IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – GHANA

CORAM: AKUFFO[MS.],(JSC),(PRESIDING),
ADINYIRA [MRS.], JSC
OWUSU [MS], JSC
YEBOAH, JSC
GBADEGBE, JSC

CIVIL APPEAL
NO: J4/50/2011

30TH MAY, 2012

1. MADAM LINDA SAGOE
2. MADAM VICTORIA ALLOTEY
3. BENJAMIN KWASI BUAH-BLAY --- APPELLANTS
4. JAMES QUAYE
5. EMMANUEL ASIEDU KOTTAH

VERSUS;

SOCIAL SECURITY AND NATIONAL --- RESPONDENT.
INSURANCE TRUST [SSNIT]

J U D G M E N T

GBADEGBE, JSC;

My Lords, by the appeal herein, the plaintiffs seek a reversal of the unanimous decision of the Court of Appeal that allowed in favour of the defendants an appeal from the decision of an Accra High Court. It appears from the decision with which we are concerned in these proceedings that the learned justices of the Court of Appeal came to the conclusion on the evidence that the plaintiffs had failed to discharge the burden of proof that they assumed in the matter. Consequently, they dismissed the claim of the plaintiffs and entered judgment in favour of the defendant but limited only to part of their counterclaim. The facts relevant to our determination in these proceedings are as follows.

The plaintiffs desirous of putting up residential dwellings severally negotiated the purchase from the James Town Stool, Accra of various plots of land within an area called Dunkonaa in the Greater Accra Region. The negotiations and purchase of the said plots according to the pleadings filed on their behalf took place on different dates between 1990 to 2004. The defendant corporation was in or about the year 1996 allocated portions of land that had been previously acquired by the government under EI 5 of 1993. The said acquisition was made primarily for the benefit of members of Ghana Real Estate Development Association (GREDA) but when they were unable to meet the requirements of the grant to them the government allocated 507.75 acres out of the 586.25 acres of the land compulsorily acquiredto the defendant. The allocation to the defendant was by means of a lease commencing from 1 November 1996 for a term of 99 years.

As a result of the grant of the leasehold to the defendant by the Lands Commission, the defendant was obliged to pay compensation to the previous owners, the James Town Stool. In the course of its entry on the land, the defendant noticed several acts of encroachment in the form of building works on the land. The defendant caused notices to be served on the developers and when the matter could not be peaceably resolved, it caused the buildings

on the land to be demolished. The plaintiffs claiming to be the owners of the properties demolished took out the action herein claiming general and special damages and a declaration that the defendant in utilising the area allocated to it had exceeded same by 43.30 acres as well as an order of perpetual injunction. Also claimed by the plaintiffs was an order of cancellation of the Land Title Certificate issued to the defendant on the ground of fraud.

The matter proceeded to a full scale trial before the High Court, Accra that was determined in favour of the plaintiffs with the award of special damages; perpetual injunction and the cancellation of a Land Title Certificate issued in favour of the defendant in respect of the area allocated to them. The defendant successfully appealed to the Court of Appeal. The plaintiffs thereafter launched the instant appeal to us seeking a reversal of the decision of the Court of Appeal. Before us in these proceedings, the plaintiffs by their notice of appeal have raised several objections to the judgment, the subject matter of the instant appeal. In this delivery, consideration would be given to the arguments presented to us by the plaintiffs in so far as they are relevant to our determination of the appeal herein.

Since the claim of the plaintiffs included damages for trespass and an order of perpetual injunction, on the strength of settled judicial opinion although there was no claim for declaration of title, the reliefs they sought necessarily required their title to the lands to be determined. It being so, the plaintiffs assumed the burden of convincingly and satisfactorily proving their respective titles to the areas that they had occupied before the demolition. In their determination, the learned justices of the Court of Appeal referring to among others, the case of **Kwesi Arhin v Davies** [1996-97] SCGLR 660 concluded that the plaintiffs had failed to discharge the evidential burden on them having regard to the state of the pleadings. The plaintiffs in a bid to persuade us to reverse the decision of the Court of Appeal in their favour have submitted considerable arguments to us partly of law and of mixed fact and law to the contrary. For reasons that follow shortly, the learned justices of the Court of

Appeal were right and expounded the law correctly on the questions that arise for our decision in the matter herein.

Having regard to the issues that turned on the pleadings, the plaintiffs assumed the burden of leading credible evidence on the facts on which they relied and also of persuading the trier of fact of their existence. One crucial fact that comes to mind requiring proof by them is the identities of the plots of the several claimants. This means from the rules of evidence that the plaintiffs bore the risk of failure of proof of persuasion. Unfortunately, there was no evidence introduced by them in respect of this crucial aspect of the case and one wonders how they could without leading any such evidence in relation to the area admitted by them to have been acquired by the state for the benefit of SSNIT have any reasonable tribunal accept their case? The knowledge that the plaintiffs had from their grantors that a huge portion of the lands owned by them had been compulsorily acquired for the use of the defendants placed a duty on them at the time they were negotiating to ascertain the identity of the respective areas acquired by them and also in the course of the trial before the High Court to lead credible evidence to establish clearly their identities, which must be proved to be outside the acquisition area. This required proof by clear, convincing and satisfactory evidence which a careful consideration from the admitted evidence does not point to.

In the case of **Memuna Moudy v Antwi** [2003-2004] SCGLR 967 in considering the burden that a party whose claim to title was in respect of compulsorily acquired land, **Wood JSC** (as she then was) observed at page 974 as follows:

> ***"Since the evidence led to the inescapable conclusion that the land in dispute had been compulsorily acquired by the government, in their bid to prove title, the plaintiffs unavoidably had to prove the extent or identity of the land owned by them as well as the mode of acquisition…."***

Although the nature of claim by the plaintiffs in the above case is in some respect different from the case of the plaintiffs herein, I think the observation ofthe learned judge in so far as it relates to proof by a party of portions of land that had been compulsorily acquired by the state is of much value to us in these proceedings. Authority aside, the observation to which reference has been made is in accord with principle and common sense as the title to compulsorily acquired lands cannot be impeached or called in question in any action. Therefore, since the plaintiffs through their grantors were aware of the acquisition they were required to show positively that the plots, which they had acquired individually fell outside the area of the acquisition. Since an acquisition by the state operates to extinguish any title and or interests that a person might have had at the date of the publication of the instrument of acquisition, it does not matter whether the acquisition was previous to the interest held in the land by an individual or subsequent thereto.

The plaintiffs must have thought that the mere proof that the area allocated to the defendants is less in size than what they registered amounted to proof that they went outside their grant in the demolition exercise which provoked the action herein. But this is not a necessary and or compelling inference to be made from the mere fact of proof that the area in respect of which the defendants' land title certificate was issued is larger than the area allotted to them by the Lands Commission. In fact, one reasonable inference that arises from the plaintiffs' inability to positively identify the areas that each of them occupied is that their areas fall within the site of SSNIT. See**: Re Accra Industrial Estate Acquisition** [1966] GLR 118 at 122. In the circumstances of this case, the failure by the plaintiffs to provide evidence to establish the particular areas occupied by each of them was fatal to their claims before the court. The conclusion that the learned justices of Appeal thus came to is supported by the application of the rules of evidence particularly the burden of proof. However, as the plaintiffs have called the said decision into question, we think it is appropriate for the purpose of the task we are faced with to measure it by reference to the rules of evidence.

Writing on the subject **"Incidence of the legal burden",** the learned authors of **Halsbury's Laws of England,** Volume 17 on Evidence at paragraph 14 of page 11 state as follows:

> *"**The legal burden of proof normally rests upon the party desiring the court to take action, thus a claimant must satisfy the tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom the substantiation of that particular allegation is an essential of his case."***

This statement is sometimes expressed that the party who asserts the affirmative of an issue has the incidence of the legal burden. Applying the above principle to the case herein, the plaintiffs must firstsatisfy this burden before the defendants introduce evidence in rebuttal. The Evidence Act, NRCD 323 makes elaborate provisions in sections 10 – 17 on the burden of proof including the consequence of failure to discharge the evidential burden by a party to an action. For a better understanding of the considerable submissions made to us by the plaintiffs regarding the conclusion reached by the learned justices of the Court of Appeal on the issue of proof by the plaintiffs of the area of trespass reference is made to relevant portions of the Evidence Act as follows:

> ***"10. (1) for the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the court.***
>
> ***(2) The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact or that he establish the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt.***

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

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact is more probable than its non-existence.

12. (1) except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities.

(2) "Preponderance of probabilities" means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.

14. Except as provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting."

By the rules of evidence, at the close of pleadings in the matter herein, based on the allocation of the burden of proof, the plaintiffs were required to lead evidence before the trial court on the respective areas claimed to belong to each of them for the purpose of persuading the trier of fact that the facts asserted in support of their case were more probable to have existed than their non-existence. "***Proof by a preponderance of probabilities"*** within the context of the burden of proof simply means weightier or superior evidence. Thus, the plaintiffswere required to lead evidence in proof of their ownership of the various portions of the area occupied by them before the demolition in such a manner that would satisfy the learned trial judge that their assertion

that the demolition exercise was carried out within an area separate and distinct from the area compulsorily acquired by the government under EI 5, was more probable to exist than its denial by the defendant. When the burden of proof is satisfied by a party, its effect is torender the evidence more convincing than that presented by his adversary.In their book entitled ***Mc Cormick on Evidence***, 2nd Edition published in 1972 at page 783, the learned authors writing on the subject: ***"The Burden of Proof: The Burden of Producing Evidence and the Burden of Persuasion***" state as follows:

> ***"……..The term encompasses two separate burdens of proof. One burden is that of producing evidence satisfactory to the judge, of a particular fact in issue. The second is the burden of persuading the trier of fact that the alleged fact is true.***
>
> ***The burden of producing evidence on an issue means the liability to an adverse ruling (generally a finding or directed verdict) if evidence on the issue has not been produced. It is usually cast first upon the party who has pleaded the existence of the fact, but as we shall see, the burden may shift to the adversary when the pleader has discharged his initial duty……..***
>
> ***The burden of persuasion becomes a crucial factor only if the parties have sustained their burdens of producing evidence and only when all the evidence has been introduced……"***

The above statements though made in reference to the evidentiary rules in the United States of Americaare substantially in agreement with the provisions contained in our Evidence Act to which reference has been made in the course of this judgment and its effect on the case herein is that the plaintiffs must first introduce evidence on the facts essential to their case before the

defendant would introduce evidence in rebuttal. But as the record of appeal discloses there was no proof of the areas occupied by the plaintiffs who strangely spent so much time in proof of the value of the demolished properties. It is surprising to relate that although the defendant testified positively that the demolition was in its area of allotment, the plaintiffs made no effort to place a contradictory view of the matter before the trial court and cannot now seek to be relieved from the consequences of such a default on their case. As this was a claim predicated primarily on trespass, the failure by the plaintiffs to prove that in carrying out the demolition the defendant encroached into their portions of land that fell outside the entire area occupied by EI 5 was fatal to their action. The plaintiffs not having introduced any evidence on the facts essential to their claim, the finding in respect of the alleged trespass in their favour by the trial court was not only unreasonable but perverse and the Court of Appeal acted correctly in setting it aside. See***:*** ***Gregory v Tandoh IV*** [2010] SCGLR 971 at 987 per ***Dotse JSC.***

From the evidence before us, it would appear that the plaintiffs entered the land of the respondent wrongfully and it being so they cannot sue in trespass against the real owner-the defendant whose entry on to the land is thus justified. In the absence of proof of their title to the areas in respect of which they mounted their action, the possession which the plaintiffs relied on in law must give way to proof of a better title to the land, a defence which on all the evidence the defendants established at the trial. Proof of a better title by the defendants rendered the plaintiffs encroachers and deprived them of any protection that ordinarily attaches to those who are in lawful possession.

Accordingly, the attacks in these proceedings directed at the conclusion reached by the Court of Appeal on the facts are to say the least without any merit and must be rejected. Reference is made in this regard to the very careful consideration given to this aspect of the matter by **Kanyoke J A** who delivered the judgment of the court at pages 502-511 of the record of appeal.

The above consideration is sufficient to dispose of the grounds of appeal that raise issues about the burden of proof and the effect of the evidence.

Having determined that the plaintiffs failed to discharge the burden of proof that they assumed at the close of pleadings, there is nothing of substance in the remaining claimsthat was deserving of the attention of the court. The collapse of their substantive claim based on an alleged encroachment on their lands by the defendants brought an end also to the ancillary reliefs. Consequently, the claim seeking a cancellation of the Land Title Certificate numbered as GA 18630 Vol.09 Folio 27 of the 14 February 2003 as well as the order for perpetual injunction that were allowedby the trial court were in error. On the state of the admitted evidence, the plaintiffs were without a scintilla of interest regarding the area comprised in the said land title certificate and accordingly it was not open to them to mount any claims concerning it. This appears to be the unassailable conclusion that the learned justices of the Court of Appeal came to at page 511 of the record of appeal as follows:

> **"In conclusion, I hold that for the foregoing reasons analysed above, the defendants having failed completely to discharge the burden of proving their titles and identities and boundaries of their respective plots and locations, the learned trial judge ought to have dismissed their claims."**

The next question of relevance for our determination in these proceedings is the counterclaim of the defendants, which was allowed in part by the Court of Appeal. Since the claim of the plaintiffs was adverse to the right of the defendant to occupy the area of 507.75 acres granted to them by the Lands Commission, the said claim to the land having failed, it was right for the Court of Appeal to grant those reliefs in their favour.

The above reasons are sufficient to dispose of the questions that arise for our determination in the appeal herein. The result is that the appeal herein fails and is accordingly dismissed.

(SGD) N. S. GBADEGBE

JUSTICE OF THE SUPREME COURT

(SGD) S. A. B. AKUFFO (MS)

JUSTICE OF THE SUPREME COURT

(SGD) S. O. A. ADINYIRA (MRS)

JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS)

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

<u>COUNSEL;</u>

NO APPEARANCE FOR THE APELLANTS.

PETER ZWENNES FOR THE REPONDENT