LIN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA - A.D. 2021

CORAM: DOTSE (PRESIDING)
PWAMANG JSC
TORKORNOO (MRS.) JSC
AMADU JSC
KULENDI, JSC

CIVIL APPEAL
NO. J4/22/2021

15TH DECEMBER, 2021

1. MRS THERESA BOAKYE
2. FRANK ASIEDU BOAKYE
SUING PER THEIR LAWFUL ATTORNEY
NAPOLEON TWUM BARIMAH
(AS LEGAL REPRESENTATIVES OF THE
ESTATE OF KINGSLEY KWADWO BOAKYE) } DEFENDANTS/RESPONDENTS/ APPELLANTS

VRS

OPANIN KWAME ASIEDU …….. PLAINTIFF/APPELLANT/RESPONDENT

JUDGMENT

TORKORNOO (MRS.) JSC:-

Background facts

The plaintiff/appellant/respondent is the brother of one Kingsley Kwadwo Boakye (deceased). The defendants/respondents/appellants are the widow and son of Kingsley

Kwadwo Boakye (hereinafter referred to as Kingsley Boakye). The plaintiff sued in his capacity as brother and customary successor of Kingsley Boakye. The subject matter of the dispute is six plots of land situated in Abenase near Oda, with a house thereon numbered house No. J2, Abenase.

The parties are agreed regarding the location of the land, and the fact that the house in issue was built by Kingsley Boakye from resources that none of his mother's children contributed to. Beyond that, they disagree on who acquired the land on which the house is built, and the nature of Kingsley Boakye's interest in the house after he built it.

According to the Plaintiff/Respondent (hereinafter referred to as Plaintiff), the land was allocated to his mother Maame Yaa Anyanyan of Abenase (also known and referred to in this judgment as MaameKyerewaa) by the Abenase Town Development Committee (hereafter referred to as the TDC), in 1979, and that she made it clear at the time of obtaining the land that she wanted six plots of land because she had twelve children. Plaintiff states in his statement of claim that the *'said land remained the property of MaameKyerewaa to the notice of all*', and at the time that Kingsley Boakye *'decided to construct a family house on the land in the lifetime of Maame Kyerewaa,* ***he knew that it was land for his mother***'. (emphasis mine)

It is also the position of Plaintiff in paragraph 15 of his statement of claim that Kingsley Boakyeopenly stated that he was *'building the house for his mother*' and consequently named the building Kyerewaa Villa. Following these positions, Plaintiff urged thateven though Kingsley Boakyebuilt the house in dispute, he had only a life interest in the building, and it was family property. He claimed for:

1. *A declaration that House No. J2 popularly called Kyerewaa Villa, Abenase near Oda is the property of the family of Maame Yaa Kyerewaa alias Maame Yaa Anyanyan (deceased)*
2. *Damages for trespass*

3. *Perpetual injunction to restrain the defendants, their agents, representatives and all privies from laying claim to the said house*

The case of the Defendants/Appellants (Defendants) in their Statement of Defence was that the six plots of land in Abenase numbered Plots 3, 4, 5, 10, 11, and 12 were purchased by Kingsley Boakyeat the time that one Nana Meenue Anim 11 was the Chief of Abenase. He was issued with receipt number 003 for the money paid. Thereafter, house No J2Abenase, was put up jointly by the Kingsley Boakye and his wife, the 1st defendant. Thus the house was the personal property of Kingsley Boakye and his wife, and not family property.

They counterclaimed for:

1. *A declaration that the property the subject matter of this suit is the bona fide property of the late Kingsley Kwadwo Boakye.*
2. *A further declaration that the 1st Defendant is a joint owner of the property with the late Kingsley Kwadwo Boakye, having jointly put it up with their joint resources.*
3. *An order for recovery of possession of the said property.*
4. *An order of perpetual injunction restraining plaintiff from laying claim to the said property.*
5. *Any further or orders as the Honourable Court might deem fit to make*.

High Court Decision

In resolving the rival claims to the land and building thereon, the trial judge, after perusing the evidence before her, concluded that she did not believe the testimonies of Plaintiff and his witness (PW1) regarding the land having been acquired by MaameKyerewaa.

She accepted the testimony of defendants' attorney and witness (DW1) that Kingsley Boakye paid for the land, and was issued with a receipt for the payment. She relied inter alia on the decision in **Fosua & AduPoku v Adu Poku Mensah[2009] SCGLR 310** stating the settled principle of law that documentary evidence should prevail over oral evidence, especially if the document is proved to be authentic.

The high court was impressed with the precise numbering of the plots on the receipt tendered by Defendants, and the fact that it gave an actual description and identity of the six plots of land. The trial judge found the fact that there was a record indicating the date of purchase significant as significant, the names of purchaser and vendor being Kingsley Boakye and Nana Meenu Anim 11 respectively. From the testimony of the Defendants' attorney that the receipt was found among Kingsley Boakye's things and sent to him via DHL, she was satisfied that it came from proper custody. She concluded and held that the land with building thereon belonged to the late Kingsley Boakye.

The High Court did not find the evidence on loans obtained jointly by the deceased and 1st defendant to be persuasive of the position that the house was put up from the joint resources of the couple. She relied on **Article 22 (1) of the 1992Constitution** to justify settling the house on the defendants as part of the estate of the deceased.

Article 22 **of the 1992Constitution** reads:

22(1)*A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will*

22(2)*Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses*

22(3)*With a view to achieving the full realization of the rights referred to in clause (2) of this article -*
a. spouses shall have equal access to property jointly acquired during marriage;
b. assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage

Court of Appeal Decision

The Plaintiff appealed and the Court of Appeal overturned the High Court judgment. On the issue of the land, the Court of Appeal evaluated that from the totality of the evidence, the Plaintiff and PW1had proved that it was acquired by Maame Kyerewaa and the allocation of the land took into consideration the number of children she had. She had also exercised acts of possession during her lifetime.

Citing the decisions in **Mondial Veneer Gh Ltd v AmuahGyebu XV [2011] 1SCGLR466** and **Abbey and Others v Antwi V [2010] SCGLR 17,**which outlined the duty of a plaintiff in a suit of declaration to title, the Court of Appeal found that it was the Plaintiffwho had discharged each aspect of the duty to adduce evidence of the root of title, mode of acquisition, acts of possession, including user of the land over a period of time.

The Courtof Appeal rejected the finding of the High Court onthe receipt tendered as exhibit 1, and held that it had manifest deficiencies that rendered it too weak to displace the credible evidence of acquisition of land by MaameKyerewaa. Further, the court held that it failed as an instrument of transfer of interest in land, contrary to **Section 1 (1) of the Conveyancing Act 1973, NRCD 175 which reads:**

1. *A transfer of an interest in land shall be by a writing signed by the person making the transfer or by the agent of that person duly authorized in writing, unless relieved against the need for a writing by section 3*

Whereas the High Court had rejected the testimony of PW1 that he was chairman of the Abenase TDC that had allocated the land to Maame Kyerewaa between 1980 and 1986 on grounds of inconsistencies in his testimonies and lack of credibility, the Court of Appeal had a contrary view.

Citing the decision of this court in **Kusi and Kusi v Bonsu [2010] SCGLR60**, the Court held that *'having regard to the fact that the evidence given by PW1 was some thirty years old*, inconsistencies or minor departures should not be the sole reason for the rejection of material evidence regarding the acquisition of land. And that what was material evidence was whether PW1 was chairman of the TDC from 1980 to 1986, and the TDC had allocated land to Maame Kyerewaa.

The Court of Appeal held that the testimony that PW1 was chairman of the Abenase TDC was not negated by contrary evidence. Further, the fact that the TDC was the body allocating lands was accepted by all the parties and their witnesses. On the preponderance of probabilities therefore, the Court determined that it was more likely that Maame Kyerewa, a citizen with usufructury rights in land belonging to her community, would be allocated six plots of land by the TDC, than that six plots would be sold by an unnamed party to her son, who was out of the country.

The Court of Appeal also found that there was no credible evidence regarding acts of possession by Kingsley Boakye prior to his construction of the building on the land. On the other hand, the evidence that Maame Kyerewa had farmed on the land was uncontested.

Regarding the building on the land, the Court of Appeal was persuaded by Plaintiff's position that the house was built by Kingsley Boakye to honor the mother. In acceptance of the Plaintiff's case that Kingsley Boakye was the builder of the house on land owned by their mother, the Court of Appeal made this legally resonant statement on page 20 of the judgment: *'Whether he did so with monies actually earned, or by*

bank loans did not change the fact that the building was put up on land acquired by his mother, ***which gave it the character of family property***'. (emphasis mine)

Appeal to Supreme Court

The Defendants' sole ground of Appeal in this court is that the judgment is against the weight of evidence.

In **Attorney General v Faroe Atlantic**[**2005 - 2006] SCGLR** 271, this court, through Wood JSC as she then was, started to put to bed the shield raised against appeals on this omnibus ground, that when an appellant urges that the judgment is against the weight of evidence, the appellant is required to focus on the pieces of evidence that were misconstrued by the lower court, and is restrained from addressing questions of law that had not been set down for resolution in the grounds of appeal. On page 308, she said *'In my opinion, the argument that (this constitutional issue and for that matter) a legal issue cannot be addressed under an omnibus ground is untenable. It seems to me that in strictness, this common ground of appeal is one of law, for in essence, what it means, inter alia is that having regard to the facts available, the conclusion reached, which invariably is the legal result drawn from the concluded facts is incorrect. The general ground of appeal is therefore not limited exclusively to issues of fact. Legal issues are within its purview.*'

This court settled the direction to review legalities that would help advance or facilitate a determination of the factual matters where the ground of appeal is that a judgment is against the weight of evidence in **Owusu Domena v Amoah [2015 - 2016]1 SCGLR 790**. As the court pointed out, the sole ground that a judgment is against the weight of evidence throws up the case for a fresh consideration of all the facts and law by the appellate court, including whether a party has discharged the burden of persuasion or producing evidence required, these two being a matter of law.

In the current case where the first appellate court reversed the holdings of the trial court, because their consideration regarding the applicable law to both the agreed and disputed facts before the court was different from the trial court, the duty of this court is to determine whether the legal evaluations of the court of appeal were supported by the evidence on record, or the reversal of the holdings was an error that has occasioned a miscarriage of justice.

The current appeal invites a re-hearing of the grounds in law on the findings of fact that led to the reversal of the High Court's decision by the Court of Appeal on the two points of (1) who acquired and owned the land in dispute, and (2) who ought to hold proprietary rights over the house in issue. Our consideration of whether the judgment is against the weight of evidence will be structured under those two points of contention.

Acquisition and Ownership of the land

While the high court held that she found a great deal of inconsistency in the evidence of PW1 and the discrepancies so significantly contradictory that she could not and did not believe it, it was the evaluation of the court of appeal that the testimony of PW1 that he was chairman of the TDC in the 1980s had not been negated and so his evidence regarding the allocation of land to Maame Kyerewa must also be given appropriate weight. The appropriate weight given was to accept PW1’s testimony of the land being allocated to Maame Kyerewaa and how the land was allocated to her as more probable than the evidence of defendant’s attorney and DW1 on how the land was purchased by Kingsley Boakye.

In his Statement of Case, Counsel for Defendants has drawn attention to the fact that the testimony of DW1 directly attacked PW1's alleged position that he was chairman of the Abenase TDC, and so the Court of Appeal erred when it held that PW1's testimony that he was chairman of the TDC was not negated. We agree.

DW1 had testified that he was the chief linguist of Nana Meenue Anim 11, and that PW1 was never the chairman of the Abenase TDC during that time that Nana Meenue Anim 11 was chief of Abenase. DW1 contradicted this alleged chairmanship of PW1 further by naming the chairman and members of the TDC from 1980 to 1986. Under cross-examination, no attempt was made to shake DW1's claim to being Chief linguist of Nana Meenue Anim 11 and the assertiveness with which he testified that PW1 had not been chairman of the TDC.

We agree with counsel for Defendants that this failure to shake DW1's testimony that he was the chief linguist of Nana Meenue Anim, and that PW1 was never chairman of the Abenase TDC during the term of Nana Meenue Anim 11 is a negation that should have weighed on the mind of the Court of Appeal when it chose to prefer the testimonies of Plaintiff and his witness to that of defendants and their witness regarding who had discharged the burden of persuasion on acquisition of the land in issue from the Abenase TDC.

The burden of persuasion is defined by **section 10(1) of the Evidence Act NRCD 323** as:

10 (1)*For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court*
(2)*This burden of persuasion may require a party to raise reasonable doubt concerning the existence or non-existence of a fact or that he establishes the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond reasonable doubt*

Both PW1, on one hand, and Defendants and their witness on the other hand, agreed that Nana MeenueAnim 11 was the authorizing power behind the allocation of lands by

the TDC during the period that they were alleging that MaameKyerewaa and Kingsley Boakyeacquired the land in different ways and on different dates.

We note that after Defendants stated in paragraph 6 of their Statement of Defence that the land was purchased in 1983, that receipt number 003 had been issued to cover the purchase, and *'the purchase was made when Nana Meenue Anim 11 was the Chief of Abenease*', the Plaintiff categorically denied paragraph 6 in paragraph 2 of his Reply and Defence to Counterclaim. Plaintiff was also silent on who was the Chief of Abenase who authorized the allocation of lands in his witness statement that he adopted as evidence in chief, and throughout his cross-examination.

In contradiction of Plaintiff's Reply and stoic silence over the authorizing chief being Nana Meenue Anim 11, PW1 corroborated the case of Defendants that it was Nana Meenue Anim 11 who appointed the TDC in 1980 for the allocation of the contested lands in paragraphs 4 and 5 of his witness statement. Thus while Plaintiff's only witness corroborated the Defendants' case in paragraph 6 of the Statement of Defence that the land was acquired during the time of Nana MeenueAnim 11, the Plaintiff had denied this critical position in his Reply and chosen to be silent on this evidence.

Despite the fact of plaintiff denying defendant's averment that the land was acquired by Kingsley Boakye in the time of Nana Meenue Anim, plaintiff's only witness went to strange lengths to contradict himself on the time he became Gyaasehene for the purpose of placing that period of time within the period that this Nana Meenue Anim was chief.

The contradiction in the testimony of PW1is significant because of the unshaken testimony of DW1 that his knowledge of PW1 never being appointed chairman of the TDC came from his personal position as the chief linguist of Nana Meenue Anim 11. Our view is that had DW1 been lying about being the chief linguist of Nana Meenu Anim 11, this testimony could easily have been challenged with the name of the person who was

truly chief linguist, but no such attempt was made to discredit DW1 on his holding this office. As such, DW1's firm assertion that he knows PW1, the fact that he is from Abenase and lives in Ayirebi because he married from there, that *'it is not true that he was the chairman of the Abenase Township Development Committee*', and his closing words that *'Mr Attuah never became the chairman of the committee.'* constituted a strong negation of PW1's testimony that he acted as chairman of the Abenase TDC when land was allocated to Maame Kyerewaa in the time of Nana Meenue Anim 11. The fact that the testimony of PW1 on the names of the persons who were officers on the TDC with him was assertively challenged with counter names by DW1 also constituted a negation of that testimony.

Indeed, the trial judge's dismissal of the Plaintiff's case on the allocation of the contested lands to Maame Kyerewaa by PW1 in his alleged capacity as chairman of the TDC, was founded on her inability to accept PW1 as a credible witness, flowing from the improbability of several parts of his testimony.

PW1 discredited himself unnecessarily on the simple issue of who appointed him Gyaasehene of Abenase and when he was so appointed. PW1 started his evidence in chief by confidently identifying himself as Gyaasehene of Abenase. This testimony was on 27th June 2016. This piece of testimony was questioned early in cross-examination with *'When did the Gyaasehenship started* (sic)'.

PW1 answer was that he was installed Gyaasehene in 1986. From his earlier testimony, this is the year that his tenure as chairman of the TDC ended. When confronted with the question that he became Gyaasehene under the chief Nana Baafi Ankrah, and so could not have allocated lands during the time of Nana Meenue Anim 11, PW1 denied this and said that he was installed Gyaasehene in the tenure of Nana Meenue Anim.

Then he was asked whether he was related to one Nana Kwame Anaafi. His voluntary answer was that Nana Anaafi *'relinquished his title after Nana Meenu Anim's term* (as

chief)'. Pressed further, he admitted that Nana Anarfi was indeed the Gyaasehene of Nana Meenue Anim, and that he PW1 only became Gyaasehene after Nana Anarfi abdicated. Having testified earlier that Nana Anaafi's abdication occurred after Nana Meenue Anim 11's term, the only inference that could be made was that PW1 could not have been installed Gyaasehene during Nana MeenueAnim's term.

We do not think that this was a minor departure from truth and an inconsistency that could have occurred because of the passage of time between the time that the events in issue occurred (1980 to 1986) and 2016 that PW1 testified, as the court of appeal evaluated. The court of appeal referred to the decision in **Kusi and Kusi v Bonsu** (cited supra) on this point, a case that applied **Effisah v Ansah[2005-2006] SCGLR 943** in the principle that '*minor, immaterial insignificant or non-critical inconsistencies must not be dwelt upon to deny justice to a party who had substantially discharged his or her burden of persuasion*'

In the case before us, the burden of persuasion on plaintiff as to Maame Kyerewaah being the owner of the land in issue required that he discharge the burden of producing evidence on this fact. This was the primary function of PW1 – to corroborate the testimony of plaintiff that this land was indeed allocated to Maame Kyerewah, and that he personally oversaw the allocation as chairman of the TDC.

Thus if there is strong negation of PW1 being chairman of the TDC at all, then such a negation attacks the very root of his testimony, and should affect the weight that must be attached to the totality of the evidence he brought to the trial and their capacity to persuade on a preponderance of probabilities. In **Effisah v Ansah** (cited supra), this court settled the principle that it is only major discrepancies that go to the root of testimonies that should affect the weight that must be attached to evidence given at trial.

Was PW1 Gyaasehene of Abenase during the time that Nana Meenue Anim was chief? From his own testimony, he became Gyaasehene after Nana Anarfi abdicated the position of Gyaasehene, and Nana Anarfi abdicated after the tenure of Nana Meenue Anim. So why would PW1 say that he was appointed Gyaasehene by Nana MeenueAnim 11 only to turn round and confirm that Nana Meenue Anim's Gyaasehene abdicted after the tenure of Nana Meenue Anim 11, and this Gyaasehene was Nana Anarfi?

The only explanation one can find for this unnecessary incongruity is an anxiety to link his office as Gyaasehene to the chieftaincy of Nana Meenue Anim 11, knowing that it was during the time that Nana Meenu Anim 11 was chief that the lands in issue were allocated. Having discredited himself on the issue of the period that he was Gyaasehene of Abenase, and in the light of the unshaken testimony of DW1 that PW1 was never chairman of Abenase TDC by, the trial judge was right in refusing to be persuaded by the testimony of PW1 that he personally supervised the allocation of land to Maame Kyerewaa.

This is especially so because added to the discrediting of his testimony as chairman of the TDC through DW1's testimony, and the discrediting of his testimony that he was appointed Gyaasehene to Nana Meenue Anim, PW1 also gave inconsistent testimonies about how Maame Kyerewaa obtained the land that he came to court to testify about.

His original testimony in his witness statement adopted as his evidence in chief was that she applied for '*a plot of land*', and changed the request when they went onto the land to demarcate same, to six plots of land, *'as she had many children*'. He went on to say in paragraph 15 therein that the TDC agreed to her request and gave her six plots of land. However under cross-examination, he first said that Maame Kyerewaah had asked for twelve plots of land, *'counting the number of children she had*'. The question was put to him:

Q. *In paragraph 13 of your witness statement you said Madam Kyerewaah came to ask for a plot of land*

His answer was to deny as untruth his own evidence in chief. He said
A. *That is not true my lady*

After this, he denied his testimony in chief that it was at the time of demarcation of the lands that Maame Kyerewaah had changed her request to six plots of land, and said that MaameKyerewaah had told the chief, and it was the chief who instructed the TDC to give her six plots of land.

It is the aggregation of these various inconsistencies that the trial judge found as material and significant enough to disbelieve PW1 on his alleged leadership of the Abenase TDC in allocating lands to people including Maame Kyerewaah. We agree with her.

On page 807 of the report on **Owusu Domena v Amoah cited supra,** this court stated the principle captured as holding (5) of that case that *'the inference to be drawn from the totality of a party's contradictory and inconsistent evidence was that, it was unreliable and the court would attach little or no weight to it*'.

Section 80 of NRCD 323 on credibility of witnesses directs that matters that are relevant to the determination of the credibility of a witness include statements that are consistent or inconsistent with the testimony of the witness at the trial (Section 80 (2) (g)) See also the decision of Dordzie J as she then was in **Lutterrodt v Nyarko [1999-2000] 1 GLR 29** on the determination that in the light of inconsistencies in the testimony of a witness, the import of their evidence should be negligible. This is the proper evaluation that the trial court did, and our view is that the court of appeal was wrong in holding that the position of PW1 as chairman of the Abenase TDC was not

negated, and so all other inconsistencies and contradictions in his testimony should be regarded as immaterial and insignificant.

Our evaluation is that, given the fact that the thrust of this dispute lies in whether PW1's testimony on his personal involvement in the allocation of the six plots of land to Maame Kyerewaa was to be preferred as the more probable evidence of truth, or the receipt found in the things of Kingsley Boakye was to be accepted as evidence of how this six plots of land was acquired, and given the fact that both Maame Kyerewaa and Kingsley Boakye were dead before the testimonies were given in support of the case made out by each of the parties, any court hearing this case ought to evaluate assertions made regarding the two dead persons, with suspicion, great caution, and close scrutiny, if it is to avoid working miscarriage of justice. See the decisions in**Mondial Veneer (Gh Ltd) v AmuahGyebu XV** and **Kusi&Kusi v Bonsu** cited supra

Our firm view is that since there was no critical mass of corroborative evidence on the crucial matter of how the land was allocated to Maame Kyerewaa to arrive at a holding that the plaintiff had substantially discharged his burden of persuasion on that issue outside of the testimony of PW1, the ir-reconciliable inconsistencies and contradictions in PW1's evidence should have led to no weight being given to it by the court of appeal when it determined whether the plaintiff's burden of producing evidence was discharged through the testimony of PW1

We are also persuaded to agree with the trial judge, because of the lack of cogency in PW1's testimony on how the allocation of lands was done. In his evidence in chief, PW1 had stated in paragraph 8 that the allocation of lands was being done to ensure that there was *'orderly development of the community*'. Then in paragraph 12, he stated that *'what the committee did was to send the young men to demarcate the lands for the grantees and asking (sic) them to plant boundary pillars and flowers'.* PW1

thereafter testified under cross-examination that as committee members, it was the five of them that moved onto the lands and demarcated them for applicants.

How could this arbitrary process of demarcation that PW1 describes lead to orderly division of land? If PW1 is to be believed, six plots of land could be identified just by five men (or young men of the town), none of whom has been shown to be a surveyor, pointing out a patch of land to an applicant, followed by instructions to place boundary pillars or plant flowers on this allocated land. Our view is that if PW1 was indeed chairman of this TDC, and his committee had the objective of orderly development of the town, his testimony would have included how the plots of land were properly demarcated and identified in order to allow for allocations and orderly development. His testimony was supposed to establish acquisition by allocation and not by settlement.

On the flip side of the arbitrary process described by PW1, Defendants' case is that the lands in contention were properly identified with numbers at the time Kingsley Boakye paid for them in 1983.

Corroboration in law is evidence that supports the testimony of a witness by confirming that the witness is telling the truth in some material particular. **Section 7 of the Evidence Act directs in 7(1)**

1. *Corroboration consists of evidence from which a reasonable inference can be drawn which confirms in some material particular the evidence to be corroborated and connects the relevant person with the crime, claim or defence.*

On a preponderance of probabilities, we are more persuaded by Defendant's version of how the land was allocated with numbers, from the corroborative record of exhibit 1, than PW1's version of arbitrary land demarcations by young men or the committee itself, with creation of flowery and other boundaries to allotees. The improbability of the process presented by PW1 is highlighted even more when one considers that after the allocation and demarcation described by PW1, what was given to Maame Kyerewaa

managed to match precisely the six plots that Kingsley Boakye had a receipt to cover. Had these same plots been shown to Maame Kyerewaa before her son paid for them? There is no such case made, and so this court can only accept that on the preponderance of probabilities, the likelihood of Kingsley Boakye paying for properly demarcated plots of land and obtaining a receipt for that payment, is more probable than those precise plots of land being allocated to Maame Kyerewaah with no record in her name, or the books of the Abenase TDC

Acts of possession

On acts of possession, the Court of Appeal's view was that there was no corroborative evidence adduced to support the alleged permission from Kingsley Boakye to his mother to farm on the land and to his brother to build a block factory thereon, whereas there was agreement on Maame Kyerewaa farming on the land in issue and evidence of Kingsley Boakye's brother having a block factory thereon. MaameKyerewaa and Phillip Asiedu therefore reflected possession of the land before Kingsley Boakye built thereon.

Counsel for Defendants urged that counsel for Plaintiff had failed or refused to ask any questions regarding the said permission during the entire proceedings, and so the Defendants had not been required to corroborate it. He referred to us to the dictum of In **Re AshaleyBotweLands; AdjeteyAgbosu& Others v Kotey v Others [2003 - 2004] SCGLR 420 at 438** where Wood JSC (as she then was) had stated the general rule as *'where a party's testimony of a material fact was not challenged under cross examination, the rule of implied admission for failure to deny by cross-examination, would be applicable and the party need not to call further the evidence on that fact*.

He invited us to find that by failure to controvert the Defendants' attorney's testimony on the said permission, the Plaintiff should be deemed to have admitted that it was Kingsley Boakye who permitted his mother to use the land and not vice versa.

It was also the submission of counsel for Defendants that the agreed position that the property was put up solely by the Kingsley Boakye raised a legal presumption of ownership in his favor by the operation of **Section 48(2) of the Evidence Act, 1975 NRCD 323**.

Section 48(2) reads:
'A person who exercises acts of ownership over property is presumed to be the owner of it".

Citing **Nyamah v Amponsah[2009] SCGLR 361**, Counsel for Plaintiff submitted that acts of ownership have to be exclusive to ownership of the property in issue, and urged extensively that there was no evidence that either Kingsley Boakye or the Defendants exercised any acts of ownership on the land or the house after Kingsley Boakye built it. He reiterated the finding of the Court of Appeal that Phillip's block factory and his burial on the land, as well as Maame Kyerewa's farming on the land constituted acts of possession.

We must say that we find this issue of possession or permissions wholly incapable of assisting in the resolution of the vital issues in dispute - to wit - whether it was MaameKyerewaa who acquired the land in 1980, or Kingsley Boakye who paid for the land in 1983. This is because with the nature of blood relationship between them and our Ghanaian culture, such permissions for use as a farm or block factory must be assumed, regardless of whether Maame Kyerewa or Kingsley Boakye held proprietary interest in the land. The acts of ownership must go beyond temporary acts such as farming. When reviewed in the light of what constitutes the strongest act of possession, it would be the construction of permanent structures, such as done by Kingsley Boakye, and not the farming by Maame Kyerewaa.

We also think it unfortunate that counsel for Plaintiff submitted to us that the embossment of Maame Kyerewaa's name on Kingsley Boakye's house is *'clear indication*

that the family had claimed the house as a family house even while Kingsley Boakye was alive and therefore the defendant cannot be heard to argue about matters for which their successor in title could not fight or even acquiesced. If we understand his submission rightly, he is urging upon us that by reason of appropriation through naming the house after MaameKyerewaa in the absence of Kingsley Boakye, Kingsley Boakye could not be presumed to be owner of House Number J2, even when he was alive. This submission is unfortunate because it suggests that appropriation of another person's completed house with token acts of claims should be enough to found a right to it. There is no law in this country that supports such a position. And there is no social context that guides us that if a house is named after the builder's mother, it is clear indication that the house was built for the mother, or it was built as family property.

The effect of the Receipt Exhibit 1

In disputing the receipt referred to by Defendants in paragraph 6 of their Statement of Defence, Plaintiff denied paragraph 6 in his Reply. Plaintiff had the opportunity to view this receipt after it was attached to the witness statement of the Attorney of the Defendant and stated in paragraph 32 of his witness statement that *'I therefore say that the purported receipt of the defendants is not authentic*'. Beyond this statement, neither Plaintiff nor his witness took any step to attack the authenticity of this receipt.

In rejecting the import and effect of the receipt, the Court of Appeal stated that the receipt *'failed as an instrument of transfer, contrary to S. 1 of the Conveyancing Act 1973 NRCD 175 as it did not have the name of the seller and was not signed by such seller. Nor was there evidence led to fill this obvious gap in that requirement*'

Counsel for Defendants submits that this evaluation is erroneous because the receipt bears the name of the grantor of the Abenase lands being Nana Meenue Anim 11, the name of the Town Development Committee which was the agent of Nana Meenue Anim 11, and the mark of the Treasurer of the TDC called J A Annan. It therefore qualifies as

a record of transfer of interest in land pursuant to **Section 1 of the Conveyancing Act**

Further, the receipt has all the marks required under **Section 146** of the **Evidence Act NRCD 323**on Ancient Documents as proof of authenticity of old documents. Third, it bears all the vital information required to reflect a receipt issued for sale of land. It has the name of the purchaser, the amount paid, number of plots allocated, and the one who issued the receipt. The receipt also came from correct custody. In the circumstances, counsel for Defendant submits that the authenticity of exhibit 1 cannot be impeached. As evidence of the transaction, exhibit 1 should prevail over the inconsistent testimonies of the Plaintiff and his witness PW1.

He also cited the fifth holding in **Duah v Yorkwa[1993-94] 1 GLR 217**stated as

'*whenever there was a written document and oral evidence in respect of a transaction, the court would consider both the oral and the documentary evidence and often lean favorably towards the documentary evidence, especially where the documentary evidence was found to be authentic and the oral evidence conflicting*'

On the other hand, Counsel for Plaintiff submits the same principle to wit - that for a written document to be preferred over oral testimony, it should be found to be authentic. Citing **Fosua & Adu-Poku v Dufie (deceased) & AduPoku -Mensah [2009] SCGLR 310**,Counsel for Respondent points to the lack of signature as we know it on exhibit 1, the different sums stated on the front and back of it, and the lack of stamp thereon as proper reasons to reject exhibit 1 as not being authentic and having evidential value.

In our consideration, we do not understand why the Court of Appeal evaluated exhibit 1 as an instrument of transfer of interest in land. The Defendants did not present the receipt as an instrument evidencing transfer of an interest in land. It was their case that

evidence of Boakye's payment for the six plots existed, and the receipt was tendered to discharge this burden of producing evidence of the averment.

Our view is that the duty of the court was to evaluate it within the context of whether the receipt discharged that burden of producing evidence in support of the defendants' case that Kingsley Boakye purchased this land from the TDC of Abenase during the chieftaincy term of Nana Meenue Anim 11 or not. The trial judge did exactly that.

As pointed out by the trial judge, exhibit 1 had the name of Nana Meenue 11, the name of the town, the name of the deceased, the precise plots of land sold, the consideration paid for the grant of land, and the date of the transaction. All the parties and the witnesses are agreed that the TDC of Abenase was acting as agents of the Chief of Abenase to grant interests in the land in contention.

There is a manuscript of the name James Annan, identified by DW1 as treasurer of the TDC, and denied by PW1 in cross- examination. It also came from the proper custody of the belongings of the deceased, sent by DHL from Sweden, where he was living until his death. What then is the reason for rejection of this receipt on account of its evidential value of Boakye's purchase of the land in issue? We find none.

Counsel for Plaintiff has made much of the lack of signature on the receipt, and indeed, so did the Court of Appeal. But it is trite law that a signature may be in the form of the writing of a name or even a mark.

Section 46of the Interpretation Act 2009 Act 792 defines signature to include '*the making of a mark and of a thumbprint*'. **Order 82 of C1 47** defines signature to include a thumbprint and a mark, and **Black's Law Dictionary 11th Edition, Thomson Reuters 2019**defines a signature as "*A person's name or mark written by that person or at the person's direction.....Any name, mark or writing used with the*

intention of authenticating a document".

Exhibit 1 has on the face of it a clearly written name JA Annan, with designation Treasurer, under the name Nana Meenue Anim 11 showing that someone received this payment. Surely neither the Court of Appeal nor Counsel for Plaintiff could have expected that the Treasurer would put his name as signature over the lines where the Chief's name was, before they were satisfied that the receipt was signed?

We think also that with the Plaintiff's denial of the authenticity of this receipt, a burden was placed on the Plaintiff to disprove this authenticity as a preliminary fact in issue or the court was required to accept the legal effect of the receipt as a writing evidencing a transaction, once the authenticity was not disproved.

Sections 3, 24 and 25 of NRCD 323read:

Section 3(1)*For the purposes of this section and section 4, a 'preliminary fact' is any fact upon which depends the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or non-existence of a privilege*

(3)*A ruling on the admissibility or inadmissibility of evidence, the qualification or disqualification of a person to be a witness, or the existence or non-existence of a privilege implies whatever finding of fact is prerequisite to it, and unless otherwise provided by any enactment, no separate formal finding of fact is necessary*

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Section 24 of the Evidence Act 1975 NRCD 323 directs:

24: (1)*Where the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, no evidence contrary to the conclusively presumed fact may be considered by the tribunal of fact*

S**ection 25 (1)** provides:

25 (1). *Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the instrument, or their successors in interest*

A review of the cross examination of the Plaintiff himself shows that he did not purport to have any knowledge or information about how the receipt he had refuted was generated, neither did he make an attempt to speak to the authenticity of the receipt as indicated in his witness statement. He was asked the following questions and gave these answers regarding the writing of Kyerewaa Villa on the house, and the receipt:

Q.*It was from that point when he saw the writing that he began to realize a grand scheme by you and your old mother to dispose (sic) him and his family of the property*
A.*My lady none of the siblings had any intention. He built the disputed property to honour my mother. He had already built one at Oda for his wife and children*
Q.*When your brother built (sic) the grand scheme he pulled out the receipt for the payment of the land to the wife and children for future reference*
A.*My lady, that is not true.*
Q.*As you stand here, you are shocked that your brother kept the receipt for the payment of the land*
A.*My lady I disagree with Counsel.*

And this is the sum total of the personal effort made by Plaintiff to address the probative value of this receipt that he had challenged the authenticity of.

Although exhibit 1 was supposed to have been created in 1983, when PW1 was supposed to be the chairman of the Abenase TDC, PW1 just stated in paragraph 11 of his witness statement that *'I have been shown a receipt by the defendants claiming that it was a receipt our committee issued to the deceased. As far as I recall the committee was not issuing receipts as the committee did not have receipts at the time*'.

He had nothing more to add to this evasive statement about the contents of the receipt, especially the plot numbers. But what we find entirely corroborative of Defendants' case that Kingsley Boakye had a receipt issued by the TDC is the fact that PW1 started his evidence in court with a request to tender a receipt issued by the TDC. This can be found on page 48 of the Record of Appeal (ROA). The receipt was filed and can be found on page 50 of the ROA. PW1 said:

'I said that we did not give any receipt in respect of the purchase of the land. My lady by we, I mean the Town Development Committee. I have in my hand a receipt and I want to tender it in evidence'.

Because an objection was sustained against the tendering of this receiptand it was rejected as evidence, it is not the content of this receipt that is being evaluated herein. It is the content of PW1's new position that receipts for transactions on Abenase lands existed, and he had brought one to court. This was a total departure from his testimony in the witness statement adopted as his evidence in chief. After the rejection of his alternate receipt, PW1 did not address the issue of the authenticity of exhibit 1.

We can only find that this testimony on the existence of receipts corroborated the case of Defendants

In **Manu v Nsiah[2005 - 2006] SCGLR 25,** this court affirmed that *'where the evidence of a party on a point is corroborated by the witnesses of his opponent, while that of his opponent on the same issue stands uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated evidence in preference to the corroborated one unless for some good and apparent reason the court finds the corroborated version incredible, impossible or unacceptable'*

By offering to tender a receipt issued by the TDC, PW1 was corroborating the case of the Defendantsconcerning a receipt issued by the TDC when Kingsley Boakye paid for allocation of Abenease lands. In the circumstances, we are of the view that the Court of Appeal gravely erred in dismissing the evidential value of exhibit 1 and treating it as a conveyance.

A conclusive presumption operates to disallow the presentation of contrary evidence, and the basic facts that give rise to a conclusive presumption must first be found or established before the application of the legal effect or consequences of a conclusive presumption. See **In re Suhyen Stool; Wiredu & Obenwaa v Agyei& Others [2005 - 2006] SCGLR 424**

Further, facts recited in a document are conclusively presumed to be true between the parties to the document and all persons claiming through them. Such a document goes on to create estoppel by written document, binding all parties to the document and their successors.**Kusi & Kusi v Bonsu [2010] SCGLR** cited supra. With the acceptance of issue of receipts, and the failure to prove the inauthenticity of exhibit 1, we hold that the receipt created a conclusive presumption of the sale of these six plots to Kingsley Boakye, which presumption binds the TDC of Abenease and their principal, Nana Meenue Anim 11, respresenting the town. This presumption sounds the death knell of the already inconsistent and contradictory testimony regarding how the same six plots of land were allocated to Kingsley Boakye's mother in 1980.

The trial judge also identified that though areceipt will not suffice to confer title on land on a party, it constitutes documentary evidence of a sale transaction on land as determined in **Asante Appiah v Amponsah alias Mansah[2009] SCGLR 90.** In the present case, the receipt tendered as Exhibit 1 indicates the price of the land, date of purchase, description of the land and location of the land that Kingsley Boakye purchased. It discharged the defendants' burden to produce evidence in support of

their claim that the land on which the house constructed by Kingsley Boakye stood, was indeed purchased by him.

Section 11(1) of NRCD 323 directs

11(1)*For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue.*

While a receipt may not constitute evidence of title to land, as rightly stated by the trial judge, we find that defendants have discharged both the burden of producing evidence and the burden of persuasion to warrant a declaration that on the preponderance of probabilities, the property the subject matter of this suit is the bona fide property of the late Kingsley Boakye

Having settled that we are bound by conclusive presumption in law, and persuaded by the evidence that the land in issue was purchased by Kingsley Boakye, the unassailed testimony that the house was built from his personal resources leads us to the conclusion that the house built on plots 3,4,5, 10,11, 12 was the personal property of Boakye, and not a house built on family land.

Joint ownership of house numbered J2

The holding in **Biney v Biney [1974] GLR 318**, cited to us by counsel for Plaintiff, that there is a presumption that a person who builds on family property acquires only a life interest therein, is not applicable to this case and that submission is dismissed.

For the purpose of setting the record straight on the decision of the Court of Appeal that if a man builds on land that was ostensibly acquired by his mother, the house gains *'the character of family property'*, we find a need to expatiate very shortly on this point.

Family property

'Family' in Ghana's customary legal arrangement comprises people descending from a particular matrilineal or patrilineal group, and not merely the children of a particular woman. Family property is also a very particular form of estate, and it is not created simply by 'a matriarch' - as the Court of appeal referred to Maame Kyerewa - obtaining land ostensibly for her twelve children, and permitting two of them to put assets on the land.

Justice Dennis Dominic Adjei summarizes succinctly the evolution of how family property may be created on page 29 of his book **Land Law, Practice and Conveyancing In Ghana, Adwinsa Publications (Gh) Ltd 2015.** He states:
'A family may acquire land through purchase or a gift and the land would become a family property. Land may become a family property where the land acquired by a family member is substantially or wholly financed by the members of the family or where a land acquired by a member of family is improved or developed with a structure or building which is substantially built or wholly built with income from the family's property or where a substantial part of labour or the whole labour used on the building or cultivation of a cocoa or cashew farm or some other cash crop was provided by the family. For a self-acquired land of a family member to become a family property, the family's contribution to the development of the property should be substantial or the family must have wholly financed the development.' (emphasis mine)

See also **Larbi v Cato & Another [1959] GLR 35**, especially the holdings (2) and (3) that it would be repugnant to natural justice and good conscience to hold that completely casual and trivial labor by one member or another of a family (or temporary financial assistance in an amount which was insignificant in relation to the cost of the building) would make the house built by a deceased person family property.

In Re Yalley (decd) Yalley v Kells [2001 -2002] SCGLR 762, there was no quibble that a lease stood in the name of the late mother of Amos Thomas Yalley, that

she had built a swish building on the land during her life time, and Yalley had conceded attempting to appropriate the mother's land by renewing the lease in his name and constructing a new house after building on the land. It was within that context that the court held that Amos Yalley had only a life interest in the house he built on his mother's land, and he was a trustee of the land for his mother's family.

In the case before us, even if the case of the Plaintiff that the contested land remained the property of Maame Kyerewaa was true, and she did not distribute the land before her death, and the house built thereon was for her or to honor her, the only legal outcome would be that the building with the rest of the land would devolve to her private estate for distribution to the beneficiaries of the estate.

To the extent that she did not purport to hand over the land to her children before the house was built, or before she died, then neither the land nor building thereon would automatically assume the character of 'family property'. Her estate could only obtain the character of 'family property', if and only if the beneficiaries of her estate decided not to distribute the house and land among themselves, but to hold it jointly as family. That is the circumstance under which beneficiaries of an estate, to the extent that they constitute an identifiable lineage, could call the house and land 'family property'.

No such averment was made as part of the plaintiff's case. Neither was any such testimony presented to the court. It must be remembered that where interest in land is conveyed to more than one person, the settled position of the law in Ghana is a presumption in favor of tenancy in common and not joint tenancy.

Section 14 (3) of the Conveyancing Act 1973 NRCD 175 reads:

(3) *A conveyance of an interest in land to two or more persons, except a conveyance in trust, creates an interest in common and not in joint tenancy.*

a. Unless it is expressed in the conveyance that the transferees shall take jointly, or as joint tenants, or to them and the survivor of them, or
b. unless it manifestly appears from the tenor of the instrument that it was intended to create an interest in joint tenancy

This presumptive intent of the law is confirmed in **Section 4 of the Intestate Succession Act 1985, PNDC L111**

4.Spouse, child or both entitled to one house
(1) Despite this Act
a. *Where the estate includes only one house, the surviving spouse or the child or both of them is or are entitled to that house and where it devolves to both the spouse and the child, they shall hold it as tenants in common;*
b. *Where the estate includes more than one house, the surviving spouse or child or both of them shall determine which of those houses shall devolve to the spouse or the child or both of them and where it devolves to both the spouse and the child they shall hold the house as tenants in common*

Thus to ignore the question of whether Maame Kyerewaa's estate has been distributed to her various children as tenants in common, or whether her many children have taken the decision together to convert the building into family property, and to arrive at a finding that this house No J2 was family property simply because one of them says the house was built as a family house, or built for or to honor the 'matriarch', is a grave error in law.

And we say this mindful of the fact that the burial of Phillip Boakye on the land does not constitute evidence of such a decision to turn the estate of Maame Kyerewaa into a family house for all her children, especially since the evidence shows that it is Kingsley Boakye who had earlier intimated that he wanted to be buried in his house in Abenease, and unfortunately died when coming to Ghana for the funeral of his brother.

The decision to bury Phillip in Kingsley Boakye's house was without the consent of Kingsley Boakye.

Ghana has travelled a long, tortuous and traumatized road in the seizure of self-acquired property as family property, leaving nuclear families bereft of assets that parents and spouses created to shelter them. The future of many children has been derailed because of these practices, that started in the days when capital for economic activity invariably derived from family assets. Courts must therefore be extremely careful not to distort the law of immovable property and succession without bearing in mind this social context.

Bearing in mind the dicta in**Larbi v Cato & Another [1959] GLR 35**, and **Yalley (decd) Yalley v Kells[2001 -2002] SCGLR 762**, we will say that where no members of a family have been shown to have contributed to the acquisition of land or construction of a house, it must only be in the face of uncontested evidence of a deceased person handing over self-constructed property to the family as a gift, or allowing the use of that house by various members of that family during the life time of the one who built it, as if the house were jointly owned by that family, that a court should find itself able to declare such a property as 'family property'. Even within that context, there must be clarity on how this 'family' is defined.

The holding that House No J2 is family property is reversed and all the counterclaims granted by the High Court are restored.

Respondent's Capacity to sue

We must also draw attention to a fundamental and procedural defect in Respondent's case that should have led to its dismissal in limine. Plaintiff stated in his statement of claim that he was brother and customary successor of the deceased Kingsley Boakye. However, if the property in issue was indeed family property, then plaintiff had no business issuing the writ unless he could show that he was head of the family that

allegedly owned the property, or he had been authorized to commence the action as head of family.

Order 4 Rule 9 of the **High Court Civil Procedure Rules 2004 (CI 47)** provides:

Representation of stools and families

9(2) *The head of a family in accordance with customary law may sue and be sued on behalf of or as representing the family*

(3) If for any good reason the head of a family is unable to act or if the head of a family refuses or fails to take action to protect the interest of the family any member of the family may sue subject to this rule, on behalf of the family

(4) Where any member of the family sues under subrule (3) a copy of the writ shall be served on the head of family

(5) A head of family served under subrule (4) may within three days of service of the writ apply to the Court to object to the writ or to be substituted as plaintiff or be joined as plaintiff

(7) An application under subrule (5) or (6) shall be made on notice to the parties in the action and shall be supported by a affidavit verifying the identity of the applicant and the grounds on which the applicant relies

Plaintiff lacked capacity to litigate on behalf of an unidentified family, when by his own showing, the property in issue was supposed to have been the self-acquired property of his mother. The proper plaintiff in this suit should therefore have been the customary successor of Maame Kyerewa, or the head of family of the family alleged by plaintiff, if indeed, anyone apart from the plaintiff was interested in being part of this case. The Court of Appeal was therefore wrong not to have reviewed the claims and facts presented to the courts within the context of applicable law. If they had done so, the only conclusion they could have come to was that the judgment of the trial judge was correct.

Joint ownership

The trial judge refused to make a finding of joint ownership from the presentations of records on loans that Kingsley Boakye had taken out with the 1st defendant. The reason she gave for this refusal was that she could not *'indulge in speculations and conjectures'* in the face of insufficient work done to link the exhibits and testimonies to the issues at stake. She based her holding that the 1st defendant was a joint owner of House number J2 on the directions of Article 22 of the 1992 Constitution.

And indeed, the record before us show unnecessary gaps in the evidence that could easily have been filled if more attention had been paid to the work required to discharge the burden of proof that the law places on a party who makes claims before a court. The objective of adjudication of disputes is to conclude from the quality of evidence presented to corroborate any position on relevant issues. It is not the mere presence of evidence, but the sufficiency and corroborative value of that evidence that can assist the court to arrive at the conclusions sought.

What is however clear, is that the defendants presented the case from their pleadings that the 1st defendant was a joint contributor to the building of house number J2, and the house was meant to be the joint home of Kingsley and Theresah Boakye. Plaintiff denied these pleadings in his Reply. And Exhibits 2a, 2b, 2c, 2d, and 2e were tendered to show that in 2004, 2005, 2013, 2014, and 2015, Kingsley Boakye and the 1st defendant had loan transactions with their bankers in Sweden. Though sadly, counsel for defendants made no effort to present to the court any evidence on when house number J2 was built, after the land was acquired in 1983, and to show that between 2005 and 2015, financial resources of the couple were being channeled into house J2, there are two safe inferences that exhibit 2 series support, that help to resolve this dispute. The first inference is that Kingsley and Theresah Boakye were a couple that conducted their financial affairs jointly. The second inference is that from 2005 to 2015, they were jointly responsible for certain moneys spent out of their household.

In the absence of evidence to contradict the contribution of 1st defendant to house number J2; and in view of the evidence of loans contracted by the 1st defendant and Kingsley Boakye as a couple, we accept exhibit 2 series as sufficient to ground the holding by the trial judge that the defendants are entitled to all their counterclaims. The appeal is allowed in its entirety. Plaintiff is to immediately yield up vacant possession of House Number J2 to the 1st defendant.

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

I.O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

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