IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2016

CIVIL APPEAL

NO.J4/15/2015

17TH FEBRUARY 2016

CORAM: ANIN YEBOAH JSC (PRESIDING)

BAFFOE- BONNIE JSC

BENIN JSC

AKAMBA JSC

APPAU JSC

KOFI SARPONG (DECEASED;) -- PLAINTIFF/APPELLANT/APPELLANT

SUBSTITUTED BY NANA KWASI KODUAH

VRS..

FRANKLIN ADUBOBI JANTUAH - - DEFENDANT/ RESPONDENT/RESPONDENT

JUDGMENT

BENIN, JSC:-

This is one case which in our candid opinion should not have been embarked upon at all in the first place. The property in dispute is numbered O.T.B. 511, Block XXVI, Adum, Kumasi. The

plaintiff/appellant/appellant, hereinafter called the plaintiff does not claim he owns the property in dispute by acquisition of the plot or by construction of the building thereon. He does not also claim the property by purchase or through inheritance. He claims the property because he is a sub-lessee whose sub-lease has expired so he has become the owner of the property unless the true owner thereof came forward to claim it. The defendant/respondent/respondent, hereinafter called the defendant, claims to be the true owner who acquired the plot in his native name and leased it to two named persons for a term of fifty years to build on it and occupy same for that duration. Also the defendant holds the title deeds to the property which he tendered at the trial court. Nonetheless the plaintiff insisted that the defendant was not the true owner because the name that he is known by is not the one which the title deeds bear. All this while, the plaintiff has not been able to identify any other person with the name on the title deeds. He has not alleged that the defendant obtained the title deeds by criminality bordering on fraud, theft, misrepresentation and what have you. In the absence of any such evidence, one would have thought that the person who has the title deeds and who was able to prove how he came to acquire the plot should be the owner as against every other person except somebody who can come forward to prove a superior title by way of acquisition of the plot and execution of the title deeds as well as the construction of the building on the plot. And that person is definitely not the plaintiff, who could not even produce evidence that he was sub-lessee of the property. Be that as it may, the plaintiff embarked on this case in the hope that the judicial system would confer ownership on him even when he did not have title deeds to the property just by leading evidence to show that the defendant is not known by the name on the title deeds. Indeed the plaintiff does not claim to have any inkling as to who the real owner of the plot is, or how the building was constructed by persons who did not own the plot. We would have dismissed this appeal *in limine* but for the fact that the plaintiff has raised some public policy considerations that

we think should engage our attention. In the process we would have to re-hear the appeal on account of the relief that the judgment was against the weight of evidence.

The plaintiff's case was that his niece one Madam Akua Addai, who was said to have died during the pendency of this action, took over the remaining term of a sublease from one Ghassoub in June 1975. The said Ghassoub, a Lebanese national and one other Lebanese national took a fifty year lease of this plot from the original lessee one Kwame Adu Bobi in 1953 for a term of fifty years certain expiring on 31st January 2003. The record shows that the said Ghassoub died in 1966 or in the 1970's, as the dates were conflicting. At any rate he was not alive as at June 1975 when the surviving sub-lessee assigned the remainder of the term to Madam Akua Addai in June 1975. The story as told by the plaintiff was that the said Madam Akua Addai was not financially sound so she approached her uncle the plaintiff herein who advanced her some money in order for him the plaintiff to take over this property. That the real owner of the property Kwame Adu Bobi was present when the sub-lessee agreed to give the property to Madam Akua Addai. The plaintiff's case further was that since July 1975 he had been in charge of this property as owner in possession. About five months to the end of the lease period the defendant wrote to the plaintiff to put the property in tenantable repair in preparation for a reversion to the said Kwame Adu Bobi. When the plaintiff discovered that it was the defendant who was posing as Kwame Adu Bobi, he resisted his claim accusing the former of impersonation. The defendant was also said to have collected various sums of money as rent advance from the sitting tenants.

Consequently, the plaintiff instituted the action at the High Court in Kumasi claiming these reliefs against the defendant:

1. **Declaration that the Plaintiff is owner in possession of House No. Plot 511, Block XXVI, OTB, Kumasi.**

2. **Declaration that as against the defendant, the plaintiff is entitled to possession of the said house.**
3. **Recovery of the advance rent and/or rents collected by the defendant from tenants in the house.**
4. **Damages for trespass.**
5. **Perpetual injunction restraining the defendant, his agents, servants, workmen, assigns and from in any way interfering, or in any way dealing with the house in dispute.**

The defendant's case was that he was the same person as Kwame Adu Bobi. He stated that the name Kwame Adu Bobi was the name given to him by his father at birth having been named after Nana Kokofuhene. That he chose to use his native name for the lease of this property because he feared he might lose it to activists of the NLM who were very active in Kumasi in those days. He described how he came to acquire the plot from the then Asantehene. He also described how after acquiring the plot for a term of 99 years 2 months, he sub-leased it to the two Lebanese nationals for a term of fifty years, to develop it and use it for that duration. He kept his interest as owner alive by various acts until the lease was about to expire when he took steps to recover it. The defendant therefore counterclaimed for these reliefs:

a. **He is the lessee/owner of the premises situate on Plot number 511, Block XXVI, Old Town Section B District of Kumasi.**
b. **Mesne profits from 1st February 2003 till possession is delivered up to the defendant.**

Both the trial High Court and the Court of Appeal dismissed the plaintiff's action and upheld the defendant's counterclaim. The grounds of appeal filed by the plaintiff in this court are these:

i. **The Honourable Court of Appeal erred when it held that it was lawful and legal for the Defendant/respondent/respondent to use a different name other than his official and known name in the alleged**

acquisition of the subject property so as to prevent its purported seizure by the then National Liberation Movement and/or government.

ii. The Honourable Court of Appeal erred when it held that the defendant/respondent/respondent was the same as Kwame Adu Bobi and to that extent the owner of the disputed property.

iii. The judgment is against the weight of evidence on record.

All these grounds will be addressed together. It was rightly decided by the two courts below that the core issue was the identity of the said Kwame Adu Bobi. Both courts were able to find that the defendant was the very person as Kwame Adu Bobi so they entered judgment for him. The plaintiff is still not satisfied hence this second appeal. We think that since the plaintiff claimed ownership, albeit by possession, it was his duty to first of all satisfy the court that he was really an owner in possession. The Court of Appeal found that the plaintiff was not speaking the truth when he said that he took possession of this property in July 1975, because it was not until 1982 that the property which Madam Akua Addai had mortgaged to the Ghana Commercial Bank was freed from the encumbrance. The trial High Court had made reference to these facts. So at what point in time did the plaintiff become the owner in possession? Certainly not in 1975. But unfortunately neither the trial court nor the Court of Appeal did pursue this important factor to its logical end. It might be because they were satisfied the defendant had established his claim so whatever the plaintiff had to offer had fallen through. However, since the plaintiff is not satisfied, we would complete the unfinished task by the Courts below as the plaintiff is saying the judgment was against the weight of evidence.

First of all, as found by the court below, Madam Akua Addai was the person to whom the Lebanese national, sub-leased the property. Indeed that was the case set up by the plaintiff, per paragraphs 3, 4 and 5 of his statement of case. The recorded transactions at the

Lands Commission clearly bear testimony to the fact that Madam Akua Addai was the sub-lessee to the Lebanese. She mortgaged it to the Ghana Commercial Bank until 1982. Therefore the court below was right when it found as a fact that the plaintiff was not given possession in 1975 as he had said. And apart from July 1975 the plaintiff did not tell the court that Madam Akua Addai entered into any agreement to sublet the unexpired term to him. If she did, there was no written agreement from her to that effect. Whether the period is reckoned from June 1975 when Madam Akua Addai took the sublease from the Lebanese, or from September 1982 when the property was freed from the mortgage, the unexpired term was more than three years. Thus the law as stated in sections 1, 2, and 3(1)(f) of the Conveyancing Decree, 1973, NRCD 175, required any such lease to be evidenced in writing else it is ineffective to convey any title. Therefore the plaintiff who has no such agreement with Madam Akua Addai could not claim to be the owner in possession. At best he was just one of the tenants under the sub-lease taken by Madam Akua Addai. The plaintiff could not act in violation of the law and ask a court of equity to come to his aid. For the law does not recognize, let alone give effect to a lease of 28 or 21 years which is not backed by any writing.

The relevant provisions of N.R.C.D. 175 read:

Section 1-Mode of Transfer

(1) A transfer of an interest in land shall be by a writing signed by the person making the transfer or by his agent duly authorised in writing, unless relieved against the need for such writing by the provisions of section 3.

(2) A transfer of an interest in land made in a manner other than as provided in this Part shall confer no interest on the transferee.

Section 2-Contracts for Transfer

No contract for the transfer of an interest in land shall be enforceable unless-

(a) it is evidenced in a writing signed by the person against whom the contract is to be proved or by a person who was authorised to sign on behalf of such person; or

(b) it is relieved against the need for such a writing by the provision of section 3.

Section 3-Transactions Permitted Without Writing

(1) Sections 1 and 2 shall not apply to any transfer or contract for the transfer of an interest in land which takes effect-

(f) by a lease taking effect in possession for a term not exceeding three years, whether or not the lessee is given power to extend the term.

The law should be applied strictly here as the plaintiff's only route to ownership is the purported sub-lease from Madam Akua Addai which is non-existent. And the law, as stated earlier, does not recognize verbal agreements beyond three years. From the facts in evidence it is only Madam Akua Addai who was in a position to claim as owner in possession, being the person who has a valid sub-lease recognized by law. The plaintiff's very link to this property was not explained with any degree of satisfaction. He pleaded that he took control of this property from Madam Akua Addai in July 1975. But the undisputed evidence was that even two years after the plaintiff claimed to have taken over as the owner in possession, Madam Akua Addai mortgaged this same property with the Ghana Commercial Bank by a deed of mortgage dated 25th May 1977. The only logical inferences to be drawn from these facts were these: the plaintiff lied when he said he took a lease from Madam Akua Addai in July 1975; the plaintiff had no legal connection to this property; even if the plaintiff gave financial assistance to Madam Akua Addai, the latter did not intend to and never did part with her interest in the property to the plaintiff. And there was no evidence the plaintiff had the

authority of Madam Akua Addai to bring this action on her behalf. Whatever transpired between the plaintiff and Madam Akua Addai did not ripen into the plaintiff becoming an owner in possession as Madam Akua Addai did not part with her interest in the property. The plaintiff's action ought to have been dismissed on this score when the Court of Appeal found he was lying about his claim to be owner in possession since 1975.

Be that as it may, assuming the plaintiff had succeeded in persuading the court that he was truly owner in possession, the burden would be on the defendant to prove that indeed he was the same person as Kwame Adu Bobi. The Court of Appeal seemed to have placed this burden on the plaintiff, since he it was who introduced the subject as part of his case. The principle of law is that the burden of persuasion rests with person who substantially asserts the affirmative of the issue on the pleadings. The burden would shift if the defendant in proof of his counterclaim was able to lead sufficient evidence to prove the identity of the owner, in which case the plaintiff would be obliged to lead rebuttal evidence.

The defendant gave a vivid description of how he came to acquire the land, its location, and the sublease agreement he entered into with the two Lebanese nationals. He led evidence to show that he was named Kwame Adu Bobi at birth. These material pieces of evidence were affirmed by his brother, K. S. P. Jantuah who was in a position to know about such matters, being the defendant's senior brother. The defendant led evidence on why he chose to use that name on the title deeds. He gave evidence of acts of ownership he had exercised even during the time of the Lebanese. Whether by coincidence or design the postal address of the defendant was the very one through which correspondence to Kwame Adu Bobi was being channeled, see exhibits 5 and 6. The defendant was in possession of the original title deeds which he said he obtained upon acquisition of the plot. And there was no evidence he procured it by criminality or was holding it on behalf of somebody else. The

plaintiff's only challenge was that the name on the title deeds was not the name by which the defendant was commonly known and called. That it was against public policy to allow him to acquire property using a different name. That the reason he gave for using his native name could not possibly be true as the CPP of which he was a member had obtained all the seats at the local council elections in Kumasi. On all these facts the trial High Court as well as the Court of Appeal accepted the defendant's case on a balance of probabilities. The High Court summed up the findings this way at page 105 to 106:

**"*Exhibit B written by the Defendant F.A. Jantuah to the Plaintiff Mr. Sarpong from Bomso Chambers, P. O. Box 3242 and dated 2nd August 2002, advised the Plaintiff to put the house.....in a tenantable repair before the expiry of his term. Exhibit D74 and Exhibit D69 were tendered in evidence by PW1 from the Lands Commission's file. Exhibit D69 is dated 26th June 1975 and written by the Defendant Mr. F. A. Jantuah from Bomso Chambers, P. O. Box 3242 to the Senior Lands Officer at the Lands Department. It is a request for a search on all transactions entered into by the Lessee since 1953 in respect of House No. OTB 511, Kumasi. Exhibit D74 is written by the Defendant from the same address to the Chief Lands Officer in respect of House no OTB 511, Kumasi. By this letter the Defendant applied for a photocopy of the sublease between Kwame Adubobi (written as one name) and Angous Anas and one other. Would it be prudent to infer that the Defendant has since 1975 been trying to lay claim to House No. OTB 511, Kumasi? The documents tendered from the Lands Commission's records in respect of House no OTB 511 have both names Kwame Adu Bobi and F.A. Jantuah recurring.*

Furthermore, Exhibit 5 a letter about re-wiring of House OTB 511 Kumasi dated 12th May 1975 from the Regional Manager and directed to Messrs Angous Trading and Transport Company is also copied to Mr. F.A Jantuah of P. O. Box 3242. Why would the Regional Manager

in his communication with Messrs Angous Trading Company send a copy to Mr. F. A. JAntuah if the latter did not have some connection with the property under reference? Exhibit 6 is a letter from Andrews Osei, Legal Practitioner to Mr. Kwame Adubobi (written as one name) of P. O. Box 3242 and is in regards to House No. OTB 511. It is dated 17th July 1975. Was it a coincidence that Mr Francis Adubobi Jantuah and Mr. Kwame Adu Bobi both shared a common address P. O. Box 3242 and now both have a link with or have received correspondence concerning House No 511 Kumasi? Moreover, was it a coincidence that the person the Defendant is alleged to have impersonated bears a similar name to his own? Is it the case that Franklin Adubobi Jantuah said to have been born on a Saturday would be impersonating Kwame Adu Bobi also born on a Saturday?

The Defendant's evidence that he and Kwame Adu Bobi were one and the same has been corroborated by DW1 and also by the documentary evidence available to this court. A reasonable inference can be drawn from the whole evidence connecting the Defendant with the names Franklin Adubobi Jantuah and Kwame Adu Bobi."

The trial court proceeded to draw some relevant inferences from the accepted facts at page 110 of the record:

"The Defendant has led evidence saying that at the time he acquired the property in dispute, it was a sanitary site. This fact is borne out by the Lands Commission records tendered in evidence as D108, D111, D112, and D114 which described the area as a sanitary site. He also gave evidence of giving a sublease to 2 Lebanese men, Anyasse and Goussoub who ran a transportation business and that they both built a house on it. How did the Defendant know the history of how the land was acquired, the condition it was in when it was acquired and how the house was built on it by the 2 Lebanese men if he had not acquired same and sublet it? The evidence he gave could only have been given if he had first hand knowledge of the land."

The Court of Appeal reviewed the entire evidence and came to the conclusion that the trial court was right. Even though the Court of Appeal wrongly placed the burden of persuasion on the issue of the identity of the owner of the property on the plaintiff, instead of the defendant who asserted the affirmative of the issue, yet we find this did not result in a miscarriage of justice. This is because after a comprehensive review of the facts, the court relied on the testimony of the defendant and his witness and the documentary evidence in concluding that the trial court had reached a correct verdict on the issue.

At this stage, it is necessary to address the question of what constitutes proof. Counsel for the plaintiff took serious issues with the reliance by the courts below on the evidence of the defendant and his brother which he regarded as mere repetitions of the averments in the pleadings. This is what counsel said:

**"*The respondent had thus been put to strict proof of his claim that he is the one called Kwame Adu Bobi. Rather than introducing credible pieces of evidence to prove his identity in this regard, he merely called his own uterine brother.....to testify as DW1 and repeated to the Honourable trial court, the defendant's averments in his pleadings and his evidence under oath to the court, which was by and large repetition of his pleadings. This kind of repetition of pleadings and facts cannot and does not amount to proof in law.*

My Lords, it is from this repetitive evidence of the respondent's witness that both the Honourable trial and appellate courts found to be corroborative of the evidence of the respondent.

*It is the position of the Law, My Lords, that where a legal duty is put on a party to introduce sufficient pieces of evidence at trial to ensure a finding of fact in that party's favour the party cannot achieve this, by merely mounting the witness box either by himself or through and/or with his witnesses to merely repeat to the Honourable Court,***

the party's averments as claimed or pleaded. Please see the case of Majolabi v. Larbi (1959) GLR 190.

My Lords, all the respondents and his uterine brother agreed to do, was to mount the witness box and repeat to the Honourable trial court the case of the respondent as pleaded. It is therefore submitted, that these repetitions do not amount to proof of the fact or claim which informed the issue put forward at the trial of the case and which the respondent was required by law to prove. This, beyond the mere repetition of the pleadings by the respondent and his brother, DW1, there is no evidence on record that ought to, or support a finding that the respondent is Mr. Kwame Adu Bobi….The position of the law is that he who asserts must proof." (sic)

From what counsel is saying a party does not prove an averment in his pleadings by testifying by himself and calling a close relative to support his evidence. To say the least this is re-writing the laws on evidence. Proof in law does not depend on evidence given by non-relation/s of a party; nor does it depend on production of volumes of evidence; nor does it require even supporting evidence. The testimony of a single person may be sufficient in proof of an averment provided it is credible and the witness is reliable in terms of giving first hand evidence. In this particular case who was better placed to support the defendant's case than his own senior brother? Did he have to go outside his family and bring a stranger to testify to his native name? Section 60 of the Evidence Decree, 1975 (NRCD 323) only requires a competent person in terms of personal knowledge to testify. The clear purpose and intent of this provision is to enable every person who has knowledge of the subject-matter to give credible testimony, regardless of his relationship with the party calling him. Again counsel was stretching the principle in Majolagbe v. Larbi, supra, out of context. That principle did not mean the party should not and cannot repeat what he had pleaded, what that principle meant was that a party should lead such evidence as would constitute proof in law. It is observed that a party is required to stick

to his pleadings when giving evidence, so there is nothing wrong if he repeats on oath what he has pleaded; the only consideration by the court is that what he has said on oath is sufficient to discharge the burden of persuasion that lies on him. The courts below were thus justified in relying on the testimony of the defendant and DW1.

The trial court also considered that it is not illegal for any person to acquire property in his native name. The Court of Appeal considered this and concluded it did not violate any law unless there was proof that it was done with a criminal purpose. It is common knowledge that among the Akans the name that is given at birth is very often not the same name that the person carries especially when he goes to church and is baptized with a Christian name or the name that he carries into school. Meanwhile back home he is commonly known and called by his native name given at birth. Thus it would not surprise anybody if such person acquired property in the native name. It is an age-old practice. But with the introduction and widespread use of technology where the name of a person captured in computerized data base cannot be easily changed, that customary practice must give way to modern practice of keeping one name from birth as obtains in the developed world. Change of name would then be duly and legally reported and recorded accordingly. But in this case there was no evidence the defendant used the native name to defraud the state or any other person. Whatever reason might have motivated him to do that is not very material in this case. It cannot be disputed that as history students we read about the brutal clashes between the NLM and the CPP in the lead up to Ghana's independence. So if the defendant as a member of the CPP claims he feared he might lose his property to the NLM that was his personal fear. It might not be real or justified, but it was personal to him. Different people react differently in the same set of circumstances. This did not detract from the fact that he did use his native name for this property. The findings made by the courts below have ample support on the established facts in evidence.

What the plaintiff is asking this court to do is to take a different view of the facts. That is not open to the court to do. An appellate court is not entitled to say that given the same facts it prefers one version to the one the trial court has decided, even if this court would have decided the case differently if it were sitting as the trial court. The appellate court would intervene if wrong inferences from the legally acceptable facts have been drawn, or some vital pieces of evidence, oral or documentary, were not considered. Both the trial High Court and the Court of Appeal have considered all the relevant evidence. And having thus arrived at their decision, it is not open to this court to disturb their findings of fact.

For these reasons, we find no merit in the appeal; consequently we dismiss it.

We hereby restore the judgments and orders of the courts below.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE- BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

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