Awuah.v.Adututu - [1987-88] 2 GLR 191. [1988] GHLL 1 (28 July 1988)

Awuah v. Adututu and Another

[1987-88] 2 GLR 191.

Court of Appeal, Accra

28 July 1988

APPEAL by the first defendant from the decision of the High Court, Sunyani, reversing the judgment of the District Magistrate Grade I, Goaso given in favour of the plaintiff in an action for, inter alia, declaration of title to a piece of farming land. The facts are set out in the judgment of the court delivered by Abban JSC.

J M Lamptey for the plaintiff-appellant.
No appearance for or on behalf of the respondents.

ABBAN JSC.

The appellant sued the respondent in the District Court Grade I, Goaso, in Brong-Ahafo for a declaration of title to land, damages for trespass and an order for perpetual injunction. Judgment was entered in the appellant's favour and the respondents appealed to the High Court, Sunyani.

On 15 July 1983 the High Court, Sunyani reversed the said decision of the district court, grade I and gave judgment for the respondents, demising the appellant's claim. It is against this judgment that the appeal was brought.

The fact in the case were simple: The appellant (hereinafter referred to as the plaintiff) obtained a grant of forest land from the first respondent for cultivation. The size of the forest land granted was described as 12 24 poles and the plaintiff paid £100 (220) to the first respondent for the grant. The first respondent for the grant. The first respondent (hereinafter called the first defendant) issued a receipt, exhibit B, to acknowledge the said payment. The plaintiff entered into possession and cultivated considerable portion of the land granted leaving a small area for future cultivation.

The plaintiff later gave that small area to a certain man to cultivate on ``abunu'' tenancy. After that person had cleared the forest, the first defendant entered it and

appropriated considerable portion thereof and gave the same to one Kwame Boakye, the second defendant herein. The latter then went onto the land, and started farming activities thereon.

The plaintiff raised objection to the conduct of the first defendant who retorted by saying that that portion of land granted to the second defendant was not included in the plaintiff's grant; and that the plaintiff had gone beyond the limits of the land granted to him. Consequently, he, the first defendant, was entitled to retake the disputed portion and so his subsequent grant of that portion to the second defendant was in order.

Letters were exchanged between the parties in which each party tried to justify his stand. The matter seemed to have been brought before the officials of the Brong-Ahafo regional office. The parties were advised to agree on a common surveyor to make a plan of the disputed area. Thus, the plaintiff and the first defendant engaged a surveyor, Kwabena Botwe, the first plaintiff witness on the day appointed for the survey to be carried out, the first defendant said he had some urgent matters to attend to in Kumasi so he could not personally be present during the survey.

It may be noted that the grant of the land was made by the first defendant on behalf of his stool. But the physical demarcation of the land for the plaintiff was done by some emissaries deputed by the first defendant Consequently, since the first defendant himself could not attend the survey, he deputed certain persons to represent him. Those representatives included the very persons who had originally demarcated the land for the plaintiff.

The surveyor in the presence of the plaintiff took measurement of the disputed land as pointed out to him by the first defendant's representatives. The surveyor later prepared a plan which was tendered at the trial as exhibits C.

The first defendant on seeing the plan, contended that an old rope which had originally been used by his emissaries to demarcate the land for the plaintiff some sixteen years ago, should have been used by surveyor and since this was not done he would not accept the plan, exhibit C. So about a month' after the surveyor, the first defendant took the same surveyor back to the disputed land and had it resurveyed in the absence of the plaintiff. The plan prepared after the second survey later became later became exhibit 1 in the proceedings.

Despite various attempts to settle the matter, the parties could still not see eye with each other. Hence the plaintiff had to commence the present action in the District Court, Grade I, Goaso. The learned trial magistrate after reviewing the evidence adduced before him found as a fact that the plaintiff had ``not exceeded the land

originally granted to him." He therefore rejected the defence. He also accepted the plan, exhibit C, and rejected ``the plan exhibit I as an afterthought."

The learned trial magistrate made further findings which for the sake of emphasis I hereby reproduce. They are as follows:

``The first defendant has no dispute with the second plaintiff witness' [Opanyin Kwabena Sefa's] evidence that he, the second plaintiff witness, shares a common boundary with the plaintiff. *I therefore accept second the plaintiff witness's evidence that the second defendant has occupied a large portion of the plaintiff foodstuffs* farms as well as a portion of his farm with*cocoa, near their boundary with Yaw Boahene.* This constitutes trespass. The first defendant having granted that land to the plaintiff, he had no right to regrant any portion of it to the second defendant ...I accept the plan exhibit C in the circumstance, and reject the plan, exhibit I, as an afterthought. *I find that the first defendant has no vacant land left between the plaintiff, Sefa and Boahene which he could validly sell to the second defendant: he had already sold it to the plaintiff, therefore he has not right to resell it to the second defendant*."

(The emphasis is mine)

Those positive and crucial findings of the learned trial magistrate were set aside on appeal by the High Court, Sunyani and the judgment founded thereon was reversed. The basis of the judgment of the High Court was seriously challenged in this appeal.

Leaned counsel for the appellant argued the only original ground of appeal filed, namely the judgment of the High Court was against the weight of evidence. Counsel contended that the plan, exhibit C, clearly showed the land granted to the plaintiff because it was the first defendant's own agents who pointed out to the surveyor the land which, according to them, they had originally demarcated for the plaintiff, and what agents showed to the surveyor was what the surveyor incorporated in exhibit C; and that boundary owners as given by the plaintiff in his evidence were the same as those on the plan, exhibit C. Counsel in the circumstances submitted that it was wrong for the learned High Court judge to reject exhibit C on the ground that ``what the surveyor did, did not reflect the size of the forest land demarcated for the plaintiff."

It was again submitted that the rejection of the plan, exhibit C, on the further ground that the surveyor did not base his measurements on a rope kept by the first defendant for measuring lands in the area was wrong. For the plaintiff rightly refused to allow

the use of that rope which could have been any rope and not necessarily the very rope that was used sixteen years ago.

There was no dispute that the land granted to the plaintiff was at Suntreso and it was portion of the stool land of Nana Akwaboahene. The first defendant was virtually the caretaker of that stool land and he was the person who had been authorized by the said Nana Akwaboahene to make grants of the said stool land to persons who needed land for farming purposes. It was also not dispute that in some cases, the first defendant himself did not go to the forest to demarcate the land. He sent agents or emissaries to go to the forest to do the physical demarcation and allocation; and in the case of the plaintiff's grant, those sent by the first defendant were three--Osei Kofi, Yaw Asenso and Subaah.

So that when the dispute arose and it became necessary to engaged the services of a surveyor the land, it was understandable that those very emissaries. Osei Kofi, Yaw Asenso and Subaah, were deputed by the first defendant to go along with the plaintiff and the surveyor. It was clear from the evidence that the surveyor took measurements of the disputed land as point out to him by those emissaries and it was that very area that the surveyor incorporated in the plan, exhibit C.

It is important to bear in mind that the first defendant was not present when his emissaries--Osei Kofi, Yaw Asenso and Subaah originally demarcated the forest land for the plaintiff. He was also not present during the first survey when those emissaries in the presence of the plaintiff showed the surveyor the area which, according to them, they demarcated for the plaintiff in 1962. thus the evidence of the first defendant to the effect that the plaintiff had exceeded the limits of the forest land granted to him was nothing but hearsay and therefore inadmissible. It could not therefore be relied upon.

In fact, the first defendant admitted lack of personal knowledge of the exact portion of land that was demarcated for the plaintiff when he said: ``I was informed by Osei Kofi that the plaintiff had exceeded the limits of land we gave him." Then under cross-examination by the plaintiff the first defendant continued: ``*I was not present when the land was measured for you but I am informed that you have exceeded the boundary*." (The emphasis is mine).

It was therefore obvious that the only admissible and relevant evidence which the defendants produced to support their contention that the plaintiff exceeded the limits of the land granted to him was that of his emissary, Osei Kofi, who happened to be the only witness called by the defendant. Osei Kofi, the first defendant witness, stated as follows:

``I was accompanied by Yaw Asenso and Subaah. We took the plaintiff to the forest. We had already demarcated the limits of the land and we showed it to him. The plaintiff told us that he wanted a mile square piece of land; we measured the land. This measured 12 24 of the rope-measure we used. This was equivalent to a farmer's mile.''

Osei Kofi took part in the first survey conducted by the surveyor in the presence of the plaintiff. On this Osei Kofi said: ``I agreed and accompanied the plaintiff and the surveyor to the land and the plaintiff showed the land he alleges we gave to him." Assuming for the purpose of argument that it was true that it was the plaintiff and not Osei Kofi who showed the boundaries of the land to the surveyor. These was nothing on record indicating that Osei Kofi raised objection as to the correctness of those boundaries. According to Osei Kofi, he just looked on and he never disputed or complained about what the plaintiff showed to the surveyor. This could not be the behaviour or the conduct of a person who was all the time hotly challenging the plaintiff's right to the disputed area. Osei Kofi kept quiet and it was one month after the surveyor had completed his work and produced the plan about C. that he and the first defendant went and took the same surveyor back to the land; and in the absence of the plaintiff, conducted the surveyor along entirely different boundaries to make another plan, exhibit 1.

I think, exhibit 1 was not binding on the plaintiff. It was self-serving. Osei Kofi attempted to explain away his conduct by saying that he agreed with the first defendant that he would attend the first survey as an on-looker ``and then later I was to make my own plan respecting the land which I actually gave to the plaintiff." This could not be true. If that was the agreement Osei Kofi had with the first defendant, why then should the first defendant agree to share equally with the plaintiff the expenses of the first survey and faithfully paid his share of the cost of the survey to the surveyor?

Again, if there was any such agreement why was it that the two separate surveys were not done on the same day in the presence of the plaintiff; and why was the plaintiff not called upon to foot part of the bill of the second survey? I think the learned trial magistrate was right when he rejected the evidence of Osei Kofi on that issue in the following manner:

``In the circumstances therefore I reject the defence that when the plaintiff refused the use of that rope, he, the first defendant, suggested that two plans be produced, one representing that land which the plaintiff claimed was for him, as well as the

land which the first defendant witness (Osei Kofi) actually gave to the plaintiff ...I reject this contention.''

With this finding nothing more was left in the evidence put forward by the defendant, namely that the plaintiff had exceeded the bounds of the land granted to him.

Be that as it may, Osei Kofi, as I have already held, was not only present at the first survey but also took active part and, in fact, pointed out to the surveyor an area which, according to him, was the area he and the other emissaries demarcated for the Plaintiff; and it was the area thus shown by Osei Kofi to the surveyor, when being cross-examined by the first defendant was asked:

> ``Q The plaintiff mentioned that the land was demarcated to him by Yaw Asenso and Osei Kofi?
>
> A Yes, and it was they who showed me the land they demarcated to the plaintiff and I measured it as shown in the first plan without objection ...
>
> Q On the land at first surveying, Aseso and Osei Kofi told you that the land the plaintiff was showing to you was larger than they actually gave him.
>
> A No; they rather led me along the boundary and I took the measurement along the line they showed me.''

The learned trail magistrate accepted, as he was entitled to do, this piece of evidence and said:

``I saw the first plaintiff witness (the surveyor) in the box; I had no reason to impugn his credulity. I took him to be a witness of truth ...The first defendant did not strike me as a witness of truth. When the plaintiff wanted to tender the plan, exhibit C, the first defendant objected upon the ground that he plaintiff made the plan without his knowledge. But it turned out, as he himself later admitted, that the first plaintiff witness did so in the presence of the plaintiff and the first defendant's representatives including Kwabina Barimah.''

The learned High Court judge rejected the plan, exhibit C, on two main grounds. First, because a certain rope was not used by the surveyor. Secondly, the surveyor under cross-examination had said that if the first defendant's agents during the first survey had objected or not to the boundaries showed by the plaintiff and had showed him the

``correct'' boundaries he (the surveyor) would not have minded them since there were cutlass marks already on the tress along the boundaries. The learned judge then made the following findings:

``By this I hold that the surveyor was not being fair to both parties ...In the result I say that what the first plaintiff witness (the surveyor) did. did not reflect the size of the forest land demarcated for the plaintiff.''

In my view, the reasons for rejecting the plan, exhibit C, were not valid. In the first place, whatever the surveyor might have said in the statement was a mere conjecture as to what he might have done or might not have done if the agents had shown him a path where the trees were not having cutlass marks; and it did not represent what he in fact did or what exactly happened during the first survey. Thus the fact still remained that he only depended on the first defendant's agents and took measurements of the land which the agents of the first defendant showed him.

The rope which the defendants insisted on was not proved to be the exact rope which was used some sixteen years ago to measure the forest land for the plaintiff. The plaintiff was therefore right in not agreeing to the use of that rope.

The plaintiff in his evidence gave the names of his boundary owners. He said the forest land demarcated for him formed boundaries with Kwame Amofo, Malam (Kramo) Yaya, Kwarteng, Kwadjo Fordjour, Amandi, Yaw Boahene, Nyantakyiwa and Opanyin Sefa. Incidentally, all names of those eight boundary owners appeared on the plan, exhibit C. to me the plan, exhibit C, clearly showed the limits of the forest land which was demarcated for the plaintiff by the first defendant's own emissaries, and that the area edged in red on the said exhibit C showed the exact size and limits of land which those emissaries demarcated for the plaintiff in 1962.

I therefore hold that the grounds on which the learned High Court judge set aside the findings of the learned trial magistrate and then rejected the plan, exhibit C, were unreasonable as well as untenable.

The area of trespass was located around the plaintiff's boundary wit Opanyi Sefa and Yaw Boahene as indicated in the plaintiff's evidence. The plaintiff said:

``The area which the second defendant had occupied is near my boundary with Sefa and Yaw Boahene ...the second defendant ...has unlawfully occupied a portion of the land which my labourer had already cleared and made into a farm.''

This piece of evidence was confirmed by the plaintiff's boundary owner, Opanyi Sefa (the second plaintiff witness) as follows:

``I know the portion which the second defendant had cleared. This is where my fallow land shares boundary with the plaintiff's fallow land. The second defendant has cleared a portion of my fallow land the, clearing the weeds around the cocoas trees and the foodstuffs which I have cultivated there. *The second defendant has cleared a large portion of the plaintiff's farm there and has continued across my boundary with the plaintiff into my fallow land and cleared a large portion of my fallow land* ...''

(The emphasis is mine.)

The first defendant could not deny that Opanyi Sefa was truly a boundary owner of the land granted and demarcated for the plaintiff.

The first defendant accepting that Opanyi Sefa was the plaintiff's boundary owner put the following question to Opanyi Sefa when cross-examining the latter:

> ``Q *I cannot challenge you when you say that you have boundary with the plaintiff, but those I sent to demarcate the boundary have said the plaintiff has exceeded the limits of the land given to him.*
>
> A I maintain that I know my boundary with the plaintiff. I know the trespass has taken place in the plaintiff's fallow land, and if you are now saying that you did not give that portion to him that is your own business: *You showed me that boundary as my boundary with the plaintiff*.''

(The emphasis is mine.)

By this question and answer, the first defendant was admitting that whatever was the size of the forest land that was granted and demarcated for the plaintiff, that forest land formed boundary with that of Opanyi Sefah. In other words, on the first defendant's own showing, the forest land granted to the plaintiff extended up to the land granted to Opanyi Sefah and formed a common boundary with it.

This was therefore a further prop that, contrary to the contention of the defendants, no vacant land was left between the plaintiff's land and that of Opanyi Sefah after the grants of land to those two persons. That being the case, the first defendant could not

demarcate and grant any land around the common boundary of ht plaintiff and Opanyi Sefah to the second defendant.

What I see in this case is that the first defendant and his agents just took the second defendant to the land and carved for him considerable portions of land on both sides of the said common boundary; and when they were challenged by the plaintiff, and finding no excuse for their conduct, they sought to justify their behaviour by contending that the plaintiff had exceeded the limits of the forest land granted to him.

The learned trial magistrate was therefore right when on the evidence, he found that the defendants had committed trespass. The learned High Court judge, however, found otherwise, and held that the trial court was wrong in making that finding. But unfortunately, it was the other way round. It was rather the learned High Court judge who did not pay due attention to the evidence and so he failed to make proper assessment of the evidence on record. I therefore indorse the following finding of the learned trial magistrate when he said:

``I find that the first defendant had not vacant land between the plaintiff, Sefa and Boahene which he could validly sell to the second defendant; he had already sold it to the plaintiff, therefore he [had] no right to resell it to the second defendant.''

In my view, this finding was arrived at after proper appraisal and evaluation of the evidence, and it was clearly supported by the evidence.

Learned counsel for the appellant also contended that it was wrong for the learned High Court judge to declare the receipt, exhibit B, invalid on the ground that it was not registered under section 24 of the Land Registration Act, 1962 (Act 122). Counsel submitted that an ordinary receipt without particulars of the land stated in it did not fall under registrable documents as defined in sections 3 and 4 of the Act. Counsel finally submitted that the grounds on which the High Court set aside the judgment of the learned trial magistrate were all wrong and that the judgment of the High Court should not be allowed to stand.

It will be recalled that the second defendant issued a receipt, exhibit B, for the sum of £110 (220) paid by the plaintiff after the latter had been granted the forest land. In the receipt, exhibit B, the forest land granted was indicated to be 12 12 poles which Osei Kofi, the first defendant witness, termed ``the farmer's mile.'' The following was recorded in that receipt:

``£110. I the under marked Kwaku Adututu [the first defendant] of Ayomso now at Kumasi have received from Yaw Awuah [the plaintiff] of Kumasi the cash sum of

£110 (One hundred and ten pounds) being payment for a piece of forest land at Burutuase Ayomso measuring 12 X 24 poles given to him by me for farming. Dated at Kumasi this 20 day of November 1962.

Kwaku Adu Tutu	His
Recipient & Owner	X
Herein	Mark
Thumbprint ..."	

The receipt was prepared by a letter writer of house No. 01/45/6, Mbrom Road, Kumasi. The first defendant fixed an adhesive stamp on it. He also made cancellation on the stamp before handling it over to the plaintiff. The learned trial magistrate accepted the receipt as showing that the land had been ``sold'' to the plaintiff. But the learned High Court judge held:

``Exhibit B, the receipt, speaks of a grant. It is only the plaintiff who talks of sale. There is no corroboration of any sale ...*There was no sale but only a grant; this is my finding going by the record of proceedings.* By section 24 of the Land Registry Act, 1962 (Act 122), since November 1962 all documents relating to the land must be registered in order to have any legal effect at all: see *Asare v. Brobbey* (1971) 2 GLR 331, CA. If such document is not registered it is invalid and so voidable. It becomes valid only when registered. *Thus exhibit B is* invalid and consequently voidable..."

(The emphasis is mine.)

The leaned High Court judge was, in my view, right when he held that exhibit B showed a grant and not a sale. He was also right when he found that the plaintiff was only granted the land. That is there was only customary grant. In consequence of these findings it should have occurred to the learned High Court judge that the receipt merely acknowledged payment of money; and that reference to the size of the land granted, without any particulars, could not change the character of that receipt into an instrument transferring title or an interest in land in the sense as is understood, in say, English conveyancing.

Exhibit B being a note showing that the plaintiff had paid money ad that the first defendant had received the said money, came within the definition of a receipt as

provided in section 52 of the Stamps Ordinance, Cap 168 (1951 Rev) which was in operation in 1962 when it was issued. The Ordinance has since been repealed by the Stamp (Amendment) Act, 1960 (No 2). But the definition which was given to ``receipt'' in the Ordinance has, in substance, been repeated in section 46 (1) of the Stamp Act, 1965 ( Act 311), as further amended. Since exhibit B was denoted by an adhesive stamp which was ``cancelled'' by the first defendant before the ``delivered it out of his hands'' to the plaintiff as required by law, it was valid. It did not require registration for its validity.

In any case, the receipt could not be a registrable instrument. Section 4 of Act 122 provides:

``4. No instrument, except a will or probate, shall be registered unless it contains a description (which may be by reference to plan which, in the opinion of the registrar, is sufficient to enable the location and boundaries of the land to which it relates to be identified or a sufficient reference to the date and particulars of registration of an instrument affecting the same land and already registered.''

The receipt did not contain any boundaries and sufficient particulars from which the land could be clearly identified. In fact, it could be said to be a conveyance or an instrument transferring land.

It must be borne in mind that documents which are prepared after a grant according to custom, like the present, serve merely as documentary evidence of the grant and they do not alter the customary nature of the transaction: see *Sese v. Sese* (1984-86) 2 GLR 166, CA. So that assuming for the purpose of argument, that exhibit B was valid as held by the learned High Court judge, it did not mean that the plaintiff should lose his land in as much as the learned judge himself properly found that the first defendant made a valid customary grant of the forest land to the plaintiff.

It also seems to me that the learned High Court judge did not take kindly to the words, ``sale'' and ``sold'' used by the plaintiff in his evidence and by the learned trial magistrate in his judgment. But having found that it was a customary grant of forest land for farming purpose, the use of those words should not have bothered the learned High Court judge. Surprisingly, he made heavy weather of them. The fact that the plaintiff did not use the appropriate word "grant" but used "sale", etc was irrelevant to the main issue. The substance of the claim was rather more important. The action was fought in the trial court by the parties themselves. They were all illiterates and never had the benefit of the services of counsel in the trail court.

It could therefore be seen that those words were used, especially by understood in English conveyancing. After all the £110 (220) could not, even in 1962, be said to be a purchase price for the land which was more that 60 acres. The amount could only represent what is sometimes described as a ``customary drink'' to the stool and not a purchase price.

The plaintiff was relying on a customary grant for which he paid that amount in recognition thereof. Thus the learned High Court judge rejecting the plaintiff's claim. It may be remarked that even the word comprehend bargains and sales, gifts, leases, charges and the like; circumstances, when the plaintiff stated that the land was sold to him absolute ownership, had been transferred to him.

The learned High Court judge also picked a quarrel with the use of the words ``owners'' and ``ownership'' by the plaintiff in his writ of summons and in his evidence. The learned judge took an unreasonably restricted view of the word ``owner'' and that led him to hold that:

``Learned counsel for the plaintiff canvassed the point of a customary grant. The law says that under customary grant the grantor or donor retrains the title of ownership in the land: see *Awisi v. Nyako* (1966) GLR 3 and *Adai v. Daku* (1905) Red[1] 231. *That being so I fail to see how the plaintiff can sue for declaration of title. Even if he did not so sue but asked for perpetual injunction then he must have put title in issue. Here too the plaintiff measuring 12 24 ropes ... I do that there was no sale and so the plaintiff was not the owner of the land. The judgment is therefore bad*.''

To put it simply, here the learned High Court judge was saying that because the ownership of the disputed land was in the stool-grantor and not in the plaintiff, the claim for a declaration of title was not maintainable and the action was therefore misconceived; and so the judgment entered I favour of the plaintiff on such a claim was bad in law.

The learned High Court judge, with due respect, got it all wrong. As I have already pointed out elsewhere in this judgment, since the first defendant admitted that he granted the land to the plaintiff and on the finding of the learned High Court judge himself that, in fact, the first defendant made the said grant to the plaintiff, the learned High Court judge should not have dismissed the plaintiff's claim. He should rather have gone further to consider the incidents of such a grant.

If he had exercised a little patience and given a little thought to that aspect of the matter he would have found that the plaintiff had an estate in that portion of the stool

land and of which he tool effective possession, occupied and cultivated. That estate could variously be described as usufructuary, possessory or determinable title. The usufructuary title is a specie of ownership co-existent and simultaneous with the stool's absolute ownership. This has nicely been put by Dr. Asante in his book *Property Law and Social Goal in Ghana*. At 53, the learned author stated:.

``The stool, in effect, no longer has dominion of the stool land but an interest in stool land conceptually superior to that of the subject. A concept of a split ownership is emerging allowing the existence of separate by simultaneous estates in respect of the same land.''

The usufructuary is regarded as the owner of the area of land reduced into his possession; he can alienate voluntarily to a fellow subject or involuntarily to a judgment creditor without the prior consent of the stool. There is practically no limitation over his right to alienate that usufructuary title. So long as he recognized the absolute title of the stool, that usufructuary title could only be determined on an express abandonment or failure of his heirs: see *Thompson v. Mensah* (1957) 3 WALR 240.

Neither can the stool divest the usufructuary of his title by alienating it to another without the consent and concurrence of the usufructuary: see *Ohimen v. Adjei* (1957) 2 WALR 275. It appears the plaintiff was not a subject of the stool of Akwaboa. The allodial owner of the land in dispute. In other words, the plaintiff was a stranger grantee of that stool in respect of a defined portion of the stool's forest land which he had cleared and cultivated. But it should be remembered that the usufructuary title which a stranger-grantee like the plaintiff acquires, places the stranger-grantee in the same position as the subject of the stool except that in the case of farming land, as well as in building land, the title of the stranger-grantee is limited to a well defined area demarcated and granted to him; whereas the subject of the stool is not *so rationed in the amount of the* forest land he may occupy.

It seems to me then that the learned High Court judge erred in law by holding that the plaintiff usufructuary owner, could not sue ``for a declaration of title'' and could not ``ask for perpetual injunction.'' The courts have repeatedly held that a subject of the stool, or a stranger-grantee of the stool for that matter, can maintain an action against even the stool in defence of the usufructuary title and may impeach any disposition of such interest effected without his consent in favour of a third party: see *Baidoo v. Osei and Owusu* (1957) 3 WALR 298. In the *Baidoo* case (supra), the plaintiff, a stool-subject, sought a declaration of title of land and damages for trespass against the defendants. The land in question was a portion of stool land and the plaintiff claimed to have acquired usufructuary title by being the first to being it under cultivation from

virgin forest. The second defendant was a also a stool subject and he granted the disputed land to the first defendant who was a stool-stranger without the consent of the plaintiff. The first defendant obtained a subsequent confirmatory lease from the stool. It was held that the plaintiff could maintain the action and judgment was entered in favour of the plaintiff. At 291-292 Ollenu J (as he then was) said:

``The Native Court found that it was the predecessor of the plaintiff and not that of the co-defendant who cultivated the virgin forest on the land *and thereby became the owner of land according to native custom.* There is abundant evidence on the record, even from the witnesses of the co-defendant, which fully justify that finding.

The Stool is not entitled to grant any interest in stool land over which a subject has acquired a usufructuary title without the consent and concurrence of the owner of the usufruct. Consequently, the lease of the land in dispute by the stool to the first defendant which prima facie was granted without the consent and concurrence *of the plaintiff's family, the owner of the usufruct, is of no effect and is irrelevant*.''

(The emphasis is mine.)

See also the case of *Oblee v. Armah and Affipong* (1958) 3 WALR 484. Here too there was a claim for declaration of title by the plaintiff, a subject of the stool, against the defendants, subjects of the same stool. The plaintiff based his claim on a grant made to him by the stool. The defendant relied on grants made in their favour by the stool subsequent in time to the grant to the plaintiff and which grants were made without the consent of the plaintiff. The plaintiff won on his claim for a declaration of title against the defendants. At 492-493, Ollenu J (as he then was) said:

``Therefore whether the grant of the land to him was express or implied, *the plaintiff, by occupying and farming the land, became the owner of it according to custom, and every grant which the stool purport to make of any portion of it to the defendant or ...To any else, without the prior consent and concurrence of the plaintiff, who holds the usufructuary title in it, is null and the void ...There will be judgment for the plaintiff against the defendant and the co-defendant for declaration of his title to the land*.''

(The emphasis is mine.) The case of *Donkor v. Danso* 1959 GLR 147 is also on the same point.

It therefore clear from all these authorities that, contrary to the views of the learned High Court judge, the relief which the plaintiff sought in his writ of summons, namely a declaration of title, damages for trespass and perpetual injunction, were in order and that the action was maintainable. Consequently, the plaintiff having satisfactorily discharged the burden that lay on him, was entitled to granted all those reliefs.

In my view, not only did the learned High Court judge fail to make proper analysis of the evidence on record but also failed to have a fair and broad view of it. This led him to draw wrong conclusions, which ultimately led him to make wrong pronouncements on the legal issues involved in the case. In my opinion, he also erred when interfered with the findings of fact made by the learned trial magistrate when there was no basis for such interference.

In the circumstances, I would allow the appeal, set aside the judgment of the High Court, Sunyani and restore the judgment of the trial district court, grade 1.

OSEI-HWERE J.A.

I agree

LAMPTEY J.A.

I agree

Appeal allowed.

J N N O

Footnotes

... Red[1]

Ed.-- The Court cites to Redwar. The case is also reported in Renner, (1905) Ren. 348, 417 (D.C. and F.C.).