IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: ANIN YEBOAH JSC (PRESIDING)
BAFFOE- BONNIE
GBADEGBE JSC
APPAU JSC
PWAMANG JSC

CIVIL APPEAL

NO:J4/20/2016

26TH JANUARY, 2017

NANA BRAFO DADAZIE II --- PLAINTIFF/RESPONDENT

/RESPONDENT

VRS.

1. JOHN KING ARTHUR --- DEFENDANTS/APPELLANTS

2. ABEIKU ARTHUR /APPELLANTS

3. GEORGE ARTHUR

4. ATTA OCRAN

5. MAD.ADWOA ACKON

6. KWESI ESSOUN

7. PAPA YAW

8. MR. JOSEPH AIDOO

9. SAMUEL KRAH ALIAS KWEKU ANNAN

10. ALBERT KOJO DADZIE-FYNN

11. EGYA KWANDADOR JNR

12. OPANYIN KWEI

13. ATOAMU KWAW

14. EGYA ACKON (DRIVER)

JUDGMENT

YAW APPAU, JSC.

This is an appeal against the judgment of the Court of Appeal dated the 10th day of December, 2014. The Appellants, who are fourteen (14) in number, were the Defendants in the trial High Court. They were sued by the Respondent who was the Plaintiff and Chief of Upper Shama Junction. His claim against all the Defendants/Appellants was for two reliefs only, i.e.:

(i) General Damages for trespass to portions of the Upper Shama Junction lands bounded on all sides by the lands of Ituma, Kwasi Ansah of Agona family of Kumase-Shama, Bonsaba lands and Konfueku lands;

(ii) Recovery of possession of lands unlawfully occupied by the defendants.

The Defendants/Appellants lost in the trial High Court and lost the second time in the Court of Appeal when they appealed against the judgment of the trial High Court. This is therefore their second appeal. They would simply be referred to as Appellants in this appeal whilst the Plaintiff/Respondent would maintain the description 'Respondent' hereinafter.

This Court has a plethora of authorities or decisions on what is expected of it as a final appellate court when it is confronted with a second appeal challenging the findings of both the trial court and the Court of Appeal. With reference to its previous decision in **ACHORO v AKANFELA [1996-97] SCGLR 209,** this Court in **KOGLEX LTD (No. 2) v FIELD [2000] SCGLR 175,** held under its holding (2) at page 176 that: ***"Where the first appellate court had confirmed the findings of the trial court, the second appellate court would not interfere with the concurrent findings unless it was established with absolute clearness that some blunder or error, resulting in a miscarriage of justice, was apparent in the way in which the lower court had dealt with the facts".***

The Court, per Acquah, JSC (as he then was), gave four (4) instances where such concurrent findings may be interfered with; reference page 177 of the *Koglex Ltd (No.2) case* cited (supra). These are:

i. ***where the findings of the trial court are clearly unsupported by evidence on record or where the reasons in support of the findings are unsatisfactory;***
ii. ***where a principle of evidence has been improperly applied;***
iii. ***where the findings are based on a wrong proposition of law; and***
iv. ***where the finding is inconsistent with crucial documentary evidence on record.***

We therefore approach this appeal, having in mind the parameters we have set for ourselves in the determination of appeals of such nature.

The progeny of the case that gave rise to this appeal is that; somewhere in 1993 (precisely on 29th November 1993), the Respondent's predecessor who was the chief of Upper Shama Junction by name Nana Brafo Dadzie, commenced a suit at the Circuit Court, Sekondi against one Kwandahor as the 1st Defendant and the predecessor of the 1st Appellant herein by name Kwamina Yaw as the 2nd Defendant. The suit was titled NANA BRAFO DADZIE v KWANDAHOR & KWAMINA YAW. The claim of Respondent's predecessor against 1st Appellant's predecessor and the other defendant in that suit was for:

(1) "General Damages for trespass to the Old Shama Junction Cemetery bounded on all sides by the Cape Coast – Takoradi motor road, the Shama

motor road, a fuel station, GPRTU Offices, the land of Kofi Kuma and the land of Kwesi Ansah, and

(2) An order of perpetual injunction restraining the defendants, their agents, privies or assigns from interfering with Plaintiff's possession and occupation of the land, subject matter of the suit.

In the course of the proceedings, Respondent's predecessor died so Respondent was substituted in his place as the new Plaintiff. He later ascended the stool of Upper Shama Junction as the chief with the stool name Nana Brafo Dadzie II. The 1st Appellant was also substituted in place of his predecessor Kwamina Yaw who was the second defendant in that suit when he also died during the pendency of the suit. The suit was therefore fought between the Respondent in this appeal as the Plaintiff and then the 1st Appellant herein as the 2nd Defendant and Kwandahor as 1st Defendant.

On 11th April 1995, the Respondent amended his statement of claim to indicate the capacity in which he instituted the action. This was evidenced by the judgment of the Court of Appeal at page 4, which appears at page 320 of the Record of Appeal (ROA) as follows: ***"In paragraph 1 of the Amended Statement of Claim, the plaintiff made the following averment – (1) The plaintiff is the Chief of Upper Shama Junction and brings this action on his own behalf and on behalf of the Oman and People of Shama Junction".***

In this amended statement of claim, Respondent claimed to be the custodian of what he called Upper Shama Junction Stool lands, which lands he said **included the Old Cemetery which was the subject matter of the suit**. He neither described nor gave the boundaries of the lands he called Upper Shama Junction Stool lands, which he claimed to be the custodian of by virtue of the fact that he was the chief of Shama. This was because he never sought any relief in the form of declaration of title to the so-called Upper Shama Junction Stool lands. The only land he described and which was in fact the subject-matter of the 1993 suit was the Old Cemetery Junction land, which he said formed part of Upper Shama Junction Stool lands. This fact was confirmed by the judgment of the trial Circuit Court dated 29th June 1998, which the Respondent is relying on in this case at page 39-40 of the record (RoA) where the judge stated as follows: ***"From the evidence on record and the affidavit in***

support of the motion, it is quite clear that there is an obvious typographical error in the title. That notwithstanding, the Plaintiff is identifiable as the chief of Upper Shama Junction (Exhibit 'M') and in that capacity, I am of the opinion that he is the appropriate person as custodian of the stool land to mount this action and on behalf of the people of Upper Shama Junction. The next issue has to do with the location of the land in dispute, the 'Old Cemetery'. According to the Plaintiff the Old Cemetery is bounded on all sides by the Cape Coast-Takoradi motor road, the Shama Junction-Shama motor road, a fuel station, GPRTU Offices, the land of Kofi Kum and the land of Kwesi Ansah". {Emphasis added}

What led to that litigation was that, the Respondent's predecessor attempted to have the Old Cemetery rehabilitated for re-use. He was allegedly confronted by the 1st Appellants' predecessor Kwamina Yaw and the then 1st Defendant Kwandahor who prevented him from doing so, claiming the land was theirs. Respondent therefore sued them for general damages for trespass to the Old Cemetery land. He again sought for an injunction to restrain them from interfering in the said land.

On the 29th day of June 1998, the trial Circuit Court dismissed Respondent's 1st relief of damages for trespass against both the 1st Appellant and the 1st Defendant in the action, i.e. Kwandahor. The reason the trial court gave for dismissing the trespass claim (which was Respondent's main claim) was that the 1st Appellant and the other defendant were licensees of the Respondent and since the Respondent had not revoked their licence, they could not be described as trespassers. This was what the trial Circuit Court judge said in his judgment dismissing Respondent's claim of trespass against the 1st Appellant and the other:

"Plaintiff can only sue in trespass after the licence of the Defendants had been revoked and Defendants continued to stay on the land or prevented the Plaintiff from entering the land. In other words, until the licence of the Defendants is revoked or withdrawn or cancelled, the Plaintiff cannot enter the land in dispute. His entry onto the Old Cemetery to rehabilitate it without first consulting the Defendants or revoking the licence was wrong. In the circumstances, the action for trespass fails".

The trial Circuit Court then went ahead to dismiss the entire suit against the 1st Defendant Kwandahor whose testimony was that he was not in town when the incident between the Respondent's successor and the 1st Appellant's successor occurred. This was what the trial court said in dismissing the entire suit against the 1st Defendant, Kwandahor:

"The 1st defendant was sued together with the 2nd defendant. However, throughout the proceedings no single cogent allegation was made against him, except that he agreed to the decision to stop the Plaintiff from rehabilitating the old cemetery. 1st defendant denied the allegation, and explained that he was out of town at the time of the incident. This explanation was not challenged whatsoever. The case against the 1st Defendant is dismissed."

Having dismissed the substantive relief of trespass on the grounds that the licence of the 1st Appellant and the other defendant had not been revoked by the Respondent since they were on the land with the permission of Respondent's predecessor (granted they were his licensees), the second relief of Injunction which is a consequential relief that depends on the success or otherwise of the substantive relief should also have fallen as a matter of course. This, however, did not happen.

After dismissing the first relief of damages for trespass against the 1st Appellant who was the 2nd Defendant in the action on the above ground, the trial Circuit Court went ahead to declare the Respondent as owner of Upper Shama Junction lands including the Old cemetery land, when the Respondent had not sought for any such relief in his claim and had not described any such land, for it to be contested on the merits. The court, nevertheless, went further to restrain 1st Appellant from interfering in the said land, which was not properly identified, when the very court had earlier on made a finding that 1st Appellant was not a trespasser but rather was on the Old Cemetery land with the permission of Respondent's predecessor so the relief of trespass must fail. The record also shows clearly that the 1st Appellant and some of his family members had farms, including coconut plantations on portions of the Old Cemetery land, which was in dispute. This was what the court said:

"I enter judgment in favour of the Plaintiff against the 2nd Defendant and declare Plaintiff owner of the Upper Shama Junction lands, including the Old Cemetery. The 2nd Defendant, his agents, privies or assigns are restrained from interfering with Plaintiff's possession and occupation of the land, the subject matter of this suit". {Emphasis added}

The trial Circuit Court then went ahead, strangely though, to award costs of c1,200,000.00 (now Ghc120.00 against the 2nd defendant i.e. 1st Appellant herein) who was not found to have committed the tort of trespass for which he was sued, and c400,000.00 (now GHc40.00) against the 1st defendant against whom also no judgment was entered in favour of the Respondent.

In fact, there was no basis for the award of costs against the 1st Appellant and the then 1st Defendant Kwandahor as they were not found liable for the tort of trespass for which they were sued. The declaration therefore that the Respondent was owner of the undefined Upper Shama Junction lands including the Old Cemetery, when Respondent never said he was the owner but the custodian of such lands, and never sought for any such declaratory order, was totally out of place. The fact that the Respondent never sought for any declaratory order in respect of land described as Upper Shama Junction lands was supported by the Court of Appeal in its judgment of 4th July 2002 in which it strangely dismissed the appeal of the 1st Appellant against the judgment of the trial Circuit Court and committed the same error the trial court committed.

The Court of Appeal per Essilfie-Bondzie, J. A. stated as follows:

"This is an appeal by the 2nd Defendant/Appellant hereinafter referred to as the 2nd Defendant against the judgment of the Circuit Court, Sekondi dated 29th June 1998 in favour of the Plaintiff/Respondent who will be simply called the Plaintiff. The Plaintiff issued a Writ of Summons against the defendants jointly and severally for the following reliefs:

(1) General damages for trespass to the Old Shama Junction cemetery bounded on all sides by the Cape Coast – Takoradi motor road, the Shama Junction-Shama motor road, a fuel station, GPRTU offices, the land of Kofi Kuma and the land of Kwesi Ansah.

(2) An order of perpetual injunction restraining the defendants, their agents or assigns from interfering with the plaintiff's possession and occupation of the land the subject of the suit".

There was nothing on record to indicate that the Respondent herein ever amended his claim by the inclusion of a relief for a declaration that he was the owner of the Upper Shama Junction Stool lands. He only amended his statement of claim to clarify the capacity in which he instituted the action of trespass and injunction against the 1st Appellant herein and the other. Unfortunately, the Court of Appeal did not notice this anomaly and went ahead to affirm the judgment of the trial Circuit Court which, after having dismissed the substantive relief of trespass upon the finding that the 1st Appellant never trespassed onto the disputed Upper Shama Junction Old Cemetery land (which was the disputed land), strangely went ahead to restrain the 1st Appellant from interfering with Respondent's ownership and possession of Upper Shama Junction Stool lands including the old cemetery when the Upper Shama Junction Stool lands were not the subject-matter in dispute.

Judging from the fact that the judgment of the trial Circuit Court, which the Court of Appeal affirmed on 4th July 2002 was one in vain, as the Appellants in this case rightly described in their written submissions filed on 29/12/15 in support of their appeal, the Respondent did not know how he could effectively execute it against the 1st Appellant or any other person. He therefore proceeded to the High Court and commenced a fresh action against the 1st Appellant and thirteen (13) others, who were not parties in the previous action that culminated in the Court of Appeal, claiming damages for trespass and recovery of possession of portions of land he claimed the Appellants were unlawfully occupying. The endorsement on his writ of summons filed on 9th April 2003, which has travelled up to this Court, read:

i. General Damages for trespass to portions of Upper Shama Junction lands bounded on all sides by the lands of Ituma, Kwasi Ansah of Agona Family of Kumase-Shama, Bonsaba lands and Konfueku lands; and

ii. Recovery of Possession of the said lands.

His pleaded case was briefly that; he was the Chief of Shama and the custodian of all Upper Shama lands. The 1st, 2nd and 3rd Appellants were siblings occupying portions of the Upper Shama lands whilst the 4th to 14th Appellants who also occupy portions of the said lands, claimed to have acquired their right of occupation from the 1st Appellant. In 1993, he litigated over the same piece of land with the 1st Appellant in the Circuit Court, Sekondi. The Circuit Court, on 29th June 1998 determined the matter in his favour as the owner of Upper Shama Junction lands. The court accordingly restrained the 1st Appellant and his privies perpetually from interfering with his ownership and rights over the said lands. The 1st Appellant appealed against the judgment to the Court of Appeal and lost. Despite the judgments of both the trial Circuit Court and the Court of Appeal, the 1st Appellant and the others who are his privies, have failed or refused to recognise him as the owner of the lands they occupy in the form of houses, carpentry shops, fitting shops and drinking spots they had built or established on portions of the land and to attorn tenancy to him. Rather, they had treated with contempt notices he had served on them to vacate the portions of the lands they occupy, having failed to recognise his authority over the said lands. The only option left for him was therefore to seek an order to recover possession of the various portions the Appellants occupy from them. He therefore instituted the action claiming the two reliefs as re-called above. The Respondent never described the portions of land he said the appellants were occupying unlawfully. The Appellants entered appearance to the action and filed a three-paragraphed statement of defence to respondent's 16-paragraphed statement of claim denying Respondent's claim that they had trespassed onto his lands called Upper Shama Junction lands.

The major issues that surfaced for determination by the trial High Court, judging from the pleadings before the court were:

a. *Whether or not the plaintiff (i.e. Respondent) had ever litigated over the same piece of land (i.e. Upper Shama Junction lands) with the 1st Appellant and won;*

b. *Whether or not the 2nd to 14th Appellants were privies to the 1st Appellant in that litigation;*

c. *Whether or not defendants have trespassed onto portions of Upper Shama Junction lands as described in the claim; and*

d. *Whether or not the plaintiff was entitled to his claim.*

In leading evidence to establish the issues that arose from the pleadings as summed up above, the Respondent did not call any witness. He did not call any boundary owner of the alleged Upper Shama Junction lands as described in his writ of summons. He only relied on the Circuit Court Judgment dated 29th June 1998 which he said the Court of Appeal affirmed in its Judgment dated 4th July 2002. His evidence was very brief. It is reproduced below:

*"My name is Nana Brafo Dadzie II, known in private life as John Grant Kwesi Anquandoh. I am a teacher by profession now Deputy Regional Manager of Methodist Schools in the Western Region. I know the defendants in this case. I have brought the defendants to court for an order that they leave my land. The land is located at Upper Shama Junction. The land shares boundaries with the land of Ituma, Kusi Amoah, Bonsaba lands and Konfueku lands. This land has been the subject of previous litigation. The case started in the Circuit Court, Sekondi in 1993. The parties were my predecessor Nana Brafo Dadzie and Kwaku Kwandahor and Kwamina Yaw. Kwamina Yaw died and was substituted by John King Arthur and I also substituted the plaintiff Nana Brafo Dadzie who died in the course of the hearing. Judgment was given in favour of the plaintiff, that is; myself. I have in my hand a copy of the judgment. I wish to tender it... (**No objection**. **BY COURT**: **Accepted and marked as Exhibit 'A'**).*

"The second defendant John King Arthur appealed against the said decision to the Court of Appeal. The Court of Appeal dismissed the appeal and upheld the decision of the Circuit Court and declared me the owner and custodian of all Upper Shama Junction lands. While the litigation was going on, the defendants were staying on portions of the land in dispute. In spite of the judgment, the defendants are still on the land. The 1st defendant in the case who was the 2nd defendant in the earlier suits gave the land to the defendants. Since the decision of the Court of Appeal, I have given the defendants notice to attorn tenancy but they have refused. That is why I have brought them to court for recovery of possession of my lands. The suit before the Shama Traditional Council challenging my enstoolment as the chief of Shama went in my favour. I am therefore the Chief of Shama. I have the judgment of the Shama Traditional Council. I wish to tender it. ***(No objection. BY COURT: Accepted and marked as Exhibit 'B').*** *All the defendants are on my land. It is not true that they are on*

their family land. It is my prayer that the Court orders recovery of possession of my lands back to me."

In fact, the above testimony was all that the Respondent placed before the trial High Court. The Appellants denied trespassing onto the said Upper Shama Junction lands which Respondent described in the endorsement of his writ of summons. According to the Appellants, though the two lower courts declared the Respondent as owner or custodian of Upper Shama Junction lands in a litigation which started in the Circuit Court, Sekondi in 1993, the Respondent never gave any description of those lands and the two lower courts also did not identify those lands in their judgments. With such a denial, it behoved on the Respondent to lead evidence to establish that:

i. *He once litigated with the Appellants over the same piece of land as described in his writ of summons and won;*

ii. *That the Appellants had indeed trespassed onto portions of the very land over which he allegedly obtained judgment in the Circuit Court on 29th June 1998, which judgment was affirmed by the Court of Appeal on 4th July 2002.*

As the then trial judge, Dotse, J (as he then was) rightly indicated, if it was true that the same matter had once been determined by the Circuit Court and the Court of Appeal, then most of the evidence would be documentary as it was just a matter of putting before the trial High Court evidence of the previous trials to establish that fact. This principle of law which does not permit the re-litigation of a matter already determined between the parties in a previous litigation is what is termed; ***'Estoppel per rem Judicatam*** *or* ***Res Judicata*** in short.

'Res Judicata', which appears to be the issue in this case, is a defensive mechanism applied by a party in litigation, mainly the defendant, to pray the court or tribunal to put a stop to litigation on a matter or an issue that has already been determined between the very parties or their privies by a court of competent jurisdiction. The Black's Law Dictionary, Ninth Edition, edited by Bryan A. Garner defines it as: ***"Latin – 'a thing adjudicated'; 1. An issue that has been definitely settled by judicial decision; 2. An affirmative defence barring the same parties from litigating a second lawsuit on the same claim,***

or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties or parties in privity with the original parties…"

This Court has espoused on the plea of *res judicata* in various cases. In the case of **BOAKYE v APPOLLO CINEMAS & ESTATES (GH) LTD [2007-2008] SCGLR 458**, this Court recalled its earlier holding on the plea in the case of; **IN RE SEKYEDUMASE STOOL; NYAME v KESSE 'alias' KONTO [1998-99] SCGLR 476**, per Acquah, JSC (as he then was) in the following words:

"The plea of res judicata can be invoked in respect of any final judgment <u>delivered on the merits by a judicial tribunal of a competent jurisdiction</u>. Such a judgment is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the <u>same claim, demand or cause of action</u>." {Emphasis added}

The three essential elements to establish for the plea to hold as mentioned in Black's Law Dictionary as quoted above, have been given affirmation by this Court in the above decision. These are:

- ***(i)*** *the earlier decision on the issue, i.e. whether same claim as the present;*
- ***(ii)*** *final judgment on the merits by a court or tribunal of competent jurisdiction; and*
- ***(iii)*** *same parties in both suits or parties in privity with the original parties.*

Contrary to the norm that it is mostly defendants who put up such pleas to stop double litigation on the same matter, in this case, it was the Respondent herein who raised this issue in his claim as Plaintiff. The judgment of the Court of Appeal dated 4th July 2002 in the previous litigation was tendered in evidence by the Appellants as **Exhibit 1**, whilst that of the trial Circuit Court dated 29th June 1998 was tendered in evidence by the Respondent as **Exhibit 'A'**. Both judgments mentioned the Upper Shama Junction Old Cemetery land as the subject matter of the dispute before the Circuit Court in 1993. The subject matter was not the Upper Shama Junction Stool lands or Upper Shama

Junction lands as variously described by the Respondent and pleaded in this case.

Again, the parties in that action were the Respondent herein and the 1st Appellant and one Kwandahor. The remaining thirteen (13) Appellants were not parties in that suit. Though the Respondent described them as privies of the 1st Appellant, they denied that assertion in their testimonies. The 3rd, 4th, 5th, 9th and 12th Appellants testified to this effect. In fact, all the appellants denied having trespassed onto Respondent's land known as Upper Shama Junction lands. They denied any knowledge of such lands and contended strongly that they had been in occupation of their own lands for several years.

The 9th Appellant said he had been occupying his land which lies at Abora Kokwado for over forty (40) years. He denied that the Respondent was the chief over his area. {See pages 87-90 of the ROA). The 12th defendant also claimed to be a farmer living at Adom Nasa near Shama-Kumase. He said he had never heard of Upper Shama lands and did not know such lands. He therefore denied ever trespassing to portions of such lands {Seepage 91 of the ROA}. The 4th Appellant also testified briefly. He claimed to be living at a place called Graveldo for the past ten (10) years at the time he was testifying in 2005. He denied any knowledge of Upper Shama Junction lands. The 5th Appellant by name Nana Adwoa Ackon said he was living in a village called Nkwanba Kesew where she had lived as a farmer for about sixty (60) years. She denied any knowledge of Upper Shama Junction lands. She also said she did not live at Shama Junction where the Respondent is chief. The 3rd Appellant also said he had been living at Abora Kokwado also known as Graveldo for about twenty (20) years as at 2005 but not at Shama Junction. He said he was occupying his own land commonly known and called Kissi Nkrofofu and denied any knowledge of Upper Shama Junction lands or having ever trespassed to same. All the other defendants who did not testify relied on the testimonies of those who testified and strongly denied Respondents claim.

It must be emphasized that whilst this suit was pending in the trial High Court, the Respondent filed a Contempt application against the 1st, 3rd and 7th Appellants, i.e. John King Arthur, George Arthur and Papa Yaw respectively and two others not parties in this action, namely; Samuel K. Osei and Sangmene Chrysantus in another trial High Court in Sekondi presided over by Anthony

Oppong, J. The application was to the effect that the five respondents had disobeyed the injunction orders made by the trial Circuit Court and the Court of Appeal in the previous litigation, which was the basis of the suit now on appeal before us. The High Court that heard the contempt application dismissed it in a ruling dated 13th March 2007 in the following words at page 338 of the record (RoA):

"For the applicant to succeed in this application for contempt, the land over which the court granted the injunction order must be clearly defined. Learned Counsel for applicant has taken pains to discharge that duty by making inferences from the judgment of both the Circuit Court and the Court of Appeal. I must however say that I am not very certain in my mind as to the exact land over which the restraint order was made, the efforts of the learned lawyer for applicant notwithstanding.

In contempt application, proof of the elements of the ingredients is quite strict and must be done without having any reasonable doubts in the mind of the court. Not having been able to prove the identity of the Upper Shama Junction lands to my satisfaction, the application certainly fails and same is dismissed. For the fact that the parties are elsewhere litigating over Upper Shama Junction lands, I don't want to give any financial advantage to any of them by awarding the respondents costs".

Notwithstanding these strong challenges to the claim by the Respondent, the trial High Court that determined the substantive case found for him on all his two reliefs of trespass and recovery of possession against all the Appellants. The trial court said its judgment was based essentially on the judgment of the Circuit Court dated 29th June 1998 between the Respondent and the 1st Appellant and another, which judgment was affirmed by the Court of Appeal. The trial High Court concluded, contrary to the evidence on record that, the 2nd to 14th Appellants were privies of the 1st Appellant so they were bound by the 1998 judgment that was affirmed by the Court of Appeal in 2002. An appeal by the Appellants to the Court of Appeal filed on 3rd September 2013 was dismissed by the Court of Appeal on 10th December, 2014. The reasons advanced by the Court of Appeal were not different from that of the trial High Court as it was a complete affirmation of the decision of the trial court. Not satisfied with this position of the 1st appellate court, the Appellants are before

us on a second appeal that was filed on 6th January, 2015. Their grounds of appeal are as follows:

1. **The Court of Appeal erred in affirming the holding of the trial High Court judge that the judgments of the Circuit Court dated 29th June 1998 and that of the Court of Appeal dated the 4th of July 2002 had described and given the boundaries of Upper Shama Junction lands.**
2. **The Court of Appeal, though correctly stating the position of the law that a judgment for declaration of title to land without setting out the boundaries of the said land was a nullity, failed to apply the principle of law to the judgments of the Circuit Court dated 29th June 1998 and that of the Court of Appeal dated 4th of July 2002.**
3. **The Court of Appeal erred in holding that the judgment of the Circuit Court dated the 29th of June 1998 and that of the Court of Appeal dated 4th of July 2002, which judgments failed to give any boundaries of the Upper Shama Junction lands, acted as res judicata.**

Though the grounds of appeal appear three on paper, there is only one ground of appeal and that is; ***The Court of Appeal erred in affirming the judgment of the High Court by holding that the judgments of the Circuit Court dated 29th June 1998 and that of the Court of Appeal dated 4th July 2002 operated as res judicatta, since both judgments failed to give any boundaries of the Upper Shama Junction lands.***

The Appellants' appeal before us is summed up in a statement they made through their counsel at page 3 of their unpaged statement of case filed on 21/12/2015. They said: - *"If indeed the previous judgments had described the Upper Shama Junction lands as sharing boundaries as those stated in the instant writ, then the plaintiff's case succeeds. If on the other hand the judgments did not describe the Upper Shama Junction lands and in fact did not give any such boundaries then those judgments are all, as in the words of Ollenu, JSC in the case of* ***Anane v Donkor [1965] GLR 188*** *- judgments given in vain. The plaintiff therefore cannot rely on these judgments if no boundaries of any land known as Upper Shama Junction lands were given."*

The Respondent, in his written Statement of Case in answer filed on 29/01/2016, tried to dismiss this argument that he did not identify the

boundaries of the alleged Upper Shama Junction lands in the 1993 suit which he said the Circuit Court declared as belonging to him. According to him, the Appellants were ad idem with him on the identity of the disputed land in the 1993 suit and quoted a portion of the judgment of the Court of Appeal dated 4th July 2002 to support this contention. This was what the Court of Appeal said in its judgment of 4th July 2002 affirming that of the trial Circuit Court dated 29th June 1998:

"It is the case of the plaintiff that all Upper Shama Junction lands including the old cemetery are vested in his ancestors by reason of the fact that they broke the virgin forest. The evidence that the virgin forest of Upper Shama Junction was broken by the ancestors of plaintiff was not challenged. But according to the attorney of the 2nd defendant that land in dispute was gifted to Kwesi Esson, his ancestor, for his eloquence in litigation".

It is quite clear that this statement by the Court of Appeal, which was quoted from the judgment of the trial Circuit Court, was taken out of context. From the record of appeal, the land that the 1st Appellant herein who was described as the attorney of the 2nd defendant said was gifted to his ancestor Kwesi Esson was not Upper Shama Junction lands but the Old Cemetery land that was in dispute. The trial Circuit Court in its judgment stated as follows at page 40 of the record (RoA): ***"According to Plaintiff, all the Upper Shama Junction lands including the old cemetery are vested in his ancestors by reason of the fact that they broke the virgin forest. <u>But according to the attorney of 2nd Defendant, the land in dispute was gifted to Kwesi Esson, his ancestors, for his eloquence in a litigation".</u>*** {Emphasis added}

It is therefore not correct, as the Respondent contended in his written statement of case that the Appellants were ad idem with him on the identity of the land he called Upper Shama Junction lands. It was the land on which the 1st Appellant had his coconut plantation at the Shama Junction old cemetery that was in dispute and even with regard to that, the Circuit Court found him not liable to the trespass claim. The so-called Upper Shama Junction land that the Circuit Court and the Court of Appeal declared the Respondent as owner in their judgments in the previous suit was not the disputed land. The disputed land in the 1993 suit was the Old Cemetery land, which the Respondent said the 1st Appellant and Kwandahor had trespassed onto.

We find the arguments advanced by the Appellant in this appeal very sound. It is the Appellants' case that because the judgments of the Circuit Court and the Court of Appeal dated 29th June 1998 and 4th July 2002 respectively, did not indicate any boundaries of Upper Shama Junction lands over which the two courts suo motu declared Respondent owner contrary to his testimony that he was the custodian for the people in his position as chief, the said judgments are in vain or a nullity and therefore cannot operate as *res judicatta* notwithstanding the fact that the 1st Appellant did not pursue the case further to the Supreme Court?

This Court, in the case of **ANANE v DONKOR (1965) GLR 188**, which the Appellants referred to in their written statement of case, filed on 21/12/2015, made this position clear in holding (i) of its judgment. Ollenu, JSC who delivered the unanimous judgment of the Court held at page 192-193 as follows:

"When 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 lands 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".

It is quite obvious that in the previous case tried by the Circuit Court that terminated in the Court of Appeal on 4th July 2002 in respondent's favour, the Respondent did not categorically lay claim to any piece of land in his writ of summons. He did not seek a declaration of title to Upper Shama Junction lands. His contention was that he was the chief of Shama and the custodian of Upper Shama Junction stool lands, which included the old cemetery then in dispute. He therefore sued the 1st Appellant in this case and one other, asking

for damages for trespass onto the old cemetery land, which he described in the writ plus injunction. The authorities are legion that where in addition to a claim for damages for trespass, the plaintiff claims an injunction, title is automatically put in issue, because that claim postulates that the plaintiff is either the owner of the land in dispute, or has had (prior to the trespass complained of), exclusive possession of it. {See the cases of **NKYI XI v KUMAH [1959] GLR 281** and **KPONUGLO v KODADJA [1933] 2 WACA 24 (Privy Council**). The boundaries of the then subject-matter in dispute from which the trespass claim arose were: ***"the Cape Coast-Takoradi motor road; the Shama Junction-Shama motor road, a fuel station, GPRTU Offices, the land of Kofi Kuma and the land of Kwesi Ansah".*** The Respondent never changed his original claim, which was for general damages for trespass to Upper Shama Junction Old Cemetery land as described above and then injunction. However, the subject-matter of the trespass relief sought in the case before us now was Upper Shama Junction lands described as bounded on all sides by the lands of ***"Ituma, Kwasi Ansah of Agona family of Kumase-Shama, Bonsaba lands and Konfueku lands."***

Invariably, these two lands are not the same. There is therefore no doubt to the fact that the land which was the subject matter of the trespass suit between the Respondent and the 1st Appellant and the other in the Circuit Court, Sekondi from 1993 to the Court of Appeal in 2002, was completely different from the land which is the subject matter of the present suit. The issue as to the identity or dimension and the ownership of Upper Shama Junction lands as described by the Respondent in this suit was never determined in any way or on the merits by both the trial Circuit Court and the Court of Appeal in 1998 and 2002 as alleged by the Respondent. That was the very reason why the High Court, per Anthony Oppong, J in its ruling of 13th March 2007 referred to supra, dismissed the application for contempt filed by the Respondent against three of the Appellants herein. Also, the parties in the two suits were not the same. While in the first suit, the defendants were only two, in the present suit, there are fourteen (14) defendants who possess their lands separately. They gave testimonies supporting that fact.

Both the trial High Court and the Court of Appeal therefore erred when they found for the Respondent on the ground that the parties had once disputed

over the ownership of Upper Shama Junction lands as evidenced by the two judgments of the Circuit Court, Sekondi and the Court of Appeal dated 29th June 1998 and 4th July 2002 respectively. That finding is not supported by the evidence on record. The said previous judgments could not therefore operate as ***res judicata*** against the Appellants in this case as the trial High Court and the 1st Appellate Court held. We find the decisions of the two lower courts quite perverse since they are clearly unsupported by the evidence on record. We therefore allow the appeal and set aside the judgment of the trial High Court dated 25th July 2013, as affirmed by the Court of Appeal on 10/12/2014.

(SGD) YAW APPAU

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE - BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) G. PWAMANG

JUSTICE OF THE SUPREME COURT

COUNSEL

E. K. AMUA -SEKYI ESQ. WITH HIM GRACE LINDA NYARKO FOR THE DEFENDANTS/APPELLANTS/APPELLANTS.

SAMUEL DZIBA ESQ. FOR THE PLAINTIFF/RESPONDENT/RESPONDENT.