THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2019

CORAM: BAFFOE-BONNIE, JSC (PRESIDING)

GBADEGBE, JSC

BENIN, JSC

APPAU, JSC

PWAMANG, JSC

CIVIL APPEAL
NO. J4/54/2018

24TH JULY, 2019

AMIDU ALHASSAN AMIDU & ANOR. …….. PLAINTIFFS/RESPONDENTS/APPELLANTS

VRS

MUTIU ALAWIYE & 6 ORS. …….. DEFENDANTS/AAPPELLANTS/RESPONDENTS

JUDGMENT

MAJORITY OPINION WAS READ BY PWAMANG, JSC:-

The parties to this appeal are litigating over ownership of a rather small piece of land at Okaishie in Central Accra which they claim through their respective predecessors-in-title. The land was acquired in the early twentieth century when the city of Accra was much smaller and not laid out as we have it today. The original acquisitions of both predecessors-in-title were covered by conveyances which delineated their grants on site plans. At the trial in the High Court, the parties led oral evidence and tendered their respective documents and site plans and a court appointed surveyor prepared a composite plan. The surveyor testified and was cross-examined.

At the close of the trial, the High Court gave judgment in favour of the plaintiffs and granted the reliefs they claimed save for relief (e), a claim for damages for trespass. Upon an appeal by the defendants, the Court of Appeal disagreed with the trial judge's findings on the evidence, set aside its judgment and found for the defendants. Being aggrieved by the decision of the Court of Appeal dated 15th June, 2017, the plaintiffs appealed from it to this court. In this judgment, the plaintiffs/respondents/appellants shall be referred to as plaintiffs and the defendants/appellants/respondents as defendants.

The only ground of appeal is that the judgment of the Court of Appeal is against the weight of the evidence. We are therefore called upon to rehear the case, review the evidence in the record, and come to our own conclusion as to whether the view taken of the evidence by the Court of Appeal is correct. See **Akufo-Addo v Catheline [1992] 1 GLR 377.**

But, before proceeding to examine the evidence, I wish to clarify the matter about public lane or thoroughfare in the area of the disputed land pleaded by the plaintiffs in paragraphs 15 and 16 of their statement of claim and the defendants in paragraph 7b of their amended defence. The plaintiffs averred that the defendants have occupied and built structures on a public lane that, from the site plan in the document of their processor-in-title, was supposed to lay south of their land. Based on this averment, they claimed in their relief (c) for an order for defendants to demolish the structures they have on the said public lane.

However, even a casual reading of the whole statement of claim makes it obvious that that matter was completely extraneous to the substantive case of the plaintiffs and their claim for declaration of title to land covered by their document of title. If by their own pleadings that public lane did not form part of their land, on what legal ground could they claim relief in respect of it? The plaintiffs have not described the boundaries of the public lane so in respect of which land are the structures to be demolished? A cause of action in public nuisance cannot lie in law as plaintiffs alone do not satisfy the number of complainants required for a nuisance to qualify as public. See **AG v PYA Quarries [1957] 2 QB 169.** What is more, civil suits on public nuisance are brought by the Attorney-General and not private persons. Clearly therefore, plaintiffs had no cause of action against the defendants

as far as the alleged public lane was concerned and those averments and the plaintiffs' relief (c) ought to have been struck out, *sua sponte,* in the early stages of the case as frivolous, vexatious and likely to embarrass or delay the trial of the action. This the trial court could have done pursuant to the inherent jurisdiction of the High Court or **Or 11 R 18 of the High Court (Civil Procedure) Rules, 2004 (C.I.47)**. Consequently, I shall dismiss plaintiffs' relief (c) *in limine*.

The defendants too who could have applied to the court to strike out those offending pleadings did not do so but rather also pleaded that the land allegedly owned by the plaintiffs at Okaishie is a public thoroughfare. The claim of the plaintiffs is for a declaration of title and whether the land is a thoroughfare or not is of no legal significance as in law ownership of land is a question completely different from its use.

Because these frivolous and vexatious pleadings were not expunged, copious unnecessary evidence was led on them thereby beclouding the trial judge in his consideration of the real claims of the parties before him. Despite the fact that the Court of Appeal in their judgment rightly took the view that the matter of a public lane or thoroughfare was irrelevant to a determination of the case, the parties in their statements of case filed in this final appeal have persisted in discussing the question of the location of the public lane at length. That is a pointless discussion because, from the evidence on record, the present lay of the area is different from the zoning that pertained about one hundred years back when the ancestors of the parties acquired their respective lands.

When the irrelevancies are shorn off the pleadings and evidence, the established facts in this case are quite simple and are that, in 1910 the defendants predecessor, Alhaji Shaibu Alawiye, acquired a piece of land described in their indenture, which was not registered under the applicable law at the time, as situate lying and being at Kimboo Boundary Road Ussher Town, Accra. Then in 1924, the plaintiffs predecessor, Amidu Butcher, acquired land adjacent to and lying to the south of the defendants' predecessor's land and was given a document which he registered at the Deeds Registry. Plaintiffs' ancestor's document described the location of his land as being near Selwyn Market, Accra, bounded on the North

by Alhaji Shaibu Alawiye property and on the South by a public lane. This positioning of the two acquisitions is reflected in the site plan in plaintiffs registered document. In their pleadings and oral testimonies, the plaintiffs state that the property of their ancestor covered by their indenture is the vacant land presently lying south of Alhaji Shaibu Alawiye's Memorial House at Okaishie so the court ought, among other reliefs, to declare them owners and make an order of recovery of possession in their favour.

The defendants on their part contend that the vacant land being referred to by plaintiffs is part of the land their ancestor acquired in 1910 for which the document was executed for him. Furthermore, defendants challenge the location of the land covered by plaintiffs' document and state that it refers to a different property and not the land in dispute. In the oral testimony of 2nd defendant, who testified on their behalf, he said the land in plaintiffs' document lies at Cowlane, off Club Road whereas the land in dispute is at Okaishie on Knutsford Avenue. According to him, as the plaintiffs' document talks of "near Selwyn Market", it is referring to a property on Selwyn Market Street and therefore at Cowlane in present day Accra and could not be referring to Okaishie in present day Accra.

As I observed at the outset, the lay of Central Accra has been changing since 1910 when the defendants predecessors-in-title acquired his land. For example, in 1910, Shaibu Alawiye's land was described in his indenture as lying at Kimboo Boundary Road, Ussher Town whereas today the location is called Okaishie. Then in his evidence, the 2nd defendant claimed that at the time Alhaji Shaibu Alawiye acquired the land in 1910 the street it shared boundary with was called Government Street but by his testimony he said the street is now called Knutsford Avenue. Curiously however, whereas the Government Street is stated in their site plan, their indenture describes the location as Kimboo Boundary Road. It is the description of plaintiffs' land in their indenture that is the same as stated on their site plan, namely; near Selwyn Market. Therefore, the claim by defendants that "near Selwyn Market" in plaintiffs' indenture means today Cowlane and not Okaishie, in the absence of geographic evidence, is pure conjecture.

What however is not disputed is the fact that the plaintiffs ancestor, Amidu Butcher, acquired a land that shares boundary with property of Alhaji Shaibu Alawiye. The only question is whether Amidu Butcher's land is the disputed land at Okaishie or it lies at Cowlane as contended by defendants. This is evident from this cross-examination of 2nd defendant at page 174 of the record;

"Q. You said in this court that Shaibu Alawiye has property number 818A/3 situated at Cowlane and it shares boundary with plaintiffs' land at Cowlane, that is number D839/3 Cowlane?

A. Yes

Q. I put it to you that what you said is not correct. Shaibu Alawiye does not have any property sharing boundary with plaintiffs at Cowlane

A. It is clear that the site plan and indenture presented by plaintiffs shows that Shaibu Alawiye has property sharing boundary with plaintiffs at Cowlane."

Next, it has been established by the evidence of the court appointed surveyor, and confirmed by the testimony of 2nd defendant, that the current true physical location of the land in dispute is adjacent and lies to the south of Shaibu Alawiye's House at Okaishie. See the composite plan and report of the surveyor, "CW1" at page 326, and his evidence at pages 83-88 of the record. I have taken particular note of the fact that the defendants in cross-examining the surveyor did not challenge the accuracy of his work. Additionally, the authenticity and validity of the plaintiffs' indenture registered in 1924 was not impeached at the trial.

From the above outlines of the respective cases of the parties, the question to be answered is; which of the two cases does the evidence render more probable as required by **Section 12 of the Evidence Act, 1975 (NRCD 323)**. In deciding to give judgment for the defendants, the Court of Appeal held that the plaintiffs who sued for declaration of title to land were by law required to prove their claim only on the strength of their case and could not rely on any weaknesses in the defendants' case. They cited as authority the West Africa

Court of Appeal case of **Kodilinye v Olu (1935) 2 WACA 336.** With due regard to them, that is a wrong standard of proof for actions for declaration of title to land posited by the Court of Appeal. In the case of **Odametey v Clocuh [1989-90] 1 GLR 14,** the Supreme Court at page 28 of the Report, through Taylor, JSC rejected that authority in the following words;

'It seems to me, with the utmost respect, that the mechanical application of this so-called principle in actions for declaration of title (the genesis of which is traceable to the erudite judgment of Webber C.J. in the West African Court of appeal on 18 June 1935) should be deprecated. In the said case, Kodilinye v. Odu (1935) 2 W.A.C.A. 336 at 337-338 involving a declaration of title, the learned Chief Justice said:

"The onus lies on the plaintiff to satisfy the Court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not rely on the weakness of the defendant's case. If this onus is not discharged the weakness of the defendant's case will not help him and the proper judgment is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration. So if the whole evidence in the case be conflicting and somewhat confused, and there is little to choose between the rival traditional stories the plaintiff fails in the decree he seeks, and judgment must be entered for the defendant."

If the dictum of Webber C.J. above stated over half a century ago supports the proposition that a weakness in the defendant's case in an action for a declaration of title must not be considered in evaluating the strength of the plaintiff's case no matter the nature of the plaintiff's case, then the dictum is now no more true of the legal position in modern Ghana, at least since the coming into force of the Evidence Decree, 1975 (N.R.C.D. 323). Amissah J.A. in his usually able manner has, however, stated the true ambit of the application of the principle. In Ricketts v. Addo [1975] 2 G.L.R. 158 at 166, C.A. he explained:

"The burden of persuasion which a plaintiff has to satisfy in every civil case is no more than proof on a balance of probabilities. In a trial involving title to land like any other civil trial, therefore, if the defendant's case is measured against the plaintiff's and the plaintiff's is found more probable, a determination which necessarily involves the balancing of the strength and weakness of the rival claims, the plaintiff's case has to be accepted. In the assessment of claims, the judge will have to examine the weakness of the defence just as he has to examine the weakness of the plaintiff's claim. The legitimacy of the exercise or of the plaintiff's assistance to the court in highlighting these weaknesses cannot be questioned."'

Applying the standard of proof on a balance of probabilities, I observe from the evidence that, it is an established fact that the land in dispute being claimed by the plaintiffs in this action lies south of the house of Alhaji Shaibu Alawiye and this is in conformity with the description in their registered indenture and their site plan used by the surveyor for the survey and superimposition. Therefore, the documentary evidence gives credibility to the case of the plaintiffs that their ancestor's document refers to the disputed land. It is however noted, that though plaintiffs submitted two site plans to the surveyor for the superimposition, he did not plot their 1924 site plan but used only their second site plan which was prepared in 2011, shortly before the case was filed. But in the case of the defendants, when the site plan they presented to the surveyor as their land in the 1910 indenture of Shaibu Alawiye was superimposed on the plan of the disputed land as it presently lies, their site plan fell off the disputed land and lies to the north of it. That position of defendants site plan is rather consistent with the case of the plaintiffs that Shaibu Alawiye's property lies to the north of Amidu Butcher's land acquired in 1924. In the circumstances, I am of the considered view that the failure of the surveyor to plot the 1924 site plan of plaintiffs does not weaken the plaintiffs' case to any significant degree since the defendants site plan corroborates their case.

Though on the ground the defendants showed the surveyor the boundaries of their land to include the disputed land, their site plan relates to a much smaller land that does not include

the disputed land. The explanation of the defendants for the disparity between what they showed on the ground and what is contained in their site plan is, that they had two site plans of different sizes, a larger one contained in the 1910 acquisition and a smaller one in a lease that was granted to a Lebanese developer after the death of their patriarch. If that were true, then why did they hand the smaller site plan to the surveyor and fail to tender the 1910 one when they claim it is larger?

In my understanding of the whole evidence that was adduced, when the strengths and weaknesses of the respective cases of the parties are assessed, the documentary evidence leans more in support of the case of the plaintiffs than that of the defendants, for the following reasons; the plaintiffs indenture is registered but the defendants' is not; the description of their land tallies with the site plan in it whereas defendants' site plan bears a description different from the document itself, and finally and more importantly, the true location of the land is consistent with claim of plaintiffs and the site plan of defendants corresponds with the location of the land as stated in plaintiffs indenture. The settled rule of the law of evidence is, that where oral evidence conflicts with and is inconsistent with documentary evidence that has not been impeached on legal grounds or through cross-examination, then a court must prefer the documentary evidence to the oral testimony. See the case of **NANA ASIAMAH ABOAGYE v ABUSUAPANYIN KWAKU APAU ASIAM [2019] 128 G.M.J. 254. S.C.** The defendants testified that the land in dispute was part of the land their ancestor acquired in 1910 but the documentary evidence shows unequivocally that it was not.

But the documentary evidence does not resolve the claim by defendants that Alhaji Shaibu Alawiyie had another property at Cowlane that shares boundary with land of Amidu Butcher so it is that land that is referred to. That is because the surveyor was not shown that land of the defendants at Cowlane and they did not tender a document covering it. I therefore perused the record for any evidence they led to prove that claim. From the record, the only evidence proffered by defendants is the bare assertion of 2nd defendant when he testified that Shaibu Alawiye has a house at Cowlane that shares boundary with Amidu Butcher's land. In any case, the 2nd defendant in his testimony was not specific as to the side of their

Cowlane property they share boundary with Amidu Butcher; whether north, south, east or west. This is significant because plaintiffs 1924 document was specific as to the side their land shares boundary with Shaibu Alawiye which the documentary evidence has corroborated. In the cross-examination of 2nd defendant quoted above, he was directly challenged that Shaibu Alawiye has no property at Cowlane that shares boundary with plaintiffs, but his only answer was that it is the plaintiffs' indenture that says so. That for me is shocking! 2nd defendant's basis for this averment that is so material to their case is the plaintiffs' indenture?

Meanwhile, the defendants had in cross-examining 2nd plaintiff, who testified on behalf of plaintiffs, suggested to him that the boundary owners of the land described in their indenture are to be found at Cowlane to which 2nd plaintiff did not agree. Since it is the defendants who allege that plaintiffs' document is in respect of a land at Cowlane, and they made it one of their main defences to the action, it was expected that they would call evidence to prove that Alhaji Shaibu Alawiyie has property at Cowlane adjacent and to the south of which Amidu Butcher's land lies. DW1 called by defendants is supposed to be a boundary owner of their buildings at Okaishie and not at Cowlane which their defence talked of.

The settled position of the law is that it is the party who stands to lose on an issue if no evidence is led on it that bears the burden of proof as far as that issue is concerned. This principle is stated in **Sections 14 and 17 of NRCD 323**;

"14. Allocation of burden of persuasion

Except as otherwise provided by law, unless it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence that party is asserting.

17. The burden of producing evidence

Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further evidence."

In this case, if no evidence is led on the alleged property of Alhaji Shaibu Alawiye at Cowlane that shares a southern boundary with land of Amidu Butcher, it is the defendants who would lose on that issue so they bear the burden of proof of that fact. It was not for plaintiffs to prove that their ancestor's 1924 acquisition was not in respect of land at Cowlane. That notwithstanding, it was rather the plaintiffs who led some evidence about a Cowlane property as not belonging to Amidu Butcher whereas the defendants offered no proof of their Cowlane property. I am therefore of the firm opinion that the defendants have failed to prove the allegation that the plaintiffs document is in respect of an acquisition of land at Cowlane.

From the evidence, it is common cause between the parties that the disputed land is not developed but is being used by traders, who plaintiffs describes as squatters and defendants claim they are their tenants who pay monies to them for using it for their activities. But the Court of Appeal in their judgment at page 444 of the record said as follows;

"In the face of the fact that the defendants have a house on the disputed land: the Alhaji Shaibu Alawayie House, with title documents predating the plaintiffs' anscestor's alleged 1924 purchase (the defendants' is dated 1910), for a finding on the identity of the area in which the land in dispute, which was contrary to the defendants', to be made, the learned trial judge ought to have made same not solely on the description contained in the plaintiff's title document exhibit "A" and the evidence of the plaintiff, but on other corroborative evidence, preferably from official sources." (emphasis supplied).

In the first place, the defendants do not have a house on the land in dispute. The land in dispute is undevelopped and Alhaji Shaibu Alawiye Memorial House is to the North of the land as testified by the surveyor and admitted by the defendants. Therefore, with great respect to the justices of the Court of Appeal, they fell in a grievous error in their understanding of the undisputed evidence. Secondly, the reference to the earlier dating of defendants' title deed is inconsequential on the facts of this case since their document does not cover the same land as the plaintiffs'. But, the Court of Appeal was right in saying, that

in order to make correct findings of facts in the case, there was a need for the oral testimonies of the parties to be corroborated by evidence from official sources. Unfortunately, unlike the trial judge, they did not at all consider the evidence of the government surveyor which is from official source as they requested for. If they had done that, they would most likely have arrived at the irresistible conclusion, that the official evidence corroborated the case of the plaintiffs and was inconsistent with the case of the defendants.

In the written submissions of the defendants in the Court of Appeal they, for the first time, sought to rely on the defences of the **Limitations Act, 1972 (NRCD 54),** acquiescence and lashes. They made submissions on these defences under the ground of appeal that the judgment of the High Court is against the weight of the evidence. Then in their statement of case filed in this court they have repeated those submissions. To begin with, the law is well-settled, and this has been acknowledged by the defendants, that the defences of acquiescence, lashes and statute of limitation are to be specifically pleaded. See **Dolphine (No.3) v Speedline Stevedooring Co. Ltd [1996-97] SCGLR 514.** Then, **Order 11 Rule 8 of C.I.47** provides as follows;

"Matters to be specifically pleaded

8. (1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any limitation provision, fraud or any fact showing illegality

(a) which the party alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

(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." (emphasis supplied)

Though the defendants say in their statement of case that they "notified" the plaintiffs of their reliance on these defences, they do not indicate the form that notification took since they do not claim to have pleaded them. As I have observed above, the first mention of these defences is in their written submissions in the Court of Appeal but the rule demands that they must be pleaded. I have read the amended defence of the defendants over and over again but I do not find an averment on those defences. The only averment on possession is in paragraph 17 of the amended defence, which is as follows;

"The defendants aver that 4th, 5th, 6th and 7th defendants are living (sic) as tenants of the 1st defendant who are the owners of the said land"

That averment does not state that defendants are relying on adverse possession over a stated period for which reason the plaintiffs' claim is defeated on grounds of estoppel by acquiescence or lashes or the statute of limitation. On the contrary, the averment insists that defendants are owners of the land in dispute, which ownership they set out to prove but woefully failed. That precisely is the point **Or 11 R8(2)** makes, that a legal defence to an action for possession of immoveable property, such as we have in this case, must be specifically pleaded and it is not sufficient for a defendant to only aver that she is in possession either by herself or through her tenants as the defendants pleaded in this case.

The purpose of the rule, as is the case with most rules on pleadings, is to uphold the opposite party's right to fair and adequate hearing by knowing in advance the case he is to answer. For instance, the defences based on adverse possession are subject to exceptions including disability, acknowledgment, fraud, mistake and the true owner of land being aware that the person in possession is asserting an interest inconsistent with the rights of he the true owner and therefore in adverse possession. See **Sections 16, 17 and 22 of NRCD 54** and the case of **Mmra v Donkor [1992-93] Part 4 GBR 1652**. That is the more reason those defences in particular ought to be specifically pleaded to afford the true owner of land the

opportunity to lead evidence on any applicable exceptions for the consideration of the court. Therefore, not haven specifically pleaded any legal defence based on adverse possession, the defendants cannot be heard on those grounds.

But even on the merits of a defence of adverse possession in the circumstances of this case, the contention of plaintiffs is that defendants predecessor used the land to keep his horses with the permission of their ancestor and being owners of adjacent lands, it can safely be assumed that defendants predecessor, through whom they claim, all the time must have known that the disputed land belonged to plaintiffs predecessor. Is it not intriguing that defendants over the years have encroached on adjoining lands outside their site plan, including what plaintiffs stated is a public lane, but left the disputed land fallow? In such circumstances, a defence based on a claim of adverse possession cannot be made in good faith and would hardly find favour with a court of conscience. Again, it was not proved that the plaintiffs were aware that defendants were asserting an interest in the disputed land inconsistent with their ownership until they wrote to the traders to vacate the land.

The defendants in their statement of case submitted that squatters can acquire title to land after 12 years of occupation. That is an erroneous statement of the law. The legal definition of a squatter in **Black's Law Dictionary, 8th Edition, 2004** *is "A person who settles on property without any legal claim or title."* The difference in law between a squatter and a trespasser is, that whereas a trespasser enters onto a land and claims an interest in it that is inconsistent with the rights of the true owner, a squatter does not claim any interest in the land he is in occupation of. Therefore, possession by a squatter is not adverse to the title of the true owner so a squatter cannot succeed on a defence of limitation. **Section 10 (2)&(3) of NRCD 54** provide that;

" 2) A right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run.

3) Where a right of action to recover land has accrued, and before the right of action is barred, the land ceases to be in adverse possession, the right of action does not accrue until the land is again taken into adverse possession."

Similarly, possession of land by a licensee is not inconsistent with the rights of the true owner, so such possession is not adverse and cannot ground a defence of limitation. In the case of **GIHOC v Hanna Asi [2005-2006] SCGLR 458,** this court rejected a defence of limitation put up by a licensee of a true owner for the reason that his possession was not adverse.

Additionally, the defendants took issue with the overlap and variations in the size of the land plaintiffs claim as against the size in their indenture Exhibit "A" as shown by the superimposition. The overlap was described by the surveyor to be of a "small dimension" and, observing it on the composite plan, it is insignificant and does not detract from the plaintiffs claim to the land as it is currently comprised of and known to the parties. As for the differences in the measurements of the land, defendants who have admitted to building on all the land surrounding the disputed land cannot be heard to complain about variations that are attributable to their own activities on land not covered by their indenture. The plaintiffs are entitled to and I hereby declared them owners of the whole land delineated on their site plan at page 292 of the record measuring 75.9 feet to the north 29.3 feet to the east 78.5 feet to the south and 29.2 feet to the west containing 0.05 Acre. I make an order that the said plan be registered in the names of the plaintiffs as the judgment plan.

For the reasons explained above, my opinion of the effect of the admitted evidence in this case is that, on a balance of probabilities, the plaintiffs proved a better claim to the land in dispute as against the defendants. Consequently, the Court of Appeal erred when they set aside the findings of the High Court and decided in favour of the defendants. Plaintiffs are entitled to judgment on the reliefs they claimed, save and except their relief (c), which I earlier on dismissed, and relief (e) which the High Court did not grant. The appeal therefore succeeds in part and is allowed in part.

(SGD) G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC: -

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

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

GBADEGBE,JSC:-

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

N. S. GBADEGBE

(JUSTICE OF THE SUPREME COURT)

BENIN, JSC:-

I agree with the reasoning and conclusion of my brother Pwamang JSC:-

A. A. BENIN

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION WAS READ BY APPAU, JSC:-

This is an appeal from the judgment of the Court of Appeal dated 15th June 2017. The only ground of appeal contained in the notice of appeal filed on 12/09/2017 was the omnibus ground that the judgment of the Court of Appeal was against the weight of evidence. No additional ground of appeal was filed as indicated in the notice of appeal. The appellants herein were the plaintiffs in the trial High Court whilst the respondents were the defendants. In this judgment, the parties shall maintain their descriptions in the trial High Court; i.e. plaintiffs and defendants respectively.

The facts of the case leading to this appeal

The plaintiffs issued out a writ of summons against the defendants on 06/07/2012 claiming six reliefs. These were:

- ***a.*** *A declaration of title to the land in dispute situate at Okaishie the property of Amidu Butcher (deceased), which he purchased in 1924 from one Mammah Gaya;*
- ***b.*** *Recovery of possession of the land in dispute;*
- ***c.*** *An order directed at 1st defendant to demolish the building erected on the public lane;*
- ***d.*** *Perpetual injunction;*
- ***e.*** *Damages for trespass; and*
- ***f.*** *An order evicting the squatters from trading on the land in dispute and or stopping them from paying rent to 1st defendant and his family.*

The plaintiffs did not describe the said disputed land in the endorsement on their writ of summons. It was in their statement of claim, specifically paragraphs 7 and 8, that they described the alleged disputed land as sharing boundary with the land of defendants' father by name Alagi Shaibu Alawiye on the North measuring 40ft 6 ins; on the South by a public lane measuring 40 ft 6 ins; on the East by the property of one Menkano measuring 43 ft 10 ins and on the West by the property of one Ajorke measuring 43 ft. 10 ins. The pleaded case of the plaintiffs was that the disputed land was purchased by their grandfather/great grandfather by name Amidu Butcher from one Mammah Gaya in 1924. According to them, the land was witnessed by an indenture executed between Mammah Gaya and their grandfather/great grandfather Amidu Butcher on 6th June 1924 and registered as instrument number 298 of 1924 at the Deeds Registry. Their grandfather/great grandfather used the land as a depot for his cola business until his death in 1929. After the death of their grandfather/great grandfather in 1929, the cola business continued whilst other businesses sprang on the land. Plaintiffs, however, did not indicate those who continued the cola business and other businesses on the land after their grandfather's death as they alleged. They went on further to state that whilst the cola and other businesses were taking place on the land, defendants father Shaibu Alawiye began to keep his horses on the land. They,

however, did not tell when the keeping of horses on the land by Shaibu Alawiye began. They contended further that, though they knew the land belonged to their grandfather/great grandfather, they did not challenge those people who were doing business on the land after the death of their said grandfather/great grandfather in 1929, including defendants' father whom they said was keeping horses on the land. Their only assertion to ownership of the land was on 3rd October 2011 when they caused their lawyer to write to the 4th, 5th, 6th and 7th defendants, whom they described as squatters on the land, to vacate the land for them to develop same. Surprisingly, they never addressed any of the letters to the 1st, 2nd and 3rd defendants who were the descendants of Shaibu Alawiye and were actually in possession of the disputed land. They went on to state that, instead of the 4th to 7th defendants responding to their letter dated 3rd October 2011, the 1st defendant rather, who said he was the head of the family of Alhaji Shaibu Alawiye, was the one who responded to the letters claiming that the disputed land had been the property of the Alawiyes from time immemorial so the 4th to 7th defendants, who were their tenants should not vacate same. The response from the 1st defendant gingered them to commence this action on 6th June 2012. Plaintiffs added that when they decided to develop the land, they conducted a search at the Archives Department and the search revealed that the defendants had built structures on the land marked as 'public lane' on the site plan attached to their indenture (Exhibit 'A'). Plaintiffs, however, did not tender the alleged search report in evidence. They contended further that defendants had, since 1980, been collecting rent from some of the squatters on the land including the 4th, 5th, 6th and 7th defendants. They therefore prayed that the defendants be ordered to demolish the buildings constructed on the public lane and also be made to refund to them all the rents they had collected from the squatters from 1980 up to date.

The defendants, who were seven in number, entered appearance through their lawyer on 12/07/2012. Their case was that the 1st to 3rd defendants are grandsons and nephew of Alhaji Shaibu Alawiye while the 4th to 7th defendants are tenants of the 1st defendant who is the current head of the Alawiye family. They categorically denied plaintiffs' claim in their statement of defence. The contention of the 1st, 2nd and 3rd defendants was that the land the plaintiffs are claiming was part of the land their grandfather Alhaji Shaibu Alawiye

acquired in 1910. They admitted that though plaintiffs' grandfather/great grandfather acquired land from one Mammah Gaya, which said land shares boundary with one of their properties, the said land is not at Okaishie but rather near Selwyn market at Cowlane. According to them, plaintiffs' predecessor Amidu Butcher was not in any cola business but was a butcher that is why he was called Amidu Butcher. They denied that plaintiffs were entitled to their claim.

At the application for directions stage, the defendants requested the trial court to make an order for the parties to submit their documents for superimposition on a composite plan to determine whether the parties were talking of different lands as the defendants contended or the same subject matter. The trial court obliged the request and made the order. The order was that the parties should submit their site plans as pleaded to the Director of Survey and Mapping Division of the Lands Commission to be superimposed. The trial judge made a further order that the grantors of the parties should also submit their relevant documents to the Survey and Mapping Division when the alleged grantors were not parties in the suit. No order was made by the trial court for the surveyor to identify the boundary owners of the parties as indicated on their site plans so the surveyor who testified as C.W. 1 did not go that length.

During the trial, plaintiffs did not call any evidence to support their claim of title to the disputed land. They relied solely on Exhibit 'A'. None of the two witnesses they called (i.e. P.W.1 and 2), gave evidence relating to ownership to the land. Though the defendants did not put in any counterclaim and therefore had no onus to discharge, they called three witnesses to support their case. The trial High court granted the plaintiffs all the reliefs they prayed for with the exception of relief (e) on damages for trespass. Not satisfied with the judgment of the trial High Court, the defendants appealed against same to the Court of Appeal.

Appeal to the Court of Appeal

The defendants relied on four grounds of appeal. These were:

i. *The judgment is against the weight of evidence;*

ii. *The learned trial judge erred when he found that there was no public lane but concluded that defendants had built on a public lane;*

iii. *The learned trial judge erred when he made a finding that the land described as public lane is not part of the land acquired by Amidu Butcher plaintiffs' predecessor in title and yet went on to find for the plaintiffs; and*

iv. *Having found that the public lane does not lie within the disputed area, the learned trial judge's conclusion that it does not mean that one does not exist is mere conjecture.*

The Court of Appeal, in a judgment delivered on 15th June 2017, reversed the trial High Court and gave judgment in favour of the defendants. It dismissed plaintiffs' claim in its entirety. The Court of Appeal determined the appeal on the sole ground that the judgment of the trial court was against the weight of evidence adduced at the trial. The first appellate court was of the view that the plaintiffs did not discharge both the burden of proof or persuasion and the burden of producing evidence imposed on them by sections 10 and 11 (1) and (4) of the Evidence Act, 1975 [NRCD 373] so it was wrong for the trial court to have found in their favour the reliefs sought in the action. According to the Court of Appeal, there was no evidence on record to support the trial court's finding that the defendants had built on a public lane when the court itself had found that there was no indication that there was a public lane as contended by the defendants and the court appointed surveyor (C.W. 1). Again, it was wrong for the trial court to have ordered the defendants to demolish their structures built on the alleged public lane when the disputed land which plaintiffs alleged belonged to them did not include the non-existent public lane. The Court of Appeal, on the basis of the above findings among others, reversed the decision of the trial High Court and entered judgment for the defendants who had been in possession of the disputed land for over a century.

Appeal to the Supreme Court

On the 12th of September 2017, the plaintiffs filed the instant appeal before this Court, praying the Court to set aside the judgment of the Court of Appeal and to restore the 15th June 2015 judgment of the High Court. The plaintiffs prayed for this relief on the sole ground that the judgment of the Court of Appeal was against the weight of evidence on record. The settled law as pronounced by this Court in a host of authorities, which are too notorious to be recounted here, is that the procedural principle that an appeal is by way of rehearing, particularly where the sole ground of appeal is that the judgment is against the weight of evidence, applies to this Court as a second and the last appellate Court as it applies to the first appellate court. Since the only ground of Appeal canvassed by the plaintiffs in this appeal is that the judgment of the Court of Appeal was against the weight of evidence on record, it is incumbent on the Court to take a harder look at the whole evidence on record and come to its own conclusion as to which of the two divergent decisions of the two lower courts is, or is not, supported by the totality of the evidence on record. We owe the parties an unparalleled duty to meticulously discharge this function so as to ensure that justice is not denied the party who deserves it. However, as was held by this Court in the case of **DJIN v MUSAH BAAKO [2007-2008] SCGLR 686**, *"where an appellant complains that a judgment is against the weight of evidence, he is implying that there were certain pieces of evidence on the record which, if applied in his favour, could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against".* It is therefore the duty of the plaintiffs to satisfy this Court that the judgment of the Court of Appeal was against the weight of evidence and therefore flawed. In my candid view, plaintiffs could not discharge this function.

Plaintiffs' submissions in brief

In their bid to discharge their function of demonstrating the flaws in the Court of Appeal's judgment, plaintiffs' arguments in brief were that the Court of Appeal did not appreciate the significance of the 'overwhelming and unequivocal' documentary as well as the oral evidence, particularly of the surveyor (C.W.1) which was in favour of the plaintiffs. According to plaintiffs, the surveyor testified that the size of the land shown on plaintiffs' site plan was

consistent with the size of the land shown to him by the plaintiffs on the ground, whilst the land shown on the defendants' site plan was smaller than what the defendants showed him on the ground. Plaintiffs submitted further that the Court of Appeal ignored the averment in the plaintiffs' statement of claim at page 101 of the record that the defendants sought permission from the plaintiffs' family and kept their horses on the land in dispute, which allegation was not challenged by the defendants. They again contended that the Court of Appeal erred when they held that the public lane did not exist when the surveyor had found otherwise. According to plaintiffs, Shaibu Alawiye's land in the area had been fully developed and therefore had no more land in the area so it was wrong for the Court of Appeal to hold that the defendants building was on the disputed land. In a supplementary statement of case filed on 27/06/2019, plaintiffs contended further that House No. D839/3 was property acquired by Amidu Butcher's son Beleribe Hamidu Butcher in or about 1935 long after his father's death in 1929 and said this fact was supported by Exhibits 'F' and 'G'. It was therefore wrong for the Court of Appeal to hold that the plaintiffs land was at Cowlane and was the one on which Beleribe Hamidu Butcher built house number D839/3.

Defendants' submissions

The defendants discounted all these arguments in their statement of case filed on 19/02/2019 and I do not intend to recall their arguments here, which in my view, deflated all the submissions made by the plaintiffs. I will demonstrate *infra* that these submissions by the plaintiffs do not find support from the evidence on record and that the Court of Appeal did not err in any way in reversing the decision of the trial High Court.

Observations and analysis

I have to emphasize that plaintiffs' contention that defendants did not challenge their pleaded case that defendants sought permission from them to keep their horses on the disputed land, is not borne out by the evidence on record. In fact, plaintiffs never pleaded that defendants grandfather Alhaji Shaibu Alawiye sought permission from their family to keep his horses on the disputed land. Their only pleading on the keeping of horses is under

paragraphs 10 and 11 of their amended statement of claim at pages 138 and 139 of the RoA. These paragraphs read:

"10. Plaintiffs say that their grandfather/great grandfather used the land as a depot for his cola nut business as well as host those who brought cola to him for sale. This cola trade continued on the land well after the death of Amidu Butcher.

11. Sometime later while the cola business continued, 1st defendant's father Alhaji Nuhu Shaibu Alawiye began to keep his horses on the land and other business activities sprang up side by side the cola business".

Plaintiffs never said in their pleading that the keeping of horses by defendants' grandfather whom they described as defendants father, was with the permission of their grandfather or any other person. Again, they never indicated when this keeping of horses on the land began. Defendants' case all along was that the disputed land belonged to them and that it was part of the land acquired by their grandfather in 1910. This grandfather of defendants (Alhaji Shaibu Alawiye), according to defendants, died in 1915; i.e. nine (9) years before plaintiffs' grandfather/great grandfather purchased his land from Mammah Gaya in 1924. Plaintiffs did not dispute this fact - ***{****See page 167 of the RoA during cross-examination of 2nd defendant by plaintiffs' lawyer****}.*** I wish to recall this cross-examination at page 167 of the RoA:

"Q. Are you saying that Shaibu Alawiye house was built by Shaibu Alawiye (deceased)?

A. Yes;

Q. Do you refer to the entire house with the inscription Shaibu Alawiye Memorial House as the house Shaibu Alawiye built?

A. <u>Shaibu Alawiye died in 1915</u>. He originally built his own house there which was a wooden structure and after his death his children leased that property to

a Lebanese who constructed the property which is now situate on the Shaibu Alawiye land. That Lebanese is Abdalla Asafiri"}.

So if Shaibu Alawiye himself was keeping horses on the land as plaintiffs pleaded, then that action predated the alleged purchase of the disputed land by Amidu Butcher in 1924. The 2nd plaintiff who testified for plaintiffs said he was born in 1967; over fifty (50) years after Alhaji Shaibu Alawiye's death – {***See page 103 of the RoA***}. It was when he was testifying for and on behalf of the plaintiffs that he changed what they pleaded under paragraph 11 of their amended statement of claim and said defendants' predecessors sought permission from his predecessors to keep horses on the land which evidence contradicted their pleading. Plaintiffs did not tell when this permission was sought, who sought it and from whom it was sought. So whilst in their pleading plaintiffs said it was Alhaji Shaibu Alawiye himself who was keeping horses on the land, their evidence was that defendants' predecessors sought permission from their predecessors to keep their horses on the land. This was a case of putting up a case contrary to their pleading – {See **DAM v ADDO (1962) 1 GLR 200**}. Interestingly, Alhaji Shaibu Alawiye died in 1915, long before plaintiffs' grandfather/great grandfather Amidu Butcher allegedly acquired the disputed land in 1924. He could not therefore have sought permission from either plaintiffs' grandfather or anybody else to keep his horses on the land since plaintiffs' grandfather/great grandfather acquired his alleged land long after his death. The two statements in plaintiffs' pleading and in the evidence of 2nd plaintiff were therefore not the same. They were a contradiction so the defendants had no business denying what was a contradiction.

Again, before the trial commenced, the trial High court made an order for the parties to submit their site plans as pleaded, to a surveyor (C.W. 1) to superimpose them on a composite plan. Surprisingly, the plaintiffs swerved the trial court by presenting a site plan that did not form part of their case. Though the plaintiffs made a list of the documents they intended to present to the surveyor, which included the indenture of their predecessor dated

6th June 1924, they did not add the site plan attached to the said indenture, which was prepared by one Kwaw Sawyer and dated 9th June 1924 - ***{See page 276 of the RoA)***. Instead, plaintiffs submitted a site plan made on 25th November, 2010 by a surveyor called E. K. Ziwu, which was quite different from the site plan attached to their Exhibit 'A' and presented that as the site plan of the land Amidu Butcher purchased from Mammah Gaya in 1924 – {***See page 45 of the RoA***}. The site plan that accompanied the indenture executed between Mamma Gaya and Amidu Butcher in 1924, which appears at page 276 of the RoA and which plaintiffs should have submitted to the court appointed surveyor, measured 40 ft. 6 ins by 43 ft 10 ins by 40 ft. 6 ins by 43ft 10 ins, whilst the one prepared by E. K. Ziwu on 25/11/2010, which was not part of plaintiffs case, measured 29 ft 2 ins by 75 ft 9 ins by 29 ft 3 ins by 78 ft 5 ins. That site plan did not indicate any boundary owners. It was this site plan, which did not form part of plaintiffs' case which the surveyor, C.W. 1 said tallied with the land plaintiffs showed him when he visited the land to draw his composite plan. This anomaly made mockery of the report and testimony of the surveyor (C.W.1). The defendants on the other hand, submitted two documents. The first was the indenture made between Salifu Jimba as vendor and defendants' grandfather Shaibu Alawiye as purchaser dated 29th July 1910 measuring 175 ft 4 ins by 122 ft. 4 ins by 10 ft 6 ins by 113 ft 0 ins, which they tendered in evidence as Exhibit 1. The second was the indenture made in 1939 between the children of the late Alhaji Shaibu Alawiye by name Abdul Aziz Alawiye, Memunatu Alawiye, Muniratu Alawiye, Rianatu Alawiye, Osenatu Alawiye, Asanatu Alawiye, Isiaka Alawiye, Nafisatu Alawiye and Awawu Alawiye on the one part as Lessors and a Lebanese by name Abdulla Asafiri on the other part as Lessee, measuring 110 ft by 67 ft by 110 ft by 67 ft, which was tendered in evidence as Exhibit 'L'. It was this second indenture that led to the construction of the Shaibu Alawiye Memorial House which defendants described as situate at Knutsford Street, Okaishie. According to defendants, this property at Okaishie, Knutsford Avenue, is different from their property at Selwyn Market Street, Cowlane, numbered D818A/3, which they claimed shares boundary with the land Amidu Butcher purchased from Mammah Gaya in 1924 – {***See page 166 of the RoA***}. It is interesting to note that after defendants' counsel had cross-examined the 2nd plaintiff on his evidence in-chief in which defendants suggested that the land that Amidu Butcher purchased

from Mammah Gaya which is the basis of their suit, is the very land on which plaintiffs' house numbered D839/3 at Selwyn Market Street stood, plaintiffs sought leave of the trial court to amend their statement of claim to plead that, that house in question belonged to Amidu Butcher's son by name Beleribe Hamidu Butcher and that it stood on a different land acquired by Beleribe Hamidu Butcher himself. Plaintiffs, however, did not deny that this house in question at Cowlane numbered D839/3 shares boundary with Alhaji Shaibu Alawiye's house numbered D818A/3, which is completely different from the Alhaju Shaibu Alawiye Memorial house at Knutsford Avenue. I wish to recall that cross-examination which appears at pages 104 to 107:

"Q. 1st plaintiff lives in a house very close to Selwyn Market Street.

A. Yes.

Q. The House No. is D839/3

A. Yes.

Q. This house is very close to a house with the inscription Peregrino house.
A. That is so.

Q. <u>The house where 1st plaintiff lives shares boundary with a place called Adjoke.</u>

<u>A. I do not know.</u>

<u>Q. Adjoke house is the same as Peregrino house.</u>

<u>A. I do not know about that</u> {Emphasis mine}

<u>Q. I suggest to you the documents you tendered in which your grandfather bought the land from Mammah Gaya is preferable to house no. D839/3, Selwyn Market Street.</u>

<u>A. That is not true.</u>

Q. I suggest to you that house number D839/3 shares boundary with Dr. Tagoe and Alawiye property.

A. I do not know about that. {Emphasis mine}

Q. That property also shares boundary with Menkano.

A. That is not true.

Q. That place is very close to S.D. Karam.

A. That is true.

Q. You grew up in Accra.

A. Yes

Q. The street, Selwyn Market Street, from Kwame Nkrumah Avenue ends at boundary road.

A. That is true.

Q. Derby Avenue from Kwame Nkrumah Avenue also ends and joins boundary road.

A. Yes.

Q. In between Selwyn Market which was a name given by the Colonial Government and Derby Avenue, we have present day Rawlings Park.

A. Yes.

Q. Knutsford Avenue, tracing it from Kwame Nkrumah Avenue also ends and joins Boundary road.

A. Yes.

Q. Exhibit 'E' with the inscription Alhaji Shaibu Alawiye Memorial House which you tendered yesterday is at Knutsford Avenue.

A. Yes. {Emphasis mine}

Q. I put it to you that the property you are claiming does not come near anywhere near the property of the defendants.

A. That is not correct.

Q. I put it to you that house number D839/3, Selwyn Market Street is different entirely from the property in Knutsford Avenue.

A. That is correct. {Emphasis mine}

Q. You agree with me that Knutsford Avenue and Selwyn Market are in two different places.

A. They are two different places but they are near each other.

Q. How near.

A. About 50 metres. {Emphasis mine}

Q. The house with the inscription, Alhaji Shaibu Alawiye Memorial House which ends together with all the properties that end and join the Boundary Road are properties of the Alawiyes.

A. That is not true.

Q. Plaintiffs do not have any property interest in that land.

A. That is not true.

Q. Defendants do not owe you any account.

A. That is not true.

Q. Whatever money they collected, they collected same as owners of the land.

A. That is not true.

Q. Menkano building is facing Pagan Road.

A. That is not true.

Q. You picked those bearings of what you are alleging belongs to you and gave them to the surveyor.

A. That is not true {Emphasis mine}

Q. <u>On the ground, the land you are claiming is on Selwyn Market.</u>

<u>A. That is not true".</u> {Emphasis mine}

In fact, the defendants' case all along has been that, the plot Amidu Butcher purchased from Mammah Gaya in 1924 and attached to Exhibit 'A' is at Selwyn Market Street and that it is the very plot Amidu Butcher's son Beleribe Hamidu Butcher has built his house numbered D839/3 on. This testimony was supported by D.W. 1 who said their house forms boundary with the property of the defendants at Knutsford Street. Exhibit 'A' states clearly that the land Amidu Butcher purchased from Mamma Gaya is at Selwyn Market as contended by the Defendants but not at Knutsford Avenue where the disputed land is situated. The boundary owners given on the site plan in Exhibit 'A' are; Shaibu Alawiye, Ajoke, Menkano and a public lane. During cross-examination of the 2nd plaintiff, the defendants suggested to him that Adjoke's property is the one on which stood Peregrino House and the answer 2nd plaintiff gave was that he did not know about that. This answer was not a denial of defendants' suggestion. Defendants again suggested to 2nd plaintiff that the plot again shares boundary with Alawiye property as stated on the site plan and to this question also, 2nd plaintiff answered that he did not know about that. That answer too was not a denial of that suggestion. Defendants again suggested that the said Amidu Butcher's property as stated on the site plan which now houses Beleribe Hamidu Butcher's house numbered D839/3 also shares boundary with Menkano's property as indicated clearly on the site plan made in 1924

but 2nd plaintiff answered in the negative. Notwithstanding all these suggestions, plaintiffs did not find it necessary to call any of the two boundary owners; i.e. Adjoke and Menkano or their descendants to support their case and to refute the suggestions made by the defendants during cross-examination. What the plaintiffs did was to submit a receipt of payment of property rate in 1935; a receipt of payment of water bill in 1947 and 1948 by Beleribe Hamidu Butcher to suggest that that building D839/3 was on a different land acquired by Beleribe Hamidu Butcher when mere payment of water bill and property rate does not confer ownership or title in the property to the person who made the payments. If plaintiffs' case was that Beleribe Hamidu Butcher did not build on his father's plot acquired in 1924 after his father's death in 1929, as alleged by the defendants, then they should have produced an indenture or a document showing when Beleribe acquired the said property in question but they failed to do so. Plaintiffs did not tender any document to establish that the land, on which Beleribe Hamidu Butcher's house stood, was acquired by him, contrary to defendants' assertion that it was the very land his father purchased from Mammah Gaya in 1924. The trial court's conclusion therefore that the plaintiffs did establish that it was Beleribe Hamidu Butcher who acquired the land on which stood House no. D839/3 was not supported by the evidence on record as plaintiffs offered no such proof. The onus was on the plaintiffs who asserted that claim to produce cogent evidence in proof of that claim on the preponderance of the probabilities, in the wake of the strong denial by the defendants, but they failed to do so.

Again, in their pleaded case, plaintiffs never asserted that defendants had built on a portion of their alleged land. They said defendants had built on the public lane, which means that their land as exhibited in Exhibit 'A' remained intact. If that is the case, then why has the size of the land shown in Exhibit 'A' changed from 40 ft, 6 ins x 43 ft, 10 ins x 40 ft, 6 ins x 43 ft, 10 ins to 29 ft, 2 ins x 75 ft, 9 ins x 29 ft, 3 ins x 78 ft, 5 ins? Again, whilst the trial judge said defendants had built on a public lane, the surveyor said there was no public lane in the area when he visited the land. This shows clearly that the area shown in the site plan attached to Exhibit 'A' is completely different from the land at Knutsford Avenue, which the surveyor visited. This explains why the plaintiffs prepared a new site plan in 2010, different

from the one attached to Exhibit 'A' and gave that to the surveyor as the plan of the land acquired by Amidu Butcher in 1924.

The defendants' case as clearly indicated in the record (RoA) was that it was not all the land their predecessor Alhaji Shaibu Alawiye purchased at Knutsford Avenue that they leased to the Lebanese to build the Shaibu Alawiye Memorial house. Exhibit '1' is the indenture covering the original land Shaibu Alawiye purchased in 1910 and Exhibit 'L' is the indenture covering the land the children of Shaibu Alawiye leased to the Lebanese Abdulla Asafiri to construct the Shaibu Alawiye Memorial House. The court appointed surveyor's composite plan shows the smaller land on which the Lebanese constructed the Memorial House and the larger land purchased by Shaibu Alawiye in 1910, which the defendants showed the surveyor when they visited the land. The one on which the Lebanese built the Shaibu Alawiye Memorial House measures 110 ft x 67 ft, whilst the larger one measures 175 ft by 122 ft. There is no public lane in that area as the surveyor (C.W.1) rightly indicated in his evidence. What is shown in the composite plan as Amidu Butcher's land purchased from Mamma Gaya is rather the new site plan plaintiffs surreptitiously made in 2010 and submitted to the surveyor when they knew clearly that they had no land in that area. The defendants have properties spread on that land that is why plaintiffs prayed the trial court to order for the demolition of the properties the Alawiyes have on the land. If indeed, plaintiffs knew the land belonged to their grandfather Amidu Butcher, then why didn't they stop the Alawiyes from building on the land several years ago? Again, why didn't they stop the Alawiyes from collecting rent from the people they called squatters on the land in between the properties of the Alawiyes when this came to their knowledge as far back as 1980 as they themselves have alleged in their pleadings and evidence? – ***{See page 102; last but one paragraph of the RoA}.*** Why wait till 2011 before writing to the alleged squatters instead of the 1st defendant who had all along, to their knowledge, been collecting rent from those doing business on the land?

In fact, the surveyor (C.W. 1) should have indicated the lands or properties of Ajoke on the West and Menkano on the East as clearly indicated in Exhibit 'A' in his composite plan but he could not do so because plaintiffs did not submit that site plan to him. Again, the plaintiffs' contention in their statement of case that the 4th to 7th defendants did not contest the matter is misplaced. The lawyer who entered appearance to the action or suit did so for and on behalf of all the defendants but not only on behalf of the 1st to 3rd defendants. The 2nd defendant also testified for all the seven defendants – **{*See page 163 of the RoA*}.** His contention was that the 4th to 7th defendants were their tenants so the defence put up covered all of them. The 4th to 7th defendants could not have offered any defence different from that of the owners of the land. The Court of Appeal therefore concluded rightly when it held that plaintiffs did not satisfy the burden of proof imposed on them by the law since on the balance of probabilities, the defendants' case was more probable than that of the plaintiffs. I will therefore dismiss the appeal and uphold the decision of the Court of Appeal in reversing the trial court's judgment. Appeal accordingly dismissed.

(SGD) Y. APPAU

(JUSTICE OF THE SUPREME COURT)

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