IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA

AD-2016

CORAM: ATUGUBA JSC (PRESIDING)

BAFFOE - BONNIE JSC

BENIN JSC

APPAU JSC

PWAMANG JSC

CIVIL APPEAL
NO: J4/6/2016

23RD NOVEMBER, 2016

YAKUBU AWABEGO - PLAINTIFF/APPELLANT/
HEAD OF FAMILY **APPELLANT**
(SUING ON BEHALF OF HIMSELF AND
AWURE FAMILY OF KALBEO)

VRS

TINDANA AGONGO AKUBAYELA -RESPONDENT/ RESPONDENT

TINDANA OF TINDONSOBLIGO **RESPONDENT**

JUDGMENT

ATUGUBA, JSC

The Plaintiff/Respondent/Respondent sued the Defendant/Appellant/Appellant claiming the following reliefs:

"1. Two hundred and six million, thirty-thousand Cedis being freeholders Reversionary Interest Compensation (in respect of a total of 9.72 acres leased plots of land which is part of a larger plot of land measuring 61.924 acres belonging to the Awure Family of Bolgatanga in the Bolgatanga Municipal Assembly and situate at Tamale Road Industrial Area, Bolgatanga and delineated as a plan of land for Bulk Oil Storage Transportation Limited (BOST) shewn edged pink certified by the Regional Surveyor, Upper East region dated 12th day of August, 2003, acquired per Executive Instrument E.I. 10 of 2004 paid to the Defendant on or about 5th day of January 2007 per Ghana Commercial Bank Cheque No. 0340380 dated 5th day of January, 2007 by Land Valuation Board, attached hereto as schedule II).

2. In the alternative, Eighty-Two Million, four Hundred and Twelve thousand Cedis (¢82,412,000.00) being the share of the Awure Family i.e. forty percent (40%) of Two hundred and six million, thirty thousand cedis (¢206,030,000.00) Freeholders Reversionary Interest Compensation in respect of a total of 9.72 acres leased plots of land belonging to the Awure family and situated in Bolgatanga Municipality affected by the acquisition per Executive Instrument E.I. 10 of 2004 paid to the defendant on or about 5th day of January, 2007 by Land valuation Board, Bolgatanga under a Memorandum of Understanding (MOU) executed for and on behalf of the

Awure Family and the Tindana of Tindonsobligo by representatives of the Plaintiff and the Defendant respectively and dated 7th November, 2006 and witnessed by several people.

3. ***Declaration that the Awure Family is the only party entitled to claim compensation under Executive Instrument E.I. 10 of 2004.***

4. ***That further proceedings will be stayed if within the time limited for appearance the Defendant pay that amount claimed to the Plaintiff or their lawyer".***

The Defendant also counterclaimed against the Plaintiff with respect to the same subject matter for:

"1. Declaration that Defendant in his capacity as the Tindana of Tindonsobligo is the allodial owner of all Tindonsobligo lands including the land declared vested in the state by E.I. 10 of 2004 particularly described by schedule 'C' to E. I. 10 and is the proper person to be paid compensation.

2. Declaration that an amount of ¢206,030,000.00 freeholders Reversionary Interest Compensation paid to the Tindana of Tindonsobligo in his capacity as the Allodial Owner (the Ghanaian equivalent of a freeholder of land under larger vested land in the state pursuant to E.I. 10 is not the actual compensation payable for the subject site and that the Tindana as allodial owner is the proper person to receive such money.

3. ***Declaration that the Memorandum of Understanding and its terms assented to by representatives of Plaintiff and Defendant on the 29th March, 2006 is not an enforceable document and the Defendant is not bound by its terms regarding how much compensation to pay to whom".***

Or in the alternative;

" ***Declaration that even if the said document is enforceable, defendant has the constitutional right to resile from it and to allow the High Court to determine who has a right to compensation and the amount of compensation payable on the basis of evidence adduced at the trial.***

4. ***Declaration that the act of executing the leases of plots Nos. 60 and 63A Tindonsonbligo Light Industrial Area by the Head of Awure family when the land in question is Tindonsobligo land and the misrepresentation by the family of who has the right to grant such land made to the Lands Commission to wrongly give concurrence to the said leases without the knowledge of the Tindana of Tindonsobligo is an act of fraud and which fraud has vitiated the leases as being null and void.***

5. ***An order that the Tindana of Tindonsobligo is the person to be paid compensation for and on behalf of the Tindonsobligo community in respect of land vested in the state by E.I. 10 of 2004***

6. ***An order that the leases covering plots No. 60, 63 and 63A Tindonsobligo Light Industrial Area be expunged from the Register as being null and void.***

7. ***An order that compensation payable to Biocal Enterprise a lesee of two of the fraudulent leases executed by the head of family of Awure family and which compensation has not yet been paid be ordered paid to Defendant".***

The crux of this appeal is whether the allodial title to lands in Kalbeo in the Bolgatanga Municipal area is vested in individual families or in the Defendant/Appellant/Appellant as the Tindana thereof for and on behalf of the whole community of those lands. The parties are ad idem as to the fact that the Appellant (for short) is the Tindana of Tindonsobligo and also performs the role of Tindana for Kalbeo, where the disputed land is situate.

However whereas the appellant contends that as Tindana thereof, the allodial title to lands in Kalbeo vests in him in trust for the whole community over which he is the Tindana the Respondent's case is that the appellant performs that role in respect of Kalbeo lands by reason of some oral treaty between the respondent's ancestors, as founders of Kalbeo and the appellant's ancestors purely because of the expertise of the latter with regard to the spiritual exercise of sacrificing to shrines for spiritual blessings and protection.

Recent Acts

It is a trite principle of Land Law in this country that the best way of resolving conflicts arising from traditional evidence concerning ownership of land is to test it against recent acts to see which traditional version is thereby supported. *See Adjeibi-Kojo v. Bonsie (1957)3 WALR 257, Adjei v Acquah (1991)1 GLR 13, S.C.* and *Nii Ago Sai v. Nii Kpobi Tetteh Tsuru* III [2010] SCGLR 762.

In this case there is a plethora of statutory declarations and leases evidencing the allodial title of the appellant as Tindana of Tindonsobligo and concurred in or witnessed by persons including the heads or representatives of the respondent's family appearing at inter alia, pages 590, 619, 627 – 635, 662 – 668, 669 – 691 of the Record of Proceedings. As pointed out by counsel for the appellant in the appellant's statement of case dated 15/1/2016:

> "In their Consolidated Amended Reply and Reply in Amended Statement of Defence, which appears at pages 126-132 of the record of Proceedings, the Plaintiff/Respondent/Respondent stated as follows:
>
> "The Plaintiff further says that the office of status or role of the Defendant is that of a Tindana and the defendant resides at Tindonsobligo, thus the Defendant is referred to as Tindana of Tindonsobligo but his ritual jurisdiction extends beyond Tindonsobligo to include Kalbeo. The Plaintiff further says that as Tindana the Defendant's assent is customarily required in all important social and economic transactions within the defendant's ritual jurisdiction and the Plaintiff further says that he the Plaintiff and the Awure Family had always sought the Defendant's customary ritual assent in their social and economic transactions <u>including the alienation of their ancestral land to organizations and to individuals for development."</u> [emphasis added].

"The Plaintiff further says that the Plaintiff and the Awure Family will continue to follow this hallowed cultural practice bequeathed to them by their ancestors. The Plaintiff further says that they have always been honest and transparent with the Lands commission, Bolgatanga and or Land Valuation Board in all their land transactions".

Defendant's Explanations

In the respondent's statement of case dated 8/2/2016 he contends thus:

"my Lords, the evidence is that most leases executed in the Bolgatanga Municipality are not prepared by professionals such as lawyers. In most cases applicants take leases already in existence modify them and submit them to Lands commission for processing. Also, the Tindana was made a lessor in the leases by the Lands Commission Bolgatanga for the Convenience of the Land Commission. The Commission did not like the idea of having to deal with individual heads of families and preferred dealing with the Tindana on behalf of the various families".

As regards this plea, one wonders how when the respondent's family's rights are affected practically, on the ground, by the operation of a wrongfully formulated document, they cannot bring an action such as they have done in this case for the necessary redress. This plea is therefore unconvincing. The case of *In re Ashalley Botwe Lands* (2003 – 2004)1 SCGLR 420, holding 7 regarding the self serving nature of statutory declarations does not extend to situations in which the injuriously affected person is a party to the document even if as a witness. In any case the aforequoted excerpts from the Plaintiff/Appellant's Reply to the Defendant/Respondent's amended Statement of Defence are deeply rooted in custom and tradition and are manifestly admissions against the Plaintiff's interests.

The documents in question are therefore acts and declarations against the respondent's interests and are consequently of high probative value in favour of the appellant's case

Text Writers

The appellant's contentions regarding his status as the allodial owner of the lands within his Tindanaship are supported by leading and eminent text writers. Some of these are refereed to in the appellant's statement of case as follows:

> "R.J.H. Pogucki (**Assistant commissioner of Lands)** whose work appears on page 557-558 of the record of proceedings stated that; "In the minutes of proceeding of such courts, such as for example, the Nankani – Kassena Federation Court and the Frafra Federation Court, one always finds the term "Tindana" translated into English as meaning "landlord" or "landowner" **this role of a Tindana is not put in doubt in these courts."**

Report on pilot phase of Ascertainment and Codification of Customary Law on Land and Family in Ghana (ACLP), Vol. III, a joint research by **the National House of chiefs and the Law Reform Com mission** published in March 2011. At page 551 of the Record of Proceedings under the heading **"Hierarchy Of Land Tenure Interests",** it was stated thus: "**Állodial interest:** based on the view expressed by various respondents during the customary land law research and subsequent enquiries after the validation workshop, the nature of land ownership in the Bolgatanga Traditional Area **is influenced by** the nature of settlement in the area. The basic principle of settlement as land ownership according to the respondents is that 'when a person (and his family) was the first person to occupy and demarcate an expanse of land, that person who is also the head of the family becomes the custodian of the land (Tingadanaa or Tindaana which literally means landowner) including ownership of the trees, water bodies and other resources on it."

At page 553 of the Record of Proceedings captain R. S. Rattary stated:

> "The former continued to assert his original title to be custodian and trustee of the land of his people, a claim which few, even of the most arrogant secular chief, ever dared to dispute, even at the present day. the people belongs to me, the land belongs to the Tindana", is a statement I have repeatedly heard made. The new foreign chief and the old tribal Tindana thus come to work hand in hand".

At page 554, Capt. R. S. Rattary further stated that "the Tindana in all his religious and spiritual activities was the exact prototype of an Ashanti chief in his capacity as *Asase wura* (owner of land), and custodian of the ancestral spirits of the land".

Footnote one at page 553 states:

> "An exception to this was the invasion of what is now Eastern Dagomba by the Mamprose chief, Na Nyagea, when many tendana were put to death".

We can again cite the work of R.J.H. Pogucki, **Gold Coast Land Tenure, vol. 1, A Survey of Land Tenure in Customary Law of the Protectorate of the Northern Territories**, published in 1955. The relevant extract appears at pages 555 to 558 of the Record of Proceedings.

In paragraph 22, Pogucki's work (page 556 of the Record of Proceedings), he succinctly states as follows:-

> 22) "All over the Northern Territories groups, which own allodial rights on land are usually represented in their execution by a special official, the Tindana. This official is always a descendant of the first settler."

The position stated by Pogucki and Rattary is affirmed by the works of renowned scholars, Professors George Benneh and Raymond Benning, titled, Technology Should Seek tradition-studies on traditional Land tenure and Small Holder Farming System in Ghana. Proceedings of which are reproduced at pages 559-562 of the record of Proceedings. Extract found at page 561 of the record of Proceedings is very pertinent. It states thus:

> "The most common office in these 'segmentary societies' is the representation of the earth god, *Tendaana* who is usually a descendant of the first settler. He is regarded as the custodian of the land. Each *Tendaana* has his own area within which he sacrifices to each god shrine and exercises his spiritual programmes. Where the area is very large, it may be divided into smaller units over which subordinate *tendaanas* may be appointed.
>
> The duties of the *Tendaana* are generally the same in the segmentary societies. Apart from his religious functions, which are sacrificing to the earth god, he allocated unclaimed land to other people who came to settle on his territory."

The writers further stated at page 560 thus:

> "The associate states in Northern Ghana are **Tellensi, Frafra, Namnam, Kusasi, Builsa, Bimoba** and parts of **konkomba.** Chieftaincy was introduced to these areas by the new ruling class. Since the 'strangers' were normally in the minority and usually relied on the power and prestige of the ruler of the distant parent state to maintain their positions, no

changes were introduced by them to upset the old social order. Ownership of land is still vested in the original custodian. As a Kusase informant pointed out chiefs now own the people but Tendana (Tendaana) still own the land".

My Lords, at page 562, the writer stated that:

"Although the British administration appointed chiefs for these societies and attempted to create large political units, there has always been a clear distinction between the duties of a chief and those of a Tendaana. The traditional rights of the latter over land have by and large remained inspite of the greater prestige which the former enjoys as a spokesman of his people to the government".

All this is amply supported by the most direct and thoroughly researched article of E.N.A. Kotey, then a Senior Lecturer of the Faculty of Law, University of Ghana Legon, in (1993 -95)19 U.G.L.J. 102, titled:

"LAND AND TREE TENURE AND RURAL DEVELOPMENT FORESTRY
IN NORTHERN GHANA." At p. 108 the Learned author stated thus:

"In the Northern Region, the tenure systems of the politically more centralized Dagbon, Mamprusi, Nanumba and Gonja recognise that the allodial title to land (the highest and ultimate title to land in the customary system of landholding traditionally vested in a community and managed on its behalf by the traditional authority) is vested in the various skins. The allodial title to land is in theory vested in the indigenous communities as

represented by their paramount skins, like the Ya Na (the Feudal King of the Dagomba, now the paramount chief) or the Nayeri (the Paramount chief of Mamprusi). Practical management is, however, done by the various sub-skins. Thus Diare or Savelugu (Dagomba towns) land is managed by the Diare Na or Savelugu Na respectively and not the Ya Na. Gambaga, Walewale and Langbinsi lands are managed by the respective Naba (chiefs).

Though these politically more centralized ethnic groups have tindemba (earth priests), they do not manage the land on behalf of their communities but minister unto and perform rituals to ensure the productivity of the land."

By contrast he forcefully states at 112 - 115 as follows:

"In the Upper East and Upper West Regions, the politically less centralized Lobi-Dagarti, Sissala, Kussasi, Tallensi and Builsa have no skin ownership of land. *The allodial title to land is vested in the various indigenous communities as represented by the various Tindemba.* This finding is contrary to the view of Ollennu that the allodial title to land in the Upper East and Upper West regions is held by the skins. Ollennu relies for this view on *Azantilow, Sandemanab. V. Nayeri , Mamprusina & 3 others*. It must however be emphasized that the issue which confronted the court in Azantilow, as Ollennu himself acknowledges, was whether the Sandemanab (Paramount Chief of the Builsa) and the Nayeri (Paramount Chief of Mamprusi) were the proper persons to sue or be sued in respect of their peoples' land. The case is therefore no authority for the proposition that

in all the ethnic groups of the Upper East and Upper West Regions the chief is the trustee for a community's land., *in Azantilow v. Nayeri,* the Sandemanab sued on behalf of the Builsa people for a declaration of title to certain lands occupied by the second, third and fourth defendant chiefs and their people.

The defendants opposed the claim on the ground that the land belonged to the Mamprusi people, whose paramount chief was the first defendant. The plaintiff had claimed that the boundary of his land was the White Volta and that the 2nd, 3rd and 4th defendants and their peoples who were denying it were in fact related to the Builsa. The court held that:

> "the plaintiff is a person capable of suing in his capacity as tribal head and that the defendants are the proper persons to be used."

It was essentially therefore a jurisdictional matter – a boundary dispute between two ethnic groups, Builsa and Mamprusi. There was no issue as to the position inter se a Builsa chief and Builsa Tindana. Ollennu gives the impression that the latter was indeed the issue by stating:

> "The question arose as to whether the plaintiff and the defendant, occupants of skins, were the proper persons to prosecute and defend the titles of their respective tribes to land and whether the proper persons to sue and to defend were not the Tindana of Builsa and the Tindana of Mamprusi."

No such issue is discernible from the report. Indeed such an issue is incapable of arising as there is in fact no institution like the Tindana of the Builsa or Mamprusi (a Head or Paramount Tindana), there being many tindemba among the Mamprusi and Builsa with no overall superior. The Court in summarising the evidence, but before making a decision, stated:

> "The evidence of the plaintiff and the first defendant both showed that each could hold a title to land in his capacity as tribal head. On the defendants' side support from this came from the first witness who said that as a sub chief he held land under the Head chief of the Mamprusi people, the Nayeri, who is the first defendant. Further support came from the defendants' second and third witnesses who were Tindanena. Both made it *clear in their evidence-in-chief that their position is one of fetish priest and not one which carries title to land with it, although elsewhere in the Northern Territories this may be the case."*

All that this shows is that *as regards the Mamprusi there was evidence by some tindemba, in support of their chiefs, that they did not hold title to land on behalf of their communities and that this was vested in their chiefs.* This is consistent with our finding that among the Mamprusi, who have a state system, it is the chief who holds the land on behalf of the community. *There is nothing in the Report that any such support was offered by the Tindemba from the Builsa.* As Woodman indicates:

> "The court there [in Azantilow] spoke of chiefs having title to sue but the evidence merely showed that the Tindana claimed no title themselves. Otherwise the chiefs' right to sue was simply taken for granted."

The Builsa, it has been stated, were a non state society. Chiefs may have been introduced to some of the Builsa at a later time in their history. The colonial policy of indirect rule however encouraged the practice of chieftaincy and raised the Sandemanab to the status of a head chief. The present Sandemanab (who has been on the skin for a very long time and was the plaintiff in *Azantilow* v. *Nayeri* has judiciously asserted his authority over the whole of the Builsa. *His claim to allodial ownership as opposed to sovereignty (in a jurisdictional non proprietary sense) of all Builsa land however has no basis in the indigenous law.*

"In the Upper East and Upper West regions therefore the tindemba lineage and family headmen are the key players in land matters. Generally, the tindemba appear to have control over the land, particularly vacant communal land. Most agricultural and town lands are, however, in the effective control of lineage and family headmen. Individual rights in appropriated land are quite pronounced and are inheritable and secure." (e.s.)

All this is further confirmed by Dr. L. K. Agbosu a former Lecturer in Law, Ghana School of law, in his article "Land Administration in Northern Ghana", in (1980)12 R.G.L. 104 at 10. In reaching this conclusion we are not unmindful of the caution sounded by this court with regard to text writers' opinions where factual matters are disputed by the parties in *Hilodjie & another v. George [2005 – 2006] SCGLR 974.* But where such text writers are distinguished authorities and are consistent on the matters which happen to favour a party's case, the same can be relied on by a court, see *Ameoda v. Pordier* (1967)GLR 479 C.A. Most direct is as stated in the appellant's aforementioned statement of case thus:

"the respective status of the parties was further confirmed by the *Report of the Committee to Investigate a Land Dispute between the Tindonsobligo and the Kalbeo people.* The Report appears at page 1459 of the record of Proceedings. The following extract from the findings is instructive:

1. That the Tindana of Tindonsobligo is the allodial owner (original/founder) of the land in dispute among other lands in the area..
2. That the people of Kalbeo are usufructs (settler/farmers) who were given land by the Tindonsobligo Tindana hundreds of years ago.
3. That the Kalbeo people recognize the Tindana of Tindonsobligo as the allodial owner and have actually co-operated with him in the recent past.
4. That the Tindana of Tindonsobligo recognizes the title of the Kalbeo people as usufructs on the land in dispute and have co-operated with them in the recent past.
5. That some owners from Kalbeo jointly executed leases with the Tindana of Tindonsobligo in the recent past.
6. That both parties have shared compensation (money) paid by SSNIT and BOST thereby indicating their mutual recognition of each other's separate title."

My Lords, it would interest you to know that the Committee **comprised** of:

1. District Police Crime Officer, Mr. Patrick
2. Lawyer Robert Tatar, Convener of the Justice and Security Subcommittee of the Assembly
3. Nelson Mba, Public Relation Officer of the Assembly (Secretary)
4. The Regional Lands Officer, Mr. Adiaba Stanislaus (Member)

5. The Town and Country Planning Officer, Mr. Sulley Shittu (Member)
6. The district commander of the Bureau of National Investigations (BNI), Raymond Abu (Mamber) and
7. Regional Surveyor, Mr. L. Q. Torsu (Member).

There is therefore, no doubt about the respective positions of the parties."

Conclusion

From all the foregoing it is clear that since the respondent admits that the appellant is the Tindanana of Tindonsobligo and performs the functions of Tindana in respect of Kalbeo Lands also which are claimed by the respondent family as theirs, it follows that since a Tindana holds the land of which he is the Tindana in trust for the community of which he is the Tindana, the appellant is the Tindana of Kalbeo also and consequently the allodial owner of Kalbeo land in trust for them. It follows also that the respondent family can only have usufructuary title over such of Kalbeo lands as have been reduced into their possession as customary free holders thereof, *see Saaka v. Dahali* (1984-86)2 GLR 774 C.A. If the Tindana witnesses the payment of compensation in respect of a usufructuary interest, it does not prejudice his allodial title. The reliance by the High Court and the Court of Appeal on a passage from History for Senior Secondary School by J. K. Fynn and R,. Addo Fening, first published in 1991 and reprinted in 1993 by the Ministry of Education, Ch. 13 at page 492 thereof does not derogate from the status of a Tindana as owner in the sense of being the custodian of communal land for and on behalf of the community. That passage is as follows:

"These indigenous peoples did not have states or kingdoms and no central administration to make laws and enforce them. Such powers rested with the Tindana and enforce them. Such powers rested with the Tindana or `owner of the land' T<u>he Tindana, however, never actually owned the land; he was only its custodian.</u> His duties were to lead his people during the annual festivities, to officiate at sacrifices to the local shrine and to pray on behalf of his people in times of danger or disaster. For this reason, the powers of the Tindana were extensive even though they were based upon respect for punishment. Tindanas also became quite rich because all lost articles, goods and animals that were found became theirs unless they were claimed by their owners. They also received the hind legs of animals killed by hunters"(emphasis mine)."

We therefore allow the appeal to the extent hereafter indicated and set aside the judgments of the High Court and Court of Appeal, though concurrent ones.

We dismiss the plaintiff's action in so far as it is inconsistent with the memorandum of understanding between the parties herein relating to the compensation in respect of the disputed land and allow the counterclaim of the appellant except in so far as it is inconsistent with the said memorandum of understanding. For the avoidance of doubt we grant relief (1) of the Defendant/Appellant's counterclaim and dismiss reliefs (2) and (3) thereof and we further state that the parties remain bound by their special Memorandum of Understanding relating to the compensation in respect of the disputed land.

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE- BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) Y. APPAU

JUSTICE OF THE SUPREME COURT

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