IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA- A.D. 2021

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

CIVIL APPEAL
NO. J4/21/2021

21ST JULY, 2021

EBUSUAPANYIN KWEKU ASEMA (SUBSTITUTED FOR EBUSUAPANYIN KWEKU EDUAFO (DECEASED)	…….	PLAINTIFF/APPELLANT/RESPONDENT
VRS		
NANA AKWA III	…….	DEFENDANT/RESPONDENT/APPELLANT
AND		
EBUSUAPANYIN KWEKU ASEM (SUBSTITUTED FOR EBUSUAPANYIN KWAKU EDUAFO (DECEASED)	…….	PLAINTIFF/APPELLANT/RESPONDENT
VRS		
NANA AKWA III	……..	DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

AMADU JSC:-

(1) This appeal is from the decision of the Court of Appeal (Cape Coast Division) dated 13th May 2015 which affirmed in part the decision of the High Court (Cape Coast) dated 9th June 2008.

(2) The background facts giving rise to this appeal are the result of two Consolidated Suits No.LS7/94 and No.LS8/94 in which the Plaintiff/Appellant/Respondent *(hereinafter referred to as 'Respondent')* had taken out writs in the High Court, Cape Coast against the Defendant/Respondent/Appellant *(hereinafter referred to as the 'Appellant')* for the following respective reliefs:-

"(i) Declaration of Title to all that piece or parcel of land called Pomponu which said piece or parcel is bounded by the properties of Nana Akwa, Nana Ampong and Ekumfi Swedru.

(ii) Recovery of possession.

(iii) General damages for trespass to Plaintiff's family.

(iv) Perpetual injunction restraining the Defendants, his agents, servants and/or workmen from having anything to do with the said land" and

"(a) Declaration of title to all that piece or parcel of land situate at Akwakrom and commonly called "Anomankyea land" which is bounded by the property of Nana Akwa, the Defendant herein the property of Nana Kwame Sakyi also known as Peppy, the property of Nana Adokor, the property of Nana Kojo Okyir, the property of Akua Nyamekye and property of Kojo Apprey.

(b) Recovery of possession

(c) General Damages for trespass

(d) Perpetual Injunction restraining the Respondents, his agents, savants and workmen from having anything to do with the said land".

The Appellant herein who was Defendant in the consolidated suits counterclaimed in both actions and sought against the Respondent reliefs for declaration of title, recover of possession and perpetual injunction with respect to the same subject matter.

(3) At the end of the trial, the High Court dismissed the claim of the Respondent for the reliefs of declaration of title and recovery of possession as well as the claim of declaration of title by the Appellant, but confirmed his allodial title over the parcels of land in dispute.

(4) On appeal, the Court of Appeal affirmed the judgment of the Trial High Court in part. With respect to Suit No.LS.7/94 the Court of Appeal held as follows:-

"(a) Declaration of title to the Pompomu lands as described on relief (a) of the Appellant's claim i.e. the land bounded by the properties of Nana Akwa, Nana Ampong and Ekumfi Swedru as determinable, usufructuary or possessory title to the Plaintiff/Appellant, subject to the Defendant/Respondent's allodial title.

(b) There would be no order as to relief (b), that is to say recovery of possession because the Appellants are already in possession.

" We would not grant relief(c) but grant perpetual injunction in relief (d)."

With respect to the reliefs in Suit No.LS.8/94, the Court of Appeal ordered as follows:-

"a Declaration of title being determinable, usufructuary or possessory tile to the land described in relief (a) to the Plaintiff/Appellant subject to the Defendant/Respondent's allodial title".

The court then summed up its final orders by refusing to grant the Respondent's reliefs of recovery of possession and general damages for trespass, but granted perpetual injunction against the Appellant restraining him, his assigns, agents and workmen from having anything to do with the subject matter.

APPEAL TO THE SUPREME COURT

(5) By notice to this court filed on 28/7/2015, the Appellant appealed to this court. In an amended notice of appeal pursuant to leave of this court, the following grounds of appeal were set out.

"(a) A declaration that the Court of Appeal erred by declaring the Defendant/Respondent/Appellant as allodial title owners of the subject matter of the suit and in the same suit granted perpetual injunction against the allodial title owner, agents and servants and workers from having anything to do with the said lands the subject matter of these suits.

(b) That Cape Coast erred in not granting both counterclaims of the Defendant/Respondent/Appellant in Suit/No.LS7/94 and Suit No.LS8/94 against the Plaintiff/ Appellant/Respondent.

(c) The judgment is against the weight of evidence on record".

(6) As rightly pointed out by counsel for the Respondent, while the formulation of some of the grounds of appeal are inelegant, the core complaint of the Appellant against the judgment of the Court of Appeal is clear. In order to determine the appeal on the merits, we shall consider the grounds on the basis of what clearly emerges as the Appellant's complaint with the judgment of the Court of Appeal. This can easily be deduced by examining the relief, the Appellant seeks from this court which is as follows:- ***"Setting aside the decision of the Court of Appeal dated 13th May 2015 whilst upholding the decision of the High Court in part by granting the Defendant/Respondent/Appellant all the reliefs in his counterclaims in both Suit/No.LS7/94 and Suit No.LS8/94.***

APPELLANT'S SUBMISSION

Ground (a)

(7) The Appellant has assailed the finding by the Court of Appeal to the effect that, though he is an allodial owner, and the Respondent is a usufruct, the Court of Appeal restrained the Appellant, his agents, servants and workmen from ***"having anything to do with the said land".*** The Appellant submits that per his pleadings and that of the Respondent, the latter had made a claim for allodial title to the disputed lands. He contends that the decision of the Court of Appeal

amounted to converting the interest of the Respondent in the disputed lands from one of a mere licensee, exercising the right of stewardship as caretaker, into one of title or ownership which he is not entitled to as it is contrary to the evidence proffered at trial. The Appellant argues that the position of the Court of Appeal amounts to creating a different freehold interest over portions of the disputed lands by taking away Appellant's ownership of his stool lands as well as the use of its shrine enclave, royal grove, community cemetery and his exercise of rights of possession to administer the lands on which he has put other tenants and licensees in possession.

(8) The Appellant submits further that the Court of Appeal was in error when after affirming the finding of the Trial Court of his allodial title, it thereafter injuncted him, his servants, agents and workers from having anything to do with the lands in dispute. The Appellant contends therefore that, the Respondent having made a claim for allodial title of the disputed lands, the finding by the Court of Appeal that the Respondent is a determinable owner or a usufruct amounted to changing the case of the Respondent.

(9) Furthermore, the Appellant submits that per the pleadings and testimony of the Respondent, he *(the Respondent)* traced his root of title to the children and wife of the founder of Akwakrom Nana Akwa I, who broke the virgin lands subject matter herein. The Appellant submits further that, the Respondent having made a claim for a different land, the Court of Appeal erred in arriving at the conclusion that while the Appellant is the allodial owner of the disputed lands, the Respondent holds a usufruct interest in the disputed lands and even worse, proceeding to injunct the Appellant as per the terms endorsed in the Respondent's writ of summons.

(10) In further submission, the Appellant argues that by the evidence on record, both parties could not have come from the same family. He submits that the

Respondent having staked his origins to the children and wife of the founder, by Akan matrilineal system, the family of Nana Akwa I would not be the same as that of the Respondent who drew their lineage from his wife, Esi Asanwa. The Appellant contends that the Respondent's clan came from Ansafona and did not derive their root and ancestry from the wife of Nana Acquah I, Esi Asanwa. He further argued that the Respondent claimed that his clan migrated from Techiman and settled at Mankessim and thereafter Akwakrom after it was founded by Nana Akwa I whilst the Appellant stated that the Respondent's clan came from Ansafo Abura State and maintained that Nana Akwa's children came from Ansafo and hold a special position as Omankrado of Ansafona. In the midst of these conflicting traditional accounts, both parties lay claim to a common ancestor Nana Akwa 1. However, with respect to the issue for determination in the instant appeal, the Respondent makes a claim to long uninterrupted possessory interest in the disputed lands which is supported by the evidence on record.

RESPONDENT'S SUBMISSION

(11) The Respondent has contested the appeal and submits that, the findings made by the Court of Appeal are not erroneous as submitted by the Appellant. The Respondent submits that while his ancestors first broke the virgin forest with the founder of Akwakrom Nana Akwa I, they exclusively broke other lands of their own. He submits that he had exercised possessory rights and control over the disputed lands for several years and had undertaken various unhindered acts including grants to Ekumfi Swedru, PW6 and PW7.

(12) According to the Respondent, while the Trial Court uphelp the Appellant's allodial title, it found in favour of the Respondent with respect to his long years of possession of the land in dispute without any encumbrance. The Respondent relied on the holding of the Trial Judge at page 225 of the record of appeal as follows: "***I do not think that it would be appropriate to make an order for recovery since the Plaintiffs have been on land for a very long time. However the***

Plaintiffs cannot alienate any portion of the land without any consent and concurrence of the Defendant".

(13) Significantly, in the judgment of the Court of Appeal, it affirmed the Trial Court's finding above when at page 425 of the record it held as follows:- ***". . .The Appellant (Respondent herein) are in possession and have exercised various overt acts of ownership without the consent and concurrence of the Respondent's stool (Appellant herein) like granting land to PW6 who had been farming on the land and paying tolls since 1988. PW7 who is also a tenant who is cultivating the land for twenty (20) years and paid tolls to the (Appellant Respondent herein)".***

(14) The Respondent submits that his case established a possessory interest in the disputed lands as one of occupation with intention of exercising the right of ownership which was not inconsistent with the claim of the Appellant as allodial owner. In support of his case, the Respondent cited the case of **Suleman Vs. Johnson [1951]13 WACA 213**, relying on the proposition that laches and acquiescence could be employed in restraining a landlord from dispossessing his tenant from a parcel of land upon proof that the landlord was aware of the fact of adverse possession or adverse claim to title. He cited the reasoning of Verity Ag, President thus:- ***"It is clear that when the original owners have granted rights of occupation to another, the possession of the other is not adverse possession and the acquiescence therein is part and parcel of the grant and cannot affect the owners reversionary rights. It is only therefore, when it comes to the owner's knowledge that the tenant has alienated or is attempting to alienate the land that the question of acquiescence can arise. The owner is not in possession, has indeed no right to possession and is not concerned, therefore with the acts of the tenant unless and until he becomes aware that those acts are inconsistent with and, therefore a denial of the overlord's rights".***

(15) We need add that Sir John Verity Ag. President, said more than just what the Respondent quoted in the case under reference where he stated *inter alia* that: ***"The real infringement of the owners right would only arise by alienation, and of this they might have no immediate knowledge. It is far otherwise when land upon which no occupational rights have been granted, but into possession of which strangers enter and exercise rights inconsistent with the possession of the owners. Then at once the owner is put on enquiry, and if for many years, he takes no action to assert his rights, not to the reversion but possession, the considerations which apply as to his acquiescence are far different and I think the evidence required to establish such acquiescence as would serve to pass the original rights of the overlord to the occupier if occupational rights had previously been granted and the reversionary rights only come into question".***

(16) Contrary to the attempt by the Appellant to tie the Respondent to his claim for allodial title, the evidence on record points to both parties having a common ancestry but in a relationship of an allodial and a usufruct with respect to the lands in dispute. The Appellant testified that it had put Respondent on the land as caretaker. In his testimony during examination in chief, the Appellant admitted to be a relation of the Respondent. See page 152 of the record where the following evidence was elicited.

"Q: The Plaintiff in this case how are you related to him?

A: Kweku Eduafo (Plaintiff) is my male child.

Q: Can you explain how it is that he is your 'Obabanyin' (male child)?

A: My ancestors got married to his ancestress from Abura Ansafona.

Q: This your elder or ancestor who married to Plaintiff's ancestor what was his name ?

A: He was called Nana Acquah.

Q: The Plaintiff is claiming that this land in dispute belongs to his maternal family ,What do you say to that ?

A: That is not correct.

Q: Tell the court how did he come to have anything to do with the land?

A: My ancestor showed his ancestors a place to feed on and they have been paying homage to our stool. They were to feed on and take care of the land. And whenever we are celebrating our festival they pay homage to our stool.

Q: So as caretakers of this land what were their responsibilities?

A: As caretakers whenever we are celebrating our annual. festival the Plaintiff herein is the person who enters the stool room to perform the customary rites".

(17) From the above testimony, it is clear that, the Appellant had known the Respondent to be in possession of the disputed lands for a long period but only as a caretaker and as the person who performs customary rites during annual festivals. The Respondent testified per PW6 and PW7 with respect to grants he had made of portions of the land some more than 20 years prior to the time of the trial. The Respondent produced evidence of his grant to Ekwumfi Swedru and tendered Exhibit "B'. However, the Appellant challenged Exhibit 'B' and denied any knowledge of same describing it as fraudulent. The Appellant relied on the legal principle that alienation of stool lands by caretakers without the knowledge, consent and concurrence of the stool rendered the alienation void and could only be ratified by the stool. The Appellant cited the cases of **Awuku Vs. Tetteh [2011] 1 SCGLR 231 & Akunsah Vs. Botchway & Another [2011] 1 SCGLR 288** in support of his submission.

(18) We notice that in the judgment of the Trial Court, it held that Exhibit 'B' was a self-serving document since the grant was made in 1955 but documented in 1985. It

then proceeded to totally disregard Exhibit 'B' as it put it. The Court of Appeal however rejected the finding of the Trial Court with respect to Exhibit 'B' on the basis that Section 4(1) of the Illiterates Protection Ordinance [1955 Rev.] Cap 262 mandatorily required any person who prepared a document for an illiterate to correctly read over and explain such document or cause the document to be read over and explained to such illiterate person. The Court of Appeal cited the case of **Nartey Vs. Mechanical Lioyd Assembly Plant Ltd. [1987-88] 2 GLR 314** particularly holding 6 in support of its finding.

(19) Upon our own evaluation of Exhibit 'B', we find that the document is not inconsistent with the provisions of Section 4(1) of Cap 262 as there is no evidence on record to suggest that it was prepared in anticipation of the commencement of the action. It is incomprehensible that the Appellant for several years had known that the Respondent did not have the rights he had exercised over the disputed lands yet he stood by and did not intervene when the Respondent was dealing with the land in a manner inconsistent with his rights without his consent. Nor was there any intervention or hindrance from the Appellant. As stated by Verity Ag., President of WACA in **Suleman Vs. Johnson** (supra) such conduct would ordinarily result in acquiescence.

(20) The record of appeal does not detract from the fact that the Respondent has been in possession of the subject matter for several years. The finding of the Court of Appeal in this respect is supported by the evidence on record and we affirm it. There is abundant evidence to the effect that the Respondent paid what he termed as tolls to the Appellant and likened it to what all people of Akwakrom did. Both parties claim their ancestry from Nana Akwa I but diverge when it comes to other lands the Respondent lays exclusive claims to. The Appellant described his relationship with Respondent as a family one and of an allodial stool and its caretaker.

(21) In respect of the finding of the Court of Appeal of allodial title in the Appellant and usufruct or determinable interest in Respondent, we do not find the Appellant's challenge of this finding and the arguments made in support thereof convincing for us to find and hold otherwise. We find that, by the traditional evidence on record, the finding by the Court of Appeal that the Respondent is the usufruct and the Appellant the allodial owner of the disputed lands is consistent with the evidence and position of the law.

APPELLANT'S SUBMISSION ON INJUNCTION

(22) We have considered the submission of the Appellant with respect to the order of perpetual injunction made by the Court of Appeal against him his servants, agents and workmen. We find the arguments to be well founded. The general meaning placed on a usufruct is that of a person or group having the right to use the property of another. While the usufruct is not an absolute owner, he has a contractually sanctioned interest in it. In the case of **Togbe Lugu Awadali IV Vs. Gbadawu Civil Appeal/NO/J4/50/2016)** dated **24th January 2018** this Court per Appau JSC defined usufruct thus:- ***"The word 'Usufruct' comes from the latin phrase ''usus et fructus, which means ;use and enjoyment' with 'frutus' used in figurative sense to mean fruits enjoyed from the use, which include the right to convey, transfer lease, assign or tax during the pendency of the use of the property concerned. The term stands for a limited real right (or in rem right) found in civil law and mixed jurisdictions that unite the two property interest of usus and frutus e.i. the right to use and enjoy a thing possessed, directly and without altering it. It connotes the right of enjoying all the advantages derivable from the use of something (not only land) that belongs to another, as far as is compatible with the substance of the thing not being destroyed or injured".***

(23) Consistent with this definition and the position of the law, the Court of Appeal was not in error in finding that the Respondent is a usufruct and thus confirmed his possessory interest and user rights over the disputed lands subject to the recognition of the allodial ownership of the Appellant. In the **TOGBE LUGU AWADALI IV** case (supra), this court found that it would be wrong for the allodial owner to fetter the fishing and farming rights of the usufruct family over the disputed land. This is not to say that long possession by a stranger with the permission of the allodial owner would confer ownership of the land upon the stranger. In that case, this court further held that: ***"The authorities are clear that laches of thus nature do not extinguish the title of the owner and does not visit 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. In the case of OHEMEN VS. AGYEI 2 WALR 275 the court held that; 'the correct position is that the true owner loses his right to assert his title to and to recover possession of the land; not that the stranger acquires title to it, though in actual fact he does thereby acquire title to it".***

(24) The long settled position of the courts on the relationship between the allodial and the usufruct has not changed. In the case of **Addai Vs. Bonsu [1961] GLR 273** this Court per Van Lare JSC held that:- ***"(1) the Kenyasi stool as caretaker for the Hiawu stool could not object to the transfer of title to the Plaintiff when the Hiawu Stool as overlord gave its consent".*** Also in the case of **Mansu Vs. Abboye And Another** [**1982-83] GLR 1313-1323** the Court of Appeal per Francois JA *(as he then was)* outlined the incidence of the usufructuary interest thus:- ***". . . Some of the cardinal incidence of the usufructuary interest were that the usufructuary had exclusive possession of the portion of land and he could not capriciously be divested of that interest by the stool neither could the stool alienate that portion of land to any other person without the prior consent and concurrence of the***

usufructuary. Thus the usufructuary interest was potentially perpetual the interest of the usufructuary could be determined only by his consent, his abandonment or upon failure of his successors".

(25) In the instant case, we find that the confirmation of the Respondent's usufruct interest by the Court of Appeal did not take away the allodial title of the Appellant thereby rendering the grant of perpetual injunction against the Appellant clearly erroneous. By the incidence of the usufruct and allodial relationship between the parties, the order for perpetual injunction cannot avail the Respondent. In the result the order for perpetual injunction against the Appellant his servants, agents and workers is hereby set aside. With respect to the other grounds of appeal, the submissions of the parties, being substantially the same as in ground (a) which involves the proper reevaluation of the evidence on record and application of the relevant law, the said grounds have become moot and merely academic and are of no consequence to the outcome of the appeal. Having reversed the order of perpetual injunction against the Appellant his servants, agents and workmen, the appeal is accordingly allowed in part.

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

Y. APPAU
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