IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: YEBOAH, JSC (PRESIDING)
GBADEGBE, JSC
APPAU, JSC
MARFUL-SAU, JSC
KOTEY, JSC

CIVIL APPEAL
NO. J4/33/2017

23RD JANUARY, 2019

EBUSUAPANYIN EKUMA MENSAH …… PLAINTIFF/RESPONDENT/RESPONDENT

VRS

NANA ATTA KOMFO II …… DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

GBADEGBE, JSC:- The question for our decision in this appeal is within a narrow compass and is related to the probative value of the evidence on which the judgment of the two lower courts is founded. As the intermediate appellate court is in agreement with the trial court on the findings of fact, our task is to determine if on all the evidence contained in the record of appeal before us, the decision of the learned justices is supported by the effect of the evidence. Restating this, we are to discern from the evidence whether placing the case of the plaintiff against that offered by the defendant within the context of the controversy herein renders his version more likely to be true; I think this is the essence of the evidential requirements contained in sections 10-12 of the

Evidence Act, NRCD 323 regarding the burden of proof. The attitude of the second appellate court to findings of fact concurred in by the intermediate appellate court has been laid down in the case of Achoro v Akanfela [1996-97] SCGLR 209 and applied in a collection of cases, the essence of which is that this court may only depart from such findings if they are proved to be perverse or unreasonable. In this regard, to succeed, the appellant must demonstrate that there was some error or blunder in the manner that the lower courts handled the resolution of questions of fact such as to have had the ends of justice not well served.

Turning to the evidence placed before the lower courts, there is no conflict of opinion that it was in its nature traditional and as it was not based on writings contained in documents but related by way of oral history, the narration of both parties suffered from inconsistencies but as has been stated in several judgments regarding the attitude of courts to such evidence, we are not to require proof by mathematical precision and it suffices if having regard to acts of recency, a particular view of the facts is more probable than the other.

After patiently scrutinizing the record of appeal before us and attending to the written briefs submitted to us by the parties, we have come to the conclusion that the view of the facts accepted by the two lower courts is sufficiently derived from the admitted evidence and that contrary to the considerable submissions by the defendant directed at overturning the findings, the plaintiff's case had greater probative value than that offered by the defendants not only for the very clear reasons provided in the judgment with which we are concerned in these proceedings but also for reasons such as the failure of the defendant to lead any evidence in support of the assertion contained in paragraph 10 of the statement of defence by which it was averred that members of his family had exercised various overt acts of ownership related to the disputed land. Although in the said pleading, reference was made to the plaintiff's family as well, we think that on all the evidence, the exercise by the plaintiff's family of substantial rights sin relation to the land as was found by the tribunal of fact coupled with the fact of the defendants receiving tolls from them has the tendency of compelling us to the opinion that the allegation of grants to other subjects of the stool is untrue. Further, by section 17 of the Evidence

Act, NRCD 323, the incidence of the legal burden on those grants was borne by the defendants, and their failure to lead any such evidence rendered their assertion not likely to be true. Section 17 of the Evidence Act provides:

> *"(1) Except as otherwise provided by law, the burden of producing evidence of a particular fact is on the party against whom a finding on that fact would be required in the absence of further proof.."*

As the defendants have failed to lead any evidence in proof of the crucial plea in paragraph 4 of their statement of defence, by the operation of the rules of evidence, they must suffer the consequences of the risk of non-persuasion within sections 11 and 12 of the Evidence Act, the effect of which is that the existence of the facts on which the plaintiff's case is grounded is more probable than that of their adversaries.

In contradistinction to the above, the defendants accepted the fact that the plaintiffs have been in possession of the land and exercising overt acts thereon including the erection of buildings and cultivation of cash and economic crops on the land. Also of significance to the case of the rival claimants regarding who has a better right to the immediate occupancy of the land, the defendant admitted that when they entered a portion of the disputed land occupied by members of the plaintiff's family and felled palm tress, they paid for the value of their unlawful acts. This piece of evidence coming from the defendants reinforces the plaintiff's right to the land; the question that arises from this is why should a person who claims to be the owner of the disputed land be compensating the plaintiff? The answer is not too difficult to find from our customary land tenure system and it is that in such circumstances, the plaintiff being a subject of the stool holds the possessory right whiles the defendant holds the nominal allodial title to the land. The holder of the possessory right called the usufruct cannot be interfered with in his possession of the land even by the holder of the allodial title. In our view, this conclusion is sufficient to dispose of the task with which we are faced in this appeal.

But that is not the end of the matter; there is the issue of the conduct of both parties by which the defendant's family received tolls from the plaintiff's family related to the latter's possession of portions of the disputed land. From the evidence, the parties regulated

their rights to the land as such for a considerable period. Such conduct triggers a presumption of law under section 26 of the Evidence Act in the following words:

> "*Except as is provided by law, including a rule of equity, when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest*. "

See: African Development Co Ltd v CEPS [2011] 2 SCGLR 955, 964

The effect of the said estoppel which is mutual in character is that both parties have for a considerable period acknowledged the interest of each other in relation to the land. While the defendant acknowledged the plaintiff's occupation of the land, the plaintiff also acknowledged the defendant's allodial title to the land. In our opinion, this is in accord with our customary land holding concepts namely the allodial title and the usufructuary right to the land. In the circumstances, by section 24 of the Evidence Act, NRCD 323, we are precluded from considering any evidence to the contrary of the presumed fact that arises from their mutual acknowledgment of their respective rights to the disputed land. Therefore, the invitation pressed on us by the defendant in his written briefs submitted to us, which has the effect of inviting us to consider a contrary view of the facts in line with the previous decision of the Privy Council in the case of Effua Amissah v Effua Krabbah in case number 1356/31/ SF No 4 is rejected. That aside, we cannot have regard to the judgment without the record of proceedings on which it is based; to do so will be a departure from the settled practice of the court in ascertaining from a previous case the reasons for the court's decision. Accordingly, the learned justices of the Court of Appeal came to the right conclusion on the admitted evidence when they agreed with the trial court on the issues of fact on which the action herein turned.

For the above reasons, the decision of the learned justices of the Court of Appeal, which affirmed the findings of the trial court was a proper exercise of their discretion. In view

of the fact that the decision on appeal to us is the only view of the facts that the lower courts could have reached on the admissible evidence, it cannot be said to suffer from either perversion or unreasonableness to warrant our intervention. Consequently, the onslaught on the decision the subject matter of this appeal is wholly without merit and is accordingly dismissed.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-
I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-
I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

MARFUL-SAU, JSC:-
I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

KOTEY, JSC:-

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

PROF. N. A. KOTEY
(JUSTICE OF THE SUPREME COURT)

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