IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: AKUFFO (MS), CJ (PRESIDING)

ANSAH, JSC

ADINYIRA (MRS), JSC

YEBOAH, JSC

BAFFOE-BONNIE, JSC

CIVIL APPEAL
NO. J4/32/2014

9TH MAY, 2018

IDDRISU TIFUURO TATALI ……. PLAINTIFF/RESPONDENT/APPELLANT

VRS

ALHAJI SAAKA YAKUBU ……. DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

BAFFOE-BONNIE, JSC:-

This is an appeal by the plaintiff/respondent/appellant, against the judgment of the Court of Appeal dated 26th July 2013. The Court of Appeal in the said judgment allowed an appeal by the defendant/appellant/respondent against a decision of the High Court dated 17th May 2010. We shall refer to the plaintiff/respondent/appellant as the appellant, and the defendant/appellant/respondent, as the respondent.

The facts in this case are as follows. The Appellant is the head of the Tatali family of Kpongo village near Wa. The Respondent is also a farmer resident at Fongo, a section of

Wa. The Appellant on 22nd May 2007 issued a writ against the Respondent in the High Court seeking the following reliefs:

1. Declaration of Title to all that piece and parcel of land lying, situate, opposite the Wa Polytechnic new site bounded on the North by the Muglu valley measuring about 1km on that side; on the West by the Wa-Kpongo road measuring about 1km on that side; on the South by Appellant's land, on the East by Appellant's land, which land shall be more particularly delineated by a site plan upon the orders of the court.

2. Perpetual injunction restraining the Defendant, his heirs, successors in title and all persons whosoever claiming title through him from interfering with the plaintiff's peaceful enjoyment of the land.

3. Costs of the action.

The Respondent also counter-claimed for:

a. Title to all that piece of land situate at a place called Muglu, bounded by the properties of Sokpeyiri to the North, Naa-Jara of Kpongo to the South, Kpaguri to the East and Puohounyiri to the South.

b. Costs

The case of the appellant is that by settlement his family came to own a vast land portions of which was given to one Maamani, also known as Naha Naa for farming. This arrangement came about because the said Maamani got married to a lady from the appellant's family. According to the appellant, the land granted to Maamani is now being farmed by the relations and descendants of Maamani. He also testified at the trial that the respondent is a relation of the said Maamani. The appellant further stated that he brought this action when the respondent put up a sign post on the land signifying that he owns the land. The appellant contended that his family has been performing rituals

on the land as owners of the land any time the circumstances required that the land needed purification.

The respondent on his part stated that the disputed land was granted to his ancestor by Jangburnga Naa from Sokpoyiri. They have been farming on the disputed land for all these years without any hindrance from anyone including the family of the appellant. They have cash crops like mangoes and cashew farms on the land. They also cultivate millet, yams and beans on the land. According to the respondent, his family has also granted portions of the land to certain individuals for farming.

The respondent admitted being a relation of Naha Naa (Maamani). He said Maamani is his grandfather. He further admitted at the trial that the appellant's family gave some land to Maamani, his grandfather. He however explained that the land which was granted to the said grandfather by the appellant's family is different from the disputed land. The respondent further contended that the appellant's family attempted to sell a portion of the land granted to his ancestors by Jangburugu Naa. This caused him to erect the sign post on the land to serve notice to all trespassers including the appellant's family.

In the course of trial the appellant sought to amend his pleadings to include another relief as follows;

"A declaration that the defendant has only a farming licence to the land in dispute"

Even though the application was granted the pursuant process was later struck out for procedural irregularity. So the suit was fought on the original statement of claim and the reliefs on the writ of summons.

Again in the course of the trial, the court ordered a plan to be drawn with survey instructions provided by the parties. The surveyor was examined by both parties and the plan so ordered was admitted into evidence.

At the end of the trial, the High Court decreed title of the disputed land in favour of the appellant's family. Aggrieved by the decision of the High Court, the respondent mounted an appeal in the Court of Appeal. The Court of Appeal reversed the judgment of the trial High Court. This current appeal has been brought against the said decision of the Court of Appeal on the following grounds:

i. The judgment of the Court of Appeal is against the weight of the evidence led at the trial court.

ii. The Court of Appeal erred when it overturned the judgment of the trial court on ground that the Plaintiff failed to prove the boundaries of his land.

iii. The Court of Appeal erred when it held that the trial judge ought to have rejected plaintiff/respondent/appellant's evidence because it conflicted with plaintiff/respondent/appellant's pleadings.

Ground 1.

Judgment is against the weight of evidence led at the trial.

The Appellant in this appeal argues that the judgment of the Court of Appeal is against the weight of evidence adduced at the trial court. In his statement of case he sought to show that the Court of Appeal erred in departing from the findings of the High Court. The Court of Appeal in its judgment partly disagreed with the findings on the trial court and made its own findings based on the evidence on record. The appellant argues that the Court of Appeal's finding that the evidence of DW2 corroborated that of the Respondent *"as a descendant of the first settlers and for that matter, owners of all Wa lands*" is not based on the evidence on record. Also, issue is raised with the finding of the Court that the *"Defendant denied his land was ever desecrated and purified".* The Court of Appeal

again made a finding that the evidence of PW1 and PW2 on purification of the land was hearsay evidence and could not support the Appellant's case. Further the Court found that the second purification, which PW2 said had taken place at Balongomo shrine was far from the area in dispute.

The respondent on the other hand in his statement of case sought to justify the findings of the Court of Appeal on the basis of statements made by the appellant and his witness when giving their testimony in the trial court. He invited this court to apply the principle that an appellate court is entitled to uphold a judgment, if proper grounds exist on the record to justify the judgment, even though it cannot be supported for the reasons given by the Court which gave it. See the cases of ABAKAH vs. AMBRADU (1963) 1 GLR 456 and SERAPHIM vs. AMUA SEKYI (1971) 2 GLR 132.

Appeals are by way of re hearing, Tuakwa v Bosom, and an appellate court is under an obligation to examine the findings of the trial court to determine whether those findings can be supported by the evidence on record. Where the findings of the trial court are inconsistent with the evidence on record, the appellate court has a duty to make its own findings based on the said evidence. However, an appellate court will be in error and may open its judgment to be set aside on appeal if it substitutes its findings for that of a trial court whose findings cannot reasonably be questioned.

In the case of Cross v. Hillman Ltd. [1969] 3 WLR 787 at 798, C.A. Lord Widgery cautioned that appellate court

"... which sees only the transcript and does not see the witnesses, must hesitate for a very long time before reaching a conclusion different from the trial judge as to the credibility and honesty of a witness".

In Amoah v. Lokko & Afred Quartey (substituted by) Gloria Quartey [2011] 1 SCGLR 505, his Lordship Aryeetey JSC had this to say;

> *"The appellate court can only interfere with the findings of the trial court if they are wrong because (a) the court has taken into account matters which were*

irrelevant in law, (b) the court excluded matters which were critically necessary for consideration, (c) the court has come to a conclusion which no court properly instructing itself would have reached and (d) the court's findings were not proper inferences drawn from the facts."

The right of a trial court in respect of findings of facts has long been settled. In **Fofie v. Zanyo [1992] 2 GLR 475,** the Court of Appeal set aside the findings of facts of the trial court and made its own findings. The Supreme Court in holding 4 of its judgment had this to say:

"Although an appellate tribunal in appropriate circumstances had the right to interfere with the findings of fact of a trial court, that right was subject to the exclusive preserve of a trial tribunal to make primary findings of fact where such findings of fact were supported by evidence on the record and were based on the credibility of witnesses when the trial tribunal had had the opportunity and advantage of seeing and observing their demeanour and had become satisfied of the truthfulness of their testimonies touching on any particular matter in issue. Where such findings could not be said to be wrong because the tribunal had taken into account matters which were irrelevant in law, or had excluded matters which were crucially necessary for consideration, or had come to a conclusion which no court properly instructing itself on the law would have reached and the findings were not inferences drawn from specific facts, it was incompetent for an appeal court to interfere."

In the appeal before us, we believe that the findings of the trial court, by its judgment and reasoning was supported by the evidence on record. There is factual basis for the conclusions of the trial judge. What the Court of Appeal in the instant action attempted to do was to set aside the findings of fact of the trial court and to substitute its own finding and did was wrong in law. At page 196 of the record of appeal the trial judge made the following findings:

The evidence adduced by the defendant in support of his contention that the disputed land was granted to his family by the family of DW2 is doubtful. There is evidence on record to show that the family of DW2 granted the Fongo land to the family of the defendant which they are occupying up to today. The land is different from the disputed property. DW2 could not mention any act of recent memory which suggests that his family owns the disputed land. The plaintiff however established that his family has in recent times purified the disputed land on two occasions without any resistance from the family of DW2. It has also been established that the land granted to Maamani is in the possession of his relations or family. The Defendant is a member of Maamani's family. He is his grandson. Issah Daamani and Amora Kofi are also family members of Maamani and they are farming on the land. In my view these pieces of evidence makes the case of the plaintiff more credible and reliable. I hold therefore that the Plaintiff's family granted the disputed land to Maamani and after his death, family members of Maamani are farming on it.

The trial judge made those findings after he had the opportunity to assess the credibility of witnesses and the opportunity and advantage of seeing and observing their demeanour and had become satisfied of the truthfulness of their testimonies touching on the issues before the court. These findings of the court, in our view, were supported by the evidence on record.

What the Court of Appeal in this case attempted to do is unfortunate. The Court of Appeal decision to depart from the findings of the trial judge was not warranted in law. There are several instances where the trial judge is vindicated in his findings contrary to the decision of the Court of Appeal to depart.

The Court of Appeal found that DW2 corroborated the evidence of the respondent as a descendant of the first settlers and for that matter owners of all Wa lands. This, the appellant, in his statement of case forcefully disagreed with. From the evidence before this court, we agree with the argument of learned counsel for the appellant. We find it

strange how the Court of Appeal came by their finding. The respondent in his testimony to the court (at page 109) stated that the disputed land was given to his family by one Jangburugu Naa from Sokpoyiri. He further stated that when they came to Wa they came to meet earlier settlers. DW2 came to give evidence that his family granted the disputed land to the respondent. How then did the Court of Appeal reconcile the two testimonies to arrive at the finding that DW2 corroborated the evidence of the defendant as a descendant of the first settlers and for that matter owners of all Wa lands. If DW2's family granted the land to respondent, then they cannot be owners of all Wa lands. That aside, DW2 testified that there are four family's that own the lands in Wa. In respect of the assertion that the respondent is a descendant of the first settlers, we did not come across evidence to that effect from the record.

Also, the Court of appeal found that the respondent denied his land was ever desecrated and purified. However, under cross-examination, the defendant stated that the land was purified by the Tendamba of Sokpeyiri. The following responses from the respondent under cross examination settle this issue:

> *"Q. Your evidence that plaintiff's family had not been purifying the land is false.*
>
> *A. It is not true he has been purifying the land.*
>
> *Q. In recent times the plaintiff's family purified the land when someone raped a lady and also someone committed suicide on the land.*
>
> *A. That is not correct it was the Tendamba from Sokpeyiri who purified the land."*

These answers of the respondent support the finding of the trial judge that the land was indeed purified. However what the respondent dispute is the fact that the land was purified by the appellant's family but rather by the Tendamba of Sokpeyiri. This again, from the record, is discredited by the testimony of DW2, family head of the Sokpoyiri family and the respondent's alleged grantor. The following responses of DW2 under cross-examination confirm this:

"Q. Are you aware that the land you claim you gave to the defendant had to be purified on more than one occasion.

A. I am not aware.

Q. Someone committed adultery on the land and the land was purified.

A. I am not aware.

Q. Another person committed suicide on the land and the land was purified.

A. I don't know.

Q. You are not aware of these purifications because the land does not belong to you.

A. Those that we gave the land to did not come to tell us anything."

The testimony of DW2 clearly runs counter to that of the respondent when he sought to establish that his grantor, the Tendamba from Sokpeyiri, had been purifying the land. These pieces of evidence cause one to wonder how the Court of Appeal came by its finding that the "Defendant denied his land was ever desecrated."

To counter the arguments of counsel for the appellant, the respondent in his statement of case made reference to the testimony of PW2. He submitted that based on the testimony of PW2, the Court of Appeal was justified in drawing the inference that if the appellant purified any land, it was far from the land in dispute.

What are the established facts in respect of the purification done on the disputed land? From the record it has been established that two separate incidents of rape and suicide occurred on the disputed land and purification rites had been performed. It has also been established that purification rights have to be performed by the Tendana but the rites in question were not performed by the family of DW2, the family that allegedly were the grantors of the respondent's family. What was left for determination was the person who purified the land.

PW1 in his testimony to the court stated that it was the Plaintiff who purified the land. He also asserted that he was present for the two purifications that were done on the land. However, under cross-examination, PW1 admitted that he was not present for the first purification as he was a child. (page 92). PW2 also in his testimony to the court confirmed that the Plaintiff did the purification on the land but under cross-examination he stated that the shrine in which the purification was performed is not within the disputed land (page 100). The testimony of these two witnesses is inconsistent.

In the case of Effisah v. Ansah (2005-2006) 943 at 960, the Supreme Court held as follows:

> *"…in the real world, evidence led at any trial which turns principally on issues of fact, and involving a fair number of witnesses, would not be entirely free from inconsistencies, conflicts or contradictions and the like. In evaluating the evidence at a trial, the presence of such matters per se, should not justify a wholesale rejection of the evidence to which they might relate. Thus, in any given case, minor, immaterial, insignificant or non-critical inconsistencies must not be dwelt upon to deny justice to a party who has substantially discharged his or her burden of persuasion. Where inconsistencies or conflicts in the evidence are clearly reconcilable and there is critical mass of evidence or corroborative evidence on crucial or vital matters, the court would be right to gloss over these inconsistencies…"*

The Court of Appeal's finding that based on the testimony of PW2 if the appellant performed any purification rites then it was not on the disputed land can be faulted on the strength of the ruling of the Supreme Court in Effisah v. Ansah. From the testimony of PW1 and PW2, clearly there are inconsistencies. However, the said inconsistencies should not justify a wholesale rejection of the evidence of the two witnesses. On the totality of the evidence adduced at the trial, it will be an affront to justice to dwell on the inconsistency in the testimony of PW1 and PW2 to rule against the appellant. Despite the

inconsistency in the testimony of the two witnesses, they both agreed that it was the appellant who performed the purification on the disputed land.

The role of a trial judge in a civil matter is to determine from the evidence available which of the parties adduced credible and sufficient evidence to tilt in his favour the balance of probabilities on an issue. In Bisi v. Tabiri alias Asare [1987-88] 1 GLR 360, the Supreme Court had this to say on the burden of proof:

> *"The standard of proof required of a plaintiff in civil action was to lead such evidence as would tilt in his favour the balance of probabilities on the particular issue. The demand for strict proof of pleadings had however never been taken to call for an inflexible proof either beyond reasonable doubt or with mathematical exactitude or with such precision as would fit a jig-saw puzzle. Preponderance of evidence became the triers belief in the preponderance of probability. But "probability" denoted an element of doubt or uncertainty and recognized that where there were two choices it was sufficient if the choice selected was more probable than the choice rejected…"*

The trial court in this case found the case of the appellant more probable than the case of the respondent despite the inconsistency in the testimony of PW1 and PW2. The parties in this case admit that the land was indeed purified. It has been established that purification rights have to performed by the Tendana but the rites in question were not performed by DW2, the head of the family that allegedly were the grantors of the respondent's family. The plaintiff asserts that his family purified the land and called PW1 and PW2 to attest to this. The trial court upon examining the totality of evidence before it found that it was the appellant who had been performing the purification rights on the disputed land. What the Court of Appeal did was to substitute their own finding for that of the trial court based on inconsistency in the testimony of PW1 and PW2. The Court of Appeal in our opinion had no sound basis to interfere with the findings of the trial court.

The appellant in his statement of case asserts that the Court of Appeal at page 267 of the record of appeal made a finding that the evidence of PW1 and PW2 on purification of

the land was hearsay evidence and could not support appellant's case. Upon a careful reading of the said page 267, we do not agree with the assertion of counsel. It is true that the Court of Appeal did find the evidence of PW1 and PW2 as hearsay, but they discredited the evidence more because of the alleged inconsistencies in their testimony and not because of the fact that it was hearsay. We have already stated how inconsistencies in the testimony of a witness should be treated by the court.

The trial court in this case found that the appellant's family granted the disputed land to Maamani and that the said land is in the possession of the family and relations of Maamani. However, the Court of Appeal decided differently in favour of the respondent. The Court of Appeal had this to say in departing from the findings of the trial court (page 266):

> *"Still on the evaluation of the evidence as a whole, defendant pleaded that his family shared boundry with Naa Jara of Kpongo. And along that boundry their family member the late Jatoe has been farming. The land granted to Maamani is beyond their land and even beyond Naa Jara land. DW1, son of Maamani corroborated that evidence. The location of the land granted to Maamani is further corroborated by PW4 who said where his grandfather farmed was granted to him by the grandfather of the plaintiff. That place called Dogruhi, PW4 said is beyond the farm of Jatoe of Fongo.*
>
> *The trial judge refused to accept the evidence of DW1 because he did not mention exactly the name of the land granted to Maamani. But PW4 has mentioned the name long before DW1 gave evidence. PW4's evidence no doubt corroborated positively the evidence of the defendant and for that matter his claim. The trial judge should therefore have preferred the defendant's case to the inconsistent and unreliable case of the plaintiff – see Asante vrs Bogyabi [1966] GLR 232."*

The finding of the Court of Appeal that DW1, one of the sons of Maamani, corroborated the defendants assertion that the land granted to Maamani is beyond their land and even

beyond Naa Jara land is, respectfully, misleading. We will make reference to the relevant part of DW1's testimony (page 113):

> *"When you get to Kpongo, there is a hill. When you descend the hill that is where my father's farm was. From Wa you get to Naajere Clan land before you get to my father's farm."*

Nowhere in DW1's testimony is the defendant's land mentioned. DW1 only makes mention of the fact that from Wa you get to Naajere Clan land before you get to his father, Maamani's land. On the contrary, what the evidence of DW1 does, which was rightly decided by the trial court, is to corroborate the appellant's assertion that the disputed land is being farmed on by the family and relations of Maamani. I will quote the words of DW1 under cross-examination (page 114):

> *"Q. Each of your brothers was given a portion of your father's land granted to him by the plaintiff's family.*
>
> *A. That is correct."*

Again, the Court of Appeal found that PW4's evidence no doubt corroborated the evidence of the defendant and for that matter his claim. To test this finding of the court we refer to some part of PW4's testimony to the court:

> *"I know the disputed land. It is on the left hand side from Wa to Kumasi. The disputed land forms part of the land granted to my grandfather by the Plaintiff's grandfather."*

What the testimony of PW4 seeks to establish is that the respondent's family are the owners of a large tract of land which includes the land in dispute and the land granted to his family. We believe that PW4's evidence, read as a whole, corroborate the claim of the respondent.

Another issue of concern is the Court of Appeal's finding on the appellant's assertion that part of the land that was granted to the respondent's family had been left fallow. The court at page 265 held thus:

> *"The failure to so indicate the fallow land on which the sign post was erected is fatal to the plaintiff's claim"*

The court from the record was not convinced of the appellant's claim that part of the disputed land had been left fallow. This, however, had been admitted by the respondent in paragraph 15 of his statement of defence (at page 12). This is what paragraph 15 of the statement of defence says,

> *"Defendant further say that save Jato's farm, no portion of their land has been left fallow. And even then strictly speaking the said Jato's farm in spite of his death about 4 years ago cannot be said to lie fallow as portions of the farm has Mango trees planted thereon…"*

The respondent's own defence corroborates appellants averment that the land was fallow. The respondent in the first sentence admitted that part of the disputed land had been left fallow but subsequently seem to dilute the damning admission in his own pleading. This the Court of Appeal should have considered before making its finding on the issue of fallow land.

After carefully perusing the judgment of the record of appeal and the written submissions of both parties, we can safely conclude that there were very serious lapses in the judgment of the Court of Appeal. These lapses as have been demonstrated proved fatal to the appellant in this case. But for the lapses, the judgment of the trial court wouldn't have been set aside. The Court of Appeal failed to heed to the warning of Lord Widgery in Cross v Hillman Ltd (supra). An appellate court which sees only the transcript and does not see the witnesses, must hesitate for a very long time before reaching a conclusion different from the trial judge as to the credibility and honesty of a witness.

The trial judge could not be said to have taken into account matters which were irrelevant in law, or had excluded matters which were crucially necessary for consideration, or had come to a conclusion which no court properly instructing itself on the law would have reached. It was therefore incompetent for the Court of Appeal to interfere with the findings of the trial court. The appeal therefore succeeds on the first ground.

Ground II.

The Court of Appeal erred when it overturned the judgment of the trial court on ground that the Plaintiff failed to prove the boundaries of his land.

The second ground of appeal is that the Court of Appeal erred when it overturned the judgment of the trial court on ground that the appellant failed to prove the boundaries of his land. The appellant in his written submission asserts that the High Court rightly set out the contest between the parties and ruled in favour of the appellant only for the respondent to seek to change the issues between the parties on appeal. The respondent on the other hand did not address this issue in his written submission but went on to give a litany of authorities on the need for a party to identify the land he claim. Upon going through the record we agree with the assertion of the appellant in this case. At the trial court, the identity of the disputed land was not an issue before the court.

It is trite learning that issues set down for trial are determined by the pleadings of the parties to the dispute. In the instant case, the defendant never challenged the plaintiff's description of the disputed land endorsed on his writ and statement of claim, hence, the trial courts failure to add the identity of the land as part of the issues set for trial. In Re Ashalley Botwe Lands [2003-2004] SCGLR 420, the Supreme Court in holding 4 held as follows:

> *"Although the general principle that a claim for declaration of title or an order for injunction should always fail if the plaintiff failed to establish positively the identity of the land claimed with the land in dispute was sound law, its application was not*

mandatory where the identity or boundaries of the land claimed was undisputed. Where the identity or the boundaries of the land in dispute as pleaded by the plaintiff was admitted or not denied by the defendant, the applicable principle was that since no issue had been joined, no evidence needed to be led on the identity of the land. In the instant case, however, even though the defendants failed to specifically deny the detailed description of the land as pleaded by the plaintiffs in the statement of claim and therefore the plaintiffs were not enjoined to prove the identity of the land, yet on the evidence they succeeded in discharging that burden through their statutory declaration, exhibit A, which contained a detailed description of the land with full bearings and distances and with an attached plan. Since not a single issue was raised under cross-examination of the first plaintiff witness with regard to the exhibit and its contents, the rule of implied admission for failure to deny by cross-examination would be applicable. Accordingly, the plaintiffs were not bound to produce other witnesses on the same issue of the identification. Accordingly, the Court of Appeal was wrong in its conclusion that the plaintiffs had failed to prove the identity of the land in dispute. Fori v Ayirebi [1966] GLR 627, SC and Mantey v Botwe [1989-90] 1 GLR 479, SC applied"

The failure of the respondent in this case to challenge the appellant's description of the land in his statement of defence on the strength of In Re Ashalley Botwe Lands was fatal. In his statement of case against the appellant's motion for interim injunction, the respondent admitted (at page 38) that the plaintiff had aptly described the land in dispute. I will reproduce the said statement of the respondent to demonstrate the respondent's admission. The respondent said as follows:

"The defendant case is that he became an owner of a vast track of land, aptly described in the plaintiff's writ as well as defendant's counterclaim by devolution."

One will find it strange that the respondent after making such a categorical statement would turn round to file an appeal based on a matter he had previously admitted to. This suit was not fought on the grounds of identity and dimensions of the subject matter. With

this in mind, we have no choice than to uphold this ground of appeal of the appellant. The identity of the land was not in dispute and the Court of Appeal erred when it overturned the judgment of the Court of Appeal on the ground that the appellant in this case failed to prove the boundaries of the land.

Ground III

The Court of Appeal erred when it held that the trial judge ought to have rejected plaintiff/respondent/appellant's evidence because it conflicted with plaintiff/respondent/appellant's pleadings.

In ground 3 of this appeal the appellant submits that the Court of Appeal erred when it held that the trial judge ought to have rejected the evidence of the appellant because it conflicted with the appellant's pleadings. The appellant in his written submission argue that there was no departure in their pleadings and also that the appellant's evidence was in fact in accord with his pleadings. The respondent on the other hand disagrees with the appellant and asserts that on the strength of Appiah v Takyi (1982/83) 1 GLR 1 the Court of Appeal was justified in ruling against the appellant. Before we discuss the issue of evidence departing from the pleadings, we address the appellant's claim that his evidence was in accord with his pleadings.

In paragraphs 8 and 9 of his statement of claim the appellant pleaded as follows:

> *"8. In the course of time a sister of the plaintiff's family married a man from Fongo* ***but not a relative of the defendant.(es)***
>
> *9. The said sister approached the plaintiff's grandfather for a land for her husband to farm and feed her children.*
>
> *10. That my grand-father obliged and gave her a portion of the Northern part of their land."*

The appellant from these paragraphs asserts that a female member of his family married a man from Fongo but not someone related to the respondent. The said female member approached the appellant's grandfather to be given land for her husband to farm on and feed their children. However, the appellant in his testimony to the court gave a different account of events as follows (at page 87):

> *"My father gave the disputed land to Maamani. The Defendants are relations of Maamani and they have taken over the land"*

The appellant in his testimony in court is now saying that his father not grand-father gave land to a relation of the respondent whom he had previously said was not a relative of the person the sister of his family married. The evidence of the appellant clearly departed from his pleadings in his statement of claim.

Commenting on this inconsistency between the pleadings and evidence on oath this is what the Court of Appeal said;

"It is noted that in his pleading, the plaintiff failed to mention the name of the man his sister married from Fongo. It was defendant who disclosed in his pleading that their relative Maamani married a woman from Kpongo. Maamani, he said, farmed on an area outside his land as described and they have nothing to do with Maamani's lands or farms.

"Despite plaintiffs pleading that it was their sister the land was given to by their ancestor for the use of her unnamed husband and non-relative of the defendant herein, the plaintiff gave the following evidence;

"My father gave the disputed land to Maamani. The defendants are relations of Maamani and they have taken the land Maamani was farming on the land. Maamani is deceased but his family is still farming on the land. The defendant erected a sign post on the land. The land belongs to my family. The defendant has no right to erect a signpost on the land. This is why I issued the writ".

"It is trite knowledge that pleadings compel the parties to give each other proper notice of the issues that will be raised and the case that will be met at the trial, so as to enable each party prepare adequately, thus eliminating surprises at the trial and assist the court to identify the matters in issue beyond which neither party may stray in the conduct of the claim or defence except upon amendment. That being so, at the trial a party must adduce evidence in proof of the material issues or facts upon which the claim or defence is founded.

In the instant case, the defendant has completely denied all the claims of the plaintiff and put him to strict proof. In fact he denied knowledge that the woman Maamani married from Fongo was a sister of the plaintiffs let alone that she was granted any portion of land to feed on. So the evidence led by the plaintiff that the portion of the land was given to Maamani whose descendants are now farming is a material departure from his pleadings which the trial court instructing itself, should not have countenanced."

Even though the Court of Appeal cited the case of Effisah v Ansah (supra) to remind itself of not harping on minor, immaterial, insignificant or non-critical inconsistencies to deny justice to a party if the inconsistencies or conflicts are reconcilable, it nevertheless came to the conclusion that the plaintiffs pleadings was markedly different from the evidence on record.

What is the rule against departure? The rule against departure states a party will not be allowed to set up a claim in a subsequent pleading inconsistent with his previous pleading. This has been applied and expatiated upon in several cases particularly Odoi v Hammond [1971] 1 GLR 375. However, the issue in this case can be distinguished from the rule against departure which was dealt with at length by both counsel in their written submissions. The issue in this case has to do with where a party's evidence in court is inconsistent with his pleadings.

The respondent in his written submission cited the case of Appiah v Takyi (1982/83) 1 GLR 1 which held that where there is a departure from pleadings at a trial by one party whereas the other's evidence is in accord with his pleadings, the latter's case was as a

rule preferable. In as much as we consider the decision in Appiah v Takyi sound, we will defer the application of that decision to the present case. The case of Appiah v Takyi can be distinguished from the current case. The plaintiff in the case of Appiah v. Takyi in his reply and evidence in court departed from his averment in his statement of claim. The case of Appiah v Takyi is case which deals with the rule against departure.

In Akufo-Addo v Catheline [1992] 1 GLR 377 the court held per Osei-Hwere JSC that the departure rule applied to pleadings only and not evidence that contradicts the pleadings. These were the words of the learned judge:

> *"…This departure rule is strictly applied to pleadings, and not to evidence which seeks to contradict pleadings. For Order 19, r. 17 of L.N. 140A provides that "no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same." The rule means that a party's second pleading must not contradict his first…"*

But was there really a material departure? We do not think so. The so called departure here refers to two things. Whilst in one breath it was the father of the plaintiff who granted the land to the lady who married the Fongo man, in another breath it was the grandfather. This we do not see as departure. There may be some inconsistency here, but again when dealing with oral history, genealogy, and devolution of property, words like father, grandfather and ancestors are easily interchangeable. It is not uncommon to hear a chief say*, "I own the land from point A to point B. I won the land after defeating so and so chief in the battle of….."*. In reality such a chief may be talking about a war that was fought some hundreds of years ago by an earlier occupant of the stool.

The second thing that court of appeal harped on as departure is appellant's pleading in his statement of case (par 8) that the man who married appellant's sister now identified as Maamani is not a relation of the defendant, as against his sworn evidence that the defendant is a relation of Maamani. Coming to think of it is this inconsistency germain to the resolution of the bigger issue of who originally owned the land?

The appellant's case is that his ancestors acquired a large tract of land through settlement a portion of which they gave to one Maamani who married a lady from their clan. It is this land granted Maamani on which the respondent is farming and has gone to erect a signpost. The plaintiff is not asking for recovery of possession. He is merely asking for a declaration of title. In deed but for the signpost that was erected by the defendant he would not have brought this action.

The defendant admits that he is a relation of Maamani. He admits that the said Maamani married a woman from Fongo, but he said the land on which Maamani was farming is different from the land in dispute. He then set out how their family came to occupy the land in dispute. We believe that the departure or inconsistency which was wrongly harped upon by the Court of Appeal was not central to the resolution of the broader issue of which family owns the disputed land.

The case before this court is one where a party has in his evidence in court departed from his statement of claim. In such a case we believe the court was duty bound to evaluate the pleadings of the party and the evidence before the court and make its own findings. The trial judge did evaluate the totality of the evidence on record and came to the conclusion that he did. Based on reasons already discussed above and the evidence on record, we believe that the Court of Appeal erred in departing from the findings of the trial court.

We hold that the trial judge arrived at the right findings on the evidence and his decision to decree title of the disputed land in the plaintiff's family is right. Consequently we set aside the decision of the Court of Appeal and reinstate the judgment of the trial judge.

The appeal is allowed and the plaintiff/appellant succeeds on his claim whilst the defendant/respondent's counterclaim is dismissed

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

AKUFFO (MS), CJ:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

S. A. B. AKUFFO (MS)
(CHIEF JUSTICE)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Baffoe-Bonnie, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

COUNSEL

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