IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: GBADEGBE, JSC (PRESIDING)
PROF. KOTEY, JSC
OWUSU (MS), JSC
TORKORNOO (MRS), JSC
KULENDI, JSC

CIVIL APPEAL
NO. J4/55/2020

2ND DECEMBER, 2020

BINGA DUGBARTEY SARPOR ……. DEFENDANT/RESPONDENT/APPELLANT

VRS

EKOW BOSOMPRAH ……. PLAINTIFF/APPELLANT/RESPONDENT

JUDGMENT

KULENDI, JSC:-

This is an Appeal against the judgement of the Court of Appeal dated 3rd May, 2018, which said judgment varied the judgment of the trial High Court delivered on 21st June 2007. The Appellant herein, dissatisfied with the decision of the Court of Appeal, and exercising her constitutional right pursuant to Article 131 of the 1992 Constitution, has brought the instant appeal to this Court.

BACKGROUND:

The antecedent facts that triggered the instant appeal are captured as follows:

On the 29th of October, 2004, the Plaintiff/Appellant/Respondent (hereinafter referred to as 'the Respondent') instituted an action in the High Court for the following reliefs:

a. Declaration of title to all that piece or parcel of land in extent 0.15 hectares (0.36 of an acre) more or less known as parcel No. 24, Block 5 Section 021 lying situate at Asylum Down, Accra covered by Land title Certificate No. GA 20228 in Land Register Volume 10 Folio 473;
b. Damages of ¢ 35,000,000 for trespass;
c. An order for perpetual injunction against the Defendant/Respondent/Appellant, her agents, assigns or anybody claiming through her from further trespassing on the land in dispute.

The Respondent averred in his Statement of Claim that he acquired the land in dispute from Jogis Ltd by a deed of Conveyance dated 17th July, 2001. The Respondent further stated in his Statement of Claim that his grantor is Mary Akua Durowaa who is said to have traced her root of title from Giftie Mnomlokie Plange Dugbartey who had acquired the land from the Nii Odoi Kwao Family by an indenture dated 1st March 1952. The Respondent also deposed that upon purchasing the land, he registered his interest in the land and on 23rd July, 2004, a land title certificate was issued in favour of the Respondent.

The Respondent states that this action was commenced at the High Court after the Appellant without the Respondent's permission, entered the land in dispute and started erecting a fence wall around same.

The Appellant entered appearance and filed her Statement of Defence on 16th December, 2004. The Appellant in her Defence asserted that she had been on the land for over 20 years. She further asseverated that she was the caretaker of the property for and on behalf of the family of one Margaret Korkor Dugbartey who died intestate and childless in 1952. She asserted that upon the death of the said Margaret Korkor Dugbartey, the family appointed her to live on the property and to take care of it for them.

The Appellant, in her Defence, also contended that Giftie Mnomlokie Plange Dugbartey had fraudulently disposed of the land and that the Appellant, as an appointee of the family of Margaret Korkor Dugbartey, had issued a writ to set same aside on grounds of fraud in a Suit No.: BF/13/2005. A copy of the writ of Summons and the Statement of Claim in Suit No.: BF/13/2005 were exhibited to an affidavit in opposition to an injunction application. The processes were not tendered at the trial.

At the close of trial, the trial Court found as a matter of fact that the Appellant had been in possession of the disputed land for over 20 years. The Court also found that the Respondent had proved title to the land. The Court however dismissed the claim of the Respondent on the sole ground that the Appellant as an appointee of the Dugbartey family had issued a writ of summons against Giftie Plange Dugbartey for fraudulently disposing of the land the subject matter of this action. The trial Judge was of the opinion that the suit, which was pending in another court, when determined may vitiate the title proved by the Plaintiff. Accordingly, the trial Judge dismissed the Respondent's action. The Respondent, aggrieved by the judgement of the trial High Court, appealed against the said judgment to the Court of Appeal.

The Court of Appeal in its judgement delivered on the 3rd of March, 2018, upheld the Respondent's Appeal in part, by declaring that the Respondent had proven better title to the land in dispute. The Court further granted an order of perpetual injunction against the Appellant, her agents, servants, assigns, or anybody claiming through her from further encroaching on the said land.

The concluding part of the Court of Appeal's judgement reads as follows:

> "***In conclusion, the appeal succeeds in part as follows:- declaration of title for the parcel of land described in the writ of summons of the Appellant is hereby decreed in the Appellant; and perpetual injunction is hereby granted against the respondent, her agents, servant, and assigns from interfering with appellant's quiet enjoyment of the land. The judgement of the trial Court dated the 21st June 2007 is hereby varied in terms of this judgement***."
>
> (see page 294 of the Record of Appeal)

The Appellant, dissatisfied with the Judgement of the Court of Appeal, filed the instant Appeal to this Court pursuant to Article 131 of the 1992 Constitution.

The part of the decision of the Court of Appeal complained of, per the Appellant's Notice of Appeal is the whole of the judgement.

GROUNDS OF APPEAL

The Appellant's grounds of Appeal as set out in her Notice of Appeal which may be found at page 297 of the Record of Appeal are as follows:

1. The judgment is against the weight of evidence
2. The Court of Appeal erred in not dismissing the case of the Plaintiff as caught by the Limitations Act.

APPELLANT'S CASE

The Appellant contends per her statement of case that the Court of Appeal, having found as a fact that the she had been in undisturbed possession of the land in dispute for well over 20 years, ought to have determined the matter in her favour by holding that the Respondent's action was statute barred.

The Appellant says that she expressly pleaded in her Statement of Defence, particularly in paragraph 8, that the Respondent was statute barred. The said paragraph reads as follows:

> "8. Defendant says that having been in undisturbed possession for well over 12 years, the Title of the Plaintiff's predecessor and by necessary implication, the Plaintiff, if they ever had title, is statute barred."

The question as to whether or not the Respondent was statute barred was set down as an issue for determination by the trial by the Court. The Appellant therefore argues that the Court of Appeal failed to apply the provisions of the Limitations Act in its reasoning and therefore erred in upholding the Respondent's Appeal in the manner it did.

Appellant premised this assertion on the fact that it is a well-established principle of Law that where a judgement can be supported by other evidence on record other than that which was relied upon by the trial Judge, the Appellate court ought not set aside the judgement of the trial Court.

RESPONDENT'S CASE:

The Respondent in his statement of case filed on 16th March 2020 argues that the Appellant cannot rely on a plea of adverse possession and the statute of limitation. According to the Respondent, the Appellant failed to prove that she had been in adverse possession of the land in dispute. The Respondent further contended that the Appellant, having alleged in her pleadings and evidence that she was in possession of the land as a care-taker of the family of the late Margaret Korkor Dugbartey, cannot rely on a plea of adverse possession and the statute of limitation since she was a mere licensee.

Resolution of the Grounds

Before resolving the issues in controversy in this appeal, we wish to point out that the Appellant did not address this Court on the first ground of Appeal, being that the judgement is against the weight of evidence.

The duty of an Appellant to sufficiently point out the lapses in the evidence and or the analysis thereof to demonstrate the allegation that the judgment is against the weight of evidence was elucidated in the case of **Djin v Musah Baako [2007-2008] SCGLR 686** as follows:

> "where (as in the instant case) 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 favor, could have changed the decision in his favor, 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 lapse in the judgment being appealed against"

Similarly, in the case of **Agyenim-Boateng vs. Ofori &Yeboah (2010) SCGLR 861**, this Court held at page 867 that:

"…The appellate Court can only interfere with the findings of the trial Court where the trial Court: (a) has taken into account matters which were irrelevant in law; (b) has excluded matters which were critically necessary for consideration; (c) has come to conclusion which no Court properly instructing itself would have reached; and (d) the Court's findings were not proper inferences drawn from the facts."

In the submissions filed by Appellant, Appellant has not demonstrated any matters which were irrelevant in law that the Court of Appeal applied against her. Appellant has not also alluded to matters which were critically necessary for consideration which the Court of Appeal failed to take into consideration. Neither has the Appellant alleged that the conclusions reached by the Court of Appeal are conclusions which no Court, properly instructing itself would have reached, nor that the Court's findings were not proper inferences.

Having failed to address this Court on the omnibus ground of appeal, we shall deem the omnibus ground abandoned. This is because, although, alleging that a judgment is against the weight evidence requires us to scrutinize the entire record of Appeal, as demonstrated from the cases cited above, the burden is on the Appellant who alleges this omnibus ground of appeal to point us to those pieces of evidence on record which substantiates his or her claim. Appellant, having failed so to do, this ground of appeal is hereby dismissed.

If the Appellant succeeds with her second ground of Appeal, which is the contention that the Respondent's action is statute barred, the Appeal will succeed and the discussion of the other ground of appeal, even if Appellant had addressed the Court on it, would have become otiose. Our distinguished brother, Jones Dotse JSC reiterated the above proposition in an unreported judgement of this Court dated 9th November, 2016 in Civil Appeal No.J4/17/2016 entitled Jean Hanna Assi vrs. Attorney General (Civil Appeal No. J4/17/2016) as follows:

"**If indeed it is [statute barred], then there is no need to look at the merits of the case since the statute of limitation is a venerable shield that can be used to ward off indolent and piecemeal litigators."**

We shall therefore proceed to further evaluate Appellant's contention of limitation and adverse possession.

Section 10 of the Limitation Act, 1972, NRCD 54 provides as follows:

> *"10. Recovery of Land*
>
> *(1) A person shall not bring an action to recover a land after the expiration of twelve years from the date on which the right of action accrued to the person*

bringing it or, if it first accrued to a person through whom the first mentioned claims to that person.

(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 ceased to be in adverse possession, the right of action does not accrue until the land is again taken into adverse possession.

(4) For the purpose of this Act, a person is in possession of a land by reason only of having made a formal entry in the land.

(5) For the purposes of this act, a continual or any other claim on or near a land does not preserve a right of action to recover the land.

(6) On the expiration of the period fixed by this Act for a person to bring an action to recover land, the title of that person to the land is extinguished.

*(7) For the purpose of this section **"adverse possession"** means possession of a person in whose favour the period of limitation can run."*

A plea of limitation cannot, unlike other legal grounds, be raised for the first time on appeal. It must have been pleaded in the pleadings of the party at trial. This is because, the law frowns upon ambushing a party with such a cardinal point of law that seeks to bar a person from seeking reliefs in court. This judicial principle was stated by his Lordship Benin JSC in the case of **Armah v. Hydrafoam Estates (Gh.) Ltd** [2013-2014] 2 SCGLR 1551 at pages 1568 to 1569 as follows:

"A party who seeks to rely on laches, acquiescence or limitation has a duty or obligation to plead them or to plead such facts as evince an intention to rely on same. … **These matters like laches, acquiescence and limitation are all to be pleaded since the party who is entitled to rely on them may decide not to do so; the other party should not be taken by surprise and is therefore entitled to notice in the pleadings in order to raise any answer he may have to these claims.** …. Thus they cannot be raised for the first time on appeal, unless the pleadings disclose

the factual basis and evidence on it was led at the trial. That is not the position in this case, as there was no such plea and no evidence was forthcoming on the record."

We are therefore to examine the pleadings of the parties to determine whether the contention of Statute of Limitation was canvassed in the pleadings in the Court of first instance.

A perusal of the Statement of Defence filed by the Appellant from the Record of Appeal shows that the Appellant pleaded limitation against the Respondent. Specifically, Appellant pleaded in paragraphs 4 to 9 of the Statement of Defence as follows:

> "4. The Defendant denies paragraph 8 of the statement of claim and states that she has been in undisturbed possession of the land for over twenty years through her tenants and caretakers.
>
> 5. The Defendants deny paragraphs 9 to 12 of the Statement of claim
>
> 6. The Defendants state that sometime prior to 1986, she put some bottle dealers on the land and they have been there till now.
>
> 7. The Defendants further state that in or about 1986, she put two brothers who are carpenters, mainly, Mensah, Koumasse and John Koumasse on the land first as tenants and subsequently as caretakers and they have been there since unchallenged.
>
> 8. The Defendant says that having been in undisturbed possession for over twelve years, the right to bring an action for recovery of possession of the Plaintiff's predecessor and by necessary implication, the Plaintiff, if they ever had title, is statute barred."

It is pertinent to mention that the trial Court found as a matter of fact that the Appellant indeed had been in possession of the land for well over 20 years. At page 202 of the Record of Appeal, the trial judge stated as follows:

"From the totality of evidence before me, Plaintiff was not able to establish that his vendor Jogis Ltd who allegedly purchased the disputed land from Mary Durowaa in 1995 was ever in actual or constructive possession of the disputed land. No such evidence was led throughout the trial. Quite apart from that, Plaintiff himself who pleaded that he placed a carpenter and his workmen on the land later denied in his testimony that there was a carpenter on the land. Rather, what he said in his testimony was that he settled a lady who was operating a communication centre in a container on the land after he had become owner contrary to his pleading. He however could not prove this assertion. He could not call this so-called lady to testify for him.

The Defendant told the Court that it was rather she who permitted this lady to place her container on the land and called the lady to support her case. This lady, who testified as DW2 denied ever knowing or meeting ***Plaintiff*** *anywhere when Plaintiff tried to suggest that he permitted her to be on the land.*

Defendant again called one of the carpenters she says she permitted to work on the land and then one of the bottle dealers she said she settled on the land somewhere prior to 1986. All of them confirm Defendant's claim that she permitted them to stay on the land over the past 20 years. They again said that they have been in undisturbed possession since their occupation. Plaintiff could not challenge the testimonies of these witnesses, which I find highly credible.

This Court therefore finds as a fact that, neither Plaintiff nor his vendor has ever been in possession of the disputed land and that it is the Defendant who has all along been in possession of this disputed land even before and after Mary Akua Durowaa purported to have purchased it from Gifty in 1994."

The Court of Appeal concurred with the trial court on the fact that the Appellant had been in possession of the land. In its judgment dated 3rd May, 2018 which is at page 291 of the Record of Appeal), the Court of Appeal held as follows:

"Possession of land in law includes the exercise of physical control of the land and the intention by a person to exercise exclusive possession and also prevent

others from owning the land. The evidence on record is clear that the Respondent had exercised control over the land in dispute for over 20 years as found by the trial judge. From the Appellant's own pleadings, he instituted this action when the Respondent started fencing the land in dispute. The evidence is thus clear that the Respondent was physically in possession and also through her agents. The evidence is that she even sought to prevent others from taking over the land by fencing the land. From the evidence on record the trial judge was right in holding that the Appellant failed to prove that he or his predecessors were in possession. The trial judge was therefore right in holding that the Respondent had proved possession of the land."

From the above, it is evident that the Applicant has been in possession of the land for over 20 years. The Appellant being in possession of the land for over 20 years does not give the Appellant a better title to the land than the Respondent. Long period of possession of land does not guarantee title nor does it by itself estop another from challenging the title to the land.

For the Appellant to succeed in his plea of limitation, he must demonstrate that he is by law, in adverse possession of the land. Section 10(2)(3) and (7) of the Statute of Limitations Act, 1972 (NRCD 54) states as follows:

"10(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 ceased to be in adverse possession, the right of action does not accrue until the land is again taken into adverse possession.

(7) For the purpose of this section **"adverse possession"** means possession of a person in whose favour the period of limitation can run."

From the above, the 12 years limitation period does not run unless the person against whom a suit is instituted for the recovery of land is in adverse possession of same.

Was the Appellant in adverse possession?

The term "adverse possession" was explained by Atuguba JSC in the case of **Djin v. Musah Baako [2007-2008] 1SCGLR 686** at 699 when he stated that "The law as we understand it… is that if a squatter takes possession of land belonging to another and remains in possession for 12 years to the exclusion of the owner, that represents adverse possession and accordingly at the end of 12 years the title of the owner is extinguished. That is the plain meaning of the statutory provisions, which I have quoted and no authority has been cited to us. The simple question is: did the squatter acquire and remain in exclusive possession?"

In the case of ***Adjetey Adjei v. Nmai Boi [2013-2014] 2 SCGLR 1474***

Her Ladyship Sophia Adinyira JSC in explaining adverse possession, had this to say:

> *"Adverse possession must be open, visible and unchallenged so that it gives notice to the legal/paper owner that someone was asserting a claim adverse to his. And section 10 of the Limitation Act, 1972 (NRCD 54) has reflected substantially the provisions of the English Statute of Limitation and the common law. Under the present law, the person claiming to be in possession must show either (i) discontinuance by the paper owner followed by possession; or (ii) dispossession or as it was sometimes called 'ouster' of the paper owner. Clearly possession concurrent with the paper owner was insufficient. If a squatter took possession of land belonging to another and remained in possession for twelve years to the exclusion of the owner, that would represent adverse possession and, accordingly, at the end of twelve years, the title of the owner would be extinguished. In the circumstances, assuming the defendants' title was bad, their adverse possession of the land for a period of twelve years and over, had conferred on them possessory rights by virtue of section 10 of the Limitation Act, 1972 (NRCD 54). The interest acquired by prescription or under the Limitation Act, 1972 (NRCD 54), was an overriding interest, which was further protected under the Land Title Registration Act, 1986 (PNDCL 152)."*

It is worthy of note that the plea of adverse possession and the defense of limitation does not avail a squatter who lays no adverse claim or a licensee but only someone whose claim of possessory title in the land is adverse to that of the true owner.

In the case of Amidu and Another Vrs. Alawiye and Others in Suit No.: J4/54/2018 (Unreported) this Court in a judgment dated 24 July 2019, per Pwamang JSC, expatiated on the above salutary principle as follows:

> "***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."***

In the instant case, the Appellant alleged that she was on the land as a caretaker on behalf of the family of Margaret Korkor Dugbartey who died intestate and childless in 1952.

In fact, the above assertion of was repeated on oath by the daughter of the Appellant, who testified on behalf of the Appellant. During cross-examination of the attorney of the Appellant, the following ensued:

"Q: You said the Defendant is caretaker of this land. Do you still maintain this?

A: Yes my Lord.

Q: When did she become caretaker of the land?

A: She became the caretaker more than 20 years ago.

Q: Who appointed her as a caretaker of the land?

A: My principal's family, the Dugbartey family."
(see page 119 of the Record of Appeal)

The question therefore is, having claimed to have been on the land as a caretaker of the family of Margaret Korkor Dugbartey, could she by law, claim adverse possessory title in herself and for her benefit as an alternative claim by virtue of the fact that she has been in possession of the land for over 20 years?

We are of the view that an Appellant who alleges that he or she is a caretaker of a land cannot rely on an alternative plea of adverse possession. Any act of ownership purported to have been exhibited by the caretaker is done at the behest of the person who put the caretaker there. The relationship between the caretaker and the person who put him in possession is synonymous to that of a principal and an agent. Therefore, just as an agent cannot claim title for his benefit and for himself, but on the instructions and for the benefit of the Principal, so will a caretaker not be able to claim adverse possession for himself.

Since the plea of adverse possession cannot avail the Appellant, the statute of limitation also cannot lie against the Respondent in this case. We are therefore inclined to dismiss the above ground of appeal on the issue of limitation.

On the strength of each party's claim, we find that the Respondent has better title than the Appellant. The Appellant failed to call the Dugbartey Family to join the suit and to contest its title. The nature of adverse possessory title in land is such that, once the Court upholds it, it prevails over all other interests including the interest of a registered proprietor of land under the Land Title Registration Act, 1986, PNDCL 152, by virtue of section 18 (1) and (2) thereof.

Thus in *GIHOC vrs, Hanna Assi case, Supra,*at 468 – 469 Dr. Date-Bah JSC elegantly stated the legal nature of an adverse possessory title as follows:

> "*The combination of the extinguishing of the original owner's rights under section 10(6) of the Limitation Decree, 1972 (NRCD 54), with the barring of action against the adverse possessor under section 10(1), must in logic result in the adverse possessor being construed to have gained a right that is enforceable by action. Otherwise, there would be the risk of "ownerless lands" resulting from a contrary interpretation of section 10(6) of the Limitation Decree. Indeed, there is authority in support of the view that an adverse possessor of land in relation to which the original owner's rights have been extinguished has rights in relation to which he can sue. The adverse possessor gains a new estate of his or her own, which is not by transfer from the original owner whose rights have been extinguished by the limitation statute*"

The learned Justice further opined as follows:

> *"There is thus persuasive authority to support the logically sound conclusion that, where an original owner's title in land has been extinguished by a statute of limitation, the adverse possessor gains a title equivalent to the title extinguished. The title is not transferred from the previous owner to the adverse possessor, but rather the squatter or adverse possessor gains a new title that takes the place of the rights of the original owner…*
>
> *It is clear that title may be acquired by adverse possession. Such title, as already pointed out, is not derivative, in that it does not flow from the title extinguished. Nevertheless, it is title and it is open to this Court to declare such title, upon a suit by the adverse possessor. Such a possessory title was held to be a good title that could be forced on a purchaser in the case of* ***In re Atkinson and Horsell's Contract [1912] 2 Ch 1****. In my considered view, therefore, the possessory title of an adverse possessor can be used as a sword, and not only as a shield. It follows, therefore, that the Plaintiff would be entitled to a declaration of title, if it were able to establish that it has been in adverse possession of plot 19 for more than 12 years."*

In effect, the Appellant's claim of adverse possession is contradictory and opposed to that of the very people who put her on the land.

We are therefore of the view that, we cannot, deny the Respondent title to the said land based on unproven verbal assertions of the Appellant that the land in question is the family land of Dugbartey Family. This Court cannot prefer oral testimony that is not corroborated especially when such oral testimony is in conflict with documentary evidence, in this case, land title documents evidencing successive purchases and transfers from one person to another.

This Court having found that the Respondent is not statute-barred, hereby dismisses the appeal as unmeritorious and affirms the judgment of the Court of Appeal.

E. YONNY KULENDI

(JUSTICE OF THE SUPREME COURT)

N. S. GBADEGBE

(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS)

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS)

(JUSTICE OF THE SUPREME COURT)

COUNSEL

NII AKWEI BRUCE-THOMPSON FOR THE DEFENDANT/RESPONDENT/APPELLANT.
S. K. AMOAH FOR THE PLAINTIFF/APPELLANT/RESPONDENT.