**ELIZABETH OSEI &**

**JULIANA OSEI DONALSON**

*(PLAINTIFFS)*

**vs.**

**KWADWO ASAFO AKOWUAH & 3 ORS.**

*(DEFENDANTS)*

[COURT OF APPEAL, KUMASI]

CIVIL APPEAL NO: HI/01/2023 DATE: 13TH JUNE 2024

**COUNSEL**

ENOCH KWABENA AMOAH ESQ. FOR 2ND DEFENDANT/APPELLANT.

KWAME ADOFO ESQ. FOR 2ND PLAINTIFF/RESPONDENT.

**CORAM**

MENSAH-HOMIAH, J.A (PRESIDING)

BAAH, J.A

OWUSU-OFORI, J.A

**JUDGMENT**

**BAAH, J.A**

**BACKGROUND**

It came to past that on 10 May 2016, the Plaintiffs/Appellants (hereafter Appellants) approached the High Court, Kumasi, seeking a number of reliefs. Per the amended statement of claim dated 2 February 2018, the Appellants:

1. sought a declaration (of title?) to a number of plots described as plot numbers 15 and 16 Block A and 19,20,21 and 22 Blo ck B, all situate at Nyankyerenease
2. an order of perpetual injunction restraining the Defendants/Respondents (hereafter Respondents), their assigns, privies, workmen and all claiming through them
3. special damages of GH₵20,800.00 (d) general damages for trespass (e) an order of recovery of possession, and (f) costs including solicitors fess.

The Respondents entered appearance to the suit and filed a statement of defence on 15 June 2016. The statement of defence was amended on 8 February 2018. A reply was filed by the Appellants on 11 July 2016.

Issues in the application for directions filed by the Respondents on 18 November 2016, were set down on 19 December 2016. On that day, the trial judge directed the parties to file their witness statements. The witness statement of the Appellants and Appellants’ witness (Nana Adu Agyei), as well as the checklist and exhibits, filed on 16 February 2017, appears at pages 47- 68 of the record of appeal (hereafter ‘record’). It is noted that the witness statement of the Appellants was amended on 8 May 2018. The heading indicated that it was filed by and for the 1st Appellant. The amended witness statement of the 1st Appellant, filed with its annexures and checklist, appears at pages 121-212 of the record.

The Respondents filed a joint witness statement for Kwame Sarfo (3rd Respondent) on 22 February 2018. A further witness statement for the Respondents filed on 4 July 2018, with a checklist as well as annexed exhibits, are all found at pages 373-467 of the record. By their witness statement and further witness statement, the Respondents indicated their intention to call one Alex Adu Gyamfi and the Registrar of the High Court as witnesses.

**CASE OF APPELLANTS**

The case of the Appellants as per their amended statement of claim was that the 1st Appellant acquired plot numbers 19, 20, 21 and 22, while the 2nd Appellant acquired plot numbers 15 and 16, all situate at Nyankyerenease, Kumasi. They were granted the plots in year 2000 by Nana Poku, who was then the chief of Kokoso. They were issued with allocation papers and site plans to evidence the grants. The 1st Appellant has acquired a land certificate over her piece of land. According to the Appellants, they constructed fence walls around their plots after the grants. Some of the plot(s) were also developed.

The Appellants alleged that after a considerable length of time into their possession of the land, spanning 1998-2016, the 3rd and 4th Respondents forcefully entered their lands and purported to sell them. Their conduct and that of one Oduro who had purportedly been sold some of the plots of land was reported to the Central Police Command, Kumasi. At a meeting of all the interested persons, it was resolved that the disputed lands belong to the Appellants.

The Appellants went back to their lands to develop same, but another person came onto the land to mould blocks at a portion meant for a street. They learnt that it was the Respondents who had purportedly sold the street and a portion of 2nd Appellant’s land to an unsuspecting developer. They alleged that on 13 March 2016, the Respondents pulled down sections of their fence walls. The Respondents levelled the land resulting in the destruction of the sand and stones heaped on their land.

They (Appellants) made a complaint to the Police and went with them to the land. When they arrived with the Police on the land, the others fled, leaving the 3rd and 4th Respondents who were arrested.

The Appellants alleged that the Respondents were laying claim to the land based on a judgment, even though they (Appellants) have been on the land with their title unchallenged till March 2016.

According to the Appellants, they were not parties to the suit intituled: **Kwadwo Asafo Akwainuah & Anor v Yaa Agyeiwaa & Ors (Suit No. FAL 3/2014)**.

The Appellants valued the damaged portions of their fence walls, destroyed 500 sandcrete blocks, 10 trips of sand and 2 trips gravels, at GH₵20,800.00, which they claimed as special damages.

The case of the Appellants was anchored on the following grounds:

1. *That they were properly granted the subject lands by the appropriate grantor, that is Nana Poku, chief of Kokoso.*
2. *That they were not parties to Suit No. FAL3/2014 and could therefore not be bound by the judgment thereof.*
3. *That they have been in undisputed possession of their lands from 1998- 2016, when the Respondents trespassed onto same based on their judgment.*

**CASE OF RESPONDENTS**

The case of the Respondents per their amended statement of defence was that the subject plots of land form part of their Mansa Twifo family land. It was their contention that since the grantor of the Appellants, Nana Poku, the Kokosohene is not a member of their family, he had no capacity to validly grant the subject plots of land to them.

Regarding the complaint to the Police, they claimed that they (Respondents were rather the ones who lodged the complaint to the Police, resulting in the arrest of 1st Appellant. According to the Respondents, they sold plot No. 26 Nyankyerenease to Oduro Kwarteng Amaning who moulded sandcrete blocks thereon and caused that plot to be walled. The said Amaning however resold that plot together with sandcrete blocks and heaps of sand to the 1st Appellant herein.

They doubted the capacity of the Police to determine land disputes and issue an order for appellants to proceed with the development of the land.

According to the Respondent, the Appellants also dealt with Nana Osei Yaw who acted on behalf of the Dinkyini Stool which issued them with an allocation note and site plan, despite the fact that the land belong to the Mansa Twifo family.

Respondents claimed that they have a judgment in a suit intituled: **Kwadwo Asafo Akowuah & Anor v Akosua Agyeiwaa & Others**, which judgment covers the subject lands. It is noted that Akwainuah was sometimes spelt as Akowuah and Akwawuah. All refer to the same person. They claimed that all efforts by the Appellants to set aside that judgment, including an application to stay its execution and an appeal, failed. According to the Respondents, even though the Appellants were either defendants or interested parties therein or parties in effective possession or development of the disputed land, they failed or neglected to challenge the Respondents when the action was commenced in 2013, with the judgment delivered in 2014. They contended that the Appellants were *estopped* by the said judgment from commencing the instant action.

They conceded breaking part of the fence walls of the Appellants but grounded their action on lawful execution of the judgment entered in their favour.

They claimed that the 1st Appellant was prominent among the concerned landlords who petitioned Manhyia when demolition took place on the land.

**JUDGMENT OF THE HIGH COURT**

The judgment of the trial court dated 21 February 2022, summated, is as follows:

1. *That the Appellants were not parties to Suit No. FAL3/2014, the judgment on which the case of the Respondents was anchored. Therefore, the plea of estoppel per res judicatem by the Respondents did not apply to the Appellants.*
2. *That since the plots of land claimed by the Appellants form part of the 80- acre tract of land over which judgment had been delivered in favour of the Respondents family in Suit No. FAL3/ 2014, the Appellants were estopped from the institution of the action.*

The Appellants disagreed with the judgment and launched a challenge to it by an appeal filed on 23 February 2022.

**NOTICE AND GROUNDS OF APPEAL**

In the notice of appeal filed on 23 February 22, the following grounds of appeal were canvassed by the Appellants:

1. *That the trial judge erred when he held that the Plaintiffs/Appellants are bound by the judgment in suit No. FAL. 3/2014 with title Kwadwo Asafo Akowuah v Akosua Agyeiwaa & 19 Others.*
2. *The trial judge erred when he relied on the witness statements of the Defendants which were not tendered in evidence at the trial.*
3. *The cost awarded was excessive.*
4. *The judgment was against the weight of evidence.*

No additional grounds of appeal were filed as indicated in the notice of appeal.

# Relief(s)

The reliefs sought by the Appellants is the setting aside of the entire judgment with the attendant costs awarded against the Appellants.

**APPROACH TO APPEALS**

By the nature of the grounds of appeal, and in particular reference to the omnibus ground of appeal, the Appellants beseech us to overturn the entirety of the decisions of the trial court, which can only be done after a thorough review of the record of appeal. They in effect require us to rehear the case, which is the statutory remit of this court in all appeals, especially where the omnibus ground of appeal has been invoked, as done by the Appellants herein.

Section 8 (1), **Court of Appeal Rule, 1997 (C.I.19)** provides:

“*Any appeal to the Court shall be by way of re-hearing and shall be brought by a notice referred to in these Rules as "the notice of appeal*".

In **Tuakwa v Bosom [2001-2002] SCGLR 61,** the 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 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 a first appellate court such as ours, are:

1. *“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…’*

Bound by statute and the teachings of the apex court, we shall approach this appeal as a rehearing by a review of the entire record of appeal. The approach adopted by us in this enquiry is firstly to sum up the submission of each counsel on each ground of appeal, after which we shall conduct our analysis and tender our decisions.

* 1. **GROUND 1: THAT THE TRIAL JUDGE ERRED WHEN HE HELD THAT THE PLAINTIFFS/APPELLANTS ARE BOUND BY THE JUDGMENT IN SUIT NO. FAL. 3/2014 WITH TITLE KWADWO ASAFO AKOWUAH V AKOSUA AGYEIWAA & 19 OTHERS.**

**SUBMISSION OF COUNSEL FOR APPELLANTS**

The first port of call for Appellants’ counsel was Respondents’ claim that they have obtained a judgment over a large tract of land inclusive Appellants’ land in a suit titled **Kwadwo Asafo Akowuah v Akosua Agyeiwaa & Ors**, of which the Appellants were parties. He enquired into Respondents claim that as parties to the said suit, the Appellants were *estopped per res judicatem* by the judgment thereof.

According to counsel, the principle of *res judicata* is founded on public policy, expressed in the Latin maxim *interest republicae ut sit finis litium*-it is in the public interest that litigation must have an end. He continued that the principle, referred to as the **Henderson v Henderson** (1843) 3 Hare 100) rule, has been applied locally in several cases, notably in, **In Re Sekyeredumase Stool: Nyame v Kese alias Konto [1998-99] SCGLR 478, SC** and **Zraik v Translavs Ltd & Ors [2017] GHASC 33.**

He identified the three parts/types of *res judicata* as follows:

1. *Cause of action estoppel,*
2. *Issue estoppel in the strict sense, and*
3. *Issue estoppel in the wider sense.*

He referred us to the conditions for pleading *estoppel* as espoused by S.A Brobbey in: ***The Essentials of the Law of Evidence*** (2014, page 309) and by the apex court in **Gariba Dintie v Kanton IV [2008] 2 GMJ 168 SC**.

It was his submission, based on the authorities, that a party pleading *res judicata* will succeed only if:

1. *He proves that there was a valid judgment by a court of competent jurisdiction,*
2. *That the judgment is still in existence, that is it isnot reversed or vacated,*
3. *That the parties in the previous suit are the same as in the present suit, or are privies, assigns or agents to parties in the previous suit,*
4. *That the subject matter or the issues dealt with in the previous suit are the same as in the present suit.*

Counsel referred to the decision of the trial judge (found at pages 14,15 and 23 of the judgment) by which he held that even though the Appellants were not parties to Suit No. FAL 3/2014, they are bound by the judgment since the plots claimed by them form part of the 80-acre land that was the subject matter of that suit. He submitted that as non-parties to the said suit, the Appellants could not be bound by same. His submission was anchored on the following:

1. *That the trial judge erred in relying on the witness statement and exhibits of the Respondents which were not adopted, admitted, or placed on record.*
2. *That since it was the Respondents who alleged that the Appellants were estopped per res judicatem, they reposed the burden of proof of what they asserted.*
3. *That proof of an assertion is by admissible evidence to the requisite degree of believe, as provided by sections 10, 11, 12 and 14 of the* ***Evidence Act, 1975 (NRCD 323)****, and as elucidated in case law including* ***Zabrama v Segbedzi [1991] 2 GLR 221-247****.*
4. *That it was incumbent on the Respondents to prove that.*
   1. *There is a valid judgment of a court of competent jurisdiction*
   2. *That the parties herein or their privies, assigns or agents are the same as the parties in the previous Suit No. FAL 3/2014.*

He referred us to the state of the proceedings and the evidence which indicates that even though the Respondents filed a witness statement per the 3rd Respondent with annexed exhibits, they failed or refused to appear in court to affirm or adopt their witness statement to transmogrify it from a mere court process to evidence, to back their plea of *estoppel per res judicatem*.

He cited the analysis of the trial judge at page 15 of the judgment, by which he found that the Appellants denied that the judgment in FAL 3/2014 operated as *res judicata* against them, for which reason the Respondent had the duty to prove otherwise, which duty they failed to discharge by their conspicuous failure to turn up in court to adduce evidence, when given the opportunity to do so. The judge at the referenced page 15 of the judgment also found that: (a) the Respondents failed to prove that the Appellants were indeed the 17th and 18th defendants in Suit No. FAL 3/2014, as pleaded by the Respondents (b) the Nissan pick-up of the 1st Appellant attached in execution of the judgment in the aforementioned case was released to her after she successfully proved to the trial court that she was not a party to Suit No. FAL 3/2014.

Counsel found it odd that after the trial judge had found and held that the Appellants (a) were not parties to Suit No. FAL 3/2014 and (b) that the judgment does not operate as a cause of action *estoppel* against them, he proceeded to hold that the Appellants were nonetheless bound by the judgment on account of their plots being part of the 80-acre piece of land decreed in favour of Respondents’ family.

In his view, the trial judge misconceived the law on the principles of *res judicata*

as applied in the Ghanaian courts.

Taking note of the acquisition of the Appellants in 1998 and their undisturbed possession thereof until 2016, he surmised that they (Appellants) were in possession of the subject land at the time the Respondents instituted the action in Suit No. FAL 3/2014.

That meant the Respondents were aware of the presence and occupation of the Appellants on the subject land. Yet, as the plaintiffs in Suit No. FAL 3/2014, they failed to or refused to join the Appellants to the suit or bring the suit to their notice.

According to him, there is nothing on record to show that the Appellants were given notice of the pendency of the suit, for them to have applied for relief(s), and there is equally nothing on record to indicate Respondents’ compliance

with **Order 43 rule 3 (3) of the High Court (Civil Procedure) Rules, 2004 (C.I.47)**, which require a party applying for possession to demonstrate that all persons in actual possession of the land had been notified of the proceedings in court.

Furthermore, there is nothing on record to show that the Kokoso Stool, being the grantor of the Appellants, was made a party to Suit No. FAL 3/2014.

On grounds of the above, he found it incomprehensible that the trial judge managed to hold that the Appellants are bound by the judgment merely on the basis that the plots of land claimed by the Appellants are included in the 80- acre land decreed for the Respondents’ Mansa Twifo family.

In his view, the trial judge’s view that the Appellants are bound by the decision in Suit No. FAL 3/2014 on account of it being a judgment *in rem* was wrong on the basis that a judgment *in rem* which declares the status of a person, or a thing is distinguishable from a judgment which declares rights or interest which a person has in a subject matter. He submitted that whereas the former instance such as paternity or divorce, operates against the whole world and does not require one to be a party to the action resulting in the judgment, a judgment relating to the rights or interest of a person in a subject matter operates only against the parties to the action resulting in the judgment. He found succour in the elucidation of the matter by S. Kwami Tetteh, in***: Civil Procedure-A Practical Approach (2011, pages 848, 849)*** and the expatiation of Abban J (as he then was) in **Passer v The Attorney General [1971] 1 GLR 439.**

He submitted that the judgment in Suit No. FAL 3/2014 in respect of the 80-acre land operates only between the Respondents herein as Plaintiffs therein and the Defendants to that action. And it only binds those parties and their privies, assigns, agents, and successors in title or those claiming through them.

In his view, the Appellants are not bound by the judgment, when in addition to others, their grantor being the Kokoso stool was not made a party to the suit.

**SUBMISSION OF COUNSEL FOR 3RD RESPONDENT**

According to counsel for the 3rd Respondent, the Appellants do not dispute that the Respondents’ family has a judgment in their favour over an 80-acre piece of land. That, in his view, caused the Appellants to tender a copy of the judgment and the proceedings thereto as exhibits F and G respectively.

He posited that even though the Appellants claim not to have been parties to suit (FAL 3/2014) resulting in the judgment, the 1st Appellant conceded under cross-examination that she was one of the landlords/landladies who petitioned the Manhyia Palace over execution of the judgment. He submitted that the petitioner/landlords were those whose land were affected by the judgment.

According to him, the Appellants are bound by the award which required them to pay a sum of GH₵15,000.00 to the Respondents’ family for their stay on the land to be regularised. That was because, the award which has not been set aside, is binding on the Appellants in the same way as a judgment of a court of competent jurisdiction. He submitted that the failure of Appellants to honour the award resulted in a decision by Manhyia to forfeit their grants by the Kokoso Stool.

In his view, the contention of Appellants of not being parties to Suit N0. FAL 3/2014 has no merit because they became aware of the judgment and its execution and hence the petition by themselves and others to Manhyia.

According to him, the 1st Appellant submitted her application for a lease in June 2014, that is five months after the judgment in Suit No. FAL 3/2014 was delivered in February 2014.

He berated the time of the suit and the procedure adopted by the Appellants in attempting to set aside the judgment. He relied on **Hammond v Lamptey [1987-88] 1 GLR 327**. He urged us not to hastily set aside the judgment, execution of which had almost completed, as cautioned by the apex court in **Opanin Agyarkwa (Sub by Opanin Yaw Asare v James Falogin & 4 Ors (Civil Appeal No. J/4/58/2019, dated 11 March 2020)**.

He conceded that the names of the Appellants were not endorsed on the writ in Suit No. 3/2014 but asserted that the Appellants and their neighbours got notice of the judgment, whether directly or indirectly, because of its enforcement. He contended that since the judgment in Suit No. FAL 3/2014 subsisted, the trial judge had no option than to recognise it and give effect to it.

**SUBMISSION OF COUNSEL FOR 4TH RESPONDENT**

Counsel first raised objection to this ground of appeal, the basis being that since it alleges error of law, particulars of the error ought to have been given in accordance with Rule 8 (4), C.I.19. He urged us to strike out the ground as being incompetent.

He departed from the trial judge’s argument based on *estoppel per res judicatem,* and rather proceeded on the path of *estoppel* by conduct. In doing so, he had to fall on the pleadings of the Respondents and apply them as evidence. He anchored on the answers of the 1st Appellant that the landlords who were affected by the judgment petitioned Manhyia Palace because of Respondents trespass onto their lands.

He argued that by sending a petition to Manhyia, the Appellants admitted that the disputed plots belong to the Respondents.

He submitted that since the 1st Appellant was one of those who petitioned the Manhyia Palace, she was *estopped* from mounting the instant action.

**ANALYSIS AND DECISIONS ON GROUND ONE**

The preliminary objection by counsel for the 4th Respondent on this ground had to fail. Even though particulars of the error the Appellants allege the trial judge fell into were not given, they were obvious.

The issue of *estoppel* was raised by the Respondents in paragraph 10 of their amended statement of defence, found at pages 103-104 of the record. They averred:

“*The defendants further state that the plaintiffs were either defendants/interested persons whichever named in the aforementioned*

*suit were in effective possession of the disputed plots and commenced its development but failed and or neglected to challenge defendants when the action was mounted in 2013 and judgment was delivered in 2014 and such plaintiffs were estopped by the said judgment of the High Court to commence instant action*.”

The pleading upon which the issue of *estoppel* was anchored was problematic. The pleading is nebulous, vague and octopian. It is not readily clear as to whether the Appellants were *estopped* because (a) they were defendants in Suit No. FAL 3/ 2014 (b) interested parties thereto (c) were in possession of the subject plots, or were (d) developers thereof, or all of the above descriptions combined.

Counsel for the Appellant took us through a number of decided cases and authorial opinions on the doctrine of *estoppel per res judicatem*. We shall refer to a few as foundation for our analysis.

Broadly speaking, *estoppel* is a legal principle that prevents a person from asserting facts or a right that ran contrary to past claims or actions. In litigation, it is a principle of evidence that posits that a judgment has been delivered and the matter was closed. In **Zraik v Tranlas Ltd & Ors [2017] GHASC 33 (10 May 2017)**, it was held by the apex court:

“*The law debars the same parties from litigating a second lawsuit on the same matter or claim, or any other claim arising from the same transaction. This is the principle known in law as estoppel per rem judicata or res judicata*…”

There are several types of *estoppels*, but what is relevant to this case is *estoppel per res judicatem or res judicata*. In the case of **In Re Sekyeredumase Stool; Nyame v Kese [1998-99] SCGLR 478,** the Supreme Court identified the three types of *estoppel*s embodied in a plea of *estoppel per res judicatem*. These are:

1. *Cause of action estoppel,*
2. *Issue estoppel in the strict sense and,*
3. *Issue estoppel in the wider sense.*

In his book, ***Essentials of the Law of Evidence*** (2014, page 309, paragraph 8.6.9), S. A. Brobbey lays down the condition precedent for the application of the principle, as follows:

# Parties

The *estoppel* operates between parties or their privies. By privies, it is meant that there must be some degree of identity among the parties in the current and previous judgment, except judgment *in rem* which operated against the whole world…

# Identity of subject matter.

The subject matter in the previous and current suit should be the same or identical.

# Procedural mandates

*Estoppel* should be pleaded before it can be relied upon unless it is obvious on the facts.

# Status of the previous judgment

The previous judgment should be final or conclusive. The previous… must not have been stayed, withdrawn, discontinued, or struck out on a preliminary point.

In **Gariba Dintie v Kanton [2008] 2 GMJ 168**, the Supreme Court of Ghana elucidated the above principles thus:

“*A party, who relies on an earlier judgment as estoppel per res judicatem must, if he is to succeed, establish;*

* 1. *That there has already been a judicial judgment decision by a court of competent jurisdiction.*
  2. *That the decision is final.*
  3. *That the same question as that sought to be in issue by the plea in respect of which the estoppel is claimed was decided in the earlier proceedings.*
  4. *That the case was between the same parties or their privies as the parties between whom the question is now sought to be put in issue. For a judgment to operate as estoppel, it must be clear, unambiguous, and should determine finally the issue between the parties*.”

In the judgment in suit No FAL 3/2014 upon which the Respondents’ plea of *estoppel* was based, the trial judge concluded (at pages 14-15 of the judgment, appearing at pages 349-350 of the record) that the Appellants herein were not parties to the suit because (a) they were not notified or served to appear in court

(b) that it was rather one Nana Adu Agyei, and not the 1st Appellant who applied for a stay of execution of the judgment (c) that when the 1st Appellant’s Nissan pick-up was attached for execution, she successfully applied to have it released on the basis that she was not a party to that suit and was not served the writ in that suit.

The trial judge held:

“*Thus, assuming without admitting for now that the plots of land in dispute forms part of the 80-acre parcel of land adjudged to belong to the family of the 3rd and 4th defendants in the suit numbered FAL 3/2014, the fact still remains that the defendants have not been able to prove on the balance of probabilities that the action that culminated in the judgment of 20th February 2014 that they are now relying on involved the instant plaintiffs for cause of action estoppel to operate against them*.’’

In spite of the above holding, the trial judge proceeded to hold that the Appellants were bound by the judgment on account of the subject plots being part of the 80-acre piece of land decreed to be for the Respondents’ family. This decision appears at page 23 of the judgment.

The above decision suffers from several deficiencies which are hereunder listed.

1. Even though the Respondents failed to appear in court to adduce evidence by the adoption of their witness statement with its exhibits, the trial judge *suo motu* admitted or considered the witness statement of the

Respondents with its exhibits as admissible hearsay evidence. The trial judge referred to several exhibits that the Respondents had filed but had failed to tender. To worsen the situation, he relied on affidavit evidence of Respondents filed to support their application to amend their statement of defence, see pages 342 and 347 of the record.

By taking the place of the Respondents and tendering their evidence, which was the duty of the Respondents to tender, the trial judge lost his position as an impartial umpire. He descended into the arena of conflict and fought a battle that was the duty of the Respondents to fight. He in effect joined forces with the Respondents in their legal fight against the Appellants. His eyes, vision and perceptions were clouded and could not be relied on to give a fair judgment based on the evidence and nothing but the evidence.

The trial judge considered substantial pieces of evidence which could not properly be considered. The evidential law on admission of evidence was so cannibalized that the ghost of **Koglex Ltd (No.2) v Field** (*supra*) etc stands invoked**.**

1. The Appellants in both their pleadings and their evidence denied that their lands fall within the 80-acre piece of land decreed to belong to Respondents family. The evidence of PW1 in particular, was of most moment, since he is the Secretary to the Kokoso Stool which granted the lands to the Appellants.

The Respondents did not testify and therefore did not tender the judgment in Suit No. FAL 3/2014, which was filed by them. The trial judge erred by concluding that the Appellants’ land falls within that of the Respondents. The issue was a matter of evidence. The Respondents who made that assertion were required to mount the witness box to produce evidence indicating which part of their 80-acre land the Appellants land fell. This they had to do by identifying the land or boundaries of the Appellants which matched a specific area within the land of the Respondents. The Respondents abandoned this cardinal evidential duty.

That averment by the Respondents in their pleading could not be treated as a hallowed verse from the Bible or an Ayat from the Koran.

But if we assume that the trial judge relied on the same copy of the judgment filed by the Appellants, the question is, where did he get the evidence that the lands of the Appellants fall within Respondents’ 80- acre land, since the Appellants traversed that pleading by the Respondents and fleshed their pleading with evidence?

The trial judge’s conclusion that Appellants’ land falls within that of the Respondents was speculative, and a conjecture. It is an evidence-free finding that cannot be supported by the evidence on record.

1. Having held that the principle of *estoppel per res judicatem* did not apply because the Appellants were not parties to Suit No. FAL 3/2014, it was quite a turn-around for the trial judge to hold that the Appellants were *estopped* because the judgment in Suit No. FAL 3/2014 was judgment *in rem*. He reasoned that since the Appellants land was included in Respondents 80-acre land, the judgment, which is *in rem*, that is against the whole world, affected the Appellants.

For the principle of *estoppel* to apply, certain conditions must exist.

* 1. There must be a valid judgment of a court of competent jurisdiction, which judgment must not have been reversed or vacated.
  2. The parties in the previous suit must be the same as the parties in the present suit, or must be privies, agents or assigns to the said parties.
  3. The subject matter or issues in the past and present suit should be the same or substantially the same.

The fact is undisputed of the existence of the judgment in Suit No. FAL 3/2014. The trial judge also found that the Appellants were not parties to the earlier suit. The Respondents were fully aware of Appellants’ possession of the subject pieces of land since 1998. There was undisputed evidence that the 3rd Respondent was caretaker of Appellants land for a period of time. Beside not making Appellants parties to the suit, they did not bring the existence of the suit to their notice. The Respondents did not see it fit to join the grantor of the

Appellants, that is the Kokoso Stool, to their action. As the trial judge rightly held, the Appellants were neither parties nor privies, agents or assigns to parties in the earlier suit.

There was no conclusive evidence that the subject matter or the issues in the present suit and Suit No. FAL 3/2014 were the same. As explained *supra*, the conclusion by the trial judge that the land of the Appellants was covered by that of the Respondents was based on mere assumption without any foundation in the evidence on record.

1. The judgment in Suit No, FAL 3/2014 was against the parties thereto. The trial judge in his judgment thus (at page 37 of the record) held:

“*There being no challenge to the plaintiffs’ evidence, I have no reason to doubt it. Judgment will accordingly be entered for plaintiffs against the defendants for all the relieves (sic) claimed*…”

Whereas the judgment in FAL 3/2014 was directly enforceable against the parties thereto, it could not be directly enforced against non-parties such as the Appellants without compliance with Order 43 3 (3), C.I.47.

For recovery of possession to be enforced in a judgment *in rem* against non- parties, certain statutory conditions must be complied with. Order 43 (3) of C.I 47 to that effect provides:

“*Enforcement of judgment for possession of immovable property*

1. *(1) Subject to these Rules, a judgment or order for the recovery of possession of immovable property may be enforced by one or more of the following means*
   1. *a writ of possession;*
   2. *in a case in which rule 5 applies, an order of committal or a writ of sequestration.*
2. *A writ of possession to enforce a judgment or order for the recovery of possession of immovable property shall not be issued without leave of the Court except where the judgment or*

*order was given or made in a mortgage action to which Order 56 applies.*

1. ***The leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the immovable property has received such notice of the proceedings as appears to the Court sufficient to enable the person to apply to the Court for any relief to which the person may be entitled*.”**

The Respondents admit that they demolished parts of the fence walls of the Appellants. They were fully aware that the Appellants were not parties to the suit, the judgment of which they sought to execute against them. The execution against the Appellants violated statute, viz Order 43 3 (3), C.I.47.

As mentioned *supra*, counsel for the 4th Respondent saw the error in the trial judge’s application of *estoppel per res judicata* against the Appellants and rather proceeded on the path of *estoppel* by conduct.

His approach could not retrieve the fortunes of the Respondents on that ground of appeal. That was because, in applying the principle of estoppel by conduct, he had to fall on the pleadings of the Respondents and apply them as evidence.

He argued that by sending a petition to Manhyia, the Appellants admit that the disputed plots belong to the Respondents. That argument is demerited on the ground that the 1st Appellant insisted under cross-examination that the only reason they petitioned Manhyia was that as non-parties to the case, the Respondents were illegally executing the judgment against them. We failed to see how an effort to forestall an alleged illegal execution could be construed as admission that the Appellants lands were covered by the judgment in Suit No. FAL 3/2014. *Estoppel* by conduct, in our humble view, did not apply.

**GROUND 2: THE TRIAL JUDGE ERRED WHEN HE RELIED ON THE WITNESS STATEMENTS OF THE RESPONDENTS WHICH WERE NOT TENDERED IN EVIDENCE AT THE TRIAL.**

**SUBMISSION OF COUNSEL FOR APPELLANTS**

Counsel noted that the Respondents after cross-examining the 1st Appellant, failed to appear in court to testify in support of their case, despite the service on them of several hearing notices. Consequently, the trial judge closed their case and proceeded to deliver his judgment. In the course of the judgment however, the trial judge decided that despite the Respondents not appearing in court to testify in chief by the adoption of their witness statement, he was relying on their witness statement with its exhibits as hearsay evidence, on account of Order 38 rule 3E, C.I.47.

And indeed, he submitted, the trial judge proceeded to examine the case of the Respondents as constituted by their witness statement and exhibits. That led to the trial judge’s consideration of exhibit 2, which is the judgment in Suit FAL 3/2014. Also considered was exhibit 3, which is a motion to set aside the judgment which failed; exhibit 4 which is a motion for stay of execution which also failed, in addition to exhibits 5 and 6.

He contended that where a party fails to attend court to testify by the adoption of his witness statement, that witness statement could not form part of the evidence. He relied on Order 38 rule 3E, C.I.47, section 6 of the Evidence Act and the cases of **Godka Group of Companies v PS International Ltd [2001- 2002] SCGLR 918** and **Republic v High Court, Commercial Division, Accra, ex parte Kwabena Duffuor [2021] GHASC 8**.

He considered the decision of the trial judge to *suo motu* admit and rely on the witness statement of the Respondents as hearsay evidence as *per incuriam*, which occasioned a miscarriage of justice. He relied on **Nii Tettey Kpobi Tsuru III v The Attorney General [2011] 35 MLRG 201**.

**SUBMISSION OF COUNSEL FOR 3RD RESPONDENT**

Counsel honourably conceded the submission of counsel for the Appellants on this ground but explained that Respondents’ exhibits 1-13 formed part of the questions put to the 1st Appellant under cross-examination by counsel for the Respondents, with belated objections from counsel for the Appellants.

According to him, the Appellants tendered exhibits F and G, which were the Respondents’ writ of summons, the statement of claim and the judgment in Suit No. FAL 3/2014 and made copious references to the unsworn and un- tended exhibits of the Respondents.

The findings of the trial judge he submitted, were therefore based on the evidence placed on record either by the Appellants or through them. He relied on section 9 (2) of NRCD 323 (on judicial notice) and **Abowara v Adeshina (1946) 12 WACA 18**.

**SUBMISSION OF COUNSEL FOR 4TH RESPONDENT**

He conceded that the Respondents did not testify or tender any exhibits but contended that the Appellants tendered all the documents which the Respondents alluded to in their amended statement of defence. These include the judgment in Suit No. FAL 3/2014; list of documents relating to a petition to the Manhyia Palace; a ruling of the High Court in Suit No. 3/2014; a mention by the Appellants of Respondents judgment and the admission by 1st Appellant under cross-examination of the existence of the judgment. Because of the above, he found the references by the trial judge to the said documents justified.

His second argument was that counsel for the Appellants at the court below sat down quietly and but for a few feeble objections, permitted counsel for the Respondents to ask copious questions on the said documents. He posited that any objection to the line of questioning should have been timeous, as required by section 6 (1) of NRCD 323. In his view, the documents tendered by the Appellants and the evidence extracted from 1st Appellant under cross- examination form part of the record and ought to be relied on.

**ANALYSIS AND DECISIONS ON GROUND TWO**

It is undisputed that after cross-examining the 1st Appellant, the Respondents failed to appear in court to present their side of the case despite having filed a witness statement with annexures. At the close of the case, the only evidence on record for consideration was that of the Appellants, and a few pieces

extracted from 1st Appellant under cross-examination for the Respondents. In his judgment, the trial judge did something evidentially inexplicable.

He took the position that even though the Respondents’ witness statement was not adopted by them, he was admitting it in addition to their affidavit evidence as admissible hearsay evidence. Here are his words as they appear at pages 341-342 of the record:

“*However, in consideration of the fact that the plaintiffs are seeking a declaratory of title relief among others, as indicated in the foregoing, and on the authority of Boateng v Dwimfour [1979] GLR 360 where it was held amongst others that ‘there had never been an unqualified rule of practice that forbade the making of a declaration when some of the persons interested in the subject of the declaration were not before the court’, as well as the provisions of Order 3E of C.I.87 and section 118 of the Evidence Act,1975 (NRCD 323), the pleadings and witness statements of the defendants and their witnesses shall be considered as admissible hearsay evidence in this judgment*”

Having so decided, the trial judge proceeded to consider the evidence of the Respondents as composed in their witness statement(s) and exhibits. For example, he referred to the witness statement of the Respondents thus:

*“And it is the case of the defendants, as per paragraphs 9 of their amended statement of defence and* ***paragraphs 17,18,19 of the witness statement of the 3rd defendant on behalf of the other defendants…****”*

He then referred to the judgment relied on by the Respondents (exhibit 2), and a decision allegedly dismissing Appellants application to set aside the judgment (exhibit 4), all appearing at page 347 of the record. At page 348 of the record, he referred to exhibit 3; exhibit 6, being a writ of *fi:fa* and a writ of possession by the Respondents. At page 353, he referred to Respondents’ site plan on the 80-acre land (exhibit 1). References to the Respondents evidence in the witness statement and the annexed exhibits including exhibit 5 appear repeatedly in several pages of the judgment.

As noted above, counsel for the Appellants had no doubt that since the Respondents did not attend court to testify, their witness statement could not form part of evidence before the court. He referred us to **Godka Group of Companies v PS International Ltd [2001-2002] SCGLR 918** and cited to us **Order 38 rule 3E, C.I. 47, as amended by C.I.87**, on use of witness statement which has been served. Order 38 rule 3E, C.I.47, as amended by C.I. 87 provides:

“***Use at trial of witness statements which have been served***

*3E. (1) If a party has served a witness statement and that party wishes to rely at the trial on the evidence of the witness who made the statement, that party shall call the witness to*

*give oral evidence unless the Court orders otherwise or that party puts the statement in as hearsay evidence.*

1. *Where a witness is called to give oral evidence under subrule (1), the witness statement of that witness shall stand as the evidence in chief of that witness unless the Court otherwise orders.*
2. *A witness giving oral evidence at the trial may with the permission of the Court give evidence in relation to any new matter which has arisen since the witness statement was served on the other parties.*
3. *The Court will grant leave under subrule (3) only if it considers that there is good reason not to confine the evidence of the witness to the witness statement of that witness .*
4. *If a party who has served a witness statement does not call the witness to give evidence at the trial or put the witness statement in as hearsay evidence, any other party may put the witness statement in as hearsay evidence*.”

The commands of the above rule in sum are as follows:

1. That a witness statement filed and served must be adopted by the witness at the trial before it can be relied on as his evidence-in-chief.
2. Where a person on whose behalf a witness statement has been filed and served fails to attend court to testify, the party who served the witness statement may have it admitted as hearsay evidence, failing which any party wishing to rely on it may have it tendered as hearsay evidence.

In **Mahama v Electoral Commission & Another [2021] GHASC 12 (4 March 2021)**, the apex court expatiated on Order 38 rule 3E *inter alia*:

“*The above rule also points to the fact that a witness statement filed and served does not constitute evidence in law till the author of the statement mounts the witness box, takes the oath and prays that the witness statement be adopted as evidence in chief pursuant to Order 38 rule 3E (2)*…”

In the instant case, the Respondents did not appear in court to swear the oath and have the witness statement of the 3rd Respondent, which was filed and served, adopted as his evidence in chief. Neither the Respondents nor the Appellants caused the said witness statement of 3rd Respondent to be put in as hearsay evidence. The trial judge not being a party to the suit had no capacity to put in the said witness statement as hearsay evidence.

Counsel for the Respondents contended that even if the trial judge erred, some of the documentary evidence the Respondents sought to rely on were tendered by the Appellants, on which Respondents counsel extensively cross-examined the 1st appellant. They posited that counsel for the Respondents elicited evidence under cross-examination from the 1st Appellant and for the benefit of the Respondents, which evidence they surmised, undermined the claims of the Appellants to the extent the trial court could not grant the said claims.

It is indeed the law that a party to a suit need not testify by himself.

A defendant can rest his case on that of the plaintiff or claimant, where the cross-examination of the witness of the plaintiff or claimant has been

devastating and has succeeded in eliciting sufficient evidence in favour of the defendant and undermined the case of the plaintiff or claimant.

In **Atiku Abubakar & Anor v Independent National Electoral Commission (INEC) & 2 Ors (Petition No. CA/PEPC/002/2019, Dated 11th September2019**), the Court of Appeal of Nigeria held:

“*The trite position of the law is that a defendant to an action or a respondent in an election petition is entitled to rest his case on that of the claimant or the petitioner where he has, through devastating cross- examination, elicited or extracted sufficient evidence to support and prove the facts or assertions contained in his pleadings. In such circumstances, a defendant can decide not to call any witness. It does not amount to not calling evidence or failure to call evidence*’’

In **Pastor Ize-Iyamu Andrew & Anor v NEC [2018] 9 NWLR (Part 1625) 507 @ 582E-F,** the Nigerian Supreme Court held:

“*Evidence elicited from a party or his witness under cross-examination, which goes to support the case of the party cross-examining, constitutes evidence in support of the case or defence of the party. If at the end of the day the party cross-examining decides not to call any witness, he can rely on the evidence elicited from cross-examination in establishing his case or defence. One may say that the party called no witness in support of his case, not evidence as the evidence elicited from his opponent under cross-examination, which is in support of his case or defence, constitutes his evidence in the case.*

*The exception is that the evidence so elicited under cross-examination, must be on facts pleaded by the concerned for it to be relevant to the determination of the question/issue in controversy between the parties, having regard to the fact the relevant evidence elicited from the appellants relate to the facts pleaded by way of defence to the action, they form part of respondents case and can be relied upon by the*

*respondents in establishing their defence to the action without calling witnesses to further establish the said evidence*.”

The burden of proof cast on a plaintiff or claimant may be discharged by evidence from the mouth of an opponent or his witness. In **Nyamekye v Tawiah & Anor [1979] GLR 265, C.A (Full Bench),** it was held:

“*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 casu*, the cross-examination of 1st Appellant by counsel for the Respondents was neither devastating nor case-shattering. Firstly, the Appellants tendered the judgment in Suit No. FAL 3/2014 to show the alleged basis of the Respondents in attempting to execute the judgment against them. It was not for the purpose of admitting that they were parties to that case or were bound by the judgment thereto. That was why they insisted in their pleadings and evidence that they were not bound by that judgment. Secondly, the Respondents counsel at the end of the cross-examination had not been able to show which part of the 80-acre land of the Respondents that the Appellants lands fell into. Thirdly, the fact of Appellants being part of the petitioners to Manhyia was not prove that their land was included in Respondents land. As the 1st Appellant emphasized in her evidence, they went to Manhyia to complain about the Respondents’ alleged illegal execution of their judgment against them, and not for the purpose of attorning tenancy to the Respondents.

Fourthly, the issue of conflict in the identity of Appellants’ land was not sufficient to undermine their claims, as would be pointed when we attend to the last ground of appeal.

Fifthly, counsel for the Respondent did not cross-examine PW1, who is the secretary of the Appellants’ grantor Kokoso Stool. PW1 confirmed the grant to the Appellants by his stool, the allocation notes issued to them, and the

location of the land allocated to them. The undisputed evidence of PW1, corroborated and supercharged the case of the Appellants across the victory line.

**GROUND 4: THE JUDGMENT WAS AGAINST THE WEIGHT OF EVIDENCE SUBMISSION OF COUNSEL FOR THE APPELLANTS**

Counsel for the Appellants referred us to the well-trodden rule that where an appellant canvasses the omnibus ground of appeal, the court was obliged to rehear the case by way of review of the entire record. He relied on **Rule 8 (1), Court of Appeal Rules, 1997 (C.I.)** and **Aryeh & Akakpo v Ayaa Iddrisu [2010] SCGLR 891 and Tuakwa v Bosom [2001-2002] SCGLR 61**. He submitted that the appellant retained the duty to point out the pieces of evidence, the consideration of which would have resulted in a decision favourable to the appellant. He relied on several cases including **Djin v Musa Baako [2007-2008] 1 SCGLR 686**. On the grounds upon which an appellate court may disturb the judgment of a trial court, he referred us to **Achoro & Anor v Akanfela & Anor [1996-97] SCGLR 209**.

Counsel listed the errors or misdirection of the trial court as follows:

1. *The trial judge erroneously relying on the witness statement of the Respondents which was never tendered to conclude that the Respondents had obtained a judgment in Suit No. FAL 3/2014, which covered the land claimed by the Appellants.*
2. *The trial judge holding that the Appellants were bound by the judgment in FAL 3/2014, even though they were neither parties to Suit No. FAL 3/2014, nor privies, agents or assigns to the parties thereto.*
3. *The trial judge failing to adequately consider the evidence of the Appellants which had been placed before him, including allocation notes and site plans, and the allocation notes of their neighbours indicating that the Kokoso Stool was their common grantor, registered lease of 1st Appellant and the fact of long undisturbed possession.*
4. *The trial judge failing to consider Appellants’ claim for special damages, despite the Respondents admitting to pulling down portions of their walls.*
5. *That even had the judgment been properly tendered by the Respondents, the trial judge failing to hold that the Appellants’ interest acquired in 1998, had obtained a prior interest in the subject property to which the rights of the Respondents decreed in the judgment was subject.*

**SUBMISSION OF COUNSEL FOR 3RD RESPONDENT**

It was the submission of counsel that based on case law, such as **Mondial Veneer (Gh) Ltd v Amuah Gyebu XV [2011] 35 GMJ,** the Appellants had the duty to establish their root of title, identity and possession of the land claimed and as being the same as the land in dispute. This they had to do by evidence meeting the standard of proof in sections 10, 11 (4), 12 and 14 of NRCD 323.

He found the pleadings and the evidence of the Appellants in reference to the identity of the land claimed to be inconsistent. That was because by the cadastral plan approved by the Regional Surveyor, Appellants land is located at Kokoso Extension and not at Nyankyerenease as pleaded. He relied on **Anane v Donkor [1965] GLR 188; Bedu v Agbi [1972] 2 GLR 238; Kwabena v**

# Atuahene [1981] GLR 136 and Dowuona II v Olewolon [2006] 7 MLRG 154.

He submitted that the failure of Respondents to call their grantor in the face of the challenge to the grantor’s capacity undermined their case.

He submitted that the Appellants’ grantor had no capacity to grant the land to them.

**SUBMISSION OF COUNSEL FOR 4TH RESPONDENT**

As foundation for his submission under this ground, counsel referred to a few cases, some of which have been cited already by counsel for the Appellants and require no repetition here.

Being a case for declaration of title and recovery of possession, counsel posited the need for the Appellants to establish their case by positive evidence

on their acquisition, identity, and possession of the subject land. He referred us to **Nyikplokpo v Agbedetor [1987-88] 1 GLR 165** and **Mondial Veneer (Gh) Ltd v Amuah Gyebu XV [2011] 25 GMJ 164**.

His enquiry began with the identity of Appellants’ land. According to him, paragraphs 3-5 of the amended statement of claim of the Appellants (found at page 98 0t the record) indicates that their plots of land are located at Nyankyerenease, Kumasi. He contended that the Appellants are bound by their relief and pleading which indicates that their properties are situate at Nyankyerenease.

However, in the witness statement of the 1st Appellant at page 121 of the record, she states that the plots of land are located at Kokoso Extension, Kumasi. Their exhibits, including the land title registration (exhibits A, B, C and C1) also indicates that their lands are located at Kokoso Extension. Strangely, he submitted, the 1st Appellant tendered with the lease another plan of plots of land numbered 19, 20 ,21 and 22, Block B, which are situate at Atwima Koforidua, and not Kokoso Extension as appears in the land title certificate.

According to him, after the Appellants have endorsed on their amended writ of summons that their lands are situate at Nyankyerenease, they could not be allowed to lead contrary evidence to the effect that the lands were situate at Kokoso Extension. In his view, Appellants land cannot be situated at three distinct places at the same time, that is, Nyankyerenease, Kokoso Extension and Atwima Koforidua. Because of the above, he could not fathom how an order for declaration of title could have been made in favour of the Appellants.

It was his submission that the Appellants failed to prove the identity or location of the pieces of land claimed, for which reason their action ought to fail. He relied on **Anane v Donkor [1965] GLR 188**.

The next enquiry of counsel was on Appellants’ root of title. He referred us to the evidence of Appellants’ witness, Akwasi Agyei (PW1), secretary to the Kokoso Stool, who testified that the land granted by his Kokoso Stool to Appellants in 1998 with allocation notes issued in 2000 are located at Kokoso

Extension. He was in distress as to how the Appellants claimed that their lands are situated Nyankyerenease, when their witness from the grantor stool claimed that it is located at Kokoso Extension. In his view, it is not the land granted the Appellants in Kokoso Extension that the Appellants are claiming in court. He contended that since the Appellants are bound by their writ of summons and pleadings, it must be determined that the plots in dispute are located at Nyankyerenease. He relied on **Hammond v Odoi [1982-83] GLR 1215**.

Again, relying on the evidence of Akwasi Agyei, he submitted that the Respondents’ family has land in the disputed area, over which they obtained a judgment and in respect of which Manhyia Palace sat on a petition from certain landlords.

He contended that the registration of a portion of the land by the 1st Appellant could not bestow statutory title on her when she could not trace her root of title and identity of the land. He relied on **Amuzu v Oklikah [1998-99] SCGLR 141** and **Asante Appiah v Amponsah [2009] SCGLR 90**.

As counsel for the 3rd Respondent before him, counsel for the 4th Respondent submitted that the Appellants failed to prove that their grantor had capacity to grant the land in disputed area to them. That was because, Appellants’ grantor being the chief of Kokoso, had no capacity to grant Nyankyerenease land to them. That in his view explained the failure or refusal of the Kokoso Stool to testify on their behalf. He drew the court’s attention to the failure of a party to join his grantor to a suit or call him as a witness where the grant is being disputed by another party. Based on the authorities on calling or joining a grantor, and the need to call a material witness to prove the case on the balance of probabilities, he submitted that the action of the Appellants ought to fail. He relied on **Sasu Bamfo v Sintim [2012] 1SCGLR 136; Owusu v Tabiri [1978-88] 1 GLR 287** and **Yeboah v Ahele [2012] 44 GMJ 37 C.A** and **Majolagbe v Larbi**

**[1959] GLR 190**.

On the strength of the foregoing, he submitted that the Appellants failed to establish the reliefs sought, thereby rendering irrelevant, the issue of *estoppel*.

He drew the attention of the court to the fact that the 1st Appellant testified only for herself, meaning the 2nd Appellant did not adduce evidence at the trial.

He submitted further that since the Appellants sought a declaration of title, they had the burden to prove their claim, without a concomitant duty on the Respondents to disprove Appellants’ claims. He relied on **Gyamfi v Badu [1963] 2 GLR 596**.

**ANALYSIS AND DECISIONS ON GROUND FOUR BURDEN AND STANDARD OF PROOF**

An action for declaration of title to land, recovery of possession and perpetual injunction such as that of the Appellants, is a civil suit which requires proof on preponderance of probabilities. 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 may have been made in the statement of claim or statement of defence.

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

That burden may be discharged by production of evidence by the plaintiff himself and or his witnesses.

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

The burden of proof may also be discharged by evidence from the mouth of the opponent or his witness, see **Nyamekye v Tawiah & Anor [1979] GLR 265, C.A; 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 required by the law. The evidence must be sufficiently

weighty to be able to persuade the trial court under section10 (1), Act 323. The standard of proof is “*proof by a preponderance of probabilities’’,* as required 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.**

The primary burden of proof lies on the plaintiff for the assertions made in his suit. Where there is a counterclaim, a concomitant primary burden lies also 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, the onus shifts onto the other party, under Section 14 of Act 323. The reason being that a defendant or a defendant to a counterclaim is required under Section 10 (2) of Act 323, to adduce sufficient evidence to rebut the case made against him, to forestall an adverse ruling against him on a joined issue, see **Faibi v State Hotels Corporation [1968] GLR 471** and **Birimpong v Bawuah [1994-95] GBR 837.**

**WHAT ADMISSIBLE EVIDENCE MUST PROVE.**

In their writ of summons, the Appellants sought the reliefs of declaration of title, recovery of possession and perpetual injunction. The Respondents did not counterclaim. In every typical land suit, the admissible evidence of a claimant must be geared towards proving the claimant’s acquisition, identity, and possession of the land claimed, see **Conca Engineering (Ghana) Ltd v Moses [1984-86] 2 GLR 319; 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…”*

We shall briefly outline the law on each of the three legal requirements and determine whether or not the Appellants met the standards.

**ACQUISITION**

# The case of Mondial Veneer (Gh) Ltd v Amuah Gyebi XV [2011] 1 SCGLR 466,

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.”*

# Decisions in 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**

are to the same effect.

# Appellants’ acquisition

The Appellants’ case is that they were granted the plots of land in dispute by the Kokoso Stool. They were issued with allocation notes and site plans. The lease and land title certificate of the 1st Appellant was tendered as exhibits A and B, while the allocation notes of the 2nd Appellant were tendered as exhibits C and C1. The claim by the 1st Appellant that she testified for herself and on behalf of the 2nd Appellant was contested by counsel for the Respondents, first during cross-examination of 1st Appellant and in their separate written submissions.

We were not persuaded by the submissions in support of that challenge. The basis of the challenge was that the 1st Appellant did indicate in the heading to her witness statement that she was going to testify for herself and on behalf of the 2nd Appellant. That the heading to the witness statement was deficient is in

no doubt. The witness statement found at pages 121-123 of the record states that it is the “*Witness statement of the plaintiff*…” It does not tell us which of the plaintiffs it was for. However, in reading the contents of the statement, one is left in no doubt that is the witness statement of the plaintiffs thereto. The objection of counsel for the Respondents amounted to the deployment of technicalities to rescue the sinking case of their clients.

A false description of a thing does no harm to the nature of the thing. The Latin, ‘*’falsa demonstratio non nocet*”, means a wrong designation does not harm.

If a person goes to the market to buy a tin of ‘*ideal milk*’ and when asked on his way home as to what he held, and he answers that he was holding a tin of *‘peak milk*’, the wrong or false description of the ‘*ideal milk’* will not turn it into ‘*peak milk*’.

The Appellants called as PW1, Akwasi Agyei, secretary to the Kokoso Stool.

Contrary to the assertion of counsel for the 4th Respondent, nowhere did PW1 state that he was testifying in his individual capacity. Everything points to the fact that he testified on behalf of the Kokoso Stool. Indeed, there cannot be a better witness for a stool or an organisation than the secretary who is the custodian of records. PW1 affirmed that the Kokoso Stool indeed allocated the disputed plots to the Appellants in an area called Kokoso Extension. Since the Kokoso Stool was not a party to the suit by Respondents family, it cannot be presumed, absent evidence, that the said suit covered the land which the Kokoso Stool had granted to the Appellants and many others, whose allocation notes were tendered by the Appellants as exhibits D Series.

At the close of the case, the Appellants had placed on record, very convincing and persuasive evidence to prove that they properly acquired the subject plots of land from the appropriate grantor. The judgment which ignored the credible and compelling evidence by the Appellants was against the weight of evidence.

**IDENTITY/BOUNDARIES**

The Appellants were firstly obliged to prove the identity of the plots of land claimed and secondly that the disputed land is the same as the land claimed, In the *locus classicus*, **Anane v Donkor [1965] GLR 188,** 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.**

Perhaps, the strongest point against the Appellants was by counsel for the 4th Respondent who asserted that since by their pleadings, Appellants’ lands are located at Nyankyerenease, their documents which indicate that the lands are at Kokoso Extension or Atwima Koforidua are contradictory and not reliable.

Indeed, the Appellants by paragraphs 3-5 of their amended statement of claim (found at page 98 of the record ) averred that their plots of land are located at Nyankyerenease. It is trite fact that it the grantor of land who would know all the intricacies of the land, including the name of its location. In the instant case, the allocation notes and site plans indicate that the plots allotted to the Appellants are located at Kokoso Extension. The secretary to the grantor stool (PW1) also testified that the lands are at Kokoso Extension. Instructively, the land title certificate of the 1st Appellant appearing at page 125 of the record indicates that her land is situate at Kokoso Extension. The cadastral plan annexed to the land certificate identifies the location as Kokoso Extension. Where a cadastral plan drawn to scale and in accordance with the planning scheme indicates that the land is located at Kokoso Extension, better evidence is required to hold otherwise. There was no evidence from the Respondents to the contrary.

Counsel for the 4th Respondent latched onto an indenture annexed by the Appellants to their pre-trial check list which appears at page 60 of the record. In the first place, this indenture was omitted from the list of documents filed by the appellants after amending their statement of claim and witness statement. When a pleading is amended, whatever is taken out is no longer a

legitimate part of the case. Secondly, the indenture does not say what counsel said it says. In the indenture, the land demised is “*All that piece or parcel of land known as Plot Nos. 19, 20, 21 and 22, Block B in the* ***Kokoso Extension*** *layout in the Atwima Nwabiagya District in the Ashanti Region*…”

There is no deviation from the fact that the lands granted the Appellants are located in the **Kokoso Extension**. Counsel could not tell us that Kokoso Extension is not in the Atwima Nwabiagya District. In any case, with the constant changes to political boundaries, the District or Region into which a land falls may be of little moment provided the actual location can be ascertained.

We could not see how the Appellants could lose their case or lands on the mere ground that they misdescribed it in their pleadings, when they had adduced concrete evidence to show the identity of the land. Here again, the *falsa demonstratio non nocet* rule applies. The wrong description of the lands’ location in the pleadings could not vitiate from the validity of the grants as evinced by the allocation notes and the site plans issued by the Kokoso Stool.

**POSSESSION**

The law recognises possession as evidence of ownership. Section 48 (1) and (2) of the **Evidence Act, 1975 (NRCD 323),** accordingly 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”.*

The case of **Aidoo v Adjei [1976] 1 GLR 431, CA,** held (holding 2) that:

*“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*).

The cases of **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**, however posits that the possession that may ripen into ownership is adverse possession to the actual or constructive knowledge of the claimant, and not possession at the behest of the true title holder, or possession exercised against the opposition and protests from the rival title contender.

The Appellants acquired their lands in 1998 and were given documents on same in 2000. They have been in possession of their plots of land since its acquisition. They have walled their plots of land while 1st Appellant has constructed a mansion on a portion of her land. The Respondents do not deny that the Appellants are in possession of their plots of land. The Respondents were fully aware of Appellants’ possession of the land but took no action against them. In paragraph 11 -12 of the amended statement of claim, the Appellants averred without a rebuttal from the Respondents that at a point in time, the 3rd Respondent was Appellants’ caretaker during which he cultivated food crops on Appellants’ land and moulded blocks for them to embark on development of the lands.

From the foregoing, it is evident that the Appellants produced evidence on preponderance of probabilities to establish the (a) acquisition (b) identity, and

(c) possession of the plots of lands allocated to them by the Kokoso Stool in 1998, which is the same as the lands in dispute. In the face of such evidence, the trial court had no option than to uphold Appellants claims. The judgment of the trial court to the contrary and based on a technical issue of a judgment *in rem*, ran contrary to the evidence.

**CLAIM FOR DAMAGES**

Per their amended writ of summons, the Appellants claimed special damages of GH¢20,000,00, in addition to general damages. The basis for the claim is the destruction of Appellants’ fence walls and building materials, namely: 500

sandcrete blocks, 10 trips of sand and 2 trips of gravels. In the amended statement of claim and the amended witness statement found respectively at pages 100 and 122 of the record, the Appellants provide the particulars of the claim.

The Respondents admitted breaking down the fence walls of the Appellants but contended that same was done in lawful execution of the judgment in Suit No. FAL 3/2014. In paragraph 15 of the amended statement of defence, the Respondents denied the claim and averred that the particulars on special damages are afterthoughts and brought to enrich the Appellants at the expense of the Respondents.

The said judgment has been found by us not binding on the Appellants. The execution based on that judgment was illegal. The illegal destruction of the property of the Appellants by Respondents warrants the grant of the relief of damages for trespass.

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In their evidence in chief, the Appellants failed to provide further and better particulars on the special damages. For instance, they could have provided receipts for the materials, or called as witness(es) the drivers who carted the trips of sand and gravels, or the workers who moulded the blocks. In the absence of such evidence, we concluded that special damages which ought to be specifically proven, were not proven.

When a claimant fails to prove special damages, the court is entitled to consider the claim as general damages. As basis for general damages, the Appellants proved that their fence wall and other building material were destroyed by the Respondents. The claim was admitted by the Respondents who claimed that the damage done was in furtherance of execution of the judgment in Suit No. FAL 3/2014. We decided that half of the GH¢20,000.00 claimed as special damages should be granted as general damages in addition to further award of GH¢10,000.00 for the inconvenience, delay, frustration suffered by the Appellants in the enjoyment and development of their lands.

**GROUND 3: THE COST AWARDED WAS EXCESSIVE**

Counsel for the Appellants found no basis for the award of the costs of GH₵2,000.00 against each Appellant. That was because, the Appellants should have won the case anyway, and secondly, the conduct of the Respondents in failing to turn up to put up their defence should have been considered.

Counsel for the 3rd Respondent considered the costs of GH₵2,000.00 against each Appellant as fair in compensating the Respondents, considering the tardiness of their action. He relied on **Harold v Smith (1860) 157 ER 1229; Sasraku v David [1959] GLR 7 and Rewane v Okotie-Eboh (1960) 5 FSC 200**

But for the success of their appeal, Appellants’ contentions against the quantum of costs would have been dismissed as unmeritorious. Costs of Gh¢2,000.00 against each Appellant at the High Court was fair, on account of counsel fees and party expenses.

**CONCLUSION**

1. The trial judge was right in holding that *estoppel per res judicatem* did not apply but was wrong in holding that the Appellants were *estopped* from instituting the action because their land is covered by the 80-acre land decreed in favour of the Respondents family. The Respondents failed to prove that the plots of land claimed by the Appellants were included in the land decreed for their family.
2. As non-parties to Suit No. FAL 3/2014, the Respondents had to comply with Order 43 rule 3 (3), C.I. 47, before embarking on execution of the judgment against the Appellants. Respondents’ failure to follow the law on execution of judgments rendered the purported execution illegal.
3. The trial judge as a non-party to the suit, erred in admitting the witness statement of the Respondents *suo motu*, and applying them in his judgment. In the absence of testimony from the Respondents, the trial

judge should have upheld the evidence of the Appellants which could not be devastated by the cross-examination of counsel for the Respondents.

1. The grounds on which counsel for the Respondents ravaged the case of the Appellants were sloppy and collapsed on the slightest challenge.
   1. Even though the heading of the witness statement of the Appellants did not say that the 1st Appellant would testify for both, the text and substance of the statement showed that it was for both Appellants. The deficient heading of the witness statement was of no moment on account of the *falsa demonstratio non nocet* rule.
   2. There was abundant evidence to the effect that the plots of land allocated to the Appellants are located at Kokoso Extension, as evinced by their allocation notes and site plans. The confirmation by the Lands Commission which works according to planning schemes and grid lines etc in the land certificate of the 1st Appellant concretises the point that the plots are located at Kokoso Extension.
   3. PW1 testified as secretary to the Kokoso Stool. There is no indication that he testified in his personal capacity as claimed by counsel for the 4th Respondent. That claim does reflect in PW1’s witness statement and was also not evidence extracted from PW1, since he was not cross-examined at all by the Respondents. That means the Appellant called their grantor as a witness, contrary to the views of counsel for the 4th Respondent. The evidence of the Appellants’ grantor’s witness proved that the plots allocated the Appellants are situate at Kokoso Extension, and most importantly the Appellants were properly granted the disputed plots by a grantor whose capacity has not been dared by the Respondents’ family in any court action or other arbitral forum.
2. At close of the case, the Appellants had adduced credible evidence to establish their (a) acquisition (b) identity of their land, and (c) possession of their land for several years to the full glare of the Respondents, especially the 3rd Respondent who was their caretaker and moulded blocks for them to develop the lands. Having discharged the burden cast

on them as claimants in a land suit, and in the absence of any contrary evidence from the Respondents, the trial judge was duty-bound to uphold the claims of the Appellants. His decision which ran contrary to the tide of evidence, is liable to be set aside.

1. The Appellants established their claim for damages. They adduced evidence on the damage done to their fence walls and building materials. Their claim was corroborated by the Respondents who admitted destroying the fence wall in execution of the judgment in Suit No. FAL 3/2014.

Having proven that the Appellants were not bound by the said judgment, the foundation of Respondents’ defence collapsed, exposing them to liability for damages for the damage done to the Appellants property.

1. From the foregoing, we found the appeal to be of merit for which reason same is upheld. The judgment of the trial High Court dated 21 February 2022 is set aside, to be substituted by judgment herein entered for the Appellants.

# Damages

The Appellants sought both special and general damages. We determined *supra* that they could not specifically prove the special damages. We determined that they are entitled to general damages. In awarding general damages, we considered the high costs of building materials, labour and the cost of inflation as a whole. We decided the Appellants, general damages in the sum of GH¢20,000.00.

# Costs

Costs of GH¢10,000.00 is allowed against the Defendants/Respondents and for Plaintiffs/Appellants.

**(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)**

**COUNSEL**

1. **Kwaku Yeboah Appiah, Esq., *for Plaintiffs/Appellants*.**
2. **Frederick Yeboah Agyakwa, Esq., *for 3rd Defendant/Respondent*.**
3. **Mathew Appiah, Esq., *for 4th Defendant/Respondent*.**