IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: PWAMANG JSC (PRESIDING)
DORDZIE (MRS.) JSC
PROF. KOTEY JSC
TORKORNOO (MRS.) JSC
AMADU JSC

CIVIL APPEAL
NO. J4/35/2022

6TH JUNE, 2022

1. THERESA YEBOAH
2. JENNIFER YEBOAH } **..... PLAINTIFFS/RESPONDENTS/APPELLANTS**

VRS

1. KWABENA BAWUAH
2. AFIA DOKYIWAA } **..... DEFENDANTS/APPELLANTS/RESPONDENTS**
3. AFIA PINAMANG

JUDGMENT

DORDZIE (MRS.) JSC:-

FACTS

The litigation in this suit is over a dwelling house described as House Number J 22/1 Nungua believed by the appellants to be a self-acquired property of Samuel Yeboah

(deceased). He died on 7 September 2005. The plaintiffs/respondents /appellants (plaintiffs) are the widow and daughter of the late Samuel Yeboah. Both plaintiffs are personal representatives of the late Samuel Yeboah. Samuel Yeboah died testate but the house in dispute was acquired after he made his will therefore, it is not included in his will. The appellants obtained Letters of Administration to administer the portion of his estate that had fallen under intestacy. The defendants/respondents (defendants) are the relatives of the deceased Samuel Yeboah and they occupy rooms in the house in dispute. The first defendant who claims ownership of the house resisted the efforts of the plaintiffs administrators to administer the estate. The plaintiffs therefore instituted an action in the High Court Accra, per a writ of summons dated 18th of October 2007, seeking the following reliefs:

a) Recovery of possession of house numbered J 22/1, Nungua, Accra.

b) An order for perpetual injunction restraining the Defendants, their assigns, agents, heirs, workmen and all persons claiming through them from interfering with Plaintiffs' administration of the estate of the late Samuel Yeboah.

c) Mesne profit from February 2006 till date of judgment.

In support of their prayer in the writ of summons, the plaintiffs averred the following facts in their statement of claim.

1. "Plaintiffs say they were granted Letters of Administration by the Circuit Court, Accra on the 23rd of February 2006 to administer the intestate portion of the estate of the late Samuel Yeboah.
2. Plaintiffs say during the lifetime of Samuel Yeboah, he granted permission to the 1st and 2nd Defendants to occupy various rooms in house number J 22/1, Nungua his personal property.
3. Plaintiffs say the 1st and 2nd Defendants paid nominal rent to the late Samuel Yeboah as they are his nephew and niece respectively.

4. Plaintiffs say the late Samuel Yeboah also allowed another nephew of his namely Badu to occupy a room in the same house under the same arrangement as that of the 1st and 2nd Defendants.
5. Plaintiffs say after the grant of the Letters of Administration to them they requested 1st and 2nd Defendants to vacate the property but they have refused to do so.
6. Plaintiffs say Badu vacated the room he was occupying and they accordingly changed the locks to the said room.
7. That sometime after the locks had been changed, Badu requested for the keys to remove his bed from the room but rather placed the 3rd Defendant who is not known to Plaintiffs in the said room.
8. Plaintiffs say the Defendants have recently caused blocks to be made in the house ostensibly to put up new structures on the property.
9. Plaintiffs say Defendants will not vacate the property and allow Plaintiffs to distribute same in accordance with the law unless they are ordered to do so by this Honourable Court.

The defendants denied the claims of the plaintiffs and in an amended statement of defence filed on 22nd of May 2009 made the following averments:

1. "Save as herein after expressly admitted the Defendants deny each and every allegation of fact contained in the Plaintiffs' Statement of Claim as if the same were set out in extenso and traversed seriatim.
2. Save that the late Samuel Yeboah (hereinafter "the deceased") died testate, in respect of which the Plaintiffs, as alleged personal representatives, are required to apply for probate to administer his testate estate, the Defendants deny paragraph 1 of the Statement of Claim.
3. The Defendants deny paragraphs 3, 4 and 8 of the Statement of Claim and say that it is a palpable falsehood that the deceased granted them permission to live in House No. J22/1, Nungua (hereinafter "the disputed property") or that they paid rent to the deceased in respect of the disputed property. On the contrary,

the 1st Defendant and a cousin, Kwadwo Atakora, who is ordinarily resident in Denmark, are the owners by purchase, through the deceased, of the disputed property, which the deceased purchased as a bare land on their behalf and constructed a 3 bedroom building thereon through remittances made by the 1st Defendant and the said Kwadwo Atakora.

4. Further, beginning from 1995 when the 1st Defendant returned to live in Ghana permanently, the 1st Defendant and Kwadwo Atakora have exercised both possessory and proprietary rights over the disputed property to the total exclusion of the deceased. It is therefore expressly denied that the disputed property forms part of the estate of the deceased as alleged or at all.
5. The Defendants say in answer to paragraphs 5 and 7 that Kwabena Badu (referred simply as Badu) was not placed in the disputed property by the deceased but, rather, Kwadwo Atakora, the co-owner of the disputed property, and that the subsequent events were undertaken pursuant to powers derived from Kwadwo Atakora and 1st Defendant.
6. The Defendants say in response to paragraph 10 of the statement of claim that at all material times prior to his death, to the knowledge of the deceased and the Plaintiffs and without any protestations whatsoever, the 1st Defendant fully developed the disputed property by constructing on the plot thereon a sandcrete building with a workshop and other structures, which were used together for the 1st Defendant's business, the cost of which is presently estimated to be GHc55, 635.61.
7. The Defendants are accordingly not only caught by equitable principles of laches and acquiescence from asserting any authority over the disputed property, but it will amount to unjust enrichment on the part of the deceased or his estate to assert any ownership claims or re-possess the disputed property, assuming to be true that the disputed property belongs to the deceased's estate."

The defendants therefore counter claimed as follows:

(i) Declaration of title to the disputed property;

(ii) Injunction to restrain the Plaintiff's from disturbing the Defendant's quiet enjoyment of the disputed property;

(iii) In the alternative, an order directed to the deceased's estate to re-imburse or otherwise pay to the 1st Defendant and Kwadwo Atakora the full value of all the properties on the disputed property (to be assessed), including the said sum of Gh¢55, 635.61.

(iv) Damages

The plaintiffs in an amended reply and defence to the counter claim filed on 10 June 2009 denied that the defendants are entitled to the counter-claim

At the close of a full trial, the High Court, in a judgment dated 29 July 2010 granted the reliefs of the plaintiffs. The defendants appealed against the decision of the High Court whereby the Court of Appeal allowed the appeal and set aside the High Court's decision. In respect of the counter claim, the Court of Appeal dismissed the 1st 3rd and 4th counter claims but granted the second which restrains plaintiffs from disturbing the defendant's quiet enjoyment of the property. The plaintiffs appealed to this court

Ground of appeal

The appeal is brought on only one ground, which is the general ground that the judgment is against the weight of evidence.

Submissions of counsel for the appellants.

In arguing this sole ground of appeal counsel maintained that the first appellate court misapplied the evidence on record, it therefore came to the following wrong conclusions:

a) That the deceased allowed the first defendant and Atakora to expend money on the land therefore it was inequitable to grant plaintiff's prayer for recovery of possession.

b) That the deceased constructed the property in dispute as part of his customary responsibilities towards his nephews (when there is no such evidence on record supporting this).
c) That the defendants are not licensees and therefore could not be evicted from the disputed property

Counsel further argued that the first defendant failed to provide any convincing evidence to establish the allegation that he and Atakora made substantial contribution to the building of the property in dispute therefore are co-owners. They relied on oral representations made to them by their deceased uncle, which carries no evidential weight. The Court of Appeal's reliance on the equitable principle to deny plaintiffs recovery of possession of the property is without merit.

Counsel concluded that the Court of Appeal wrongfully interfered with the decision of the trial court.

The defendants filed no submissions as at the time of hearing this appeal; it is deemed they have waived their right of doing so.

Determination of the Appeal by the Supreme Court

It is trite that consideration by this court of the sole ground of appeal that the judgment on appeal is against the weight of evidence calls for rehearing; whereby the evidence has to be reviewed by this court in its totality and conclusions drawn on the balance of probabilities. This court restated its position on this principle in a recent decision in the case of ***Adjetey Adjei & Others v Nmai Boi & Others [2013-2014] 2 SCGLR 1474. When it held in its first holding at page 1477 that "it was incumbent on the Supreme Court, to analyse the whole record of appeal, take into account the testimonies and all documentary evidence adduced at the trial, so as to satisfy itself that on the balance of probability the conclusion of facts by the Court of Appeal wear reasonably or amptly supported by the evidence."***

I would successfully do this by analyzing the evidence on record; I would particularly consider the findings of fact made by the two lower courts, and possibly the application of the law and the correctness or otherwise of the judgment on appeal.

Analysis of the evidence.

Plaintiffs' Evidence.

In proof that the disputed property is self-acquired property of the deceased Samuel Yeboah, plaintiffs tendered an indenture exhibit H which confirms Samuel Yeboah's ownership of the property. Exhibit H is dated 10th of March 1995 executed between representatives of the Nungua Stool and WO1 Yeboah Samuel the deceased husband of the first plaintiff. The first plaintiff gave an account of how the property was acquired and how the defendants came to live in the property and said her daughter Beatrice Akosua Yeboah who lived abroad sent ₵100,000 to the father, which he used to purchase the land. She and the rest of her children contributed to the construction of the house. As a family, they had no objection to the lease document being made in the husband's name. The husband, Samuel Yeboah died testate. However, the property in dispute was acquired many years after he made the will therefore it was not included in the will. This particular property therefore fell under intestacy. Evidence from the plaintiffs witnesses have it that the question as to what to do with this self-acquired property of the deceased's arose at family meetings at Nkoranza. The first family meeting was on the 40th day anniversary of the death of Samuel Yeboah. The second meeting was the one-year anniversary. The first defendant was present at these meetings. That the first defendant was present at these meetings can be found in the evidence of PW1 and PW2. The family decided that the property would become family property according to custom. Beatrice Yeboah then suggested that she gave her father Ghc40, 000 cedis to renovate the family house at Nkoranza the family should refund that money to her and take the house. The family agreed, and 3 months was agreed on for payment to be done. After the 3months, the family head offered only Ghc20, 000 cedis. This was rejected by the plaintiffs. With the consent of the family head Musa Donkor, the plaintiffs obtained letters of administration to administer the deceased's

estate that fell under intestacy including the house in dispute. Osei Yaw the plaintiffs' first witness who is a member of late Samuel Yeboah's family was the one appointed by the family head to represent him in the application for the Letters of administration.

It is worth noting that the first defendant never raised any issue about he being the owner of this property at the family meetings at which he was present. In cross-examination, it was never denied that he was at these family meetings. First defendant amended his pleadings after PW2 gave evidence. This means at time he amended his pleadings PW1 and 2 have given evidence on the family meetings and have specifically stated that the 1st defendant was present at these meetings. It is significant to note that in his amended pleadings he never denied that he was present when the Yeboah family took decisions concerning the property and treated same as self-acquired property of late Samuel Yeboah.

With regard to how the defendants came to live in the property, first plaintiff explained that the defendants are the deceased's nephews and niece; he allowed them to live in the house. The first defendant Kwabena Bawuah had a rented room in Teshie where he lived with his younger brother Kwame Adu. Bawuah travelled to Germany and his younger brother lived in his rented room at Teshie. At a point in time, Kwame Adu reported to her late husband that the roof of the room he was occupying was leaking and rain was damaging Bawuah's belongings. Her late husband asked the first defendant's junior brother Kwame Adu to move Bawuah's belongings to a room in the disputed house. When first defendant returned from his travels, he came to live in the room where his belongings were kept.

In respect of second defendant's occupation of a room in the house in dispute, first plaintiff testified that the second defendant needed a place to live when she returned from Abidjan with her husband. The deceased asked her husband to rent a room in the house for her and he did and paid rent advance to the deceased.

In respect of the third defendant, she has a brother called Atakora who used to share room with the children of the family. When the disputed house was built, the deceased

asked Atakora to give him money to enable him fix a door on one of the rooms for him to sleep in. Atakora gave 500cedis, the door was fixed, and he occupied that room. It was Atakora who allowed one Badu to occupy his room when he travelled abroad. After the death of the deceased Badu vacated the room. First plaintiff said she changed the locks but Badu came back and said he left his bed in the room, which he wanted to pick so she gave him the key. He refused to return the key and rather put the third defendant in the room. Third defendant according to the records vacated the room when this suit was instituted and had not responded to the writ of summons.

It is a further evidence of the Plaintiffs that the late Samuel Yeboah and his immediate family, that is, his wife and children have been in possession and in control of the house. The family has a corn mill in the house. One of the Yeboah women, Jennifer also has a hairdressing saloon in the house. Plaintiffs denied that the house belongs to the first defendant or any other person.

First plaintiff further testified that the first defendant at the late husband's permission built a workshop in the house where he carries out a car spraying business. After the death of her husband and even while this case was pending in court the first defendant took to building additional structures in the house. When the deceased was alive, the first defendant never exercised any ownership rights over the property.

Evidence of the Defendants

First defendant confirmed plaintiff's evidence that he lived in a rented apartment at Teshie prior to his departure abroad. He testified that he travelled to Germany and lived there until 1995. Before his departure, his uncle the late Samuel Yeboah told him to send money to him to purchase land for him. Between 1986 and 1987, he sent a total of Ȼ600 to his uncle Samuel Yeboah through a "connection man" who was going back and forth Germany and Ghana. In 1990, he came to Ghana and found that the uncle had built a 3-bedroom house for him and had collected his belongings from the rented house into the newly built house. He did not live in the new house built for him because

he spent only one month in Ghana and went back to Germany. Some boys were living in the house built for him and the uncle asked him to allow the boys to live in the house. He visited Ghana again two years later. The boys were ejected from the house so he lived there for 6 months and returned to Germany. He came back to Ghana for good in 1995. He had since lived in the house. He had built a workshop, fenced the frontage of the house and built a toilet and bathhouse in the house. He tendered pictures of the additional structures he added to the house.

Per a valuation report he tendered, the first defendant claimed the additional structures cost him ₡550,000,000. He wanted a refund of this amount, as an alternative remedy should his claim of ownership fail. He maintained the property belongs to him but a cousin of his by name Atakora has one room because the late uncle told him Atakora also sent him money to build for him.

Second defendant's evidence is based on what she alleged her deceased uncle told her that first defendant sent him money to build for him therefore the property in dispute belongs to the first defendant. It was the late uncle who asked her to come and live in the house to take care of it for the first defendant. According to her, there is no document on the property because it is government land.

Kwame Adu testified as DW1 and confirmed first defendant's evidence that the property belongs to Bawuah the first defendant, but maintained that it was the late Samuel Yeboah who told him that first defendant sent him money to build a house for him. His reason for the property not having title document is because the uncle told him the land was government land and it was difficult to obtain documents.

DW1's evidence confirms the plaintiff's evidence that first defendant's extensive construction he did in the house he did it after the death of his uncle Samuel Yeboah and some of the construction was done when the case was in court. The suit was instituted in 2007. Exhibit M for example DW1 admitted was constructed in 2009.

The defence had not adduced any evidence to prove Atakora's co-ownership of the property. Though first defendant in his evidence maintained that a room was kept for

Atakora because he is a co-owner of the property, there is no evidence from him establishing that as a fact. The evidence of the other defendant which is that the late Samuel Yeboah told her Atakora sent him money to buy him the property is debunked by the evidence of DW1. DW1's evidence is that the house was completed in 1989 and he moved in. He met Atakora living in one of the rooms in the house. If Atakora left for Denmark after the house was built then he could not have sent money to the uncle to build him a house he was living in before he left Ghana. The first plaintiff's account of how Atakora came to live in the house is a more probable situation. Which is that Atakora was sharing a room with the children of the household; when the uncle built the house in dispute, he asked him to provide money for a door and windows to be fixed in one of the rooms for him. He did and therefore resided in one of the rooms until he left for Denmark.

The first defendant's claim of ownership of the house has not been substantiated by any evidence whatsoever. That he sent $600 dollars to his deceased uncle to purchase land and built a house for him remained a bare assertion without proof. That the first defendant sat in meetings with the family when decisions of ownership were taken and he never raised any objection or made known his interest in the property is a further proof that his claim of ownership in the court is an afterthought.

The findings of fact made by the trial court are in line with and support the evidence as analysed above. The trial court consequently held that the first defendant and Atakora are not co-owners of the disputed property as claimed by the first defendant. The property is a self-acquired property of the deceased Samuel Yeboah. The plaintiffs, the trial court held were not able to prove that the defendants paid rent for the rooms they occupied therefore concluded that the defendants are licensees living in the property at the permission of their deceased uncle.

The trial court rightly granted plaintiffs' prayers and dismissed the counter claims of the defendants. The evidence on record proves that the property was owned by Samuel Yeboah deceased and falls into his estate which the administrators, the plaintiffs are seeking to manage.

The 1st appellate court made findings of fact that are in line with the findings of fact made by the trial court but strangely, at the later part of its judgment the Court of Appeal introduced facts that are alien to the record and based on that, set aside the judgment of the trial court. The Court of Appeal for example agreed that the evidence of the first and second defendants narrating what they alleged their deceased uncle told them could not be true. It therefore affirmed the trial court's finding that the deceased was the true owner of the property. The court below continued and accepted the trial court's finding that the deceased uncle permitted the defendants to occupy part of the property and that they were not in exclusive possession.

In another breath, this same court held that Atakora and first defendant are contributors to the construction of the property. They have been allowed to incur expenditure by putting up permanent buildings on the land. They have life interest in the property therefore; plaintiffs are not entitled to recover possession. The question is - upon which evidence did the court below base these findings? Is it the evidence of the defendants on their contributions, which was based on what the deceased uncle told them? The Court of Appeal relied on the principle that evidence charged to a deceased person ought to be treated by a tribunal with great caution and rejected the defendants' evidence of ownership earlier in its judgment. The court in fact relied on the case of Mondial Veneer (Gh) Ltd. v Amuah Gyebu 1V [2011]1SCGLR 466 to reject the evidence of the defendants on allegations of what a deceased person told them.

There is also the unchallenged evidence on record that Bawuah's initial workshop he built in the house was by the permission of his uncle. Subsequent developments he made in the house were made after the death of the uncle and some he built whiles this case was pending in the court.

It is my opinion that the conclusions the Court of Appeal came to, setting aside the judgment of the High Court and declaring equitable life interest in the property in favour of the defendants are not supported by the evidence on record.

That Atakora made a contribution of 500 cedis to the construction of the property in dispute and the first defendant also contributed $600 dollars to the construction of the house are assertions made by the first defendant without any proof whatsoever.

Section 11(1) of the Evidence Act, 1975 NRCD 323 prescribed the required standard of proof a party must meet to avoid a ruling against him on a particular issue. The sections reads

"11. Burden of producing evidence defined

(1) For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party."

Subsection 4 defines the requirement in civil matters thus:

"(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence."

This court in the case of ***Martin v Barclays Bank (GH) Ltd. [2017-2018] 1SCLRG 800*** considered this issue of the burden of producing evidence in civil matters. The Court of Appeal in that case set aside the award of damages for emotional stress by the High Court in favour of the plaintiff on the ground that it was not proved, and in its place awarded general damages when in fact there was no evidence before it to warrant award of general damages. On appeal to this court by the defendant, the appeal was allowed and the court per Benn in JSC at page 812 of the report reasoned as follows: ***"...the court below had found that there is no evidence to support the claim for damages founded on emotional distress yet it accepted the same scanty evidence as supporting an award of general damages. The standard of proof in civil matters is for the person who assumes the burden***

of producing evidence to lead such evidence as to enable the trier of fact to determine that he has established his case on a preponderance of probabilities. The court below was thus under a duty to consider the totality of the evidence in arriving at this conclusion. It was not sufficient to base an award of damages on the bare fact that the defendant was found to be in breach of contract,…."

I would venture to say that the court below based the conclusion it came to that the defendants have beneficial interest in the property on evidence not found in the record. The court, after rejecting the defendant's evidence on ownership of the property went on to say that, what the deceased might have told the witnesses was that Atakora and Kwame Bawuah have interest in the property. This is the first appellate court's own speculation and it renders its reasoning very confusing (See page 246 to 247 of the Record of Appeal)

It had been established by the defendants' own evidence that the building in dispute was concluded in 1989 and Atakora was allowed by the deceased to occupy one room, he left for Denmark thereafter. It cannot therefore be a true statement that Atakora sent money for a house to be built for him. The 500 cedis the deceased demanded from him was to fix a door and windows in one of the rooms for him to sleep in because he was sharing a room with the children of the household at the time. The statement by the court below in conclusion of its judgment that Atakora contributed to the building of the house contradicts its own earlier findings. Similarly, there is no basis on which the court concluded that first defendant sent $600 to the uncle to build for him when no credible evidence was adduced by him to prove that assertion. The evidence of the second defendant and DW1 on the issue clearly has no probative value. The information they gave to the court was not from their personal knowledge, they claimed their deceased uncle told them first defendant sent him money to build for him.

The law is well settled on charges made against a deceased person, that a court must be careful as to the weight it attaches to evidence of that nature. See the case of ***In re***

Garnett v Marcauly (1835) 31 Ch D 1 where the principle is explained as follows ***"The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive he might have answered the charge, the evidence ought to be looked at with great care; the evidence ought to be thoroughly sifted, and the mind of the judge who hears it ought to be, first of all in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine [of corroboration] becomes absurd."***

This principle has been adopted and applied in our jurisdiction in several cases hence in the case of ***Mondial Veneer (Gh) Ltd. v Amuah Gyebu 1V [2011]1SCGLR 466*** the court per Georgina Wood CJ at 475 held, ***"Our jurisprudence has examined the approach courts must adopt when evaluating charges and assertions made against dead persons. We have firmly established the principle that real danger lies in accepting without questioning or close scrutiny, claims against a dead person. The caution that such claims must be weighed carefully is based on plain good sense and has consistently been applied in a number of cases.."*** The court went on to give a list of cases in which the Supreme Court relied on this principle. These are ***Fosua & Adu Poku v Dufie (deceased) Adu Poku Mensah [2009] SCGLR 310; In re Krah (Decd), Yenkyeraah v Osei-Tutu [1989-90]1GLR 638 and Bisi v Tabiri [1987-88] 1GLR 360.***

In this case, on appeal before this court it is not difficult to deduce from the evidence on record that the defendants and DW1 did not tell the court the truth on the issue of Bawuah and Atakora's contribution to the building of the disputed house. There are other established facts on record which I have earlier on referred to but which I will re-emphasise to expose the untruthfulness of the defendants and their witness on their claim of interest in the disputed house. Firstly, the first defendant never claimed any interest in the property while the deceased uncle was alive. Secondly, he did not

disclose any such interest in the property when the family met and took decisions concerning the property though he was present at those meetings. Thirdly, there is the undisputed evidence on record that he put up most of the additional structures to the house after the death of his uncle and some while this case was pending in the court. It is therefore difficult to appreciate that the court of appeal turned its back on its earlier finding in which it rejected the allegations based on what a dead person told the defendants to overturn the judgment of the trial court.

In conclusion, I hold the view that the findings of fact made by the trial Court are sound and are supported by the evidence on record. The defendants are bare licensees and nothing more; they were permitted to live in the house by their deceased uncle Samuel Yeboah. There is no proven evidence on record to clothe them with equitable interest in the disputed property.

By unanimous decision of the court, the appeal succeeds in its entirety. The judgment of the Court of Appeal dated10 December 2020 is hereby set aside; and we make the following orders:

1. The plaintiffs are granted an order for recovery of possession of house N0 J22/1 Nungua, Accra.

2. An order of perpetual injunction is granted against the defendants restraining them from interfering with house N0 J22/1 Nungua, Accra in any manner whatsoever.

3. The plaintiffs shall recover against the 1st defendant mesne profits assessed at Ghc10, 000 covering the period February 2007 to date of this judgment.

Cost of Ghc10, 000 in favour of the plaintiffs against the defendants

A. M. A. DORDZIE (MRS.)

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

PROF. N. A. KOTEY

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