

GHANA / JUDGMENT

MARK ADU PREMPEH VS SAMUEL ANKRAH (KH1/06/22) [2024] GHACA 1 (25 January 2024)

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IN THE SUPERIOR COURT OF JUDICATURE IN THE COURT OF APPEAL ACCRA – GHANA AD - 2024 CORAM: RICHARD ADJEI -FRIMPONG JSC. (PRESIDING) JENNIFER DODOO (MRS) J.A. HAFISATA AMALEBOBA (MRS) J. A CIVIL APPEAL NO: KH1/06/22 25TH JANUARY 2024. MARK ADU PREMPEH - PLAINTIFF/RESPONDENT VRS SAMUEL ANKRAH - 1ST DEFENDANT DREKE - 2ND DEFENDANT ABIGAIL SAFO - 3RD DEFENDANT/APPELLANT

JUDGMENT

1 AMALEBOBA (MRS) J.A.

INTRODUCTION

This is an Appeal from the decision of the Circuit Court, Akropong, Akuapem dated 19th November 2019. The Circuit Court per its Judgment entered Judgment for the Plaintiff on all reliefs sought against Defendants. Being aggrieved by the decision of the Circuit Court, the 3rd Defendant /Appellant, filed the instant Appeal. In this Judgment, the parties will be known by their designations in the Court below. The Appellant will be referred to as 3rd Defendant and the Respondent referred to as Plaintiff. The other Defendants are not parties to this Appeal.

BACKGROUND

By his Writ of Summons filed in the Circuit Court, the Plaintiff claimed against Defendants, orders for a declaration of title to the land in dispute situate at Kitase, recovery of possession, damages for trespass and perpetual injunction. The Plaintiff's case in the Court below in summary was that on or about 7th April 2002, he acquired a piece or parcel of land measuring 0.36 hectare or 0.88 acres, at Peduase in the Akwapim South District in the Eastern Region, from Nana Korkor Ntim II, Queen mother of Kitase in the Eastern Region. According to the Plaintiff, on 17th July 1995, the said Nana Korkor Ntim II, his grantor acquired the said land through a gift of a parcel of land measuring 6.75 acres, from one 2 Abusuapanyin Kofi Sakyi, the Head and Lawful representative of the Asona family of Kitase. The Plaintiff asserted that his grantor's

ownership of the land was confirmed by a Judgment granted in her favour in the case of Dr. Isaac Kwasi Nuamah and Mrs. Linda Nuamah vrs. Glanda Mills and Nana Korkor Ntim II – Suit No. 104/2002. The Plaintiff averred that his indenture was stamped as LV/ER 2463/2015 and plotted as RE 1277/2015. The Plaintiff contended that he was in quiet possession of the said land and constructed a building and fence on the land, until the Defendants entered his land threatened his workers and had them arrested on one occasion. He averred that the Defendants having entered the land, they have made it difficult for him to enjoy quite possession, hence the action commenced against them. The 1st and 2nd Defendant never contested the Plaintiff's claim in the Court below. The 3rd Defendant who applied and was joined to the suit stated that the 2nd Defendant is a family friend who was acting on her behalf, at a time she was out of the country. For this reason, the 2nd Defendant filed no processes in the suit. The 1st Defendant who initially entered conditional appearance failed to take any steps after he was unable to have the suit dismissed. Interlocutory Judgment was entered against him. The Record shows that though served with the Judgment and Hearing notices, he failed to participate in the trial. The suit accordingly proceeded without 1st Defendant. The 3rd Defendant per her Statement of Defence denied the assertions of the Plaintiff. She averred that the Peduase/Kitase lands are stool lands held in trust by the Omanhene for the people of Peduase/ Kitase and that Abusuapanyin Nana Kofi Sakyi had no right to gift the land to the Plaintiff's grantor Nana Korkor Ntim II, or anyone else. According to the 3rd Defendant, in 2004 her family through her sister-in-law obtained the disputed land from one Kwabena Fosu, whose grantor was Nana Twum Ankrah II, after which she constructed a wooden structure and put her caretaker one Osei in charge of 3 same. The 3rd Defendant averred further that some years after her acquisition of the land, one Nana Kwasi Ankrah III, regent and Omanhene of Kitase published a Statutory Declaration in the Newspapers directing all persons who had purchased Kitase/Peduase lands to regularize their titles with him. She said thereupon in 2015, she again obtained a grant in respect of the land, from the said Nana Kwasi Ankrah III. The Defendant asserted that sometime in 2009 she had a fence wall constructed around her portion of the disputed property, that however in 2015 her caretaker informed her that the Plaintiff had pulled same down, leaving a cement block room she had constructed for the caretaker's use. The 3rd Defendant averred that she has been in quiet possession of the land until the Plaintiff disturbed her quiet possession. by pulling down her fence wall amidst threats. The Defendant filed a counterclaim praying for a declaration of title to the land in dispute situate at Kitase, damages for trespass, an order of perpetual injunction and an order directing the lands commission to cancel the Plaintiff's Deed plotted in their records. After the Plaintiff had filed a Reply and Defence to counterclaim, pleadings were closed, and issues set down for trial as follows:

- a. Whether or not Plaintiff acquired the subject land from the rightful owner.
- b. Whether or not Plaintiff is able to show the demarcation of his land.
- c. Whether or not Plaintiff is in possession of the land.
- d. Whether or not Plaintiff is entitled to his claim.

- e. Whether or not Defendants are liable.
- f. Whether or not Plaintiff is stopped by conduct from asserting any claim of the title to the disputed land. 4
- g. Whether or not 3rd Defendant is the owner of the disputed land, having exercised rights of ownership and possession by overt acts for years without interference or objection from the Plaintiff.
- h. Whether or not Kitase lands are family land belonging to the stool. At the close of the trial and upon the evaluation of the evidence, the learned trial Judge having found the claims of the Plaintiff to have been established, entered Judgment for the Plaintiff. It is this Judgment which the 3rd Defendant seeks to overturn by this Appeal. The Plaintiff did not file a cross-appeal. THIS APPEAL By the Notice of Appeal filed by the 3rd Defendant on 19th December 2019, which is at pages 386 and 389 of the Record of Appeal (ROA), the 3rd Defendant filed the following grounds of Appeal: GROUNDS OF APPEAL
- i. The Judgment is against the weight of evidence. ii. that the learned Trial Judge erred in law when she ignored the long undisturbed possession of the land by the 3rd Defendant/Appellant herein. iii. Further grounds of appeal will be filed upon the receipt of the full record of appeal. No further ground of appeal was however, filed by the 3rd Defendant. SUBMISSIONS OF COUNSEL FOR 3RD DEFENDANT 5 Counsel for 3rd Defendant submitted that though the Trial Judge set issues (f) and (g) down for trial, same were not addressed in the Judgment. Counsel contends that had these issues been properly determined, the Trial Judge would have entered Judgment for the 3rd Defendant. In arguing that the Judgment of the Court is against the weight of evidence, Counsel referred to Section 10 OF THE LIMITATION ACT, 1972 (NRCD 54), contending that if the Trial Court had applied the said provisions and the principles of adverse possession, the Court would have entered Judgment for the 3rd Defendant, since she was able to establish that she had been in long possession of the land. Counsel for 3rd Defendant supported his arguments with the cases of MORGAN KWAME OPOKU V. AKOSUA OSAA: CIVIL APPEAL NO H1/214/2015 (21ST MARCH, 2019); VANDERPUYE V. GOLIGHTLY 7 ORS [1965] GLR 453 S.C.; ELIZEBETH OSEI V. MADAM ALICE EFUA KORANG [2013] 58 GMJ SC 1 AND ADJETEY ADJEI AND OTHERES V. NMAI BOI AND ORS [2013 – 2014] 2 SCGLR 147. Counsel for 3rd Defendant argued further that from Exhibit CW1 and the evidence of the Surveyor, the Plaintiff's building is not within his land as shown by the site plan or the land physically shown to the Surveyor by the Plaintiff. He argued further that the Plaintiff's sand and stones are a distance away from the 3rd Defendant's land as indicated by her site plan and shown by her. Counsel submitted that the Plaintiff's building is outside the land he claims and furthermore, that the site plan of the Plaintiff has not been approved by the Director of Surveys. According to Counsel, the 3rd Defendant's land corresponds with her site plan and that shown on the land and her building is within her land. 6 Counsel for 3rd Defendant submitted further that though the Plaintiff contends that he is in possession of the land and has fenced same, he states that someone has planted maize and cassava on the land. Counsel stated that these inconsistencies show that Plaintiff

was not in possession of the land, for had he been in possession, the said maize and cassava would not have been planted. Counsel argued that the Plaintiff is caught by section 10 OF THE LIMITATION ACT, 1972 (NRCD 54) and twelve (12) years having lapsed, the Plaintiff has slept on his rights, having allowed the 3rd Defendant to spend resources to develop the land and occupy same. 3rd Defendant further contended that the Plaintiff is caught by laches and acquiescence. Counsel for 3rd Defendant further contended that though the 3rd Defendant knows the boundaries of the land, the Plaintiff does not know the boundaries of his land and is caught by the authority of AKOTO V. KAVEGE [1984 – 86] 2GLR 365. According to Counsel for the 3rd Defendant, though the Trial Judge considered Exhibit 4 which is the Lease between Nana Kwasi Ankrah III and 3rd Defendant, she failed to consider Exhibit 3 which is the parent document of Exhibit 4. Counsel contended that Exhibit AS1 is a Search Report which indeed confirms that the said Kwabena Fosu was granted the land in dispute by Nana Twum Ankrah II on 6th May 2000. Counsel argued further that the evidence before the Court establishes that Exhibit 3, is a Deed of Conveyance by which one Kwabena Ofosu granted the 3rd Defendant land in 2004 and that Exhibit 4 was obtained by the 3rd Defendant only when she sought to regularize her title pursuant to a Statutory Declaration published by Nana Kwasi Ankrah III. Counsel for 3rd Defendant argued that the evidence before the Court establishes that the 3rd Defendant and her grantor were in adverse possession of the land in dispute for a period of twelve (12) years or more. Counsel contended that though the Plaintiff asserts 7 that he acquired his land in 2002, he registered same in 2015 as seen from Exhibit AS 1, by which time the 3rd Defendant and her grantor had been in possession for more than twelve (12) years. Counsel for 3rd Defendant submitted that for these reasons the Trial Judge ought to have determined the issue of adverse possession since same had been set down for trial. COUNSEL FOR PLAINTIFF'S SUBMISSIONS Counsel for Plaintiff stated in his submissions that the Trial Judge evaluated the evidence before the Court and found Exhibit 4 to be a fraudulent document, on the basis among others, that the said Abusuapanyin Kofi Sakyi who purportedly witnessed same in 2013 died in 2012. He submitted that the 3rd Defendant was unable to establish that the said land was Kitase Stool land as contended by her. Counsel argued further that the 3rd Defendant cannot rely on Exhibit 3 in support of her case, since the Plaintiff's grantor Nana Korkor Ntim II, had obtained a valid grant from the head of the Asona family in 1995, long before the grant to the 3rd Defendant's grantor in 2002 and the subsequent grant to the 3rd Defendant herself in 2004. Counsel for Plaintiff further argued that there was no certainty to Exhibit 3, since the Deed of Conveyance purported to grant the land to Abigail Safo and her named children, when in fact the 3rd Defendant was the only person who signed same. Counsel for Plaintiff submitted further that the argument by Counsel for 3rd Defendant that Exhibit 3 is the parent document of Exhibit 4 has no merit. According to Counsel, though Exhibit 3 has no attached site plan, same has been attached to a Search Report Exhibit AL 1A. Counsel contended that the site plan attached to the Search Report, Exhibit AL 1B which is in respect of land granted by Exhibit 4, shows that the parcel of 8 land granted by Exhibit 3 and that granted by Exhibit 4 are different, for which reason Exhibit 3 cannot be said to be the parent document of Exhibit 4. Counsel contends that Exhibit 3 is defective and Exhibit 4

fraudulent. Counsel for Plaintiff argued that the land in dispute is family land belonging to the Asona Royal Family of Kitase and not Kitase Stool land as contended by the 3rd Defendant. Counsel for Plaintiff contends that the 3rd Defendant was unable to establish that she acquired the land from the proper grantors. Counsel for Plaintiff contended that the arguments of Counsel for 3rd Defendant on CW1 are inaccurate, as the composite plan shows that the single room structure or building claimed by the 3rd Defendant falls outside the Site Plan of the Plaintiff and is not on his land. Counsel argued that the farming on the land by a trespasser occurred long after the Plaintiff took possession of the land in 2002 and after he had built his fence wall along one boundary of his land. He submitted that the Plaintiff's case has always been consistent. Counsel for Plaintiff submitted further that in any case, Exhibit CW1 and evidence of the Surveyor reveals that the site plan the 3rd Defendant submitted for the composite plan was that contained in Exhibit 4. According to Counsel Exhibit 4 having been declared fraudulent, the 3rd Defendant cannot make any claim through same, more so when the land granted her per Exhibit 3 which she claims to be her parent document is different from that in Exhibit 4. According to Counsel for Plaintiff, the contention by Counsel for the 3rd Defendant that the Plaintiff's site plan was not approved by the Director of Surveys only relates to an application for registration of land and not to the facts before the Court. 9 Counsel for Plaintiff submitted that the 3rd Defendant never set up a Defence of adverse possession at the trial and cannot do so on appeal and further that in any event, she was unable to establish long possession of the land at the trial. DEETERMINATION OF THIS APPEAL There is a presumption that the Judgment of the Court below on the facts is correct. As such, where the 3rd Defendant who is the Appellant, contends that the Judgment of the Court below is wrong, she ought to displace the presumption in favour of its correctness. In the case of KISSIEDU V. DOMPREH [1937 WACA] 281@ 286, Lord Russel stated of the presumption thus: "Their Lordships find it impossible to say that the Court of Appeal could on the materials before them, properly be satisfied that this finding of fact by the trial judge must be erroneous. No doubt an appeal in a case tried by a judge alone is not governed by the same rules which apply to an appeal after a trial and verdict by a jury. It is rehearing. Nevertheless, before an appellate court can properly reverse a finding of fact by a trial judge who has seen and heard the witnesses and can best judge not merely their intention and desire to speak the truth, but of their accuracy in fact, it must come to an affirmative conclusion that the finding is wrong. There is a presumption in favour of its correctness which must be displaced." Furthermore, where the 3rd Defendant as the Appellant, contends that the Judgment of the Court below is against the weight of evidence, the burden of proof is on her to establish same with reference to the evidence on record. The Court of Appeal per ESSIEM JA in AMPOMAH V. VOLTA RIVER AUTHORITY [1989-90] 2 GLR 28 at page 35 stated this principle as follows: 10 "Whereas in this case, an Appellant charge, that the Judgment of the Court below is against the weight of the evidence, it must be remembered that there is a presumption that the Judgment of the Court below on the facts is correct. The Appellant in such a case assumes the burden of showing from the evidence on record that the Judgment is indeed against the weight of the evidence. The Appeal on that ground must fail if that burden is not discharged..." The

Supreme Court reiterated this position of the law in the case of DJIN V. MUSA BAAKO [2007 – 2008] SCGLR 686 (HOLDING 1). The onus is therefore on the 3rd Defendant, being the Appellant in this case, to demonstrate which pieces of evidence were wrongly applied against her and which pieces of evidence were not applied and if applied, will turn the decision of the Court below in her favour. Though the burden of proof is on the Appellant in an Appeal to show that the Judgment is against the weight of evidence, this Court ought to look at the entire Record of Appeal, taking into account the testimonies and documentary evidence to satisfy itself that the Learned Trial Judge's conclusions are amply supported by the evidence on record. This was the position taken by the Supreme Court in the case of TUAQWA V. BOSOM [2001 – 2002] SCGLR 61@ 65 per Sophia Akuffo JSC. However, the determination on the findings of fact is not only limited to the facts on record, for where a decision on the facts requires a determination on what the law is on a point or issue, this Court needs to make a determination of both law and fact. This was the position taken in the case of OWUSU -DOMENA V. AMOAH [2015 – 2016] SCGLR 790 @ 799 per Benin JSC (as he then was) as follows: “..... Sometimes a decision on facts depends on what the law is on the point or issue. And even the process of finding out whether a party has discharged the burden of persuasion or producing 11 evidence is a matter of law. Thus, when the appeal is based on the omnibus ground that the judgment is against the weight of evidence, both factual and legal arguments could be made where the legal arguments would help advance or facilitate a determination of the factual matters”. The Supreme Court has reiterated this position in the case of In Re Okine (DECD) DODOO AND ANOR V. OKINE [2003 – 2004] SCGLR 582, thus: (Holding 1), “ an appellate court must not disturb the findings of fact made by a trial court, even if the appellate court could have come to a different conclusion, unless the findings of fact made by the trial judge were wholly unsupportable by the evidence. Therefore, where the evidence was conflicting, the decision of the trial court as to which version of the facts to accept was to be preferred, and the appellate court might substitute its own view only in the most glaring of cases. That was primarily because the trial judge had the advantage of listening to the entire evidence and watching the reactions and demeanour of the parties and their witnesses.” Guided by the foregoing, we will now proceed to determine this Appeal. Counsel for 3rd Defendant argued the two grounds of Appeal together. We will determine the two grounds of Appeal together, as a determination of both grounds will require that we examine the evidence on record in arriving at our conclusion. It is settled law that a party seeking a declaration of title to land ought to prove his acquisition from the rightful owner, to enable him succeed on his claim. See: KPONUGLO V. KODADJA [1933] 2 WACA 24. The 3rd Defendant testified that the land she acquired from one Kwabena Fosu in 2004 per Exhibit 3 and subsequently from Nana Kwasi Ankrah III Regent of Kitase in 2013 per Exhibit 4, was Kitase Stool land. The Plaintiff on the other hand testified that the land in question was Asona family land acquired from his grantor, Nana Korkor Ntim II, Queen mother of Kitase, per Exhibit A. The Trial Judge upon evaluation of the evidence adduced by both parties and their witnesses in her Judgment at page 384 of the Record of Appeal 12 found that the Plaintiff's grantor had indeed acquired land belonging to her family (Asona family), which included the disputed land when she was enstooled as

queen mother. The Trial Judge at page 384 of the Record of Appeal rejected the case of the 3rd Defendant on the title of her grantor, stating that the 3rd Defendant and her witnesses failed to adduce satisfactory evidence to establish that the land in dispute was stool land. The 3rd Defendant has lodged no appeal against this decision of the Trial Court. The import being that the finding against the 3rd Defendant, that she failed to acquire her title from the rightful grantor is correct and binding on her. The Trial judge made a further finding in her Judgment at page 379 – 382 of the ROA that upon the evidence, the Deed of Conveyance Exhibit 4 (being the grant upon which the 3rd Defendant relies), said to have been given concurrence by Abusuapanyin Kofi Sakyi, Head of the Asona family in 2013, was not signed by him since he died in 2012, as admitted by DW2. The Trial Judge made a further finding that the oath purportedly proved by the Abusuapanyin was not signed by him since he died in 2012. The Trial Court further determined, that DW3 who was one of the signatories to the Lease, Exhibit 4 was not a member of the Asona Family of Kitase by his own admission under cross- examination. The trial Court concluded that the 3rd Defendant's grant Exhibit 4, was not valid and did not pass any title to her. This finding of the Trial Court has also not been challenged by the 3rd Defendant. It is binding on her. Not having challenged these findings of the Trial Court, the 3rd Defendant however, contends in this Appeal that Exhibit 3 which is the parent document of Exhibit 4 was disregarded by the Trial Judge. Her Counsel contends that in dismissing Exhibit 4, the Trial should have considered Exhibit 3, which the 3rd Defendant obtained prior in time to the regularization of same per Exhibit 4. 13 Exhibit 3 as stated is the Deed of Conveyance of the disputed land, from Kwabena Fosu to the 3rd Defendant. The said Kwabena Fosu recites a grant from one Nana Twum Ankrah II in 2000. In the said Exhibit 3, Nana Twum Ankrah II made the grant in his capacity as the Head of the Royal Asona family. The claim of the 3rd Defendant at all times has been that the said land in dispute is stool land. This assertion was repeated by her in cross- examination at page 314 of the ROA. The evidence on record per the unimpeached testimony of Nana Adu Amponsah, a past Chief of Kitase (PW1) and Nana Korkor Ntim, Queen mother of Kitase (PW 2) establish that at the date of Exhibit 3, Abusuapanyin Kofi Sakyi was the Head of the Asona Royal family, from the year 1989 – 2012 and was the proper person as Custodian of the Asona Royal family lands to alienate same. Exhibit 3 was executed by one Nana Twum Ankrah II in 2000, at a time Abusuapanyin Kofi Sakyi was the Head of the Asona Royal Family. The 3rd Defendant does not now contend per the submissions filed by Counsel, that the land in dispute is Asona Royal family and even if she did, it is too late in the day for her to change her case and set up a new one after Judgment. The principle in DAM V. ADOO [1962] GLR 200, will not permit her to do so. Furthermore, the evidence on record establishes that at the date the 3rd Defendant acquired the land in Exhibit 3, Nana Twum Ankrah II who purported to alienate Asona Royal family land to 3rd Defendant's grantor, Kwabena Fosu, had no authority to do so. At all times material to the grant of Exhibit 3, Abusuapanyin Kofi Sakyi was the Head of the Asona Royal Family with authority to alienate Asona Royal family lands. Therefore, Exhibit 3 does not confer on the 3rd Defendant any valid grant, since she did not obtain same from the rightful grantor. Another contention of Counsel for 3rd Defendant, is that in Exhibit CW1 (the composite plan drawn by the Surveyor), the land as identified by the

3rd Defendant on the ground, 14 is same as that covered by her site plan. Counsel stated that the Plaintiff on the other hand does not know his boundaries, since the land as identified by him and that in his site plan are different in size. Counsel for 3rd Defendant further contended, that in any event the Plaintiff's Lease, Exhibit A contains a site plan not approved by the Director of Survey, for which reason he cannot make any claim through same. The status of a site plan not approved by the Director of Survey was spelt out by Akamba JSC in the case of *NORTEY VRS. AFRICAN INSTITUTE OF JOURNALISM & COMMUNICATION AND OTHERS* (NO. 2) [2013-2014] SCGLR 703 @ 717, AS FOLLOWS: "...The plaintiff tendered exhibit A, a site plan which bears the same endorsements as in the writ of summons in apparent proof of his claim to the land, i.e. his root of title. Exhibit A is however not dated. It is also not signed by the Director of Surveyor his representative. This is contrary to section 3 (1) of L.I.1444, the Survey (Supervision and Approval of Plans) Regulations, 1989 which makes it mandatory for plans of any parcel of land attached to any instrument for the registration of such instruments to be approved by the Director of Survey or any official surveyor authorized in that behalf...". An examination of Exhibit A tendered in evidence by the Plaintiff, indicates that the site plan attached to the Plaintiff's Lease from his grantor, Nana Korkor Ntim II, Queen mother of Kitase (PW 2) has not been approved by the Director of Survey. As determined by the Supreme Court, this Court is bound to disregard same as being of no probative value. The Court will therefore disregard the Site Plan in Exhibit A. The facts which distinguish Exhibit A in this case from the Exhibit A (Site Plan) in the case of *NORTEY VRS. AFRICAN INSTITUTE OF JOURNALISM & COMMUNICATION AND OTHERS* (supra) are that, unlike Exhibit A in the said case, 15 which was a Site plan simpliciter, Exhibit A in this case, is an Indenture which recites the Plaintiff's root of title and the grant made to him. Exhibit A in this case describes the land in dispute and sets out the boundaries of the land granted to the Plaintiff. Therefore, while disregarding the attached site plan in Plaintiff's Exhibit A, this Court will consider relevant evidence, being the Indenture to which the site plan is attached. Furthermore, in this case, Nana Korkor Ntim II, Queen mother of Kitase (PW 2), the grantor of the Plaintiff testified in support of the grant to the Plaintiff. PW2's grant was confirmed by Nana Adu Amponsah, a past Chief of Kitase, PW1. The said Queen mother has corroborated the boundaries of the Plaintiff as contained in Exhibit A. It is indeed settled law that, a claim for declaration of title, will fail if the Plaintiff fails to establish positively, the identity of the land claimed, with the land the subject-matter of his claim. See: *ANANE & ORS V. DONKOR & ANOR.* [1965] GLR 188 S.C; *YAWSON (SUBSTITUTED BY TULASI) & ANOR* [2011] SCGLR 568. In this instance, though this Court cannot rely on the Plaintiff's land as contained in the site plan shown in Exhibit CW1, we find that the Plaintiff's land has been clearly defined in the recitals in Exhibit A, and there is no confusion as to its identity. Moreover, the Trial Court's finding that the 3rd Defendant obtained no valid grant in respect of the land she claims was not challenged by her. The contention by Counsel for 3rd Defendant that the 3rd Defendant's building on the land in dispute falls within her site plan as per Exhibit CW 1 was not in dispute. The Plaintiff in his evidence corroborated same contending that indeed the building of the 3rd Defendant is not on his land, and he has never been bothered by same. The Plaintiff testified that he resisted the trespass to his land,

when the 3rd Defendant and others acting on her behalf entered his land to plant cassava and maize and undertake other activities. 16 Counsel for 3rd Defendant contended in his 2nd ground of appeal, that the Trial Judge erred in law when she ignored the long undisturbed possession of the land by the 3rd Defendant/Appellant. Counsel argued that the Trial Judge failed to determine issues (g) and (h) and that had she so determined the said issues, she would have entered Judgement in favour of the 3rd Defendant. In support of the 3rd Defendants possession of the land, Counsel cited section 48 (2) of the EVIDENCE ACT 1975, ACT 323 as follows: “a person who exercises acts of possession over property is presumed to be the owner of it”. Counsel further referred to the case of MRS. ELIZABETH OSEI vs. MADAM ALICE EFUA KORANG [2013] DLSC270, wherein the Supreme Court stated as follows: “In the present appeal the stark fact is that the appellant was in possession of the house just as was the DW6. Now in law, possession is nine points of the law and a plaintiff in possession has a good title against the whole world except one with a better title. It is the law that possession is prima facie evidence of the right to possession and it being good against the whole world except the true owner, he cannot be ousted from it. See Summey v Yohuno [1962] 1 GLR 160, SC; Barko v Mustapha [1964] GLR SC 78”. Counsel for 3rd Defendant also cited the case of ADJETEY ADJEI AND OTHERS V. NMAI BOI & OTHERS [2013 – 2014] 2 SCGLR, 1474, (Holding 2), as follows: “Adverse possession must be open, visible and unchallenged so as to give notice to the legal/paper owner that someone was asserting a claim adverse to his. And section 10 of the Limitation Act, 1972 (NRCD 54), has reflected substantially the provisions of English Statutes of Limitation and the common law. Under the present law, the person claiming to be in possession must show either

- (i) discontinuance by the paper owner followed by possession; or dispossession or as it was sometimes called “ouster” of the paper owner. Co possession concurrent with paper owner was 17 insufficient. If a squatter possession of land belonging to another and remains in possession for 12 years to the exclusion of the owner, that represents adverse possession and accordingly at the end of 12 years the title of the owner is extinguished”. Counsel for 3rd Defendant raised the plea of adverse possession, citing Section 10 OF THE LIMITATION ACT, 1972 (NRCD 54). “10. Recovery of land
- (1) A person shall not bring an action to recover a land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to a person through whom the first mentioned claims to that person.
- (2) A right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run.
- (3) Where a right of action to recover land has accrued, and before the right of action is barred, the land ceases to be in adverse possession, the right of action does not accrue until the land is again taken into adverse possession.
- (4) For the purposes of this Act, a person is in possession of a land by reason only of having made a formal entry in the land.

- (5) For the purposes of this Act, a continual or any other claim on or near a land does not preserve a right of action to recover the land. 18
- (6) On the expiration of the period fixed by this Act for a person to bring an action to recover land, the title of that person to the land is extinguished.
- (7) For the purpose of this section “adverse possession” means possession of a person in whose favour the period of limitation can run”. Counsel for Plaintiff argued that the 3rd defendant never raised adverse possession as a defence to the action on her pleadings and cannot raise same on appeal. Order 11 r (18) (1) of the High Court Civil Procedure Rules , 2004 (CI 47),provides as follows: “8. (1) A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any limitation provision, fraud or any fact showing illegality
 - (a) which the party alleges makes any claim or defence of the opposite party not maintainable.” Where a party therefore seeks to rely on any matter which he or she asserts as a defence to any action, same must be specifically pleaded, failing which the said party cannot rely on the said defence. The said defence cannot be raised on appeal for the first time. This position of the law was succinctly stated by Benin JSC in the case of ARMAH V HYDRAFOAM) LTD [2013-2014] 2 SCGLR 1551 AT PAGES 1568 TO 1569 as follows: “A party who seeks to rely on laches, acquiescence or limitation has a duty or obligation to plead them or to plead such facts as evince an intention to rely on same. ... These matters like laches, acquiescence and limitation are all to be 19 pleaded since the party who is entitled to rely on them may decide not to do so; the other party should not be taken by surprise and is therefore entitled to notice in the pleadings in order to raise any answer he may have to these claims. Thus they cannot be raised for the first time on appeal, unless the pleadings disclose the factual basis and evidence on it was led at the trial. That is not the position in this case, as there was no such plea and no evidence was forthcoming on the record”. This Court will examine the pleadings to determine whether the plea of adverse possession and limitation were raised. In examining the pleadings of the 3rd Defendant filed before this Court, at pages 138 and 139 of the ROA, she states at the following paragraphs: “7. The 3rd Defendant denies paragraphs 10 of the Statement of Claim and will put Plaintiff to strict proof thereof. The 3rd Defendant says that in 2004, her family through her sister -in -law purchased the disputed land from one Kwabena Fosu whose grantor was the said Nana Twum Ankrah.
- 8. The third Defendant says that after the purchase, she constructed a wooden structure on the land for her caretaker to reside in. The 3rd Defendant further says that the said wooden structure stood on the land for years and was subsequently replaced by a cement structure.
- 14. the 3rd Defendant avers that she and her family have been in quiet possession oof the land from 2004 till the Plaintiff pulled down their structures on the property.

15. The 3rd Defendant contends that her family has been in the land for the last twelve (12) years without any objection from the Plaintiff or his alleged predecessors in title. The 3rd Defendant further contends that having stood by for her family to purchase and possess the structures thereon 20 without any protest whatsoever, the Plaintiff is guilty of acquiescence and is hereby estopped from claiming to [sic] the disputed land". From these pleadings of the 3rd Defendant, it is our considered view that the facts averred thereto, raise a defence of adverse possession, thereby putting the Plaintiff on notice of same. No surprise was therefore occasioned to the Plaintiff, more particularly so, when the Court set issues (g) and (h) for determination as follows:
- (f) Whether or not the Plaintiff is estopped by conduct from asserting any claim of title to the disputed land.
- (g) Whether or not the 3rd Defendant is the owner of the disputed land having exercised rights of ownership and possession by overt acts for years without interference or objection from the Plaintiff. Though the Trial judge in conclusion rejected the entirety of the 3rd Defendant's case on the basis that her evidence and that of her witnesses was not credible, admittedly she did not specifically determine the issue of possession. Since an appeal is by way of re-hearing, we will consider the issues of adverse possession, limitation, laches and acquiescence, raised by the pleadings and the evidence on record and which were not determined by the Trial Judge. Under cross-examination, the Plaintiff stood by his testimony that he acquired the land in 2002 and took possession of same. The said evidence was never impeached. The Plaintiff also testified that he is not concerned with the building which the 3rd Defendant said she constructed in 2004, because same is not on his land. The Plaintiff testified that though he saw said building, he was not bothered by it. His testimony was also not impeached under cross-examination. According to the Plaintiff, subsequently, the Defendant's agents commenced a trespass on his land by farming maize and cassava on same and though warned on several occasions, they have refused to desist from the trespass. Under cross-examination, the Plaintiff denied that he ever saw or demolished a fence wall built by the 3rd Defendant on the said land as asserted by her. Exhibit B" tendered in evidence by the Plaintiff shows he is in possession the land and has constructed a fence wall along one boundary. DW 4 Eric Gyamfi testified that he was the caretaker of the 3rd Defendant from 2004 -2006. He said that he commenced the building of a fence wall during the period he was on the land. He said being unaware of recent events he had to visit the land prior to filing his Witness Statement, as he did not know of current happenings on the land. The said evidence clearly contradicts the testimony of the 3rd Defendant in paragraph 10 of her Witness Statement where she states that the said fence wall was constructed in 2009. The Witness was further challenged on his status as caretaker of the property. The case of the 3rd Defendant per paragraph 5 of her Witness Statement was that her caretaker was one Osei, however, per paragraph 6 of her Witness Statement she named one Eric Gyamfi (PW4) as her caretaker. The testimony of the 3rd Defendant on her possession of the disputed land was inconsistent and contradictory, while the Plaintiff's testimony remained consistent. More significantly, the 3rd Defendant stated that she was in

possession of the land from 2004 till 2015 when the Plaintiff challenged her possession of same. Even if her testimony were true, the period between 2004 to 2015 amounts to eleven (11) and not twelve (12) years of possession. On the evidence we find that the 3rd Defendant was unable to establish long undisturbed possession of the land in dispute. . 22 From Section 10 of NRCD 4 and the ADJETEY ADJEI case cited supra, the title of the Plaintiff who was established to have proved better title, can only be extinguished if the 3rd Defendant is able to prove that she had been in open , visible, and unchallenged possession of the land for a period of twelve (12) years or more. As she has been unable to establish such possession, her defence of adverse possession fails. Furthermore, a defence of laches and acquired can only avail the 3rd Defendant, if she was in possession of the land and had substantially developed same, upon the urging or acquiescence of the Plaintiff. As none of the factors having been established, the said defence will not avail the 3rd Defendant. In the circumstances, the authorities cited by Counsel for Plaintiff in aid of Plaintiffs adverse possession and laches and acquiescence will not aid 3rd Defendant. Upon the totality of the evidence on record we find that the learned Trial judge arrived at the correct conclusions and find no reason to disturb her Judgment . The appeal accordingly fails and is dismissed. The decision of the learned Trial Judge is upheld. HAFISATA AMALEBOBA (MRS) JA. I agree. RICHARD ADJEI – FRIMPONG JSC. 23 I also agree. JENNIFER DODOO (MRS) JA. COUNSEL: EMMANUEL WILSON ESQ. FOR THE 3RD DEFENDANT/APPELLANT. ADJEI MENSAH ALFRED ESQ. FOR THE PLAINTIFF/RESPONDENT. 24

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