

GHANA / JUDGMENT

ANSU VRS MENSAH (C12/010/2023) [2024] GHAHC 185 (26 March 2024)

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IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, COMMERCIAL DIVISION “B” (GENERAL JURISDICTION) HELD AT SUNYANI ON MONDAY THE 26TH DAY OF MARCH, 2024 BEFORE HER LADYSHIP JUSTICE JOYCE BOAHEN, HIGH COURT JUDGE SUIT NO. C12/010/2023 ANSU ADUSA GORDON PLAINTIFF / RESPONDENT V KWASI ANING MENSAH DEFENDANT / APPELLANT JUDGMENT – CIVIL APPEAL Plaintiff Respondent represented by Lawful Attorney Vivian Kumi Defendant Appellant present Benjamin Kusi Adomah holding brief of Moses Kofi Obah for Defendant Appellant Da – Costa Asante holding brief of Romeo Asante Nimo for the Plaintiff Respondent BACKGROUND TO THE APPEAL The facts leading to this appeal is that the house of the Plaintiff / Respondent hereinafter referred to as Respondent abuts the house of the Defendant / Appellant hereinafter referred to as Appellant. The Respondent’s house is house number 56 Block F Sector 2 and the Appellants house is on plot number 54 Block F Sector 2 all located at Dormaa Ahenkro. The ownership of the parties’ plots is not in issue but the dispute between the parties is about the boundary between the parties which caused the Respondent to issue a writ of summons against the Appellant at the District Court Wamfie claiming the following reliefs; 1 A. The Plaintiff’s claim against the Defendant is for a declaration of title and recovery of possession to that entire plot No. 56 Block F Sector 2 situate at Nkyenkyenkye Dormaa Ahenkro is property of the Plaintiff. B. Damages for trespass C. Perpetual injunction restraining the Defendant, his agents, assigns, labourers and any person claiming through the Defendant from interfering with the Plaintiff’s property. The Appellant disputed the Plaintiff’s claims against him and denied trespassing unto the Respondent’s land. He contended that the Respondent is not entitled to the reliefs being sought. After hearing the parties, the District Court Wamfie presided over by His Worship Simon Gaga Esg. delivered judgment on 16th August, 2022 in favour of the Respondent. It is against this judgment that the Appellant appealed praying this Court for the judgment of the trial Court including all the consequential orders made upon the said judgment to be set aside. The Notice of Appeal was filed on 5th September, 2022 captured at pages 84 and 85 of the record of appeal. Part of the judgment complained of is; The entire judgment and all the consequential orders made on the 16th day of August 2022. The grounds of appeal are as follows;

- a. That the judgment is against the weight of evidence

- b. Additional grounds of appeal shall be filed upon receipt of the record of appeal 2 The Appellant did not file additional grounds of appeal and it is therefore considered to be abandoned by the Appellant. COUNSEL FOR APPELLANT'S SUBMISSION Arguing the appeal per written submission filed on 30th August, 2023 Counsel for the Appellant stated "the ground of appeal being the judgment is against the weight of evidence" and cited the cases of Tuakwa vs. Bosom [2001 -2002] Supreme Court of Ghana Law Report (SCGLR) 61 and Ago Sai vs. Kpobi Tetteh Tsuru III [2010] SCGLR and stated that per the above authorities the Appellate Court is obliged to thoroughly evaluate the record of appeal to come to a conclusion to either affirm the findings of the trial Court or arrive at a different conclusion. Counsel quoted the trial Court's judgment at page 83 of the record of appeal as follows; From the above analysis, the Plaintiff/Attorney has been able to proof (SIC)her case on the balance of probability than that of the Defendant. The length of the Plaintiff's plot No. 56 which is measured 90 feet includes where the Defendant has dug his well. I award GHS2,000.00 as damages for trespass against the Defendant for the Plaintiff. I award cost of GHS3,000.00 against the Defendant. Counsel submitted that the above finding of the trial Court is what they are submitting that it is against the weight of the evidence adduced during trial. Counsel stated the reliefs being sought by the Respondent and noted that the Respondent did not lead sufficient evidence to support the reliefs being sought before the trial Court. Counsel cited authorities on the burden of proof including section 11 (4) of the Evidence Act, 1975 (NRCD 323) and the case of Mondial Vener (GH) Limited vrs. Amuah Gyebu XV [2011] SCGLR 466 at 475 and argued that in an action for declaration of title to land the law requires the person asserting title and the person on whom the burden of persuasion falls 3 to prove the root of title, mode of acquisition and various acts of possession exercised over the subject matter of litigation. It is only when the party establishes these facts on the balance of probabilities that the party would be entitled to his claim. Counsel submitted that the Appellant denied the Respondent's statement of claim and therefore the Respondent assumed the burden to prove all the matters he alleged in his statement of claim. Counsel contended that the Respondent's claim in paragraph 4 of his statement of claim is that he acquired the disputed plot in 1995 from one George Agyei which the Defendant challenged. However, the Respondent did not lead any corroborative evidence in support of her claim but merely repeated her averments on oath. According to Counsel the Respondent's duty is to establish his root of title and the dimensions of his plot that the Appellant trespassed unto otherwise his action for trespass fails. Counsel rightly argued that it is not disputed that the property of both party abuts each other. The issue between the parties is the measurement of the plot which the Respondent claims belongs to him but he failed to establish from the totality of his evidence. According to Counsel, the Respondent did not tender any site plan or plan of land to substantiate his claims against the Appellant and she did not call witnesses to corroborate her evidence. She only tendered exhibit "A", a power of attorney without tendering a site plan or building plan. Counsel contended that it is surprising that the trial Judge at page 83 of the record of appeal stated that the length of the Respondent's plot is 90 feet and questioned where the Judge got the said measurement from. Counsel contended that the Court rejected the survey report filed by one Bajike, a Surveyor claiming that the

report would not help to resolve the issues. Counsel argued that the said conduct of the Judge was contrary to established practice because a Judge is not supposed to put up a case for a party suo motu per the case of *Ababio & Another vrs. Pastor Adusei* (2018) 122 GMJ 99. Counsel noted that the Judge took a measuring tape 4 and went to the land without any site plan or plan of land and started taking measurements. Counsel argued that in the light of the foregoing there is no doubt that the judgment is against the weight of evidence. Wherefore Counsel prayed the Court to set aside the judgment and all consequential orders on it and enter judgment in favour of the Appellant. COUNSEL FOR RESPONDENT'S SUBMISSION

Counsel for Respondent argued that the trial Judge did not fail to evaluate the pieces of evidence on record and that the Judge applied the law before arriving at his judgment. Counsel observed that the record of appeal was not sequential which made it difficult for ease of reference. Counsel cited applicable authorities including *Djin vs. Musa Baako* [2007/08] SCGLR 686 and argued that the Appellant's case is that the judgment is against the weight of evidence which implies that there are certain pieces of evidence on record which if the trial judge had averted his mind to he would not have arrived at the decision he did. The duty of the Appellate Court therefore is to examine the evidence. With reference to *Mondial Vener (GH) Limited vs. Amuah Gyebu XV* [2011] SCGLR case cited by Counsel for Appellant, Counsel for Respondent noted that the Respondent established his root of title by identifying his plot as plot number 56 Block F Sector 2 Nkyenkyenkye, Dormaa Ahenkro. Counsel contended that the Respondent established his root of title to one George Agyei whom the Respondent called as PW1 who gave evidence and was cross – examined by Counsel for Defendant. He also indicated that after he purchased the plot with an uncompleted building on it he completed the building in the year 2001 and put his wife and daughter in possession from then to date. Counsel referred to applicable authorities such as *Eric Asante vs. The Republic* [2017] SC, Civil Appeal No. J3/7/2013 delivered on 26th January, 2017 and stated that the evidence of the Plaintiff supported by PW1, makes the Respondent's evidence credible. In disputing Counsel for Appellant's argument that 5 the Respondent tendered only a power of attorney and not even a site plan, Counsel for Respondent argued that the Respondent submitted a site plan just as the Appellant but both site plans did not have dimensions which is a common feature of site plans. According to Counsel, the Respondent's site plan is at page 90 of the record of appeal and from page 17 onwards when the parties filed their survey instructions they attached their site plans so it is not true that the Respondent did not tender any site plan. Counsel argued that when the parties were ordered to file survey instructions they both presented site plans which were used to measure the land. According to Counsel, the Court did not find the report of the Surveyor useful and therefore rejected it which is proper because the Surveyor is a Court witness and his testimony is not binding on the Court. Counsel argued that upon the Court's rejection of the surveyor's report the Court caused the Registrar to write to the parties and the Town and Country Planning Officer who assisted the parties and the Court to go to locus to measure the respective lands of the parties, submitted the report as Court witness and was cross – examined. Counsel submitted that per the said report it was found that the Appellant had trespassed unto the Respondent's land. It is therefore not fair for Counsel for Appellant to

say that the trial judge took tape measure, went to the disputed land and without any plan of land containing measurements started taking measurements and noted that the Judge obtained the measurements from the locus inspection report at pages 24 and 25 of the record of appeal. Counsel argued that the issues raised by the Appellant in this appeal were all succinctly dealt with by the trial judge. Counsel contended that throughout the appeal the Appellant failed to show that there are certain pieces of evidence which if the trial Court applied in his favour could have changed the decision in his favour or certain pieces of evidence have been wrongly applied against him. Counsel contended that the Appellant could not properly point out the lapses in the judgment being appealed against. It is Counsel's case that this appeal is frivolous and that same should be dismissed for the judgment delivered by the trial Magistrate at Wamfie on 16th August, 2022 to be affirmed. BY COURT; In the case of Adei & Adei vs. Robertson & Sempe Stools [2017 – 2020] 2 SCGLR 447 at 449, the Court held that; where a trial Court that heard the evidence had made findings based on the evidence and had come to a conclusion in a case, an appellate Court ought not to disturb those findings except where there was no evidence on the record to support the findings or the reasons for the findings were unsatisfactory. An Appellate Court might also reverse findings of a lower Court where they were based on a wrong proposition or a rule of evidence or the findings were inconsistent with documentary evidence on the record. The Supreme Court held in the case of Ayeh & Akakpo vs. Ayaa Iddrisu 2010 SCGLR 891 at 894, that; it was a well established principle of law that where an appellant had appealed on the omnibus ground that the judgment was against the weight of the evidence, the Appellate Court was bound to consider comprehensively the entire evidence on record before coming to a conclusion on the matter. It is useful to note that the trial between the parties at the trial Court which triggered this appeal is not about declaration of title as couched in the Respondent's relief (A) since the respective plots of the parties are not disputed. The Respondent's plot is plot number 56 Block F Sector 2 while the Applicant's plot is plot number 54 Block F Sector 2 and they are both occupying their respective plots. The issue is about boundary between the parties and whether the Appellant had trespassed onto the Respondent's land. Counsel for the Appellant stated this so succinctly at page 6 of his submission as follows; My Lord, it is not in dispute that the house in which the Plaintiff resides abuts the house in which the Defendant also resides. What is however relevant for the purposes of the instant matter is; what is the boundary of the land which the Plaintiff claims is his. Differently put, what are the dimensions / measurements of the plot which the Plaintiff claims. Counsel submitted that the finding of the trial Court is against the weight of the evidence adduced during trial and that the Respondent did not lead sufficient evidence to support the grant of the reliefs being sought before the trial Court. Counsel argued that in an action for declaration of title to land, the burden of persuasion falls on the Respondent to prove his root of title, mode of acquisition and various acts of possession exercised over the subject matter of litigation. After proving his case he would be entitled to his claim. Counsel contended that the Respondent alleged in paragraph 4 of his statement of claim that he acquired the disputed plot in 1995 from one George Agyei which the Defendant challenged but the Respondent did not lead any corroborative evidence to support his claim but merely

repeated his averments on oath. Counsel for Respondent disputed the above submission of Counsel and stated that the Respondent established his root of title by identifying his plot as plot number 56 Block F Sector 2 Nkyenkyenkye, Dormaa Ahenkro. He established his root of title to one George Agyei whom the Respondent called as PW1 who gave evidence and was cross – examined by Counsel for Defendant and that the evidence of PW1 in support of the Respondent’s evidence makes the Respondent’s evidence credible. He also indicated that after he purchased the plot with an uncompleted building on it he completed the building in the year 2001 and put his wife and daughter in possession from then to date. According to Counsel for Respondent, the evidence of the Respondent supported by PW1, makes the Respondent’s evidence credible. To buttress Counsel for Respondent’s argument, the Court makes reference to pages 29 to 33 of the record of appeal where the Plaintiff’s Lawful Attorney gave evidence and was discharged. From pages 34 to 36 of the record of appeal, the said George Agyei gave evidence as PW1 and he was cross – examined by Counsel for the Appellant. The Court 8 however agrees with Counsel for Appellant that the Respondent tendered only the power of attorney as exhibit “1” and no other exhibits. Meanwhile the Appellant tendered documents which were marked as exhibits “1” to “5” on 29th July, 2019 at pages 48 – 51 and pages 60 to 63 when he gave evidence and he was cross - examined. Upon instructions of the Court the parties produced site plans to aid in the locus inspection that is why the Respondent’s site plan in the record of appeal is not marked as exhibit. Counsel for Appellant expressed surprise that the trial Magistrate stated at page 83 of the record of proceedings that the length of the Respondent’s plot is 90 feet and questioned where the Magistrate got the said measurement from. According to Counsel, the Court rejected the survey report filed by one Bajike, a Surveyor claiming that the report would not help to resolve the issues but this is proper in the Court’s view because the report of the Surveyor as a Court expert is not binding on the Court. Counsel for the Appellant contended that the trial Magistrate after rejecting the Surveyor’s report took a measuring tape and went to the land without any site plan or plan of land and started taking measurements. Counsel argued that in the light of the foregoing there is no doubt that the judgment is against the weight of evidence and Counsel prayed the Court to set aside the judgment and all consequential orders on it and enter judgment in favour of the Appellant. Counsel for Respondent noted the fact that the record of appeal was not tidy and stated how difficult it was to make references yet he tried to peruse it. Counsel noted that from page 17 of the record of appeal onwards when the parties filed their survey instructions they attached their site plans so it is not true that the Respondent did not tender any site plan. Counsel argued that when the parties were ordered to file survey instructions they both presented site plans which were used to measure the land. Counsel submitted that it is proper for the Court to reject a survey report if it is not found useful to the Court. Counsel argued that upon the Court’s rejection of the Surveyor’s 9 report, the Court caused the Registrar of the Court to write to the parties and the Town and Country Planning officer who together with the parties conducted locus inspection to measure the respective lands of the parties. The Court clerk submitted the report as Court witness and he was cross – examined by the parties. Counsel submitted that per the said report it was found that the Appellant trespassed unto the Respondent’s land

and therefore it is unfair for Counsel for Appellant to say that the trial Magistrate took tape measure went to the disputed land and without any plan of land containing measurements started taking measurements and noted that the Judge obtained the measurements from the locus inspection report at pages 24 and 25 of the record of proceedings. Counsel argued that the issues raised by the Appellant in this appeal were all succinctly dealt with by the trial Magistrate. Counsel contended that throughout the appeal the Appellant failed to show that there are certain pieces of evidence which if the trial Court applied in his favour could have changed the decision in his favour or certain pieces of evidence have been wrongly applied against him. Counsel argued that the Appellant could not properly point out the lapses in the judgment being appealed against. It is Counsel's case that this appeal is frivolous and that same should be dismissed for the judgment delivered by the trial Magistrate at Wamfie on 16th August, 2022 to be affirmed. It is important to note that in order to resolve the issue between the parties, the trial Court on 2nd June, 2020 at page 66 of the record of appeal, ordered the parties to file survey instructions for a Surveyor to survey the land and produce a report on the correct boundary of the parties. In the said order, the parties were to attach their site plans. At the subsequent sitting on 26th August, 2020 at page 67 of the record of appeal, the Court noted that the parties had filed their survey instructions and ordered the Registrar to write to the Regional Surveyor to survey the disputed land. On 5th October, 2021 at page 71 of the record of appeal, the Court noted that the Surveyor had filed his report and 10 ordered the Registrar to summon the Surveyor to appear to tender the report on 16th November, 2021. On 11th January, 2022 at page 73 of the record of appeal, the Surveyor tendered her report. The Respondent had no questions for the Surveyor by way of cross – examination but the Appellant cross – examined the Surveyor. The Court rejected the report of the Surveyor at page 74 of the record of appeal with the reason that the Surveyor said she asked the parties to get new site plans from the Dormaa Assembly but they failed and the site plan they produced did not conform to the (SIC). The Court ordered the Registrar to write to the Dormaa Municipal Town Planning Officer to assist the Court to visit locus. The Registrar complied and wrote a letter dated 12th January, 2022 at page 22 of the record of appeal addressed to the Town and Country Planning Officer Dormaa Central Municipal Assembly, Dormaa Ahenkro informing the said officer that per an order of the Court he is to assist the Court to go on locus inspection on 25th January, 2022 at 10:30am prompt to enable the Court to take a decision on the matter. The locus inspection report was filed on 17th March, 2022 at pages 24 and 25 of the record of appeal and signed by the Court clerk. The report indicated that the parties, the Court Clerk of the Wamfie Court, the Dormaa Municipal Town and Country Planning Officer with two other officers from his department went for locus inspection. The Court ordered the parties to submit their old site plans which they did and both were checked. The Court ordered for plot numbers 54 and 56 Block F Sector 2 to be measured. On the field, 20 feet measurement was taken starting from the centre of the road to the front view of the Respondent's building which is opposite the road. From where the 20 feet measurement ended, 90 feet measurement was taken which ended at where the Appellant constructed a well. Ninety feet was measured from where the well was located to the Appellant's land, they got 125 feet making an extra 35 feet so the

Appellant's plot measured 125 feet. From pages 24 and 25 of the record of appeal, the proceedings continued with the evidence of the parties among others and on 29th March, 11 2022 at pages 75 to 76 the Court Clerk tendered the report as exhibit "CW1" without objection by the parties and he was cross – examined by Respondent and the Appellant. The judgment is at pages 77 to 83 of the record of appeal where the trial Magistrate concluded as follows; From the above analysis, the Plaintiff /Attorney has been able to prove (SIC)her case on the balance of probability than that of the Defendant. The length of the Plaintiff's plot No. 56 Block F which is measured 90 feet includes where the Defendant has dug his well. I award GHS2,000.00 as damages for trespass against the Defendant for the Plaintiff. I award cost of GHS3,000.00 against the Defendant. It is instructive to note that the record of appeal was not properly arranged which made reference to it very difficult as observed by Counsel for Respondent and as indicated above in the arrangement of the pages although the index appeared to be in order. However, the Court managed to peruse it painstakingly and in the light of the submission of Counsel for the parties the Court is convinced and satisfied that there was sufficient evidence on record which supported the findings of the trial Court. The reasons the trial Magistrate gave for his findings, that is the measurements that were made from the locus inspection is satisfactory. The findings of the Magistrate was consistent with documentary and oral evidence provided including site plans, locus inspection report, cross – examination of the Court clerk on the locus inspection report among others. The Court has comprehensively considered the entire record of appeal and is convinced that the judgment of the trial Magistrate supported the evidence on record. The Appellant could not establish any lapses in the judgment for which reason this Court should set aside the said judgment because all the purported lapses the Appellant raised in the appeal were addressed by the record of appeal which informed the trial Magistrate's decision. In the light of the foregoing, the judgment of His Worship Simon Gaga Esq. dated 16th August, 2022 at the Wamfie District Court is in the Court's view supported by 12 the weight of evidence and the said judgment is hereby affirmed with the consequential orders. In the circumstance, the appeal fails and same is hereby dismissed in its entirety. Cost of GHS5,000.00 awarded in favour of the Respondent. JUSTICE JOYCE BOAHEN HIGH COURT JUDGE 26TH MARCH 2024 (SGD) 13

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