21ST CENTURY RESTATEMENT OF THE PRINCIPLE IN KPONUGLO V. KODADJA

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Introduction

On 24th November 1933, the Privy Council delivered a decision that has had far reaching consequences on not only our jurisprudence but 'British West Africa' in general. The case was Abotche Kponuglo and Others v. Adja Kodadja[1] (known in our law reports as 'Kponuglo v. Kodadja' and in this article as 'the Kodadja case').

The ratio of that decision is that where a person in a land suit claims damages for trespass and an injunction against further trespass, he puts his title in issue. Sound in reasoning and simple in construction, the principle was cited over and over again in our law courts with admirable ardour and enthusiastic fervour.

This was after its proponents had symbolically 'removed their knees off our necks'[2] following many years of loud and agonizing shriek of 'we can't breathe' spearheaded by Danquah & Nkrumah – an emancipation that was only to become political but far from economic. Unambiguous in context and unsullied in form, one would have thought that under independent Ghana, it would be applied without color. It received some trifling injections.

Nonetheless, it was applied with relative consistency till the end of the 20th Century. When the applause was getting louder and louder for the Kodadja case, it was taken unawares to the slaughter house by the then judicial giants with a view to installing her younger competitor to take over her seat. Though it partially survived the attack, it was severely battered as it staggered slowly into the new Century. In the not too distant future, Kodadja case will be a century old.

This article gives an account of how it was born and the various stages it has undergone. The writer lays more emphasis on how the principle has gone under the knife on a couple of occasions especially in this century at the blind side of its numerous admirers. It appears that many 21st Century practitioners are ignorant that the Kodadja principle that is presented to them by the courts has assumed a new body and shape after undergoing several surgeries in the judicial operation room.

The Kponuglo v. Kodadja Case

In his writ of summons the plaintiff claimed damages from the defendants for trespass, and an injunction restraining them from entering certain lands or in any way interfering with the plaintiff's possession of them. The Judicial Committee of the Privy Council, being the Zenith Court at the time, in reversing the decision of the West Africa Court of Appeal held per Lord Alness thus: "The respondent's claim being one of damages for trespass and for an injunction against further trespass, it follows that he has put his title in issue". Because title was in issue, the respondent was expected to prove it beyond reasonable doubt.

British West African Guiding Light

So popular was the Kodadja case in its prime stage that our English speaking West African neighbors could not resist keeping their eyes on it. The report of the cases below is enough proof:

Nigeria - In the case of the Registered Trustees of the Apostolic Church v. Mrs Emmanuel I. Oloweleni, Nnaemeka Agu JSC referred to the case and held: "It must be conceded that on a claim for trespass and injunction, title is in issue."[3] See also Joshua Ogunleye v. Babatayo Oni.[4]

The Gambia – Among the cases the Gambian Courts have applied the Kodadja case are Essa Kuusela v. Patrick Cherallier[5] and Alhaji Ousman Leigh v. Luis Diaz De Losana Construction & Another. [6]

Sierra Leone - In Sierra Leone, one can find it mentioned in the Supreme Court case of Wilson v. Samua and Another.[7]

The Principle in Post Independent Ghana

It is pertinent to know that after our Independence, the Kodadja principle was applied with pride till the end of the Century and in virtually all the cases, their Lordships spoke with one voice; that a person's title was put in issue when he sued in a claim for trespass and injunction. See for example the cases of Dagadu & Others v. Addy & Another,[8] Otoo v. Biney & Another[9] and Summey v. Yohunu.[10]

The only modification made to the Kodadja principle when Ghanaian Judges started applying it was the generalization of the injunction. Whereas the Kodadja case specifically mentioned perpetual injunction, Ghanaian Judges[11] at the Court of Appeal in the case of Nkyi XI v. Kuma (Bedu substituted)[12] when applying the principle for what appears to be the first time in 1959 after Independence, did not limit it to perpetual injunction, but injunctions in general.
The same path charted by their Lordships was trailed by the Court of Appeal in 1970 in the case of Issiw v. Wiabu IV[13] and other cases. In Bogolo v. Aliebo[14] for instance, the claim was for trespass and interim injunction, but the Court still applied the principle.

Kodadja Case towards the end of the 20th Century

Close to the end of the Century, the popularity of the Kodadja case continued to glitter. It was more than a taboo for a Judge not to reserve some space in his memory for the Kodadja case. And for litigants seeking reliefs in land cases, they were 'to lay prostrate and in absolute adulation' before they could find favour with the principle. It was no wonder that in 1988, a prominent Supreme Court Judge in the person of Amua-Sekyi JSC was requested to give a lecture and 'sing the familiar chorus' of the Kodadja stanzas to newly appointed Supreme Court Justices. The publication of his lecture in the Review of Ghana Law should tell the reader how important the 'homily' was to the third arm of Government. In his article titled: 'Proof in Civil Cases: Some thoughts on Land Suits'[15], the learned Supreme Court Judge noted: "It was not a mere slip of the tongue when in Abotche Kponuglo v Adja Kodadja (1933) 2 WACA 24, where the respondent had claimed damages for trespass and an injunction against further trespass, the Privy Council said at page 25, "Has the respondent discharged the onus which rests upon him of demonstrating beyond reasonable doubt that the title to the disputed land is in him?" The irony of it all was that during this period, a new princess had been born by our law-makers who had been given the seat of Kodadja. However, it would seem that her birth went un-celebrated. The courts continued to accord the Kodadja principle the honour it had ceased to merit. The new princess was born in 1975 and was christened 'the Evidence Act, 323' (then a Decree). As part of her policies, she did not compel litigants claiming land to 'lay flat before her as Kodadja demanded'. She appreciated it if the applicant could show some 'reverence' in any acceptable manner in the usual way other 'civilians bowed'. When the courts later discovered that Kodadja had lost her crown but bandied around as the legitimate monarch, they became furious and hatched a plan to depose her before the end of the Century. In their view, Kodadja

was good for the 'typewriter age' and not the 'computer age'. In a revolution led by Acquah JSC (as he then was) in 1997, the Supreme Court at its sitting in Accra with Ampiah JSC presiding in the case of Adwubeng v. Domfeh[16] officially broadcast the overthrow of Kodadja. After that historic announcement, Kodadja's successor was formally introduced. At the sitting, Acquah JSC explained how he tactically masterminded the whole plot. He revealed that the Volta Region was the preparatory ground for the 'overturn' and that it all started on 11th February 1993 upon his encounter with Adzraku and Dzatagbo[17] in Ho where he expressed his disgust about Kodadja's illegitimate reign and unreasonable demands. Excerpts of Acquah JSC's words were captured in the 'judicial almanac' thus: "Let me indeed point out that cases like Kodilinye v Odu (1935) 2 WACA 336, and Kponuglo v Kodadja (1933) 2 W ACA 24 which laid a different and indeed higher standard of proof in land suits, no longer represents the present state of our law ... Our Evidence Decree, 1975 (NRCD 323) postulates a single standard of proof in all civil trials. That is proof by a preponderance of the probabilities which is defined in section 12(1) of the Decree ..."

The Principle in the early years of the 21st Century

At the turn of the Century, there was a crusade by our law-makers to 'exterminate' the laws in our statute books with tired limbs. The Statute Law Revision Commissioner[18] was thus appointed with the express mandate to identify all the laws which like 'matter' in Physics, were having weight and occupying space. Before he could carry out his mission, some of these laws had sneaked into the new Century and were causing confusion in our court-rooms. The news got to our lawmakers and the outmoded laws were immediately apprehended and fired. Old practitioners might have some fond memories of the provisions on the Community Tribunal and Circuit Tribunal in the Courts Act that were shown the exit in 2002. Those were the days when panel members other than the Chairmen who were lawyers could be seen dozing helplessly and sometimes snoring in court during the proceedings, but still delivered decisions that reckoned. Similarly, the hour of the High Court Civil Procedure Rules of 1954 (LN 140A) came two years later and was blissfully checked out.

Unlike some of these laws that were obliterated, the Kodadja case limped into the new Century. It rarely showed its face in court during the period, until the sorrowful demise of its pursuer.[19]

The Principle in the 21st Century

Two years after Acquah CJ had passed on, the Kodadja case was revisited and accorded some prominence by the Supreme Court. The law Lords appeared to have given the principle a new twist. This happened in the case of Asante Appiah v. Amponsah alias Mansa.[20] In that case, although the Supreme Court referred to the Kodadja case and others that supported the principle, it appears that their Lordships restated the principle unwittingly, replacing trespass with possession. Brobbey JSC (as he then was) speaking for the apex Court held as follows: "The law is well-established that where a party's claims are for possession and perpetual injunction he puts his title in issue"[21]. We should be mindful of the fact that possession and trespass are twin claims usually sought in land suits together with declaration of title and perpetual injunction. However, we do not have to interchange the two claims, because they are separate and distinct in all respects. More importantly, we should recognize that a person can succeed in a claim for possession, but fail in trespass and vice versa. A licensee for instance, may succeed in an action for damages against the licensor where the latter caused damage to his property by unlawfully revoking the license[22]. But such a licensee may fail in an action for recovery of possession as happened in Tenewaah v. Manuh[23] Another concern is that there would have been no difficulty understanding the Asante Appiah case supra if the apex Court had given an indication that it was extending the principle to cover a claim of possession. By referring to Kodadja and other cases which all talk about trespass, it was quite surprising that the Court in following the 'well-established law' traded 'trespass' with 'possession'. Perhaps, the Court could have rooted its decision on the viewpoint of Adumua-Bossman JSC in Oppong Kofi and Another v. Fofie[24] & Acolatse and Others v. Ahiableame. [25] The learned Judge on both occasions understood the Kodadja principle to apply to a claim of possession also, but it appears from the dearth of its application in successive cases that most judges were not too convinced then.

The impact of the reintroduction of Possession into the Principle in the 21st Century

The reintroduction of possession into the principle in the 21st Century went viral and was soon rehearsed by the Court of Appeal in the cases of Fuseini v. Moro[26] and Daniel Boadi v. Abena Nyame Adom & 1 Other.[27]

Parallel Application: It must be pointed out that the restatement did not substitute possession

for trespass as it did in the cases cited, because the Supreme Court continued to state the original principle in Kodadja pertaining to an action for trespass and injunction alongside the claim for possession and injunction. In Sagoe v. SSNIT (2012) 2 SCGLR 1094, Gbadegbe JSC in delivering the unanimous judgment of the Court held: "Since the claim of the plaintiff included damages for trespass and an order of perpetual injunction, on the strength of settled judicial opinion, although there was no claim for declaration of title, the reliefs they sought necessarily required their title to the lands to be determined." It now appears that the frontiers of the Kodadja case have been extended to encompass a claim for possession. It is not uncommon these days to find the Courts and text writers referring to the Kodadja case specifically, but stating the principle in relation to a claim for possession and injunction as if that was what the Kodadja case held. The principle appears to have metamorphosed into a claim for either trespass or possession.[28] Kodadja Principle can now stand on one leg Plaintiffs in the Kodadja principle had unswervingly been walking with two legs for a period of about four scores[29] – that is, a claim of trespass (possession) on one hand and injunction on the other hand. The Court of Appeal in the case of Mensah v. Peniana[30] held per Azu Crabbe JSC that for the Kodadja principle which puts the plaintiff's title in issue to apply; there must be: A. (1) A claim for trespass & (2) A claim for perpetual injunction B. In a land matter the Defendant is claiming ownership.

Appau JSC in the recent decision of the Supreme Court in Nana Brafo Dadzie II v. John King Arthur & Others[31] poignantly acknowledged the point thus "The authorities are legion that where in addition to a claim for damages for trespass, the plaintiff claims an injunction, title is automatically put in issue". (my emphasis). Shockingly, in about three years after the principle had taken a new dimension in Asante Appiah v. Amponsah supra, the apex court again took it to the surgical theatre cutting off one of its two limbs and assuring us that the remaining limb of 'injunction' is resilient enough to hold it together. This amputation was done in the case of Hydrafoam Estates (Gh.) Ltd. v. Owusu (per lawful attorney) Okine & Ors.[32] In that case, the relief indorsed on the plaintiff's writ was for perpetual injunction only (there was no claim for recovery of possession or damages for trespass). Anin Yeboah JSC (as he then was) speaking for the Apex Court (at holding 2) held: "… since the plaintiffs had sought injunction against the defendant, they certainly had put their title in issue and were as such enjoined by law to have proved their title as expected of any party who had sued in court for declaration of title to land." Now, in this 21st Century, the principle has been restated that a claim for injunction

alone puts the title of the claimant in issue and it does not matter whether it was attached to another claim or not.

Further Restatement of the Principle Per the ratio in the Hydrafoam case

A person who makes a claim for injunction over a land is always duty bound to prove his title and that appears to be the burden on the claimant in almost all the cases. If that position is maintained, then a licensee may not be able to obtain an injunction in a land suit, because he lacks title and merely has permission to be on the land. Recently, when the Kodadja principle was discharged from the judicial theatre in the Nana Brafo Dadzie II case, it was observed that a person who claims injunction may not have to prove his title all the time. If he had no title it was still possible for him to succeed in his claim on another leg - that is, if he is able to demonstrate that he was in prior possession of the land. This is how Appau JSC conveyed the unanimous opinion of the Court: "The authorities are legion that where in addition to a claim for damages for trespass, the plaintiff claims an injunction, title is automatically put in issue, because that claim postulates that the plaintiff is either the owner of the land in dispute, or has had (prior to the trespass complained of) exclusive possession of it." (Emphasis is mine). The new outlook of the principle may be appreciated if a licensee commences an action against a third party who trespassed on the land or against his licensor. As stated earlier in this article, the law is that a licensee needs reasonable time to remove himself and his property from the land after the revocation of the license.[33] A licensor who enters a land without giving the licensee time to remove his things from the land or acted contrary to the license may be injuncted, although such a licensee may have no title to the land, but might have had exclusive possession of the land prior to the trespass. In Mamadu Wangara v. Gyato Wangara[34], the Court of Appeal found that the plaintiff was a licensee who had no title to the land and so his claim for title was dismissed. Nonetheless, the Court granted him an injunction against the licensor. The position that a licensee can obtain injunction against his licensor appears to be sympathetically anchored by the recent decision of the Apex Court in the case of Republic v. Bank of Ghana & 5 Others, Ex parte Benjamin Duffour. [35] The Court however doubted the possibility of a licensee obtaining perpetual injunction against his licensor. His Lordship Baffoe-Bonnie JSC in delivering the decision of the Apex Court said: "Irrespective of the type of licence being held by the appellant, the grant of a perpetual injunction restraining a licensor from ejecting his

licensee is highly doubtful. An injunction may be obtained in cases of a licence coupled with an interest and a contractual licence. However to hold that such an injunction includes a perpetual injunction in the absence of any cogent evidence to aid the court would be untenable…" (my emphasis). It stands to reason that a licensee whose license has not been revoked can bring an action to restrain the licensor till the expiration of the license or for a specified period as contemplated during the granting of the license. Such injunction may not be perpetual and in that case there may be no need to prove title. In fact, in Mensah v. Peniana supra, Azu Crabbe JSC (as he then was) was well on point when he held that the injunction contemplated by the Kodadja case was only perpetual injunction and not interim injunction. The Court of Appeal, per Ayebi J.A. (as he then was) held in the case of Adwoa Kontor & Others v. Akua Addae[36] that per the Kponuglo v. Kodadja case, the plaintiff puts his title in issue where the action assumes the character of a declaration of title and that: "Where an interim injunction is sought, plaintiff 's title is not in issue and he is not bound to prove it". It may therefore appear that when the Supreme Court used 'injunction' which required title to be proven in the Hydrafoam and Nana Brafo Dadzie cases, their Lordships had in mind perpetual injunction. The Court of Appeal in the case of Acquaye v. Awotwi & Another[37], had however contemplated the possibility of a licensee having a permanent interest in a market stall. It held: "so long as a licensee of a market stall complied with the terms of the grant and paid the monthly rent, the allottee remained a permanent licensee of the stall, and the licence, for all practical purposes, passed down to the estate of a deceased licensee, although the name of the original licensee was retained in the register". With the recent pronouncement by the Supreme Court in the Republic v. Bank of Ghana & 5 Others, Ex parte Benjamin Duffour supra, the binding effect of the Court of Appeal's decision seems to have been neutralized. Be that as it may, the U K Supreme Court recently in a ground breaking decision in the case of the Manchester Ship Canal Company Ltd. v. Vauxhall Motors Ltd (formerly General Motors UK Ltd)[38] held that a licensee can obtain perpetual relief from forfeiture if he has possessory rights. Despite the extensive inroads made by their Lordships in the law on license pertaining to immovable property, the decision of the UK Supreme Court which is only of persuasive weight, will, in the meantime wait in the green room[39] until such time that the Courts in Ghana are ready to showcase it on the judicial dais.

Recommendations

It cannot be disputed that the courts continue to refer to the Kodadja case after almost hundred years. Nonetheless, the principle is being applied quite differently from how it was originally stated and therefore occasioning confusion in our courts. Following the trend of its application by the courts and in order to achieve some level of certainty and consistency, it is suggested as follows:

- That the principle be simplified by detaching the claim of possession and trespass from an injunction, since one does not need title per se to be able to maintain an action in trespass or possession, but just proof of possession.
- That where the courts mention injunction that puts title in issue, they should limit themselves to perpetual injunction only.
- That the principle should simply be restated that 'whoever claims perpetual injunction in a land suit puts his title in issue'.

Conclusion

In conclusion, it should be borne in mind that Kodadja continues to be the main character we look up to in our land courts when a person's title is put in issue. However, we should not be oblivious of the fact that after being in and out of the surgical theatre, Kodadja has lost steam and has taken on a new shape and form in the 21st Century in our Country's jurisprudence. I therefore entreat you to spend some time and examine its body closely the next time you meet her for you are likely to see the scars on her mutilated body.

Endnotes

1 Abotche Kponuglo v. Adja Kodadja [1933] 2 WACA 24
2 Symbolically referring to the cry of George Floyd when a Minnesota Police officer put his knee on his neck for about eight minutes leading to his death; which act was later interpreted by Rev. Al Sharpton to mean how the white man has for many generations kept his knees on the black man's neck.
3 The Registered Trustees of the Apostolic Church v. Mrs. Emmanuel I. Oloweleni, SC 180/1988 (1st October 1990)
4 Joshua Ogunleye v. Babatayo Oni (1990) All N.L.R. 341, S.C. (delivered on 27th April 1962) per Belgore JSC
5 Essa Kuusela v. Patrick Cherallier (1994) GR 206 at p. 208-209
6 Alhaji Ousman Leigh v. Luis Da Losada Construction Ltd & Another [1994] GR 232
7 Wilson v. Samoah & Another (Civil Appeal No. 3/74) [1975] SLSC (03 June 1975)
8 Dagadu & Others v. Addy & Others [1991] 1 GLR 316
9 Otoo v. Biney & Another (1966) GLR 136, per Archer J.
10 Summey v. Yohunu [1962] 1 GLR 160, S.C.
11 The Ghanaian Court of Appeal Judges were Korsah CJ, Van Lare J.A. and Ollenu J.
12 Nkyi XI v. Kuma (Bedu substituted) [1959] G.L.R. 281, C.A. at holdings 1 & 2
13 Issiw IV v. Wiabu (1970) CC 108, CA
14 Bogolo v. Aliebo [1982-83] 2 GLR 1170
15 Amua Sekyi JSC: 'Proof in Civil Suits: Some thoughts on Land Cases' (1987-88) Vol XV1 RGL 110-116
16 Adwubeng v. Domfeh [1997-98] 1 GLR 282, 295
17 Adzraku v. Dzatagbo, High Court Ho, 11th February 1993 (Unreported)
18 See the Laws of Ghana (Revised Edition) Act, 1998 (Act 562), section 2
19 See Yaa Kwesi v. Arhin Davies [2007-2008] SCGLR 580
20 Asante Appiah v. Amponsah alias Mansa [2009] SCGLR 90, 98
21 ibid
22 See Dankwa & Others v. Kwaku & Another [1961] GLR 619
23 Tenewaah v. Manuh [1962] 2 GLR 143
24 Oppong Kofi and Another v. Fofie [1964] GLR 174
25 Acolatse and Others v. Ahiableame [1962] 2 GLR 34
26 Fuseini v. Moro [2010-2012] 2 GLR 433, C.A.
27 Daniel Boadi v. Abena Nyame Adom & 1 Other [2018] DLCA 4619, dated 4th February 2018 (Civil Appeal No. H1/59/2017
28 28 See Darpoh v. Teye Akrong [2016] 95 G.M.J. 71, 99, CA per Acquaye J.A. & Kwao v. Baaleifi 2009] 25 MLRG 193, 209 C.A.
29 A score represents 20, so a period of four score means 80 years
30 Mensa v. Peniana [1972] 1 GLR 337, 343
31 Nana Brafo Dadzie II v. John King Arthur & Others [2017] DLSC 2508 (Civ. App. No. J4/20/2016, dated 20th January 2017) (Unreported)
32 Hydrafoam Estates (Gh.) Ltd. v. Owusu (per lawful attorney) Okine & Others [2013-2014] 2 SCGLR 117
33 See Quagraine v. Adams [1981] GLR 599;
34 Mamadu Wangara v. Gyato Wangara [1982-82] GLR 639, C.A.

35 The Republic v. Bank of Ghana & 4 Others. Ex parte Benjamin Duffour [2018] DLSC 2503 (Civil App. No. J4/34/2018) dated 6th June 2018

36 Adwoa Kontor & Others v. Akua Addae [2015] DLCA 7992, dated 22nd December 2015 (Civil Appeal No. H1/58/13

37 Acquaye v. Awotwi & Another [1982-83] GLR 1110, C.A

38 Manchester Ship Canal Company Ltd. v. Vauxhall Motors Ltd. (formerly General Motors UK Ltd) [2019] UKSC 46

39 In show business, the green room is the state in a theatre or similar venue that functions as a waiting room for performers when they are not engaged on stage. In Shakespeare's day, the actors waited in a 'tiring house'