**AMA NYAME & 3 ORS.**

*(PLAINTIFFS)*

**vs.**

**YAA ASANTEWAA & AKOSUA AMPOMA**

*(DEFENDANTS)*

[COURT OF APPEAL, KUMASI]

CIVIL APPEAL NO: HI/09/202 DATE: 9TH MARCH, 2023

**COUNSEL**

JOHN BREFO ESQ. FOR DEFENDANTS/APPELLANTS

WILLIAM KUSI ESQ. FOR PLAINTIFFS/RESPONDENTS

**CORAM**

MENSAH-DATSA (MRS), J.A. (PRESIDING)

BAAH, J.A

DIAWUO, J.A

**JUDGMENT**

**BAAH, J.A**

**BACKGROUND**

The reliefs sought by plaintiffs/respondents (hereafter respondents) and by the defendants/appellants (hereafter appellants) in their counterclaim, the facts relied on by the parties, as well the issues set down at the court below are relevant to this appeal and will therefore be set out.

On 21st March 2014, respondents, invoked the jurisdiction of the Circuit Court, Kumasi, seeking the following reliefs:

* 1. *“An order of the court for the defendants, their agents, assigns, children, family, or any other person in occupation of House Number Plot 35 Block B Atasomanso to give vacant possession of the said house.*
  2. *Recovery of possession of House Number Plot 35 Block B Atasomanso, Kumasi.*
  3. *An order of perpetual injunction restraining the Defendants from interfering with House Number Plot 35 Block B Atasomanso, Kumasi”.*

In the crisp statement of claim accompanying the writ of summons, respondents claimed that the subject house was built by their father named Akwasi Agyapong, who passed away on 15th January 2000, in Adzope, Cote D’Ivoire.

After the demise of their father, they applied to the Circuit Court, Kumasi, for letters of administration and same were granted to the 1st respondent and one Yaw Mosi, the customary successor. Thereafter, the property was vested in them as beneficiaries.

Respondents claimed that upon the property being vested in them, they caused their lawyer to formally notify appellants of their need of the house for their personal use. It was the refusal of appellants to yield vacant possession that compelled respondents to approach the court for redress.

A statement of defence and counterclaim was filed by appellants on 20th May 2014. They denied that the 1st and 2nd appellants are tenants of the subject house. According to them, the land holding property number Plot 35 Block B, Atasomanso, Kumasi, was originally acquired by their uncle called Akwasi Agyapong for 1st appellant’s mother called Adwoa Konadu and all her children.

The said Akwasi Agyapong began the construction of a house on the land but could not complete same by the time of his death on 21st January 2000. The construction was completed by a son of Adwoa Konadu called Kwadwo Boateng, who completed the house for his mother and his siblings.

Thereafter, Adwoa Konadu is said to have taken possession of the house and rented same to the Women Development Foundation without let or hinderance from any quarter. Appellants claimed that Adwoa Konadu and the 1st appellant took the tenant to court to recover possession, after which they have been in possession without any contest from respondents.

They considered respondents estopped from laying any adverse claim to the subject house.

Appellants averred that respondents applied for letters of administration in the Circuit Court, Kumasi, in respect of their father who they also call Akwasi Agyapong, who allegedly died in Cote D’ Ivoire on 15th January, 2000.

Appellants alleged that they caveated the application and filed an affidavit of interest in which they denied that respondents’ father was called Akwasi Agyapong. Appellants claim that respondents’ father who married 1st appellant’s mother was called Kwaku Tawiah, alias Woarabeba, and not Akwasi Agyapong as claimed by respondents.

Appellants claimed that respondents procured the letters of administration by misrepresenting to the Court that their father was named Akwasi Agyapong. For that reason, and in pursuance of an action for revocation, an application was filed by them under Order 66 Rule 37, C.I 47, for the respondents to bring in the grant and to deposit same with the Circuit Court, Kumasi. They claim to have been granted letters of administration in respect of their uncle Akwasi Agyapong, who died on 21st January 2000.

Based on the above averments, appellants sought the following reliefs from respondents by way of a counterclaim:

* 1. *“A declaration of title to and recovery of possession of all that House Number Plot No 35 Block B, Atasomanso, Kumasi.*
  2. *Damages for trespass.*
  3. *An order of perpetual injunction restraining the plaintiff’s (sic), their agents, servants, workmen, assigns and all those claiming through him (sic) from interfering with the 1st defendant’s possession and enjoyment of the said property.”*

# ISSUES

At the close of pleadings, the following issues were set down by the trial court on 23rd July 2014:

1. *“a. Whether or not the plaintiffs are beneficiary owners of House Number Plot 35 Block B Atasomanso.*
2. *Whether or not House Number Plot 35 Block B, Atasomanso was originally acquired by the father of the plaintiffs.*
3. *Whether or not the court has granted letters of administration to the plaintiffs.*
4. *Whether or not the house in dispute has been vested in the plaintiffs.*
5. *Whether or not the plaintiffs are entitled to their claim (sic)*
6. *Any issues raised by the pleadings”.*

# EVIDENCE

At the ensuing plenary trial, 1st respondent testified for herself and on behalf of the other respondents. Respondents called the following three witnesses, namely, James Adu Tutu (PW1), Kofi Akyer (PW2) and Michael Dela Ahey (PW3), an official from the Lands Commission who appeared upon a subpoena, and tendered a copy of a lease in the records of the Commission over the subject land in the name of Akwasi Agyapong as exhibit G.

Each of the appellants testified. They also relied on the evidence of Abena Amankwah (DW1), Akwasi Kyerepem alias Owusu Agyemang (DW2) and Kwabena Frimpong (DW3).

# DECISION OF CIRCUIT COURT, KUMASI

In a judgment rendered on 28th February 2018, the Circuit Court, Kumasi, *coram*; Her Honour Nsenkyire (Mrs) entered judgment for respondents and granted all the reliefs sought by them, as laid out supra. To cap it was the award of costs of GHC3,000.00 in favour of respondents. Appellants were aggrieved by the judgment and appealed against it in its entirety.

# GROUND OF APPEAL

In the notice of appeal, the filing date of which is not obvious on the face of the document, only one ground of appeal, namely the omnibus ground that “*The appeal is against the weight of evidence”*, was canvassed.

# SUBMISSION OF COUNSEL FOR APPELLANTS

In his written submission dated 29th June 2022, counsel for appellants contended that the appeal raises sufficient grounds for us to review the decision of the trial court on the facts and alter it to meet the ends of justice.

The key question the submission sought to address was as to whether respondents’ father was called Akwasi Agyapong as alleged by respondents or Kwaku Tawiah, as alleged by appellants. In his view, the onus was upon respondents to prove that their father was indeed Akwasi Agyapong. This duty, he submitted, they woefully failed to discharge. That was because, respondents failed to produce any document to prove that their father was indeed named Akwasi Agyapong.

He harped on respondents’ failure to tender a death certificate during the application for letters of administration in the face of the caveat, and their failure to produce the passport or the identity card for a person who lived in Cote D’Ivoire.

He submitted that since the claim of respondents that their father was called Akwasi Agyapong was capable of proof, they ought to have proved same to the requisite standard, rather than relying on bare assertions. He relied on **Majolagbe v Larbi [1959] GLR 190; Adwubeng v Domfeh [1996-97] SCGLR 660; Yaa Kwesi v Arhin Davies [2007-8] SCGLR 580; Owusu v Tabiri [1987-88] 1 GLR 287 and Ackah v Pergah Transport Ltd [2010] SCGLR 728**

On the part of appellants, he firstly referred to the documentary evidence tendered by them in the form of the letters of administration, burial permit (exhibit 5), and the property rate demand notice and payment receipt in respect of H/No AA4, Adiembra- Kumasi (exhibit 3), all of which are in the name of appellants’ uncle, Akwasi Agyapong.

He submitted secondly, that appellants proved that they completed the house by roofing it. They have also been in undisturbed possession for years, rented portions to tenants and received rents, for which they accounted to none. They also sued a tenant to recover possession from her. He also referred to the evidence of the caretaker of the Atasomanso stool, Kwabena Frimpong (DW3) who was emphatic that the subject land was acquired by appellants’ uncle called Akwasi Agyapong, who was placed in possession of the subject land by him (the witness). In addition, he contended that respondents were caught by the statute of limitations, having waited from 2000 to 2014 before acting.

On the proper approach to the omnibus ground of appeal, counsel for appellant drew our attention to our legal duty under Rule 8 (1) of the **Court of Appeal Rules, 1997 (C.I 19),** to rehear the entire case, as elucidated in numerous cases including **Gameli Vinetor & Ors v The Republic [2015] 90 GMJ 43; Djin v Baako Musa [2007-2008] 1 SCGLR 687; Brown v Quarshigah [ 2003-2004] SCGLR 932; Owusu-Domena v Amoah [ 2015-16] 1 SCGLR 790** and others.

# SUBMISSION OF COUNSEL FOR RESPONDENTS

Counsel for respondents contended in his submission that appellants failed to canvass any ground or facts that showed that if they had been applied properly, the judgment would have been different.

He emphasized the analysis of the trial judge on exhibits M and 6, tendered by respondents and appellants respectively, after which the claims of respondents found favour with him.

He equally backed the trial judge’s conclusion that the property has been

properly vested in the respondents.

On the approach to the omnibus ground of appeal, counsel for respondents submitted similarly, and in addition referred us to **Republic v Central Regional House of Chiefs & Ors Ex parte Gyan IX (Andoh Interested Party) 2 SCGLR 845** for our guidance**.**

# OMNIBUS GROUND OF APPEAL

The true nature, scope, and effect of the omnibus ground of appeal has been elucidated in a number of landmark cases.

In **Tuakwa v Bosom2001-2002 SCGLR 61,** the apex court per Sophia Akuffo JSC (as she then was), held (at p 61):

*“An appeal is by way of re-hearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial court is against the weight of evidence. In such a case, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that, on a preponderance of probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence…’’*

In the case of **Koglex Ltd (No.2) v Field [2000] SCGLR 175, SC**, Acquah JSC (as he then was), stated the principles upon which a second appellate court may set aside the concurrent findings of a first appellate court, of the findings of a trial court. These principles, which are equally good for consideration of a trial court’s findings by this intermediate appellate court are:

1. *“i. Where the said findings of the trial court are clearly unsupported by evidence on record; or where the reasons in support of the findings are unsatisfactory…*
2. *Improper application of a principle of evidence… or, where the trial Court has failed to draw an irresistible conclusion from the evidence…*
3. *Where the findings are based on a wrong proposition of law; where the finding is so based on an erroneous proposition of law, that if that proposition is corrected, the finding disappears; and*
4. *Where the finding is inconsistent with crucial documentary evidence on record…’’*

Alive to our duty under the law, we shall review the entire record of the appeal to determine as to whether or not the judgment was in tandem with the weight of evidence. Before that however, we shall outline the legal principles and standards that we considered applicable to the case.

# BURDEN AND STANDARD OF PROOF

In every civil suit, the primary burden of proof, which comprises the duty of producing evidence in support of an assertion relevant to the court’s decision, is upon the party who made the assertion. The assertions are made in the endorsement to the writ of summons, the statement of claim, statement of defence or counterclaim.

Accordingly, where a defendant counterclaims, he assumes the same burden to prove the assertions in the counterclaim as the plaintiff in the claim.

The obligation on the party making the assertion is two-tiered. The first tier involves the production of evidence in proof of the averment, as required by sections 11(1) and 14 of the **Evidence Act, 1975 (N.R.C.D 323).**

First of all, that burden may be discharged by adduction of evidence by the plaintiff himself and or his witnesses.

Secondly, the burden of producing evidence may be discharged if the averment made by the plaintiff or defendant-counterclaimant, is admitted by the opponent. In **West African Enterprise Ltd v Western Hardwood Enterprise Ltd [1995-96] 1 GLR .CA**, it was held (in **holding 3),**

“...*no principle of law required a party to prove an admitted fact.’’*

Thirdly, the burden of proof may be discharged by evidence from the mouth of the opponent or his witness. In **Nyame v Tawiah & Anor [1979] GLR 265, C.A (Full Bench)**:

“*A party could prove his case by admissions from the mouth of his opponent or his adversary’s witness and in holding otherwise the house offended both principle and authority.’’*

See also: **Tsrifo v Duah VIII [1959] GLR 63; Ameoda v Pordier [1967] GLR 479** and **Eugene Guddah & Ors v Goldfields (Ghana) Ltd [2006] 8**

# M.L.R.G 13, C.A.

The second tier of the obligation is to ensure that the evidence adduced meets the standard of proof set by the law. The evidence must be sufficiently strong to be able to persuade the trier of fact under section10 (1), Act 323. The test applied by the trier of fact in determining whether the evidence adduced was persuasive, is “*proof by a preponderance of probabilities’’,* as required by section 12 of Act 323, see the cases of: **Majolagbe v Larbi [1959] 2 GLR 190; Owusu v Tabiri & Anor [1987-88] 1GLR 287; Fosua & Adu-Poku v Adu-Poku Mensah [2009] SCGLR 310** and **Agbeko v Standard Electric Co [1978] 1 GLR 432.**

The primary or initial burden of proof lies on the plaintiff for the assertions made in the action. Where there is a counterclaim, the primary burden lies on the defendant counterclaimant, see **Malm v Lutterodt [1963] 1GLR 1** and **Birimpong v Bawuah [1994-95] 2 GBR 837**.

Where the plaintiff or counterclaimant adduces sufficient evidence in discharge of the primary burden regarding their claims, the burden shifts onto the other party, under Section 14 of Act 323. That was because, an original defendant or a defendant to a counterclaim is required under Section 10 (2) of Act 323, to adduce sufficient evidence in rebuttal, in order to avoid a ruling against him on each contested issue, see, **Faibi v State Hotels Corporation [1968] GLR 471** and **Birimpong v Bawuah [1994-95] GBR 837.**

## What admissible evidence must prove.

In a land suit such as the instant one, the admissible evidence required of a claimant and to the standard stated above, must be geared towards proving the claimant’s acquisition, identity, and possession of the subject land.

In the instant case, whereas respondents’ sought the reliefs of recovery of possession and perpetual injunction, appellants’ counterclaimed for the reliefs of declaration of title to the land, recovery of possession, damages, and perpetual injunction.

The settled law is that, where a claim includes declaration of title, recovery of possession or perpetual injunction, evidence ought to be taken to prove those claims on a scale of preponderance of probabilities, except where legal arguments can dispose of the case without the need for adduction of evidence by the parties, see **Conca Engineering (Ghana) Ltd v Moses [1984-86] 2 GLR 319 (holding 4); Ayiku IV v A-G [2010] SCGLR 413/[2010] 29 MLRG 99,SC; Majolagbe v Larbi [1959] GLR 190; Adwubeng v Domfeh [1996-97] SCGLR 660; Kponuglo v Kodadja (1933) 1 WACA 24 at 25-6 and Rev. Rocher De-Graft Sefa & Ors v Bank of Ghana (Civil Appeal No: J4/51/2014.**

In **Asante-Appiah v Amponsah [2009] SCGLR 90,** it was held (holding 5):

“*The law is well established that where a party’s claims are for possession and perpetual injunction, he puts his tittle in issue. He therefore assumes the onus of proving his title by a preponderance of probabilities, like a party who claims declaration of title to land. Consequently…”*

As already mentioned above, in a dispute involving land such as the present one, the evidence of each claimant, in order to meet the standard of proof, must establish (a) *the claimant’s acquisition (root of title), (b) identity of the land claimed and (c) evidence of possession.*

We will briefly outline the law on each of the three legal requirements.

# ACQUISITION:

In **Mondial Veneer (Gh) Ltd v Amissah Gyebi XV [2011] 1 SCGLR 466,** it was held (holding 4):

“*In land litigation, even where living witnesses, directly involved in the transaction had been produced in court as witnesses, the law would require the person asserting title and on whom bear the burden of persuasion…to prove the root of title, mode of acquisition and various acts of possession exercised over the disputed land. It was where the party had succeeded in establishing those facts, on the balance of probabilities that the party would be entitled to the claim.”*

See also: **Odoi v Hammond [1971] 1 GLR 375; Adwubeng v Domfeh [1996-97] SCGLR 660 and Yaa Kwesi v Arhin Davis & Anor [2007-2008] SCGLR 580**.

# IDENTITY:

In expatiation of the importance of establishing firstly the identity of the land and secondly that the disputed land is the same as the land claimed, we resort to the landmark case of, **Anane v Donkor [1965] GLR 188,** where it was held (holding 1):

“*A claim for declaration of title or an order for injunction must always fail, if the plaintiff fails to establish positively the identity of the land claimed with the land the subject matter the suit.”*

See also: **Agyei Osae & Ors v Adjeifio & Ors [2007-2008] SCGLR 499 and Tetteh & Anor v Hayford [ 2012] 14 GMJ 11, SC.**

# POSSESSION:

Possession has been affirmed as an indicium of ownership. To that end, section 48 (1) and (2) of the **Evidence Act, 1975 (NRCD 323),** provides:

“*48 (1): The things a person possesses are presumed to be owned by that person.*

*48 (2): A person who exercises acts of ownership over property is*

*presumed to be the owner”.*

In **Aidoo v Adjei [1976] 1 GLR 431, CA,** it was held (holding 2):

*“A person in possession of land was presumed to be the absolute owner…”*

## See also: Amankwaa v Nsiah [1994-95] 2 GBR 758; Nyikplokpo v Agbedetor [1987-88] 1 GLR 165 and Majolagbe v Larbi (supra).

Note should be taken of the principle as elucidated in the dissenting opinion of Amua Sekyi JSC in **Nartey v Mechanical Lloyd Assembly Plant Ltd [1987-88] 2 GLR 314, SC** and in cases such as **Saaka v Dahali [1984- 86] 2 GLR 774,CA; Yartey & Oko v Construction & Furniture West Africa Ltd [962] 1 GLR 86, SC; Kuma v Kuma (1936)5 WACA 4; Payinlli v**

**Anquadah (1947) 12 WACA 284 and Birimpong v Bawuah [1991] 2 GLR 20, CA**, that the type of possession that may ripen into ownership is adverse possession to the actual or constructive notice of the other party, and not possession at the grace of the true title holder, or possession in the teeth of opposition and protests from the rival title contender.

Having laid out the applicable law, we shall screen the evidence through them to determine the veracity of the ground of appeal. Specifically, we shall examine the bona fides of the parties’ acquisition, identity, and possession. We shall begin with the identity of the subject land, which was a matter on which the parties were ad idem.

# IDENTITY OF SUBJECT LAND:

## Respondents’ evidence:

In their statement of claim, respondents as plaintiffs asserted that the subject house was built by their late father. In the endorsement to the writ of summons, the house was identified as House Number Plot 35 Block B, Atasomanso, Kumasi. The same house was identified in the declaration of property annexed to the letters of administration, tendered by them as exhibit A. The same identification appears in the vesting assent tendered by respondents as exhibit C. Respondents further tendered through an officer of the Lands Commission, an indenture claimed to be in the name of their late father as exhibit G. Respondents tendered an allocation note in respect of the subject land as exhibit M. Both exhibit G and M bear the same description of the property. To cap it all, the respondents and their witnesses were in one accord that the property claimed by them is House Number Plot 35 Block B, Atasomanso, Kumasi.

## Appellants’ evidence:

In the statement of defence and the counterclaim, appellants laid claim to the same House Number Plot 35 Block B, Atasomanso, Kumasi. They tendered exhibit 1, being a tenancy agreement between 1st appellant’s mother and another entity in respect of the subject house. It should be noted that in spite of exhibit 1 mentioning Adiembra, the parties agreed that the house rented out by 1st appellant’s mother is the same as the subject house. Incidentally, appellants tendered an allocation note in many respects similar to respondents’ exhibit M. The version of allocation note of appellants was marked exhibit 6. In similar vein, appellants and their witnesses testified that House Number Plot 35 Block B, Atasomanso, Kumasi, is their property by descent.

The evidence therefore unmistakably established that both sides laid claim to a particular House Number Plot 35 Block B, Atasomanso, Kumasi, which was established to be the same as the subject matter of the suit resulting in the instant appeal.

Respondents and appellants accordingly surmounted the first hurdle in the discharge of the respective burdens of proof and persuasion in respect of the identity of the subject matter of their claims.

In the circumstances, none of the parties could win the cause solely on the evidence on identity of the property respectively claimed, and as being the same as the subject property of this dispute. That leads us to the determinative issue of acquisition of the subject property.

# ACQUISION OF SUBJECT PROPERTY:

Central to the determination of this case is the question of acquisition. In order to do judicial justice to this issue, we shall critically examine the case of each side in respect of:

1. *The pleaded case-to determine its consistency or confliction with the evidence.*
2. *The existence or not of two Akwasi Agyapongs in the form of*

*respondents’ late father and appellants’ late uncle.*

1. *Evidence on acquisition by the respective sides-to determine which met the legal requirements set out supra.*

## Pleaded case of respondents on acquisition:

On acquisition, respondents pleaded in their statement of claim as follows:

1. *The plaintiffs are beneficiary owners of House Number Plot 35 Block B, Atasomanso, Kumasi.*
2. *The plaintiffs aver that the said house in dispute was built by their late father by name Akwasi Agyapong (deceased).*
3. *The plaintiffs aver that their late father Opanin Akwasi Agyapong built the said house during his lifetime.*

They further averred that after the death of their father, they applied for letters of administration and have had the subject house vested in them.

## Pleaded case of appellants on acquisition:

In paragraph 10 of the statement of defence, the appellants averred that the subject house was acquired by 1st appellant’s uncle called Akwasi Agyapong.

The pleadings on either side does not disclose the root of title or the name of the grantor and the mode of acquisition, whether through outright purchase, lease, or gift. That was quite odd because the parties who were fully represented by counsel knew or ought to have known that the root of title is critical in any land dispute.

The omissions were not fatal. Pleadings are the skeleton upon which the fresh (evidence) was to be pasted. Since the parties were at par on the pleadings on the issue of acquisition, they were obliged to prove by evidence, the mode of acquisition by their respective principals, who incidentally are alleged to have the same name of Akwasi Agyapong.

## Who were/was Akwasi Agyapong?

Respondents’ claimed that their late father who acquired the subject property was called Akwasi Agyapong. Appellants on the other hand claimed that the subject property was acquired by their uncle also called Akwasi Agyapong.

The pleadings were critical on this issue. Even though respondents denied that appellants’ uncle acquired the subject land and built the house thereon, nowhere in their pleadings did respondents deny that appellants had an uncle called Akwasi Agyapong. On the other hand, appellants robustly pleaded and denied that respondents’ father was called Akwasi Agyapong. They labelled respondents claim fraudulent and alleged that their father was called Kwaku Tawiah alias Woarabeba. In reply, respondents denied appellants’ claim and joined issues on the name of their father, inter alia.

The evidence placed by respondents before the trial court regarding the name of their late father were:

1. Letters of administration- exhibit A
2. Vesting assent-exhibit C
3. Picture of respondents father-exhibit D, and
4. Lease with the Lands Commission-exhibit E

The trial judge expressed her thinking on the evidence adduced to prove the identity of Akwasi Agyapong at pages 229-230 of the record of appeal as follows:

*“I must state that, beyond the tendering of the exhibits, both sides did practically nothing by way of introducing any independent evidence as to the true identity of the said Akwasi Agyapong who on the face of the documents and from the evidence of both sides acquired the land. The court was left with only the option of examining the evidence led by the parties and the documents tendered to come to conclusion on a balance of probabilities as to whether it is the plaintiffs’ father or the defendants’ uncle who is the said Akwasi Agyapong’’*.

She then embarked on an enquiry into the exhibits tendered by the parties and the evidence adduced and concluded that the evidence proved respondents’ father called Akwasi Agyapong to have a legal and superior title to the equitable interest of appellant’s uncle Akwasi Agyapong.

## Probative value of the exbibits

The trial judge, in our humble view, placed undue weight on some of the exhibits tendered at the trial. She further fell into fatal error by ascribing to the late father of respondents, ownership of the exhibits in the absence of any credible evidence. We shall now examine the position of the trial judge on each of the said exhibits and then draw our conclusions.

## Name of respondents’ father

Since respondents denied appellants’ claim that their father is Kwaku or Kwasi Tawiah, and issues were joined on that critical matter, respondents who affirmed that averment reposed the primary onus of proving it. In **Agbeko v Standard Electric Co [1978] 1 GLR 432 at 443,** it was held:

“*It is a vital principle of evidence, a common place of law, that the proof is upon the party who affirms and not upon the one who denies”.*

## In West African Enterprise Ltd v Western Hardwood Enterprise Ltd [1998-99] SCGLR 105, it was held:

*“Where an averment made by one party in his pleadings was denied by the other in his defence or reply, it was necessary for the one who made that averment to produce evidence in proof of it…’’*

In **Zabrama v Segbedzi [1991] 2GLR 223, CA,** *it was held (holding 2):*

*“The correct preposition is that a person who makes an averment or assertion, which is denied by his opponent, has the burden to establish that his averment or assertion is true. And he does not discharge this burden unless he leads admissible and credible evidence from which the fact or facts he asserts can properly and safely be inferred. The nature of each of each averment or assertion determines the degree and nature of that burden…’’*

See also: **Majolagbe v Larbi [1959] GLR 190**.

The respondents therefore had the obligation to prove that their late father was Akwasi Agyapong or was also called Akwasi Agyapong*.*

The best respondents could do was to tender a bare picture of their late father. The picture has no name or markings on it. The dispute on the name was not as to whether respondents father ever existed. It had to do with whether he was indeed called Akwasi Agyapong as they contended. In that context, the bare picture tendered proved nothing, and was worthless evidence, aside proving that their father ever existed.

Respondents father stayed in the Ivory Coast. As a foreigner, he was required to enter that country with his passport or other travel documents. The Cote D’Ivoire is noted for its strict national identity card system-*carte nationale d’identite,* see [www.refworld.org](http://www.refworld.org/)> *Cote d’Ivoire:*

*Identity documents, including the national identity card-accessed on 3 March 2023.* Respondents could not explain why they could not tender any identity document of their father.

They also failed to tender any document announcing his death, or an invitation to his funeral as the appellants did. We could not believe respondents’’ claim that their father’s funeral is yet to be performed. If the funeral is not yet performed, how was Yaw Mosi appointed the customary successor to be able to apply for letters of administration with the daughter Ama Nyame?

The evidence of appellants came in the form of (a) oral evidence (b) funeral invitation card for their uncle Akwasi Agyapong-exhibit J (c) burial permit for same Akwasi Agyapong-exhibit 5 (d) letters of administration- exhibit-4 and property rate demand notice and receipts-exhibits 3 and 3A respectively.

Appellants and their witnesses claimed that respondents father was called Kwaku Tawiah alias Woarabeba, even though the Kwaku was sometimes missed up with Kwasi and Kwame. Respondents admitted that their father was nicknamed Woarabeba but denied that he was called either Kwaku or Kwasi Tawiah.

Appellants’ funeral invitation card has the name of Akwasi Agyapong and his picture. The burial permit also has his name. This puts beyond doubt, the existence and death of appellants’ uncle called Akwasi Agyapong. The letters of administration tendered by appellants was founded on concrete evidence of an Akwasi Agyapong who lived and died and was buried on a particular day.

True to their non-denial of the name of appellants’ uncle in their pleadings, respondents could not challenge the documentary evidence tendered by appellants to prove that their uncle was indeed called Akwasi Agyapong.

What appellants did by their documentary evidence was to disprove the claim of respondents by negative evidence. They did this by not tendering any document indicating that respondents’ father was Kwaku Tawiah, but by proffering evidence which excluded the possibility that respondents father was the man called Akwasi Agyapong.

Of the oral evidence adduced, the only fairly non-partisan one was from Kwabena Frimpong (DW3). He was the only witness who was not a relative to a party in the case. The result is that the only fairly neutral evidence favoured the appellants and went against respondents.

The conclusion is that respondents failed to discharge the onus of proof regarding the name of their father. The evidence adduced to prove that their father was called Akwasi Agyapong was so general and vague that it should have failed to persuade the trial court that their father was called Akwasi Agyapong. The conclusion of the trial court that respondents’ father was called Akwasi Agyapong defied the established facts.

On the other hand, the name of appellants’ uncle as Akwasi Agyapong remained uncontested. In spite of that, appellants adduced oral and documentary evidence which on the balance of preponderance, proved that the late uncle was Akwasi Agyapong.

The established fact therefore is that there were not two, but only one Akwasi Agyapong, who was the uncle of appellants. Respondents engaged in identity theft. They stole the name Akwasi Agyapong belonging to the uncle of appellants for the purpose of appropriating the subject property.

With that finding, all documents standing in the name of Akwasi Agyapong must by application of logic and common sense, refer to the late uncle of appellants and not the father of respondents.

## Letters of administration.

In the course of the trial, both sides tendered letters of administration in respect of their principal. Respondents tendered exhibit A in respect of their father Akwasi Agyapong. To begin with, the date of death on the letters of administration, which is 15th January 2000, contradicts the date of death on the inventory, which is 3rd January 2000. Secondly, even though the subject house has been listed as a property of respondents’ father, Akwasi Agyapong, respondents failed to prove that their father was in fact called Akwasi Agyapong. Thirdly, the mere listing of a property in an inventory, and the grant of letters of administration in respect of the deceased’s estate does not foreclose the issue of ownership or title if there was evidence to the contrary.

When the affidavit of interest of (exhibit N) is properly scrutinized,

The case of appellants at the time respondents applied for letters of administration was that their late uncle acquired the subject property for his sister who was mother to respondents. Indeed, the letters of administration of Akwasi Agyapong tendered by appellants as exhibit 4, has no inventory of the subject property. But if appellants claim that the subject property was acquired by their uncle for their mother is true, how was the same property expected to be inventoried for Akwasi Agyapong as his personal property?

On this issue, we found respondents to been hypocritic, their counsel’s submission not candid and the trial judge’s analysis defective.

The evidence established that respondents’ father built a house in his hometown that was not inventoried in his letters of administration.

The following ensued between counsel for appellants and Kofi Akyer (PW2), who is nephew of respondents father:

*“Q. The house that you claim your uncle built in Sefwi, did you list that in the inventory in support of the application for letters of administration.*

*A. No*

*Q. This house that you claim that your uncle built at Sefwi you alleged that it was gifted to the family.*

*A. He gifted it to my mother and her children”.*

If respondents understood and accepted that the house built by their own father but gifted to his sister and his children needed not to appear in the inventory as their father’s property, then it was odd for them to refuse to understand and accept that the subject house acquired by Akwasi Agyapong for sister and children also needed not to have appeared in the inventory. Is what is good for the goose not good for the gander?

The son of Akwasi Agyapong, Akwasi Kyerepem alias Owusu Agyemang who testified for appellants was emphatic that the subject house was not inventoried in his father’s letters of administration because his father acquired the property for his sister, who was the mother of the appellants.

The fuss about the subject property not been mentioned in the letters of administration of appellants’ uncle amounted to misappreciation of the evidence and the relevant law. In the face of the case of appellants in the affidavit of interest, the court below erred in removing the caveat, and proceeding to issue the letters of administration in favour of respondents.

The mere listing of the subject property in the letters of administration of respondents could not create in them title, where there was none. And the mere decision to state the name Akwasi Agyapong to secure the letters of administration could not covert that name for their father if he was not known by that name.

## Allocation notes (exhibits M and 6):

Two allocation notes were tendered respectively by the parties as exhibits M (for respondents) and 6 (for appellants). There was no doubt that exhibit 6 was made from exhibit M. We therefore agree with the trial judge that exhibit M was the (most) authentic of the two. The respondents, their lawyer and the trial judge took the view that since exhibit M was tendered by respondents, the grant was made to him and further, the name Akwasi Agyapong on the exhibit was that of respondents’ father.

That assumption was proven wrong. Respondents could not tell the court as to how exhibit M got into their possession. Since their father was married, or at least in concubinage with appellants’ mother, and since the two sides lived in the same house, access to such documents could have been easy. The mere possession and tendering of such a document were not sufficient to secure a presumption of its contents in favour of respondents.

DW3 contended that exhibit M was issued to appellants’ uncle, and not respondents’ father. Therefore, until respondents proved that their father was called Akwasi Agyapong, they could not leap-frog to rely on documents issued in that name, when the grantor stool had given evidence that the document was given to appellants’ uncle.

## Indenture (exhibit G)

Respondents tendered an indenture as exhibit G, in proof of their claim that their father acquired the subject property. The indenture was in the custody of the Lands Commission and was tendered with the allocation note (exhibit M), by an official therefrom. In the first place, respondents provided no background information as to who deposited exhibit G with the Lands Commission. As has been found supra, respondents’ father was not Akwasi Agyapong. It was appellants’ uncle who was called Akwasi Agyapong. The indenture tendered by respondents rather supported the case of appellants that their uncle acquired the subject property.

## Evidence of grantor:

The parties as aforementioned, did not plead the source of their respective grants. During the trial however, the evidence from both sides disclosed that the grant was from the Atasomanso stool. Respondents made no efforts to bring forth any evidence from the grantor stool to back their root of title or acquisition. They were content to rely on an indenture, exhibit G, issued by the Atasomanso Stool to Akwasi Agyapong who they claim was their late father. As the discourse supra has proven, respondents woefully failed to prove that their late father was indeed called Akwasi Agyapong.

Appellants fulfilled their legal obligation towards meeting the burden and standard of proof, by calling the grantor of their late uncle Akwasi Agyapong. The law is settled that in a land dispute, the evidence of the grantor, especially where the parties have a common grantor, weighs heavily.

In **Majolagbe v Larbi [1959] GLR 190**, the High Court per Ollenu J (as he then was) held (holding 3):

“*That the position of a vendor when his purchaser and a third party litigate to the land is governed by native law and custom, which requires that the vendor must join his purchaser in such litigation”.*

On the need to call the grantor, Twumasi J (as he then was) in **Egyir v Hayfrom [1984-86]** GLR 60, also held (holden 3):

*“Where a party derived his title from someone else, either by way of gift or purchase or other form of alienation of land, it was incumbent upon that party whose title was derivative to prove the title of his grantor or vendor or donor as the case might be”.*

*Consequently, a grantor had a duty to sue or defend jointly with his purchaser in any dispute relating to the land sold and the purchaser had a corresponding duty to bring his vendor into the suit in his own interest*…”

Due to the widened scope of litigation for grantors, especially stools, convenience and exigencies of time do not permit them to join such disputes in most cases. The current practice which the courts widely endorse, is to call the grantor as witness.

On the need to call a joint grantor and the weight of his evidence thereof, the apex court per Anin Yeboah JSC (as he then was), in the case of **Benyak Co. Ltd v Paytell Ltd & Ors [2013-2014] 2 SCGLR 976,** held (holden 2):

“*Where rival parties claim property as having been granted to each by the same grantor, the evidence of the grantor in favour of one of the parties should incline a court to believe the case of the party in whose favour the grantor gave evidence unless destroyed by the other party”*.

Appellants’ called the grantor stool as their witness. The Stool was represented by Kwabena Frimpong (DW3), who is the caretaker of the Atasomanso Stool. The witness who knew the principals of the parties, testified that respondents father was called Tawiah and not Akwasi Agyapong. He was positive that it was appellants’ uncle who was called Akwasi Agyapong.

According to the witness, he was present and was a participant when formalities for the grant of the subject land to appellants’ uncle Akwasi Agyapong took place. He claimed to have been asked by the then chief, Nana Owusu Barima II, to pour libation on the subject land for Akwasi Agyapong to begin work. He was then given GHC20 by the chief for the work he did. According to the witness, the chief issued an allocation note to Akwasi Agyapong to reflect the grant made to him. Three days later, he went with him (Akwasi Agyapong) for a site plan and the chief asked him (Akwasi Agyapong) to go to the Lands Commission to register the land. He identified exhibit M as the allocation note given to Akwasi Agyapong by the chief.

It was quite strange that the trial judge placed little weight on the evidence of the grantor. What should have been noted by her was that, that Stools are corporate bodies with perpetual succession. As the caretaker of the Atasomanso Stool, DW3 was in the same position as Nana Owusu Barima II who allegedly made the grant to appellants’ uncle.

The evidence of DW3 could not be destroyed by respondents’ counsel under cross examination. His position as caretaker of the Atasomanso Stool could not be doubted. Nothing in the cross examination disproved his claim that he knew the father of respondents and the uncle of appellants, and that whereas respondents’ father was called Tawiah, appellants’ uncle was called Akwasi Agyapong. We found nothing in the cross examination that undermined his claim that he was present when the subject land was allocated to appellants’ uncle with a covering allocation note (exhibit M) and a site plan, with some advice by the chief to Akwasi Agyapong to register a lease with Lands Commission.

In our view, the fact that (a) respondents have a grant of letters of administration covering the subject house, (b) that the letters of administration of appellants’ uncle does not cover the subject property

(c) appellants have not taken steps to bring the property into their names

(d) appellants head of family did not join their suit or testify for them, were irrelevant to the veracity and cogency of the evidence of DW3.

We further found it odd as to how the evidence of DW3 could be devalued because counsel for the respondents barely labelled DW3 “an untruthful witness” or “a busybody”.

The trial judge misdirected herself on the facts regarding the evidence of DW3, after affirming his credibility when she held at page 232 of the record:

“*I also found the evidence of DW3 very instructive considering his position in the affairs of things in the Atasomanso Stool. DW3 Kwabena Frimpong described himself as the caretaker of the Atasomanso Stool”.*

Oddly, the trial judge treated the evidence of DW3 on piece meal basis, and relied on his evidence only when she thought it favoured respondents. She decided to ignore the credible and compelling evidence of DW3 on the issue of acquisition which favoured appellants.

The evidence of appellants on their root of title, as corroborated by the current occupant (caretaker) of the grantor Atasomanso Stool, far outweighed the zero evidence of respondents on their root of title. The trial judge erred on the facts in ignoring the clear state of the evidence, and landing her decision on documents which did not tilt in anyway in favour of respondents.

# POSSESSION:

As has been expatiated supra, possession of a subject property is evidence of ownership or title. The case of respondents was that their father began the construction of the subject house but left for Cote D’ Ivoire when it reached the roofing stage. They claimed that their father sent money for the completion of the house.

Appellants on the other hand claimed that their uncle acquired the land for their mother. He began the construction but could not complete it. It was their brother overseas who brought money for completion of the house.

Since we have found that the subject land was granted to appellants’ uncle, a contribution or role played by respondents’ father was gratuitous and free for his wife or concubine and her family.

We hasten to state that on the issue of possession, the evidence of appellants far outweighed that of respondents. For a start, it was appellants mother who rented out the property to an entity called Women in Development Foundation. When she had a challenge with that entity, she took them to court through their head and succeeded in ejecting them through the judicial process.

This act, of which respondents were aware and did not challenge, strengthened appellants claim to the land.

The evidence established that appellants and their family members have been in possession of the property from at least year 2000 to the present day without any protest from respondents. Respondents father died in January 2000. Until the institution of their action in March 2014, they had not taken any concrete steps towards laying an adverse claim to the house. Based on the pleadings, we considered the trial court’s refusal to allow appellants’ application for leave to plead the Limitations Act erroneous.

At a time, 1st respondent claimed at page 80 of the record of appeal that her father had not visited Ghana 8 years before his death in year 2000. At page 81, she conceded that her father left Ghana and never returned until 17 to 18 years before his death. According to PW2, the last time his uncle visited Ghana was in 1992. In fact, respondents father never lived in the subject house and never laid any adverse claim to it during his lifetime.

Despite claiming that appellants and their mother were caretakers for their father, respondents conceded that appellants and their mother never accounted to their father. If appellants mother was a caretaker for respondents’ father, some form of accountability was expected to have taken place.

The fact of possession of the subject property by appellants and their family in the lifetime of respondents’ father and over a decade after his death, supported appellants’ claim to the subject property.

# APPELLANTS CAPACITY:

Despite there being no averment challenging appellants’ capacity, the trial judge relied largely on a single bare question by counsel for respondents and concluded that appellants lacked capacity to institute the counterclaim.

The exchange between 2nd appellant and counsel for respondents was as follows:

“Q. You have also counterclaimed; I suggest to you that you do not have capacity to seek for declaration of title to the house in dispute.

1. We have capacity to counterclaim because our uncle Akwasi Agyapong built that house in dispute”.

The 1st appellant also testified that they are owners of the house because their mother gave it to her children (appellants). On the authority of **Okyere (Dec’d) (Substituted by) Peprah v Appenteng & Asoma [2012 1 SCGLR 66,** the trial judge held that since appellants have not been appointed administrators and do not have the subject matter vested in them by a vesting assent, they lacked capacity to institute the counterclaim.

The trial judge was not only wrong. She was very wrong on appellants capacity to institute the counterclaim. The Okyere v Appenteng case was inapplicable to the present case. In that case, the subject property had been devised under a Will. That made a vesting assent a necessity. In the instant case, there was no such Will or devise. Letters of administration are also yet to be procured.

In the appellants’ circumstances, the applicable law is section 1 of the **Administration of Estates Act, 1961 (Act 63).** It provides:

*“Section 1—Devolution on Personal Representatives***.**

* 1. : *The movable and immovable property of a deceased person shall devolve on his personal representatives with effect from his death.*
  2. *: In the absence of an executor the estate shall, until a personal representative is appointed, vest as follows:*
     1. *if the entire estate devolves under customary law—in the successor.*
     2. *in any other case—in the Chief Justice”.*

The capacity to sue under such circumstances without letters of administration was affirmed by the Supreme Court in **Adisa Boya v Zenabu Mohammed (J4/44/2017, dated 14th February 2018).** Since the property devolved on appellants under customary law with effect from the death of their mother, they had capacity at the time to institute the counterclaim.

# CONCLUSION:

It is our conclusion that the judgment of the trial Circuit Court, Kumasi, dated 28th February 2018, by which the claims of respondents were upheld, and the counterclaim of appellants dismissed, is against the weight of evidence, for the following reasons:

1. Central to the dispute was whether there were two Akwasi Agyapongs in the form of respondents’ late father and appellants’ late uncle, or there was only one Akwasi Agyapong, and who that person was.

Whereas appellants challenged the name of respondents’ father as Akwasi Agyapong in both the pleadings and the evidence, respondents did not put up any such challenge either in their pleadings or evidence, about the existence and name of appellants’ late uncle as Akwasi Agyapong. The burden fell on respondents to prove that their father was indeed called Akwasi Agyapong.

All they could do was to tender a bare picture without a name or any description. The mere repetition of the name in their oral evidence was worthless, since there was a better way of concretely proving that their father was indeed called Akwasi Agyapong. They had to prove that their father was called Akwasi Agyapong before they could rely on that name in the letters of administration, allocation note and the indenture. Respondents failed in their duty to establish that their father was called Akwasi Agyapong.

Appellants on the other hand proved by (a) evidence, particularly that of DW3 who was fairly neutral (b) the funeral invitation card with the name and picture of their uncle (c) the burial permit and

(d) receipts for payment of rates, that their uncle was indeed called Akwasi Agyapong. That was in addition to respondents’ admission sub silentio, that appellants uncle was called Akwasi Agyapong.

1. Since it was appellants’ uncle who was called Akwasi Agyapong, and respondents failed to prove that their father was also called Akwasi Agyapong, all the exhibits including the allocation note and indenture with the name Akwasi Agyapong, were referrable to appellants’ uncle and not respondents’ father. Respondents merely engaged in identity theft for the purpose of appropriating for themselves the subject property.
2. Whereas appellants established their root of title by calling a representative of the grantor stool to expatiate on the grant to their uncle, respondents left the proof of their father’s acquisition in abeyance, in breach of their evidential burden.

Worse still, they could not establish that the name Akwasi Agyapong appearing on the allocation note and indenture tendered by them was that of their father, and not appellants’ uncle.

On account of the above, we uphold the appeal in respect of the suit of respondents and set aside the trial court’s decision in favour of respondents. In its place, judgment is entered for appellants.

## Counterclaim:

The trial judge dismissed the counterclaim of appellants on the grounds upon which judgment was entered for respondents on their claim and principally, because according to her, appellants lacked capacity to sue in respect of the subject property. On the evidence, we have held supra that she was wrong. She was equally wrong in dismissing the counterclaim in part on grounds of lack of capacity.

The moment the mother of appellants who owned the property passed away, same devolved on the customary successors under section 1 of Act

63. Contrary to the trial judge’s conclusion, the customary successor(s) in whom the property is so vested under section 1 of Act 63, as the Supreme Court affirmed in **Adisa Boya v Zenabu Mohammed,** supra, is entitled to sue to protect the property in the absence of letters of administration.

The decision dismissing appellants’ counterclaim did not ride with the tide of the evidence. We uphold the appeal in reference to the counterclaim and set aside the judgment on the counterclaim. Judgment is hereby entered for appellants on the reliefs endorsed in the counterclaim.

* 1. *It is hereby declared that title in the subject property being House Number Plot No 35 Block B, Atasomanso, Kumasi reside in appellants by descent through their late mother Adwoa Konadu.*
  2. *An order for recovery of possession of property House Number Plot No 35 Block B, Atasomanso, Kumasi, is hereby granted in favour of the appellants.*
  3. *An order of perpetual injunction restraining the respondents, their agents, servants, workmen, assigns and all those claiming through them from interfering with appellants’ possession and enjoyment of the subject property is hereby issued.*

Since respondents have not physically trespassed onto the subject property, we saw no justification in awarding damages for trespass.

**(SGD.) ERIC BAAH**

**(JUSTICE OF APPEAL)**

**I agree. (SGD.)**

**GEORGINA MENSAH-DATSA(MRS.)**

**(JUSTICE OF APPEAL)**

**I also agree. (SGD.)**

**SAMUEL OBENG-DIAWUO**

**(JUSTICE OF APPEAL)**