ PRESIDING
ANSAH JSC
DOTSE JSC
YEBOAH JSC
BENIN JSC

CIVIL APPEAL
NO. J4/25/2014

21ST OCTOBER 2015

BENJAMIN QUARCOOPOME SACKEY - PLAINTIFF/APPELLANT/ RESPONDENT

VRS

ISSAKA A. MUSAH - DEFENDANT/RESPONDENT

APPELLANT

JUDGMENT

DOTSE JSC:

This is an appeal by the Defendant/Respondent/Appellant, hereinafter referred to as the Appellant, who initially obtained judgment at the trial

Circuit Court but which judgment was reversed by the Court of Appeal following an appeal by the plaintiff/Appellant/Respondent, hereinafter referred to as the Respondent.

FACTS OF THE CASE

The respondent averred that, he acquired the disputed land from the Asere Mantse Nii Akramah II in 1964 and was given a document. He also acquired a Land Title Certificate in 1992.

The appellant commenced building on the said land and the respondent reported the appellant's alleged unlawful building to the Accra Metropolitan Assembly and the Land Title Registry. The appellant however continued building, and the respondent sued the appellant in 1996 in the Circuit Court Accra **for a declaration of title to land, damages for trespass, an injunction restraining the appellant from interfering with the land and recovery of possession of the disputed land.**

The appellant on the other hand denied the respondent's claims and challenged the validity of the title certificate, **alleging that the said certificate was tainted by fraud.** According to the appellant, he acquired the land from the allodial owners of the land initially from the Asere Mantse and when he was challenged, he then obtained a deed of lease from the acting head of the Nikoi Olai Stool family of Asere Djorshei in 1986. The appellant alleged that he had been in effective possession since 1972 and that the respondent was aware of the appellant's said

possession and registration of his interest before he allegedly registered his own at the Land Title Registry.

The appellant explained further that he actually acquired the land in 1972 from the Asere Mantse Nii Akramah II, but no document was issued to him even though he was immediately placed in possession. It was further alleged that in 1974, in the absence of the substantive Mantse, the appellant was directed to the then Asere elders of the stool, who executed an indenture in favour of the appellant in respect of the land. In 1986 the appellant was challenged by the Nikoi Olai family which claimed ownership of the entire area.

The appellant thus obtained a fresh conveyance of the land from the said family and registered the indenture at the lands department.

The appellant thus counterclaimed for a declaration of title to the land, an order that the respondent's land title certificate was obtained by fraud, an order for the cancellation of the respondent's certificate and damages for trespass.

The trial Circuit Court entered judgment for the appellant, on his counterclaim, whilst the respondent's claim was dismissed. An appeal by the Respondent, therein appellant to the Court of Appeal resulted into the setting aside of the Circuit Court judgment and entry of judgment for the respondent.

The appellant felt aggrieved with the decision of the Court of Appeal which reversed the judgment of the trial Circuit Court and was granted special

leave by this court on the 5th day of April 2011 to appeal against the Court of Appeal decision.

It is instructive to note that, in granting the appellant special leave to appeal, the Supreme Court stated the following as the reasons why it granted the special leave to appeal:

> *"It is our view that the issues sought to be raised by the Applicant's appeal concerning the provisions of the Land Title Registration Act merit authoritative consideration and determination by the court. Consequently, we are inclined to grant the application for special leave to appeal and we hereby do so."*

Following the grant of the special leave, the appellant filed the following grounds of appeal against the Court of Appeal judgment.

Grounds of Appeal

1. The Court of Appeal erred in not considering the effect of the Lease made between the Nikoi Olai Stool Family of Asere and the Defendant/Respondent/Appellant herein dated 8th March 1986.

2. The Court of Appeal erred in not considering the provisions of sections 13 and 46 (1) (f) of the Land Title Registration Act, 1986 (PNDCL 152) which required the preparation of a list of all registered interests in land and required the Chief Registrar of Land to inquire

from the Lands Commission, about transactions on lands he intends to register prior to the issuance of Land Certificates.

3. The Court of Appeal did not adequately consider the long period of occupation/possession of the Applicant herein.

IDENTITY OF DISPUTED LAND

Having stated the grounds of appeal, I deem it expedient to comment on how the Court of Appeal dealt with the resolution of the issue of the identity of the land and consider how that issue affects the resolution of the instant appeal.

On the identity of the land, the Court of Appeal, speaking through Kusi-AppiahJ.A, in a unanimous decision of the Court, delivered on 20th May 2010, stated as follows:-

> *"On the issue of whether the plaintiff (herein respondent) succeeded in proving the identity of the disputed land, it appears to me that the position taken by the trial Judge was that on the peculiar facts of the case (i.e. proving the identity of the subject-matter as well as establishing all boundaries), the identity of the land was not in dispute. This explains why the trial Judge delivered himself in paragraph 2 of this judgment at page 182 of the record as follows:-*
>
> ***"I must say that the description of the land as depicted in Exhibit "B" appears to be sufficient enough to absolve the plaintiff from the evidential duty of showing positively the***

dimensions and indeed the identity of his land especially when he claims to be entitled to declaration of title and an injunction against the defendant."

I am in agreement with the learned trial Judge that the identity of the subject matter was not in dispute. Indeed paragraph 1 to 4 of the amended claim were specifically answered by paragraph 2, 3, 4, 5, 6, 7 and 8 of the amended defence. And the clear implication is that the plaintiff and defendant were "ad idem" as to the identity of the land in dispute."

Continuing further, and basing themselves on a WACA case ***Okpareke v Egbuoho, 7 WACA page 53*** *and* ***Sah v Darku [1987-88] I GLR 123 CA,*** *the C/A stated as follows:-*

Guided by this authority, I find the identity of the disputed land was one of agreed fact. It was agreed upon by both parties in their evidence at the trial. Consequently, the trial court was bound by law to have accepted this agreed fact as established without any proof."

I have verified the above statements and references attributed to the learned trial Judge, and I have found them to be correct as per the record. I have also verified the averments contained in the statement of claim and defence referred to by the Court of Appeal.

In those averments, the appellant appeared certain that the disputed land is one and the same land that he was disputing with the respondent. It is therefore clear that the parties were "adidem" as to the identity of the land.

Concluding their observations on this issue of identity of the land, the Court of Appeal, per Kusi-Appiah J.A delivered themselves thus:-

> *"Admittedly, the courts have consistently refused to declare title in any claim for land when the land cannot or has not been clearly identified. But as a matter of fact, the contention that a party must prove the identity of the land in a land suit with certainty to enable a court decree title* ***does not mean mathematical identity or precision. See JASS Co. Ltd & Another v Appau & Another.***
> *In the instant appeal, we hold that the trial Judge having held earlier on in his judgment that the identity of the land between the parties was not in dispute (see page 181 of the record supra),* ***it did not lie in his mouth to resurrect an issue which by his own findings was dead and buried (i.e. the plaintiff's original Indenture and the Land Title Certificates – Exhibits "A" & "B" respectively) and hold otherwise as he did."***

Learned counsel for the appellant, in his written statement of case, spent a considerable time on the issue of the required standard of proof in a civil case, such as the instant land suit. Learned counsel referred to the

Supreme Court cases of ***Adwubeng v Domfeh [1996-97] SCGLR 660*** and ***Effisah v Ansah [2005-2006] SCGLR 943*** in which the Supreme Court held that proof in all civil actions without exception, is proof by a preponderance of probabilities, and not proof beyond reasonable doubt.

Based on the above principle, learned counsel for the appellant contended that since both parties did not call their respective vendors, it was incumbent on the Court to critically examine the documents of title upon which the parties relied.
In respect of the respondent, he relied on exhibits "A" and "B" whilst the appellant relied on exhibits "3" and "4" respectively.

Learned counsel for the appellant then argued strenuously that, it was therefore incumbent upon the learned trial Circuit Judge to have examined the respective documents of the parties to find out whether the parties are litigating over the same parcel of land or not. This matter appears to me to be very critical in the resolution of this appeal.

In my opinion, it was perfectly legitimate for the learned trial Judge to have embarked upon such an exercise. However, at the point when he discovered that it appeared the respondent's land documents did not correspond with the land documents of the appellant, he ought to have amended his findings in respect of the identity of the disputed land stated supra.

I believe that it was this difficulty that led the Court of Appeal to conclude thus:-

> *"It is significant to note that the two documentary conveyances from Nii Akramah II, Asere Mantse and Nikoi Olai stool family of Asere as Exhibit "3" and "4" respectively without further evidence makes it difficult for the court to ascertain which of the two grantors was the real owner of the land in dispute.*
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> ***In the absence of any cogent and credible evidence to ascertain which of the two grantors was the real owner of the subject property, the court will be compelled to accept the first in point of time as the real grantor who happened to be Nii Akramah II, the Asere Mantse.***
> *Having found that the parties have a common grantor, the only consideration for the court is which of the two grantees must have title to the land. It should be who got the land first*."

Learned counsel for the appellant, described the above observations by the Court of Appeal as erroneous. Instead, learned counsel preferred the layman approach of the learned trial Judge who without any scientific observations concluded that the documents of the respondent i.e. exhibits A & B did not support and complement each other hence was of the view that the appellant must succeed on his counterclaim.

SURVEY PLAN

I am of the considered opinion that, the learned trial Judge should have ordered a survey plan of the disputed land with a further order for the parties to file survey instructions. This would have afforded the parties the opportunity to surrender their respective site plans file survey instructions and have their site plans superimposed on the land in dispute. This would have shown whether the respective land documents will fall on the land on the ground, which would have indicated whether the respondent's and or appellant's lands are indeed one and the same land and therefore the disputed land.

The question that comes to my find is whether it is too late in the day for that procedure to be used? It is generally accepted that an appeal is by substance a rehearing of the case. See ***Tuakwa v Bosom [2001-2002] SCGLR 61*** and **Dexter Johnson v Republic [2011] 2 SCGLR at 601**, holding 3 thereof.

I am further strengthened in the position I have taken by article 129 (4) of the Constitution which provides as follows:-

> *"For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the*

Supreme Court by this Constitution or any other law, ***the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by this Constitution or any other law.***"

See also section 2 (4) of the Courts Act, 1993 Act 459 and also Rule 23 (1) & (3) of Supreme Court Rules 1996 C. I. 16

This court is then to be considered as being clothed with the powers of the trial court. In that respect, what the learned trial Judge should have done by ordering a survey plan of the land in dispute in order to determine whether in reality the site plans of the parties really touch and concern the disputed land ought to be done by this court instead of reverting it to the trial court. This will provide for judicial economy as has been done recently by this court in the following unreported Supreme Court cases.

1. Charles Lawrence Quist, substituted by Diana Quist v Ahmed Danawi , Suit No. CA J4/63/2013 dated 28th November 2014

2. Isaac KwasiOwusu substituted by AduBafour v KwabenaOfori& others Suit No.J4/22/13 dated 23rd December 2014.

Under these circumstances, I think it is prudent for this court to determine whether in truth and in fact, the parties are really disputing over the same parcel of land. It is only when this matter has been determined

scientifically that the other issues of priority and or the *"nemodat quod non habet principle"* and the other provisions concerning the Land Title Registration Law would be considered. This will help prevent a total failure of justice.

In that respect, I am of the opinion that in order to do justice to the parties, this court should order a survey plan with clear instructions to the parties to file survey instructions using their respective land documents.

(SGD) V. J. M DOTSE

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) A. A. BENIN

JUSTICE OF THE SUPREME COURT

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