IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: YEBOAH CJ (PRESIDING)
PWAMANG JSC
AMEGATCHER JSC
TORKORNOO (MRS.) JSC
KULENDI JSC

CIVIL APPEAL
NO. J4/38/2021

8TH DECEMBER, 2021

ADWOA BOKOR ..... PLAINTIFF/APPELLANT/RESPONDENT
NSAWAM

VRS

MADAM AGBO ODDOYE
SUBSTITUTED BY
PHILLIP ODOI, NSAWAM ..... DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

TORKORNOO JSC:-

The plaintiff in this suit is Adwoa Bokor. She lost the suit in the high court, became the appellant in the court of appeal, won the appeal, and is the Respondent in this court. For ease of reference, she will be referred to as Plaintiff hereafter. The defendant Madam Agbo Oddoye, won the dispute in the high court, became respondent to the

appeal in the court of appeal, lost it in the court of appeal, and is the Appellant before this court. She will be referred to as Defendant hereafter.

THE CASE OF THE PLAINTIFF

According to the case made out in her Amended Statement of Claim and Reply, Plaintiff claimed to be the owner of 28.76 acres of land more particularly described in the indorsement of her writ of summons as:

`*situate and being at a place commonly called Duayeden-Ahodwo near Nsawam and bounded on one side by the Ahohonomfra stream and measuring on that side a distance of a total distance of 1180 feet more or less on one side by Nsawam-Aburi main motor road and measuring on that side a distance of 1100 feet more or less on one side by Ahodwo family measuring on that side a distance of 850 feet more or less and on the other side by Ghana Medium Security Prisons measuring on that side a distance of 1160 feet more or less*.

Plaintiff's case was that this land had originally been acquired **as part of a larger tract of land** by her ancestor called Opayin Duayeden who was married to her maternal grandmother Akua Asi Botwe. Duayeden gifted part of this larger tract of land to his wife Akua Asi Botwe and her children and they provided customary drink or aseda in the form of one live sheep, one bottle schnapps and £5, through her brother Opayin Mensah Krokrokwa in or about 1915. Maame Akua Asi Botwe immediately went into possession with her children with Duayeden.

Plaintiff sets out how the defendant got access to the land in issue and states that the children of Akua Asi Botwe brought one Ataa Nii to farm on the land as a tenant farmer. He came with his wife and son known as Oddoye. The defendant is the wife of this son Oddoye.

According to the case of the Plaintiff, at some point in time, the Government acquired portion of the land to build the Nsawam security prisons and compensation to the

children of Asi Botwe through one Martin Owusu Afram, a member of her family since at the time of the acquisition, none of the children of Asi Botwe were around.

Plaintiff's case went on further to aver after the death of most of the children of Asi Botwe and in the lifetime of the last surviving son called Opayin Kwaku Amoafo, he registered his interest in the land through a Statutory Declaration dated 4th March 1985 and numbered 948/1985. Thereafter, he gifted the land in dispute to her in 1987. She provided one live sheep and one schnapps as customary Aseda for the land gifted to her. The document prepared as evidence of the transaction was registered at the Deeds Registry as No EA3991 in 2007.

Plaintiff went on to plead that it is after the death of Ataa Nii and his wife and son Oddoye that Oddoye's wife, started to lay adverse claim to the land. She went on to the land with her late uncle Amoafo to recover possession of the land but defendant threatened to kill them, because according to her, one Ogyam had sold the land to her. Plaintiff's case is that this Ogyam has no interest whatsoever in the land in dispute.

Plaintiff goes on to aver that in the lifetime of her uncle Amoafo, Amoafo sold a portion of the land in dispute to a purchaser and the said Ogyam had summoned him before the Adontehene of Aburi. The matter was eventually arbitrated upon by the Chief of Ahyiresu who found in favour of her uncle and pronounced a grant made by Ogyam to be null and void and of no legal effect

Plaintiff further averred that an indenture had been executed between the defendant and her grantors but this indenture cannot transfer the land in dispute to the defendant because the title of the grantor is defective for fraud. A statutory declaration had been registered by the defendant's grantor as No. 5885/1986 and it is from this statutory declaration that the grant made to defendant was done fraudulently.

The particulars of fraud set out by the plaintiff were:

(1) Odoi Ardey and Kwabena Larbi jointly declaring and appropriating the land in dispute to themselves as grandchildren of Nana Mensah Ababio when in fact Odoi Ardey is not.
(2) Odoi Ardey and Kwabena Larbi jointly appropriating the landto themselves as their inheritance when in fact Odoi Ardey is not
(3) Odoi Ardey and Kwabena Larbi jointly registering the land as owners of it when in fact they are not

According to plaintiff, all her efforts to recover possession of the land from the defendant had proved futile and the defendant will not give possession of the land to her unless compelled by the court to do so.

She also claimed for '*general damages for trespass; and perpetual injunction restraining the defendant, her agents, assigns, workmen and servants from interfering from the land in dispute*'.

THE DEFENCE

Defendant's amended statement of defence denied plaintiff's claims in paragraphs 3, 4 and 5 of the statement of claim that set out plaintiff's averment on her root of title and how the defendant's father in law was brought on to the land as a tenant farmer.

The amended statement of defence admitted paragraph 2 on defendant being a farmer staying in Nsawam. It denied paragraphs 6, 7, 8, and 9 of the Statement of Claim which set out plaintiff's acts of possession over the land, and the fact that defendant started to lay adverse claim when her father in law and husband who were brought on to the land by plaintiff's uncles had died.

Defendant described the land she defends as:

'…*a piece or parcel of land at Nsawam now sharing boundary with the Nsawam medium security prison, the Nsawam-Aburi motor road, Duayeden land and Ahodwo land, the said piece or parcel of land being called and known as Kokrokwa or Mensa Krokrokwa*'. Defendant provided no dimensions to the land she claimed in her pleading.

In contention over the root of title, defendant denied plaintiff's averments and pleaded in her original statement of defence that Kokrowa land used to be the ancestral property of the Kwabena Larbi or Ogyam section of the Aburi-Atweasin Asona family until 1994.

In her amended statement of defence, defendant expanded her averments on this root of title and claimed thatOpayin Mensah Krokrokwa was also called Mensah Ababio and that Mensah Krokrokwa, the original owner of the land, gave the land to her father in law whose name was Tetteh Kwame. It was this Tetteh Kwame who felled the virgin forest and after his death, his son Odoye Ardey continued with the cultivation of the land in dispute with the defendant and their children. She urged that her name is Regina Yemle Okoh and not Madam Agbo.

She further averred that after Krokrokwah's death, Tetteh Kwame started accounting to one Adjei, who was a family member of Mensah Krokrokwah, and after Adjei, Tetteh Kwame accounted to the next Krokrokwa family member called Kwabena Larbi.

It was her case that on or about March 1985, Kwabena Larbi caused a summons to issue against Plaintiff's uncle Amoafo in the Kyidomhene's palace at Asuboi and Amoafo had been found liable. Thereafter in October 1985, Kwabena Larbi and Odoi Ardey had made a statutory declaration and same had been registered in the Land Registry as No 5885/1986.

Then in 1993, the Kwabena Larbi or Ogyam section of the Aburi-Atweasin Asona family at Aburi entered into an agreement to sell the land to her and her children in consideration of her constructing a dwelling house for that family in Aburi. She constructed this house at great expense and so the Kokrokwa land was given to her and her children for ever by the family, and she and her children had been in possession of the said land since 1994.

The amended statement of defence denied plaintiff's averments on arbitration before the Chief of Ahyiresu which was supposed to have upheld the right of plaintiff's uncle Amoafo to the land and declared a grant by defendant's grantor Ogyam as null and void

with the counter allegation on the arbitration before the Kyidomhene of Asuboi in March 1985 where plaintiff's uncle was rather found to be liable. Defendant urged two sources and periods of adverse possession.

The first one was that defendant had owned the land in dispute for more than fourteen years prior to the institution of the suit through the 1994 sale to her personally, and so the plaintiff's action was statute barred by Section 10(1) of the Limitation Decree. If the plaintiff had any title, it had been extinguished in favour of the defendant.

Second, and prior to her own adverse possession since 1994, with the sale of the Krokrokwa land to her, her father in law, her husband Oddoye and herself had been in possession of the land for over one hundred years farming on it as tenants or licensees of the family which effected the sale to her and her children and that possession was adverse to plaintiff's title, if any, to the Krokrokwa land.

The adverse possession through the license from that family had lasted long enough to extinguish plaintiff's title to the Krokrokwa land. Defendant denied any fraud in how she obtained her interest from her grantors and presented no counter claim.

REPLY

Plaintiff joined issue with defendant on her defence, reiterated that the land in dispute is her family property, and denied that her family sold any land to defendant in 1994. She insisted that any purported sale of the land in dispute to the defendant in 1994 would be null and void and of no legal effect. She went on to reiterate that the defendant is just an in-law of the tenant farmers taking care of the land plaintiff laid claim to, and that is the status that she has always known the defendant to have in relation to the land. She contended that she will put defendant to strict proof of the claim to the sale set out in paragraphs 7 to 12 of the Statement of defence that described defendant's route to her interest.

Trial and Judgment of the high court

The issues set down from trial did not include any controversy arising from the arbitrations referred to by the parties in their pleadings – being an arbitration before the Chief of Ahyiresu claimed by the plaintiff, and arbitration before Kyidomhene at Asuboi by defendant.

Indeed it is important to clarify that although it was in paragraph 11 of her original statement of claim that Amoafo had sold a portion of the land and Ogyam had summoned him before the Adontehene of Aburi with the subsequent arbitration before the Chief of Ahyiresu going in favour of Amoafo, the defendant had been silent with regard to the averments in paragraphs 10 to 11 of the original Statement of Claim. Defendant's original defence made no reference to a different arbitration either.

Plaintiff had closed her case, and defendant's attorney was testifying when plaintiff applied to amend her statement of claim. In the amended statement of claim, she repeated the original paragraph 11. It is in the amended statement of defence that defendant denied plaintiff's paragraph 11 in paragraph 13. In addition to this denial, defendant introduced a new paragraph 5d in which she made the averments regarding the arbitration in the Kyidomhene's palace at Asuboi.

In resolving whether or not the plaintiff had proved her claim of being owner of the land she claimed through a gift from her uncle Amoafo, who obtained it as joint owner with his mother and siblings from his uncle Kokrokwah by the instrumentality of their father Duayeden, and that defendant's adverse claims arose through a fraud perpetrated by her grantors; or that the defendant had proved that title to the land devolved to her variously through adverse possession starting from her father in law as a tenant farmer/licensee of Krokrokwa, or through valid sale from Krokrokwah's successors in interest being the Kwabena Larbi or Ogyam section of the Aburi-Atweasin Asona of Aburi, the trial judge decided that the contentions were settled by the outcome of arbitration proceedings conducted at the Kyidomhene's palace in Asuboi in

March 1985, as contended by defendant. The record of these proceedings were tendered as exhibit 2 through the defendant's attorney. It is dated 31st March 1985.

It was the evaluation of the trial judge on page 6 of the judgment that '*that the subject matter of this suit regarding its status, was the subject matter of an arbitration*' even though this was not specifically raised as an issue for determination.

He went on to refer to paragraphs 10 and 11 of the Plaintiff's amended statement of claim and paragraphs 5d and 13 of the defendant's statement of defence as the pleadings where issues were joined regarding this arbitration proceedings and its effect. The trial judge prefaced his opinion on the arbitration proceedings on page 7 of his judgment with these words: '*The law is trite that any issue in a matter before a court of law, that has been validly determined at an arbitration is res judicata, and the parties by law are estopped from re-litigating the issue in court. Indeed parties to an arbitration validly conducted and submitted to by the parties, are bound by the award of the arbitrators given*'. Citing words of Korsah CJ in **Aniamoah v Otwiraah 1961 GLR 404**, he went on to say that both sides are ad idem as to the fact of the conduct of the arbitration, neither has there been any query from either as to the award delivered and its binding nature.

He set out that how the plaintiff traced her title from her uncle Amoafo who was the son of Asi Botwe, the wife of Duayedinwho had caused his brother in law Mensah Krokrokwa to buy the disputed land for his sister Asi Botwe and her children '*due to the matrilineal system of inheritance as pertaining in the family of Duayeden at Aburi*'. On the other hand, defendant traced her interest by virtue of an agreement entered into with the elders of Mensah Krokrokwah family represented by Kwabena Larbi alias Ogyam and others, on one hand, and descendants of Oddoye Ardey on the other hand for the valuable consideration of building a house in Aburi in exchange for the land.

He identified that this arbitration was conducted between the parties described as Kwabena Larbi Ogyam v Opayin Kwaku Amoafro. The award of the arbitrators headed 'Judgement' was that:

'*From the evidence of the plaintiff and his witness Awo Okutu and also from some answers given by the defendant and his witnesses, we conclude without any shade of doubt that the Ahodwo land is truly and really a family property. The evidence of the defendant himself and also that of his 2nd witness, provided conclusively that the mankrado 1st defendant's witness, is untrue. Op. Kwaku Amoafro is according found guilty of deceit of his family and serious breach of trust and proven misconduct by trying to dispose of the family property without the knowledge consent and approval of members of his family, contrary to custom. We order that the property in question reverts to the family and the resident tenant Odoi to continue its occupation as caretaker for and on behalf of the family. That is the Ahodwo land. This arbitration court has not the power and authority to confirm or unseat Op Kwaku Amoafo as head of family. We advise the parties on both sides to meet their overall head of family at Aburi to resolve their family differences and for peace and harmony among them. There and then see about the arrangement or agreement for the recovery or otherwise of the land haven been sold.* ***We award the plaintiff costs of GHC1,170 to be paid him by the defendant Kwaku Amoafro***' (emphasis mine)

After setting out the terms of the 'judgment' of the arbitration, he went on to set out his understanding of the award and how it applied to the case before him. He said on page 10 of his judgment:

'*I think by this award, the decision of the panel of arbitrators is quite clear and distinct with regard to the status of the Ahodwo land. Same confirms the membership of both Kwabena Larbi alias Ogyam and Kwaku Amoafro, of the family which has title of the land in dispute. It also resolves the claim by Kwaku Amoafro that the land is not family land, but is the land of the children of Duayeden, of whom he is a member, as it states the contrary that same is family land. This award by the panel has not been challenged in any court of law as such it stands. The said award also states very clearly Kwaku Amoafro's lack of capacity to transfer title to the land to any person or body of persons save by the family of which Kwabena Larbi alias Ogyam is a member. It therefore stands to reason that Kwaku Amoafro lacked the capacity to have transferred or gifted*

the land in dispute to the plaintiff on the basic legal principle of nemo dat quod non habet. He could not have gifted to the plaintiff what he did not have.'

Regarding the defendant's evidence on how she obtained the land in dispute, the trial judge went on to say *'The defendant's claim is based on a sale from that family to she and her family in 1993….This agreement was documented and tendered as exhibit 4. The said exhibit 4 was arrived at by members of Kwabena Larbi's family which included Kwabena Larbi alias Agyam himself and four others…..On the basis of the arbitration conducted as per exhibit 2, and the fact of the construction of the family house at Aburi for the family that owned the land, and which has not been disputed, I find that valid title was passed to Oddoye Ardey's descendants of the land in dispute. Clearly plaintiff's claim to title is extinguished for want of capcity on the part of Kwaku Amoafro to pass same*'.

On the basis of this reasoning and evaluation, the trial judge adjudged the contentions on validity of interest in favour of the defendant and the plaintiff appealed against the decision.

APPEAL TO THE COURT OF APPEAL AND JUDGMENT OF THE COURT OF APPEAL

The court of appeal struck out nine of the ten grounds of appeal filed by Plaintiff's counsel as offending against **Rule 8 of the Court of Appeal Rules 1997 CI 19** and particularly **sub rules 4, 5 and 6**. These rules of court direct that grounds of appeal ought to be set down concisely and under distinct heads without any argument or narrative, and any ground of appeal which is vague or general in terms shall not be permitted except the general ground that the judgement is against the weight of evidence. The court of appeal therefore determined the appeal on the sole ground that the judgement was against the weight of evidence, which ground of appeal admits the resolution of legal questions relating to the evidence before the court on the authority of the decision in **Attorney General v Faroe Atlantic 2005 – 2006 SCGLR 271 at 284** and **Owusu Domena v Amoah 2015-2016 1 SCGLR 790 at 799**

Citing the decision in **Quaye v Mariama 1961 1 GLR 93 at 95**, the court of appeal pointed out that it is the duty of a trial judge to make up their mind on the primary facts of the case as disputed by the parties, state the findings on those primary facts, and apply the law to resolve the import of the findings.

From the review of the honourable Justices of appeal, the issues that fell for determination by the trial judge were whether the plaintiff was estopped from seeking her claims by virtue of exhibit 2, whether Kwaku Amoafo had the capacity to grant the disputed land to plaintiff, whether the issue of fraud was properly raised and considered, whether the defendant led sufficient evidence to warrant a declaration of title in her favour in the absence of a counterclaim; and whether the judgment entered was supported by the evidence led at the trial.

It was the evaluation of the court of appeal that the trial judge made no specific findings of fact as to whether the land in dispute was originally owned by Kofi Duayeden, whether the arbitration in exhibit 2 was in respect of the disputed land, and how the grantors of the defendant were related to Mensah Krokrokwa. It was their opinion that the trial judge failed to consider the entire evidence in coming to his conclusion, and failed to give adequate consideration to the issue of fraud raised by the amended pleadings. He premised his entire judgment on exhibit 2, the arbitration award, and exhibit 4, the agreement between the defendant and her grantors.

So as the first appellate court directed by **Rule 8(1) of The Court of Appeal Rules 1997 CI 19** to conduct a rehearing of the matters in issue, the court of appeal determined that after reviewing the pleadings, testimonies and exhibits, the judgment was indeed against the weight of evidence because the evidence supported a finding that the land in dispute was originally owned by Kofi Duayeden, and subsequently acquired by Mensah Krokrokwah, who was the brother of Duayeden's wife with whom he had seven children including Amoafo and plaintiff's mother, and all these parties came from a matrilineal heritage, making the plaintiff's rendition of the root of title to it more probable and persuasive than the defendant's. They pointed to contradictions in the testimonies of defendant's attorney and witnesses. The court of appeal therefore

accepted plaintiff's case on how interest and title to the land validly devolved to Amoafo and then to plaintiff.

On the issue of whether the arbitration in exhibit 2 and its award could support a plea of estoppel per rem judicatam against the plaintiff as held by the trial judge, it was the opinion of the court of appeal that the answer was negative. Pointing out that apart from the procedural requirement that a party wishing to rely on a defence of estoppel per rem judicatam must plead it to avoid surprise to the other party, the court of appeal clarified that judicial authorities are firm that a party who pleads the doctrine of estoppel per rem judicatam must not be successful unless three conditions exist simultaneously: first that there has been a judicial decision by a court or tribunal of competent jurisdiction; second, that the same questions as sought to be put in issue by the plea in respect of which estoppel is claimed was decided in the earlier proceedings; and third that the parties in the second dispute are the same or the privies of the parties in the earlier suit. The view of the court of appeal was that the first two necessary factors could not be found on the face of exhibit 2.

It pointed to defects on exhibit 2 that were identified by counsel for plaintiff. These defects were that exhibit 2 did not appear to be authentic on the face of it because it carried no certification from the arbitration panel, but rather the stamp of the Circuit Court, Koforidua. No explanation was given as to how it came to have that stamp, and it was not tendered by a member of the arbitration panel. Plaintiff counsel also pointed to cancellations on the face of exhibit 2 and submitted that not being an official record or coming from official custody, exhibit 2 did not qualify to be admitted under either **section 126(1) or 162** of the **Evidence Act 1975 NRCD 323**.

The opinion of the court of appeal was that the document did not qualify for admission under any of the exceptions to the hearsay rule. The court did not expand on this view of '*exceptions to the hearsay rule'* to enable us determine the rightness or wrongness of this evaluation. It was their view that exhibit 2 did not come from proper custody.

Thereafter, they asserted, that assuming without admitting that this document was even admissible, the evidence contained therein did not suggest that the subject matter of the dispute in exhibit 2, described as Ahodwo land, was the same land that is the subject matter of the current dispute.

In that regard, it was their opinion that '*if the trial judge had at least examined the document critically, he could not have given it the weight that he did and declare the plaintiff estopped by it.*

The trial court erred in finding the doctrine of res judicata applicable to the dispute of the parties on account of the arbitration proceedings tendered as exhibit 2.

The court of appeal also found that though fraud was set down as an issue for consideration by reason of the amended pleadings, the trial judge just seemed to ignore the issue and failed to give proper consideration to the issue of fraud though no court is allowed to ignore the issue of fraud when raised.

The court of appeal's opinion was that, the statutory declaration of Ogyam and Oddoye tendered as exhibit D was '*a deliberate misrepresentation intended to overreach the true owners of the land*'. It concluded that since exhibit D was a creature of fraud, and it purportedly formed the root of title of defendant's grantors, as well as the foundation for the agreement reached between defendant and her grantors in exhibit 4, which evidenced the interest she claimed, exhibit 4 had no basis to stand or transfer any title in the disputed land to the defendant.

The judgment of the trial court was not supported by the evidence led at the trial, and that the trial judge failed to apply the law properly to the facts, resulting in his wrongly entering judgment for the defendant. It set aside the judgment of 24th July 2018 and entered judgment for the plaintiff for the reliefs endorsed on her writ of summons.

APPEAL TO THE SUPREME COURT

The appeal before this court is on the sole ground that the judgment is against the weight of evidence. As rightly pointed out by Counsel for defendant, where the findings

of the two courts were based on established and undisputed facts, we are in the same position as the trial court and can draw our own inferences from the established facts. Where any finding of fact was concurred in by the two courts below, then unless the evaluation of one of the courts is shown to be palpably wrong, and premised on a misapprehension of the applicable law, or the proper inference to make out of the facts, we ought not to interfere with the finding. See the decision of this court in **Koglex Ltd (No 2) v Field 2000 SCGLR 175**, cited to us by counsel for appellant. In the present case, as rightly pointed out by the court of appeal, the trial judge held the arbitration as dispositive of the issues before him, and therefore made no findings of fact on the different roots of title present to him. The court of appeal differently evaluated this matter of law from the evidence before the court, thus requiring us to resolve this issue of whether exhibit 2 compelled a finding of estoppel per rem judicatam against the plaintiff first.

RELIANCE ON THE DOCTRINE OF ESTOPPEL PER REM JUDICATAM TO DISPOSE OF THE DISPUTE IN THE HIGH COURT

Instructedly, defendant counsel absolutely shied away from discussing the application of the principle of res judicata that was used by the trial judge to arrive at the finding that the defendant's root of title had been established by the arbitration of 31st March 1985 before the Kyidomhene of Asuboi as evidenced in exhibit 2. This is strange, because that was the whole premise for the high court decision.

We agree with the court of appeal that as a matter of law, because of the dispositive nature of a finding of estoppel per rem judicatam, a party who wishes to rely on it as a defence is required by law, specifically**Order 11 Rule 8 of the High Court (Civil Procedure) Rules, 2004 CI 47**to plead it to avoid surprise to the other party.

Rule 8 (2) directs that

(*2) Without prejudice to subrule (1), a defendant to an action for possession of immovable property shall plead specifically every ground of defence on which the*

defendant relies, and a plea that the defendant is in possession of the immovable property in person or by a tenant shall not be sufficient

To this extent, it is expected that had it been a matter for resolution in this suit that the arbitration in the palace of the Kyidomhene's palace extinguished any claim through Amoafo to any land owned by Mensah Kokrokwah at Ahodwo in his life time, such that plaintiff was estopped per res judicata from making a claim to the land in her claim as having been granted to her by Amoafo, this defence should have been clearly pleaded in defendant's statement of defence. This is the principle determined in cases such as **Nartey v Mechanical Lloyd Assembly Plant 1987-88 2 GLR 314,** in its consideration of **Order 19 Rule 16 of the High Court (Civil Procedure) Rules 1954 LN 140 A,** which mirrors the current provisions in **Order 11 rule 8(1) of CI 47**.

What we note and must say is that the defendant's original statement of defence did not point in any manner to a judicial settlement of who had title over the land being contested, though the plaintiff had pleaded in paragraph 11 of her original statement of claim that there had been an arbitration award in favour of her uncle in these words:

11. *The plaintiff will say that her late uncle sold a portion of the land to a purchaser and the said Ogyam summoned him before the Adontenhene of Aburi but the matter was eventually arbitrated upon by the Chief of Ahyiresu who found in favour of her uncle and declared the grant made by Ogyam to be null and void and of no legal effect*

To this pleading, the defendant maintained a silence in the original statement of defence and made no admission or denial or even reference to plaintiff's paragraphs 10, 11, 12, and 13 of the statement of claim in all of the statement of defence. Defendant therefore should be deemed to have admitted this pleading by the direction of **Order 11 Rule 13 (1) of CI 47** that reads

13(1) *Subject to subrule (4) of this rule, any allegation of fact made by a party in the party's pleading shall be deemed to be admitted by the opposite party unless it is*

traversed by that party in pleading or a joinder of issue under rule 14 operates as a denial of it'

There was therefore no issue joined on the plaintiff's averments regarding an arbitration that found in favour of Amoafo after he had sold a portion of land to a purchaser, and which also declared a grant of land by Ogyam to be null and void and of no effect. There being the statutorily implied admission of the pleading, there was no obligation placed on the plaintiff to prove at least the fact of this arbitration and its outcome. See the decision of this court in **Ashalley Botwe Lands, In re: Adjetey Agbosu v Kotey [2003 – 2004] SCGLR 42.,**

It was after plaintiff had closed her case, and defendant's attorney, who testified last was testifyingon the defendnat's supporting documentation that plaintiff sought leave to amend her statement of claim to plead this fraud. It was in the amended statement of defence filed in response to the amended statement of claim that defendant expanded her paragraph 5 to include paragraphs 5a, 5b, 5c and 5d. Paragraph 5d stated:

5d. *Defendant will say further that on or about March 1985, Kwabena Larbi Ogyam caused summons to issue against the plaintiff's uncle Opayin Kwaku Amoafo at the Kyidomhene's palace at Asuboi and plaintiff's uncle was found liable and a copy of the proceedings and the decision were issued*

It will be noted that the reference to the cause of action that was arbitrated on in this pleading was extremely ambiguous. What was plaintiff's uncle found liable for? Coming after paragraphs 5a to 5c, the expression is even more meaningless because those previous paragraphs had made no reference to any summons before an arbitration panel. They read thus

5a. *Defendant will contend that Mensah Krokrokwah was also called Mensah Ababio and that he gave the land to the defendant's father in law Tetteh Kwame*

5b. The late Tetteh Kwame felled the virgin forest and after his death, his son Odoye Ardey continued with the cultivation of the land in dispute with the defendant and

children they later had which include Phillip Odoye,, Odoye Teye, Douglas Odoye and the defendant whose name is Regina Yemle Okoh and not Madam Agbo and others

5c. Mensah Krokrokwah died and as a result Tetteh Kwame was accounting to one Adjei, a family member of Mensah Krokrokwah and after Adjei, the next Krokrokwah family member was Kwabena Larbi.

From this, it can be seen that indeed, no issue was joined by the parties in their pleadings regarding a defence of estoppel per rem judicatam emanating from arbitration proceedings in the Kyidomhene of Asuboi's palace, to enable the plaintiff defend such a plea at the time the plaintiff presented her case. This paragraph 5d, which was pleaded for the first time after the plaintiff had closed her case, did not also clarify what case was supposed to have gone to the Kyidomhene.

Second, the defendant was in law deemed to have admitted the plaintiff's pleading that there had also been a summons against Ogyam before the Adontenhene of Aburi which was eventually arbitrated by the chief of Ahyiresu who found in favour of Amoafo. With this state of affairs, the trial judge was palpably wrong therefore in considering the alleged import of exhibit 2 without taking into account the inference that ought to have been made from plaintiff's original paragraph 11 which stood deemed as admitted as at the time plaintiff closed her case. If the trial judge was going to hold that exhibit 2 constituted a determined arbitration outcome, he should have juxtaposed its alleged effect with the arbitration outcome that plaintiff had pleaded. That failure to do so rendered his decision as unsupported by the totality of the proceedings before the court.

Indeed, the testimony that undergirded this pleading in defendant's amended paragraph 5d, (which was filed after the said testimony) was given by defendant's attorney in his evidence in chief on 5th May 2016. This means that this was testimony that was not based on any pleading at the time that it was offered. It went like this:

Q. *Now you have already told the court that after the death of Mensah Korokwa, the agreement between your side and Korokwa's side was Kwabena, now tell us did anything happened when your family was atoning to Kwabena Larbi's family?*

A. What happened after the death of Tetteh Kwame and we were atoning to the family was, we were on the land in March 1985 when Op. Kwaku Amoafo came and sold the land. So my lord we went and reported the matter to Kwabena Larbi and Kwabena Larbi summon Op. Kwaku Amoafo at Asuboye Chief Palace before the Akyedom hene. When the matter was summon before the Kyemdom hene Kwaku Amoafo was found liable ***and a document was prepared to restrict him from going on the land*** *(emphasis mine).*

Q. *You said you cannot read and write but when you are given a document can you identify it?*

A. Yes my lord

Q. Now look at this document is a photocopy, where is the original

A. The original of the document I have in hand is with one of my mother's siblings

Q. What do you want to do with it?

A. I want to tender it in evidence.

Mr. Korang: May it please the court we are not objecting to it

Judge: Exhibit two without any objection.

Q. Now after the arbitration tell us all that went on in respect of the land. Kwabena's family and your family

A. What happened after the arbitration was that Kwabena Larbi went in for a surveyor to measure the land and made a site plan on it

Under cross examination, defendant's attorney testified that the Mensah Kokrowah land described in the statement of defence was the same as Ahodwo land described in these arbitration proceedings that had been introduced through exhibit 2 He was then asked

Q. *Are you able to read?*

A. No my lord I cannot read

Q. So what then do you know the content of exhibit 2?

A. How I got to know the content of exhibit 2 was that I was in the cottage when Kwaku Amoafo came to sold the land and the matter was sent to the elders. So the matter was reported to Abusuapanin Kwame Larbi who then summon Amoafo to Asuboye. When he was summoned Kwaku Amoafo was found liable as the land is not his

From the evidence in chief and cross examination therefore, this arbitration award that was tendered was a photocopy that came from an illiterate man who could not read the document or explain any matters thereon except that first, it was a document that was **prepared to restrict Amoafo from going on the land**. It was not his testimony that he was part of that trial conducted at the arbitration, or was even present at that trial. All he knew was that this arbitration was supposed to have occurred, and he heard that exhibit 2 was created after a report had been made to the elders and Kwabena Larbi summoned Amoafo to Asuboye. The testimony was also elicited without any foundation in pleading.

We must agree with the court of appeal that the high court was wrong in pronouncing this exhibit as dispositive of the matters that were placed before the court to be tried, because the testimony lacked the foundation of pleadings that complied with Order 11, no issues were joined by the parties on this alleged arbitration to enable a trial on it, rendering the decision per curiam, and the exhibit did not come from proper custody.

In **Attorney -General v Sweater & Socks Factory Ltd, 2013-2014 2 SCGLR 946**, this court reiterated that the well- established principle was that a party who intended

to rely on the plea of estoppel per rem judicatam must do so expressly, and make full disclosure of all the material facts on which it was anchored on page 964 of the law report. The primary object of this sound and high public policy-driven rule, was that it was in the interest of justice and the public at large that finality should attach to binding judgments and decisions of courts and tribunals of competent jurisdiction. Also, parties should not be vexed twice or more over the same matters in litigation.

However, it went on to set a proviso, albeit per curiam, that failure of a party to specifically plead the defence of estoppel per rem judicatam should not be fatal to the party's case because whenever legally justifiable and appropriate, the need for substantial justice must not be sacrificed on the altar of technicality based on rules of procedure. Circumstances under which a court would be bound to consider the plea even when not specifically pleaded by a party includes *'where the defendant's statement of case points unequivocally or substantially to the plea'*. It was the opinion of this court that in such a situation, it can hardly be argued that an opponent has been taken by surprise or prejudiced.

In the matter under consideration in **Sweater and Socks Factory Ltd** (cited supra), the defendant had raised a contention in their Statement of Case and Memorandum of issues that there was a previous suit between the same parties, that the court duly considered the issue of de-confiscation of assets (the issue in contention in the case being contended before the court) on the merits and that there had been a final judgment on the issue.

It is very clear that the direction of this court, given per curiam, as must be pointed out, because what was before the court for settlement was the constitutionality of the high court's decision in the previous suit, and not the fact of the decision, does not at all fit into the circumstances of the case before us, as I have drawn attention to. Thus even if there should be an exception to the express pleading rule that may be derived from the opinions in **Sweater and Socks**, the current case does not fit into the circumstances of these exceptions.

The authorities from this court, from **Peniana and others v Affram 1966 GLR 220, In re Sekyedumase Stool; Nyame v Kese alias Konto 1998 – 1999 SCGLR 476, Darhabieh v SA Turqui & Bros 2001 – 2002 SCGLR 498**, are very clear that for a judgment to operate as estoppel, the decision of the earlier court must be clear and unambiguous regarding the issue determined, the parties to the two suits must stand in the same capacity, and should determine finally the issues between the parties, such that it binds the privies of the parties.

If the doctrine of estoppel per rem judicatam is to be used to resolve a dispute between the parties, then all the critical aspects of resolution of a dispute subject to the doctrine should be present. The burden in such a situation for the court is to determine who the parties were in the earlier proceedings, what issues arose between them and the final decision arrived at concerning the parties and the issue. See **Kariyavoulas v Osei 1982-83 GLR 658 at 664**

In the instant suit, apart from the fact that the parties never joined issues on this alleged arbitration before the Kyidomhene in Asuboi before the plaintiff closed her case, and the award came from the custody of a witness who could not read and answer any question thereon, it is important to also note that the issue that the arbitration was supposed to have considered was *'plaintiff* (Kwabena Larbi Ogyam*) charge against the defendant (*Amoafo*) to show cause or his right for having unlawfully and without lawful title sold a portion of the 'Asona Family' land situate lying and being at Ahodwo Ketewa without the knowledge consent and approval of the said 'Asona Family' of which he, the plaintiff is the accredited family agent/caretaker of the land in question'*

My view is that this issue is contradictory of the pleadings that the defendant herself had presented for resolution in the instant suit. It was the defendant's case that the land in contention was the ancestral property of the Kwabena Larbi or Ogyam section of the Aburi-Atweasin –Asona family which was handed to them directly by Mensah Kokrokwah, and not the Asona family. Now if the land the defendant was supposed to be defending herself against belonged to this precisely described Aburi-Atweasin – Asona family group, how could the same land be 'Asona family' land that this arbitration

was supposed to be in relation to? We must take judicial notice of the fact that in Akan custom, Asona is one of the clans that families belong to. Again, defendant's own case was that Kwabena Larbi or Ogyam was supposed to be the head of this Aburi-Atweasin –Asona family and it is in that capacity that he acted with other members of that family to give defendant an interest in the land. How did he then change to become an accredited family agent/caretaker of the land in question for the Asona family that was the subject matter of the arbitration record in exhibit 2? The principle must be noted that where a party's evidence is inconsistent with his pleaded case while that of his opponent is consistent with his pleadings, the opponent's case must be found preferable to the one who departs from his pleadings. See the directions in**Zabrama v Segbedzi, 1991 2 GLR 221 at 227 to 229,** and **Appiah v Takyi 1982-83 GLR 1 at page 7**

Again, as the court of appeal noted, the land that the determination of the arbitration proceedings covered was supposed to be in a location variously called Ahodwo Ketewa, Mensakrom Ahodwo, and Ahodwo, a name that features just conjunctively with other names in the description of the land that the parties herein lay claim to. No general boundaries were given of this land to enable a determination of whether the land in dispute lies within the disputed land or not, especially bearing in mind the plaintiff's case that the land given to her grandmother that has eventually devolved to her is **only part of a larger tract of land owned by her grandfather Duayeden's that he caused to be** purchased by her great uncle Mensah Kokrokwah.

From the totality of pleadings and testimonies in this case, both Duayeden and Kokrokwa were men of substance, and it is not surprising to find that swathes of the area that that the dispute is located in are named after either Duayeden or Krokokwa. See **Robertson v Reindorf 1971 2 GLR 289** on the principle that if judgment is given over a larger tract, then the principle of estoppel per res judicata will apply to a dispute over a smaller portion **of the same land.** This is different from when lands just abut, or are in the general vicinity of each other. The dispute in this court does not give that clarity.

Plaintiff lays claim to land more specifically described as '*situate and being at a place commonly called Duayeden-Ahodwo near Nsawam and bounded on one side by the Ahohonomfra stream and measuring on that side a distance of a total distance of 1180 feet more or less on one side by Nsawam-Aburi main motor road and measuring on that side a distance of 1100 feet more or less on one side by Ahodwo family measuring on that side a distance of 850 feet more or less and on the other side by Ghana Medium Security Prisons measuring on that side a distance of 1160 feet more or less*.

From Exhibit B, this stretch of land covers 28.74 acres of land.

The defendant's title, ostensibly derived from the statutory declaration tendered as exhibit D covered 37.20 acres of land '*lying and being at KOKROKWA-NSAWAM and bounded on the North East by Donor's land measuring a total distance of 1900 feet more or less on the South East by Ntow Kuma's property measuring a total distance of 1,214 feet more or less on the South by existing and measuring a distance of 365 feet more or less on the South West by Existing Road measuring a total distance of 1,162 feet more or less on the North West by Ahodjo family land measuring a total distance of 345 feet more or less and containing an approximate area of 37.20 acres more or less as indicated by the color pink on the plan attached and which shows the relevant measurements*:'

In both her original and amended statement of defence, the defendant set out that she was defending the action with respect to '*a piece of land at Nsawam now sharing boundary with Nsawam Medium Security prison, the Nsawam Aburi motor road, Duayeden land and Ahodwo land, the said piece or parcel of land being called and known as Krokrokwa or Mensah Krokrokwa*'.

It will be noted that the description from the pleadings and the exhibits ostensibly identifying the parties' lands are significantly different. The acreage for the defendant is 37.20 while that of plaintiff's is 28.74. The two descriptions are different in that defendant does not lay claim to land bounded by the *Ahohonomfra stream* like plaintiff does.

Clearly, without further and more exact evidence, one cannot compel a nexus between these three collections of boundaries found in this trial and the general reference to Ahodwo and Ahodwo Ketewa land that was supposed to be the subject matter area of the arbitration. The only person's word on the subject of similarity of the lands was the defendant's attorney who claimed he could not read the exhibit 2 that he was tendering.

As earlier stated as the well-established principle of law relating to judicial proceedings, the conditions that must exist before a court can apply the principle of res judicata is that the parties in the second dispute must be the same (or their privies), they must sue in relation to the same res and capacity, and the issue before the court must be the same as that alleged to have been the subject matter of adjudication in the previous proceedings, leading to a final decision on the subject.

Before closing this evaluation of the impropriety of the high court's judgment based on this exhibit 2, we must now add what we find to be the death knell of the credibility, validity and weight of exhibit 2. The costs awarded in what was supposed to be a 1985 proceeding, ostensibly recorded in 1985, was set out in these words that I highlighted earlier: '***We award the plaintiff costs of GHC1,170 to be paid him by the defendant Kwaku Amoafro***' Now this court cannot help but take judicial notice of the fact that the currency of Ghc was introduced into this country more than twenty years later than the date of this record – in 2007. Clearly, whoever put exhibit 2 together forgot this notorious piece of history.

The only inference from this line is that this record in exhibit 2 was created after 2007, and not in 1985. I find it interesting that defendant's attorney testified that after the arbitration proceedings in exhibit 2, exhibit 3 was created to delineate the boundaries of this Asona/Ahodwo family land, that defendant now claims is the ancestral property of the Ogyam section of the Aburi-Atweasin –Asona family. My opinion is that both the arbitration proceedings and exhibit 3 were put together for the purpose of providing the high court with a reason to hold in favour of defendant.

Beyond this, exhibit 2 carried other defects that affected its authenticity such as delineations that changed the designation of the person named as chairman, and the name of one of the members of the panel. Part of the testimony of the defendant and one of the defendant's witnesses had been crossed out, with no indication of who did it and when they did it. These are all characteristics of the document that should have raised strong questions about the knowledge of the person who prepared the record, and the authenticity of the record and should have prevented the high court judge from relying on it even as corroborative evidence of its alleged content. **In Re West Coast Dyeing Industry Ltd; Adams & Another v Tandoh 1984-86 GLR 561, 605,** the exercise of discretion against relying on a document that would have been admissible to afford prima facie evidence of the truth of its content, but had not been authenticated, and contained untrue statements, was upheld as the proper position to be taken in evaluation of such documents.

It is our opinion that the failure of pleadings on the defence of estoppel per res judicata and failure of clear nexus of the precisely described lands in issue before this court with the generally described lands and cause of action in issue in the arbitration award in exhibit 2, and lack of credibility of exhibit 2 should have been more than enough reasons for the trial judge not to push the wider issues set out for him to resolve in this suit, into the narrow vault of the 31st March 1985 arbitration proceedings. And especially because the arbitration proceedings were alleged to be between two dead people, the trial judge should have looked at the evidence with great care, thoroughly sifted it, and kept his mind in a state of suspicion that would have alerted him to the incredulity of exhibit 2. As stated in **Kusi & Kusi v Bonsu 2010 SCGLR 60**, the rationale for this principle is of abiding value because there is a grave danger in accepting charges against dead persons who have no means of answering the charge. As can be seen from exhibit 2, there is a real likelihood that this arbitration may never have occurred. I think the plaintiff's lawyer also ought to have been more keenly aware of the legal principles applicable to the kind of case that he was fighting. If you put new wine into old wineskins, the wineskins will tear and everything will be lost. We affirm

the reversal of the high court's dismissal of the plaintiff's claims on the basis of the arbitration award tendered as exhibit 2.

PROOF OF TITLE TO THE LAND IN ISSUE

While the high court held that '*it is obvious that the probabilities preponderate in favour of the defendant's claim*', the court of appeal held that it *'is satisfied that they rather favoured the plaintiff'*. Which of these courts arrived at the right conclusion with regard to weight of evidence?

As asserted in **Mondial Veneer (Gh) Ltd v Amuah Gyebu XV 2011 1 SCGLR 466 at 475,** the law requires that person asserting title and on whom the burden falls, must prove the root of title, mode of acquisition and various acts of possession exercised over the subject matter of litigation. It is only where the party has succeeded in establishing these facts on the standard of balance of probabilities that the party would be entitled to the claim; **Adwubeng v Domfeh]1996-97] SCGLR 667 at 669**.

DISCHARGE OF BURDEN OF PRODUCING EVIDENCE AND PERSUASION

The plaintiff's pleadings and indorsement identified the exact boundaries of the land she claimed. She also clarified the root of title by presenting averment of traditional acquisition of the land devolving from her grandmother's brother Mensah Krokrokwa from as far back to as 1915 to her mother and her children, a group that includes plaintiff's grantor Amoafo, and the validation that was given to the two grants by the customary. She supported this traditional history set out in her pleading with averments of recent acts such as her pleading of the arbitration by the Chief of Ahyiresu on Amoafo's disposition of land which was not denied. She further supported these averments with documentary evidence. In **Ago Sai & Others v Kpobi Tetteh Tsuru 111 2010 SCGLR 762** at 825 this court reiterated the long standing principle that where title to land is premised on traditional history that is disputed, the testimony has to be weighed in the light of more recent facts as can be confirmed from evidence before the court.

The Statutory declaration by her uncle Amoafo dated 4th March 1985 that had been later registered as evidence of his interest, as well as the deed of gift he prepared for the plaintiff in 1987 were tendered as evidence to corroborate plaintiff's case. The point is noted that generally, statutory declarations are regarded as self-serving documents without probative value where the fact stated thereon are challenged or disputed, and they do not confer interest in land. See **In re Ashalley Botwe** (cited supra) and **Mondial Veneer (Gh) Ltd v Amuah Gyebu XV cited supra**.

In the suit before us however, the averments in the Statutory declaration dated 4th March 1985 and numbered 948/1985 formed the foundation for the plaintiff's deed of gift dated 10th March 1987. It was registered at the Deeds Registry as No EA3991 in 2007.

Through this Deed of Gift, plaintiff discharged the obligation to introduce sufficient evidence of her claim to avoid a ruling against her on the issue of her interest in the land that she claimed and shifted the burden of producing evidence against its validity on to defendant. See **Section 11 (1)** and **Section 10 (1)** respectively of the **Evidence Act 1975 NRCD 323**.

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*.

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*.

Having done so, the burden of persuasion shifted to defendant to establish a requisite degree of belief in the mind of the triers of fact regarding her defence that plaintiff's claims could not be sustained on account of the two defences she raised. See **In re Ashalley Botwe** again on the import of the shifting of the burden of producing evidence when one party substantially discharges their obligation to persuade a court with evidence that would avoid a ruling against them.

Section 10 (2) of the **Evidence Act** also provides**:**

10 (2) *The burden of persuasion may require a party to raise a 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 a reasonable doubt*

The two defences of defendant, as set out earlier, are that from Mensah Krokrokwah, the land in issue became the ancestral property of the Kwabena Larbi or Ogyam section of the Aburi Atweasin Asona family of Aburi until they sold it to defendant. That the land in issue never belonged to plaintiff's grandmother, mother and her siblings through a grant from Mensah Krokrokwah

I agree with the court of appeal that defendant woefully failed to discharge both the burden to produce evidence on this defence, and her burden of persuasion as to this defence.

As already determined, exhibit 2 was not at all dispositive of the claims of the defendant that an arbitration tribunal had pronounced on the land in issue being the ancestral property of the Aburi Atweasin Asona family that was headed by Kwabena Larbi Ogyam, and as at the time of trial, by DW1, as claimed by defendant and her witnesses. It was also not an authentic document that could be relied on as corroborative evidence.

It is settled law that previous decisions of a court can be used as evidence of a particular issue, even if the judgment in that case does not constitute estoppel per rem judicatam. See **Peniana and others v Affram 1966 GLR 220.**My view however is that if there is any value that could have been derived from exhibit 2, that value inured to the benefit of plaintiff, because it only helped to contradict the defendant's case, and corroborate the plaintiff's case. The evidence therefrom clarified that Ogyam was not the head of an Aburi-Atweasin- Asona family with title to the land in dispute, that could subsequently give a valid grant to defendant. In essence, exhibit 2 contradicted the defendant's assertions regarding the ownership of the land therein.

On the other hand, within exhibit 2, Amoafo described himself as head of Asona Abusua family at Mensakrom and this was not contradicted. The inference to be made is that Amoafo had a better capacity to alienate the land in reference in exhibit 2 as head of family to his family members, such as plaintiff who is his niece through his sister.

Regarding the alleged root of title that gave defendant the interest she claimed, I find it instructive that Plaintiff's attorney had testified that there was no Ogyame section of the Abiriw Etwasin Asona family. He said that in Abiriw Etwasin (not Aburi Atweasin), there are about four families but no Ogyame section. These families are Nana Duabra Asona, Ofori Tawiah Asona, Amankrado Asona, and Twum Ankra Asona.

Under cross examination, DW1 gave several conflicting pieces of evidence regarding which family was supposed to hold the proprietary interest in the lands of Kokrowa. He started with this answer:

Q. Can you specifically tell the court, which family you are talking about

A. I am talking about Asona Abusua.

He was thereafter asked and gave the following answers:

Q. So can you specifically tell this honourable court which of the families of the Asona Atwesen family you belong to

A. We are the followers of Nana Mensah and he bought that land for our family.

Halfway through his cross examination on that date, he was asked the question:

Q. Mr Obuobi, what Im telling you is that Nana Adu Amponsah 11 is the head of Asona Atwesen clan?

A. If even he is the head, he is not the head of Kokrokwah family

Q. See, is the Kokrokwa family you have mention part of the Asona Atwesen clan

A. No my lord

Q. So could you tell the court which clan Nana Mensah family belongs to

A. He is from Asona clan

Q. Mr. Obuobi, tell the court which division of the Asona clan did Mensah Kokrokwa family belongs to

A. Nana Mensah is from Asona clan, but in the Asona clan we have divisions and everybody has its own division

Q. You see, Nana Mensah was a member of Adubra Asona family, is that correct?

A. Yes my lord, he belong to the family and the clan

The net effect of DW1s evasive and pugilistic testimony was not just corroboration of the testimony of plaintiff's attorney that the four known families included an Adubra Asona family to which Nana Mensah Krokrokwa belonged, but he also helped create doubts as to what the identity of this Ogyam section of the Aburi Atweasin Asona family actually is. In **Manu v Nsiah [2005 – 2006] SCGLR 25 at 33** and **Sarkodie v FKA CoLtd [2009] SCGLR 77**, the principle was clarified that where the evidence of a party on an issue is corroborated by that of his opponent's witnesses, while his opponent's own stands uncorroborated, the court ought not to accept the uncorroborated version unless the corroborated testimony is found to be incredible, impossible or unacceptable.

Defendant utterly failed to discharge the burden of persuasion and the obligation to produce evidence to shift the persuasiveness of the plaintiff's case and establish her own counter version of the root of title to the land in issue. She also failed to produce evidence and discharge the burden of persuasion that the alleged sale of land to her was validly done because Mensah Krokrokwah land properly passed on to Ogyam as head of a family that validly held title to Mensah Krokokwah lands. Her own exhibit 2, as inauthentic and lacking of credibility as it was for the purpose of establishing the arbitration she claimed to have occurred, actually served to contradict her case in the material particulars.

From my review of the records, the only persuasion that comes to me is that the words 'Ogyam section', and the words 'Mensah Kokrokwah family' found in defendant's pleadings and the Agreement tendered as Exhibit 4 respectively, were carefully curated to ensure that the persons asserting interest over the disputed land in this case are the persons who congregate around the customary successor of Mensah Kokrokwah – namely Agyei, and later, Ogyam, and DW1 himself, who was supposed to be the successor of Ogyam. This effort reveals an attempt to overreach whatever wider Asona family group that Mensah Kokrokwah came from whose interests were projected in exhibit 2, and also over reach the grant of the land in issue to Mensah Krokrokwah's sister, as plaintiff urged.

When read together, the impression created is that it is after the arbitration proceedings reflected on exhibit 2, where he described himself as 'accredited family agent/caretaker', that Ogyam was supposed to have morphed into Kokrokwah's customary successoralong with the Ga man Odoi Ardey in the Statutory declaration of October 1985 in order to support the alienation to defendant. And in the purported alienation to defendant, Ogyam and his collaborators went forward or backward to describe themselves as 'Mensah Krokrokwah family, a designation that did not appear in exhibit 2 or in defendant's pleadings. There is absolutely no coherence regarding the claims of defendant and her grantors, either orally or in their documentation and they were properly dismissed by the court of appeal.

ADVERSE POSSESSION

The defendant pointed to two periods of time from which her defence of adverse claims commenced. The first was the position in paragraph 10 of her statement of defence that her father in law, husband and she herself had been in possession of the land in issue '*for over one hundred years farming on it as tenants or licencees of the family which effected the sale to her and her children'*.

The second adverse claim was allegedly from 1994 when she went into possession through the purchase of the land from Kwabena Larbi Ogyam and his Aburi-Atweasin-Asona family. These arguments of adverse possession are very weak and unsustainable.

From the defendant's own pleadings in paragraph 10 of her statement of defence, both her father in law and husband were on the land 'farming on it as tenants or licensees'. So before the defendant decided to take steps to gain proprietary interest in this land, her husband and father in law recognised themselves as licensees with no proprietary interest and asserted none. There was no reason for defendant to rope these dead men into her proprietary claims over the land.

To quote B J Da Rocha and Christian Hans Lodoh's **Ghana Land Law and Conveyancing, Anansesem Publications Ltd 1995, page 77** '*a license is a permission given by the owner of land or of an interest in land which allows the licensee to do certain acts in relation to the land which would, without permission, amount to a trespass*'

Contrary to the very character of licenses, both **Section 10 of Limitation Act 1972, NRCD 54** and decided cases are clear that it is only hostile, adverse, exclusive, uninterrupted possession by a non-owner claimant established as a fact over an unbroken period of twelve years that would amount to adverse possession of land. In **Djin v Musah Baako [2007-2008] SCGLR 686,** this court, per Atuguba JSC firmly reviewed the English authorities on adverse possession and agreed with Lord Denning MR in **Wallis' Clayton Bay Holiday Camp Ltd v Shellmex & BP Ltd 1975 1 QB 94 at 103** in these words: '*Possession by itself is not enough to give a title. It must be adverse possession. The true owner must have discontinuedpossession or have been dispossessed and another must have taken it adversely to him. There must be something in the nature of an ouster of the true owner by the wrongful possessor'.*

On page 699, his lordship quoted thus*'Clearly, possession concurrent with the paper owner is insufficient'.*

So did the defendant's purchase of 1994 give her adverse possession that was hostile, unbroken, and prevented plaintiff or any agent of hers from ever visiting the land? There is no such evidence. The time from which adverse possession can be counted is determined from evidence of factual assertions. There is no record that plaintiff knew of the statutory declaration of Odoi and Ogyam dated October 1985 and the 1994 agreement until the case came to court. Indeed, the record shows that when these documents came to the notice of the plaintiff through the court proceedings, she took the step through her counsel to apply to amend her statement of claim to include the position that they were creatures of fraud.

Prior to this and in her statement of claim, plaintiff averred that after the defendant's started asserting proprietary interest in the land on account of having purchased it from Ogyam, and threatening to kill her and her uncle, they started taking steps to eject the defendant. It is these steps that culminated in this court action. And it can be seen that from 1985, plaintiff and her uncle took steps to document their interest in the land that had been let out to the tenant farmer family that defendant married into.It was the testimony of plaintiff's attorney that she registered her Deed after her uncle died sometime in the 90s and completed this registration in 2007.

In view of these acts and the fact of the pre-existing license given to defendant and her family going back a hundred years to live and cultivate crops on this land as tenant farmers before the commencement of this suit, we do not consider that defendant can be said to have asserted effective adverse possession against plaintiff's proprietary interests

It must also be noted that the alleged indenture from the sale to defendant in 1994 did not independently contain any area of land that was allegedly sold to defendant. The land that defendant ostensibly obtained from that indenture was more particularly described on the Statutory declaration tendered as exhibit D. Defendant was not a party to exhibit D. Within her agreement that defendant purports to have asserted adverse claim from, there is no description of the land that this transaction was supposed to be related to, to enable a determination that the agreement constituted

notice of adverse possession of any identified land. Defendant's defence of the application of Section 10 (1) of the Limitations Act were rightly dismissed by the court of appeal.

FRAUD

The plaintiff had pleaded that the statutory declaration registered by the defendant's grantor as No 5885/1986 from which the grant was made to the defendant was done fraudulently. The particulars of fraud did not address any fraud against the defendant, who is the party before the court. We agree with the court of appeal that any court confronted with an allegation of fraud must not turn a blind eye, and for that we refer to the words of Abban JAon page 605 of **Adams v Tandoh** cited supra that *'Fraud, like cancer, calls for a swift remedy. It must be uprooted. Therefore, when fraud is brought to the court's notice and there is credible evidence to support it, the court is obliged to deal with it swiftly and decidedly'*

The cases on the subject are too many to recount but suffice the reference to the decisions in **Network Computer Systems v Intelsat Global Sales & Marketing 2012 1 SCGLR 218 at 230** and **SA Turqui & Bros v Dahabieh 1987-88 2 GLR 486 at 502**

As such, the trial court ought to have considered the issue of fraud raised by the plaintiff and given it a fitting evaluation. Our consideration is that from the records, the issue raised by the plaintiff was not properly joined with the defendant, because the particulars of fraud raised no allegations of fraud against her.

We must therefore dismiss the allegations of fraud against Odoi and Kwabena Larbi alias Ogyam as unfounded within the contours of this suit, because they are not parties to this suit, and cannot be called on to defend the allegations.

We however take notice of the mass of evidence, including defendant's own pleadings, that her family had no relationship with Mensah Krokrokwa and his family except for that of landlord and tenant. The representations in exhibit D therefore, that defendant

urged constituted the record from which she entered into agreement in exhibit 4 with the Ogyam family and descendants of Odoi Ardey, are on the very face of the document untrue and contradictory of her own pleadings in paragraph 6 of her amended Statement of Defence. In that paragraph 6 she had averred:

6. *That Krokrokwa land used to be the ancestral property of the Kwabena Larbi or Ogyam section of the Aburi –Atweasin Asona family at Aburi until 1994 when that family sold it to defendant and her children in consideration of a complete dwelling house being constructed by her at Aburi for the family*.

We must reiterate the principle stated supra from **Zabrama v Segbedzi and Appiah v Takyi** that where a party's evidence is inconsistent with his pleaded case, a court must reject that inconsistent testimony.

We are satisfied that defendant failed to prove the acquisition of any valid interest in the land she claimed in defence to the contentions of plaintiff. The dismissal of the defence by the court of appeal is upheld. The appeal is dismissed. Costs of GH₵10,000.00 are awarded against the defendants.

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

ANIN YEBOAH
(CHIEF JUSTICE)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

E. Y. KULENDI
(JUSTICE OF THE SUPREME COURT)

COUNSEL

GABRIEL ODAME ADUFUL FOR THE PLAINTIFF/APPELLANT/RESPONDENT.

FRANK G. DONKOR FOR THE DEFENDANT/APPELLANT/APPELLANT.