IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: APPAU, JSC (PRESIDING)
DORDZIE (MRS.), JSC
PROF. KOTEY, JSC
OWUSU (MS.), JSC
PROF. MENSA-BONSU (MRS.), JSC

CIVIL APPEAL
NO. J4/53/2021

7TH JULY, 2021

1. EBENEZER KWAKU
2. NUMO TEILA KWADWO } DEFENDANTS/APPELLANTS/APPELLANTS
3. PRINCE MART LIMITED ….. DEFENDANT

VRS

MANKRALO TETTEH OTIBU IV ….. PLAINTIFF/RESPONDENT/ RESPONDENT

JUDGMENT

APPAU, JSC:-

The Respondent in this appeal Mankralo Tetteh Otibu, sued the 1st Appellant herein Ebenezer Kwaku in the trial High Court, claiming his family's title to a piece of land measuring 23,552.27 acres, which he said the 1st Appellant had trespassed onto. He sought further reliefs in the nature of damages for trespass and perpetual injunction. The 1st Appellant denied trespassing onto the land; a portion of which he claimed belonged to his family. He counter-claimed for title to that portion of the said land

which is occupied by members of his family, damages for trespass, recovery of possession and perpetual injunction. Later, the 2nd Appellant joined in the action as Co-defendant in the trial High Court on the ground that he was the head of 1st Appellant's family. He also counter-claimed for title to that same portion of the land for and on behalf of his family, order for refund of rent paid to the Respondent by various occupiers on the land, recovery of possession and perpetual injunction. That portion of the land which the two Appellants in this appeal claimed belonged to their family and over which they counter-claimed, falls within the larger land over which the Respondent sued. They described it as measuring 14.06 square miles. The disputed land was therefore the 14.06 square miles of land which lies within the 23,552.27 acres over which the Respondent sued. There was a 3rd Defendant, a Company by name Prince Mart Limited, which leaned on the 1st and 2nd Appellants for support during the trial as a lessee of the Appellants. That Company is not part of this appeal. The 1st and 2nd Defendants, who are the Appellants herein, (and would be referred to as such hereinafter), defended the action together on a claim that the disputed land belonged to their family.

At the end of the trial, the High Court found the Respondent's case (then Plaintiff), more probable than the Appellants. The trial High Court found as a fact that Appellants' family is on the disputed land upon permission granted them by the Respondent's family, which owns the larger portion including the smaller portion claimed by the Appellants. The court, however, found that the said family had been in possession of that smaller portion for a long time. The trial High court accordingly granted judgment in favour of the Respondent on all the reliefs sought and dismissed Appellants counter-claim. It ordered the Appellants not to develop or alienate in any way, any portion of the disputed land without the permission of the Respondent's family, which is the allodial owner of the land. The court went ahead to award damages against the Appellants for trespass. The trial High Court held:

"In view of Exhibit 'B' and by virtue of the aforesaid, the court prefers the Plaintiff's evidence over the Defendants and finds as a fact that the

Gbesedorm family is on the disputed land by virtue of the permission granted them by Plaintiff's family. Indeed, by virtue of their presence on the disputed land, the Gbesedorm were able to put in a claim for compensation...

As against the Defendants, the Plaintiff has successfully proved, in my view his title to the land in dispute on a balance of probabilities. The balance tilts in favour of the Plaintiff..

In the light of the aforesaid, the Defendants have failed to prove their claim. Consequently, I dismiss the counterclaim by Defendants herein and declare title of the disputed land in the Plaintiff.

I perpetually restrain the 1st Defendant , their heirs, assigns, grantees, workmen and any person claiming through them from developing , alienating, interfering or in any manner dealing with the land the subject-matter of this suit without the permission and consent of the allodial owners, the Plaintiff family. I will award damages of GHc10,000.00 in favour of the Plaintiff against the Defendants for their trespass". {Emphasis added}

Appeal to the Court of Appeal

The Appellants, being aggrieved by the judgment of the trial High Court, appealed against same to the Court of Appeal on six (6) grounds. The grounds of appeal were:

i. *The judgment was against the weight of evidence adduced before the trial court;*

ii. *The trial judge erred when the court failed to reject Plaintiff's exhibit A, the site plan, which was in clear violation of LI 1444, The Survey (Supervision and Approval of Plan) Regulations, 1989;*

iii. *The trial judge erred in law when it made a finding of fact that the Lanor and Sewem families were in occupation of parts of the disputed land, yet made a declaration of title in favour of the Plaintiff for the entire land;*

iv. *The trial judge erred, when in in the evaluation of the Traditional Evidence before the court, the court relied on the case of* ***YORKWA v DUA****;*

v. *Based on the finding of fact by the trial judge that the 1st and 2nd Defendants' family were in undisturbed and uninterrupted possession of portions of the disputed land, the court, the court erred in concluding that they were on the land with the permission of the Plaintiff's family, and;*

vi. *The court erred in awarding General Damages against the 1st and 2nd Defendants in the clear face of absence of evidence to suggest that they were trespassers.*

The Court of Appeal dismissed the Appellants' appeal in its entirety and affirmed the judgment of the trial High Court. The Court held: ***"Having dismissed all grounds and issues which arose from the appeal, and there being nothing of merit urged on us by the Defendants to authorize appellate interference, we uphold the judgment of the trial court and dismiss the appeal in its entirety."***

Further appeal to the Supreme Court

The Appellants appealed further to this Court and the grounds of appeal canvassed for our consideration were:

a. *The judgment is against the weight of evidence.*

b. *The learned justices of the Court of Appeal erred in affirming the declaration of title to the disputed land made by the trial court in favour of plaintiff, in the face of concurrent findings of fact that defendants family had been in uninterrupted possessions and occupation of 14.06 square miles over several years of the total land in dispute and this has occasioned a grave miscarriage of justice.*

c. *The learned justices of the Court of Appeal erred in law in holding that the failure to plead Limitation Act, (NRCD 54) disentitled defendants from relying on their long period of uninterrupted possession in defence to the suit.*

Submissions made by the Appellants in their Statement of Case

In their Statement of Case filed on 16/02/2021, Appellants merged grounds **(a)** and **(b)** as recalled above and argued them together under the omnibus ground that the judgment was against the weight of evidence. They then argued ground **(c)** which is on the application of the Limitation Act, (Act 54), separately. We recount briefly, the arguments canvassed by the Appellants on the grounds.

Grounds (a) and (b)

On grounds **(a)** and **(b)**, Counsel for the Appellants contended that though there was unchallenged evidence on record of recent acts by the appellants' family on and in respect of the disputed land, which acts confirm Appellants' claim of title to the land as against the Respondent's family, both the trial High court and the Court of Appeal found otherwise. Counsel mentioned the claim made by the Appellants for compensation in respect of the disturbance caused to a portion of the disputed land during the construction of the Accra – Akosombo motor road. They again mentioned the land they leased out for the construction of Water Works for the community, which forms part of the disputed land, without any challenge by the Respondent. According to Appellants, they have established villages, cottages, hamlets and farms on the disputed land to the knowledge of the Respondent and his family, for the over one hundred years that they have settled on the land. In addition, they have granted customary leases of portions of the land to other stranger farmers and settlers for farming and building purposes. Appellants contended that their claim was limited to the 14.06 square miles of land which lies within the 23,552.27 acres claimed by the Respondent but not the whole land claimed by the Respondent.

According to them, even granted it was Respondent's predecessor family that permitted Appellants' predecessors Tei Kwame and Aworteinar to settle on the disputed land to farm and feed their family as contended by the Respondent, that action took place over one hundred (100) years ago. Since that time, they have remained in unconditional possession and control of that portion of the land, for which they have acquired a

customary freehold interest in same. They denied being mere licensees on the land. It is for this reason, according to them, that they have successfully made customary grants of portions of the land to others all these years in their own right, to the extent of even successfully putting in a claim for compensation without any challenge from the Respondent's family. Appellants therefore strongly urged this Court to partly reverse the two lower courts and hold that, even granted Respondent's family is the allodial owner of the larger land of 23,552.27 acres of land, which includes the 14.06 square miles in dispute, they are customary freeholders on the disputed land. They accordingly submitted that as customary freeholders, they have usufructuary or user rights or interest in the land for which their possessory rights could not be disturbed by the Respondent.

Ground (c)

On the last ground of appeal, the Appellants contention was that the Court of Appeal erred when it held that the failure to plead the Limitation Act (NRCD 54), disentitled the Appellants from relying on their long period of uninterrupted possession of the land in defence of the action. Appellants argued that on the strength of the decisions of this Court, the mere failure to plead the Statute of Limitation (NRCD 54), as required under Order 11 r. 8(1), must not deprive the Court from doing substantial justice where the appellants' testimony points unequivocally or substantially to the plea. Appellants mentioned the cases of **SAMASINGHE v SBAITI [1977] 2 GLR 442; AMUZU v OKLIKAH [1998-99] 141 @ P. 174 & ATTORNEY-GENERAL v SWEATER AND SOCKS FACTORY LTD[2013-2014] 2 SCGLR 946,** to support their argument.

According to Appellants, in both the *A-G v Sweater & Socks* and *Amuzu v Oklikah cases* (supra), though the principles of 'Estoppel' and 'Fraud' respectively, were not specifically pleaded as required under the rules of court, the courts held that courts of justice must strike a proper balance between substantive justice and procedural laws. In both cases, this Court held that where a plea has not been explicitly set out, but the defendant's case points unequivocally or substantially to the plea, the court is bound to consider it

as if same had been specifically pleaded or raised by the defendant. Appellants prayed the Court to apply the Statute of Limitation on their behalf, though not pleaded, to stop the Respondents from interfering in their possession and developments on the land, as was done in the *Sweater and Socks* and *Amuzu cases* (supra). Appellants were of the view that the legal remedy of limitation is available to them to preserve the over one hundred (100) years of uninterrupted occupation or possession, which the trial High Court found to be an undisputed fact, as affirmed by the Court of Appeal.

Respondent's response to Appellants' submissions

We state emphatically that the submissions made by Counsel for the Respondent in his Statement of Case in answer filed on 09/03/2021, did not in any way, touch on or answer the issues raised by the Appellants in their Statement of Case. The Respondent did not respond to Appellants' submissions on the Limitation Act; neither did he answer their arguments on the acquisition by appellants of a customary freehold interest in the disputed land measuring 14.06 square miles. Frankly, this Court did not benefit in any way from the submissions made by the Respondent in his written Statement of Case as he did not address the issues at stake. Notwithstanding the fact that Respondent did not answer the issues raised in the notice of appeal, he prayed the Court to affirm the judgment of the Court of Appeal, which was a total affirmation of the judgment of the trial High Court.

Evaluation and determination by the Court of the issues raised in the appeal

We wish to discuss first the last ground of appeal on the applicability of the statute of limitation as canvassed by the appellant, before addressing the submissions on grounds **(a)** and **(b)**. Whilst we appreciate the wisdom and good reasoning in the arguments of the Appellants on the applicability of the limitation plea as provided in the Limitation Act, where it has not been specifically pleaded in compliance with the rules of court, we do not think the facts in this case do call for such a discourse. However, it is worthy to

emphasize, as Counsel for the appellants brilliantly argued in their written submissions that, this Court recognizes the overarching influence of substantive justice over procedural propriety as showcased in several of its authoritative pronouncements including the two cases of *Sweater and Socks* and *Amuzu v Oklikah* mentioned above. In the *Amuzu case* where 'Fraud' was not distinctly pleaded as the practice required under the rules of the High Court; i.e. Order 11 rule 8(1) of (C.I. 47), this Court, per Atuguba, JSC held that: ***"In view, especially of the provisions of sections 5, 6 and 11 of the Evidence Decree, 1975 (NRCD 323), regarding the reception of evidence not objected to, the court cannot ignore the same, the myth surrounding the pleading of fraud notwithstanding".***

Order 11 rule 8(1) of the High Court Civil Procedure Rules, 2004 C.I. 47 provides: *"A party shall, in any pleading subsequent to a statement of claim, plead specifically any matter, for example, performance, release, any limitation provision, fraud or any fact showing illegality*

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

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

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

Also in the Sweater & Socks case, this Court noted the well-established principle of the plea of *estoppel per rem judicatam*, which is that; a party, who intended to rely on that plea, must do so expressly and make full disclosure of all the material facts on which it was anchored. Though the defendant in that case did not put up such a plea as practice required, this Court held that; ***"the failure to do so with specificity, employing the well-known legal terminology "estoppel per rem judicatam" is not fatal to a party's case".*** According to the Court; ***"Courts of justice must always strive to strike a proper balance between substantive justice and procedural laws. Whenever legally justifiable or appropriate, substantial justice must never be***

sacrificed on the altar of technicism, or technical rules of procedure. Thus, where the plea has not explicitly been set out, but the defendant's statement of case points unequivocally or substantially to the plea, the court is bound to consider it, as if same had been specifically raised by the defendant".

So, as brilliantly argued by Appellants' counsel, we think the same principle that was applied in the two cases above, could be applied in a situation where a defendant fails to plead the Statute of limitation in his statement of defence, but puts up a defence or case that suggests that the party intended to rely on that plea, without any objection from his adversary. However, as we have earlier on stated, that situation is not present in this case. The defence put up by the Appellants in both their pleadings and their testimony in court, did not suggest in any way that they intended to rely on the Statute of Limitation. This is because the Respondent did not put in a claim for recovery of possession as part of the reliefs sought. Subrule (2) of rule 8 of Order 11 states: ***"Without prejudice to subrule (1), a defendant of an action for possession of immovable property shall plead specifically every ground of defence on which the defendant relies, and a plea that the defendant is in possession of the immovable property in person or by a tenant shall not be sufficient."*** One of such grounds of defence, which a defendant can specifically plead as a shield where plaintiff prays for recovery of possession, is the Statute of Limitation.

If the Respondent had put in a claim for recovery of possession, then the Appellants would have been required to plead the Statute of Limitation as a defence, as provided under subrule (2) of Order 11 rule 8 recalled above due to their long presence on the land, granted their possession was an adverse one. That was, however, not the position in this case. We therefore fault the Court of Appeal for introducing the Statute of Limitation as a plea the Appellants should have relied on in their defence to strengthen their case because of their long possession on the land, when the possession of the Appellants was not an adverse one but one with the permission of the Respondent's family or predecessors.

Respondent's complaint for which he took this action, as his evidence clearly shows, was that the 1st Appellant had leased portions of the disputed land to strangers for building purposes without his knowledge and consent as the allodial owner. He therefore prayed the trial High court to collect the document that the 1st Appellant possessed, which empowered him to lease out the lands as he did since the land did not belong to them. This was what he said in his evidence at page 330 of Volume One of the record of proceedings (RoA), when led by his counsel in his evidence in-chief:

"Q. You have indicated to this court that you brought the 1st Defendant to court because they have come into your land; what actually have they done on the land?

Plaintiff: My Lord, the intention of the family land is being destroyed by the 1st Defendant because he sold the land and people are building on it. Those who were there built and roofed the building.

Q. So what do you want this court to do for you in respect of what you…?

Plaintiff: My Lord, what I am asking the court to do for me is that the document which covers the land and is in possession of the 1st Defendant, is not a good document because the land does not belong to them so I am asking the court to take that document from the 1st Defendant and give us back our land."

A careful reading of the provisions of section 10 of the Limitation Act, (Act 54) on recovery of land shows clearly that, the section only applies to land that is held to be in adverse possession. Subsection (3) of section 10 of the Act reads: *"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".* **'Adverse possession'** is defined by Black's Law Dictionary, 9th Edition by Brian A. Garner as; *"The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is*

continuous, exclusive, hostile, open, notorious." The Shorter Oxford Dictionary (Deluxe Edition), defines the term as; *"the occupation of land to which another person has title with the intention of possessing it as one's own".*

The evidence and findings made by the trial High Court and affirmed by the Court of Appeal was that the Appellants are on the land with the permission of the Respondents. In fact, for over one hundred years, the Appellants' family and the Respondent's family have peacefully co-habited on the land without any hostility. It was when the Respondent realized that the 1st Appellant had carved out portions of the land to other persons for building purposes that he initiated this action against him. Since the contention of the Respondent was that it was their predecessor who permitted the predecessors of the Appellants to settle on the land for farming and settlement purposes, it could not be said that for all these long years or period of settlement, the Appellants were in adverse possession of the land. In fact, they were in possession with the consent and knowledge of the Respondent's family without any hostilities, as the Respondent's testimony showed. The Appellants could not therefore have pleaded the Statute of Limitation because the Respondent never contended that the Appellant's presence on the land was unknown to his family or was adverse. If the Respondent's contention all along was that the Appellant's predecessors entered onto the land without their knowledge and consent for the past one hundred (100) years and over, then the Appellants would have been required to raise the plea of limitation as a defensive shield, as contended by the Court of Appeal.

Again, the Respondent's testimony did not suggest in any way that the Appellants' presence on the land constituted trespass notwithstanding the claim of damages for trespass as endorsed on the writ of summons. Having found that the Respondent's family permitted the Appellants' predecessors to settle on the disputed land for the past one hundred years and over unconditionally, it was wrong for the trial court to have awarded Respondent damages against the Appellants for trespass. Indeed and in fact, the Appellants cannot be described as trespassers, neither can they be termed as mere licensees. The rights and interests that they have acquired in the disputed land under

their possession are over and above that of mere licensees. The Court of Appeal therefore erred in affirming this finding of the trial High Court.

On grounds (a) and (b), we are of the view that the Appellants did not canvass sufficient grounds to challenge the findings of the two lower courts that the Respondent's family is the allodial owner of the disputed land, including the large tract measuring 23,552.27 acres over which he sued. We therefore affirm that holding. This is because of the certainty of the law that long possession by a stranger with the permission of the allodial owner would not confer ownership of the land upon the stranger. The authorities are clear that laches of this nature do not extinguish the title of the true owner and do not vest the stranger occupier with title to the land. All it does is that it prevents the true owner from recovering possession, and enables the stranger to retain the use of the land as a usufruct or possessory right holder– See the cases of **OHEMEN v AGYEI [2 WALR], 275; MANSU v ABBOYE [1982-83] 2 GLR 1313 (CA)** and **AWUAH v ADUTUTU & Another [1987-88] 2 GLR 191 (CA)**.

In the *Ohemen v Adjei case* (supra), the court held that the customary freehold interest, also known as user or usufruct interest, is not a mere right of occupation and farming but an interest in land which prevails against the whole world, including even the allodial owner. Some of the incidents of a customary freehold or usufruct interest, as pronounced by the courts in several cases, including those referred to above are; right of possession, user rights and enjoyment, right to an action in trespass, right of alienation and inheritability of interest. In the case of **TIJANI v SECRETARY TO THE GOVERNMENT OF SOUTHERN NIGERIA [1921] 2 AC 399**, the Privy Council held that: ***"The owner of the usufruct title can alienate his said title without the prior consent and concurrence of the absolute owner so long as the alienation carries with it an obligation upon the transferee to recognize the title of the absolute owner."*** Though such a stranger can deal with the land as he wishes, including granting conveyances, these interests are limited to possessory and user rights and cannot mature to absolute ownership. As was stated in the *Ohemen v Agyei case* (supra); ***"The correct position is that the true owner loses his right***

to assert title to and recover possession of the land; not that the stranger acquires title to it, though in actual fact, he does thereby acquire title to it".

This position of the law was affirmed by this Court in its recent decision in **TOGBE LUGU AWADALI IV v TOGBE GBADAWU IV [2017-2018] 2 SCLRG 699 @ pp700-701.** This Court at holding 2 of its judgment which is at page 701 of the report held that: ***"Usufructuary rights are not reserved exclusively to individual members of the group or family or clan which communally owns the land in question, but they can be acquired by any person, including a stranger. A stranger can acquire usufructuary rights over land owned by another group or family either on terms or through acquiescence…….In the eyes of the customary law, such a naturalized stranger holds and enjoys an interest in the land not as a stranger anymore, but as a subject with no limitations or restrictions attached to his enjoyment of the land".***

The evidence on record is graphic that the Appellants have been in undisturbed possession of the disputed land for over one hundred years and have villages, cottages, hamlets and farms thereon. The trial High court even recognized the fact that the Appellants were able to claim compensation in respect of a portion of the land due to their long possession or occupation of same. We are therefore *ad idem* with the Appellants that their interest in the disputed land; i.e. the 14.06 square miles which they occupy, is that of customary freehold or usufruct and for that matter, they cannot be restrained from developing or alienating portions of same, subject to the recognition of the title of the absolute or allodial owner; i.e. the Respondent. We therefore allow the appeal in part by reversing the injunction order placed on them by the trial High Court and affirmed by the Court of Appeal. We again set aside the award of damages made against them for trespass since from the findings of the two lower courts, their presence on the land was not trespassory, but with the permission and consent of the Respondent's family.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)
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PROF. N. A. KOTEY
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