IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)

YEBOAH, JSC

BAFFOE-BONNIE, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL APPEAL
NO. J4/10/2016

24TH OCTOBER, 2018

NANA ASIAMAH ABOAGYE ..... DEFENDANT/APPELLANT/APPELLANT

VRS

ABUSUAPANYIN KWAKU APAU ASIAM ..... PLAINTIFF/RESPONDENT/RESPONDENT

JUDGMENT

PWAMANG, JSC:-

This case takes its roots from an earlier case filed in the High Court, Accra, Suit No. 2539/91 intituled Nana Asiamah Aboagye v 1.Nana Addo Dankwa III, 2. The Attorney-General. The plaintiff in that case claimed on behalf of four families for ownership and possession of a parcel of land at Larteh adjoining the Okuapeman Secondary School. He contended that the land was the ancestral land of the four families but unknown to them the predecessor of Nana Addo Dankwa III, Akropong Omanhene Nana Kwame Fori, purported to grant it out in the 1960s for the building of Okuapeman Secondary School without their consent. Their case was that the school occupied only a portion of

the land and they did not know their whole land had been taken until their activities on the land were challenged by subjects of the Akropong Stool and a search at Lands Commission revealled that the land had indeed been given out, hence the suit. The families were; Okyeame Kwame Asiem, Nana Obeng Kwabena, Wontumi and Akyeampong Families all of Larteh-Ahenease. The High Court gave judgment on 27th September, 2002 in favour of the plaintiff. At the trial, plaintiff tendered a plan of the land on which the boundaries of land belonging to each of the four families as well as Okuapeman Secondary School were delineated. The total land of the families came to approximately 369 acres while the land of Okuapeman Secondary School was approximately 37.60 acres.

It appears that after the judgment there was no appeal so there was peace until 27th February, 2008 when plaintiff herein took out a writ of summons from the High Court, Koforidua against the 1st defendant and some "Developers/Trespassers" claiming that the entire 369 acres of land at Larteh adjudged by the High Court, Accra in Suit No. 2539/91 is the exclusive property of the Nana Obeng Family of which he was Head. Nana Obeng Family is one of the four families that were adjudged to be owners of the land in the earlier suit. He sued the 1st defendant, who is the head of Okyeame Kwame Asiam family, another of the four families in the earlier case, and the one who was given a power of attorney to represent the four families in that case. The grounds for the new suit were that after the judgment 1st defendant had the land registered in only his name at the Lands Commission, Koforidua and made grants of parts of it to developers without plaintiff's authorisation. As to the interest of the other three families that were involved in the first case, plaintiff stated in his statement of claim that they were licensees of his family but it was his family that had exclusive ownership of the land. A summary of the reliefs plaintiff endorsed on his writ of summons is as follows; (a) declaration of title, (b) recovery of possession, (c) deletion of 1st defendant's registration, (d) general damages for trespass, and (e) perpetual injunction.

The so called "Developers/Trespassers" did not participate in the case and only 1st defendant sought leave to enter appearance and filed defence on 29/12/08. On the substance of plaintiff's claim, defendant denied that they the other families were

licensees but admitted registering the land in his name. In one breadth, defendant pleaded that he registered the land to ward off trespassers and in another, he stated that when he was given the power of attorney to represent the families in the first case, they all agreed that if he succeeded in claiming back the land he should take over the whole land since he was to use his own resources to fight the case in court. However, pursuant to leave of the court, defendant through his new lawyer, Sir Asante-Ansong, filed an amended defence on 3/4/09. This defence was further amended by the leave of the court on 17/4/12. In the amended defences defendant maintained his denial of the claim by plaintiff that the other families were licensees and at paragraph 17 he further pleaded as follows;

"17. The first defendant will contend at the trial that the land that was the subject matter of the suit intituled Nana Asiamah Aboagye Vrs. Nana Addo Dankwa III & Anor Suit No. 2539/91 was owned by the families whose heads of family executed the Power of Attorney and the plaintiff's family...."

In view of the state of the pleadings we consider issues (e) and (f) set out in plaintiff's application for directions as the central issues the determination of which would lead to a resolution of the merits of the case. They are as follows;

(e) whether or not the 1st defendant and his family are licensees on plaintiff's family land.

(f) whether or not the land in dispute is the absolute property of Nana Obeng Kwabena Family.

At the trial the plaintiff narrated traditional history of how his ancestor was the first person to discover the land before inviting the ancestors of the other families to join him hence his ancestor was the original owner of the entire land. He called a witness, PW1 who said the other families have only usufructuary interest in the land. Usufructuary interest in land is a substantial interest higher than a license that plaintiff himself talked of. The 1st defendant's testimony showed that his family's portion of the land was acquired by his family and not given to it by plaintiff's family. More important, he stated in several parts of his evidence that the land belongs to the four families and

in support he tendered the power of attorney he was given to initiate the first case, the judgment in that case and the land plan with delineations of each family's part of the 369 acres that was tendered in the first case.

Before proceeding, we wish to comment that having regard to issue (e) the court should have pursuant to Order 4 Rule 5(2)(b) of the **High Court (Civil Procedure) Rules, 2004 (C.I.47),** *suo moto* ordered the Wuntomi and Akyeampong families to be joined to the action as defendants and not simplistically accepted plaintiff's say so that he spoke to them but they refused to join in the suit. In any case, their absence notwithstanding, the question whether they were owners of their respective lands or licensees was subsumed under issue (e) set down as an issue for determination and the trial judge had to resolve that issue having regard to the totality of the evidence before the court, both documentary and oral.

In resolving the above issues the trial judge in his judgment said he was applying the principle in **Adjeibi-Kojo v Bonsie [1957] WLR 1223**. The principle in that case is applicable where a court is faced with conflicting traditional evidence and there is little to choose between the stories of the parties. In such situation, the law is that the court is required to evaluate the conflicting traditional evidence against undisputed evidence of events and acts of ownership in living memory adduced before the court and opt for the version of the traditional evidence that is consistent with the undisputed evidence. According to the trial judge, an application of this principle led him to the conclusion that the other families are licensees and that plaintiff's family is the absolute owner of the entire 369 acres. The Court of Appeal affirmed this finding and being dissatisfied the defendant further appealed to this court.

Under Ground 16 of the grounds of appeal, the defendant has argued before us in his statement of case that, in the application of the *Adjeibi-Kojo v Bonsie* principle, both the High Court and the Court of Appeal ought to have considered the traditional evidence against the recent events and acts of ownership as proved by the power of attorney that was used for the earlier case, the judgment in that earlier case and the plan therein that were all tendered in the instant case. Those documents that are not disputed show unequivocally that the other three families are owners of their respective

lands and not licensees and that plaintiff's family owns only 106 acres and not the entire 369 acres. We are in agreement with defendant on this ground of appeal. This is what is stated in the Power of attorney tendered as Exhibit "4";

"WHEREAS since time immemorial certain parcels or pieces of land situate and being around the Okuapeman Secondary School site ***have been vested in the under mentioned families of Larteh-Ahenease***

AND WHEREAS by native custom the rights in ***the said lands have become vested in us as HEADS OF FAMILIES***

NOW BY THIS POWER OF ATTORNEY we YAW OTWE, Head of the WONTUMI FAMILY, OTUEI DWAMENA, Head of AKEAMPONG FAMILY, all of the ADABRI clan of Larteh-Ahenease, MOSES KWAKU APAU-BEKOE, Head of Nana Obeng Kwabena Family of the AKEREMEDE clan also of Larteh-Abenease hereby APPOINT NANA ASIAMA ABOAGYE, Head of the OKYEAME KWAME ASIAM FAMILY of the AKEREDE clan of Larteh-Abenease our ATTORNEY to act on our behalf in all matters connected with the said parcel of land inclusive of the area encompasing the Okuapeman Secondary School..."

This power of attorney was prepared by lawyer Ohene Obeng of Larteh who interpreted and explained it to the donors including plaintiff's head of family at the time before they executed it. In the judgment in Suit No 2359/9, the four families were stated to be allodial owners of the land. Therefore, by these documents the lands were vested in the various families with the same vested interest so plaintiff's testimony to the contrary ought not to have been preferred to the case of defendant that they are all owners of their respective parts of the land and not licensees. Furthermore, the settled principle of the law of evidence is that where oral evidence conflicts with documentary evidence which is authentic, then the documentary evidence ought to be preferred over and above the oral evidence. See **Agyei Osae v Adjeifio [2007 – 2008] SCGLR 499**.

Where a second appellate court, such as we are, comes to the conclusion that a finding in a judgment appealed from is inconsistent with undisputed documentary evidence on the record of the court, the appellate court is mandated to set that finding aside unless there are compelling reasons to the contrary. We find no reasons in this case that

would hold our hand from setting aside this finding and same is hereby set aside. In its place, we state that the 369 acres of land subject matter of this case belongs to the four families in the proportions indicated in the plan used in the earlier case and tendered in this case as Exhibit "6". The plaintiff based his action on Suit No 2359/91 so he is deemed to have adopted the proceedings and judgment of that case. He cannot approbate and reprobate at the same time. In the circumstances, Ground 16 of the grounds of appeal succeeds.

We notice from defendant's evidence that though he stated that the other families authorised him to take over the land, he could not prove same. In any case, he did not claim exclusive ownership of the 369 acres but said in several parts of his evidence that the land belonged to all the families and that he registered the whole land to protect it against trespassers. Defendant in his amended defence even left out his counter claim for injury to his reputation. Furthermore, defendant challenged plaintiff's status as head of his family but, in our view, plaintiff adduced sufficient evidence to prove that he was indeed the head of Nana Obeng Kwabena Family.

In fact, upon close scrutiny of the pleadings we are of the opinion that this case should have been resolved by ADR from the moment 1st defendant amended his pleadings and contended that the land was for all four families which is consistent with the documents which were not disputed.

Having held that the land belongs to all four families, we do not see any use in considering each of the other grounds of appeal. Based on our conclusion, we would proceed to dismiss plaintiff's reliefs (a), (b), (d) and (e). However, since the registration of the 369 acres in defendant's name creates the impression that the entire land belongs to him, we grant plaintiff's relief (c) and order the Lands Commission, Koforidua to delete from their records in respect of the land subject matter of this case the registration of defendant's name and that of any grants made by him. For the avoidance of doubt, we declare that the land is owned by the four families and each family's land is as delineated on the land plan, Exhibit "6". Consequently, the appeal is allowed in part.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

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

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Pwamang, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

COUNSEL

JOSEPH ACHEAMPONG FOR THE DEFENDANT/APPELLANT/APPELLANT.

MATTHEW OTENG FOR THE PLAINTIFF/RESPONDENT/RESPONDENT.