IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: DOTSE JSC (PRESIDING)
PWAMANG JSC
DORDZIE (MRS.) JSC
L-JOHNSON (MS.) JSC
AMADU JSC

CIVIL APPEAL
NO. J4/10/2021
8TH DECEMBER, 2021

1. DANIEL RAMSEY ADJEI OKOE
2. MARTIN ADJEI SOWAH
   (For and on behalf of Odametey Family of Nii Adjei Okpleim Family of Teshie) } PLAINTIFFS/APPELLANTS/APPELLANTS

VRS

1. NII AKWETEY LAWANI
2. SAMUEL ADJEI ASHONG } DEFENDANT/RESPONDENTS/RESPONDENTS

JUDGMENT

MAJORITY OPINION

DORDZIE (MRS.) JSC:-

The plaintiffs who are the appellants herein acting as representatives of the Odametey family of Nii Adjei Okplem We of Teshie took out this suit against the defendant respondents claiming the following:

a) Declaration of title to a parcel of land described as: the land situate at Oyibi near Dodowa in the Greater Accra Region containing an approximate area of 171.81 acres, bounded on the North by the Accra- Dodowa road measuring 3,600 feet more or less.On the South West by Oyibi land measuring 2,600 feet, measuring 3,055 feet more or less. On the North East by Sasabi's property measuring 2,872 feet more or less
b) Order for recovery of possession
c) Perpetual injunction restraining the defendants, their assigns, agents, servants and all those who derive title through them from having any dealings with or on the said property.
d) General damages for trespass and
e) Cost.

It can be observed from (a) above,that the description the plaintiffs gave to the land they are claiming as endorsed on their writ is not accurate. There seems to be only 3 dimensions of the land described, instead of four, the third side, that is, the description 'to the South West', is said to have a measurement of 2,600 feet and then, 3,055 feet. It is a bit confusing, a cross check on other documents, presented by plaintiffs on record, which describes the land, that is the statutory declarations have the same descriptions with an obvious omission or mistake. Assuming that it is an omission or mistake in the endorsement on the writ of summons, it is curious that the title documents the plaintiffs possess bear the same mistake or omission.

The defendants resisted the claims of the plaintiffs and counter- claimed as follows:

a) Declaration of title to all that piece and parcel of land, subject matter of the suit.
b) Order for recovery of possession
c) Perpetual injunction against the plaintiffs, their assigns, agents, servants and all persons deriving or claiming title through them.
d) General damages for trespass.
e) cost

The facts upon which the parties based their claims are set out in their respective pleadings as recounted below:

Averments of plaintiff

The plaintiffs averred that they are the elders of the Odametey Family of Nii Adjei Okplem We family of Agbawe, Teshie and are presently the lawful representatives of the said family. Their family owns land, known as Onya Shishi situate at Oyibi, near Dodowa in the Greater Accra Region. The dimensions of the land plaintiffs are claiming is as described in the first endorsement of their claims in the writ of summons.

Plaintiffs further averred that their ownership of the land is backed by two statutory declarations. The first is dated 8th January 2000 made by Nii Laryea Gordjie, the Head of Nii Mantse Ayiku We of Nungua, registered as LVB 82067/02. The second, dated 12th January 2000, was made by Nii Kojo Donkor and Nii Akpor Kwao, representatives of the Odametey family of Nii Adjei Okplem We and registered as LVB 7808/2000. Per their averments the plaintiffs maintain they came by the said land by way of a gift from the then Nungua Mantse, Nii Odai Ayiku I. The gift was made in the 19th century to the brothers of Nii Odai Ayiku's wife, Naa Suokor alias Korkor Owu of the Nii Adjei Okplem We Family. According to the plaintiffs, they have exercised acts of ownership over the land by farming on the land; they built a shrine and had distilled akpetesie on the land. They had permitted family members of their grantors, which is the Nii Odai Ayiku family to dwell on the land as caretakers. Some of the caretakers who are presently deceased are Nii Kwaku Sueye, Nii Sueyefio, Nii Anteley Odai, Asafoatse Anteley Otu.

Plaintiffs further averred that upon the death of the last caretaker, AnteleyOtuin 1996, they attempted to take over their land but the defendants fiercely resisted them leading to brutalities that ended up at Dodowa police Station. The matter was referred to Oyibi Divisional Council for arbitration. They were dissatisfied with the outcome of the arbitration hence their present action in court.

Defendants'averments

The defendants, on their part averred that their history and oral tradition have it that the land in dispute was a customary grant from Nungua Mantse Odai Fio in about the 16th centray to their ancestor Kotoko Odai and his siblings. The disputed land forms part of a larger parcel of land granted them as a reconciliatory gesture to resolve a long-standing family feud. Their ancestor, Kotoko Odai lived and farmed on the land throughout his lifetime. One of his sons known as Kotoko Adjei Fio Odai also lived on the land with his wives and children. These children include Anang Adjei (Lawani), Adjetey Adjei, Ablorh Adjei, Akpor Anum Adjei, Ashong Adjei, Adjei ŋme and Sowah ŋme. They and their descendants, which include the defendants, have been in uninterrupted possession of the land to the present. The defendants maintain they have possessory right over the disputed land;they have as well exercised various acts of ownership over the land. These include a license to the indigenes of Oyibi to use a portion of the land for cemetery. The 2nd defendant has for decades been carrying on commercial farming activities on a part of the land with the blessing of the Kotoko Odai family. He has erected permanent structures for poultry farming on the land. In recognition of his enterprise, he was adjudged the best farmer in the Greater Accra region in 2010.

They have also made grants of the land to various individuals and companies who successfully registered their titles at the title registry without any challenge. The defendants maintain that the plaintiffs' family, the Odametey family of Nii Adjei Okplem We of Teshie, has no title, right or interest in the land in dispute. The action is statute barred and it is also caught by laches and acquiescence.

After a full trial, the trial High Court dismissed the plaintiffs' claims and granted the defendants' counter – claim.

The plaintiffs dissatisfied appealed to the Court of Appeal seeking reversal of the decision of the High Court. The Court of Appeal in its judgment dated 25th of June 2019 dismissed the appeal and affirmed the judgment of the trial High Court. The appellants still

dissatisfied with the decision of the Court of Appeal have appealed to this court on the grounds of appeal stated below.

Grounds of appeal

a) The judgment is against the weight of evidence adduced.
b) The judgment is completely contrary to customary law on claim of ownership of land on long possession or occupation.

Ground(b),in my view falls below the expected standard of formulating grounds of appeal under the rules of court. Ground (b) turns out to be rather a vague statement which does not disclose any valid ground of appeal. This ground is vague in the sense that it fails to outline the customary laws the judgment is alleged to be contrary to, it leaves this court in limbo as to the issues to consider so far as the determination of the said ground is concerned. Counsel for the appellant am convinced faced difficulties in arguing this ground of appeal because of the vague nature of the ground. For, the appellant's statement of case does not address this ground of appeal at all, counsel for the appellants at page 26 of the appellants' statement of case only made averments which I do not think solved the problem of the inability to argue the said ground. The comments of counsel for the plaintiffs at the said page reads "Counsel for the appellants herein avers that in arguing the stated 1st ground of appeal… she has by so doing also almost completely argued the second ground of appeal."

It is my view that ground (b) of the grounds of appeal offends Rule 6 sub- rule 5 of the Supreme Court Civil Procedure Rules C. I. 16 and ought to be struck out. The said rule of court reads (*5) "No* ***ground of appeal which is vague or general in terms or discloses no reasonable ground of appeal shall be permitted, except the general ground that the judgment is against the weight of evidence; and any ground of appeal or any part of it which is not permitted under this rule may be struck out by the Court on its own motion or on application by the respondent."***

On this court's own motion therefore, ground (b) of the grounds of appeal filed by the appellants is hereby struck out.

The sole ground of appeal to be consider in this appeal therefore is ground (a)which is - The judgment is against the weight of evidence adduced.

Arguments for and against the ground of appeal

In the appellants' statement of case counsel for the appellants went a great length citing numerous authorities pointing out the circumstances in which a second appellate court may interfere with the concurrent findings of the trial court and the first appellate court.

The expectation which follows such erudite exposition of the law on the issue is that the appellants would demonstrate to this court that the lower courts erred in their evaluation of the evidence or that there are lapsesin the evaluation of the evidence and if those lapses are corrected the decision would be tilted in favour of the appellants. I must say the statement of case of the appellants though lengthy missed the point. It failed to show the evidence adduced by the appellant in support of their claim of ownership of the disputed land (oral and document) which was wrongly applied by the lower courts, or not considered at all. The statement case rather turned to emphasize that the findings of the Court of Appeal amount to prejudice against the appellants and it is in protest to such damage or detriment to the appellants' legal rights that the appellants have appealed to this court.

A summary of the respondents' answer to the appellants' statement of case is that the appellants have failed to demonstrate to the satisfaction of this court, the lapses in the judgments of the trial court and the Court of Appeal, The appeal therefore, ought to be dismissed.

Consideration of the ground of appeal

It is a well settled principle thatwhere a judgment is challenged on the general ground of appeal that the judgment is against the weight of evidence, there is a call for a review of the totality of evidence on record so as to ascertain whether the findings made by the

lower court, both factual and legal on the issues joined between the parties were properly made. This court in a recent decision in the case of ***Offei v Asamoah & Another [2017-18] 1SCLRG 417*** re-emphasized its position in ***Owusu-Domena v Amoah [2015-2016]1SCGLR 790*** that a ground of appeal that alleges that the judgment is against the weight of evidence 'throws up the case for a fresh consideration of all the facts and law by the appellate court.'

It is required of this court therefore to take a fresh look at all the evidence presented by the parties as contained in the record before the court.

Plaintiffs' evidence

By their claims the plaintiffs seek among other claims a declaration of title to land, they are therefore required to adduce satisfactory evidence to establish the following a) Their root of title, b) their mode of acquisition and c) overt acts of possession. This has been the position of the law established in several decisions of this court. In the case of ***Mondial Veneer (GH) Ltd. V Amuah Gyebu XV [2011]1SCGLR 466*** this court per Georgina Wood CJ restated this position in the following words ***"In land litigation, even where living witnesses who were directly involved in the transaction under reference are produced in court as witnesses, the law requires the person asserting title, and on whom the burden of persuasion falls... to provethe root of title, mode of acquisition and various acts of possession exercised over the subject-matter of litigation. It is only where the party has succeeded in establishing these facts on the balance of probabilities, that the party would be entitled to the claim."***

The first plaintiff testified on behalf of the plaintiffs. In proof of their root of title, he tendered exhibits A and B these are statutory declarations. Exhibit A is a declaration made by Nii Laryea Gordjie Odai who described himself as the family head of the Nii Mantse Ayiku We of Nungua. The declaration was made on 8th January 2000. Exhibit B is a declaration made by Nii Kodjo Donkor Kwao and Nii Akpor Kwao who described

themselves as representatives of Odametey family of Nii Adjei Okplem We, Agbawe Teshie it is dated 12th June 2000.

The plaintiff's evidence on their mode of acquisitionis traditional history and was narrated as follows:Nii Odai Ayiku family of Nungua are the original owners of the land. In 1950 one Naa Suokor alias Korkor Owuo,married a man from the Nungua Royal family called Nii Odai Ayiku. The brother of Naa Suokor helped Nii Odai Ayiku on his farm at Oyibi during farming seasons.In appreciation, Nii Odai Ayiku gave a portion of his land at Oyibi covering 171.81 acres to his in-laws to farm on.

On their overt acts of possession the plaintiffs testified that they farmed on the land, some of their relatives from Nungua built shrines on the land. Some also distilled Akpeteshie on the land. The names of some of their relatives who lived on the land they gave as Kwaku Quaye, Nii Quaye, Nii Quaye Fio, Asafoatse Anteley Odai and Anteley Otu. Otu was the last caretaker of the land. After his death in 1996, the head of Manhia family of Nungua, Nii Laryea Gordjie Odai approached their elders at Teshie to come and take over the land. They were introduced to the chief of Oyibi as the owners of the land. The chief invited the defendants who took objection to their claim and made a report to the police. Per exhibit C, the police invited them and later the chief of Oyibi was asked to arbitrate on the issues and write a report. The parties submitted to the arbitration by the Oyibi Divisional Council. The Council issued a report on their findings. Plaintiffs tendered this report as exhibit F, which is dated 24th September 2008. According to plaintiffs they were dissatisfied with the findings in the report hence their decision to seek redress in the court.The witness further tendered Exhibits D, a declaration made by the plaintiffs in the course of the arbitration.

In cross-examination, the plaintiffs made the following significant admissions. "Q. You yourself, you have never stayed there before?

A. Yes

Q. Your own father has never stayed on the land before?

A. Yes my Lord.

Q. The 2nd plaintiff has also never stayed on the land before?

A. That is correct.

Q. The 3rd plaintiff also has never stayed on the land before?

A. Yes none of the plaintiffs ever stayed on the land.

Q. Mr Nii Akwetey Lawani has always stayed on the land for the past seventy (70) years, he was born there?

A. Yes they have been there for some time but that doesn't qualify them to be owners of the land.

Q. Are you aware that his father also stayed on the land for a long time before he was born?

A. Yes I am very much aware but that didn't qualify him to be the owner of the land.

Q. You are also aware that as at today he has built a dwelling house and lives with his family on the land?

A. Yes My Lord.

Q. So you see until the year 2000 you and the entire Odametey family of Nii Adjei Okplem We have never challenged their being in possession or being on the land for over a century?

A. The father of the defendants was on the land as a tenant it was Nii Sowah Tsakley who permitted him to live there.

Q. So you and all the other plaintiffs have never ever farmed on the land before?

A. Yes we have never farmed on the land but that does not mean we are not the owners of the land.

Q. And you know that 1st defendant and his late brother Benjamin Adjei Adjetey, the 2010 best farmer has farmed on the land for over fifty (50) to sixty (60) years?

A. I know 1st defendant farmed on the land as a tenant but not Benjamin Adjei Adjetey."

The plaintiffs called one witness, a representative of the Nii Odai Ayiku family of Nunguawho repeated what the plaintiff said in his evidence in chief.

Defendants' evidence

The 2nd defendant testified on behalf of the defendants. He narrated the traditional history of how his ancestors came by the land as averred in paragraphs7-14 of their statement of defence. He said according to history and oral tradition, the land in dispute was customarily granted in or about 1850 by the then Nungua Mantse, Odai Fio, to the defendants' ancestor, Kotoko Odai, as a conciliatory gesture to resolve a long-standing family feud. In the 16th century, a royal of the Nungua Stool (Mantse-We), by name Nuumo Afotey Adjemeiano, married three wives who were Aryeley from Nungua Odaitei Tse We, Manye Adjeley from Teshie Agbawe and Ankpa Adukwei from Moi We.Aryeley, the first wife of Nuumo Afotey Adjemeiano, gave birth to Odai Nkpa. Adjeley, his second wife gave birth to Kotoko Odai, while his third wife, Ankpa Adukwei, gave birth to Odai Fio.In 1844, enthronement of a king to lead the people of Nungua became imperative. The accredited elders of Nuumo Afotey Adjemeiano We Lineage of Mantse We presented his first son, Odai Nkpa for enstoolment as chief but was rejected. Odai Nkpa's mother being dissatisfied with the decision rejecting her son's nomination transferred her children's lineage to the Odaitei Tse-We, her father's lineage.Thereafter, Nuumo Afotey Adjemeiano's youngest son, Odai Fio, was presented to be enstooled as King. Kotoko Odai was prevailed upon by the kingmakers to support the choice of his younger brother as king. Aggrieved by the fact that her son had been deprived of the kingship, Kotoko Odai's mother transferred her children's lineage to Teshie Agbawe-Kotoko We, her father's lineage.

Having been successfully enstooled as king in Nungua in 1844,Odai Fio decided to reconcile with his siblings and invited them to a meeting in or about 1850 for that purpose. Only Kotoko Odai and his siblings honoured the invitation.

As a conciliatory gesture, King Odai Fio and the accredited elders of the stool customarily granted the land, subject matter of this suit, forming part of a larger parcel of land to Kotoko Odai and his siblings. A bottle of Akpeteshie was offered in gratitude and appreciation by them.

Kotoko Odai lived and farmed on the said land throughout his lifetime. One of Kotoko Odai's sons known as Kotoko Adjei Fio Odai, son of Kotoko Odai's second wife also stayed on the land with his wives and children.

Kotoko Adjei Fio Odai had a number of children including Anang Adjei (Lawani), Adjetey Adjei, Ablorh Adjei, Akpor Anum Adjei, Ashong Adjei, Adjei ŋme and Sowah ŋme. They and their descendants, inclusive of the defendants who are grandchildren, have been in uninterrupted possession the land to this day.

He further gave evidence on their long occupation of the land without any objection from any quarter. The defendants, who are the descendants of Kotoko Adjei Fio Odai had settled on the land and done commercial farming out of which one of them won 2010regional best farmer award. His award, which was a house,was built for him on the land. He further testified that the defendants have made grants of the land to third parties who have built and lived on the land for several years.

The defendant have fenced part of the land and created a cemetery, which the family controls and takes care of. He tendered Exhibit 6, 6a-6c as evidence of permission the family granted people who sort their permission to bury their dead in the cemetery.

He further tendered title deeds of grants they made to 3rd parties such as Supreme Genesis an estate development company and E. P Church Volta Presbytery.

2nd defendant in his evidence gave boundaries of the disputed land as follows:

To the North-East Sasabi family land.

To the East Sasabi family land

To the South East Moi We family land

To the West Defendant's land

To the North West is the Accra-Dodowa Road.

The witness explained that the statutory declaration tendered by the plaintiffs concerns only part of the land in dispute. The contents of the declaration however are false.

One Annan Armah testified for the defendants as their first witness andsaid he is the Gyaasetse of Sasabi and confirms that his village, Sasabi shares boundaries with the defendant's land to the West.He testified further that their land is not a big one so the defendants permit him to farm on portions of the defendant's land and he pays tolls to them. He further testified that he had known the defendants as owners of the land for a very long time. He was born in Sasabi and he is between 80 and 90 years old; he has co-existed with the defendants on the disputed land all his years without any challenge from anybody.

Daniel Odai Bisa testified as DW2 he is a tenant of the defendants and said he had farmed on the disputed land for 59 years at the permission of the defendants and no one had ever challenged him.

DW3 is one of the grantees of the defendants. He is an estate developer and had obtained the land from the defendants. He has a registered title to the grant the defendants made to him, which he tendered as exhibit 4. According to him, he had built estate houses on his property and had had no confrontation with anyone for being on the land.

Evaluation of the evidence and the applicable law

Part of Counsel for the plaintiff's submissions in her statement of case is that the defendants failed to plead the identity of their land therefore; they are not entitled to

their counter-claim. Though the defendants neglected to clearly describe their land in their pleadings, the second defendant in his evidence on behalf of the defendants gave the boundaries of the land in dispute, which they maintain, is part of a larger parcel of land they own and this has not been challenged. It is clear from the evidence that the parties are ad idem on the portion of land in dispute.

The issues to be determined therefore are simply a) who owns this disputed land, plaintiffs or the defendants and b) Can the concurrent findings of the lower courts be interfered with.

Both parties relied on traditional evidence to tell their story of mode of acquisition of the disputed land. The courts have over the years exercised a lot of caution in evaluating traditional evidence. Wisely so, because it is often oral narration of events over a long period of time, the likelihood of the history being not accurate or the facts lost with the passage of time is high. The courts have therefore laid down guiding principles to follow in considering conflicting traditional evidence.

In the case of ***In Re Adjancote Acquisition; Klu v Agyemang II [1982-83] 2 GLR 852 at 857*** the Court of Appeal per Edward Wiredu JA (as he then was) outlined very useful guiding principles as follows:

(1) Oral evidence of tradition may be relied upon to discharge the onus of proof if it is supported by the evidence of living people of facts within their own knowledge.

(2) Where it appears that the evidence as to title is mainly traditional in character on each side and there is little to choose between the rival conflicting stories the person on whom the onus of proof rests must fail in the decree he seeks.

(3) Where there is a conflict of traditional history, the best way to find out which side is probably right is by reference to recent acts in relation to the land.

(4) Where claims of parties to an action are based upon traditional history which conflict with each other, the best way of resolving the conflict is by paying due regard to the

accepted facts in the case which are not in dispute, and the traditional evidence supported by the accepted facts is the most probable

(5) Where the whole evidence in a case is based on oral tradition not within living memory, it is unsafe to rely on the demeanour of the witnesses to resolve conflicts in the case.

(6) Where the admission of one party establishes that the other party has been in long undisturbed possession and occupation of the disputed land, the party making the admission assumes the onus to prove that such possession is inconsistent with ownership. The law is that such a person in possession and occupation is entitled to the protection of the law against the whole world except the true owner or someone who can prove a better title.

(7) In a claim for title to land where none is able to show title because of want of evidence, or that the evidence is confusing and conflicting, the safest guide to determining the rights of the parties is by reference to possession.

These principles have been restated by this court per ***Dotse JSC in the case of Dzokui II v Adzamli (Deceased) substituted by Adzamli & Others [2017-2020] 1 SCGLR 663 at 674.***

The parties in this suit have presented conflicting traditional evidence to prove their mode of acquisition of the disputed land.However, it is obvious from other pieces of evidence on record that the traditional evidencepresented to the court by both parties is doubtful and cannot be relied on in the determination of this appeal. The plaintiffs tendered as part of their documentary evidence exhibit F the report the Oyibi Divisional Council issued after the arbitration on the issue of ownership of the land between the parties. The report gave stated reasons demonstrating why the traditional narrations of both parties cannot be credible evidence. It is worth quoting the relevant portions of the report exhibit F.

"According to the evidence of Okplem We, they acquired the land in dispute from Nii Odai Ayiku I the then Mantse of Nungua sometime in the 19th century through marriage. No attempt was made to explain how the said marriage led to the acquisition of the said land.

On their part, the Nii Kotoko We testified that they acquired the land through settlement by one Odai Kotoko. They shifted their position later by testifying that they acquired the land by purchase from the Akwapims in 1824.

The Oyibi Divisional Council found no merit in the evidence given by the Nii Kotoko We firstly because they could not explain how the alleged settlement came about.

Secondly, it is historically incorrect that the land in dispute, which forms part of the Oyibi lands, can be purchased from the Akwapims when it is a fact that the Oyibi Lands belong to the people of Nungua who acquired the same when they migrated to Ghana several centuries ago.

With respect to the evidence of the Okplem We, as stated earlier no satisfactory explanation was given by them to show firstly who married whom and the same led to the acquisition of the land in dispute. Besides, the lands at Oyibi are owned by the different clans of Nungua each clan having clearly defined boundaries with the others. Consequently, the evidence by the Okplem We that they acquired the land in dispute, which is situated at a place called Onyai Shishi and beyond the borders of Mantse We lands, cannot be true. That is to say that the said Nii Odai Ayiku I who hailed from Mantse We cannot legitimately leave the Mantse We lands and make a grant of someone else's land to the Okplem We as alleged by the members of the said Okplem We in their evidence before the council.

From the foregoing therefore, the Oyibi Divisional Council found that both parties were unable to show how they acquired the land in dispute and therefore was unable to make a finding in favour of either party."

The law requires that the plaintiffs' proof of title to the land meet the standard of proof required in civil suits, which is, proof on the preponderance of probabilities. ***Sections 11 (4) and 12 of the EvidenceAct, 1975 (NRCD) 323*** provide that: ***11 (4) "In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.***

12. Proof by a preponderance of the probabilities

(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

Having rejected the traditional evidence of the plaintiffs, Could therest of evidence led by the plaintiffs meet the threshold defined by the rules of evidence as quoted above to give them title to the disputed land?

Exhibits A and B are the documentary evidence the plaintiffs relied on as further proof of their title to the land. The date of the Oyibi Divisional Council report exhibit F and the dates of the plaintiffs' statutory declarations exhibits A and B are very significant in determining the probative value of these documents. The arbitration report from the Oyibi Divisional Council is dated 24th September 2008. The statutory declarations were made in January 2000 and June 2000. If indeed the plaintiffs' historical narration as contained in the statutory declarations existed at the time of the arbitration,why did they not present their story at the arbitration as they later declared in these documents? The report exhibit F quoted above states that, plaintiffs, at the arbitration, had no explanation as to how they came by the land through marriage. The two documents it is obvious were prepared after the arbitration and the missing links as to how they acquired the land by marriage was filled in. The doubt as to the credibility of the story as told in the statutory declarations deepened when the representative of the alleged grantors vehemently denied that the land is known as Onyai Shishi. Exhibit A is the declaration of

Nii Laryea Gordjie Odai the head of Nii Mantse Ayiku We. He described the disputed land in exhibit A as "in the 19th century Nii Odai Ayiku I …..gave all that piece or parcel of land known as Onyai Shishi …. to his in-laws…..the Nii Odametey family of Nii Adjei Okplem We …." The witness denied that the land in dispute is known as Onyai Shishi and insisted the land granted to the plaintiffs is called Krobo Gon, and that there is no land called Onyai Shishi.The following is the evidence of DW1 the plaintiffs' grantor on the issue:

Q. You know lands at Oyibi have always been owned by families?

A. That is correct but not families from Akropong Akuapem but families from Nungua.

Q. And since Oyibi lands are owned by families then we call same family lands?

A. That is correct.

Q. In your evidence-in-chief, you told the court that the land, subject matter of this suit is known as Krobo Goŋ?

A. That is so my Lord.

Q. You know this Krobo Goŋ shares boundaries with another land known as Onyai Shishi?

…….

Q. But you know Onyai Shishi?

A. I do not know Onyai Shishi.

Q. And you do not know any land called Onyai Shishi?

A. There is no land called or known as Onyai Shishi.

Q. So that if any land known as Onyai Shishi has been given to a group of people then that is not the land in dispute in this case?

A. That is so.

Q. Have a look at Exhibit 'A'

In your evidence-in-chief, you said Nii Laryea Gordjie gave documents on the land to the plaintiffs?

A. That is so.

Q. Now that is the document?

A. Yes.

Q. Now in this document, Nii Laryea Gordjie said that the land he had given to the plaintiffs is known as Onyai Shishi; is that not so?

A. Yes in the document he said part of the land is Onyai Shishi;"

The evidence of the plaintiffs' grantor quoted above throws a heavy doubt on the credibility of the contents of the two statutory declarations. Exhibits A and B are obviously self-serving documents,prepared for the purposes of this litigation they have no probative value.The trial court's findings on these documents, which was affirmed by the court of appeal, are very much in place and cannot be disturbed.

Plaintiffs' evidence of possession and overt acts of ownership

Though the plaintiffs,alleged their relatives have lived on the land, some farmed on the land and others distilled akpeteshie, they failed to adduce any evidence to establish these facts, those assertion therefore remain mere assertions, which have not been proved.

Plaintiffs rather admitted the evidence of the defendants' long undisturbed possession and overt acts of ownership. As stated in the In ***Re Adjancote Acquisition; Klu v Agyemang II case cited supra***, where the admission of one party establishes that the other party has been in long undisturbed possession and occupation of the disputed land, the party making the admission assumes the onus to prove that such possession is inconsistent with ownership. The law is that such a person in possession and occupation is entitled to the protection of the law against the whole world except the true owner or someone who can prove a better title. The onus therefore lies on the plaintiffs in this

circumstance to produce evidence to rebut the ownership of the defendants. That the plaintiffs failed to do.

The defendants have equally not been consistent with their traditional evidence on how they acquired the land, what they finally settled on and which they averred to in their pleadings cannot be the truth in view of the findings made by the Oyibi Divisional Council in exhibit F; they however made a strong case of possessory title.

Defendants' evidence of possession

The defendants' defence to the action, apart from the traditional evidence, which I find to be unreliable, is their long undisturbed acts of possession. In their evidence, the defendants gave particular description of the various boundaries of their land and called the Gyasekye of Sasabi, the village they share boundary with who confirmed the evidence of the defendants on boundary. He also confirmed the defendants' long possession and said he is between 80 to 90 years old. He was born in Sasabi and had always co-existed with the defendants as owners of the land. He had with the permission of the defendants farmed part of the disputed land because the defendants have a bigger parcel of land. A tenant who pays toll to the defendants and had farmed the land as defendants' tenant for 59 years confirmed the defendant's recent acts of possession. The defendants; evidence on acts of possession and ownership include grants they had made to 3rd parties; registered title deeds of such grants formed part of the defendants evidence. The defendants gave documentary proof that they had established a cemetery on the land; they control the cemetery and grant permission to others to bury their dead in the cemetery. To crown all these the plaintiffs have admitted that the defendants have been in undisturbed possession of the land for almost a century and they plaintiffs have not objected. I have earlier quoted these admissions.

The law presumes that a person who exercises acts of ownership over property owns that property. Section 48 of the Evidence Act, 1975 (NRCD) 323 provides (1) ***"The things which a person possesses are presumed to be owned by that person.(2)***

A person who exercises acts of ownership over property is presumed to be the owner of it."

The plaintiffs failed to produce any evidence to rebut the presumption of ownership, which had been established by the defendants. In fact, the documentary evidence of valid grants made by the defendants with registered title deeds is a proof that plaintiffs acquiesced to the defendant's acts of ownership and are estopped from denying same.See the decision of this court in the case of **Ago Sai & Others v Kpobi Tetteh Truru III. [2010] SCGLR 762.** Thus the defendants, having established their long (almost a century) undisturbed acts of possession and ownership which is admitted by the plaintiffs, they are entitled to their counter-claim.

From the evidence on the record, it is patently clear that plaintiffs who bear the burden of adducing convincing evidence in proof of their claim to ownership of the disputed land have failed to do so.

Whether this court has any cause to interfere with the concurrent decisions of the lower courts.

The subject matter of this appeal being a concurrent decision of the two lower courts, it is imperative to consider the position of the law on whether this second appellate court has any course to interfere with the decision of the two lower courts.

The decision of this court in the case of ***Achoro v Akanfela [1996-97] SCGLR 209*** settled the guiding principles a second appellate court must consider when faced with whether or not to interfere with concurring decision of a trial court and the first appellate court. The court held per ***Acquah JSC (as he then was) that the Supreme Court would not interfere with the findings of the lower courts "unless it is established with absolute clearness that some blunder or error resulting in a miscarriage of justice, is apparent in the way the lower tribunal dealt with the facts. It must be established, eg, that the lower courts had clearly erred in the face of crucial documentary evidence, orthat a principle of evidence had not properly been applied... or that the finding is so based on erroneous***

proposition of the law that if the proposition be corrected, the finding disappears. In short it must be demonstrated that the judgments of the court below are clearly wrong."

None of the above situations arose in this case. The findings on both the facts and the law made by both lower courts are sound and supported by the evidence on record. This court therefore has no cause to interfere with the findings made by the lower court. The appeal lacks merit, it is hereby dismissed.

A.M.A. DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

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

A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

PWAMANG JSC:-

My Lords, after combing through the pleadings and the evidence in this case carefully, I have formed the opinion that both the trial court and the intermediate appellate court grossly misapprehended the legal effect of the admitted facts and as a result arrived at a conclusion which, in my view, is not right.

The two families disputing in this case each claim for declaration of title to the land in dispute being and lying at Oyibi and they are ad idem about it. Though the pleadings of the plaintiffs/appellants/appellants (plaintiffs) are inelegant, the gravamen of their case

arising from paragraph 4 of their final amended statement of claim is, that sometime in the late 19th Century, Nii Odai Ayiku I, then Mantse of Nungua gifted the land to the family of his wife from Teshie. The wife was called Naa Suorkor alias Korkor Owu and her family that was given the land is Nii Okplen We, the plaintiff herein. It is common ground in this case that allodial title to Oyibi landsis in the people of Nungua andthat the lands are owned by various Nungua familie. It is the case of the plaintiffs that the land in dispute forms part ofNii Mantse Ayiku We family land at Oyibi andthat Nii Odai Ayiku I hailed from that family. The plaintiffs further state that upon the gift their family took possession of the land, not personally, but through caretakers who were relations of the Nungua Mantse Nii Odai Ayiku I. The last of the caretakers before the dispute with the defendants'family arose were Nii Anteley Otu and Nii Anteley Odai.

The basis of the claim of the defendants/respondents/respondents (defendants) to be owners of the land,as finally pleaded in their final amended statement of claim and counterclaim at page 126 of the record,isas stated at paragraphs 8 to 15thereof;

"8.The defendants state that in the 16th Century a royal of the Nungua Stool (Mantse We), by name Nummo Afotey Adjemeiano, married three wifes;

*Aryeley from Nungua Odaitei Tse We

*Manye Adjeley from Teshie Agbawe

*Ankpa Adukwei Tsuru from Moi We……

9. Aryeley, the first wife of Nuumo Afotey Adjemeiano, gave birth to Odai Nkpa. Adjeley, his second wife, gave birth to Kotoko Odai, while his third wife, Ankpa Adukwei, gave birth to Odai Fio.

10. In 1844, enthronement of a king to lead the people of Nungua became imperative. The accredited elders of Nuumo Afotey Adjemeiano We lineage of Mantse We presented his first son, Odai Nkpa for enstoolment as chief but he was rejected. Odai Nkpa's mother being dissatisfied with the decision rejecting her son's nomination transferred her children's lineage to Odaitei Tse-We, her father's lineage.

11.Therefore, Nuumo Afotey Adjemeiano's youngest son, Odai Fio was presented to be enstooled as King. Kotoko Odai was prevailed upon by the kingmakers to support the choice of his younger brother as king. Aggrieved by the fact that her son had been deprived of the kingship, Odai's mother transferred her children's lineage to Teshie Agbawe-Kotoko We, her father's lineage.

12. Having been successfully enstooled as king of Nungua in 1844, Odai Fio decided to reconcile with his siblings and invited them to a meeting in or about 1850 for that purpose. Only Kotoko Odai and his siblings honoured the invitation.

13. As a conciliatory gesture, King Odai Fio and the accredited elders of the stool customarily granted the land, subject matter of this suit, forming part of a larger parcel of land to Kotoko Odai and his siblings. A bottle of "Akpeteshie" drink was offered in gratitude and appreciation by them.

14. Kotoko Odai lived and farmed on the said land throughout his lifetime. One of Kotoko Odai's sons known as Kotoko Adjei Fio Odai, son of Kotoko Odai's second wife, also stayed on the land with his wives and children.

15. Kotoko Adjei Fio Odai had a number of children including Anang Adjei (Lawani), Adjetey Adjei, Ablorh Adjei, Akpor Anum Adjei, Ashong Adjei, Adjei ŋme and Sowah ŋme. They and their descendants, inclusive of the defendants who are grandchildren, have been in uninterrupted possession of the land to this day."

The plaintiffs led evidence through 1st plaintiff who stated that their caretakers were peaceably in possession of the land on their behalf and farming there until the defendants' father, Anang Lawani, attempted to interfere with their activities so their then head of family stopped him. After the death of their last caretaker the then head of their grantor family, Nii Odai Gbordjie, took the plaintiffs to introduce to the Oyibi Mantse as the persons their family gave the land to. The Oyibi Mantse on that occasion summoned the defendants to the meeting and in reaction to the message of Nii Odai Gbordjie, the defendants said their father never told them that the plaintiff family are the owners of the land. The Oyibi Mantse then proposed that representatives ofthe two

families should meet with him on the land but when the plaintiffs went on the appointed day, they were informed that the defendants had made a complaint against them with respect to the land at the police headquarters. When they reported to the police, they advised the parties to resolved their differences before the Oyibi Traditional Council. This was in 1998/1999.

Both parties accordingly met at the Oyibi Traditional Council and an arbitration committee was formed to go into the matter. According to the 1st plaintiff, in the proceedings they maintained that the land belonged to the Nii Mantse Ayiku We family who gave it to their predecessors and they called witnesses from their grantor family. The defendants on the other hand said their grandfather called Odai Kotoko acquired the land by settlement. The arbitration committee took about ten years to come out with its report which they filed on 11th March, 2009 after this case had been commenced on 4th July,2008. When this case was filed the plaintiffs applied to the court for an order of interlocutory injunction against grants of the land pending determination of the case but their application was refused. In the interim, while this suit was held in abeyance waiting the report of the arbitration, the parties engaged in violent clashes on the land each trying to control it. During the pendency of the arbitration the defendants in year 2000 went to the Lands Commission and swore to a statutory declaration on their ownership of the land and it was published in the National Dailies. In that declaration, the defendants deposed on oath that their ancestor, Kotoko Odai, acquired the land by purchase from the people of Akwapim after the Katamanso War of 1824. After making that declaration the defendants changed the grounds on which they claim the land before the arbitration panel to be as contained in the declaration.

After the extended time taken by the committee, in its report, it held that it was not satisfied with the evidence of ownership by either party so no award was made. In the meantime, in reaction to the defendants published declaration, da Rocha Chambers, acting on behalf of Kwakwa Assiampong Assakyir Family of Akwapim, wrote a letter to the Lands Commission and also caused it to be published, denying the defendants claim of purchasing the disputed land which, according to them is their ancestral land. As

would be noticed from the pleadings of the defendants quoted above, when this case was being contested in court, the defendants abandoned their declaration and finally pleaded an entirely different root of title.

The 1st plaintiff tendered a Statutory Declaration made by Nii Odai Gbordjie in which he narrated how the land was given to the plaintiffs predecessors and how it was possessed by the caretakers. He also tendered the report of the Oyibi Traditional Council Arbitration Committee, the Declaration by the defendants saying they bought the land from Akwapim, the letter by da Rocha Chambers and medical reports of bodily injuries they suffered from violent attacks on them by the defendants . At the time of the trial in the High Court Nii Odai Gbordjie had died so he was not available to testify but the plaintiffs' called Nathan Laryea Otu, the linguist of the Nii Mantse Ayiku We who testified in support of their case that the family is the original owner of the land and it gifted the land to the plaintiff family. He gave his age as 63 years, he was born and lived at Oyibi and knows the defendants. He recounted the dispute over the land between the father of the defendants and Numo Tsarkley who was the head of plaintiffs' family which he said occurred about 30 years earlier. He stated that he was among the family members led by Nii Odai Gbordjie who went to the Oyibi Mantse in 1999 to discuss about the land matter. He also personally participated in the arbitration proceedings before the committee set up by the Oyibi Traditional Council. He denied the claims of the defendants and stated that their story about a misunderstanding regarding the installation of a Nungua Mantse from among the children of Numo Afotey Adzemanor never happened.

By way of proof of their claim, the 2nd defendant gave evidence onbehalfof the defendants from page 212A to 212C of the record and it consists in a repetition of their pleadings quoted above. He ended by saying that of the children of their grandfather, Kotoko Odai, their father, Annang Lawani was the only one who stayed and farmed on the land in dispute. He gave birth to the defendants at Oyibi and they continued to farm on the land and in the year 2006, he the 2nd defendant, won National Best Farmer in Poultry Farming category. He referred to grants of parts of the land they made to third parties and tendered transfer deeds in that respect; one made by them to an estate

developer, Supreme Genesis Investment Co in 2009, another to Evangelical Presbyterian Church in 2010. He also tendered permits taken from them for burial in a cemetery on the land dated in 2009. The defendants called three witnesses; DW1 from Saasabi, a boundary owner who testified to seeing the defendants father farming on the disputed land, DW2, who said he farmed on the land by the permission of the defendants, and DW3, the owner of the estate company which in 2009 took a grant of the land from the defendants.

My Lords, the plaintiffs admit the presence of the defendants on the land but say that a former head of their family by name Nii (or Numo) Sowah Tsakley was the one who permitted the predecessor-in-title of the defendants to farm and stay on the land. The mother of the said Nii Sowah Tsakley is said to have hailed from Kotoko We of the defendants so he brought Annang Lawani, the father of the defendants to the land. The defendants admit that at the time the land was settled on by their father, Nii Sowah Tsakley was the head of Okplen We (the plaintiffs family). At page 245 of the record, the following cross-examination of the 2nd defendant occurred;

Q. I am putting it to you that Numo Tsakley was the head of the plaintiffs' family.

A. ***I am not denying it. At that time Numo Tsakley was the head of Okplen We, Numo Lawani was also the head of Kotoko We in Agbawe.***

Q. I am further putting it to you that the plaintiffs at the time that Numo Tsakley gave permission to Nii Annang Lawani to go to the land and farm, the plaintiffs had this land in the care of relatives of Nii Ayiku?

A. That is never true.

Q. I am putting it to you that when Annang Lawani went to the land by such permission and later wanted to claim same by putting a customary injunction on the land, Nii Tsakley went to warn him and told him where he came from ?

A. It is not correct that Nii Tsakley gave the land to Numo Lawani, because Numo Lawani was born on the land, Secondly, the alleged caretakers in Nungua, none of them has ever come to us to complain about the land up to today. ***Thirdly, the said injunction was placed on the land because those who farmed on the land did not ask his permission.***

Q: I am putting it to you that Numo Tsakley warned him not to put an injunction on the land?

A: That is not true.

From the aboveevidence, the dispute over exclusive ownership of the land between the two families started from the time of Numo Tsakley and Numo Lawani and was provoked when Numo Lawani stopped some persons from farming on the land by placing a customary injunction on them unless they obtained permission from him. These persons were the caretakers of the plaintiffs; Nii Anteley Otu and Nii Anteley Odai. This was confirmed in the following questions and answers between the defendants' counsel and the 1st plaintiff at page 203 of the record;

Q. In your evidence-in-chief you mentioned the names Nii Anteley Odai and Nii Asafoatse Anteley Otu. Do you know them?

A. Yes they are those who cared for the land on our behalf.

Q. ***These people were driven away from the land by the defendants because they failed to ask permission from the defendants to farm on the land.***

A. That is not correct. Nii Anteley Otu was taking care of the land. 1st defendant's father Annan Lawani had confrontation with him and he was taken to Nii Sowah Tsakley at Teshie and he was sanctioned for doing that.

Q. This evidence of sanctioning never ever occurred and cannot be true. I am putting it to you.

A. It did occur and is very very true.

Notwithstanding counsel's denial in the cross-examination that the defendants' father, Annan Lawani was sanctioned by Numo Tsakley for interfering with the farming activities of the caretakers of the plaintiffs on the land, the statement by 2nd defendant himself that their father placed an injunction on the caretakers and the statement by counsel too that those caretakers of the plaintiffs were evicted from the land because they would not seek permission from the defendants is undisputed evidence that the plaintiffs caretakers were on the land in dispute. Because their presence on the land was on account of the ownership of Numo Tsakley and his family, they resisted the attempts by the defendants' father to claim to be owner of the land. PW1 also corroborated this sanctioning of the defendants father at pages 226/227 in his evidence where he said;

"Before this present case the predecessors of the plaintiffs had taken action against the defendants,…What I know is that Numo Lawani put an injunction (customary) on Anteley Otu and Anteley Otu summoned Numo Lawani to Numo Tsakley who brought him. When they met Numo Tsakley told Numo Lawani to go and remove the injunction and he was warned. This took place about 30 years ago. I therefore say the land belongs to the people of Teshie Okplen We."

So, this incident took place but before the activities that finally resulted in this phase of the dispute over the ownership of the land which started in 1998. At page 247 of the record the following question and answers ensured during cross-examination of 2nd defendant;

Q. I am not referring to what happened in 1998. I mean the report made to the Panthers in 1999?

A. The case started in 1998 when the plaintiffs attacked us and we woke up at dawn; and they would go onto the land at night to destroy structures and that is the reason why the matter went to the police headquarters.

Q. You are aware that Nii Gbordzie in 1999 went with the plaintiffs to the Oyibi chief for him to take them to the land?

A. It is true; this led to the whole dispute.

From the above admissions by the defendants and the evidence on the record, the question of who is entitled to a declaration of title of the land has to be determined on the basis of which of the families had the right of ownership as at the time the defendants' father challenged the caretakers of the plaintiffs on the land, which was long before 1998 and during the lifetime of Nii Sowah Tsakley and Anang Lawani. By the testimony of PW1, the representative of Mantse Ayiku We, that challenge occurred 30 years prior to 2015 when he was testifying. (See page 227). That is roughly in 1985.It must be noted that at this point in time none of the alleged acts of possession that the defendants led extensive evidence on during the trial had occurred. The grant to the estate developer, Supreme Genesis Investment Ltd was on 17/6/2009, the grant to Evangelical Presbyterian Church on 10/12/2010, the request for permission for burial 26/2/2009. See pages 462 to 482 of the record. All of these were subsequent to the filing of this suit in the High Court and about ten years after the dispute of ownership over the land became blown out and had been reported to the police and was pending arbitration before the Oyibi Traditional Council. These acts by the defendants despite the challenge to their claim of ownership earlier, which involved violence, do not qualify as evidence of possession that can in law support their claim of title.

In the case of **Odoi v Hammond [1971] 1 GLR 375**, a plaintiff who occupied Osu Stool land at Kotobabi in Accra, resisted a claim to the land by a grantee of the Osu Stool arguing that members of Nii We, who had been in occupation of the land, granted it to him. Apaloo JA (as he then was) sitting as Additional High Court judge dismissed his claim and held for the defendant who proved that he took his grant from the reputed owner of Kotababi lands, the Osu Stool. On appeal to the Court of Appeal, the judgment of Apaloo JA was affirmed. Azu Crabbe JA (as he then was),who read the judgment of the Court of Appeal,reiterated the principles applicable to prove of title to land in the following words at page 384 of the report;

'But as Sir John Verity C.J. said in Emegwara v. Nwaimo (1953) 14 W.A.C.A. 347 at pp. 348-49 (the emphasis is mine):

"It is essential before any declaration is made that the party seeking it should state specifically what is the nature of the right he claims and that he should prove that the terms of the grant under which he claims conferred such a right. Unless these two factors are present the Court cannot properly exercise its discretion in his favour and make any declaration."

Nowhere in the present case have I been able to find that the nature of the right is specified, nor have I been able to find evidence as to the precise terms of the grant upon which any such specific claim could be based.'

At page 385 the venerable jurist held as follows;

"In this case I have been unable to discover any evidence as to how the Nii We family became the owners of Kotobabi land, and the learned trial judge himself made no finding that the land in dispute originally belonged to the Nii We family. Indeed, there was absolutely no evidence from which such an inference could be made. Neither was there evidence of the precise terms of the customary grant upon which the plaintiff based his claim. But the learned trial judge did, however, find that the allodial title to the whole of Kotobabi land vested in the Osu stool, and this finding is in accord with the decision of the former Supreme Court in Akwei v. Awuletey [1960] G.L.R. 231, S.C. Despite this finding, and also the failure of the plaintiff to prove the precise terms of the alleged customary grant made to him by the Nii We family, the learned trial judge was able to say, "that on the crucial issue of title joined between the plaintiff and the defendants, I decide that the plaintiff has shown a good title to the land and the defendants have shown none." And he finally concluded his judgment with this sentence: "Accordingly, I make in favour of the plaintiff, a declaration of title in terms sought in paragraph (1) of the writ.""

Similarly, in the case of **Awuku v Tetteh [2011] 1 SCGLR 366,** another case concerning Kotobabi lands which the allodial owner is well known to be the Osu Stool,at page 376, Ansah, JSC speaking for the Supreme Court stated the principle of land law as follows;

"Even though the appellant occupied the land in dispute as a subject of the Osu Stool, the grounds thereof were proved to be null and void, it was not valid enough to be labelled effective occupation which was necessary to make it legally inviolable."

As the allodial title to Oyibi lands is accepted by both parties to be the people of Nungua, in order for the plaintiffs to succeed in the claim for declaration of title to the land as against the defendants, they had to prove the alleged grant to them by Nii Mantse Ayiku We family of Nungua. In the same vein, since the defendants have counterclaimed for declaration of title, in order to succeed against the plaintiffs, they needed to prove the grant from King Odai Fio of Mantse We of Nungua to their family, both in accordance with the well establishedprinciples stated above by Azu Crabbe JA. If it turned out that the grounds on which the defendants father claimed ownership of the land were null and void, the acts of possession in the teeth of challenge and litigation cannot avail them as effective possession to support their claim of title.See **Dove v Wuta-Ofei [1966] GLR 299.**

What needs to be distinguished in this case is that either party is relying on a derivative title from apparently different grantors. Therefore, this case is different from those cases where either party's claim to the land is premised on prior settlement from time immemorial. The principles of law governing a claim for declaration of title based on prior settlement from time immemorial are completely different from where the claim for declaration of title is based on an identified derivative title.

In **Awuku v Tetteh (supra)** the Supreme Court held at holding (3) of the headnote;

"We believe we state the law correctly that where appellant's title was derivative, he ought to demonstrate that the predecessor-in-title held a valid title which he could pass to his grantee, for if the foundation was tainted, the superstructure was equally tainted."

The principles on prove of title to land stated in the case of **Adjeibi Kojo v Bonsie [1957] 1 WLR 1223,** and applied in a number of cases in our jurisdiction that the Court of Appeal and the defendants have relied heavily on should be understood within the context of the facts in those cases. The facts in Adjeibe-Kojo v Bonsie were that the

Odikro of Nerebehiin Ashanti had been in long exclusive occupation of a large tract of forest land at Bonkwaso for generations through his caretaker. He in turn accounted for the fruits from the land to the Bantamanhene under whom he served. Then in about February, 1950, the Atwimahene sued the Odikro claiming the land stating that it was given to his ancestor after the Abrimoro War which took place more than 200 years earlier. The defendants denied the claim and said they had been in continuous, exclusive and undisturbed possession after the Abimoro War as owners without the let of the plaintiff. The plaintiff lost the case in the Privy Council because his account of how he came by the land was not within living memory and when it was compared with story of the defendants supported by acts of exclusive ownership within living memory, the case of the Odikro was more probable.

But, the matters arising in this case are within living memory. About 1985 when the father of the defendants placed the customary injunction on the land and tried to drive out the plaintiffs caretakers, was less than thirty years before the presentation of the dispute to the Oyibi Traditional Council to arbitrate, which happened in 1999. The 2nd defendant was able to testify to the customary injunction his father placed on the land as it happened during his lifetime and so too did the 1st plaintiff and PW1.Therefore, the matters in contention here are not tradition from time immemorial but required to be proved by positive evidence.

In **Yoguo & Anor v Agyekum [1966] 482, SC**, Ollennu, JSC distinguished traditional evidence from evidence within living memory when he said as follows at page 487 to 488 of the report;

"Thirty years is within living memory, therefore, what happened within that period is not tradition. Therefore the evidence as to what was told the plaintiffs by their father is hearsay, not tradition; at its very best it is an assertion which calls for proof.As stated in Khoury v. Richter and repeated in Majolagbe v. Larbi: 'Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by

merely going into the witness box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true'."

I affirm that statement of the law. ***The easiest way of proving this allegation that the stool of Yonso granted the land to Kwaku Agyekum is by evidence of the stool which could be given either by one of the elders of the stool who had personal knowledge of the grant, or by a linguist or other traditional elder as a tradition of the stool.One such person is the plaintiffs' first witness Kwasi Krobo who gave his age as 62 years and said that he had lived all his life at Yonso and was, until seven years prior to 1962, the Gyasehene to the Yonsohene".***(Emphasis supplied).

Therefore, prove in this case required the parties to call their grantor family linguists or elders to give evidence in support of their case. The plaintiffs led cogent evidence to prove the gift of the land to their family by Mantse Ayiku We. The Statutory Declaration made on oath by Nii Laryea Gordjie Odai, Head of Mantse Ayiku We, made on 8/1/2000, (page 432) states categorically that the land in dispute was given to the plaintiffs family by his family, the original owner thereof. Mention in it is made of Anteley Odai and Anteley Otu whom the defendants father had the confrontation with over ownership of the land.The evidence contained in this statutory declaration was corroborated by the then current Gyaase Okyeame (Linguist) of Nii Mantse Ayiku We, the original owner of the land from pages 223 to 238 of the record. He confirmed that the family is aware that the land was granted to the plaintiffs family and that in his life time their former head of family, Nii Gordjie Odai, took them to introduce to the Oyibi Mantse, who is a sub-chief of Nungua. He also talked about how the defendants' father's attempt to interfere with the plaintiffs' family ownership was resisted.

On the other hand, the only evidence supporting the defendants' story of a gift consisted in a repetition of their pleadings by the 2nd defendant. Meanwhile, these defendants had prior to the trial sworn on oath that they trace their title to the land by purchase from the Akwapim people. See at page 435 of the record. This was made on 12th June, 2000 and

after both families had met in 1999 at the palace of Oyibi Mantse where Nii Gbordjie Odai, then head of Mantse Ayiku We, stated emphatically that his family gave the land to the plaintiffs. When 2nd defendant was confronted under cross-examination about this earlier inconsistent statements about how they came by the land, he replied at page 240 of the record as follows;

"My Lord, those who testified before the committee misstated the position."

A declaration on oath is not evidence to be recanted without a credible explanation but none was offered by the defendants. The defendants did not call their grantor family to support their claim of a gift by that family. In fact, it is unclear if the Mantse We family referred to by the defendants existed in Nungua or they meant the same family that gifted the land to the plaintiffs. The evidence of possession they relied on did not prove long, exclusive and undisturbed possession. Their father's possession was concurrent with the possession of the caretakers of the plaintiffs and when he attempted to claim ownership of the land he was promptly resisted.

Under **sections 11(4) and 12 of the Evidence Act, 1975 (NRCD 323)** in a civil case, findings of fact are to be made on the preponderance of probabilities. When I weigh the evidence of title led by the plaintiffs,supported by their grantor and that of the defendants, which has been changing and is unsupported, the preponderance of probabilities tilts heavily in favour of the plaintiffs and against the defendants. The probability that Mantse Ayiku We gave the land to the plaintiffs family far outweighs the probability that a gift was ever made to the defendants family by a Nungua family. The story of the defendants to me is clearly an after thought conjured after other roots of title could not avail them. The defendants explanation of how their father came to be on the land in dispute changed from prior settlement to purchase and then to grant from the allodial owner. This confusion in the mind of the defendants lives me unpersuaded that they are entitled to a grant of declaration of title to the land in dispute.So, in my considered opinion, the plaintiffs proved a better claim to the land than the defendants. In my view, the evidence supports a conclusion that defendants presence on the land was by the license of the plaintiffs' family who relate them at Teshie.

The main argument of the defendants in this case is that they are presently in control of the land whereas the plaintiffs were not personally living on the land. But the evidence they adduced related to acts after their claim to the land was challenged by both the Mantse Ayiku We and the plaintiffs. The fact that the defendants father farmed on the land was explained by the evidence that he was a licensee of the plaintiffs family. At that time, the plaintiffs family were equally in possession through their caretakers. The defendants have admitted the presence of the plaintiffs caretakers whom they claim they drove away and employed violence to keep the plaintiffs off the land while the dispute raged. Since the evidence proves that the defendants father was a licensee of the plaintiffs family, at customary law, their possession of the land does not make the defendants owners of the land. In the case of **Mensah v Blow [1967] GLR 424, CA,** (Ollennu, Apaloo, Larsey, JJA) held as follows in the Headnote of the report;

"Held, allowing the appeal: (1) customary law regarded the respondent's ancestors as licensees of the appellant's ancestors. There was no estate or interest in the land in a licensee who had a right to use the land equally with the grantors. Throughout the period of this occupation the licensee had a present right of possession and user over any portion of the grantor's land where the right of the grantor was not ousted. The granting of the license without paying tribute or tolls was not to be regarded as a surrender of all claims or rights in the land.

(2) A licensee did not in the course of time become an absolute owner of land to the extent of depriving the real owner of the right of user over unoccupied portions of the land. Because the appellant's ancestors originally cleared the land and did not subsequently abandon it, customary law and practice enjoined the respondent to give way to the appellant as the rightful owner."

In his judgment, the trial judge sought to make capital of the misdescription of the land in the statutory declaration of Nii Gbordjie Odai, head of Mantse Ayiku We but from the testimony of the 2nd defendant and the cross-examination by the defendants counsel, it is beyond doubt that the parties are ad idem as to the land they are disputing over. The declaration mentions that the land was put in the care of Anteley Odai and Anteley Otu

whom the defendants in their evidence said they evicted from the land. Which land? The land in dispute of course no matter by what popular name it is called in the community.The said Nii Gbordjie Odai summoned the defendants before the Oyibi Mantse over this land and they said their father never told them that the land belongs to the plaintiffs' family. Was there any doubt as to the land then? No. The 2nd defendant testified that the plaintiffs came to demolish their structures on the land. So, since 1985 the two families have been disputing over the same land that is known to them.Therefore, it is plain that the land in respect of which the declaration was made is the land covered by the site plan attachedto the declaration that was in the possession of Nii Anteley Odai and Anteley Otu and also described in the plaintiffs' statement of claim. See **Laryea v Oforiwa [1984-86] 2 GLR 410**and **In Re Ashalley Botwe Lands [2003-2004] 1 SCGLR 466 Holding (3).**

My Lords, the evidence in this case portrays a scenario where the plaintiffs' family brought the defendants' father onto the land as their licensee but he conceived of the idea of claiming it as his own so he started to dispute the ownership of the plaintiffs' family by requiring their caretakers to atone tenant to him. This they refused since the land belongs to the plaintiffs family. The defendants initially had no clue about the history of the land so they swore to a statutory declaration that their ancestor bought it from the Akwapims after the Katamanso War of 1824. It is a fact of the History of Ghana that the Katamanso War was in 1826 and not 1824. When the Akwapims per their lawyer, da Rocha Chambers, challenged them, they abandoned that account of their root of title and came up with the story of a gift by King Odai Fio of Mantse We having learnt at the arbitration proceedings that allodial title resided in the people of Nungua. They carried this story to the trial and woefully failed to prove it. No attempt whatsoever was made by the defendants to prove the alleged gift after their story of installation of King Odai Fio in the 19th Century, 1844specifically, whereas his mother was married in the 16th Century, was shown in cross-examination to be incongruent. From that account, Aryeley and her son Odai Fio lived a total of about 300 years before the installation of Odai Fio as Mantse of Nungua. That has never happened in human affairs except in the Bible creation story

in the book of Genesis. The defendants then relied on their control of the land attained by violent acts undertaken after they were challenged and they were unable to tell how they came by the land.

From this background, to give judgment for the defendants is to endorse their use of force against the truth, which, in my opinion,ison the side of the plaintiffs. It may be a precedent for feuding parties to out compete each other to take control of land while the dispute is raging, as their control, no matter how it was achieved, would enhance their claim of ownership.

On account of the above reasons, I find merit in the appeal and allow same. I hereby set aside the judgments of the High Court dated 28/7/2015 and the Court of Appeal dated 25/6/2019. I grant the plaintiffs declaration of title to the land described in their statement of claim, recovery of possession, and perpetual injunction against the defendants. Having regards to the blatant acts of trespass by the defendants who though started as licensees became trespassers on the land the moment they denied the title of their licensor and purported to grant the land to third parties, I award general damages of GHS300,000.00 against the defendants. I dismiss the counterclaim of the defendants in its entirety.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

AMADU JSC:-

(1) I have had the advantage of reading in draft the opinions of my sister Agnes Dordzie JSC for the majority and the dissenting opinion of my brother Pwamang JSC. I am also of the opinion that the appeal be allowed for the following reasons.

(2) In this appeal, this court is invited to reverse the concurrent judgments of the two lower courts in favour of the Defendants/Respondents on their counterclaim. The

appeal is grounded on an allegation that the judgment of the High Court as affirmed by the Court of Appeal was not based on a proper evaluation of the evidence adduced before the trial court. Consequently both lower courts had arrived at the wrong conclusion. In other words, the ground of appeal on which the instant appeal is substantially anchored is that the judgment of the trial court which the Court of Appeal wholly affirmed is against the weight of evidence.

(3) From the evidence on record, the Appellants had averred per paragraph 11(d) and (e) of their amended statement of claim filed on 24/6/13*(page 169 of the record)* that the dispute between the Respondents and Appellants with respect to the land in dispute was referred by the Police to the Acting Chief of Oyibi for settlement. The Appellants further alleged that the case of the Respondents during the settlement process was that they acquired the disputed land through settlement and later by purchase from the people of Akwapem.

(4) The Appellants further averred that their attention was brought to a publication by the Executive Secretary of Lands Commission in the Daily Graphic *(page 444 of the record)* at the instance of the Respondents of a statutory declaration by the Respondents through Adjei Lawani, Adjei Adjetey Akono, Oko Lawani and Akwetey Lawani claiming to be lawful representatives of the Kotoko Odai family of Teshie Agbawe Accra to the effect that they had acquired the land in dispute by purchase from the Akuapems after the Katamanso war of 1824.

(5) In their defence of this allegation, the Respondents denied the above averment by the Appellants evasively without providing any factual grounds why they have abandoned a claim to the disputed land by purchase several years ago which mode of acquisition they had publicized to the whole world.

(6) There is also evidence of the report on the dispute settlement between the parties before the Acting Oyibi Chief *(page 17 on the record)*which captured the Respondents' position as having claimed to have acquired the land through settlement by one Kotoko Odai and also through acquisition from the Akuapems. At the trial court however, the Respondents' case per their pleadings and

testimonies was that the land was granted to them in 1850 by the then Nungua MantseOdaiFio through the Respondents' ancestor Kotoko Odai as a conciliatory gesture in resolving a long standing dispute. The Respondents denied the publication aforesaid and per paragraph 18 of their final amended statement of defence, averred that the alleged statutory declaration published by the Executive Secretary of the Lands Commission at their instance in the Daily Graphic of 18th March 2000 was factually inaccurate.

(7) While under cross-examination *(page 240 of the record)* the 2nd Defendant/Respondent Mr. Ashong testified that the Respondents who appeared at the settlement before the Acting Oyibi Chief misstated the position regarding the Respondents' settlement on the land. The Respondents however provided no evidence with respect to the extent of misstatement or inaccuracy in the statutory declaration nor on the matters said to be factually inaccurate. In the absence of any such clarification therefore, the evidence supporting the Respondents' defence and counterclaim was demonstrably conflicting and inconsistent. The issue of the inconsistency in the ancestral history of acquisition of the land by the Respondents which was put before the 2nd Defendant/Respondent satisfied the provisions of Sections 75 and 76 of the Evidence Act [1975] NRCD 323 which the Respondents from the evidence on record had failed to explain.

(8) In the circumstances, I find that the Respondents 'ancestral root of title oscillates inconsistently between purchase of the land from the Akuapems and the grant to their ancestors by the then Nungua Mantse.The statutory declaration, and the report of the Acting Oyibi Mantse are not consistent with the Respondents' pleadings and testimony. In the case of**DAM VS. ADDO [1962]2 GLR 200-206**this court per Adumua Bossman JSC held *inter alia* as follows: ***"in both ESSO PETROLEUM CO. LTD. VS. SOUTHPORT CORPORATION AND OLOTO VS. WILLIAMS above referred to, it was the case of the court accepting a case contrary to and manifestly inconsistent with that which the Plaintiff himself has set up, whereas in our instant case it is the case of the court***

accepting a defence contrary to and inconsistent with that which the Defendant himself has put forward but the principle of law involved is undoubtedly the same and in the words of Lord Normand amounts to condemning" *a party on a ground on which his evidence has been improperly excluded".* See also **KWAKU VS. SERWAH AND OTHERS 1 GLR 429-456.**

(9) In the instant case, the Appellants argue that the two lower courts erred in entering judgment for the Respondents on their counterclaim. The Respondents' counterclaim *(page 176 of the record)* was set out as follows:-

"a. Declaration of title to all that piece and parcel of land subject matter of the suit.

b. Order for recovery of possession.

c. Perpetual injunction against the Plaintiffs their assigns, agents, servants and all persons deriving or claiming title through them.

d. General damages

e. Costs".

(10) In the case of **OSEI VS. KORANG [2013]58 GMJ1 at 22-23 and 32**this court held per Ampiah JSC that: ***"Where in an action the parties claim and counterclaim for declaration of title to the same piece of land each party bears the onus of proof as to which aside has a better claim of title against his/her adversary, for a counter claimant is as good as a Plaintiff in respect of a property which should be assays to make his/her own. In this wise it might be useful to state that the approach adopted and approved for resolving disputes to title of land has been stated repeatedly in several judicial dicta in our reports and wish to cite only one for example, namely YORKWA VS. DUAH [1983-83] GBR 278 CA, at 281 . . ."***Thus, for a family or Stool to prove declaration of title to land it is incumbent on it to prove its method of acquisition either by traditional evidence, documents of title or by overt acts of ownership exercised over the disputed land.

(11) The Respondents by their evidence have sought to make a claim for ownership though long years of possession and use. This position is radically different from the earlier publicized claim of purchase from the Akwapems. They could not therefore discharge their evidential burden by their inconsistent and conflicting modes of acquisition clearly apparent on there cord. With such oscillating yet conflicting claims as to their radical root of title, the Respondents failed to adduce the requisite evidence in defence of the Appellants' claim and consequently failed to discharge the burden of proof on their counterclaim. The principle of law on the effect of inconsistency in evidence has been established from a rich line of decisions as for example the case of **NII NARH DOWUONA II (SUBSTITUTED BY EBENEZER NARKU OKWEI, FURTHER SUBSTITUTED BY EMMANUEL NORTEYE DOWUONA) VS. ADDOKWEI TETTEH OLEWOLON (SUBSTITUTED BY DANIEL ADDOQUAYE ADDO & BENJAMIN TETTEH ADDOQUAYE & 2 ORS. in Civil Appeal No.J4/14/2005 dated 21st June 2006**per Ahinakwa JSC and in earlier the case of **OBENG VS. BEMPOMAA [1992-93] PART 3 GBLR 1029**where Lamptey J.A *(as he then was)* stated that: ***"inconsistencies though individually colourless, may cumulatively discredit the claim of the proponent of the evidence. The conflict in the evidence of Plaintiff and his witnesses weakened the merit of his case and proved fatal to his claim".***

(12) For the obvious manifest inconsistencies in their radical root of title, the Respondents did irredeemable damage to their claim for which reason their defence and counterclaim must fail. Consequently, I will also set aside the concurrent judgments of the High Court and Court of Appeal and allow the appeal.

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

COUNSEL

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EDWARD SAM CRABBE ESQ. FOR THE DEFENDANTS/RESPONDENTS/ RESPONDENTS.