IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE, KOFORIDUA HELD ON FRIDAY THE 24TH DAY OF JANUARY, 2025 BEFORE HER LADYSHIP JUSTICE JENNIFER MYERS AHMED (MRS.) JUSTICE OF THE HIGH COURT.

SUIT NO: C1/98/2022

1. NANA OSAE SEKYI II
2. ABUSUAPANYIN KWAME DARTE

VRS

COMET PROPERTIES LIMITED

JUDGMENT

The Plaintiffs by their writ of summons issued on the 27th of January 2022 against the Defendant prayed for the following reliefs:

a. Recovery of possession of 298.36 acres of land situate, lying and being at Asabi – Berekuso in the Eastern Region trespassed upon by the Defendant which size of land is over and above the land acreage originally granted to the Defendant in 2002.
b. General damages for trespass.
c. An order cancelling any document in the possession of the Defendant in excess of the 200 acres of land situate, lying and being at Asabi – Berekuso in the Eastern Region granted to the Defendant by the Plaintiffs' family.
d. An order of perpetual injunction to restrain the Defendant, its agents, privies, assigns and servants from entering unto any land in excess of the 200 acres of land granted to it by the Plaintiffs' family or in any way disturbing the Plaintiffs' possession of the land the Plaintiffs' family did not grant to it.
e. Cost including legal fees.

The plaintiffs' case is that the Aduana Abrade family of Asabi (of which the 1st plaintiff is the Asabihene and Kyidomhene of Bereku and the 2nd plaintiff being the head and lawful representative of the Aduana Abrade family) is the owner of a large tract of land situate at Asabi-Berekuso in the Eastern Region which encompasses the land in dispute.

These lands, according to the Plaintiffs, are ancestral family lands acquired through discovery and the family has, from time immemorial, exercised various acts of ownership including the alienation of portions of the land to developers for valuable consideration. The family has been in undisturbed possession of their lands all these years.

The plaintiffs stated that the family in November 2002 acting per Nana Acquah, the erstwhile Asabihene and Kyidomhene, and Nana Oteng Korankye II, Chief of Berekuso, granted a total acreage of 200 acres of their family land to the defendant herein. However, the plaintiffs averred that they recently got wind that the defendant has extended the acreage of land conveyed to it and has trespassed on other parts of the plaintiffs' family land measuring over two hundred (200) acres of land.

The plaintiffs averred further that in an attempt to resolve the anomaly, they caused their lawyer to write to the defendant for an amicable resolution of the matter which proved futile. The plaintiffs averred that in addition to the acts of trespass of the defendant, the latter threatens the plaintiffs' representatives on the land with armed men. It is the case of the plaintiffs that the defendant's acts of trespass on the land would change the character of the land to such an extent that the Plaintiffs would not be able to use it for their intended purpose. For these reasons, they had been compelled to seek succour before the court.

The defendant, on the other hand, essentially denied all the claims of the plaintiffs in its statement of defence. The denial went so far as to challenge the

1st plaintiff's capacity to maintain this suit. The case of the defendant is that it took grants from both the Aduana Abrade family of Onyinakese and Asabi upon representations made by Nana Acquah and Nana Oteng Korankye II and the defendant, having verified same, took the grant from the aforementioned families. The defendant averred further that the plaintiffs are estopped from asserting a new history of the defendant's grant. The defendant averred that the said land conveyed to the defendant has brought many legal battles which the defendant has fought all these years through court cases. There have adverse claims from land guards to the knowledge of the Defendant's grantors.

For the reasons outlined above, the defendant per its statement of defence and counterclaim filed on the 30th of January 2023, also prayed for the following reliefs:

a. An order directed at the Plaintiffs to reimburse the Defendant all expenses incurred through numerous litigations and other expenses on the disputed land assessed at 2 million Ghana Cedis.
b. Cost including legal fees.
c. Any other order(s) as this Honourable Court may deem fit.

The plaintiffs filed a reply and defence to the counterclaim wherein they joined issues generally on the defence filed. The 1st plaintiff strongly asserted his capacity to maintain this action by virtue of being the Asabihene and Kyidomhene of Berekuso after succeeding Nana Acquah II. The plaintiffs further stated that the defendant is not entitled to the reliefs sought.

After the close of pleadings, directions were taken on 17th April, 2023 and the issues set down for trial were:

a. Whether or not the Plaintiffs' predecessors granted the Defendant land in excess of 200 acres.

b. Whether or not the Defendant has trespassed onto the Plaintiffs' family land.

It is trite that he who alleges must prove. In **Owusu v Tabiri** (1987-88) 1 GLR 287 the Supreme Court stated that;

'It was a trite principle of law that he who asserted must prove and win on the strength of his own case'

The onus lies then on the plaintiffs to prove that what they have asserted is indeed the true state of affairs and that the land in dispute belongs to them. Sections 10, 11 and 12 of the Evidence Act 1975, NRCD 323 also give statutory recognition to this long held position that the person who asserts assumes the burden of proving same and he must do so by adducing such evidence to discharge the burden of proof placed on him on the preponderance of the probabilities.

It is instructive to note that, although the burden is usually on a plaintiff, a defendant who files a counterclaim assumes the same burden and the same standard of proof would be used in evaluating and assessing the case of such a defendant. Where a defendant fails to adduce sufficient evidence in support of his claim, his counterclaim fails. See **JASS CO. LTD & ANOTHER V APPAU & ANOTHER [2009] SCGLR 265 & VERONICA OPOKU V MARY LARTEY [2018] 119 GMJ 244.**

In light of the above, the parties in this case are 'equally yoked' when it comes to establishing their respective claims before this court as they each bear the onus to adduce sufficient evidence to satisfy this court that on the balance of the probabilities what they assert is the truth and that their opponent is found wanting.

As clearly observed from the statement of defence, a challenge has been raised regarding the 1st plaintiff's capacity to maintain this instant suit as illustrated by paragraphs 2 and 3 of the statement of defence where the defendant pleaded:

2. *The Defendant denies paragraph 1 of the Statement of Claim and will put the Plaintiff to strict proof thereof.*
3. *The Defendant further says that the 1st Plaintiff has no capacity whatsoever to maintain the instant action.*

On the totality of the pleading, I fail to see any legal or factual grounds to sustain the challenge especially so when no evidence was led by the defendant to counter the narration of the plaintiffs or to even challenge the 1st plaintiff when he mounted the witness box by way of cross-examination. The Courts have severally held that a party's capacity should not be challenged for the sake of it. The challenge must be bona fide and grounded in law. See **MADAM ABIGAIL TWUBA HALM V GRACOMA LTD & 4 OTHERS (CIVIL APPEAL NO. H1/26/2012) DATED 22ND NOVEMBER, 2012 (DELIVERED BY THE COURT OF APPEAL).**

In this case, the Court of Appeal, speaking through the venerable Marful-Sau JA (as he then was) of blessed memory held as follows:

> *"Capacity as observed is so fundamental in the institution of civil actions. In view of its effect on cases the issue of capacity ought not to be raised without any legal basis. **In other words, a challenge to a party's capacity in an action must have legal basis and the pleadings must give cause to the challenge."***

Be that as it may the challenge still merits consideration. The law is trite that where a party's capacity to mount an action is challenged, he cannot succeed on the merits without first satisfying the court that he is clothed with the requisite capacity to institute the action. It is therefore incumbent on a plaintiff

whose capacity is put in issue to adduce cogent evidence to establish his capacity.

In paragraph 1 of the statement of claim, the 1st plaintiff described himself as the Asabihene and the Kyidomhene of Brekusu. In proving this fact, the 1st Plaintiff who testified that he succeeded Nana Acquah III as the Kyidomhene of Brekusu on 28th September, 2017, tendered into evidence as exhibit B, a publication in this regard made in the National Gazette confirming his status as Asabihene/ Kyidomhene. This evidence was in no way challenged by the defendant nor was the 1st Plaintiff subjected to cross-examination in respect of Exhibit B. Therefore, by virtue of the incontrovertible evidence of the status of the 1st plaintiff, this Court finds his capacity established.

With this preliminary hurdle surmounted, I proceed with the determination of the issue of whether or not the plaintiffs' predecessors granted the defendant land in excess of 200 acres. The plaintiffs in proving their case relied on the testimony of the 1st plaintiff. In his evidence, he sought to prove the bounds or the extent of the Aduana Abrade family of Asabi lands by relying on a statutory declaration (**EXHIBIT A**) sworn by Nana Acquah III, Kyidomhene of Berekuso and the Head and lawful representative of the Aduana Abrade family of Asabi and Nana Oteng Korankye II, the chief of Berekusu Twafohene of Akwapim Traditional Area.

Although there is no accompanying site plan clearly delineating the boundaries of the land, the land is adequately described in the schedule. In my opinion, the description of the land as contained in the statutory declaration is sufficient to enable the location and boundaries of the land to which the statutory declaration relates to be identified.

It is noteworthy that there is no challenge by the defendant in respect of the contents of Exhibit A thus, this Court is satisfied that the Statutory Declaration

of the plaintiffs made on the 30th of July 2001, possesses significant evidentiary weight in this instance. Besides, statutory declarations are only considered as self-serving documents and of no probative value where the facts contained therein are challenged or disputed. See **IN RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU & OTHERS (2003-04) SCGLR 420**. In the instant case, the defendant has not in any way mounted a challenge to exhibit A and this court accordingly accepts exhibit A as confirming the plaintiffs' claim that the land as described in exhibit A, belongs to the Aduana Abrade family of Onyaakesaese.

Having established the extent of the family land, the 1st plaintiff further testified that by a deed dated 15th May 2002 between Nana Acquah III, the then Kyidomhene of Berekuso, Aduana Abrade family of Asabi Berekuso and Nana Oteng Korankye II, Chief of Berekuso on the part and the Defendant on the other part, a total acreage of two hundred (200) acres of the family's land was granted to the latter for a period of ninety-nine (99) years. The said indenture was tendered into evidence as **exhibit C.**

When cross-examined on the grant made by the family to the defendant, the 1st plaintiff had this to say on 12th March, 2024:

Q7: And after the execution of the deed for these 200 acres of land, there were subsequent grants to the defendants by the said Nana Acquah III and Nana Oteng Korankye and some others, a grant totalling 200 acres. Are you aware?

A7: No, my Lady.

Q8: So, I put it to you that after the initial grant of 200 acres to the defendant, there was other grants of various acreages totaling about

20 acres to the defendant by the said Nana Acquah III, Nana Oteng Korankye and some other principal members of the family.

A8: *No, My Lady, all we have in our records is 200 acres.*

Q9: *And that the defendant has been in active occupation and possession of those 400 acres of land right after the acquisition.*

A9: *My Lady, what I know is the family has granted 200 acres of land to the defendant and he has gone beyond his boundary claiming the total land.*

Q10: *I put it to you that the defendant has not gone beyond his boundaries but is legitimately within the total acreage of land granted to him by your predecessor, Nana Acquah, Nana Oteng Korankye and others.*

A10: *My Lady, per the records of the family and per the declaration the family made, we knew the has gone beyond the land which was given him, the 200 acres.*

From the above testimony, the plaintiffs have consistently asserted that save for Exhibit C, no other instrument has been executed by the family for the defendant alienating portions of the family lands to the defendant. The onus therefore shifts onto the defendant to prove ownership of the lands occupied by the defendant in excess of the 200 acres conveyed in Exhibit C notwithstanding the fact that its counterclaim did not include a declaration of title.

This is because I am satisfied that the plaintiffs, by Exhibit C, have established a prima facie case in respect of the total acreage of land conveyed to the defendant. The evidentiary burden therefore shifts onto the defendant to prove otherwise failing which, the plaintiffs deserve a finding in their favour. The law is trite that although the burden lies on the Plaintiff, the evidential burden is

not fixed on the Plaintiff throughout the case but shifts from party to the other at various stages of the trial depending on the issues asserted and/or denied. See **IN RE ASHALLEY BOTWE LANDS; ADJETEY AGBOSU & OTHERS V KOTEY & OTHERS (2003-2004) SCGLR 420.**

From the testimony of Kwasi Sarpong Peprah who is the managing director of the defendant, the defendant acquired the initial 200 acres from the Aduana Abrade family of Asabi and Onyinakesease for a monetary consideration of GH₵ 15.00 per acre for 99 years subject to the terms and conditions stated in the lease. The lease is in evidence as **EXHIBIT 1** which is the same as the Plaintiffs' Exhibit C.

According to DW1 there was a second acquisition by its grantors to the Defendant for 67.1 acres for which payments were made to the youth of Aduana Abrade family of Asabi upon the instructions and consent of the grantors. This second acquisition is evidenced by a deed of sublease dated 9th November, 2002 and tendered into evidence as exhibit 4. There was again a third purchase which is evidenced by a deed of lease dated 1st January, 2003 and executed between Nana Acquah III and Nana Oteng II as the Lessors and the Defendant herein as lessee. A copy of this indenture was tendered into evidence as exhibit 6. Another acquisition which forms part of the 407 acres of land more or less was also obtained by an assignment between Sam Acquah Yeboah, Eugene Harrison Asante, Michael Addo and Clifford Addo and the Defendant herein covering 30 acres more or less. A copy of this assignment was tendered into evidence as exhibit 7.

During cross-examination of DW1 on 14th June, 2024 reservations were voiced about the authenticity of the indentures tendered in evidence. The record reflects that counsel for the defendant undertook to get the originals of all the indentures at the next court sitting but, unfortunately, this was done.

The law of evidence dictates that to prove the contents of a writing, a party must produce the original writing to do so. This is known as the best evidence rule and same is adequately provided for under section 165 of the Evidence Act as follows:

> *"Except as otherwise provided by this Act or any other enactment evidence other than an original writing is not admissible to prove the content of a writing."*

The Supreme Court in **KWAKYE V ATTORNEY-GENERAL [1981] GLR 944-1071** in elucidating the rationale behind the best evidence rule held thus:

> *"The rational underlying the best evidence rule is that human recollection and oral description is sufficiently subject to error to make men place more trust in written material than in recollection or oral description of that writing. By this rule, the law declares its preference in favour of the original writing over other evidence where the original is available."*

It is instructive to note that the law allows for some exception to this rule. For instance, the best evidence rule does not apply where the original is lost or upon proof of any of the factors contained in sections 167 to 176 of the Evidence Act. Further, in some cases, copies are likely to be very accurate to rely on unless there is a genuine question as to its authenticity of the duplicate. Reference is made to section 166 of the Evidence Act which stipulates that:

> *A duplicate of a writing is admissible to the same extent as an original of that writing unless*
>
> *(a) a genuine question is raised as to the authenticity of the original or the duplicate, or*
>
> *(b) in the circumstances it would be unfair to admit the duplicate in lieu of the original.*

In this instant case, the reservations by counsel for the plaintiffs bordered on some discrepancies between the original document and Exhibit 4. Counsel compared the copy (Exhibit 4) to the supposed original document which is not in evidence and arrived at the conclusion that the original document is different from the copy. With the supposed original document not in evidence, this court cannot reasonably accept the conclusions of counsel for the plaintiffs regarding the nature of exhibit 4 and consequently rule same as inadmissible. On the strength of section 166 of the Evidence, I accept the duplicates (Exhibits 4, 6 and 7) as admissible and that they can be relied upon by this court in its determination.

However, the defendant should not take comfort in the Court's decision to admit these indentures into evidence as the court's discerning gaze scrutinised the indentures tendered by the defendant in significant detail and noticed some defects in **exhibits 4** and **6**

In respect of **exhibit 4** it is clear that there is no site plan attached to the indenture. Compounding the issue is the absence of an adequate description of the subject matter of Exhibit 4. The closest thing to a description of the property is as contained in paragraph 1 which, for the purposes of this judgment, I reproduce below:

> *"IN CONSIDERATION of the rent reserved and of the covenants consideration and stipulation on the part of the Lessees to be paid performed and observed the Lessors hereby "DEMISED" unto the Lessees ALL THAT PERCELS OF LAND situate lying and being at BEREKUSO EASTERN REGION OF the Republic of Ghana and covering a total acreage of 67.1 acres under sites "A" and "B" which are more particularly delineated and thereon shown edged "PINK" TO HAVE TO HOLD the same unto same and to the use of the lessees for the term of NINETY-NINE (99) YEARS from 1st day of*

October, 2002 PAYING thereon unto the Lessors the yearly rent of 100,000.00"

In my considered view, the above is insufficient to enable the location, boundaries and/or identity of the land to which exhibit 4 relates to be identified. Land cannot be sold or conveyed in a vacuum; an instrument conveying an interest in land must sufficiently describe the boundaries or identity of the land being conveyed in the schedule to the instrument and more importantly, delineated on a site plan attached to the indenture. In the absence of such description, the indenture is defective and incapable of passing or creating any interest in the transferee as there is no way of determining the subject matter of the conveyance.

The above holding applies mutatis mutandis to **exhibit 6** which also suffers from the same defect. Exhibit 6 contains no description of the land being conveyed nor a site plan to aid in the identification the land thus, I hold same to be defective and incapable of passing or creating any interest in the defendant. To hold otherwise will result in a situation where the defendant seeks to enforce its rights over unascertained lands. See the case of **ANANE V DONKOR; KWARTENG V DONKOR (CONSOLIDATED) [1965] GLR 188.**

A further observation made is that, whiles **EXHIBIT 4** is totally bereft of an oath of proof as required by law, **EXHIBIT 6** contains an oath of proof albeit defective. I hold so because, per the commencement of the lease, same was executed on 1st January, 2003 however, the oath of proof indicates that the witness observed the execution of the deed on 27th October in what appears to be 2004 as a result of an obvious correction or alteration.

For these reasons, **EXHIBITS 4 & 6** are clearly defective for want of proper execution and cannot be relied upon. Pre-eminently, no interest passed onto the

defendant by virtue of the uncertainty surrounding the identities or boundaries of the subject matters in Exhibit 4 and 6.

The purported second acquisition of an unidentified 67.1 acre land was a grant from the Youth of Aduana Abrade family of Asabi to the defendant and payments were made to their leaders who from the slew of receipts tendered by the defendant, included the name of one Emmanuel Aryeetey. DW2 who had tendered the receipts of payment stated that the payments to the youth was under the instructions and consent of their grantors. Yet no evidence of any such 'instructions and consent' was provided to this court. It appears that the defendant company which has been engaged in the business of real estate for quite a number of years, dealt with some persons based on their oral say so, without taking the time to do the due diligence, to determine if these persons were authorized in any way to deal with any part of the Aduana Abrade family land.

Again it must be emphasized that it has been stated, time without number by the courts that it is only the head of family who has the power to alienate family land with the consent and concurrence of the principal members of the family. In **Dzefi v Ablorkor** (1999-2000) 1 GLR 10, the court stated that *'It is the head of family together with principal elders of the family who have the capacity to alienate family land'*. So under what wherewithal did the youth of the Aduana Abrade family alienate family land without the knowledge and consent of the head of the Aduana Abrade family and its principal elders? The court cannot by any measure attach any validity to this already defective document or hold that there was a valid grant made to the defendant of the 67.1 acre of land. This purported grant was void ab initio. In **Asafoatse Agbloe II & Others v E.T.A Sappor & Others** (1947) 12 WACA 187 where four out of the six principal members of the Tetteh-Ga family had without the consent of the head of family,

granted a member of the family a parcel of land after he had redeemed same it was held that:

'...the head of family may be considered to be in an analogous position to a trustee from which it follows that it is quite impossible for land to be legally transferred and legal title given without his consent. The alleged deed exhibit B was therefore void ab initio and the respondents derive no right of absolute ownership by virtue thereof.'

Exhibit 7 on the other hand does not have the above highlighted defects and appears to have duly stamped in accordance with provisions of the Stamp Duty Act, 2005 (Act 689). Exhibit 7 is an assignment between Sam Acquah Yeboah, Eugene Harrison Asante, Michael Addo and Clifford Addo on the one part and the defendant herein on the other part. On the face of the assignment, the assignors trace their title to the Aduana Abrade family acting by Nana Acquah III Kyidomhene of Berekuso and Head of Aduana Abrade family of Asabi Berekuso and Nana Oteng Korankye II, Chief of Berekuso and the Head of the Aduana Abrade family of Onyinakese Berekuso Akuapim in the Eastern Region of the Republic of Ghana. The subject matter of Exhibit 7 has been duly described and delineated in a site plan which is attached to Exhibit 7. By Exhibit 7, I am satisfied that the defendant became the beneficial owner of 30 acres of land.

On the totality of the evidence, this court therefore finds that the defendant company validly acquired 200 acres of land from the family of the plaintiffs on 15th May, 2002. Subsequently, by a deed of assignment, the defendant acquired a further 30-acre land from assignors who trace their root of title to the family of the plaintiffs. The interest or title of the defendant in these lands are conclusively established by **EXHIBIT C & EXHIBIT 7.**

Having held so, the Defendant is lawfully in possession of Two Hundred and Thirty (230) acres of Aduana Abrade of Asabi Berekuso family lands and the

identity or description of these lands are as stated in Exhibits C and 7. Consequently, acts of the defendant beyond the bounds of the lands lawfully acquired constitute trespass.

In respect of the counterclaim of the defendant to be reimbursed for all expenses incurred through numerous litigations and other expenses on the land acquired assessed at Two Million Ghana Cedis (GH₵ 2,000,00.00), the defendant adduced no evidence to merit the grant of this relief. There is no proof before this court that the defendant has been involved in litigation in respect of the lands acquired by the defendant. The writs of summons and statement of claims tendered by the Defendant as **EXHIBIT 10** is no proof of litigation over Aduana Abrade of Asabi Berekuso family lands. The subject matter of the writ of summons issued on 25th October, 2006 relates to a parcel of land situate at Kwabenya, outside the jurisdiction of this court, while that in Suit No. L 641/2002 is not defined.

Granted that Exhibit 10 is indeed, proof of litigation over the disputed land herein, the defendant has provided no justification for the award of Two Million Ghana Cedis (GH₵ 2,000,00.00). It is pertinent to observe that the Courts cannot make findings based on mere conjecture. Findings of the Court must be substantiated by the evidence on record. Therefore, in the absence of evidence to satisfy this court how the defendant incurred Two Million Ghana Cedis (GH₵ 2,000,00.00) through litigations over the disputed land, the claim fails.

The plaintiffs' claims succeed. Accordingly, judgment is entered in favour of the plaintiffs in the following terms:

1. The Aduana Abrade family of Asabi are the owners of the large tract of land situate at Asabi-Berekuso in the Eastern Region of the Republic of Ghana and more particularly described in **EXHIBIT A** save for the Two

Hundred and Thirty (230) acres of land acquired by the defendant by virtue of **EXHIBIT C & EXHIBIT 7.**

2. The defendant is the beneficial owner of the lands, the subject matter of **EXHIBIT C & EXHIBIT 7,** and with the total acreage of Two Hundred and Thirty (230) acres of land.

3. The plaintiffs are therefore entitled to recover possession of lands in excess of the said Two Hundred and Thirty (230) acres of land acquired by the defendant.

4. The defendant, its agents, privies, assigns and servants are perpetually restrained from dealing or interfering with lands beyond the scope of **EXHIBIT C & EXHIBIT 7.**

5. Cost of Gh¢50,000.00 is awarded in favour of the plaintiffs against the defendant.

SGD

JENNIFER A.M.AHMED (MRS.)
(JUSTICE OF THE HIGH COURT)