

GHANA / JUDGMENT

OBENG VRS ANSAH & ANOTHER (A1/08/2022) [2024] GHACC 121 (16 February 2024)

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IN THE CIRCUIT COURT HELD AT GOASO IN THE AHAFO REGION ON FRIDAY THE 16TH DAY OF FEBRUARY 2024 BEFORE HIS HONOUR CHARLES KWASI ACHEAMPONG ESQ. CIRCUIT COURT JUDGE KWASI OBENG

PLAINTIFF A1/08/2022 VRS.

1. OWUSU ANSAH
2. ABENA BOTWE

DEFENDANTS

JUDGMENT

The Plaintiff and 1st Defendant are half-brothers. They have a common mother but different fathers. Given their relationship, it was hoped that the contentious matters before this Court would be resolved amicably but this was not to be. In fact, despite having referred the parties to attempt settlement through ADR, settlement unfortunately broke down as both parties held entrenched positions. Consequently, this Court shall determine the rights as between the parties based on the respective evidence adduced by them in the course of trial and hope that this judgment would salvage whatever relationship the parties may still have as between themselves. The facts are relatively straight forward and are to the effect that Akosua Takyiwaa the mother of Plaintiff and 1st Defendant got married Opanin Kwabena Nornoh and had three children together namely Akosua Boafowaa, Kwasi Obeng (Plaintiff) and Afia Konadu. Their marriage however fell on the rocks leading to their eventual divorce. Plaintiff then alleges that prior to the dissolution of the marriage Kwabena Nornoh and his mother the latter obtained a grant of land from his wife's family and reduced same into a cocoa farm 1 for the exclusive benefit of the children he had with Akosua Takyiwaa. According to Plaintiff this was the sole reason why the land was granted to

Kwabena Nornoh and so upon the dissolution of the marriage, the cocoa farm vested in his children but given the fact that they were minors at that time, Akosua Takyiwaa held same in trust for them, that is, exclusively for Kwabena Nornoh's children namely Akosua Boafowaa, Kwasi Obeng (Plaintiff) and Afia Konadu. Plaintiff alleged that he and his other two siblings have been in exclusive possession of the land until recently when Defendant attempted to exercise acts of adverse possession of same which prompted him to institute the present action. Plaintiff therefore sought the following reliefs by his writ; i. Declaration of Title and recovery of possession of all that piece and parcel of farmland lying, being and situate at Oseikrom on Mehame Stool Land which shares boundary with the property of Opanin Osei Kwadwo, Madam Akua Nnum, Adutwumwaa, Opanin Kwaku Manu (Head of family), Mehame-Goaso motor road and the Oseikrom school. ii. Perpetual injunction restraining the Defendants, their agents, assigns, privies, servant, workmen and all those who derive their title from the Defendants from dealing with the land in issue. iii. General Damages against the Defendants for trespass. The 1st Defendant who filed a Defence for himself and on behalf of 2nd Defendant conceded that irrespective of the fact that his mother Akosua Takyiwaa as earlier married to Kwabena Nornoh, the land in dispute was nevertheless acquired and cultivated by Akosua Takyiwaa prior to her marriage with Opanin Kwabena Nornoh. He averred that since the land in dispute belonged to Akosua Takyiwaa upon her demise the land became family property and consequently any family member had the right to cultivate the land as he/she pleases. At the close of pleadings, this court set down the following issues for trial; i. Whether or not the land in dispute was held in trust for Plaintiff and his siblings by their mother Akosua Takyiwaa? ii. Whether or not the land in dispute belonged to Akosua Takyiwaa and upon her demise the land in dispute became family property? iii. Whether or not 1st Defendant has an interest in the land in dispute? iv. Whether or not the Abunu Tenancy entered between 1st Defendant and 2nd Defendant is valid? Given the outright denial by Defendants the onus therefore fell upon Plaintiff to establish each fact in issue on the preponderance of probabilities which is "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". [See: Sections 11(4) and 12(2) of the Evidence Act 1975 (NRCD 323)]. In the case of *Adwubeng vrs Domfeh* [1996-97] SCGLR 660 in crystallizing this standard of proof required in all civil actions the Court held that, "section 11 (4) and 12 of the Evidence Decree [1975] NRCD 323 which came into force on 1st October 1979) have provided that the standard of proof in all civil actions was proof by preponderance of probabilities no exceptions were made." (See: *Effisah vrs Ansah* [2005- 2006] SCGLR 943). In the course of trial, it became obvious that both parties and their witnesses offered differing accounts as to how their family which is Akosua Takyiwaa's family, acquired their family's lands which includes the land in dispute. For instance, Plaintiff simply alleged that the land belonged to his mother's family without indicating who in the family acquired the land. His witness, Opanin Kwaku Manu (Pw1) on his part, suggested that the land was originally purchased by Eno Kyerewaa, his mother. Again, while 1st Defendant alleged that the land was originally acquired by three persons namely Afia Kyerewaa, Akua Hyebre and Adwoa Birago and these persons in the family who jointly owned the land, his witness, Abena Frimpomaa (Dw1) insisted that it was only her mother Adwoa Birago who acquired the family's lands. Clearly the parties and their witnesses could not agree on

the manner in which their family came to own their larger family land. What they however seemed to agree upon was the fact that the land in dispute originally formed part of the larger land acquired by the family of Akosua Takyiwaa. If the land in dispute formed part of the larger land originally acquired by the family of Akosua Takyiwaa, how then did she later come to possess it? Plaintiff's explanation with regards to the above issue was that his father (Kwabena Nornoh) married his mother Akosua Takyiwaa in the 1950's and subsequently had three children with her. Later Kwabena Nornoh requested from Akosua Takyiwaa's family a piece of the family's land in order to cultivate cocoa for and on behalf of the children he had with Akosua Takyiwaa. This request was granted by Eno Birago and Eno Kyerewaa and the land in dispute was carved out for him in order for Kwabena Nornoh to cultivate same for his children. However, when the marriage between the couple was dissolved, Akosua Takyiwaa took possession and control over the farm cultivated by Kwabena Nornoh and continued to hold same in trust for him and his two other siblings born of Kwabena Nornoh. Plaintiff alleged that the reason why his mother held the farm in trust for him and his siblings was that they were minors at the time of the dissolution of the marriage. Despite the fact that Defendant duly cross-examined Plaintiff in the course of trial, he however failed to challenge him on these rather salient allegations. 4 In further proof of his case, Plaintiff called Opanin Kwaku Manu (Pw1) who the parties admitted was the head of their family. Pw1's testimony corroborated Plaintiff's assertion of a grant of the family's land to Kwabena Nornoh and the purpose for the said grant. He testified to the effect that one day when he returned from school, he was informed by his mother Eno Kyerewaa that the land in dispute had been gifted to Opanin Kwabena Nornoh for the purpose of cultivating same for his children. Just like in the case of Plaintiff, Defendants did not challenge Pw1 on these specific assertions as well. By his failure to do so, the Defendants had in effect admitted the truth of Plaintiff's assertions. In the case of *Universal Merchant Bank Ltd. vrs. Akosombo Textiles Limited* (2016) JELR 64190 (HC) the Court observed as follows; "It is the rule that the failure by a party to cross examine a witness on vital matters testified to is deemed to be an admission of those matters and a party need not call further evidence on that" Again, in the case of *Isaac K Kobi & 24 Ors Vrs. Ghana Manganese Company Ltd.* (2004) JELR 67944 (CA) the Court of Appeal observed that; "The law is quite succinct that where a party leads evidence and his opponent fails to take him on, shake or puncture the claims or allegations of fact he has made, then there is a presumption in law that the opponent who has failed to cross examine on the fact, has conceded that the correctness of the fact alleged". Despite the position of the law as above reiterated, this Court would scrutinize the evidence adduced by Defendants and their witnesses in order to ascertain if they managed to lead cogent evidence to establish their contention. 5 It must be noted that, the essence of the case of Defendants is their assertion that Akosua Takyiwaa was in possession of the land in dispute prior to her marriage to Kwabena Nornoh. It is therefore expected that the testimony of 1st Defendant at least, would lead credible evidence relating to facts bothering on how, when and from whom Akosua Takyiwaa acquired the land in dispute. Unfortunately, this was not the case. The import of 1st Defendant's testimony was that the land in dispute belonged to three persons namely Afia Kyerewaa, Akua Hyebre and Adwo Birago who owned same jointly and upon their demise the land became family property and, "everybody in the family can farm at any time without reporting to anyone". There is no mention of Akosua Takyiwaa's possession

or ownership of the land in dispute. Consequently, 1st Defendants testimony fell short of establishing his assertions as captured in his Statement of Defence. He had failed to lead any scintilla of evidence to support his contention regarding how his mother came to possess the land in dispute. This failure makes his case doubtful as compared to that of Plaintiff. It was only Abena Frimpomaa (Dw1) who stated in paragraph 8 of her witness statement filed on the 9th June 2022 as follows; “...that before Kwabena Nornoh got married to my sister Akosua Takyiwaa, my sister was already cultivating both cocoa and food stuffs for her livelihood on a portion of the land/farm” Despite being challenged on the above assertion, Dw1 remained resolute. However, the veracity of her claims became uncertain when one considers an admission she made under cross examination. Dw1 was asked; Q. How old were you when Akosua Takyiwaa married Kwabena Nornoh? A. I never witnessed their marriage. 6 Dw1 was clearly being evasive, owing to her failure to directly answer the question posed to her. However, the logical inference that may be drawn from her answer is that at the time of the marriage between Kwabena Nornoh and Akosua Takyiwaa, she (Dw1) was not age, if not, unborn. This explains the reason why she did not witness the marriage of her own sister Akosua Takyiwaa. If that is the case, on what basis was Dw1 insisting that Akosua Takyiwaa was already in occupation of the land in dispute prior to the marriage in question. It thus becomes obvious that Dw1 could not have personally perceived the events she was narrating. This makes her testimony doubtful. Furthermore, just like 1st Defendant, Dw1 failed to lead evidence as to how Akosua Takyiwaa acquired the land in dispute, from whom she acquired same and when the land in dispute came into her possession. In direct contrast is the testimony of Opanin Kwaku Manu (Pw1) who is the head of family of the parties and according to him, he is the oldest member of their family. Given his age and the capacity he wields in the family, it can rightly be presumed that comparatively, his testimony regarding the history of the land in dispute, would be more credible and probable as opposed to that of Dw1. To that extent, this Court finds as duly established on the balance of probabilities Plaintiff’s assertion to the effect that the land in dispute was granted to Kwabena Nornoh by the family of Akosua Takyiwaa for the former to cultivate same for and on behalf of his children namely Akosua Boafowaa, Akwasi Obeng (Plaintiff) and Afia Konadu. This Court further finds that upon the dissolution of the marriage between Kwabena Nornoh and Akosua Takyiwaa, the latter possessed the farm cultivated by Kwabena Nornoh. It is therefore not the case that the land was owned by Akosua Takyiwaa prior to her marriage to Kwabena Nornoh. Plaintiff further alleged that Akosua Takyiwaa held the land in dispute in trust for him and his two other siblings? 7 According to the learned author Justice Dennis Dominic Adjei (JA) in his book *Land Law, Practice and Conveyancing in Ghana*, (2nd Edition) at page 229, “a trust results where a trustee manages property as a fiduciary for one or more beneficiaries”. In the case of *Cofie and Others v. Forson and Others* [1992] 1 GLR 312 the Court observed that, “to create a trust there had to be three prerequisites which were popularly described as the three certainties, i.e. (i) the words used had to be imperative; (ii) the subject matter had to be definite and certain; and (iii) objects or beneficiaries had to be identifiable and ascertainable”. There are three main types of trust namely, express trust, resulting trust and constructive trust. Without belabouring the matter, given the facts as established in the present suit, one can rightly conclude that neither an express trust nor a resulting trust was created when Kwabena Nornoh acquired the land in dispute. It

however appears that a constructive trust could be presumed given the purpose for which the land was acquired by Kwabena Nornoh and the subsequent possession of the land in dispute by Akosua Takyiwaa. In *Mary Akutu Maccarthy V. Godwin Narh Maccarthy* (2017) JELR 108206 (HC) the Court observed as follows; “Osborn’s Concise Law dictionary 8th edition defines constructive trusts as trust raised by equity to satisfy the demands of justice and good conscience without reference to any presumed intention of the parties. The concept is therefore very flexible”. The Court further espoused; “In a constructive trust therefore, the constructive trustee acknowledges that a property has been vested in him under certain circumstances but in actual fact the property does not belong to him and so any profit or proceeds from the property must be transferred to the actual owner. The constructive trustee releases the property so vested in him to the actual owner at a given point in time” The following facts have been established in the instant suit; i. ii. iii. iv. That the land in dispute was granted to Kwabena Nornoh to cultivate cocoa. That the purpose for the grant was for him to cultivate the land for his three children namely Akosua Boafowaa, Akwasi Obeng (Plaintiff) and Afia Konadu. That Kwabena Nornoh’s marriage with Akosua Takyiwaa was dissolved. That the land was left in the care, control and possession of Akosua Takyiwaa subsequently. Did the purpose for the acquisition of the land in dispute extinguish upon the dissolution of the marriage? In the view of the Court, that purpose was never smothered even after the dissolution of the marriage given the fact that, the farm had already been acquired and cultivated with cocoa by Kwabena Nornoh and hence when Akosua Takyiwaa subsequently took over the farm, she was merely continuing that purpose. In the view of the Court, these established facts form a basis by which a constructive trust in favour of Plaintiff and his siblings born to Kwabena Nornoh may be presumed. Consequently, this Court finds and holds that Akosua Takyiwaa held the land in dispute in trust for the children of Kwabena Nornoh namely Akosua Boafowaa, Akwasi Obeng (Plaintiff) and Afia Konadu who were then minors. Does the above finding suggest that Defendant has no interest or right in the land in dispute? The answer to this question would have been in the affirmative but for certain facts that cropped up in the course of trial. 9 It would be noted that by his pleadings particularly paragraphs 18, 19, 20 and 21, Plaintiff creates the impression that 1st Defendant first came onto the land about 15 years ago and only cultivated plantains for a season and left and that it was only recently that 1st Defendant came onto the land in dispute again but this time around, started claiming adverse ownership by cultivating palm trees and giving out a portion to 2nd Defendant on Abunu basis. During the cross examination of Plaintiff, Defendant attempted to suggest that he had been on the land quite longer than the period suggested by Plaintiff. He put his case to Plaintiff to the effect that, he had cultivated palm trees on the land in dispute which had matured and that Plaintiff was at a point in time harvesting some of the palm fruits for his use. These assertions were vehemently denied by Plaintiff during his cross examination. Strangely however, Plaintiff’s only witness corroborated 1st Defendant’s assertion of long undisturbed possession of the land in dispute during cross examination as follows; Q. Do you agree that I was cultivating on the land in dispute? A. Yes that is true. However, I do not know what your mother who is also Plaintiff’s mother told you about the land for which you started cultivating the land. He was later asked by the Court; Q. How long has 1st Defendant cultivated the land in question? A. He cultivated palm trees and they even matured and he sold the palm trees. After he sold the palm trees plaintiff

started claiming the land. It has been over 15 years since 1st Defendant cultivated the land. Q. During the over 15 years of Defendant's cultivation, where was Plaintiff? 10 A. He lived in Ejisu his father's hometown. From the above, one observes that, contrary to Plaintiff's assertion that it was only recently that 1st Defendant came unto the land and started claiming adverse ownership by cultivating palm trees, the fact is that 1st Defendant has been on the land quite longer than that suggested by Plaintiff. So long is the possession of 1st Defendant that he had managed to cultivate palm trees on the land in dispute which had matured and eventually disposed of by 1st Defendant to the exclusion of Plaintiff. In fact, Pw1 indicated that 1st Defendant has been on the land for over 15 years and within this period, 1st Defendant did not just cultivate plantains as alleged by Plaintiff but he had cultivated economic trees. This is a case where the testimony of a party's witness corroborates that of his opponent and in that situation the Courts have long held the view that, the corroborated version ought to be relied upon by the Court. The case of *Tsirifo v. Dua* VIII [1959] GLR 63 is instructive in that regard. In that case, the Court observed; "Where the evidence of one party on an issue in a suit is corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses, a Court ought not to accept the uncorroborated version in preference to the corroborated one, unless for some good reason (which must appear on the face of the judgment) the Court finds the corroborated version incredible or impossible". [See also: *Asante v. Bogyabi* [1966] GLR 232, *Nana Fredua Agyemang Vrs. Nii Akotey Iv & 2 Others* (2013) JELR 67165 (HC)] It is, therefore, the opinion of this court that 1st Defendant's evidence in respect of his long undisturbed possession over the land in dispute is more probable than Plaintiff's assertion. In further support of this finding is Plaintiff's failure to challenge Stella 11 Nkrumah (Dw2) under cross examination when she alleged in her evidence in chief that 1st Defendant has been on the land in dispute "...for so long and enjoyed the fruits and other benefits without any hindrance or whatsoever from any one". Following the principle as laid down in the *Universal Merchant Bank Ltd* case (supra), Plaintiff is deemed to have admitted the truth of same. In the view of the Court, the only reason why Plaintiff would seek to deny knowledge of 1st Defendant's long possession over the land in dispute during his cross examination, is borne out of his attempt to avoid the implication and effect which such long possession connotes by operation of the law. Unfortunately, Plaintiff cannot run away from the long hangs of the law. Firstly, Section 10 (1) of the Limitation Act, 1972 (NRCD 54) provides that; "A person shall not bring an action to recover a land after the expiration of 12 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." Since 1st Defendant has cultivated the land in dispute for over 15 years, Plaintiff's action by law is statute barred. Secondly, the conduct or rather inaction of Plaintiff over the years raises the issue of estoppel by conduct. This principle was aptly explained by the Supreme Court in the case of *New Patriotic Party vrs. The Electoral Commission and Another* (1993) JELR 66482 (SC) where the Court cited with approval the dictum of Lord Denning MR in the case of *Moorgate Mercantile Co Ltd v. Twitchings*

[1975] 3 All ER 314 at 323, CA as follows; “Estoppel ... is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affair, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so”¹² This is further given statutory backing in Ghana under Section 26 of the Evidence Act 1973 (NRCD 323) which provides that “...when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest”. In the instant suit, it is a fact that 1st Defendant has been in possession of the land in dispute for well over 15 years within which period he cultivated economic trees (palm trees) other food crops. 1st Defendant exercised acts of ownership by harvesting the fruits of the palm trees and eventually selling same out to the knowledge of Plaintiff yet no step was taking by Plaintiff to protest or challenge the conduct of 1st Defendant. It is worthy to note that Pw1 under cross examination further indicated that 1st Defendant started cultivating the land during the life time of Akosua Takyiwaa, the mother of the parties. It was Akosua Takyiwaa who permitted 1st Defendant to cultivate the land in dispute. This fact if known by Plaintiff’s only witness, then certainly Plaintiff must have known about it as well. The question is why did Plaintiff fail to question his mother when she permitted 1st Defendant to cultivate the land since he knew that his mother was only holding the land in trust for him and his two other siblings? A similar question was asked Pw1 by 1st Defendant and this was his response; Q. Did you question your sister as to why she had permitted me who was not a child of Kwabena Nornoh to farm on the land? A. No I did not ask anything. It was not in my place to do so since she was your mother. I was not present when the land was given to you. ¹³ Indeed, it was not the business of Pw1 to question Akosua Takyiwaa but rather the onus fell upon Plaintiff and his siblings namely Akosua Boafowaa and Afia Konadu to have questioned their mother as to why she had permitted 1st Defendant to cultivate the land in question. No protest whatsoever was made by them even when they were no more minors. It appears the adverse ownership and possession of the land in dispute started with Akosua Takyiwaa by virtue of her conduct over the land which were not in accord with her duty as a trustee. Plaintiff and his siblings knew about this fact, yet they failed to bring their mother to order. So notorious was Plaintiff’s failure to challenge their mother’s conduct and subsequently 1st Defendant’s adverse occupation of the land in dispute that his own witness, Opanin Kwaku Manu (Pw1) had assumed that the land in dispute had taken on a new character of a family land as revealed under cross examination as follows; Q. I suggest to you that the land in dispute is family land? A. Initially the land was not family land however presently it is family land. Q. Do you agree with me that being family land, the land in dispute has not been carved out for anyone? A. That is true however family members have the right to cultivate on any portion of the land. Pw1’s answer clearly supported 1st Defendant’s contention that the land in question belonged to the family a contention Plaintiff was vehemently opposed to. No doubt Pw1 arrived at this conclusion simply because over the years he had observed

that siblings of Plaintiff who were not initially intended to enjoy the land, had taken up possession of portions of the land through the permission of their mother Akosua Takyiwaa and with the knowledge of Plaintiff without any let or hindrance. Consequently, this Court finds that Plaintiff by his conduct had acquiesced over the years to the fact that 1st Defendant 14 had a right and interest over the land and as such Plaintiff cannot be heard to contend otherwise presently. Even though the issue of limitations and estoppel by conduct were not specifically pleaded by Defendants in their Statement of Defence they nevertheless alluded to same in paragraph 12 of their Statement of Defence. It is trite that Courts are admonished to tilt more in favour of doing substantial justice than sacrificing justice on the altar of technical rules of procedure. In the case of Attorney General's Department vrs. Sweater and Socks Factory Limited [2013-2014] 2 SCGLR 946 at pp 951-952, Wood (Mrs.) C.J. stated as follows; "The rationale for the rule that a party who intends to rely on the plea must expressly plead same is to prevent the other party being taken by surprise by offering him or her full opportunity to prepare adequately to meet the plea. Notwithstanding this requirement, the failure to do so with specificity, employing the well-known legal terminology-"estoppel per rem judicatam" - is not fatal to a party's case. Courts of justice must always strive to strike a proper balance between substantive justice and procedural laws. Whenever legally justifiable or appropriate, substantial justice must never be sacrificed on the altar of technism, or technical rules of procedure. Thus, where the plea has not explicitly been set out, but the defendant's statement of case point unequivocally or substantially to the plea, the court is bound to consider it, as if the same had been specifically raised by the defendant. It can hardly be argued under such circumstances that an opponent has been taken by surprise or prejudiced." [See: Roula Zraik Vrs. Translas Limited, Hussein Zraik And Millicent Appah (2017) JELR 68810 (SC)]. Consequently, it is not only proper but just for the Court to consider the issue of limitations and estoppel by conduct for which Plaintiff is caught hook, line and sinker. 15 By virtue of foregoing findings, it become clear that the Abunu tenancy that exists between 1st Defendant and 2nd Defendant cannot be declared in valid since 1st Defendant acted under the impression that he being a son of Akosua Takyiwaa, he had every right to alienate same to third parties which impression was created by virtue of Plaintiff's acquiescence over a long period of time. Consequently, Plaintiff's case must fail. The suit is dismissed and cost of GH¢5000.00 is awarded against Plaintiff. SGD H/H CHARLES KWASI ACHEAMPONG ESQ. CIRCUIT COURT JUDGE - GOASO 16

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