**ASAMOAH BOAKYE**

*(PLAINTIFF)*

**vs.**

**GHANA EDUCATION SERVICE & AIRTEL GHANA LTD**

*(DEFENDANTS)*

[COURT OF APPEAL, KUMASI]

CIVIL APPEAL NO: HI/128/2023 DATE: 8TH FEBRUARY 2024

**COUNSEL**

VIVIAN MFODWAA GYAN ESQ. FOR PLAINTIFF/RESPONDENT.

KWABENA AMPONSAH ASARE ESQ. FOR 1ST DEFENDANT/APPELLANT.

**CORAM**

MENSAH-HOMIAH, J.A (PRESIDING)

BAAH, J.A

OFORI, J.A

**JUDGMENT**

**BAAH, J.A**

* 1. **BACKGROUND**

This appeal challenges the decision of the Circuit Court, Kumasi, dated 26 May 2021, *coram*: Ali Baba Abature J, sitting as an additional Circuit Court Judge. The legal hostilities over the subject parcel of land situate at Aputuogya in the Ashanti Region, began with the issuance of a writ of summons by the plaintiff/respondent (hereafter respondent) in the Circuit Court, Kumasi, by which he sought in substance the reliefs of:

*(a) Declaration of title to the disputed land (b) Recovery of possession (c)damages for trespass (d) Perpetual injunction and (e) Litigation costs.*

The 1st defendant/appellant (hereafter appellant) which filed a statement of defence to contest the case, did not counterclaim. The 2nd defendant decided not to partake in the hostilities. It notified the court of its intention to atone tenancy to whomsoever emerged victorious. The contest was accordingly between the respondent and the appellant. The respective cases of the parties as communicated by their pleadings, are summated below.

* 1. **CASE OF PLAINTIFF/RESPONDENT**

The respondent (Asamoah Boakye), by the title of the suit, sued in a representative capacity. He sued for ‘*’Himself and on behalf of the other children of Akua Agyeiwaa*’’. According to the respondent, the subject land was owned by her late mother called Akua Agyeiwaa, who also got the grant of it from her mother.

Part of the said land, he claimed, was granted to the “Council’’ a long time ago. The land granted to the Council, came into the possession of the Ghana Education Service (appellant) on or around 1991. According to the respondent, their land shares a common boundary with the appellant, with flowers as the boundary fixture. He claimed that his family has been in undisturbed possession of the subject property during the life of their mother and since her demise in 2006. He has erected stores on part of the land.

The instant suit was prompted by the construction of a mast by the 2nd defendant on land the respondent considered to be part of their land. When he was informed that it was the appellant who leased the land for the said construction, he went to their director to make him aware that the mast was being constructed on his family’s land. Several visits to the District Chief Executive (DCE) could not resolve the issue, leading to the issuance of the writ of summons.

* 1. **CASE OF APPELLANT**

The case of the appellant (GES) is that the entire land in the subject area was acquired by the state (Colonial government) and was used as a courthouse (District/Magistrate Court). When the court was moved to the new District capital, Kuntunase, the appellant took over the land with its premises, and has been in effective possession of the entire land since 1989.

According to the appellant, the land suffered encroachment from the townsfolk of Aputuogya, including allegedly the respondent’s mother, who was written to by the Assembly as far back as year 2002 by the District Town Planning Officer to cease the trespass onto appellant’s land. Despite warnings and protests, the respondent and other members of the community allegedly unilaterally erected the structures.

According to the appellant, the mast of the 2nd defendant was constructed entirely on land belonging to the appellant. The appellant denied the respondent’s claim to title of the subject land and labelled the site plan relied on by the respondent as being without legal basis.

* 1. **EVIDENCE**

In the ensuing plenary trial, the respondent testified through his attorney and sister, Rose Badu. Respondent called three witnesses, namely, Jones Siriboe (PW1), Kwabena Anning (PW2) and Ohene Asiamah (PW3).

Asare Bediako, the District Information and Communication Technology

(ICT) coordinator, testified for the Appellant. The two witnesses called by the appellant were Ernest Kwakye (DW1) and Nana Asakyem Kwakye Agyeman II, chief of Aputuogya (DW2).

* 1. **JUDGMENT**

In its judgment dated the 26 day of May 2021, the trial court granted the entirety of the claims of the respondent, with general damages and costs against the defendants assessed at GHC5,000.00 and GHC2,000.00 respectively. Our task is to determine whether the judgment swam against the tide of the evidence; as the appellant contends, or with the tide of the evidence; as the respondent postulates.

* 1. **GROUNDS OF APPEAL**

The two grounds of appeal found at page 251 of the record of appeal (hereafter ROA) are as follows:

* + 1. *The trial judge erred when he placed the burden of proof on the 1st Defendant/Appellant.*
    2. *The judgment is against the weight of the evidence on record.*

No further grounds of appeal were filed as advertised in the notice of appeal.

# Inelegancy of the first ground of appeal

The first ground of appeal is patently inelegant, vague, and general. Firstly, it violates Rule 8 (4) of the **Court of Appeal Rules, 1996, C.I.19**. It appears to allege misdirection or error in law, without providing particulars of the misdirection or error of law, see **Zabrama v Segbedzi [1991] 2 GLR 221**. Secondly, it violates Rule 8 (6), C.I. 19. The burden of proof is not static. The first point in locating who bears the primary burden on a particular averment depends on the pleadings. A burden may therefore either lie on a plaintiff or defendant, depending on the configuration of the pleadings.

When an averrer adduces evidence to discharge his primary burden, the burden shifts onto the opponent for a rebuttal, failing which a ruling would be made against him, see-sections 10 and 11, **Evidence Act, 1975 (NRCD 323)**. To merely allege that the burden of proof was wrongly placed on the appellant was therefore vague and general. Which burden of proof? The burden of proving acquisition? possession? or identity of the land claimed? Was it the primary burden on the respondent as an averrer/claimant or the secondary burden of rebuttal which would have been on the appellant if the respondent had discharged the primary burden as an averrer? For the stated violations, we strike down ground one of the appeal.

That leaves us with the omnibus ground of appeal, which generally commands us to approach the appeal as a rehearing under Rule 8 (1), C.I.19, see-**Owusu-Domena v Amoah [2015-2016] 1 SCGLR 790.**

* 1. **SUBMISSIONS OF COUNSEL FOR PARTIES**

Counsel for the appellant and respondent respectively filed their written submission on 18 May 2023, and 5 June 2023. We shall revert to the submissions where relevant.

Before dealing with the sole ground of appeal and issues related thereto, we intend to dispose of the issue of respondent’s capacity which was raised by counsel for the appellant in his written submission.

* 1. **CAPACITY**

In his written submission, counsel for the appellant raised the capacity of the respondent as a preliminary legal issue. His contention was that, since the respondent claimed that the subject land belonged to his mother who died intestate, the property is yet to devolve on the respondent and his siblings as personal representatives since letters of administration has not been procured.

It was his submission that since no evidence was adduced to show that the subject property had by law passed from the respondent’s mother to the respondent and his siblings, they had no capacity to approach the court, even if title in the land was vested in their late grandmother and descended onto their mother.

He relied on sections 1,2, 96 and 108 of the **Administration of Estates Act, 1961, (Act 63); the Intestate Succession Law, 1985 (PNDCL 111)** and the case of **Okyere (Deceased) v Appententg & Adoma [2012] 1 SCGLR 65.**

In his rebuttal, counsel for the respondent posited that the current legal position is that beneficiaries of an estate can sue in their own capacity, absent probate, letters of administration and vesting assent. He relied on **Abisa Boya v Zenabu Mohammed (substituted by Adama Mohammed) & Anor [2018] GHASC 7.**

Capacity or *locus standi*-the right to approach a court, is a fundamental prerequisite for the institution of civil actions**. In Sarkodie I v Boateng II [1977] 2 GLR 343, at 346**, the Full Bench of the Court of Appeal held:

“*It is now trite learning that where the capacity of a plaintiff or complainant is put in issue, he must, if he is to succeed, first establish his capacity by the clearest evidence*.’’

In a few instances, the issue of capacity when raised on the pleadings and timeously, is tried separately and preliminary. Typically, the issue of capacity is tried together with the other issues raised for the trial. Where lack of capacity is successfully raised, the court is obliged to truncate the trial without any resort to the merits of the case, see-**Alfa Musah v Dr Francis Appeagyei [2018] GHASC 24 (02 May 2018)**.

In the instant case, no doubt arises that the respondent and his siblings are the sole or major beneficiaries of their mother’s intestate estate. Indeed, for a regrettably lengthy period of time, the courts under the leadership of the Supreme Court had held that the beneficiaries of an estate had no capacity to approach the court until the property is vested in them by vesting assent. The case of **Okyere v Appenteng** (supra) cited by counsel for the respondent typifies the precedent. The capacitary paradigm of beneficiaries of estates of intestates has recently markedly evolved in tandem with current social change and exigencies. In **Abisa Boya v Zenabu Mohammed** (supra), the apex court decided that beneficiaries of an estate have capacity to sue even where letters of administration and vesting assent are yet to be issued. The court per Gbadegbe JSC held, *inter alia*:

“*We are of the view that by virtue of the rules on intestacy contained in section 4(1) (a) of the Intestate Succession Law, PNDC Law 112 , following the death of the father of the defendants and their mother- the original 1st defendant, the property devolved upon the children and as such they had an immediate legal interest in the property that they are competent to defend and or sue in respect of and in any such case either the children acting together or any of them acting on behalf of the others may seek and or have an order of declaration of title made in their favor*.’’

The court adverted its mind to its earlier decision in Okyere v Appenteng but explained that since the Okyere case had to do with a Will, the statement of Brobbey JSC in that case was *obiter* and secondly, the defendants therein were in peaceful possession, and were rather the ones sued by the plaintiff therein.

The law as it applies today is that beneficiaries of an estate can sue to remedy a disadvantage, with or without letters of administration and vesting assent.

The preliminary issue based on the capacity of the respondent, in the circumstances, fails. We shall now, in summary, lay out the configuration of the burden and standard of proof that the respective parties were expected to meet.

* 1. **BURDEN AND STANDARD OF PROOF**

The primary burden of proof, in terms of adduction of evidence to the requisite standard of proof, is on the party making the particular averment, whether he be the plaintiff or defendant.

However, 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.’’*

Furthermore, the burden of proof may be discharged by evidence from the mouth of the opponent or his witness. In **Nyamekye 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.**

In order to prove an averment, the evidence adduced in support of same must be sufficiently strong to be able to persuade the trier of fact under section10 (1), Act

323. The test applied by the court in determining whether the evidence adduced was persuasive, is “*proof by a preponderance of probabilities’’.* That is the requirement by section 12 of Act 323, see-**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.**

Where the plaintiff adduces sufficient evidence in discharge of the primary burden regarding his 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 the instant case, respondent sought the reliefs of (a) declaration of title to the subject land (b) recovery of possession (c) damages for trespass to land and (d) perpetual injunction. This being a land suit, the burden and standard of proof required of the respondent was to adduce credible evidence which on the preponderance of probabilities, establishes his mother or family’s acquisition, the identity, and possession of the subject land.

The cardinal rule 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 is sufficient to dispose of the case, 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 title 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…”*

We shall now proceed to a consideration of the parties’ evidence on acquisition (root of title), identity/boundaries and possession.

* 1. **ACQUISITION/ROOT OF TITLE**

# Submissions of counsel.

It was the submission of counsel for the appellant that the trial judge’s findings that

(a) appellant had the duty to prove that the disputed land was actually acquired by the state (b) that the appellant failed to prove that the buildings it inherited had lands attached to it up to 100 yards away, and (c) the appellant failed to prove that the mast was within its land, were erroneous.

He submitted with relevant authorities that by reason of the respondent’s claims, the burden was on him to prove his acquisition, boundaries and acts of possession. He saw apparent inconsistency in respondent’s claim that the mother inherited the land from his grandmother, and exhibit 4, by which the Asene Family of Aputuogya claimed the same piece of land. He faulted the court for granting title to the respondent in the face of the inconsistency.

He cited evidence to back appellant’s claim of undisputed possession and the fact that structures inclusive the toilet (KVIP) stands on its land.

Counsel for the respondent submitted on her part that her client’s claim to title of the disputed land was by the proven evidence that his mother was in possession and has a building on it, in which she lived with her children for years. According to her, the building and plants cultivated by the respondent’s mother are close to the mast erected by the 2nd defendant.

According to her, the respondent did not claim the portion of land on which appellant has built the KVIP. She understood the evidence as saying that the appellant occupies four of the five buildings handed to it, and that the mast is beyond the last building.

In a land dispute, the plaintiff is obligated to prove the nature of acquisition of the land claimed and then link it to the subject land as being the same. The mode of acquisition or the root title, explains the history and source of ownership of the land. In **Mondial Veneer (Gh) Ltd v Amua Gyebu 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.

**Respondent’s acquisition**

Per the pleadings, the respondent traced his root of title to his mother Akua Agyeiwaa, who was alleged to have gotten her title from her un-named mother. Respondent claimed that it was part of her mother’s land which was carved for the Council, which it used as a courthouse, and which has recently come into the possession of the appellant. The land shares boundary with the appellant and the boundary between the two lands is fixtured with flowers.

In her evidence, plaintiff’s attorney claimed that her mother who passed away in 2006, lived on the disputed house for over 50 years. She claimed that her family has a building on the land which is occupied by herself and her siblings. They have been cultivating cassava on the land. She conceded that her mother’s land shares a boundary with the appellant but explained that the appellant is occupying the land of the Council which was previously used as a courthouse for the District Court.

PW1, PW2 and PW3 confirmed that respondent’s mother has a piece of land in the disputed area which shares boundary with the appellant, the boundary fixture of which are flowers.

# Appellant’s acquisition

The appellant testified through its witness, Asare Bediako. According to appellant, the subject land was acquired by the state (colonial government) in the 1940’s and used as a courthouse after independence. When the district capital was cited in Kuntunase, the subject property was ceded to the appellant which took over possession of the land with the (five) structures thereon. DW2 who is the current chief of Aputuogya, former chairman of the Unit Committee, member of respondent’s family and former secretary to the head of that family, testified that the subject land was granted to the state and the buildings thereon constructed way back in 1952. The land with its buildings were used as a courthouse and Native Police Post. He confirmed the undisputed takeover of the subject land by the appellant. He confirmed also that respondent’s mother has land in the area, close to the subject land on which she farmed.

When the evidence from the respondent was reviewed, it was concluded that the respondent was able to trace his family’s root of title to a piece of land in the vicinity of the disputed land. We found as credible, the evidence of the respondent that his family farmed on the land and that it was his grandmother who acquired or inherited the land which was handed over to his mother, which land has devolved on the respondent and his siblings on the passing of their mother.

Beside the claim of the respondent and his witnesses, the appellant’s own witness (DW2) testified that surrounding the about four acres of land around the buildings handed over to the appellant are the lands of Akua Agyeiwaa (respondent’s mother) and Opanin Akwasi Anane. Under cross-examination, he stated that a road passes in between the land of the respondent and appellant’s toilet (KVIP) facility.

The evidence of DW2 is critical and credit worthy on account of the following: (a) He is the current chief of Aputuogya where the disputed land is situated. All things being equal, he is expected to be abreast with the history of the land over which he is the chief.(b) He was an elder of the town and chairman of the Unit Committee, who followed the issue of the mast constructed by the 2nd defendant. He therefore has specific insight and firsthand knowledge about the events leading up to this dispute and (c) He is a relative of the respondent and was therefore not likely to testify falsely against the interest of a family member, absent any antagonism or ill motive.

As we have already held regarding the issue of capacity, respondent, and his siblings as beneficiaries, immediately upon the death of their mother became vested with the title of the piece of land that was owned by their mother. They had the capacity to sue to protect their interest.

Having sued and having established the root of title of the land they claimed, the burden shifted onto the appellant to prove that they properly acquired the subject land from the right source so as to avoid a ruling against them.

It was common cause between the parties that the land hosting the buildings used as a courthouse and police post, and handed to the appellant, was acquired by the colonial government in the 1940s. Since that land abounds that of respondent’s mother’s land, it was not difficult to conclude that the land on which the appellant’s five buildings stand was acquired by the Colonial government from the farmers and landowners in that vicinity, including the grandmother of the respondent.

Once the land was acquired by the state, the interest therein of the original owners became extinguished. From the moment of acquisition to the present, the title or interest and right to possession of the acquired land is in the state.

The picture made clear by the evidence is that, after part of the farmlands had been acquired by the state, the portions not affected remained in the hands of the original landholders, including respondent’s grandmother and later his mother.

The fact that the respondent’s mother has a house on the land in which she resided for a reported period of about 50 years, and in which house the respondent and his siblings have lived for years, coupled with the fact that the land on which that building stands is not being claimed by the appellant as part its land, is indicative that the respondent and his family have land in the area of the dispute.

In the circumstances of the above, the determination of the root of title was insufficient to establish which of the two sides owns the piece of land in dispute in this case. That required that we proceed to the identification of the land claimed by the respondent and determine whether it is the same as the land in dispute in this case. Before that however, we shall consider the evidence of the parties’ possession of the subject property to see its influence on ownership.

* 1. **POSSESSION:**

Possession is accepted 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).

It is not every act of possession that speaks to ownership. The type of possession that may indicate ownership is adverse possession to the actual or constructive notice of the other claimant. It is not possession at the instance or blessing of the true title holder, or possession in the teeth of resistance from the rival title claimant, see-**Nartey v Mechanical Lloyd Assembly Plant Ltd [1987-88] 2 GLR 314, SC; 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,**

The evidence was quite settled that both respondent and the appellant have been in possession of pieces of land in the disputed area. As stated hereinbefore, the appellant did not dispute the fact that respondent’s mother was in possession of a piece of land for about 50 years, and that she has a house on the land in which she lived with her children. Respondent’s claim that they have been farming on their land was confirmed by the appellant through the chief of Aputuogya who testified as DW2.

The respondent also conceded that his family shares boundary with the appellant. He concedes further that the appellant is in possession of the five buildings that were used as a courthouse and a police post. In effect, both sides admitted the presence of the other through possession of a piece of land in the disputed area.

This dispute therefore is essentially a boundary dispute, and not a full-fledged land dispute. A land dispute involves “*conflicting claims to rights in land by two or more parties, focused on a particular piece of land, which can be addressed within the existing legal framework*’’, see-([http://www.land-links.org](http://www.land-links.org/)., accessed on 25/1/2024), while boundary disputes refer to disputes over the physical division of land or water bodies among two or more individuals (legal or artificial), families or communities. The most important feature of a boundary dispute is that each party recognizes that the other has undisputed land in the area, with the dispute only focused on where the physical boundary between the two should be placed.

As the facts stand, the dispute can only be resolved by identifying the specific identity or boundaries of the land being claimed by the respective parties and establish its relationship with the land in dispute.

* 1. **IDENTITY**

After tracing the source of acquisition or root of title and establishing acts of actual possession or right to possession, a plaintiff must in addition establish the identity or boundaries of the land he claims, and further show that the land he claims is the same as the land in dispute.

In the landmark case of **Anane v Donkor [1965] GLR 188,** the Supreme Court per Ollenu JSC, 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.

**Respondent’s evidence on identity/boundaries**

In the instant case, the respondent claims that their land, part of which was carved out for the state (Council), and which is situate at Aputuogya, shares common boundary with the appellant, with the boundary fixtured by flowers planted by a former employee of the appellant. A site plan over the land, prepared apparently with the perceived boundaries between the respondent and the appellant, that is the flower hedges, was admitted as Exhibit B. This site plan covers Plot No. Block D, in the name of Akua Agyeiwaa (respondent’s mother).

Under cross-examination by counsel for the appellant, the following transpired, among others with respondent’s attorney (page 7 of ROA):

“Q*. Is there any fixture that demarcates your boundary farm (sic) that of the G.E.S*

*A. When the G.E.S took over the land. The G.E.S Agric Officer planted a flower hedge to demarcate the boundary between my mother’s land and that of the G.E.S. The name of the Agric Officer is Mr. Ohene Asamoah. I don’t know the name of the flower*”.

When PW1 was put under cross-examination by counsel for the appellant, the following transpired (page 22 ROA):

“Q. *What are the boundaries.*

*A. The disputed land is bounded by a flower hedge which was planted by the GES, by one Mr. Mensah*.”

On the part of PW2, this is what transpired under cross-examination by appellant’s counsel (pages 36-37):

“Q. *So you are saying that the land where the poles are belongs to the plaintiff and not G.E.S.*

*A. Yes. This is because, sometime ago a Metro Director, who was transferred to the place, approached us, and said she wanted to plant flowers and trees in the areas, so she asked the elders of the town to show her the boundaries, so we showed her the boundaries.*

*So she introduced us to Ohene Asamoah, who was in charge of growing flowers, so we showed him the boundaries to the land. He then proceeded to plant flowers on the boundary between G.E.S and the plaintiff’s mother’s land. As we speak the flowers are still there”.*

Critically, the respondent called the former G.E.S worker who cultivated the flower hedges, Ohene Asiamah, as PW3. He admitted that he cultivated the flower hedges on behalf of the G.E.S. On the purpose for planting of the flowers, he said it was for “*beautification and sanitation.*”

This is part of what transpired under cross-examination by counsel for the appellant (page 47, ROA):

“Q. *Do you know about some flowers that were planted around the G.E.S. Office.*

*A. Yes. I did the planting.*

*Q. Why did you plant there (sic) flowers.*

*A. We were embarking on a beautification and sanitation program. That is why I planted there (sic)…”*

(At pages 52-53, ROA)

“Q. *The flowers were planted solely for the purpose of beautification.*

*A. That was not the only reason. It was for beautification and sanitation purpose.*

*Q. So you agree with me that the planting was not for the purpose of demarcation.*

*A. That is so.”*

He conceded that there is a Motorola mast, built purposely for the appellant, that is sited beyond the flowers.

He conceded also that the main G.E.S building extend beyond the flowers.

Even though he claimed that the appellant agreed with the adjoining landowners to use part of their land and return it later, he said that was a gentleman’s agreement not meant to be enforced.

Having asserted and anchored his family’s boundary with the appellant on the flower hedges, the respondent had the primary onus of proving that the flower hedges are indeed the boundary fixture. But as the preceding clearly shows, the respondent’s claim that the flower hedges form the boundary between the two parties remained unproven by his evidence. Respondent’s star witness on that claim, PW3, ended up defeating that claim. His evidence corroborated the claim of the appellant that the flower hedge did not form the boundary between the appellant and the respondent.

# Respondent’s site plan

This brings into sharp focus the effect of the site plan tendered by the respondent as exhibit B. Firstly and most importantly, the site plan was prepared under the assumption that respondent’s mother’s land covers a particular space with certain fixtures known to the respondent and his family. As the evidence has shown above, the respondent and his family were fatally wrong in terms of the position of their boundary with the appellant, and the flower hedges as the boundary fixture thereof. Since the perceived boundary line fixtures that dictated the preparation of the site plan have been proven wrong, the product of that wrong assumption, being the site plan, will also be wrong and therefore unreliable.

Secondly, the site plan does not conform to the law. It was not signed by the Director of Survey or his representative, as demanded by section 3 (1) of the **Survey (Supervision and Approval of Plans) Regulations, 1989 (L.I.1444).** In **Nortey v African Institute of Journalism & Communication & Ors (J4 47 of 2013) [2014] GHASC 125 (26 February 2014),** the **Supreme Court** per Akamba JSC held**:**

“*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 Survey or 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.*

*This stark infringement of the statutory requirement renders the exhibit A of no probative value as rightly determined by the Court of Appeal. Notwithstanding that the exhibit A was accepted in evidence without any objection, it could not constitute evidence for the purpose for which it was tendered since it infringed the Instrument. This is so because our courts have a duty to ensure compliance with statutes including subsidiary legislations like the LI 1444 in this case. (****See Ex Parte National Lottery Authority (2009) SCGLR 390 at 402***).’’

Thirdly, the site plan tendered by the respondent as exhibit B, beside identifying a co-joining land as being for the “EDUCATION OFFICE’, does not indicate any of the other boundary owners mentioned by the respondent. Strangely in exhibit B, the Kumasi to Kuntunase main road forms a boundary on one whole side of the land identified as being for respondent’s mother. The said road was not mentioned in respondent’s pleading as a boundary feature. It was in her evidence that the attorney mentioned a road as a boundary feature. To an extent, the site plan and respondent’s evidence departed from the pleading.

**Appellant’s evidence on identity/boundaries of its land**

According to appellant’s witness (Asare-Bediako), the appellant inherited five buildings on the subject land. The buildings are adjacent to each other and are sited parallel to the Bosomtwe Lake road from Kumasi. Four of the buildings are being used by the appellant while the 5th one is being used by the Assembly as its revenue office.

According to him, the mast constructed by the 2nd defendant is on appellant’s land and is located 10 metres away from the 5th block that houses their “direction’’ (sic, director?). The mast is also situated between the KVIP and the said block and is about 50 metres from the main block.

Ernest Kwakye (DW1) from the Department of Physical Planning told the court that a planning scheme has been approved for the Aputuogya community since 2017. He tendered a copy of the planning scheme as exhibits 5/7. According to him, the land of the appellant is numbered 57.

It was his testimony that when he visited the subject land, he found that the Airtel mast in contention is on the land of the appellant. According to him, appellant’s land is about 1.6 acres ( about 6 plots of land).

He testified (at page 179 of the ROA):

“*From the layout I do not know how somebody could have obtained a site plan of the whole Aputuogya area because the layout was made just two years ago in 2017. There could not have been any site plan for the area before 2017. I cannot identify the land as indicated in plaintiff’s exhibit B…because that plan has no grid values. I regard exhibit B as normal drawings but not a site plan*.’’

Under cross-examination, he explained (at page 184 of the ROA): “*Aputuogya is an old town. But the layout was done based on how the physical structures have been erect*ed.’’

On how the planning scheme was able to capture the size of appellant’s land, this

is what transpired under cross-examination (pages 185-186, ROA):

“Q . *With specific reference to the 1st defendant (GES) how did you know the size of their land.*

*A. G.E.S has physical structures on their land. So their land size is based on the existing structures*.”

The witness explained that the three buildings beyond the hedges surrounding the

G.E.S buildings are on road reservations and are bound to be pulled down.

Another critical piece of evidence on the size and nature of appellant’s land, and the location of the mast, was from DW2. As stated hereinbefore, DW2 is the current chief of Aputuogya and the overlord of the subject land. Before becoming chief, he was secretary to Abusuapanin Osei Karim, who was caretaker chief of Aputuogya on behalf of the Asantehene. He was in addition the chairman of the Unit Committee of Aputuogya. That is not all. DW2 is a relative of the respondent and bears no apparent grudge with him so as to testify falsely against him.

DW2’s evidence on the locality of the subject land as well as the location of the mast of the 2nd defendant, in relation to the lands respectively claimed by the parties, was weighty.

According to DW2, the land around appellant’s buildings measures about four acres. He claimed that the said land is also surrounded by the lands of Akua Agyeiwaa and Opanin Akwasi Anane, who used to farm on their lands.

On the land handed to the appellant, DW2 testified under cross-examination by

respondent’s counsel ( page 198 of ROA):

“Q. *So you will agree with me that GES (1st Defendant) were given only offices but not lands.*

*A. The building was built on land. So they are occupying the building (sic) and the land around it that was formerly used as the native court and Police station*.”

On the location of the mast, he said(page 194 of the ROA):

“*The Airtel Mast is located on the land my ancestors gave to the G.E.S for them to establish their work*.’’

On the location of another fixture, loosely termed in this judgment as a landmark, being the toilet (KVIP) belonging to the appellant, DW2 indicated ( see page 196 of ROA):

“*There is a road in between the land of Akua Agyeiwaa and the G.E.S toilet facility*.’’

It is clear from the evidence that the respondent failed to establish on preponderance of probabilities, the identity of the piece of land forming the boundary between his late mother’s land and that of the appellant.

**M. CONCLUSION**

1. Since respondent’s claims were for declaration of title to land, recovery of possession, damages, and perpetual injunction, he was required to adduce credible evidence to establish his family’s/mother’s: (a) acquisition/root of title. (b) actual possession or right to possession, and (c) identity/boundaries of the land claimed, and as being the same as the land in dispute.
2. At the close of the case, the respondent was able to establish that his grandmother acquired a piece of land in the disputed area, which was inherited by his mother called Akua Agyeiwaa. The respondent also proved that the mother built a house on her land in which she lived with her children for about 50 years before she passed away.
3. Having established his root of title and possession of their land, the onus fell on the appellant to do same. The appellant did not disappoint. Appellant was able to establish that the land it is in possession of was acquired by the colonial government in the 1940s. The appellant is therefore occupying land acquired by the state. The five buildings on the land were constructed by the same colonial government in the 1950s. As the appellant alleged, and same corroborated by the planning authority in the District represented by DW1, as well as the chief of Aputuogya, DW2, the appellant and the Revenue office of the Assembly are in possession of the five buildings that were previously used as the courthouse. The said buildings were used as a courthouse and a police post until the said institutions were moved to the new district capital in Kuntunase. In the result, the appellant, as the 1st defendant, was equally able to establish acquisition and possession of the land it claimed.
4. What came out crystally clear was the fact that the case was a boundary dispute, and not a full-blown land dispute. Both parties admitted to sharing boundary with the other. The central issue therefore was as to where the said boundary is or should be. Respondent’s claim that the flower hedges is the boundary fixture between their land and that of the appellant unraveled. Respondent’s witness (PW3), a former staff of the appellant, was the star witness on the purpose and function of the hedges. PW3 was emphatic that the flowers were planted for “*beautification and sanitation’*’, and not as a boundary fixture.

With his own witness testifying against him on the key issue of the boundary and its fixture, the court was bound to accept his witness’s evidence as corroborating the claims of the appellant on the issue of boundaries.

1. PW2 corroborated the appellant’s claim that the KVIP on the disputed land was constructed by the appellant. On the critical issue as to the position of the mast, respondent’s own witness (PW3), confirmed that the mast was constructed for the appellant, on the land occupied by the appellant, after the appellant took possession of the land. That piece of evidence corroborated the claim of the appellant that the mast is on the land it occupies.
2. The established evidence is accordingly that: (a) the appellant is in possession of the entire land on which the courthouse and the police post used to be (b) the KVIP is at the edge of appellant’s land, with a road behind it serving as the boundary between the respondent and the appellant (c) the flower hedges are on appellant’s portion of the land (d) the mast, the erection of which ignited this case, is also situate on appellant’s land.
3. The conclusions of the trial judge leading to the declaration of title of the subject land in the respondent were erroneous and ran contrary to the weight of the evidence on record. We uphold the appeal and set aside the judgment of the Circuit Court, Kumasi dated 26 May 2021, with all of its consequential orders. In its place, judgment is hereby entered for the appellant. Since the appellant did not counterclaim, the effect of the judgment is to affirm the possession of the appellant unless a party with a better title comes up.
4. To forestall future disputes, we order the Planning Division of the Lands Commission to prepare a judgment plan based on the land in possession of the appellant, covered by the five buildings and described in conclusion (vi). The exercise shall be at the expense of the appellant.

No order as to cost.

**(SGD.) ERIC BAAH**

**(JUSTICE OF APPEAL)**

**I agree (SGD.)**

**ANGELINA MENSAH-HOMIAH (MRS)**

**(JUSTICE OF APPEAL)**

**I also agree (SGD.)**

**ALEX OWUSU-OFORI**

**(JUSTICE OF APPEAL)**

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