IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ADINYIRA, JSC (PRESIDING)
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
AKOTO-BAMFO, JSC
APPAU, JSC

CIVIL APPEAL
NO. J4/50/2016

24TH JANUARY, 2018

TOGBE LUGU AWADALI IV …….. PLAINTIFF/RESPONDENT/APPELLANT

VRS

TOGBE GBADAWU IV …….. DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

APPAU, JSC:-

The appellant in this case, who was the plaintiff in the trial High Court, sued the respondent as defendant for and on-behalf of his family or clan, claiming the following reliefs: -

1. *A declaration that the land contained in the schedule to a Statutory Declaration sworn to by the defendant dated 8/7/1981 and covered by Land Registry No. 2718/1981 is the property of the Anyigbe Clan of Agave of which the plaintiff herein is the custodian.*
2. *An order setting aside as null and void the Statutory Declaration declared on 8/7/1981 by the defendant and registered at the Lands Registry as No.*

2718/1981 as wrongful, unlawful, illegal and on grounds of fraud, particulars of which are stated in the Statement of Claim.

3. *A declaration setting aside all conveyances of parcels of land by the defendant in respect of any parcel of land covered by the land described in the schedule attached to the Land Registry No. 2718/1981 declared by the defendant to any person whatsoever since 1981.*

4. *Perpetual Injunction to restrain the defendant, his agents, servants, privies, assigns, etc. and indeed any other person claiming and/or deriving title through the defendant from having anything whatsoever to do with the land covered by the schedule attached to the Statutory Declaration dated 8/7/1981 contained in Land Registry No 2718/1981.*

The respondent denied appellant's claim and asserted ownership to the land in question through purchase by his ancestress called Borkanu. The respondent, however, did not put in any counterclaim against the appellant for title. The trial High Court granted the appellant's prayer in part. The court came to the conclusion that the appellant's family were the first settlers on the land and therefore the allodial owners of the land whilst the respondent's family held the usufructuary rights through purchase and long possession. The court however dismissed entirely reliefs 3 and 4 on the ground that as usufructuary holders, the respondents could deal with the land as they did. With regard to relief 2, the court refused to declare the Statutory Declaration executed by the defendant null and void as prayed by the appellant. Having accepted that the said Statutory Declaration contained errors and inaccuracies, the court set it aside subject to the execution of a new and a corrected version by the respondent, based on the court's directions.

Both parties were not satisfied with the judgment of the trial High court dated 3rd February 2012. The respondent herein, appealed against same to the Court of Appeal on 22nd March, 2012 whilst the appellant also cross-appealed on 2nd May 2012. The respondent's main ground of appeal, inter alia, was that the judgment was against the weight of evidence. He sought a reversal of the trial court's decision and an order declaring his family (the Gbadawu family) the absolute owners of the disputed land exclusive of appellant's family or clan. The Court of Appeal granted the appeal filed by the respondent and dismissed entirely the appellant's cross-appeal. The Court of Appeal held that from the evidence on record, the respondent's ancestors purchased the absolute interest or title of the appellants in the disputed land from appellant's ancestors, which included the allodial ownership so the appellants had no interest whatsoever in the disputed land. It is this decision which is on appeal before us.

The appellant canvassed only two grounds of appeal and they are: -

i. The court below erred when it found that defendant/appellant/respondent had been in undisturbed and uninterrupted possession of the land without

identifying what specific area of land defendant/appellant/respondent's ancestors acquired from plaintiff/respondent/appellant's ancestors.

ii. The court below erred when it held that the plaintiff/respondent/appellant's ancestors sold their absolute interest in the land to the defendant/appellant/respondent's ancestors when defendant/appellant/respondent provided no evidence as to the nature of the interest their ancestors purchased from plaintiff/respondent/appellant's ancestors.

The issues presented in this appeal, upon a cursory reflection, would appear simple but they are not that simple. They raise very interesting legal and factual conundrums, which the Court of Appeal, from our objective view and consideration, did not properly address. From the evidence on record, both parties were ad idem that: **(i)** the appellants founded the disputed land as first settlers so they were the allodial title holders to the disputed land and **(ii)** the respondents were strangers who came to settle on the land. Where they parted ways was when the respondents claimed they acquired ownership of the disputed land by purchase against appellants' contention that respondents were their licensees. These varied contentions raised two crucial questions for determination in this appeal. They are: -

1. ***Did the respondent's ancestress or ancestors ever purchase the disputed land from the appellant's ancestors as the Court of Appeal found? And;***
2. ***Has the appellant's family lost its allodial ownership to the disputed land as a result of the alleged purchase?***

The trial High court came to the conclusion that respondent's family acquired title to the disputed land by purchase as recorded in previous decisions of the courts culminating in the judgment of the High court in the case of STEPHEN K. GERALDO v GBADAWU II & 2 Others (unreported judgment of the High court, Ho, dated 6th December, 1979, per Coussey, J.). The trial court, however, held that the respondents only purchased the usufructuary interest in the land from appellant's grantee called Agorviegli alias Gli while the appellants continued to hold on to their allodial title or ownership. The Court of Appeal, which was given the opportunity to re-hear the case in the appeal filed before it, reversed the trial court on this issue and held that the respondent's ancestors purchased the absolute interest; (i.e. both the usufruct and the allodial) in the land from appellants' ancestors so every interest the appellants had in the land had been extinguished.

It was clear from the onset that the identity of the land was never in dispute. By paragraph 2 of their amended statement of defence, the respondents admitted that they were strangers on the land in dispute. Their ancestress called Borkanu came to settle on that portion of appellants' land as a result of a purchase from one Agorviegli

or Gli who was also a stranger lodging with the appellant's ancestors. This was what transpired during cross-examination of the respondent by counsel for the appellants, as recorded at page 169 of the RoA: -

"Q. You have said the Adutor creek and its surrounding land was purchased from Agorviegli by Mama Borkanu.

A.That is so.

Q. You are relying on Exhibit 2 to say that the land was purchased by Mama Borkanu from Agorviegli.

A. Yes, I do. He lodged with the Anyigbe clan.

Q. Are you saying that a stranger sold land belonging to his host?

A. It is not so. At that time he was in control of the Adutor lands.

Q. How did he come to control the Adutor lands?

A. I cannot tell."

The above testimony of the respondent established without doubt that the respondent did not know the sort of interest their vendor Agorviegli alias Gli had in the land he allegedly sold to them. What he knew, from his evidence, was that though Gli was a stranger who came to lodge with appellant's ancestor, he (Gli) was in control of the disputed land. The respondent tendered in evidence Exhibit 2 to support his contention that his family is the owner of the disputed land by purchase. Exhibit 2 was evidence led by one Awudzi Amenyefia who was said to be a linguist to the head of appellant's family, in support of respondent's claim of ownership of the disputed land by purchase from one Gli in a case involving respondent's ancestors and others. This testimony was quoted by the trial court at page 205 of the RoA and I do not wish to re-call the whole evidence here. The evidence was however explicit that Gli, who purportedly sold the land to respondent's ancestress, was a stranger who came to lodge with the head of the Anyigbe clan by name Faname, whereby Faname permitted him to fish in the Adutor and some other creeks forming part of Anyigbe lands. The interesting part of Awudzi's evidence, which respondents strongly relied on, was that Gli fled from the area in the night after he had sold the disputed land to respondent's ancestress. Gli fled Anyigbe for fear of repression from the chief of Agave with whom he had had a quarrel while lodging with the head of the Anyigbe clan called Faname. So clearly, there is no doubt to the fact that Gli sold the disputed land to respondent's ancestress without the express consent of his host who was the head of Anyigbe clan and who permitted him to exercise rights over same. That is the only conclusion that could be inferred from the evidence on record, going by the case set up by the respondent.

So the question is; if the respondent's ancestress purchased the appellant's family land from the appellant's licencee or grantee, as Gli could be perfectly described, without the notice and consent of the appellants, most importantly at a time their licencee was fleeing the land, could it be said that the respondent's ancestors purchased the land from appellant's ancestors as the Court of Appeal concluded? We do not think so.

It appears the Court of Appeal assumed, albeit erroneously, that Agorviegli or Gli was an ancestor of the appellant as a result of the wrong impression created by the respondent in Exhibit M, which the appellant tendered in evidence through the respondent during cross-examination of the respondent. Exhibit 'M' was an amended statement of defence which the respondent had filed in respect of a case the appellant initiated against the respondent and five others at the Ho High Court in 1987 with suit No. LS 36/87. That suit involved the same subject-matter but the defendants in that case were the respondent herein and five others. The appellant abandoned that case and instituted this pending one on appeal before us in 2001 and this time against the respondent only. In Exhibit 'M', the respondent described Agorviegli or Gli as appellant's ancestor. It is worth quoting that part of the cross-examination of the respondent that appears at page 169 of the RoA.

"Q. Look at this document and see if it is the amended statement of defence filed on your behalf in the case of LS 36/87 intituled TOGBE LUGU AWADALI & 3 Ors v GBADAWU & & 5 Ors.

A. Yes, it is.

Q. In paragraph 11 of Exhibit 'M' you referred to Agorviegli as the ancestor of the plaintiff.

A. That is so."

Whilst in one breath, respondent described his vendor Gli as an ancestor of appellant, in another breath, he admitted that he was a stranger who came to lodge with the respondent's ancestor, who in turn permitted him to fish and farm on portions of his family land; i.e. Anyigbe lands. It is this portion where he was permitted to occupy, which Gli purportedly sold to respondent's ancestor before fleeing Anyigbe in the night under cover. The question that arises is; could Gli have sold the land he was permitted to farm or fish on to another stranger without the express consent of the appellant's family, granted respondent's narration was true; and if yes, what interest did he sell?

The totality of the evidence on record shows that appellant's family did not challenge the presence of the respondents on the land after Gli had fled the area. Rather, they permitted respondent's family to also exercise the same rights Gli was exercising over the land before he fled, so long as that occupation did not affect appellant's allodial

ownership of the land. It is for this reason that the appellants had contended all along that the respondents were their licensees.

The law is certain that long possession by a stranger with the permission of the allodial owner, would not confer ownership of the land upon the stranger. The authorities are clear that laches of this nature do not extinguish the title of the true owner and do not vest the stranger-occupier with title to the land. All it does is that it prevents the true owner from recovering possession, and enables the stranger to retain the use of the land. In the case of **OHEMEN v AGYEI, 2 W.A.L.R. 275**, the court held that; ***"The correct position is that the true owner loses his right to assert his title to and to recover possession of the land; not that the stranger acquires title to it, though in actual fact he does thereby acquire title to it".*** Though such a stranger can deal with the land as he wishes including granting conveyances, these interests are limited to possessory and user rights and cannot mature to absolute ownership rights. This is grounded on the customary law principle that a stranger cannot by mere occupation of land of a stool or clan or family to which he does not belong, acquire any real interest in that land, no matter how long.

As the appellant rightly asserted in his grounds of appeal, there is no evidence on record that suggested in any way that the ancestors of the respondent purchased the absolute title of the appellant in the disputed land from the appellant's ancestors as the Court of Appeal erroneously concluded. We wish to quote some of the erroneous findings of the Court of Appeal which we think operated on its mind to come to the conclusion it did arrive at. At page 342 of the RoA, the court wrote:-

"There is evidence that the defendants and their agents have been in undisturbed and uninterrupted possession of the land since his ancestors acquired it from the plaintiff's clan over a century ago". Then at page 344 of the same record, the court said; ***"The plaintiff testified that his ancestor who founded the Adutor land was a hunter and having settled on it he allowed other strangers to settle on portions thereof. This is clear evidence that he had the allodial title to the land. The clan/family of the late Awadali continued to exercise allodial title to the land until they sold a portion thereof; being the disputed property to the ancestors of the defendants".*** {Emphasis added}

The above findings were erroneous. There is no evidence on record to suggest that the respondent's family acquired the disputed land from appellant's clan by purchase, though there is no doubt of the fact that respondent's family has been in possession of the land for centuries. The Court of Appeal was misled to come to this conclusion by the trial court's assertion that the respondent's family; i.e. (the Gbadawu family) acquired the land by purchase. This was the finding of the trial court which the Court

of Appeal quoted to ground its erroneous conclusion. It appears at page 345 of the RoA and it reads:

"Indeed, the fact that the defendant's family had acquired the disputed land by purchase has been the sole factor upon which they either prosecuted or divested its interest in the disputed land in a number of suits. Incidentally, all the suits terminated in their favour thus strengthening their hold on the land...

The Anyigbe per Awudzi Amenyefia, having acknowledged the ownership or title of the Gbadawu family 63 years ago, it lies foul in the mouth of the plaintiff herein to dispute the title of the defendant. The equities are clearly against the plaintiff. I therefore hold that the Gbadawu family acquired the land many years ago by purchase".

After quoting the above finding of the trial court, the Court of Appeal continued as follows: - ***"The trial court rightly found that the plaintiff's family which held the allodial title sold the land to the defendant's family. The trial court judge after having rightly made the above findings of fact, misapplied the law and came to the conclusion that the plaintiff's family sold the usufruct title in the land to the defendant's family and kept the allodial title themselves. With respect to the trial judge, the said conclusion is not supported by the evidence on record".*** {Emphasis added}

We wish to stress that, notwithstanding the trial court's finding that the respondent's family acquired the disputed land by purchase, the court never stated anywhere that it was purchased from the appellant's clan or family. The *Stephen Geraldo case* (supra), which was exhibited as Exhibit '6', on which the respondent placed great reliance, must be put in its proper perspective. It must be emphasized that the appellant's family was not a party to that case. The facts of that case are that; the descendant of Gli, Stephen Geraldo sued the predecessor of the respondent claiming recovery of the disputed land on the ground that Gli pledged it to respondent's ancestor but never sold it. The High Court, per Coussey, J. in an appellate decision held that, from the evidence on record, the transaction between Gli and respondent's ancestor was a sale but not a pledge. Stephen Geraldo therefore lost against respondent's predecessor. The appellants were not privy to that case and there was no documentary evidence to support the alleged sale. Again, the decision did not say that it was the appellant's family that sold the land to respondent's ancestor. That decision therefore, could not in any way debar the appellant's family from challenging any assertion by the respondent of an interest which is greater than what his family acquired from the alleged sale.

Incidentally, the Court of Appeal misapprehended the facts when it came to the conclusion that it was appellant's family that sold the disputed land to respondent's

family. The trial court, relying on respondent's own testimony, found that it was Gli who sold the disputed land to respondent's ancestress Borkanu. The trial court then questioned the authority Gli had to dispose of the land he was permitted to use. The trial court stated: **-**

"Gli, as a stranger, could have been given leave and licence to feed on the land including the creeks. As a licencee, he has no power to alienate the land as he acquired no rights over it...

The defendant, in his evidence under cross-examination, said Gli sold the land because he had control over it. This evidence from the defendant does not help to determine Gli's interest in the land. From the above analysis, Gli's interest is imprecise...

It appears to me that by his attachment to Fanname and his association with the Anyigbe clan, he was absorbed into the family and became part and parcel of them prior to his escape. By reason of his connection with the Anyigbe tribe, he became vested with the usufruct or the possessory title. As a possessory title holder, he was at liberty to transfer his interest in the land by sale. The purchaser then acquired Gli's interest, that is, the possessory title and not the absolute title. The absolute title continued to be vested in the Anyigbe clan while the Gbadawu family became vested with the possessory title to the lands."

The trial High court came to the above conclusion on the principle that a purchaser of land cannot acquire interest that is greater than that of his vendor. That is exactly the true position of the law. If it was Gli who sold his interest in the disputed land to respondent's ancestress prior to his escape as the respondent himself asserted, then the interest respondent's family had acquired in the land was Gli's determinable or possessory rights over the land but not the allodial title which was still vested in the appellant's family as original settlers.

The appellant, in his statement of case, argued that a stranger could not acquire usufructuary rights over land as that is the exclusive preserve of individual clan members or family members. It was therefore wrong for the trial court to have concluded that Gli was a usufruct holder of the disputed land. We wish to state that this statement of the law that a stranger cannot acquire usufructuary rights over land belonging to his host is not accurate. Usufructuary rights are not reserved exclusively to individual members of a group or family or clan that communally owns the land in question. A stranger can acquire usufructuary rights over land owned by another group or family either on terms or through acquiescence.

The word '**Usufruct**' comes from the Latin phrase *'usus et fructus'*, which means; 'use and enjoyment', with *'fructus'* used in a figurative sense to mean fruits enjoyed from

the use, which include; the right to convey, transfer, lease, assign or tax during the pendency of the use of the property concerned. The term stands for a limited real right (or in rem right) found in civil law and mixed jurisdictions that unite the two property interests of '*usus*' and '*fructus*'; i.e. the right to use and enjoy a thing possessed, directly and without altering it. It connotes the right of enjoying all the advantages derivable from the use of something (not only land) that belongs to another, as far as is compatible with the substance of the thing not being destroyed or injured. The Cambridge English Dictionary describes it as; ***"the legal right to use someone else's property temporarily and to keep any profit made"***. Black's Law Dictionary, in its ninth edition, defined it as; **"the right of using and enjoying property belonging to another provided the substance of the property remained unimpaired. More exactly, was the right granted to a man personally to use and enjoy, usually for his life…the property of another which, when the usufruct ended, was to revert intact to the *dominus* or his heir".** The Shorter Oxford English Dictionary; Deluxe Edition, describes it as; **"The right of enjoying the use of and income from another's property without destroying, damaging, or diminishing the property".** In customary law, *usufruct* means land is owned in common by the people, but families and individuals have the right to use certain plots or portions of the land. While people can take fruits of the land, they may not sell or abuse it in ways that stop future use of the land by the community.

In his 'PRINCIPLES OF CUSTOMARY LAND LAW IN GHANA', published in London by Sweet and Maxwell in 1962, the learned and celebrated legal writer and jurist Nii Amaa Ollenu, with reference to Sarbah's Fanti Customary Law (1897), stated at page 64 as follows: ***"It is only by grant or rather by contract that a stranger acquires any estate or interest in stool or ancestral land. Hence the principle that long undisturbed possession of land either by a trespasser or by a person with a limited interest cannot ripen into title to land and that is so, even though no tribute or toll was demanded by either the owner of the determinable estate, or of the absolute title".***

According to Ollenu, a stranger may, by grant, acquire all estates or interests which are capable of being held in land which are mainly; the ***'user interest'*** which is determinable and the ***'absolute interest'*** which is perpetual. As he rightly stated in Chapter Five (5) pp. 63-78 of his book under reference, one stool or clan or family may transfer to another stool, clan, family or a large community of subjects of another stool, etc. its absolute estate or interest in a large area of land. In that case, it is not only property in the land which would pass, i.e. the *usufruct or user rights*; but jurisdiction over the land would also pass, i.e. the *allodial or absolute interest.* Generally, an individual is incapable of acquiring the absolute estate or interest, which always goes with the collective responsibility of the community or tribe to defend and

protect the land. Transfers or grants of this nature are expressly made and a party who asserts the existence of such a grant or transfer must establish positively that; ***(i)*** *such a grant was made and* ***(ii)*** *that it was made by or with the consent of the owners of the absolute or naked title.*

The next estate or interest which a stranger may acquire in land as rightly stated by the learned author is a determinable estate, commonly known as the *usufruct*. According to him, the stranger may do so by identifying himself with members of the family or clan by the performance of customary services just like a member of the family. In the eyes of the customarily law, such a naturalised stranger holds and enjoys the determinable title in the land, not as a stranger anymore, but as a subject and no limitations or restrains are attached to his said enjoyment. Usufructuary rights or interest could therefore be acquired and enjoyed by any person at all but not limited to only members of the group that owns the land.

The Privy Council, in the case of **TIJANI v SECRETARY TO THE GOVERNMENT OF SOUTHERN NIGERIA [1921] 2 AC 399**; held that the owner of the usufruct title can alienate his said title without the prior consent and concurrence of the absolute owner so long as the alienation carries with it an obligation upon the transferee to recognise the title of the absolute owner. That principle of law still holds good. From the facts on record, the appellant's family did recognise the respondent's possessory rights over the land after the purported sale of same to respondent's ancestor by their licencee Gli. That accounts for the long undisturbed possession by the respondent's family of this portion of appellant's Anyigbe clan land. As was rightly held by the trial court; ***"the rights and benefits which accrue to a possessory title holder at custom cannot be swept away by the allodial title holder for no apparent reason…The granting of leases by the Gbadawu family to prospective developers is consistent with their ownership rights; and it is well within their power to so act. The Gbadawu family has exercised its power of alienation since 1957 when, to the knowledge of the Anyigbe clan, it granted a lease of a portion of the disputed land to the West African Enterprise Ltd. Interestingly, according to the plaintiff, the grant to the West African Enterprise Ltd was made with the consent and approval of his ancestor Lugu Ahiaku III…"***

It must be emphasized that had it not been the attempt by the present generation of the respondent's family to exact tolls from appellant's family members who hitherto were fishing and farming freely on portions of the disputed land by virtue of their allodial ownership of same, as the evidence on record clearly portrays, this suit would not have seen the light of day. In his own testimony, the appellant said he embarked on this litigation when the respondent wanted to exact tolls from his family members who hitherto had been fishing freely in the Adutor and other creeks on the land and also when it came to his notice that the respondent had secretly executed a statutory

declaration declaring the Gbadawu family as absolute owners of the disputed land. {Emphasis added}

We agree with the trial court that the respondent family has possessory and user rights over the disputed land subject to the recognition of appellant's allodial ownership to same. As allodial owners, it was wrong for the respondent to attempt in any way, to fetter the fishing and farming rights of the appellant's family members over the wet and dry creeks on the disputed land. It is therefore our candid view that the Court of Appeal erred when it set aside the judgment of the trial High court on the ground that the appellant's family had sold its absolute interest in the land to respondent's family when there was no evidence to support that finding. The Court of Appeal would have been right in its conclusion if the totality of the evidence on record had established that it was the appellant's ancestor who indeed sold the land to the respondent's ancestress. However, this was not the evidence on record. We accordingly allow the appeal and restore the decision of the trial High Court save the order that the respondent should prepare a new Statutory Declaration to replace the one that has been set aside.

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