IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: ANSAH, JSC (PRESIDING)

GBADEGBE, JSC

PWAMANG, JSC

DORDZIE, JSC

AMEGATCHER, JSC

CIVIL APPEAL
NO. J4/07/2018

27TH MARCH, 2019

SUBUNOR AGORVOR

(SUING ON HIS BEHALF AND ON BEHALF
OF THEAGORVOR FAMILY OF TAMATOKU) …. PLAINTIFF/RESPONDENT/RESPONDENT

VRS

1. MR. J. K. KWAO

2. AARON NARH ACHIA …… DEFENDANTS/APPELLANTS/APPELLANTS

JUDGMENT

GBADEGBE, JSC:-

This is an appeal from the judgment of the CA by which the decision of the trial High Court in the matter herein, a land cause was reversed. In these proceedings, we will retain the description of the parties which they had before the trial High Court. Similarly,

reference to the grounds of appeal will be made in the manner in which they were set out in the notice of appeal. Before us, the defendants have lodged an onslaught against the judgment of the CA on several grounds. These grounds relate to the capacity of the plaintiff to mount the action, the order of possession that was declared in the plaintiff and the finding in trespass. The said grounds will be referred to in so far as they are relevant to the issues for our decision in this appeal.

The backdrop to the action herein may be briefly narrated as follows. The plaintiff took out the action herein against the defendants claiming a declaration of title and other ancillary reliefs. The action herein was provoked according to the plaintiff by the defendants' unlawful entry upon portions of the disputed land that their family has been in possession of over several years. While the plaintiff claimed the land by means of a grant obtained from the defendants' family by their predecessor in title and their subsequent undisturbed possession of same until acts of encroachment thereupon by the defendant's family, the defendants claimed that the land was only granted over the period at different times to two members of the plaintiff's family for farming and related activities only. The said grant, it was asserted by the defendants was not absolute and was accompanied by the acknowledgement of the title of the defendants' family by their grantees. After the close of pleadings and other proceedings had towards trial, the action proceeded to trial.

After a full-scale trial of the action, the High Court delivered its judgment by which it accepted the version of the plaintiff and rejected that of the defendants. Accordingly, the trial court decreed title in respect of the disputed land in the plaintiff and granted in his favor ancillary reliefs including damages. For trespass. The defendants promptly appealed to CA and succeeded in obtaining a reversal of the judgment. In particular, the learned justices of the CA concluded that the plaintiff was unable to prove the grant that he alleged and as such declared title to the disputed land in the defendants on the counterclaim filed to the action. It is significant to note that in the intermediate appellate court, the plaintiff did not submit a statement of case in answer to that of the defendants who had appealed from the decision of the trial court. Following the reversal of the pivotal

determination of title to the land, the CA declared possessory right only in the plaintiff's family in relation to the disputed property. These proceedings arise out of the appeal by the defendants against the grant of possessory rights in respect of the disputed land to the plaintiff. Notwithstanding the reversal of the judgment of the trial court in favor of the defendants on the question of title to the disputed land, the defendants have lodged an appeal to this Court. The questions which turn on the grounds of appeal before us shall conveniently be considered under various heads commencing with the challenge to the capacity of the plaintiff to have issued out the action herein.

CHALLENGE TO PLAINTIFF'S CAPACITY TO MOUNT THE ACTION HEREIN.

The ground relating to the plaintiff's capacity is that numbered as (ii) and expressed thus:

> *"The Court of Appeal erred in holding that the Plaintiff/ Respondent/ Respondent had the capacity to commence legal action against the Defendants/ Appellants/ Appellants and further erred in failing to consider Order 4 r 9 (4) of the High Court (Civil Procedure Rules, 2004, CI 47 in its judgment."*

As the issue of capacity is fundamental to the plaintiff's right to bring the action, it is attended to first. After carefully going through the considerable arguments submitted regarding this question and reading the record of appeal, it is observed without meaning any disrespect to the defendants that there is abundant evidence that supports a challenge to the hitherto quiet possession of the disputed land by the plaintiff's family when some time in the year 2012, the defendants sent a bulldozer onto the land. As the encroachment was not merely accidental but accompanied by adverse claim to the land, there was a reasonable likelihood of the plaintiff's claim to the ownership of the land being eroded and tended to bring it within the category of jeopardy such as to have enabled the plaintiff to bring the action on behalf of the plaintiffs within the exception to the principle that only a head of family can maintain an action in respect of family

property. See: *In re Ashalley Botwe Lands: Adjetey Agbosu and Others v Kotey and Others* [2003-2004] 1 SCGLR 420. Beyond this, there was undisputed evidence of the serious indisposition of the head of the plaintiff's family that rendered him incapable of prosecuting an action to protect the family's interest in the land.

Also, there is the effect of the counterclaim of the defendants against the plaintiff whose capacity they have ceaselessly denied. By the operation of the Rules on pleadings in Order 11 of the High Court (Civil Procedure) Rules, CI 47, the making of a counterclaim against the plaintiff in respect of the disputed land has the effect of constituting an admission that the plaintiff is a competent person to take out the action herein on behalf of his family. Furthermore, Order 81 rule 2 of CI 47, precludes a party who knowingly takes a fresh step in a matter from complaining about a defect in the adversary's pleading; the technical term employed in the Rules and indeed commonly described by practitioners of the law may be found in the words contained in Order 81 rule 2 namely 'fresh step after knowledge of the irregularity'. Reading the said rule together with Order 11 on the content of pleadings, it is concluded that the sole ground argued in regard to the want of capacity in the plaintiff is devoid of substance and must fail.

QUESTION OF THE IDENTITY OF THE DISPUTED LAND

The grounds of appeal which raise the issue of identity of the disputed land are set out as (1), (iii, (iv), (v) and (vi) as follows:

> *"The Court of Appeal erred when it restrained Defendants /Appellant/ Appellant from entering onto the disputed land after it found as a fact that Plaintiff /Respondent /Respondent had not been able to identify his own exact boundaries.*
>
> *(iii) After finding as a fact that the peculiar facts of the case clearly demanded some evidence more than just a site plan to establish the identity of the disputed land, the Court of Appeal fell in error by holding that all the portions bulldozed by Defendants/Appellant/ Appellant formed part of the*

disputed Agorvorkorpe land when there was no evidence to show that the Plaintiff/Respondent/ Respondent was in occupation or was farming in the area or on the said land on which a building had been constructed by Defendant/Appellant/Appellant.

(iv) The Court of Appeal erred after finding as fact that Plaintiff/ Respondent/Respondent failed to surmount one of the major obstacles in a claim for declaration of title, that is, its inability to identify the disputed land boundaries, yet went ahead to substitute Plaintiff/ Respondent/ Respondent's relief for declaration of title with a declaration of possession rights over land whose boundaries Plaintiff /Respondent/ Respondent could not identify.

(v) The Court of Appeal erred when it granted possession rights to Plaintiff / Respondent/ Respondent over land whose boundaries are unknown and could not be identified when it found that the description on the writ does not conform to the site plan tendered as Exhibit A.

(vi) The Court of Appeal erred when it restrained defendants from further developing Sega family lands in the absence of any evidence that the area being developed falls within unidentified Agovorkope boundaries."

The grounds set out in regard to the identity of the area in dispute look quite repetitive as each of the five grounds raises substantially the same complaint of the failure of the plaintiff to have positively identified the boundaries of the land claimed in the action. Strangely, however, the defendants made a counterclaim to the same area and succeeded in obtaining a declaration of title in respect of the alleged indefinite area. As the grounds raise the same issue, they will be conveniently considered together. Where, as in this case, rival parties to an action made claims to the same area, there cannot in point of procedure and substance be any obligation on either of them to prove the boundaries of the area in dispute. The Supreme Court considered a similar challenge to

capacity in the case of Adjetey Agbosu v Kotey (supra) and reached a conclusion that on the state of the pleadings, the defendants were deemed to have admitted the identity of the land claimed by the plaintiffs. Pausing here, although the defendants in paragraph 40 of their statement of defence denied paragraph 38 of the statement of claim in which the boundaries of the land claimed by plaintiff's family were set out, the defendant's counterclaim in paragraph 42 was made in respect of the very same area. For a better understanding of the point raised here, reference is made to the various descriptions of the land by the parties commencing from that of the plaintiff.

Plaintiff's description:

> *"A declaration of title to all that piece or parcel of land measuring approximately 19.470 acres or 7.879 hectares known as Agorvorkorpe or Agorvor village situate and lying and being about 10km off the Kasseh to Aflao Road, after Tamatoku, near Akletsekorpe and Sonkwenyan in Dangme East District of the Greater Accra Region."*

Defendants' description:

> *"A declaration that the Sega family is the owner of all that piece and parcel of land measuring 19.470 acres, situate, lying and being 10km off the Kasseh to Aflao Road, after Tamatoku, near Akletsekorpe and by the part Sonkwenyan in the Dangme East District of the Greater Accra Region of Ghana."*

Reading the two descriptions put up by the parties to this dispute, the area is the same and semantic differences apart, there can be no credible dispute that the action herein was contested by the parties in respect of the same area. Indeed, in their respective evidence the parties left no one in doubt that they were litigating over the same piece of land. And also, in the application for directions taken in the matter, no issue was raised regarding the identity of the land. It is significant to observe that the application for directions in the matter was sought under the hand of learned counsel for the defendants

on November 20, 2012. This being the case, there is not much substance in the contention to the contrary and accordingly the learned justices of the CA were right in making the declarations in favor of either party to the area. In the light of the absence of any dispute over the identity of the disputed land, it is difficult to understand the urging pressed on us by the defendants related to the identity of the area in respect of which possession was granted to the plaintiff as the learned justices of the CA made a declaration of title in their favor regarding the same area. The grounds touching the question of identity of the disputed land therefore fail.

GRANT OF POSSSESORY RIGHT AND RESTRAINING ORDER

The next question of relevance to which we next turn our attention concerns the CA 's declaration of possessory rights in the plaintiff's family over the disputed land. The complaint relating to the said award appears from grounds (iv) and (v) which have been considered in relation to the issue of identity of the disputed land but have some bearing on the grant of possessory right in favor of the plaintiff's family as well. In view of this, we proceed to deal with the said grounds in so far as they touch the question of the grant of possessory rights to the plaintiff. In their statement of case, the defendants made an admission that such a right cannot be denied in view of a previous judgment that was tendered in evidence as exhibits 3 and 4 entitled *Tetteh Worbi and Others v Adamali Asamanyuah and Others*. Regarding the said judgment, the defendants contended in their statement of case at page 48 as follows:

> *"The issue of possessory rights of the Respondents forbears has not been disputed as stated in the pleadings and contained in the judgment of Tetteh Worbi case (supra) which was tendered by the Appellant in the course of the trial……."*

The above statement in truth is supported by the pleadings and there is sufficient and irrefutable evidence that the plaintiff's family has been in undisturbed possession of the

disputed land for over hundred years rendering the order of the CA conferring such a right on them a proper exercise of their discretion.

The defendants' complaint in part also relates to the substitution by the CA of an order of possession in favor of the plaintiff who claimed a declaration of title to the land. A possessory right is part of the interests or incidents that bundle into ownership or title. Indeed, by section 48 of the Evidence Act, a person in possession is presumed to be the owner of the thing possessed. As the possessory right is less than the incidents attaching to title, when evidence tendered before a Court establishes without the slightest doubt that a party has been in such a possession as only the holder of the absolute title can oust him from such possession and the said possession is derived from the holder of the paramount title, as in the case before us, the court may confer a right to remain in such possession in the party by refusing orders for general damages for trespass and perpetual injunction. In conferring possessory right on the plaintiff in terms of its judgment, the learned justices of the CA did that which the justice of the case demanded from the evidence contained in the record of appeal on which the appeal was heard. As the proceedings herein were heard by the Court of Appeal in the exercise of its appellate jurisdiction, the Court had all the powers of the trial court to give any judgment that the trial court could have made. See*: A-G All E. R. v Birmingham, Tame & Rea District Drainage Boar*d [1911-13] All E. R. Rep. 935.

Having previously dealt with an aspect of this ground planked on the identity of the land in respect of which the possessory right was made, the only justifiable objection to the conferment of the possessory right on the plaintiff arises from the CA making the order infinitely without the plaintiff's family acknowledging the paramount title of the defendants. It repays to refer to the order of the CA which may be found at page 733 of the record of appeal at page 733 as follows:

> *"From the opinions expressed in this judgment the grounds of appeal are determined as follows:*

Grounds of appeal a, b, c, d, e and f are dismissed. Grounds of appeal g and h on identity of land are upheld. Ground of appeal f on the counterclaim is dismissed save that the Sega family is hereby declared as the owner of all the lands including that currently occupied by the plaintiff and the family subject to the prohibition mentioned in this judgment that they are not to interfere with the possessory rights of the plaintiff and family."

The order of the CA quoted above leaves one in uncertainty regarding what the decision in the appeal was. An appellate court is required in its judgment to clearly indicate whether the decision appealed from is upheld or dismissed. Unfortunately, however, from the passage referred to above there is no clarity in the decision of the learned justices and to discern this, one has to consider the effect of their decision on the various grounds of appeal argued before them. For example, the effect of declaring the defendant's family as owners of the disputed land is to allow their counterclaim that they are the owners of the land. That is a clear indication that the ground numbered as '9' by which the refusal to allow the counterclaim was raised was allowed. It is noted that while the grounds of appeal are numbered by reference to numerals as set out at pages 476 to 480 of the record of appeal, the judgment of the CA like the defendants written submission dealt with the grounds by reference to letters. For example, that ground "9" of the notice of appeal which raised the trial Court's failure to grant the counterclaim was described in the judgment as "f". The said ground reads:

"The learned trial judge erred when she dismissed Defendants' counterclaim."

Had the learned justices of the CA dismissed the said ground, they could not have declared title to the land in the defendant's family. The learned justice of the CA who authored the judgment to which agreement was expressed by his colleagues must have employed the numbering used by learned counsel for the defendants in their written submissions instead of what appears in the notice of appeal. In our view the preference

of the defendants' case to that of the plaintiff meant that the plaintiff's claim of declaration of title to the disputed land that was accepted by the trial court was reversed. Without reaching a different conclusion on the facts as found by the learned trial judge, the learned justices of the CA could not have granted a declaration of ownership to the land in favor of the defendants' family as the plaintiff's claim to title was based on a contrary conclusion. Notwithstanding these observations, we agree with the CA's decision in allowing the counterclaim of the defendants. We think that the comments relating to ground"9" of the notice of appeal was a slip and correct the statement by which the CA expressed is dismissal of that ground to read that "Ground of appeal numbered as "9" on the counterclaim is allowed." The decision of the CA allowing title in favor of the defendants meant that the crucial and or fundamental findings of fact on which the decision of the trial High Court was based was found to have been unsupported by the evidence contained in the record of appeal. By the decision of the CA that has been appealed to us, the rights of plaintiff's family under the judgment of the High Court was lessened while that of the defendants' family was enlarged. Therefore, by not appealing from the decision of the CA, the plaintiff is deemed to have accepted the correctness of the facts crucial to the decision of the CA including the rejection of the case advanced by the plaintiff that his ancestors had purchased the disputed land from the defendants.

For a party to raise for re-hearing a ground of dissatisfaction or grievance with a judgment, he must file a notice of appeal in compliance with rule 6(1) of the Supreme Court Rules, CI 16; merely expressing disagreement with the decision in response to the defendants' statement of case as was done by the plaintiff in these proceedings will not suffice. A careful consideration of rule 6 (1) of CI 16 together with the model precedent contained in Form 1 of Part One of the Schedule to the Supreme Court Rules, CI 16 reveals that to constitute a notice of appeal, the notice must contain full details of the court and of the judgment or order from which the appeal is lodged, as well as the grounds of appeal and the order sought from the Supreme Court. Therefore, the failure of the plaintiff to lodge an appeal that procedurally may have the effect of a cross-appeal precludes us from considering whether on all the evidence contained in the record of

appeal, the judgment of the CA on the question of ownership of the disputed land was right.

In so concluding, the CA was only reiterating what Jackson J said in an unreported judgment dated October 23, 1951 in a consolidated action entitled *Tetteh Worbi of Sega and 2 Others v Adamali Asamanyuah and Others*; And *William Ametepe Gorleku and 2 Others v Tetteh Worbi,* numbered as TRS 28/1947 and received in evidence variously as exhibits 3 and 4. In the course of the judgment in the said case, the learned judge after declaring title to the land then in dispute in the defendants' family proceeded to limit the exercise of rights of ownership over the lands at page 32 by excluding the adjudged owners from interfering with the rights of tribes which for generations have been in occupation of various portions of land belonging to the defendants family. In these proceedings, the defendants have not called in aid any matter or reason for which the limitation placed on the title of the Sega family in the said case should be interfered with as he contended before us. In our opinion, it is desirable that nothing be done to disturb the customary relationship between the title holder and those in possession as this has been the basis on which their rights to the land have been regulated for several generations.

We think that the above reasons are sufficient to dispose of the specific complaint directed at the order of restraint made by the CA. Such an indication appears impliedly from ground (v1) to which we respond that such orders are designed to protect the holder of the possessory right in respect of any adjudged land and therefore there cannot be any legitimate issue turning in these proceedings over its making.

FINDING IN TRESPASS

From the written briefs submitted to us by the defendants regarding this complaint, it is predicated on the general ground numbered as (1) in the notice of appeal that: *"That the judgment is against the weight of the evidence."* As a matter of procedure, the said ground actually deals with the probative value of the evidence related to the core issue namely which of the rival parties had a better title to the disputed land. The question of

trespass is an ancillary relief which is dependent on the determination of the core issue in the action. That being so, the defendants must be said to have surreptitiously argued the case of the award of damages for trespass under the omnibus ground of "*The judgment is against the weight of the evidence*". At page 51 of the defendants' statement of case, it was submitted thus:

> *"Under this ground, I respectfully wish to address the question of damages of GHC5,000.00 awarded against the Appellant which should have been set aside by the Court of Appeal after Respondent's claim for declaration of title was dismissed, more so, when the Respondent was not given special damages as a result of his failure to prove any head of damage in the suit."*

My Lords, we have before us arguments related to the general ground that speak not of the probative value of the admitted evidence but the propriety of the award of damages for trespass. This is an unusual way of raising for the consideration of an appellate court the question of the award of damages. The better practice is to specifically complaint about the said award and we are of the opinion that the defendants have substantially presented before us under the said omnibus ground matters which properly speaking, should have been raised under a different ground of complaint which attacks the award either on principle or quantum. A typical example of a ground of appeal against the award of damages may be formulated thus:

> *"The damages awarded for loss of income is inadequate having regard to the consequences of the injuries sustained by the plaintiff on his ability to continue in gainful employment."*

In regard to the substance of the arguments submitted under the erroneous ground, one may for example express the complaint in the following words:

"The learned justices of the Court of Appeal erred by not disallowing the award of damages for trespass made against the defendants."

Although the defective ground escaped our scrutiny at the hearing of the appeal, we still retain the power to deal with the submissions made under it in a manner that will uphold the requirements of the Rules on grounds of appeal. See Rule 6 sub-rules 4 and 5 of the Supreme Court Rules, CI 16. As the arguments made under the said ground relate to matters not properly belonging to the omnibus ground, the arguments made in relation to it are hereby struck out as incompetent. In our view, the award of damages flowed directly from the finding in trespass in favor of the plaintiff's family which from the undisputed evidence has been in undisturbed occupation of the disputed land until the defendants' encroachment which provoked the action herein.

For the reasons above, the appeal herein fails and is accordingly dismissed.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

DORDZIE (MRS.), JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

A. M. A. DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

AMEGATCHER, JSC:-

I agree with the conclusion and reasoning of my brother Gbadegbe, JSC.

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

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