IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)

DOTSE, JSC

BAFFOE-BONNIE, JSC

AKOTO-BAMFO (MRS), JSC

APPAU, JSC

CIVIL APPEAL
NO. J4/19/2014

14TH MARCH, 2018

1. OPANIN NANTWI ABABIO
2. FRANCIS MANU BOATENG …… PLAINTIFFS/RESPONDENTS/APPELLANTS

VRS

PASTOR NANA ADUSEI ……. DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

BAFFOE-BONNIE, JSC:-

This suit which was started in the Circuit Court, has come to us pursuant to leave granted by this court.

The facts of this case are quite settled and admit of little controversy.

The plaintiffs/respondents/appellants, hereafter plaintiffs, instituted this action in 2006 claiming as follows;

1. A declaration that both the legal and equitable interest in H/No, Plot 23 Block 1X A, Dadiesoaba, Asafo, Kumasi, forms part of the intestate estate of the

late Kwasi Boateng, pursuant to a valid lease duly executed between the President of the Republic of Ghana in trust for the Golden Stool and the Kumasi state and the late Kwasi Boateng registered at Lands Commission as LS K.T.L. 504/61 bearing plan No. K.7026 dated the 1ST day of April, 1960.

2. Accounts
3. Permanent/perpetual injunction
4. Recovery of posession

In a 11-paragraph statement of claim, the plaintiff said that the property was acquired by his predecessor, the late Kwasi Boateng of Sewua, who had same registered in the Lands Commission and that the late Kwasi Boateng of Sewua never transferred his interest in the property or encumbered it in any way till he died in 1973. The plaintiffs continued their pleadings as follows;

4."*The plaintiffs say that both the children of the late Kwasi Boateng and his family did not until recently, even know that H/No Plot 23,Block IX A, Dadiesoaba, Kumasi was the bona fide property of the deceased except that he (late Kwasi Boateng) was all along living in the said house as if he was a tenant.*

5. *The plaintiff says that it was quite recently when a close friend of the deceased informed the plaintiff's family that H/No 23 Block IX A Dadiesoaba, Kumasi was legitimately acquired by the late Kwasi Boateng and that there was a lease on the property at Lands Commission.*

6. The plaintiff says that when the deceased's family and children conducted an official search at lands Commission to ascertain and or confirm the ownership of the said house, the search revealed that the said property was legitimately vested in the late Kwasi Boateng before his death, and he did not transact any business on the file at Lands Commission.

7. The plaintiff says that pursuant to the said discovery, he plaintiff, and one of the surviving children of the deceased, applied to the Circuit Court, Kumasi

for grant of Letters of Administration same of which was granted dated the 13th day October, 2006"

Concluding his pleadings the plaintiffs said,

"The plaintiffs say that the defendant's adverse claim for this property has no legal justification, reasonable, probable or legitimate basis whatsoever."

In his 10-paragraph statement of defence and counterclaim, the defendant completely denied the claim of the plaintiff. He said the property was acquired by his predecessor Kwasi Boateng of Pease, who died in October 1965. The property, which at the time of his death was only an outhouse, devolved on his customary successor called Nsomme, who continued collection of rents from tenants who had been put there by the late Kwasi Boateng. Due to Nsomme's advanced age when she succeeded to Kwasi Boateng, even in her lifetime the defendant was in charge of the day to day management of the property. When Nsomme died he became the customary successor and he continued with the management of the property. It is the defence case that the property as it is now was built in phases. The first, outhouse was built by Kwasi Boateng who died in 1965. Between 1972 and 1975 the defendant says he built another outhouse and started the ground floor of the main house. He then built the first floor and roofed it in 1992. The defendant says all tenants who have lived in the house at one stage or another were given their rooms by Kwasi Boateng, Akua Nsomme or himself, and they all pay rents to him. Apart from the tenants, other members of Kwasi Boateng's family live in that house. The defendant therefore denied the plaintiffs claim and counterclaimed for a declaration of title and perpetual injunction.

After a full trial the trial Circuit Judge entered judgment for the plaintiff, holding as follows;

"In conclusion, and on the preponderance of the evidence adduced before this court, I prefer the case of the plaintiff to that of the defendant. Consequently, I enter judgment for the plaintiff and against the defendant for the reliefs endorsed on the writ of summons.

Consequently I declare that both the legal and equitable interest in the property House No Plot 23 Block IX A, Dadiesoaba, Asafo, Kumas, forms part of the estate of the late Kwasi Boateng pursuant to the lease engrossed in his favour and registered at Lands Commission as LS No KTL 504/61 bearing plan No KTL280 and file NO K 7026 dated 1/4/60"

Aggrieved by this judgment the defendant appealed to the Court of Appeal on a number of grounds among which was,

a. The judgment is against the weight of evidence.

The Court of Appeal unanimously upheld the appeal and held as follows

"Thus on a consideration of the totality of the evidence in terms of section 80(2) of the evidence act, it leads one to the conclusion in respect to the substance of the rival versions that the narration of the defendant and witnesses looked more credible than that of the plaintiff and witnesses; coupled with the other observations we made as to the long undisturbed possession of the defendant and his family for over 33 years prior to the action.

Under the circumstances, we will interfere with the judgment of the Circuit Court dated 22 January 2010 by setting same aside. The appeal is hereby allowed in its entirety.

Feeling aggrieved by the decision of the Court of Appeal, and pursuant to leave granted by this court, the plaintiff has appealed to us on a number of grounds.

GROUNDS OF APPEAL

(i). The Court of Appeal erred in law when it suo moto, raised the question of failure to tender the letters of administration, which is a matter of fact, and was not raised in the trial court or by the appellant in his written submission; as that fact was not in dispute, and the Court of Appeal then proceeded to base its decision on that matter without calling on the Respondent to be heard on it.

(ii). The Court of Appeal erred in its judgment in law when it referred to and relied upon the declaration of moveable and immoveable properties by the plaintiffs filed in the application for letters of administration yet the court nevertheless held that the plaintiffs are not the administrators of the estate of the deceased.

(iii). The Court of Appeal erred in law by vesting title to the house in dispute in the defendant whereas his case in the trial court was that the house devolved on the family of Kwasi Boateng of Pease such that he not being the head of the family he has no authority to hold family property.

(iv). The Court of Appeal erred in law when it refused to follow the decision of the Supreme Court in the case of Djin vrs. Musah Baako [2007-2008] SSCCLR, which is binding on the Court of Appeal, and to apply same with regards to when time begins to run under S.10(6) of the Limitation Act which is a matter of law.

(v). The Court of Appeal erred in law when it failed to follow the decision of the Privy Council in Golightly vrs. Ashrifi [1961] 1 GLR 28, which is binding on the Court of Appeal, and to apply same on the question of whether estoppel alleged to operate against the plaintiff in a different capacity continued to apply against him in the capacity in which he was in court, namely, as administrator.

(vi). The Court of Appeal erred in law by relying on the cases of Fori vrs Ayerebi [1966] GLR 627; Asare vrs Appau II [1948-86] GLR59 and Abakam Effina Family vrs. Mbibado Effina [1959] GLR 362 CA which were decided when the High Court (Civil Procedure) Rules 1954 LN 140 A permitted a defendant in an action for possession of his immoveable property to rely only on his possession, whereas that position has been reversed by the provision of Or11R8(2) of the new High Court (Civil Procedure) Rules, 2004 CI 47, which provides that a defendant's reliance on possession of immoveable property in person or by a tenant shall not be sufficient answer to an action for possession of land; consequently the court applied a wrong standard of proof to the case of the defendant/counter claimant.

(vii).The judgment of the court is against the weight of the evidence.

(viii). Additional grounds of appeal to be filed on receipt of the Record of Appeal.

GROUND VII (JUDGMENT AGAINST WEIGHT OF EVIDENCE)

In spite of the long list of grounds of appeal, and in spite of the order in which the parties have argued them, we are of the view that the issue of ownership of the property in dispute is at the core of the problem and so its resolution will completely dispose of this appeal in its entirety. And since the resolution of this can only be done by looking at the evidence adduced at the trial we will like to take the seventh ground of appeal first.

The case before the trial court was simple. The main issue for determination was the ownership of property known as H/No. Plot 23 Block IX A, Dadiesoaba, Asafo – Kumasi. The property is covered by a lease made between the President of the Republic of Ghana, in trust for the Golden Stool and the Kumasi State and one Kwasi Boateng of Kumasi as lessee. Whereas the plaintiff claimed that the Kwasi Boateng named in the lease was his deceased relation who hailed from Sewua, the defendant in his counterclaim contended that the Kwasi Boateng named in the lease was his relation who hailed from Pease.

At the time the action was instituted, the defendant was in possession of the property exercising all rights of ownership and had, among other things, let out portions to tenants. The action was commenced to claim title through one Kwasi Boateng who had died 30 years before the commencement of the action. (See pages 237 to 238 of the record of appeal).

Arguing this omnibus ground, the appellant has submitted that the Court of Appeal overturned the findings of fact by the trial Circuit Court without observing the correct principles laid down by the legal authorities for reviewing findings of fact made by a trial court. He submitted that the broad principles to be observed by an appellate court were stated by the Supreme Court in the case of Agyenim-Boateng v Ofori [2010] SCGLR 861. In the unanimous decision delivered by Aryeetey, JSC at page 867 the court stated as follows;

"It is the trial court that has the exclusive right to make primary findings of fact which would constitute building blocks for the construction of the judgment of the court where such findings of fact are supported by evidence on the record and are based on the credibility of witness. It is also the trial tribunal which must have had the opportunity and advantage of seeing and observing the demeanour of the witnesses and become satisfied with the truthfulness of their testimonies touching on any particular matter in issue. In the case of Cross v Hillman Ltd [1969] 3 WLR 787 at page 798, CA, Lord Widgery cautioned that 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 honest of a witness".***

The appellate court can only interfere with the findings of the trial court where the trial court; (a) has taken into account matters which were irrelevant in law; (b) ***has*** *excluded matters which was necessary for consideration; (c) has come to conclusion which no court properly instructing itself would have reached; and (d) the court's findings were not proper inferences drawn from the facts. See the case of Fofie v Zanyo [1992] 2 GLR 475".*

Further, in In Re Okine this is what the court unanimously held in the Headnote (1)

"(1) *an appellate court must not disturb the findings of fact made by a trial court, even if the appellate court could have come to a different conclusion, unless the findings of fact made by the trial judge were wholly unsupportable by the evidence. Therefore, where the evidence was conflicting, the decision of the trial court as to which version of the facts to accept was to be preferred, and the appellate court might substitute its own view only in the most glaring of cases. That was primarily because the trial judge had the advantage of listening to the entire evidence and watching the reactions and demeanour of the parties and their witnesses…*

Counsel also cited Prof. Kludze JSC in Re Okine (supra) as follows;

> **"***The words of a witness in cold print, though permanent, may not be always easy to assess for their impact and credibility. If a witness hesitated in his answer to the extent that his demeanour cast a doubt on his credibility, this may not be apparent from the record of proceedings,*"

Concluding his attack on the Court of Appeal, counsel cited the case of

Kissiedu v Dompreh [1937) 2 WACA 281, where Lord Russell said (at page 286 of the Report):

> ` *Their Lordships find it impossible to say that the Court of Appeal could on the materials before them, properly be satisfied that this finding of fact by the trial judge must be erroneous. No doubt an appeal in a case tried by a judge alone is not governed by the same rules which apply to an appeal after a trial and verdict by a jury. It is rehearing. Nevertheless before an appellate court can properly reverse a finding of fact by a trial judge who has seen and heard the witnesses and can best judge not merely their intention and desire to speak the truth, but of their accuracy in fact, it must come to an affirmative conclusion that the finding is wrong. There is a presumption in favour of its correctness which must be displaced'.*

Counsel then posed the question: Was the defendant/appellant able to displace the presumption of rightness of the findings of the trial judge in this case? He answered in the negative.

We commend counsel for his industry in reviewing the various authorities on this principle but wish to say that counsel has failed to appreciate in full the principles of law governing the evaluation of primary findings of facts by an appellate court.

In the Supreme Court case of **PRAKA VRS KETEWA** [1964] GLR 423 the principle was stated that an appeal is by way of re-hearing and an appellate court is entitled to make up its own mind on the facts and to draw inferences from them to the same extent that the trial court could. So where wrong inferences were drawn from

admitted facts or facts found by the trial court, the appellate court can interfere with those findings. See also Tuakwa V. Bosom [2001-2002] SCGLR 61

In the case of **AMOAH V LOKKO & ALFRED QUARTEY** [2011] SCGLR 505, this court, per Aryeetey JSC. stated the principle plainly that, just as the trial court was competent to make inferences drawn from the facts and arrive at its conclusions, the appellate court is equally entitled to draw inferences from findings of facts by the trial court and come to its own conclusions.

The principle is that the Court of Appeal is required to evaluate the primary findings of facts and if after doing so they come to the conclusion that the learned trial judge had not taken proper advantage of having seen and heard the witnesses and had drawn improper conclusions from the primary facts, they will be perfectly within their right to interfere in the conclusions of the trial judge.

The Court of Appeal rightly captured the principles which regulate the right of an appellate court to interfere with findings of fact made by a trial judge in **the case of**

KYIAFI VRS. WONO [1967] GLR 463 as follows:

> *"where the appellate court was satisfied that the reasons given by the trial court in support of its findings were not satisfactory or where it irresistibly appeared to the appellate court that the trial court had not taken proper advantage of having seen and heard the witnesses, then in any such case, the matter would become at large for the appellate court in which case the appellate court was under a duty to give such decision as the justice of the case required and if need be, reverse the decision of the trial court and substitute its own judgment*".

See also the case of LAGUDAH vs. GHANA COMMERCIAL BANK (2005-2006) SCGLR 388 where the Supreme Court held that:

> *"an appellate Court would be justified in overturning the findings of a trial court where taking into account the entirety of the record of appeal there are circumstances apparent in the manner in which the previous court dealt with the matter either on the facts or the law that clearly justify doing so"*

In an earlier case of KOGLEX LTD. (NO.2) VS. FIELD (2000) SCGLR 175 this court, per Acquah JSC (as he then was), outlined the instances where an appellate court will be justified in setting aside the finding of a trial court as follows:

1. Where the said findings of the trial court are clearly unsupported by the evidence on the record.
2. The improper application of a principle of evidence or where the trial court had failed to draw an irresistible conclusion from the evidence.
3. Where the findings are based on a wrong proposition of law that if that proposition is corrected the finding disappears and
4. Where the judgment is inconsistent with crucial documentary evidence on record.

Based on these cited authorities and more, we hold that the Court of Appeal was perfectly within their jurisdiction when they sought to re-evaluate the evidence on record, examine the conclusions and inferences drawn therefrom by the trial judge, and where need be substitute their conclusions in line with the evidence on record. That in essence is the meaning of ***"appeal is by way of rehearing".*** And this court being a second appellate court is also required to re hear the appeal and come to its conclusion which may be in accord with that of the trial judge or that of the Court of Appeal or a departure from either of them.

In the case before us the trial judge after evaluating the evidence the trial judge held as follows;

> *"In conclusion, and on the preponderance of the evidence adduced before this court, I prefer the case of the plaintiff to that of the defendant. Consequently, I enter judgment for the plaintiff and against the defendant for the reliefs endorsed on the writ of summons."*

To support this conclusion the trial judge made this statement,

> *"I find that on the evidence adduced in this matter as a whole, the plaintiff by tendering Exhibit A which is a lease that borders on the property in dispute*

and which has not been disputed, has succeeded in laying a concrete basis of his claim to title to the same"

This finding did not find favour with the Court of Appeal which said

"The above holding in our view flies in the face of the conflicting evidence of the plaintiff as to how exhibit A came into his custody."

Another point raised by the Court of Appeals evaluation of the evidence on record vis a vis the conclusions arrived at by the trial judge, was the marked departure of the plaintiff's evidence in the dock from his pleadings. On this point the Court of Appeal said

"A critical look at the plaintiffs statement of claim when compared to the evidence adduced by the plaintiff and witnesses amply support the fact that the plaintiff departed completely from his case set out in the statement of claim" (emphasis ours)

We have carefully evaluated the evidence on record, and we fully endorse this finding. To support this endorsement let us recount some of the pleadings put forward by the plaintiff in his pleadings as against the evidence proffered at the trial.

STATEMENT OF CLAIM

4. "The plaintiffs say that both the children of the late Kwasi Boateng and his family *did not until recently even know that H/No Plot 23,Block IX A, Dadiesoaba, Kumasi was the bona fide property of the deceased except that he (late Kwasi Boateng) was all along living in the said house as if he was a tenant.*

5. The plaintiff says that *it was* ***quite recently when a close friend of the deceased informed the plaintiff's family*** that H/No 23 Block IX A Dadiesoaba, Kumasi was legitimately acquired by the late Kwasi Boateng and that there was a lease on the property at Lands Commission.

6. The plaintiff says that when the deceased's family and children conducted an official search at lands Commission to ascertain and or confirm the ownership of the said house, the search revealed that the said property was

legitimately vested in the late Kwasi Boateng before his death, and he did not transact any business on the file at Lands Commission.

7. The plaintiff says that pursuant to the said discovery, he plaintiff and one of the surviving children of the deceased applied to the Circuit Court, Kumasi for grant of Letters of Administration same of which was granted dated the 13th day October, 2006"(EMPHASIS ADDED)

Compare this pleading to the evidence while in the box and under oath.

PLAINTIFF:

I am the head of family. I know the late Kwasi Boateng, I succeeded him after his death. The late Kwasi Boateng was possessed of a house at the time he died. The house is numbered 23 Block A Dadiesoaba. **After the death of my late uncle, we looked through his property and discovered documents covering the house, ie the lease covering the house**. I sent the lease to conduct a search at the lands secretariat. The document was a photocopy. At the lands secretariat, the search revealed that the house belonged to my uncle. I do not know whether the defendant's late uncle was living in the house, and are still living there. My late uncle was living at Sewua before his death. While in Kumasi, he was living in somebody's house while building this house.

Under cross examination this is what happened.

Q. You said your uncle lived in someone else's house any time he came to Kumasi. Who is this someone?

A I do not know that person

Q. Have you personally been to the house in dispute?

A. I saw it but never entered into the house.

Q. When did your uncle die?

A. He died in 1973.

Q. And at the time of his death was this house a completed house.

A. Yes

The marked departure of plaintiff's evidence in chief from his pleadings regarding how the plaintiff's family got to know that the property belonged to their late predecessor, Kwasi Boateng of Sewua, cannot be overemphasised and should not have been glossed over by the trial judge. This is particularly so because the resolution of this dispute borders on oral and traditional evidence and therefore the credibility of witnesses is very crucial.

Commenting on the importance of pleadings In the case of HAMMOND vs. ODOI (1982-83) GLR 1215, at page 1235, Crabbe JSC stated as follows;

> **"Pleadings are the nucleus around which the case – the whole case- revolves. Their very nature and character thus demonstrate their importance in actions, as for the benefit of the court as well as for the parties. A trial court can only consider the evidence of the parties in the light of the respective case of each of the contestants. The pleadings bind and circumscribe the parties and place fetters on the evidence they would lead. Amendment is the course to free them from such fetters. The pleadings thus manifest the true and substantive merits of the case"**

The learned judge quoted from the presentation by the learned Master I.H. Jacob captured in **"Current Legal Problems" 1960 pp 171-176 on "The Present Importance of Pleadings"**.

"Pleadings do not only define the issues between the parties for the final decision of the court at trial, they manifest and exert their influence throughout the whole process of the litigation…they act as the measure for comparing the evidence of a party with the case which he has pleaded…"

In effect the pleadings in a case form the basis of the respective case each party indicates it will establish by relevant evidence at the trial in order to prove a cause of action or to show that the other party does not have a cause of action. That being the case, the evidence led at a trial must have the function or purpose of establishing the case that has been set out in the pleadings. If the evidence that is led is at variance with the pleadings, it cannot be held that the party has proved the

case set out in his pleadings. He may by his evidence have succeeded in proving a case that he has not pleaded but a court cannot accept that case which is not pleaded as the duty of the court is to adjudicate upon the specific case in dispute set up by the pleadings.

In the oft cited case of DAM v. ADDO 1962 2 GLR 200 the Supreme Court held that

"A court must not substitute a case proprio motu, nor accept a case contrary to or inconsistent with that which the party himself puts forward, whether he be plaintiff or defendant"(holding 2)

Then in the case Zabrama v. Segbedzi (1991) 2 GLR 22 the court had this to say about pleadings

> *"It is trite learning that where a party's evidence is inconsistent with his pleaded case, whilst that of his opponent is consistent with his pleadings, the opponent's case is preferable to the one who departs from his pleadings. This principle was reiterated by this court in the case of Appiah v. Takyi (1982-83)GLR 1 CA where it was held that if there was a departure from pleadings at a trial by one party whereas the others evidence accorded with his pleadings, the latter case was as a rule preferable"*

On the basis of these settled authorities and in view of the marked departure of the plaintiff's evidence from his settled pleadings as against the consistency between the defendant's pleadings and evidence on record, we agree with the Court of Appeal that;

> *"A critical look at the plaintiffs statement of claim when compared to the evidence adduced by the plaintiff and witnesses amply support the fact that the plaintiff departed completely from his case set out in the statement of claim" (emphasis ours)*

The result is that defendant's case is more believable than that of the plaintiff

Another inconsistency in the case of the pleadings is why the action was started as recently as 2006 December. The writ was issued on 7th December 2006. Kwasi Boateng from whom the plaintiff claims died in 1972. Obviously anticipating the question why they are bringing their action so late in the day, ie 33-34 years after his death, the plaintiff said in his pleadings,

5**. The plaintiff says that *it was quite recently when a close friend of the deceased informed the plaintiff's family* that H/No 23 Block IX A Dadiesoaba, Kumasi was legitimately acquired by the late Kwasi Boateng and that there was a lease on the property at Lands Commission.**

6. The plaintiff says that when the deceased's family and children conducted an official search at lands Commission to ascertain and or confirm the ownership of the said house, the search revealed that the said property was legitimately vested in the late Kwasi Boateng before his death, and he did not transact any business on the file at Lands Commission.

7. The plaintiff says that pursuant to the said discovery, he plaintiff and one of the surviving children of the deceased applied to the Circuit Court, Kumasi for grant of Letters of Administration same of which was granted dated the 13th day October, 2006"(EMPHASIS ADDED)

This answer obviously will not be in accord with the evidence adduced at the trial. At the trial as discussed already, the plaintiff said the document was found as far back as 1972 when Kwasi Boateng died and they were going through his things. The question that remained unanswered is if they found the information about the ownership of the property as far back as 1972 why did they wait till 2006 to apply for letters of administration and use that as a basis of claiming the property. And funnily though the L.A. had been procured to administer the estate of Kwasi Boateng who had died some 33 years earlier, the property in dispute was not specifically even mentioned in the inventory in Form 68 attached to the application**.**

Again, the plaintiff in paragraph 4 of his statement of claim said as follows:

5. *"The plaintiffs say that both the children of the late Kwasi Boateng and his family did not until recently even know that H/No Plot 23,Block IX a, Dadiesoaba, Kumasi was the bona fide property of the deceased except that he (late Kwasi Boateng)* ***was all along living in the said house as if he was a tenant****.(emphasis added)*

Again this is inconsistent with the evidence adduced at the trial. First, the plaintiff never led any evidence to show that Kwasi Boateng ever lived in that house either as a tenant or a landlord. Indeed all the witnesses of the defendant said that they rented their rooms from the defendant or his predecessor and that the Kwasi Boateng plaintiff was referring to was neither a tenant nor their landlord. In fact none of them had heard about Kwasi Boateng of Sewua, plaintiff's predecessor. This piece of evidence is confirmed by the defendant himself. He said among other things;

"My late uncle was living at Sewua before his death. While in Kumasi, he was living in somebody's house while building this house."

During cross examination this is what transpired

Q. You said your uncle lived in someone's house any time he came to Kumasi who is this someone

A. I do not know that person

Q Have you personally been to the house in dispute

A I saw it but never entered into the house.

Q When did your uncle die

A. He died in 1873

Q. And at the time of his death, was this house a completed house

A . Yes

Then later

Q When you said the late Kwasi Boateng was your uncle, can you tell this court what you mean by uncle

A My mother is the immediate younger sister of Opanin Kwasi Boateng

Q Where did your uncle live

A . He was residing in Dadiesoaba Ahenfie

Quite clearly this is another material inconsistency that goes to further weaken the case of the plaintiff.

In the light of these inconsistencies pointed out in the pleadings and evidence in chief, the rule in Appiah vs. Takyi (supra), becomes relevant; that if your evidence is inconsistent with your pleaded case, and the other party's evidence is consistent with their pleadings, the court must prefer the case of the party who has succeeded in establishing his pleaded case by the evidence led.

We therefore hold that the learned justices of the Court of Appeal were right and their decision to draw an inference from the facts different from that of the trial judge was permissible in law.

In the instant case, apart from denying the claim of the plaintiff, the defendant also counterclaimed for a declaration of title to the property, and an order of perpetual injunction. But short of disbelieving the plaintiff due to the discrepancies between their pleadings and their evidence in chief, and also the inconsistencies in their evidence as a whole, did the defendant himself lead any evidence to prove his entitlement to the property?

Order 12 Rule 1(i) of CI 47 says,

> *"A defendant who alleges that he has a claim or is entitled to a relief or remedy against the plaintiff in an action in respect of any matter, whenever and however arising, may, instead of bringing a separate action make a counterclaim in respect of that matter".*

By his counterclaim therefore the defendant had put his own title in issue and therefore bore the evidential burden to prove his own title. In the case of Re Ashalley Botwe Lands: Adjettey Agbosu &Ors v Kotey & Ors [2003-2004] SCGLR it was held as follows

> *"The burden of producing evidence in any given case was not fixed, but shifted from party to party at various stages of the trial, depending on the issues asserted and/denied"*

At page 425 Brobbey JSC said,

> *If the Court has to make a determination of a fact or an issue and that determination depends on evaluation of facts and evidence, the defendant (counterclaimant) must realise that the determination cannot be made on nothing"*
>
> *The logical sequel to this is that if he leads no such facts or evidence, the court will be left with no choice but to evaluate the entire case on the basis of the evidence before the court"*

The defendant led uncontroverted evidence to show that since the building was put up, rooms in the house have been occupied by his family members and tenants who have been put there by him or his predecessors in title. There was no evidence that any member of the plaintiff's family has either lived in this house or rented out any rooms in the house. In deed some tenants who had lived in the property for a long time came to testify to the fact that they rented their rooms from, and pay their rents to the defendant. This long possession of the property in dispute created a strong presumption, though rebuttable, of ownership in the defendant. In the Supreme Court case of Asare v Appaw II(1984-95)1 GLR 59 it was held

"A person in possession is prima facie entitled to the land"

Then in the case of ABAKAM EFFINA FAMILY V MBIBADO EFFINA FAMILY (1959) GLR 362 CA, it was said,

"where a defendant has been in long possession and occupation of land he is entitled to the protection of the law against all **who cannot affirmatively prove a better title"(emphasis added)**

Yes, the defendant did not tender any documents on the property, claiming they were stolen in the lifetime of Nsomme. Again, even though he claimed to have been in charge of the construction of a greater part of the finished property since the construction was done in phases, he could not produce any drawings or permit or anything. But these were minor or trivial details that could not take away his credibility. And the defendant could not prove affirmatively a better title.

After reviewing the rival versions as narrated by the parties and their witnesses coupled with the long and undisturbed possession by the defendant and his family, we hold that the defendant has proved his title and is entitled to his counterclaim. We therefore endorse the conclusion s arrived at by the Court of Appeal.

Having come to this conclusion in respect of grounds 7, we do not find it necessary to go into the other grounds of appeal. The appeal therefore fails in its entirety and the judgment of the Court of appeal with regard to ownership of the property is confirmed.

P. BAFFOE-BONNIE
(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)

DOTSE, JSC:-

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

J. V. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

AKOTO – BAMFO (MRS), JSC:-

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

AKOTO-BAMFO (MRS)
(JUSTICE OF THE SUPREME COURT)

Y. APPAU,:-

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

Y. APPAU

(JUSTICE OF THE SUPREME COURT)

COUNSEL

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MICHAEL GYAN OWUSU WITH HIM MONICA NERTLEY, AKUA AMPONG AND LESLIE AMEDIOR FOR THE DEFENDANT/APPELLANT/RESPONDENT.