IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: DOTSE, JSC (PRESIDING)

BAFFOE-BONNIE, JSC

GBADEGBE, JSC

BENIN, JSC

APPAU, JSC

CIVIL APPEAL
NO. J4/17/2017

6TH DECEMBER, 2017

MADAM COMFORT OFORI ..... PLAINTIFF/APPELLANT/RESPONDENT

VRS

KWAME APPENTENG ..... DEFENDANT/RESPONDENT/APPELLANT

J U D G M E N T

BENIN, JSC:-

This is an appeal from the decision of the Court of Appeal, which had reversed a decision of the Circuit Court, Accra. The parties herein are disputing over a piece and parcel of land situate at a place in Accra called Bawaleshie. Both parties claim from the same grantor. Both parties claim to have registered their respective tract of land. Thus from the pleadings, the issue boiled down to the identity of the land and whether from

their respective site plans contained in their indenture that they claim to have registered, either party has encroached on the other party's land. This was the ultimate issue, which from the brief narration could have been resolved with a properly drawn up composite plan.

The trial judge took the right step by appointing a surveyor to draw up a composite plan with the aid of the documents, especially the site plans presented by the parties. The surveyor who did the assignment testified as CW1. Indeed his testimony leaves much to be desired; he made a mess of himself, and we wonder if he is truly a professional surveyor. In one breath, he said the plaintiff's land lay some 100 feet away from the disputed land. In the next moment he said the distance was about 45 feet approximately. Yet in another breath he said the two parties showed the same piece of land. As if there was not much confusion already, he said the defendant had also exceeded his land, so only a part of the land in dispute falls within the defendant's land. Indeed the defendant's land overlaps the disputed area, according to the witness. He was specifically asked by counsel for the defendant this question:

"You admit that the areas covered by the site plan for Mr. Appenteng, the defendant which is marked yellow virtually covers the land in dispute." And his answer was:

"No, there was an overlap"

It is clear the surveyor created more confusion than he was called upon to resolve. It is no wonder that at the end he could not tell the court exactly the position of the plaintiff's land, as he himself had depicted on the composite plan. The following extract from his cross examination by counsel for the plaintiff is instructive:

"Q. So given the outcome of what you did and in accordance with the composite plan, could you confirm to the court where the plaintiff's land is located?

A. If I compare the site plan and the ground situation, there is a shift of about 100 feet at the north-western part.

Q. So as a result of the shift, where would say the plaintiff's land is situated?

A. My Lord, I think the court will ascertain that."

It is true that it is the court's duty to ascertain the relative positions of the land being claimed by each party. But it is to ease that finding that an expert, in this case, a surveyor was called upon to assist the court arrive at a decision. If the expert is unable to tell the court precisely where the respective pieces of land are located, in spite of the site plans, then it would have been better not calling for expert testimony at all. From the totality of the evidence of the surveyor one is able to point out not less than nine areas where he gave contradictory and inconsistent statements. Since he was called as a court witness, the court ought to have treated his testimony as unreliable and lacking credibility, and should have discountenanced it altogether.

Rather unfortunate to re-call, the trial court judge chose to rely on those portions of the surveyor's evidence which favoured the defendant's case and rejected the parts that favoured the plaintiff's case. The court took that course notwithstanding its own finding that the surveyor "was at times ambivalent on the issues……(and) confused himself and reduced his credibility as a witness." The Court of Appeal fell into the same error, by accepting the parts of the surveyor's evidence which favoured the plaintiff's case and rejected the other part. Having done that, the Court of Appeal was able to overturn the trial court's decision on the facts. The Court of Appeal, however, also based its decision on the 'nemo dat quod non habet' principle, in that the grantor family having made a valid grant to the plaintiff had no more title to pass to the defendant. The courts below failed to realize that they were not bound to accept the findings of the court-appointed surveyor even if his testimony was credible and reliable. They failed to realize that the surveyor, as an expert, was there to assist the court only, so his evidence was subject to all the rules pertaining to evaluation of witness testimony. The court as the trier of fact was bound to form an opinion on the facts, independent of the surveyor's testimony. This is a statutory edict captured in Section 3(2) of the Evidence Act, 1975 (N.R.C.D. 323) which states that "where there is no jury,

all questions of fact shall be decided by the court." In this country, this applies to all civil trials. Thus even where expert evidence has been received, the power of decision rests solely with the trial judge in civil matters. And as stated in Phipson on Evidence, 15th edition, paragraph 37-12 at page 925, "This is so even when the decision turns on a matter on which the tribunal would be unable to understand the evidence without the assistance of experts."

And given the fact that the surveyor was not positive and conclusive in findings he himself had put down, nothing prevented the courts from rejecting same as unreliable and forming their own opinions on the evidence adduced by the parties.

The defendant appealed against the Court of Appeal's decision on these grounds:

1. The judgment is against the weight of evidence.
2. The learned justices of the Court of Appeal erred when they gave judgment for the plaintiff contrary to the case put forward by the plaintiff as revealed by the pleadings.
3. The learned justices fell into grave error when they applied the principle of 'nemo dat quod non habet' in resolving the case in favour of the plaintiff.

PARTICULARS OF ERROR

The principle of nemo dat quod non habet is only applicable where the subject matter in dispute is the same and the parties to the suit claim through a common grantor.

4. The learned Justices of the Court of Appeal erred when they held that the identity of the disputed land was one of agreed fact and that the trial judge was bound by law to have accepted this agreed fact established without any proof.

This is essentially a matter that can be resolved on the facts, so we intend to deal with all the issues together, with emphasis on the omnibus ground. This court has the task now to review the entire evidence on record by way of re-hearing in order to ascertain which of the parties' evidence is reasonably probable. In so doing we have decided to

discard the evidence of CW1, the same being unreliable and discredited, thereby rendering its probative value inconsequential; in short no weight should be attached to it.

At the hearing before the trial court, both parties testified. The plaintiff called three witnesses. The summary of the testimony of the plaintiff and her witnesses is as follows. According to the plaintiff her husband acquired two plots of land at a place called Bawaleshie, a suburb of Accra, in 1978 from the Tsiquaye family of the Klana Quarter of La, Accra. One of the plots was registered in her name and the other in her husband's name. The two plots adjoin each other. In evidence-in-chief she was led by her lawyer in respect of the identity of her land, and was asked:

"Q-The defendant says the land that he claims to be his is different from yours; what do you say?" And her answer was: "That is not correct. It is not true because my land shares boundary with my husband's land....."

On acts of possession, the plaintiff said she decided to erect a house on the plot so she bought two thousand blocks and placed same on the land. Her brother Kwesi Ofori-Atta who testified as PW3 confirmed this and said he was the one who saw to the conveyance of the blocks to the plot sometime in 1985.

The other two witnesses were David Osei Yeboah (pw1) and Godfred Kwesi Nkansah Baah, (pw2). Pw2 was one of the administrators of the estate of the plaintiff's late husband. The administrators decided to sell his land to pw1. The said pw1 conducted a search at the Lands Commission which confirmed that the land was in the name of the deceased and the adjoining land was in the name of the plaintiff. But when they conducted a physical inspection of the land, they discovered that the plaintiff's land as well as part of the deceased's land had been fenced. A local inquiry disclosed it was the defendant who had erected the fence wall. Pws 1 and 2 therefore went to the defendant. The witness pw1 recounted the two encounters with the defendant in his evidence-in-chief recorded as follows:

"....myself and one of the vendors, Mr. Kwesi Nkansah Baah confronted Mr. Appenteng with the evidence. We gave him a copy of the search report for him to verify.

Q-What was his reaction when you showed the report to him?

A-He didn't appear to have anything against it. Two weeks later, Mr. Kwesi Nkansah Baah went back to Mr. Appenteng and we demanded to know whether he had any document to counter what we had submitted to him. He did not have anything to support his interest in the land. At that point Mr. Appenteng pleaded with me to give up my interest in the land offered me by the vendors to enable him buy but I .....refused but instead advised him that he should contact Madam Ofori-Atta to explore the possibility of getting her to sell hers to him. Mr Appenteng accepted the suggestion.....At that meeting, we agreed with Mr. Appenteng that I could go ahead and demolish a part of the fence wall and the temporary structure that fell within the boundaries of the land offered me by the vendors. The condition was that I should be responsible for the construction of the new boundary wall and also reconstruction of the temporary structure."

The witness added that following this second meeting he went ahead to demolish the wall and the temporary structures as agreed. He then concluded the sale with the vendors. He said in December 2010 the defendant phoned to tell him that "he had managed to lay hands on his title documents and that I had to go back to reconstruct the wall I had demolished. I took it as a big joke. Naturally, I demanded to see documents and as I speak, he has not been able to show me any title documents. Since then when he made that empty threat, I have continued to develop my property without let or hindrance."

Pw2 confirmed in material details the testimony given by pw1. The defendant denied that any of the matters spoken of by pws1 and 2 in the alleged encounters with him took place.

In his evidence the defendant stated that he acquired this land from the head of the Niiquaye Tse We of the Klana Quarter of La in 2001. He erected a fence wall and a wooden structure and planted caretakers therein. In 2004 he was given an indenture-exhibit 1 dated 16 March 2004. He said he remained in undisturbed possession until he was invited by the Nima Police where he got to know the plaintiff. The police asked both of them to produce their documents and according to him "after going through the

documents, the Police said if both of us were claiming the same land then it has to go to court."

On the encounter with pws1 and 2 he said pw1 alone came to him and requested to see his documents as he was interested in buying the land from him (defendant) but he told pw1 he could not give him his documents. He said he only got to know pw2 when he came to testify in court.

The first witness for the defendant dw1, was Dr. Nii Kortei Dzane, who testified as attorney for Nii Kotei Amli III, head of the grantor family. The substance of his testimony was that the family granted the land in dispute to the defendant in 2001 and gave him the document exhibit 1 with site plan attached. He said Nii Ashie Kotei who signed the plaintiff's deed, exhibit A was not the head of family at the material time.

The next witness for the defendant was one Apronti Godson, dw2. He testified that in 2013 he conducted a search for the defendant in respect of the disputed land and it disclosed that it was in the name of the defendant. This search report was tendered as exhibit 5.

The Court of Appeal found that both parties were ad idem as to the identity of the land in dispute, a finding which is supported by the evidence on record. The meeting between pws1, 2 and defendant confirmed this. The defendant in his police caution statement confirmed it. From the totality of the evidence on record, it is the piece of land measuring 100 by 90 feet more or less, lying to the south of plaintiff's late husband's land (now the property of pw1), and sharing boundary with this land.

The only issue is the ownership of this land. It is purely a question of fact, and the burden of producing evidence rests with the plaintiff. On the evidence, the plaintiff led evidence as to how she and the late husband acquired two adjoining plots, one for each of them. There was evidence she placed 2000 blocks on the land. She made efforts to develop the land by securing building permits, but could not do so due to the husband's illness. Her husband passed into eternity and his land was sold to pw1 by the administrators. One of the administrators, pw2 and the person to whom they eventually sold the plot pw1 went to meet the defendant. The detailed encounters have been reproduced already in this decision. The significance of this encounter was three-fold: i.

the defendant impliedly admitted having trespassed into the plaintiff's husband's land; ii. the defendant agreed that pw1 should pull down the part of the wall that had encroached upon the said land and reconstruct same at the correct place; iii. the defendant told them he did not have his documents on the land, which is understood to mean as at the time of the meeting.

It is said that a plaintiff cannot rely on the weakness of the defendant's case in order to succeed in a land case. But it does not mean that where the defendant has made important admission prior to or at the trial the plaintiff cannot rely on it. It does not also mean that the defendant's evidence, even though discredited, cannot inure to the benefit of the plaintiff. By conceding to pw1's demolition of part of the fence wall, the defendant had effectively conceded that the land he claimed was given to him was not correct. He had conceded that he knew the wall he erected had partly encroached on somebody's land.

And the evidence established that the remainder of the land covered by the defendant's fence wall after pw1 had demolished a part was the land lying south of pw1's land, which the undisputed evidence establishes is the adjoining land owned by the plaintiff.

The defendant is saying the plaintiff's land lies elsewhere. If this is accepted it means the plaintiff's land no longer adjoins that of her late husband. That is clearly untenable in the light of the overwhelming evidence on record. If the defendant's testimony is accepted, it'd mean he owns part of the land he has ceded to pw1; but he has no claim against pw1. Following the concession defendant made to pw1, it means what remains of the land is less than what the defendant purports to have secured by exhibit 1.

At the trial the defendant did not appear to be a witness of truth, a fact which should not have been glossed over by the courts below. For the credibility of a witness is very critical in assessing and evaluating his evidence, and what weight to attach thereto. To begin with, both defendant and his grantor said he bought the land in 2001. Three years later he was given a document exhibit 1 which the defendant says he registered in 2005. But a look at exhibit 1 disaffirms what defendant and dw1 said. Exhibit 1 does not show the land was given to the defendant in 2001. It does not show it is even a registered instrument. And there was no way it could have been registered in 2005

when the oath of proof was taken in November 2009. It also shows the document was received at the deeds registry on 26 November 2010. The defendant's explanation was that he submitted it to the Lands office in 2004 so he was not in a position to explain all these obvious anomalies. On the face of exhibit 1, it is clear the purported registration in 2005 was either backdated or was plainly false. A court of justice cannot countenance such misconduct on the part of whoever was involved in putting the 2005 registration number on exhibit 1. Exhibit 1 does not give rise to any legal consequence and is rejected accordingly. It is clear it was prepared and given this veneer of legality to defeat the plaintiff's claim.

Next, if indeed the defendant had exhibit 1 in proof of his title he would not have told pw1 he did not have a document. And indeed he did not have it having regard to the date it was received and stamped at the deeds registry.

Thirdly, the defendant denied in evidence he knew pw1 prior to seeing him in court in this case. It was part of the attempt to deny the narrative of the two encounters he had with pws1 and 2. Hence his evidence was that it was only pw1 who came to him. Pw2 had testified that he knew the defendant at both KNUST and at Roman Ridge in Accra. But the denial by the defendant was clearly an afterthought because the defendant failed to suggest this to pw2 when he testified, in line with the principle that a party is required to put across to his opponent so much of his case as he does not admit, during cross examination. On the contrary, the questions that were put to pw1 during cross examination confirmed that the defendant knew him before this case. The following extracts from the cross examination of pw2 will bear out whether or not pw2 was present at the encounters with defendant:

"Q- You said you went to Mr. Appenteng, is that correct?

A- That is correct.

Q- When you went to Mr. Appenteng, he told you the land belonged to him and he had been in possession for over ten years, is that not correct?

A- Mr. Appenteng never said so.

Q- I am putting it to you that you were not truthful to the court when you said Mr. Appenteng never said so.

A- I have sworn to tell the truth; Mr. Appenteng never said so.

Q- You requested for his document, is that correct?

A- We did not request for his document.

Q- What did you ask him to produce to you when you went to him?

A- We only put it to him that the land belongs to Madam Comfort Ofori and gave him a copy of the joint search report we had secured"

On whether or not pw2 and defendant knew each other before they met in court, this extract from pw2's cross examination by defendant's counsel is also revealing:

"Q- Your allegation that you know Mr. Appenteng in KNUST is not true.

A- I know Mr. Appenteng both from Roman Ridge, Accra and KNUST.

Q- It was only in Roman Ridge that you got to know Mr. Appenteng not in KNUST as you are alleging.

A- I still affirm what I said."

It is clear the defendant was not being truthful to the court, and is discredited as a witness. Dw1 was also not being truthful, when he said they gave land to the defendant in 2001.

On the plaintiff's grantor not being the head of family at the time he signed exhibit A for her, that is of no moment. If he was a former head of family this must be known to the Lands Commission so that they will be in a position to reject any document signed by him. According to dw1 the family heads and elders would sign a document signifying that a particular person has been appointed a head of family. How will the Lands Commission know about this unless it has been deposited with it. Thus if such head signs a document and his name appears in the records at the Lands Commission as the head of the family, that document will be accepted for registration. And indeed any lessee risks not having his document registered if it is issued by the present head of family who is unknown in the records of the Lands Commission. Indeed the scenario being described was played out in the case of Anthony Wiafe v. Dora Borkai Bortey & Victoria Amoo, CA J4/43/2015, unreported judgment of the Supreme Court, dated 1st June 2016. In that case the then Nungua Manche was removed from office and that removal was affirmed in a judgment of this court. The court judgment was not

communicated to the Lands Commission. The destooled chief called Nii Odai Ayiku continued to grant leases of stool lands which were duly registered by the Lands Commission. One such registered document was the subject of the dispute in the case cited. This court stated that "...unless the court's decisions were brought to the notice of the Lands Commission to enable them to rectify their records, it would be unfair to fault them for registering any document issued in the name of Nii Odai Ayiku IV. It would therefore be unjust and unreasonable in the circumstances for the court to reject exhibit A."

There is no evidence the plaintiff was aware Nii Ashie Kotei no longer represented the grantor family, nor was the Lands Commission made aware of it. Thus it is unreasonable to reject exhibit A. In appropriate proceedings, a plea of limitation, laches and acquiescence may even lie against the grantor family.

The judgment of the Court of Appeal is supportable for the foregoing reasons. The appeal is accordingly dismissed.

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