IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: YEBOAH CJ (PRESIDING)
PWAMANG JSC
AMEGATCHER JSC
TORKORNOO (MRS.) JSC
KULENDI JSC

CIVIL APPEAL
NO. J4/33/2021

8TH DECEMBER, 2021

JANET NANA KONADU ..... PLAINTIFF/RESPONDENT/RESPONDENT

VRS

NANA KOFI FRIMPONG ..... DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

PWAMANG, JSC:-

My Lords, the defendant/appellant/appellant (the appellant) has stated two grounds on which he prays us to reverse the concurrent findings and conclusions of the High Court and the Court of Appeal in this case.

The basic facts are not in dispute and are that the land in dispute lies at a suburb of Dawu-Ashanti called "Obidanbi-Dawu". The land falls within Dawu Stool land and the

Stool is the holder of the allodial title. About 1926, the Stool granted portions of its land to branches of the royal family but reserved some outskirts land for the Stool itself. The Kyidom family of the royal family was given land and they in turn granted seven plots to one Opanin Adawuah for valuable consideration and he made a poultry farm on it. In 2012, the plaintiff/respondent/respondent (the respondent) herein acquired the seven plots from Opanin Adawuah who had ceased operating the poultry farm there. She required it for purpose of building a house and she obtained the consent of the Kyidom family, Opanin Dawuah's grantors. When she started to clear the land she was confronted by agents of the appellant whom they claimed was the Chief of Dawu and asked her to obtain the permission of the appellant before building. The respondent presented some customary drinks to the appellant and proceeded with building operations only for the appellant to cause the complete demolition of her house under construction which had reached lintel level. She reported to the police who after investigations prosecuted the appellant and another person for the offence of causing unlawful damage. They were convicted and sentenced to fines and made to enter into bonds to be of good behavior.

After the criminal case, the appellant caused the respondent to be summoned before the Asantehemaa's Court of Arbitration in Kumasi, where disputes are resolved by customary arbitration. The Asantehemaa's Court realised in respect of the case that the land in question falls within Dawu Stool land but there was no substantive Dawu Chief as the appellant's claim to the Stool was under challenge and pending determination. The Arbitration court therefore did not go into the merits of the dispute but directed the parties not to deal with the land until a Chief was installed for Dawu.

Following that, the respondent sued the appellant in the High Court, Kumasi for declaration of title and recovery of possession of the seven plots of land. She also claimed for damages and perpetual injunction. The appellant upon service entered appearance, filed a defence and counterclaimed for a declaration that the land forms part of Dawu Stool land earmarked for building a palace, an order cancelling any sale of the land to the respondent and perpetual injunction against her. At the close of a full-

scale trial judgment was entered for the respondent by the High Court but the appellant appealed to the Court of Appeal. The appeal was dismissed and he has further appealed to this court.

The first point of disagreement the appellant has raised against the judgment of the Court of Appeal in Ground (1) of the appeal is, that it was unlawful to grant the respondent's relief of declaration of title and recovery of possession when it was not proved that the interest her grantor acquired in the land was the allodial title. He contended that the allodial title to the land was still in the Dawu Stool and what the respondent's grantor got was a usufructuary interest so she could not obtain a higher title than that unless the Stool grants it to her. In the view of the appellant, a usufractuary interest in land cannot be the subject of a declaration of title and an order for recovery of possession, specially against the Stool allodial owner. The argument of the appellant portrays a basic misunderstanding of the nature of interests in land at customary law that may be subject of a declaration of title by a court. However, the respondent's counsel, S. K. Yeboah-Akowuah Esq, in her statement of case competently answered the appellant by referring to the following comprehensive statement of the law by Abban, JSC (as he then was)in the Court of Appeal case of **Awuah v Adututu & Anor [1987-88] 2 GLR 191** at pp. 206-207 of the report;

"**The usufructuary title is a specie of ownership co-existent and simultaneous with the stool's absolute ownership.** This has nicely been put by Dr Asante in his book Property Law and Social Goals in Ghana. At 53, the learned author stated:

"The stool, in effect, no longer has dominium of the stool land but an interest in stool land conceptually superior to that of the subject. A concept of a split ownership is emerging allowing the existence of separate by simultaneous estates in respect of the same land."

The usufructuary is regarded as the owner of the area of land reduced into his possession; he can alienate voluntarily to a fellow subject or involuntarily to a judgment creditor without the prior consent of the stool. There is practically no limitation over his

right to alienate that usufructuary title. So long as he recognised the absolute title of the stool, that usufructuary title could only be determined on anexpress abandonment or failure of his heirs: see Thompson v. Mensah (1957) 3 W.A.L.R. 240.

Neither can the stool divest the usufructuary of his title by alienating it to another without the consent and concurrence of the usufructuary: see Ohimen v. Adjei (1957) 2 W.A.L.R. 275. It appears the plaintiff was not a subject of the stool of Akwaboa, the allodial owner of the land in dispute. In other words, the plaintiff was a stranger grantee of that stool in respect of a defined portion of the stool's forest land which he had cleared and cultivated. But it should be remembered that the usufructuary title which a stranger-grantee like the plaintiff acquires, places the stranger-grantee in the same position as the subject of the stool, except that in the case of farming land, as well as in building land, the title of the stranger-grantee is limited to a well-defined area demarcated and granted to him; whereas the subject of the stool is not so rationed in the amount of the forest land he may occupy.

It seems to me then that the learned High Court judge erred in law by holding that the plaintiff usufructuary owner, could not sue "for a declaration of title" and could not "ask for perpetual injunction." The courts have repeatedly held that a subject of the stool, or a stranger-grantee of the stool for that matter, can maintain an action against even the stool in defence of the usufructuary title and may impeach any disposition of such interest effected without his consent in favour of a third party: see Baidoo v. Osei and Owusu (1957) 3 W.A.L.R.. 289."

Then at p.208 the learned jurist stated that;

"It is therefore clear from all these authorities that, contrary to the views of the learned High Court judge, the reliefs which the plaintiff sought in his writ of summons, namely a declaration of title, damages for trespass and perpetual injunction, were in order and that the action was maintainable.

Consequently, the plaintiff having satisfactorily discharged the burden that lay on him, was entitled to be granted all those reliefs." (Emphasis supplied).

The above quoted passage disposes of the first complaint of the appellant since there is no dispute about the grant of the land by the Dawu Stool to Kyidom family who also granted it to Opanin Adawuah, the respondent's grantor. Therefore, even if the appellant had capacity to counterclaim against the respondent on behalf of the Stool of Dawu, that counterclaim cannot stand against the respondent, the Stool having earlier made the grant of the land to the Kyidom family. The appeal accordingly fails on Ground (1).

The second objection of the appellant is that since there was a matter pending in the Asantehemaa's Arbitration Court concerning the land in dispute, the respondent was estopped from instituting an action in the High Court in respect of the same matter. The appellant referred to and relied on **section 105** of the **Alternative Dispute Resolution Act, 2010 (Act 798)** which provides as follows;

"A party shall not withdraw from Customary Arbitration".

Customary arbitration, like all the Alternative Dispute Resolution mechanisms provided for in Act 798, is voluntary and operates on the agreement of the parties. As such, it is provided under sections 90(6) and 100(1) of the Act as follows;

90 (6) A person shall not be forced or coerced by another person, institution or authority to submit to customary arbitration.

100. (1) The parties to a customary arbitration may agree on the circumstances under which the appointment of a customary arbitrator may be revoked, and they may in any case acting jointly revoke the appointment.

Therefore, where a customary arbitration has commenced, all the parties may by agreement terminate it before an award is made. Section 105 of the Act forbids unilateral withdrawal but not where there is agreement by all the parties, either expressly or by conduct. In this case, when the respondent left the Asantehemaa's

arbitration, which did not determine the merits of the dispute, and sued in court, the appellant did not object to the jurisdiction of the High Court but entered unconditional appearance and went ahead to file to a counterclaim. This conduct on the part of the appellant signified his agreement with the respondent to terminate the customary arbitration and to have the matter resolved on the merits in the court of law. As the Counsel for the respondent rightly pointed out, in **De Simone Ltd v Olam Gh Ltd Civil Appeal No. J4/03/2018, 28th March, 2018** unreported judgment of the Supreme Court, it was held that where one party to an arbitration agreement sued in court and the other party to the agreement does not object but files a defence to the merits, she would be deemed to have waived the agreement for arbitration and it would cease to bind the parties.

Therefore, by failing to object to the jurisdiction of the High Court in this case and filing a defence to the merits and counterclaiming, the appellant is deemed to have agreed to terminate the arbitration before the Asantehemaa's Court of Arbitration and cannot now seek to reprobate after first approbating. Consequently, Ground B of the appeal too is dismissed.

For the reasons explained above, the appeal fails in its entirety and is accordingly dismissed.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH
(CHIEF JUSTICE)

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

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