IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA

CORAM: BROBBEY, JSC (PRESIDING)
ANSAH, JSC
DOTSE, JSC
YEBOAH, JSC
AKOTO-BAMFO (MRS), JSC

CIVIL APPEAL
NO.J4/15/2010
9TH JUNE, 2010

1. ERIC OMAN MENSAH
2. BENJAMIN OBOUR MENSAH … PLAINTIFFS/RESPONDENTS/ RESPONDENTS

VRS

1. MR. PAT YAWSON (SUBST. BY TETTEH TULASI)

2. GEORGE EDUSEI-POKU … DEFENDANTS/APPELLANTS /APPELLANTS

J U D G M E N T

YEBOAH, JSC:-

The respondents in this appeal commenced an action against the appellants as defendant at the High Court, Accra. By the amended writ of summons the plaintiff claimed against the defendants jointly and severally, a declaration of title to the land described in the schedule and other ancillary reliefs. The land the subject matter of the action is at Tudu, South East of Adabraka, Accra.

The claim of the plaintiffs is based on the simple ground, that the land was acquired by their grandfather in or about 1911. The said grandfather whose name was not pleaded enjoyed the use of the land and upon his death the land became the property of the father of the plaintiffs'. It was after the death of the plaintiff's father that the property passed to the plaintiffs' as successors. It was part of the pleadings and evidence that the statutory declaration covering the land was used to procure a

Land Title Certificate covering the land. The cause of action against the defendants is that the defendants had broken the wall on part of the land which serves as the boundary between the defendants' predecessors-in-title's land and that of the plaintiffs.

The defendant controverted most of the allegations of facts pleaded but it appears that when the evidence was led it became clear that the defendants acquired their land from one Mr. Yawson who inherited the land from his father. After the death of the first defendant's father, the property passed on to the first defendant. A vesting asset was prepared after the administrators had applied for and obtained letters of administration for the property to be vested in the first defendant who sold the property to the second defendant. In the course of his evidence, the second defendant claimed that the property was acquired in the name of his firm for a warehouse. The defendants' also counterclaimed for title and damages for trespass and prayed for a further order for cancellation of the Land Title Certificate granted to the plaintiffs, on grounds of fraud.

From the record of proceedings, several interlocutory proceedings were taken before the trial court which do not appear to be necessary for the determination of this appeal.

As stated above, both parties did not dispute that their predecessors-in-title owned their respective lands. Even though several issues were joined to establish the title of both parties, at the application for directions stage, the core issue which the trial court was confronted to resolve was not the issue of ownership but a boundary dispute between the plaintiffs and the first defendant whose title to his land had passed to the second

defendant. This indeed became very clear before His Lordship Justice Tweneboah – Kodua on 26/06/1995 when he made this formal order:

> "By Court: The Chief Surveyor of the Survey Department is accordingly appointed to undertake the job of making a composite plan of the area in dispute and superimpose the respective plans of the parties herein to help resolve the dispute between the parties. Specifically the Chief Surveyor will determine the boundaries of the land the parties claim to be theirs, particularly in the light of the registration of 1940 and 1994 herein exhibited by the parties.
>
> He will determine whether there is any conflict at all and the extent of the conflict and make a report". {Emphasis ours}

Even though this order was made in one of the interlocutory proceedings, it would appear that at that stage, even before the close of pleadings, the trial court was of the opinion that the issue at stake was the boundary between the plaintiffs and the defendants. This core issue eluded both the trial court and the court of Appeal in deciding this matter. It did appear, however, that on the 11/04/97 when the trial court presided over by His Lordship S.T. Fakye was taking evidence, one Joseph Enstia-Mensah, a surveyor from the Department of Survey gave evidence.
He did not in any way say that he was representing the Director of surveys or the Director of Surveys commissioned him to do the survey as ordered by the court in the formal order referred to above. When he was subjected to cross-examination this was what he said in answer to the questions by counsel for the plaintiffs:

Q. Were you part of the team that went to the site?

A. No

Q. Have you ever been to the site?

A. Yes

Q. When you went to the site you looked at all the land marks?

A. Yes

Q. From point A2 – B4 was a broken wall?

A. Yes

Q. Is the wall the boundary between the defendants' land and the land in dispute?

A. Yes

In another coincise cross-examination by the counsel for the defendants the witness said as follows;

Q. There is no licensed surveyor who signed the site plan of the plaintiffs

A. No

Q. Is the document dated?

A. No

The witness proceeded to tender exhibit C2 but the plaintiffs sought to tender another site plan in a Land Title Certificate through the witness as exhibit C3

The trial proceeded and both sides led evidence to establish their respective titles. The trial judge proceeded to the locus in quo. The record of proceedings, however, does not show the notes she made there as a judge. She, expressed herself in the judgment that " I have no doubt in my mind that the two plots are distinct from each other" It appeared further from the opinion expressed in the judgment of the High Court about inconsistency in the maps. The learned trial judge further stated as follows

> "It is true, looking at the two exhibits, there is a clear inconsistency in the maps as the positions of the two plots. Hence, the ridiculous situation of having two plots 10 and 20 being claimed by second defendant and plaintiffs respectfully…It appears therefore that the people form the Survey Department and Land Title had drawn their maps as a result of what probably indicated to them by the parties notably the second defendant"

The learned judge after going through the evidence including the maps entered judgment for the plaintiffs by relying on what she described as the correct site plan which are exhibits 1 and 2. She also dismissed the counterclaim of the defendants.

The defendants lodged an appeal against the judgment of the trial court on several grounds. The Court of Appeal dismissed the appeal on 4/12/2008. This appeal is from the judgment of the Court of Appeal. Before us several grounds of appeal have been argued to seek the reversal of the judgment.

At the Court of Appeal the learned judges in their opinion were confronted with this core issue of boundaries. Cases like ANANE V. DONKOR [1965] GLR 188 and AKOTO V. KAVEGE [1984-86] 1 GKR 385 which establish that failure to identify the boundaries of the land with accuracy would be fatal to a claim for declaration of title to land. On this the Court of Appeal expressed itself as follows;

> "The respondent had claimed for declaration of title and recovery of possession and admit the they share boundary with the first appellant and therefore he needed to positively establish the identity of the land in dispute and establish the boundary between his land and the land for the appellant"

The court also expressed similar opinion on the above proposition of the law against the defendants who had lodged a counterclaim.

As both parties were not contesting the issue of title from the evidence and the pleadings but the issue of boundary, it was imperative that clear findings on this ought to have been made by the learned trial judge. Land Title Certificate with its site plan of the subject matter may not be conclusive evidence of the boundaries of the subject matter. It may be prima facie evidence of title to the property, the subject matter of the registration, but when a boundary dispute is in issue with adjoining land a court of law is bound to ascertain the exact boundaries of the parties. This could be done if parties had met the surveyor who was enjoined by the order of the court to carry out the survey work. In this case, the surveyor admitted that he was not part of the team that went to the site. The learned judge who visited the land with the court clerk failed in her duty as a trial judge to record notes of the visit and the impressions gathered therefrom. Reliance, however, was placed on the evidence of CW3 one Agnes Nyarko who was a court official. Indeed the judge placed

no reliance on the plan drawn by the surveyor but offered no reasons for so doing.

The trial judge relied on Exhibits 1 and 2 to say that they "correspond with what is actually on the ground and exhibit CB3 which seeks to divide into plots 10 and 20 is either mischievous design or a genuine mistake"

We find from the judgment of the Court of Appeal that no effort was made to find from the facts the reasons for the trial judge's rejection of the evidence placed before her in respect of the exact boundaries of the parties and her own impression of the visit to the locus in quo.

The action being essentially one of a boundary dispute the trial judge was enjoined to locate the boundaries of the parties through proper admissible evidence on record and give reasons for so believing one side against the other. See In Re Aryeetey (Deceased) **Aryeety v. Okwabi** [1987-88] 2 GLR 44 CA.

The learned justices of the Court of Appeal even though appreciated correctly that the core issue was one of boundary, it was able to justify the findings made by the learned trial judge without assigning any cogent reasons whatsoever. While we commend them for locating the main issue in dispute, their Lordships should have gone further to justify the findings made by the trial judge which we find to be wholly in error and thus leading to the issue of the boundary unresolved by the two lower courts.

It is out respectful opinion that the appeal be allowed. We cannot at this second appellate court make any proper findings on the location of the exact boundary between the parties even though several site plans have been tendered, it is essentially the duty of the learned trial judge to do so. It is therefore ordered that there should be a fresh hearing of the matter, even though parties may have to go through another lengthy trial, the justice of the occasion demands that it should be so.

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

J. ANSAH
JUSTICE OF THE SUPREME COURT

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

V. AKOTO-BAMFO (MRS)
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