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

CORAM: ATUGUBA, JSC (PRESIDING)
DATE-BAH (DR), JSC
YEBOAH, JSC
BAFFOE-BONNIE, JSC
ARYEETEY, JSC

CIVIL APPEAL
NO. J4/22/2009
19TH MAY 2010

MAAKYE KORKOR AKUNSAH … PLAINTIFF/APPELLANT/APPELLANT

VRS

1. NAI ASHALLEY BOTCHWAY
   (CHIEF OF AWUTU OF AADAA FAMILY STOOL, AWUTU) … DEFENDANTS/RESPONDENTS/ RESPONDENTS
2. JEI RIVER FARM LIMITED

J U D G M E N T

ARYEETEY, JSC:-

The plaintiff/appellant/appellant whom we shall refer to as the plaintiff in this appeal is the biological mother of the 1st defendant/respondent/respondent whom, together with the 2nd defendant/respondent/respondent, we shall refer to as defendants. This matter first went to court when the 1st defendant, as chief of Ofaadaa, sold a piece of Ofadaa stool land to the 2nd defendant for its farming enterprise, which was followed by a claim of ownership by the plaintiff. She based her claim of ownership of the 212 acres of stool

land on a gift to her in 1947 by the reigning chief of Awutu Ofaadaa after which she performed the necessary rites of Akan custom in thanking the chief for the gift. By the year 2000 she, her children and tenant farmers had cultivated approximately 212 acres of the land by shifting cultivation as reflected in a site plan which she tendered in evidence. Even though by the year 2000 she had acquired a customary freehold interest in the land, the 1st defendant made a grant of a lease of her land to the 2nd defendant company for commercial farming purposes in September 2000 without her consent or concurrence in any form. Being completely dissatisfied with the trend of events, on 5th February 2001 she caused a writ to be issued against the defendants claiming some reliefs, including damages for trespass and perpetual injunction. Following the death of her counsel the action was discontinued. After exchange of letters between the parties the 2nd defendant company commenced its commercial farming activities on the land which resulted in the total destruction of cassava, corn, oil palm trees and other crops under cultivation without compensation to the plaintiff, her children and tenant farmers. Therefore on 10th April 2002 the plaintiff caused to be issued a writ of summons claiming the following reliefs against both defendants:

(a) A declaration of title in respect of all that piece and parcel of land situate at Awutu Ofaadaa in the Central Region as per the site plan attached containing an area of approximate of 212.06 acres and or
(b) A declaration that the plaintiff is the customary freehold owner of all that piece and parcel of land containing an approximate area of 212.06 acres as per the site plan attached.
(c) Damages for trespass.
(d) An order for the recovery of possession of all that area of land containing an approximate area of 212.06 acres as per the site plan attached.

(e) A perpetual injunction restraining the defendants, their agents and privies and or assigns from further alienation of the plaintiff's land as per the site plan attached.

(f) A perpetual injunction restraining the defendants, their agents and privies and or assigns from registering the land subject matter of this dispute at any Land Commission in Ghana.

(g) Costs and any further orders as this Honourable Court may seem fit.

The defendants deny that the chief of Ofaadaa, Nai Otabil Ashalley II made a customary grant of stool land in his lifetime to the plaintiff. It is the stand of the 1st defendant that during the period 1945 to 1956 the reigning chief of Ofaadaa who was the custodian of Awutu Ofaadaa stool lands was ill and a nine member committee was put in place to superintend over Awutu Ofaadaa stool lands. That means Nai Otabil Ashalley II was not in the position to make a gift of stool land to the plaintiff in 1947 personally. According to the 1st defendant, the plaintiff who is her mother, had inherited other farm lands from at least six deceased relatives which she controls. He also contends that a ruling of the Awutu Traditional Council confirms his right as chief of Ofaadaa to hold all Ofaadaa stool lands in trust for the lineage of Okomfo Ashalley, the originator of Ofaadaa village. The defendants counterclaim for the following reliefs:

(a) A declaration that the first defendant as chief of Ofaadaa and as confirmed by the several rulings of the various fora before whom he was made to appear by plaintiff either personally or through disguised agents is proper custodian of Ofaadaa lands inclusive of what is being claimed by plaintiff and the only one who can grant any valid lease to farmers.

(b) An order that the agreement reached between the 1st defendant and 2nd defendant is valid as it was contracted by parties at equal lengths appropriately seized with the legal capacity to contract and therefore should not be disturbed.

(c) A perpetual injunction restraining the plaintiff, her privies, agents and assigns from interfering in any dealings in Ofaadaa lands as custom demands.

(d) Plaintiff must be mulcted in punitive and exemplary costs for the multiplicity of actions – not a single one of which she was successful.

The trial High Court dismissed the plaintiff's claim and entered judgment for the defendants in respect of their counterclaim. At pages 74 and 73 of the record of appeal we have the concluding portion of the judgment which made pronouncement on some findings of fact which could be considered as crucial to the determination of the suit. That portion of the judgment is reproduced below as follows:

> "There is evidence before me that the 1st defendant consulted the plaintiff about the lease to the 2nd defendant together with elders of the family and they all agreed. Counsel for the plaintiff referred the court to the case of Golighty vrs. Ashrifi (supra) that a stool cannot alienate land in possession of a subject without her consent. That, being the law, I think has been satisfied because there is uncontroverted evidence that the plaintiff was informed and she consented to the same. That is if she was in possession of the land at all. I say so because there is evidence before me that she was not even in actual possession of the land in issue. All the defence witnesses who are plaintiff's own sisters gave evidence to the effect that the land in issue was never gifted to her. The 1st defendant gave evidence as to why there was the need for the lease i.e. to renovate the palace. He is the chief and as the custodian of the stool land can lease out a portion for that purpose with the consent and concurrence of the elders and principal members of the family. This I think he did. He even gave portions of the proceeds to the members of the family. This piece of evidence is not denied.
>
> I do not also believe the plaintiff's evidence that she together with her children and the tenants farmed 212.06 acres of land. Her own witness could not tell the size or acreage he farmed, from 60 to 40 to 10 and then finally 2 acres. On the preponderance of probabilities I think I believe the defendants' story against the plaintiff. I do not think that that the plaintiff is entitled to the reliefs set out in

her statement of claim and her writ is hereby dismissed as unmeritorious. I believe the [1st] defendant as the chief of the village and custodian of the stool lands subject to certain conditions can lease off the stool lands and he has fulfilled those conditions to my satisfaction. I therefore grant him his reliefs in his counterclaim."

The plaintiff appealed and before the Court of Appeal she filed the following grounds of appeal:

(a) Judgment is against the weight of the evidence adduced by the plaintiff.
(b) The learned trial judge erred in law when he failed to sufficiently consider whether or not the plaintiff was in possession of the land as against the defendants who could not show a better title.
(c) The learned trial judge erred in law by not sufficiently considering whether or not compensation was paid to plaintiff after she was dispossessed of the land in dispute by the defendants.
(d) The learned trial judge erred in law by not sufficiently considering whether or not a grantor of land can eject the grantee without the grantee's consent.

The unanimous judgment of the Court of Appeal hit the nail right on the head when it identified the core issue of the litigation which could be dealt with in the first ground of appeal namely: "The judgment was against the weight of evidence". When the issues raised in respect of that ground of appeal were determined in favour of the defendants the remaining grounds of appeal became irrelevant. At page 133 of the record of appeal this is what came out of the judgment of the Court of Appeal:

"Having then examined the pleadings and evidence on record, the fundamental issue in controversy in the suit was whether or not the land in dispute was gifted to the appellant by Nai Otabil Ashalley II, the late Chief of Awutu Ofaadaa in or around 1947. This being the core issue to be determined, grounds (b), (c), (d) as stated above are all misconceived"

The conclusion of the judgment of the Court of Appeal is at pages 135 and 136 of the record of appeal as follows:

> "The legal principles enunciated in the above cases all relate to customary gift of land individually owned as against land owned communally by a family or stool as in this suit. For such land owned by a family or a stool, I think that a further essential requirement to validate the gift would be for the donor to secure the consent of the principal family members for the grant. The presence of such principal members to witness the ceremony will thus be paramount to validate such a gift.
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> At the trial of this suit, the appellant led no evidence to prove any of the essential requirements a gift made under customary law. No evidence was led as to the "aseda" performed. Was it in the form of drink or money? All the appellant said was that her father, mother and uncle were present when the gift was made to her, were all dead.
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> The respondent led credible evidence through DW1 and DW2, to demonstrate that no such gift was made to the appellant. At the time she testified she was 68 years, she denied any gift of the stool land to the appellant. She testified that applicant and her children were all present at the family meeting when a decision was taken to lease the land to the 2nd respondent. DW2 was Kofi Nyarko. The appellant was the sister of DW2's mother. DW2 testified that he was in Ghana in 1947. At the time he had grown beard, so if the chief ever made a gift of the stool land to the appellant, he would have been invited. The combined effect of the evidence of DW1 and DW2 was to the effect that no gift was made to the appellant. Their evidence corroborated the evidence of the 1st respondent, the Chief of Awutu Ofaadaa. …
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> From the record of appeal, there is credible evidence adduced by respondents demonstrating that the appellant's claim or case was not reasonably probable and as such should lose the contest. The ground that the appeal is against the

weight of evidence is thus unsustainable since, the appellant failed woefully to prove the gift to her. The appeal therefore fails and it is hereby dismissed."

Again the plaintiff was not satisfied with the verdict of the appellate court and appealed to this court. Her grounds of appeal before this court are as follows:

(a) Judgment is against the weight of the evidence adduced by the plaintiff.
(b) The Court of Appeal erred in law when it failed to sufficiently consider whether or not the plaintiff was in possession of the land as against the defendants who could not show a better title.
(c) The Court of Appeal erred in law by failing to sufficiently consider whether or not compensation was paid to plaintiff after she was dispossessed of the land in dispute by the defendants.
(d) The Court of Appeal erred in law by not sufficiently considering whether or not a grantor of land can eject the grantee without the grantee's consent.
(e) The Court of Appeal erred by failing to find that the land was indeed gifted to the plaintiff/appellant/appellant.

In dealing with the issue of the alleged gift by Nai Otabil Ashalley II to the plaintiff, it must be emphasized that there is a distinction between a gift from an individual owner of land to a beneficiary and a gift of stool land by an occupant of a stool, which is more appropriately described as a grant. In the case of a personal gift the owner's decision is not subject to approval or consent from anyone. The only condition is that it should not be done in secret. It should be witnessed by others, preferably by members of the immediate family of the donor who are not entitled to question his decision provided they have no interest in the property which he intends to give away. It does not end there. The beneficiary of the gift expresses his acceptance and gratitude for the gift by payment of "aseda" in any form depending on the circumstances of each case. In the

case of Yoguo & Anr. V. Agyekum & Ors. Ollennu JSC explained the law on the essential requirements of customary gift as follows:

> "A valid gift, under customary law, is an unequivocal transfer of ownership by the donor to the donee, made with the widest publicity which the circumstances of the case may permit. For purposes of the required publicity, the gift is made in the presence of independent witnesses, some of whom should be members of the family of the donor who would have succeeded to the property if the donor had died intestate and, also, in the presence of members of the family of the donee who also would succeed to the property upon the death of the donee on intestacy. The gift is acknowledged by the donee by the presentation of drink or other articles to the donor; the drink or articles are handed to one of the witnesses — preferably a member of the donee's family, who in turn delivers it to one of the witnesses attending on behalf of the donor; libation is then poured declaring the transfer and the witnesses share a portion of the drink or other articles. Another form of publicity is exclusive possession and the exercise of overt acts of ownership by the donee after the ceremony: see Kwakuwah v. Nayenna, (1938) W.A.C.A. 165, Asare v. Teing, [1960] GLR 155, Addy v. Armah, (1960) Oll. C.L.L. 240 and Asante v. Bogyabi. [1966] GLR 232. Sarbah emphasizes these principles of acts of transfer and acceptance and proof of those two acts when he says in his Fanti Customary Laws (2nd ed.) at pp. 80-81: "Gift consists in the relinquishment of one's own right and the creation of the right of another, in lands, goods, or chattels, which creation is only completed by the acceptance of the offer of the gift by that other . . .
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> To constitute a valid gift, an intention of giving or passing the property in the thing given to the donee by the donor, who has power so to do, is necessary . . . The giving and acceptance must be proved and evidenced by such delivery or conveyance as the nature of the gift admits of." See also Anaman v. Eyeduwa [1978] GLR 114, Adamu v. Administrator General [1987-88] 2GLR 460."

However, in the case of a grant of stool land by the occupant of the stool, the chief or the head of family in case of family land which is communally owned, such grant is

always made subject to the approval and consent of the elders of the stool or the principal members of the family. See France v. Golightly; France v. Addy (Consolidated) [1991] 1 GLR 74, Odametey v. Clocuh & Anr. [1989-90] 1 GLR 14, Republic v. High Court, Accra, Ex Parte Lands Commission, [1995-96] 1 GLR 208. In this case we have to examine the totality of the evidence adduced at the trial before us and to ascertain the category in which we are to place the supposed gift of the late chief of Awutu Ofaada to the plaintiff in 1947.

It is not disputed that the land which is the subject matter of this litigation is Awutu Ofaadaa stool land. It would be expected therefore that a grant of that land to a stool subject would follow a laid down customary law principle of alienation of stool or family land. In the instant appeal when the plaintiff gave evidence on oath at the trial she testified as to how the land in dispute was gifted to her at page 5 of the record of appeal as follows:

> "I got this land when my uncle Otabil Ashalley II gave it to me to farm on. Otabil was the chief of Ofadaa stool. There were witnesses present when Otabil gave me the land. Though they are now deceased, they were my mother Tetewah, my father Kojo Teiko and Kofi Ashong. After the presentation custom was performed. I presented a bottle of schnapps as aseda to my uncle. That took place during that … eclipse of the sun. The size of the land is measured and my lawyer can tell the exact figure. I planted cassava, maize and palm on the land , the second defendant destroyed all these crops."

Our first observation is that the details of the plaintiff's sworn evidence quoted above do not answer to the requirements of customary law respecting grant of stool land by a stool to a subject. There is no evidence of approval and consent by elders of the stool.

The description of what supposedly happened was at best a representation of a private donation of what was indisputably stool land in the presence of close family members, including the plaintiff's father. That answers more to a disposal of a personal and not stool property by the then chief of Ofaadaa as a gift to the plaintiff.

The conclusion by the trial court which was confirmed by the Court of Appeal to the effect that no gift of stool land was made by Nai Otabil Ashalley II to the appellant should mean that any claim whatsoever based on the supposed ownership of the land in dispute cannot be sustained. Indeed the Court of Appeal had no cause to disturb the findings of the trial court. Its decision confirmed the vital finding of the trial court that the plaintiff failed to discharge the evidential burden placed on her by her pleading to the effect that the land in dispute was given to her as a gift by her late uncle, Nai Otabil Ashalley in 1947 when he was chief of Ofaadaa.

It is in this context that we ought to look at the grounds of appeal before this court. In the first place Grounds (a) - (d) of the grounds of appeal are a virtual reproduction of the grounds of appeal before the Court of Appeal with the necessary modifications. The only addition is Ground (e) of the grounds of appeal before this court, that is "The Court of Appeal erred by failing to find that the land was indeed gifted to the plaintiff/appellant/appellant." In any case we do not think that that additional ground (e) makes any difference. It is not surprising therefore that the appellant's statement of case in this appeal in respect of Grounds (a) – (d) of this appeal is a replica of the written submissions of appellant's counsel before the Court of Appeal. Since the Court of Appeal in its judgment assigned detailed reasoning to its conclusion that Ground (a),

that is, "The judgment is against the weight of evidence", is unsustainable, it would be expected that in this appeal the written submissions of the appellant's counsel would at least devote some attention to the analysis by the Court of Appeal of the evidence adduced at the trial for its decision, which is the subject matter in this appeal. That was not done. In our view, therefore, there is no effective challenge to the ruling of the Court of Appeal's judgment before this court. For the reasons given in this judgment we dismiss the appeal as being without merit.

B. T. ARYEETEY
JUSTICE OF THE SUPREME COURT

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

DR. S. K DATE-BAH
JUSTICE OF THE SUPREME COURT

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