IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2014

CORAM: ANSAH JSC (PRESIDING)
ADINYIRA (MRS)JSC
DOTSE JSC
ANIN-YEBOAH JSC
AKAMBA JSC

CIVIL APPEAL
No. J4/17/2013

12TH MARCH 2014

EBUSUAPANYIN KWEKU ASSAFUAH	**1ST PLAINTIFF/APPELLANT/ APPELLANT**
ANTHONY APPIAH	**2ND PLAINTIFF**
REV. JOHN ADJEI	**3RD PLAINTIFF**

VRS

THE REGIONAL SECRETARY LAND COMMISSION SECRETARIAT SEKONDI	**1ST DEFENDANT**
REV. ARHIN DAVIES	**2ND DEFENDANT/RESPONDENT RESPONDENT**

JUDGMENT

JONES DOTSE JSC:

This appeal is an epitome of a phenomenon that is gradually creeping into the judicial and legal systems, and this is the difficulty of losing parties in previous litigations accepting the outcome of the decisions in those cases thereby respecting the age old principle that litigation must come to an end with the final resolution of previous and similar disputes albeit at the final apex court, in this instant the Supreme Court of Ghana.

The Plaintiffs/Appellants/Appellants, hereafter referred to as the Plaintiffs lodged an appeal against the judgment of the Court of Appeal dated 1st December, 2011 which confirmed an earlier decision of the High Court, Sekondi which was rendered on 15th June, 2010 in favour of the 2nd Defendant/Respondent/Respondent hereafter referred to as the Defendant.

FACTS OF THE CASE

On the 1st February 2007, the Plaintiffs herein instituted *Suit No E1/16/07* in the High Court, Sekondi against the Defendants in which they claimed for themselves and other developers, the following reliefs:-

a. An Order of Perpetual Injunction Restraining the 1st defendant from deleting the leases made on West Anaja Planning Scheme Sectors B, C, D and f.

b. An order compelling the 2nd Defendant to show the source of the Plan submitted to the 1st Defendant for plotting.

c. An order deleting the plotting of the plan submitted to the 1st Defendant by the 2nd Defendant for plotting.

d. Substantial damages against the 2nd Defendant for harassment and threat of death.

In order to understand the context of this suit and the earlier suits before it, it is desirable to quote in extenso some of the averments of the plaintiffs in their supporting statement of claim in respect of this suit No. E1/16/07. We will therefore reproduce paragraphs 1, 2, 3, 4, 5, 6 and 14 of the Plaintiffs statement of claim therein. These state as follows:-

1. "The 1st Plaintiff is the head of the Ebiradze Family of Anaji whilst the 2nd and 3rd Plaintiffs are the chairmen and Secretary of mount Zion residents Association and have instituted this action for themselves and other residents of the area within Sectors B, C, D and F of West Anaji Planning Scheme.

2. Sometime ago, the 1st Plaintiffs predecessors caused the areas within Sectors A, B, C, D, F and G of West Anaji Planning Scheme to be zoned as residential Plots.

3. One Mr. Nortey was seen developing a plot within sector 'C' of West Anaji Planning Scheme.

4. The 1st Plaintiffs predecessor Yaa Kwesi instituted action against Mr. Nortey and the 2nd Defendant in the High Court Sekondi and lost.

5. During the hearing **no plans were drawn** but the litigation centered on part of Sector 'C'.

6. The 2nd Defendant did not counter claim, but pleaded that his ancestor purchased part of Basia Aya's land at a public auction without disclosing the boundaries of the land that was acquired neither did he produce the certificate of purchase.

14. The Plaintiff says that since the 2nd **Defendant did not Counter-Claim, neither did he give evidence of his boundary nor a**

plan drawn, the 1st Defendant has no power to plot any land for the 2nd defendant and to delete any leases."

The 2nd Defendant therein vehemently denied those averments, and also averred as follows in paragraphs 5, 6, (a), (b), (c), (d), 7, 8, 9, 10 and 11 of the amended Defence and counterclaim as follows:

5. "In reaction to paragraphs 3, 4 and 5 of the statement of claim, the plaintiff says that in suit No. LS.25/92 entitled: Ebusuapanyin Yaa Kwesi as the head of Basia Aya's branch of the Ebiradze Family of Anagye sued Arhin Davies, (the present 2nd Defendant) and Mr. Nortey in the High Court, Sekondi."

[It should be noted that the reference to Plaintiff therein should have been [Defendants, and the Plaintiff herein is the successor to Ebusuapanin Yaa [Kwesi who instituted that case.]

6. "By his said writ the Plaintiff claimed for:

   a. Declaration of title to a large part and parcel of land situate at Anagye and bounded by the lands of Ebiradze family of Fijai, Nsona family of Anagye then Noweh's Ebiradze family of Anagye.

   b. An order quashing the purported lease that has been made to lease part of the land without the consent and concurrence of Plaintiff's family.

   c. Damages for trespass

   d. An order of perpetual injunction restraining the Defendants, their agents, servants, etc. from having any dealing with the land.

7. The Plaintiff lost this action and appealed to the Court of Appeal which also dismissed his appeal and eventually to the Supreme Court where also the Plaintiff lost."

8. "The 2nd Defendant contends that the Plaintiffs are therefore estopped by the said judgment from claiming any part of the said land against the 2nd Defendant.

9. The 2nd Defendant says that by paragraphs 5, 6, 11, 12, 13 and 14 of the statement of claim the Plaintiffs are trying to re-open the case which has been decided against them.

10. The 2nd Defendant says that the 2nd Defendant put in a plan which was used in the case of L.T.C Davies v Norweh made by one Andrew Essien and certified by him in 1927. The said case was heard by the Supreme Court of the Gold Coast Colony, Western Province, Secondee held before His Worship H.C.W Grimshaw, Esquire on 10th day of December 1912. This plan was upheld by all the three Superior Courts mentioned in paragraph 7 above.

11. It was this plan that was exhibited in the Daily Graphic and has also been submitted to the 1st Defendant for plotting. The original plan covers an area of over 119 acres.

COUNTERCLAIM

"The 2nd Defendant repeats paragraphs 1-14 and counterclaims for:

a. Declaration of title to the land in dispute

b. Damages for trespass

c. Recovery of possession

d. Perpetual injunction against the plaintiffs, their agents, privies, assigns and their workmen from interfering with the 2nd Defendant's ownership and possession of the said Land".

From the above pleadings in the instant appeal and the previous suit, in LS 25/92 intitutled **Ebusuapanyin Yaa Kwesi v Arhin Davies and Another,** what is clear is that, the Plaintiff herein and his predecessor both took action against the 2nd Defendant herein in respect of portions of land which appear to be similar in nature.

Whilst the emphasis of the Plaintiff's action seems to be on the fact that, the 2nd Defendant did not disclose the nature of the boundaries of the Basia Aya's land which the 2nd Defendants predecessors purchased at a public auction and also did not produce any relevant documents such as certificate of purchase, or a site plan, the emphasis of the 2nd Defendants case on the other had was that, once the Plaintiff herein is the successor in title to Ebusuapanyin Yaa Kwesi who lost the action in LS 25/92 against him from the High Court through the Court of Appeal to this Supreme Court, the Plaintiff is accordingly estopped from claiming any part of the said land against the 2nd Defendant.

What is actually of great moment to us in this court is the contention by the Defendant that all the three Superior Courts have upheld a 1927 plan which was prepared by one Andrew Essien and used in an earlier case of **LT.C. Davies v Norweh** in which certain vital declarations against interest were made by the Plaintiff's predecessors in title.

After a full trial, in the High Court, the learned trial Judge after evaluation of the pleadings, evidence and the law delivered himself thus:

"To found estoppels, the judgment pleaded or relied on will determine the person it affects. Where the judgment is based on a judgment in rem, the estoppels will affect all persons in Ghana and it will only affect parties or their privies where the judgment is in persona.

It is the 1st Plaintiff's case that he has brought this action as successor to their grantor Ebusuapanyin Yaa Kwesi for and on behalf of the 2nd and 3rd Plaintiffs. The said grantor had litigated with the 2nd Defendant Rev. Arhin Davies up to the Supreme Court. Since there is no contrary evidence to this effect, I hold that the parties to this action are same as the case in LS 25/92. Therefore, the principle of res judicata will operate against parties and their privies.

It is also Plaintiff's case that the 2nd Defendant herein cannot rely on a plan of the subject matter in the litigation in case Number LS 25/92 and a different plan tendered in this case as Exhibit '5' to ground estoppels.

In suit No. LS 25/92, the subject matter pleaded by Plaintiff was described as follows:-

"…a large part and parcel of land situate at Anaji and bounded by the lands of Ebiradze family of Fijai, Nsona family of Anaji then Norweh's Ebiradze family of Anaji."

In the current suit this was what the plaintiff (sic) leaded for:-

"An order of perpetual injunction restraining the 1st defendant from deleting the lease made on West Anaji Planning Scheme Sectors B, C, D and F."

In his evidence-in-chief, plaintiff said:-

"That suit was in respect of Sector 'C' plot demarcated for residential purposes. At the Court, because my former head

of family did not disclose the boundaries of that plot, the suit was dismissed."

I wish to state that, that suit was fully tried and judgment delivered. See exhibit 'B' and Exhibit 1".

From the said judgment, it is quite apparent that the learned trial Judge correctly appreciated the facts of the case and applied the law correctly. This is because, we have in this judgment established that the plaintiff's predecessor, Ebusuapanyin Yaa Kwesi indeed litigated with the 2nd Defendant herein and was a three time loser in the High Court, Court of Appeal and the Supreme Court.

What is also germane to this appeal is that the subject matter of this suit and the previous suit appear to be similar.

Are the parcels of land indeed the same or are different in nature?

Here again, we are of the view that the learned trial Judge correctly made the analysis of the facts and then came to the right conclusions. For example, it is clear from the record that the Plaintiff's predecessor in LS 25/92 failed to disclose the boundaries of the land he claimed and therefore lost the action, notwithstanding the fact that the 2nd Defendant herein did not counterclaim.

What indeed is of great moment to us is the lack of clarity or exactitude in the nature of the description of the land the subject matter of the instant suit.

We have indeed recognised the fact that, in cases of this nature, the most desirable thing to have done was to have given instructions for the preparation of a composite plan for the area in dispute. What this would entail is that the area in dispute in the previous suits would have been plotted alongside the area in dispute in the instant suit.

The plotting of the land in the instant suit would then be used to superimpose the area of land in the previous suits and the composite will then be used to determine whether the areas overlap.

We were anxious about giving the above scenario serious considerations, but this soon evaporated into thin air after an appraisal of the same thoughts by Lartey JSC in the judgment of the Supreme Court in suit No. CA J4/10/04 dated 16th March 2005 intitutled **Ebusuapanyin Yaa Kwesi v Arhin Davies and Another i.e LS 25/92** already referred to supra.

Having lost the action in the High Court as was referred to supra, the Plaintiff appealed to the Court of Appeal which by a unanimous decision delivered on 1st December 2011 dismissed the said appeal,

Still undaunted, the plaintiffs launched yet another appeal against the said judgment to this court which has resulted into this judgment.

The following are the grounds of appeal which the plaintiff filed to this court.

GROUNDS OF APPEAL

i. Exhibit 5 was produced independently by the 2nd defendant and therefore a self-serving document; and the Court of Appeal fell into the same error as the Trial Court in relying on this document for its judgment.

ii. The evidence on record does not support the holding that Exhibit 3 and Exhibit 5 are the same.

iii. The contents of exhibit 4 are contrary to the case of the 2nd defendant/respondent/respondent. The Court of Appeal failed to appreciate the submissions made in respect of Ground 3 (i) as contained in the notice of appeal before it and therefore failed to consider this ground of appeal.

iv. The 2nd defendant/respondent/respondent failed to lead evidence as required by law in prove of his counter claim, in particular, as regards identity and/or boundaries of the land the subject matter of the counter claim; and the Court of Appeal ought to have upheld the appeal.

v. The defence of estoppels will not avail the 2nd defendant/respondent/respondent in the circumstances of this case.

vi. The 1st defendant/respondent/respondent failed to defend the action and judgment should have been entered against it in favour of the plaintiff/appellant/appellant.

From the above grounds of appeal, it is clear that the thrust of the plaintiff's complaint against the judgments of the Court of Appeal and by implication that of the trial High Court all hinge around the lack of clarity of the boundaries of the land, the identity and location of the land and also the fact that, having counterclaimed in the instant suit, the 2nd Defendant failed to prove his counterclaim or the boundaries of the land.

In addressing these grounds of appeal, the Court of Appeal in their judgment delivered themselves thus:-

> "*The 1st Plaintiff/Appellant" who is the plaintiff herein, "admitted under cross examination that he sued out a writ claiming a declaration of title among others to the land in dispute but the action was dismissed by the Courts. This clearly shows that the Plaintiff/Appellant has no interest in the land he purported to lease to third parties which have been registered by the 1st Defendant/Respondent. It is proper therefore for the 1st Defendant to*

delete those leases from the records. The argument proffered in support of this ground of appeal is unsupportable and it is dismissed."

We in this court find ourselves in total agreement with the said findings and conclusion and are not prepared to disturb them.

On the other grounds of appeal which have a direct bearing on the identity and plan of the land which was used by the 2nd Defendant to do his plotting and lease to third parties, this is how the Court of Appeal rendered its opinion on the matter.

"It is true that the plan which was admitted by the trial court in the case of ***L.T. C. Davies v Norweh*** *in 1927 is the same as Exhibit 3 in the instant suit and has neither compass bearings nor grid references. In times past when surveying had not advanced to present levels such plans were admissible especially when drawn to scale as is the case in Exhibit 3. With the present scientific developments in the art of surveying accurate and geographic specifications such as compass bearings and grid lines are required to make the boundaries drawn on such plans more scientifically verifiable. Even without plans boundaries were marked by such physical features as trees, hills, rivers, lakes and rocks etc. In the absence of compass bearings and grid lines boundaries could also be determined by such physical features. It was common to have the boundaries of plans bearings and grid lines to be determined by such physical features. In the light of this the evidence of DW2 Alexander Kwamina Sakey from pages 122 to 142 of the record of proceedings is of vital importance. This witness testified that they went unto the land with Exhibit 3 and the 2nd Defendant pointed out his boundaries and physical features like a cotton tree, Ntankorfu village and a pond. DW2 continued that pillars were fixed and a Geographical and*

Positioning System which could give geographical co-ordinates like grid values and bearings was used to determine the scientific features of the boundaries as shown by the 2nd Defendant/Respondent on the ground which also tallied with the plan contained in Exhibit 3.

The print out from the Geographical Positioning System was plotted and sent to Survey Department which also approved it. The evidence of DW1, a Principal Surveying Technician, Daniel Okyere Asiedu is significant. This witness pointed out similarities in Exhibits 3 and 5 and concluded that "with these features or boundaries Exhibit 5 is same as Exhibit 3." He also testified that the slight difference of 0.773 of an acre between the two exhibits is tolerable or insignificant."

The Court of Appeal then expatiated on the evidence led by DWI and DW2 both of whom are experts in their fields on exhibits 3 and 5 and drew the necessary conclusions on the failure of the plaintiff to call expert evidence to disprove what the DWI and DW2 had testified upon, prompting the learned trial Judge to state at page 143 of the record that Counsel for the plaintiff can make the necessary application to also call expert survey evidence if he found that crucial to his case.

Based upon the above findings and analysis, the Court of Appeal then stated categorically that Exhibit 5 is not a self serving document produced by the 2nd Defendant but

"A scientifically improved Exhibit 3 which has already been accepted up to the Supreme Court. There is also the evidence of DWI that Exhibit 3 is the same as Exhibit 5."

It should indeed be noted that, in the absence of verifiable scientific Survey Plans, overt acts of physical features like Anthills, cemeteries, old settlements, sacred groves, streams, rivers and other features have always

been accepted and used to indicate boundary features between two adjoining lands.

On the submissions by learned Counsel for the Plaintiff that the failure of the 2nd Defendant to call boundary owners in support of the identity of the land is fatal to their case, the Court of Appeal delivered a lethal decision to the following effect:-

> "*The boundaries of the land the parties are litigating over is well known to the parties and does not need boundary owners to establish." Emphasis*

We have earlier on stated that the Supreme Court, in the previous suit No. CA J4/10/04 dated 16th March 2005 in the suit intitutled ***Ebusuapanyin Yaa Kwesi-Plaintiff/Appellant v Arhin Davies & Anr.-Defendants/Respondent*** delivered an incisive decision which to us has removed all doubts about the identity and location of the land in dispute as well as establish the lack of candour on the part of the 1st plaintiff and his team of legal advisers.

This is what Lartey JSC, speaking on behalf of the Court said in that judgment.

> *"It was also part of the contention of the plaintiff that the first defendant, while tracing his root of title from Basia Aya, failed to show the identity, the extent and position of the land.* ***It is difficult to comprehend the force of this argument coming as it were from the plaintiff because when the motion for appointment of a surveyor was filed by counsel for the defendants, it was the same plaintiff who by his affidavit of 4th March 1994 opposed same on the ground that the issue in controversy did not call for the making of a plan. If the***

making of a plan was not necessary in the trial, why should he turn round to accuse his opponents of failure to identify the land in dispute or show the extent and position of it? By unwittingly resisting the said application the plaintiff failed to acknowledge its effect to his own detriment. He failed to realize that as the plaintiff claiming in a land litigation it was he who bore the primary responsibility or the burden of producing evidence on the issue of a surveyor's plan to strengthen his case. If this had been done the entire land he claims to own to the exclusion of the defendants would have been clear on the evidence. I do not appreciate the legal or moral basis for the plaintiff's attack against the defendants on the issue of the extent of the disputed land." Emphasis supplied.

From the above quote from the judgment, it is clear that the Supreme Court actually considered the issue of the non-preparation of composite plans by the parties in the previous suit and came to the conclusion above.

In order to respect the decision of the panel that decided the above case and considering the fact that it was based on sound deductive logic and reasoning, we are unable to depart from it.

The above constitute the main reason why we decided to jettison the Plaintiff's request for a plan and the complaint of over reliance on exhibits 3 and 5 which to him are self serving documents. Even though the said arguments appeared attractive on the surface they soon fizzled out into insignificance when put under close scrutiny.

What should be noted by both litigants and learned counsel is that, a greater need of attention is required of them when dealing with land cases. This is because land has become an asset of huge economic benefit that a lackaisidical approach which is what we have seen as the rule rather than

the exception has the recipe of denying whole communities and generations yet unborn of their birth right.

We have observed that in the instant case where the pleadings have disclosed the plea of Res Judicata as having been established, there ought to have been an assessment as to whether that decision applied to the parties and the subject matter or not.

What is worthy of note from the pleadings and the evidence is that there is consensus about the application of the judgments to the parties. The really vexed issue is the subject matter, i.e. whether the previous suits apply to the subject matter of the land in dispute in the instant case.

Having perused the judgments in the previous suits, especially those from the High Court, through to the Supreme Court in suit No. LS 25/92, there is little doubt that the parties are really adidem on the identity of the subject matter of the land as well as it's location.

If the plaintiff had been vigilant from the beginning and candid he could have established his claims in respect of the cases with more particularity and exactitude from the onset of the legal battle. But it appears that, the plaintiff changed the character of his case with the changing fortunes of his case in the law courts.

There is a public policy that litigation must come to an end and that is why there is a limit as to how far one can go on the litigation ladder. For now, the Supreme Court is the highest court of the land and having been there where the very issues being raised here had been argued and dealt with, it will be the highest breach of this age old public policy that there must be an end to litigation to allow the plaintiff to profit from his conduct.

Secondly, to permit the plaintiff to subtly mount another challenge to a validly subsisting Supreme Court judgment will be an insult and abuse of the judicial and legal process. Indeed, it appears that the latter is a recent phenomenon which has crept into the legal system whereby unsuccessful litigants are advised by their legal advisers to cleverly mount fresh suits commencing from the trial courts and seek to outwit the binding nature of the previous decisions against them. See cases like **Henderson v Henderson (1843) 3 Hare 100**, **Barrow v Bankside Agency Ltd. [1996] 1 W.L.R. 257, at 260** where it was reiterated that:

> *"It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits. See also NAOS Holding v Ghana Commercial Bank [2011] SCGLR 492*

In the instant case, since we have come to the conclusion that the issues raised in the instant appeal, though attractive had been raised and dismissed by this very Supreme Court, there is no need to pursue this case any further.

In view of the above, the appeal herein is dismissed as being without any merit. The Court of Appeal judgment of 1st December 2011 is accordingly affirmed.

(SGD) J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

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

(SGD) ANIN YEBOAH
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