

Allodial interest under the Land Act, 2020: Some thoughts

By Justice Alexander Osei Tutu

Introduction

The problems that confronted land acquisition and administration in Ghana were daunting. It was therefore a big relief when a new land law was passed in 2020 to attend to the issues. The Land Act, 2020 (Act 1036) which came into force on 23 December 2020 is undoubtedly replete with innovative ideas. The Act has been hailed by land users and experts who consider it as a panacea in dealing with the myriads of challenges confronting land acquisition and administration in Ghana.

Undeniably, Act 1036 has brought hope to the homes of many Ghanaians. Nonetheless, being a human product, it may have its own flaws. In a recent article I authored on long possession and adverse possession, I pointed out some seemingly drafting errors and inadequacies in Section 5 of Act 1036. Today's discussion focuses on Section 2 of Act 1036 which deals with allodial title.

Meaning of the term – Allodial

The term '*Allodial*' is derived from the German word '*alod*' or '*allod*' which means absolute interest or original heritage'.¹ Historically, allodial pertained to land owned by a person without any feudal obligations or held without acknowledgement of any superior. Under customary law, allodial title is the highest title in land usually owned by a stool, skin, clan or family.² In 1921, the Privy Council held per Lord Haldane thus: "*Individual ownership was foreign to native ideas, and that land was vested in communities or families, but not individuals.*"³

¹ See Ollenu and Woodman, *Principles of Customary Law*, pp. 7-15.

² See BJ da Rocha and Lodoh, *Ghana Land Law and Conveyancing*, Second Edition at page 4.

³ See the case of *Amodu Tijani v. The Secretary, Southern Nigeria* (1921) 2 A.C. 399.

Allodial title can therefore be said to be the mother of all interests in land. In the 1999 National Land Policy document by the Ministry of Lands and Forestry, it was captured thus: “*Fundamentally, land ownership is based on absolute "allodial" or permanent title from which all other lesser titles to, interests in, or right over land derive. Normally, the "allodial" title is vested in a stool, skin, clan, family, and in some cases, individuals.*”

Allodial Title under Act 1036

Allodial title is among the interests created under Section 1 of Act 1036. Section 2 of the Act provides as follows:

“*Allodial title is*

(a) the highest or ultimate interest in land; and

(b) held by the State or, a stool or skin, or clan or family or an individual;

and may have been acquired through compulsory acquisition, conquest, pioneer discovery and settlement, gift, purchase or agreement.”

A careful examination of Section 2 of the Act would reveal that:

- It does not appear to be progressive.
- There is an omission in the section.
- It can be a springing board to foment unwarranted litigations.

It may appear that the lawmaker might have struggled with the definition of allodial title in the course of drafting the law. This can be deduced from the initial draft of the Land Act. We are told by one writer,⁴ that *allodial title* was defined as:

“(a) *the highest or ultimate interest in land;*

(b) held by a stool, skin, tendana, clan, family or individual, and

⁴ See Yaw D. Oppong; “*Contemporary trends in the Law of Immovable Property in Ghana*” (2019)

(c) *usually acquired through* conquest, pioneer discovery and settlement, gift, purchase or agreement” (Emphasis is mine)

The draftsman initially used the word ‘*usually acquired through*’ at an early stage of the Land Bill pertaining to how allodial titles are mainly acquired. It appears that the draftsman did not find the phrase apposite, so he eventually changed it to ‘*may have been acquired*’. But in my view, by so doing, he fell into an error, which will be discussed in this paper.

Section 2 of Act 1036 as non-progressive

By being non-progressive, I mean that the section creates the impression as if acquisition of the allodial title could only be in the past and cannot be created now or in the future. In other words, the Act states how allodial title ‘*may have been acquired*’ (in the past) but it does not tell us how it can now be acquired. After reading the section, one is tempted to believe that the era of the acquisition of allodial title is over. This is particularly so, because it can easily be inferred from the section that some of the modes of acquisition of the allodial title are no longer possible under our present dispensation. On the issue of whether an allodial title can be acquired now or in the future, the law maker preferred to remain mute and so, he did not provide any answer for our application.

For a better appreciation of the issues, the modes of acquisition of the allodial interest spelt out or recognized under Section 2 of the Act are outlined and discussed.

1. Compulsory Acquisition
2. Conquest
3. Pioneer Discovery and Settlement
4. Gift
5. Purchase or
6. Agreement

a. *Compulsory Acquisition*

Originally, the allodial title was vested in stools, skins and families only. Along the line, the State used legislations to compulsorily acquire lands and divested the ownership from the stools, skins and families. This has been done in the past and it was right that the section gave that indication. It is observed that although Section 2 of Act 1036 does not expressly mention that the state can now acquire allodial lands by compulsory acquisition, under Article 20 of the 1992 Constitution, that option is still open and possible. In fact, Act 1036 itself affirms that possibility under Section 233.

b. *Conquest*

The proper mode of acquisition of the allodial title relative to this point is conquest and subsequent settlement thereon and not conquest alone as stated in the Act. Ollenu J. held in the locus classicus of **Ohimen v. Adjei and Another**, thus: “*There are four principal methods by which a stool acquires land. They are conquest and subsequent settlement thereon and cultivation by the subjects of the stool; discovery by hunters or pioneers of the stool of unoccupied land and subsequent settlement and use thereof by the stool and its subjects; gifts to the stool; purchase by the stool.*”⁵

Lawyer Yaw Oppong in his book, *Contemporary trends in the Law of Immovable Property in Ghana*, referred to the **Ohimen v. Adjei** case supra and commented thus: “... conquest per se did not automatically confer absolute ownership of land on the victorious party after a party had successfully defeated, subdued or driven away the defeated persons. The conquerors must occupy, settle and develop the land belonging to the vanquished, without which they cannot be said to have become the absolute owners of the land.” (Emphasis is mine)

As far back as 1957 when unoccupied land was not as scarce as it is today, His Lordship Ollenu J. took his time to state the principle unambiguously to avoid any

⁵ Ohimen v. Adjei and Another (1957) 2 W.A.L.R. 275.

confusion. He was emphatic that conquest must be accompanied by subsequent settlement and occupation by the subjects before the allodial title could be acquired. Throwing more light on the point, the learned Judge took pains to explain in his book, *Principles of Customary Land Law in Ghana* that the conquering state acquired only so much of the land as it brought to its effective control.⁶

Going forward, it is now impossible for any stool or group to acquire allodial title in Ghana by conquest. In 1968, Woodman made the point clearly that conquest as a mode of acquisition of allodial title has ceased in Ghana about 250 years back and is no longer possible today. This means that the inclusion of conquest under Section 2 of Act 1036 is in reference to events in the past and not the present or the future.

c. *Pioneer Discovery & Settlement*

Sarbah,⁷ Danquah,⁸ Ollenu,⁹ Bentsi-Enchill¹⁰ among others all spoke with one voice that there are no virgin or ownerless lands in Ghana. More than a century ago in 1905, the Superior Courts applied the principle in a number of cases, notably, **Ofori Atta v. Atta Fua**¹¹ and **Wiapa v. Solomon**.¹² Their assertion was however challenged by Professor Kludze in 1974 in his article, '*The Ownerless Lands of Ghana*'.¹³

The learned law Professor reviewed the cases cited in support of the principle and concluded that they were stated per incuriam. He went ahead to mention some lands in the Volta region like Drato, Kodzofe, Abudome that they are still ownerless. If his assertion were even true in the 1970's at the time he made that argument, it is not known whether the said lands are still ownerless today. One cannot be sure whether

⁶ See Ollenu's *Principles of Customary Land Law in Ghana*, 2ND Edition, page 17.

⁷ Sarbah, *Fanti Customary Law* (2nd edition, at pp. 66). In the first edition (1897), it is at pp. 56

⁸ Danquah J.B. *Akan Laws and Customs* (1928), p. 215.

⁹ Ollenu N.A., *Principles of Customary Land Law in Ghana* (1962), pp. 140.

¹⁰ Bentsi-Enchill K., *Ghana Land Law* (1964) p.16.

¹¹ Ofori Atta v. Atta Fua, D. & F. Ct. 11-16, 65.

¹² Wiapa v. Solomon (1905) Renn. 410 (F.C.). See also Ababio v. Kanga (1932) 1 WACA 253.

¹³ Kudze A.K.P. '*The Ownerless Lands of Ghana*'. Published in (1974) Vol. XI No. 2 of the University of Ghana Law Journal, pp. 123-142.

the learned Supreme Court Judge would have maintained the same position today if he were alive.

Whatever it is, one thing is clear – that Professor Kludze could not sway the legal fraternity¹⁴ to his side. The law is now settled that there are no ownerless lands in Ghana. Therefore, pioneer discovery and settlement as a mode of acquisition of the allodial title is no longer possible today. It is important to state here that of all the modes of acquisition, pioneer discovery and settlement has been found to be the only original mode of acquisition of the allodial title. In respect of the other modes, a person or group of persons would have first settled on the land prior to its acquisition by a subsequent group or individual.¹⁵

d. *Gifts, purchase and agreement*

The two previous modes of acquisition just discussed (conquest and pioneer discovery & settlement) were applicable in the past. Concerning gift, purchase and agreement, I believe individuals were able to acquire allodial titles in the past as a result of these three modes of acquisition. In ancient times, individuals' acquisition of the allodial title was inconceivable.¹⁶ While gift, purchase and agreement were used in the past to acquire allodial titles, it is not clear from the Act whether they are still effective ways of acquiring allodial title today.

Omission in Section 2 of Act 1036

It is important to emphasize that the modes of acquisition of the allodial title recognized under Section 2 of Act 1036 fall short of the modes stated by jurists, judges and in statutes.

¹⁴ See for instance, BJ da Rocha and CHK Lodoh's book *supra* at page 9.

¹⁵ See Yaw Oppong *supra*.

¹⁶ Rayner C.J. in his *Report on Land Tenure in West Africa* in 1898 wrote: "Land belongs to the community, the village, or family, never to the individual..."

Sarbah in his *Fanti Customary Laws*,¹⁷ mentioned the following modes of acquisition of the allodial title:

- Appropriation of what has no owner, i.e. of vacant or unoccupied land,
- Conquest or capture in war;
- Accession: lands gained or reclaimed from sea or river by alluvion, i.e. washing up of mud, or by water gradually or imperceptibly receding.
- Derivative: alienation in one form or the other, sale, gift, testamentary disposition and succession.

The industrious son of the Gold Coast, Sarbah, included accession as one of the modes of acquisition of the allodial title, but it has not been included in Section 2 of Act 1036. In recent times, the construction of sea defence walls has enabled allodial lands to be reclaimed in some parts of the country.

Aside Sarbah, Woodman, who demonstrated profound knowledge of Ghanaian customary law, also identified re-acquisition and foreclosure of a mortgage or pledge as other modes of acquisition of the allodial title.

Re-acquisition

According to Woodman, a stool may re-acquire an allodial title it may have lost if the same is abandoned by the new owner whereupon that portion of the land automatically reverts to the stool. He proceeded to explain that when the allodial title is granted by way of a gift or sale and the grantee subsequently abandons his interest, the grantor stool may re-acquire the land back.

The Supreme Court's application of the limitation doctrine in the case of **Djin v. Musah Baako**¹⁸ (2007-08) SCGLR 686 appears to move in the same direction with the re-acquisition principle. Their Lordships held at holding 4 thus: "*If a trespasser*

¹⁷ Sarbah, *Fanti Customary Laws*, (3rd ed.) pp. 57-58.

¹⁸ Djin v. Baako (2007-2008) SCGLR 686.

can acquire title to land through adverse possession by reason of the period of limitation, nothing prevents the ousted owner from re-acquiring title to the same land through a similar process"

Further, BJ da Rocha and CHK Lodoh identified re-acquisition of the allodial title in relation to compulsory acquisition as another mode of acquisition. Under **Clause 6 of Article 20 of the 1992 Constitution**, if the property so acquired is not used for the intended purpose for which it was acquired, the owner of it immediately before the compulsory acquisition has the right of first option to re-acquire the property.¹⁹ There is therefore no doubt that re-acquisition is another mode of acquiring allodial title.

Foreclosure

Prior to the passage of the **Mortgages Act, 1972 (N.R.C.D. 96)**, a mortgagee or pledgee could exercise his right of foreclosure to shut the door in the face of a mortgagor or pledgor from redeeming the property.²⁰ In that event, if the title to the property was an allodial title held by a stool or family, the mortgagee or pledgee became the new allodial owner. Although the Mortgages Act supra came to do away with foreclosure,²¹ it did not affect prior acquisitions.

Danquah on his part listed conquest, reversion, occupation, acquiescence, purchase and gift as the modes of acquisition of the allodial title.²² It can be seen that acquiescence which is included here has not been captured under Section 2 of Act 1036.

¹⁹ See also BJ Da Rocha and CHK Lodoh, *Ghana Land Law and Conveyancing*, Second Edition at pp. 12.

²⁰ Until the coming into force of the Mortgages Decree, the common law rules on mortgages were applicable in Ghana.

²¹ See Section 18 (9) of the Mortgages Act, 1972 (N.R.C.D. 96).

²² See Danquah, *Gold Coast: Akan Laws and Customs*, pp. 199-200.

Seizure of Property in Execution of a Judgment debt

The principle at customary law was that if a stool land was taken in execution of a judgment debt and sold, the purchaser acquired all the rights, title and interests of the allodial holders.²³ It is immaterial that the title concerned is allodial. In the case of **Dennis and Arthur v. Ababio**,²⁴ a stool land was taken in execution of a judgment debt against the stool. The court held that the purchaser at a subsequent auction of the land acquired the right, title, and interest of the stool which was the allodial title.

The principle pertaining to acquisition of an allodial title of land by way of seizure of a stool property in execution of a judgment debt is neither dead nor buried. In his book *supra*, Lawyer Yaw Oppong explained that the practice was common in Ashanti in ancient times, but has now received statutory affirmation to apply to the whole of Ghana.²⁵ Quoting from **Section 46 of the Chieftaincy Act, 2008 (Act 759)**, the learned writer stated: *“The implication is that stool property may be seized in execution of a stool debt at the suit of a person on condition that the written consent of the National House of Chiefs has been obtained”*.²⁶

For ease of reference, I reproduce the said **Section 46 of Act 759** here for its full effect: *“Stool property whether movable or immovable shall not be seized in execution at the suit of a person except with the written consent of the National House of Chiefs”*.

From the above discussion on the seizure of allodial land in execution of a judgment debt, there is no controversy about the fact that where a stool property is seized in execution of a judgment debt upon the written consent of the National House of

²³ Afari v. Nyame (1961) GLR 599 at holding 1; Kumah & Anor. v. Himah (21977) 1 GLR 204 at holding 3 and Partners Health Services v. Bikkai Ltd. & Ors., Civil Appeal No. J4/48/2015, dated 27 April 2016, S.C. (Unreported).

²⁴ Dennis and Arthur v. Ababio (1941) Divisional Court, Cape Coast (unreported) cited by BJ da Rocha and Lodoh in their book, *Ghana Land Law and Conveyancing* (Second Edition) at page 7.

²⁵ See p. 116 of his Land Law Book *supra*.

²⁶ Op. cit.

Chiefs, the person who eventually acquires it becomes the allodial holder of that property.

Section 2 of Act 1036 did not include acquisition from a property seized in execution as a method of acquiring an allodial title. Although ‘*purchase*’ is mentioned in Section 2 of the Act, it does not appear to cover a purchase in an auction sale pursuant to a seizure of an allodial property of a stool in execution of a judgment debt. It seems that the authorities on the subject have given a limited interpretation to the word ‘*purchase*’ which can operate to serve as a means of transferring an allodial title. For instance, BJ da Rocha and Lodoh at page 9 of their Land Law book *supra* discussed the acquisition of the allodial title through ‘*purchase*’ as an example of a voluntary transfer of the allodial title from the allodial owner itself (**My emphasis**).

Acquiescence

Both Woodman and Danquah identified acquiescence as a mode of acquisition of the allodial title. It needs reiterating the point that originally at customary law, there was no limitation as to the time within which actions were to be commenced, except that they were expected to be filed within a reasonable time.²⁷ The common law doctrine of laches and acquiescence were relied upon in Ghana to resist stale claims.²⁸ It is pertinent to state here that prior to the passage of the **Limitation Act of 1972, (NRCD 54)** *infra*, although the **English Limitation Act of 1623** was applicable in Ghana as a statute of general application, the courts did not apply its provisions to customary law transactions.²⁹

Limitation arising from adverse possession

In 1972 when **the Limitation Act (N.R.C.D. 54)** was passed, a landowner was made to lose his land if another person occupied it and exercised open, visible and

²⁷ See the case of *Manu v. Kuma* (1963) GLR 464 at p. 471, SC, per Van Lare JSC; *Ennin v. Prah* (1959) GLR 44, per Adumuah-Bossman J. at holding 5

²⁸ See *Adjabeng v. Kwablah* (1960) GLR 7, per Ollenu J.

²⁹ See BJ da Rocha & CHK Lodoh at page 1 of their book *infra*.

unchallenged acts of adverse possession for a period of twelve years.³⁰ Under **Section 10 (6) of N.R.C.D. 54**, the title of the true owner became extinguished. **Section 30 (3)** further made the Act applicable to matters regulated by customary law. Since then, the courts have applied the Limitation Act to customary transactions.³¹

The law developed to a point where the courts hesitated not to confer possessory title on an adverse possessor. This was observed in the case of **GIHOC v. Hannah Assi**³², where the Supreme Court held: “... *such adverse possessory title could be used both as a sword and shield.*”³³

In some way, it was unclear whether such an adverse possessor could acquire the same allodial title previously held by the allodial owner. According to BJ da Rocha and CHK Lodoh, allodial title being the highest title in land in Ghana cannot be extinguished or terminated, because extinguishment or termination presumes a superior title or interest into which the title or interest extinguished or terminated shall merge. “*There is no title or interest beyond the allodial title into which the allodial title could merge when it is extinguished or terminated*”, they emphasised.³⁴

It is debatable whether the position held by the learned lawyers of blessed memory reflects the current position of the law. The courts have in recent times held that limitations of actions also apply to allodial titles and have also made it possible for the title of the allodial owner to extinguish for the same to pass on to the adverse possessor.

³⁰ See the case of Adjetei Adjei & Ors. V. Nmai Boi & Ors. (2012-2014) 2 SCGLR 1473 and In Re Neequaye (Dec’d) Adei Kotey v. Kootso Neequaye (2010) SCGLR 348 at holding 3.

³¹ See the cases of Essoun v. Yemo (1982-83) GLR 562 at p. 573 and Akwesi Amankwa Evans v. Kojo Prempeh (2018) DLCA 5253, per Suurebaareh JA.

³² GIHOC v. Hannah Assi (2005-2006) SCGLR 458.

³³ See *Learch v. Jay* (1878) 9 Ch. D 42 where it was held by the English court that such a squatter acquires an actionable interest in the land on which he or she squats.

³⁴ See page 11 of BJ da Rocha & CHK Lodoh’s book *supra*.

In the case of **Ago Sai and Others v. Kpobi Tettey Tsuru III**³⁵, Atuguba JSC speaking for the apex Court held: “*Even if Ogbojo land were La Stool land the La stool having acquiesced in the acts of ownership by the appellant and his predecessors would not only be estopped at common law by the facts of this case from claiming allodial title to the land but would, as pleaded by the co-defendants/respondents/appellants lose that title to the appellant by reason of section 10 (1) and the incidental 10 (6) of the Limitation Decree 1972 (N.R.C.D. 54)... It must be stressed here that it is the allodial title that is in issue and therefore on the facts of this case, clearly the position is that either the appellant or the respondent has that title*”.³⁶ (My emphasis).

The legal implication of Section 2 of Act 1036

Section 2 of Act 1036 appears to have been largely influenced by the four modes of acquisition stated by Ollenu J. in the case of **Ohimen v. Adjei** supra. Since the decision by Ollenu J., the case has become the reference point for many judges and text writers in the discussion of the modes of acquisition of the allodial title. However, it seems that many of the judges and authors misunderstood Ollenu’s proposition by taking the four modes of acquisition stated in the decision to be the only methods by which an allodial title can be acquired.

A careful examination of the case of **Ohimen v. Adjei** will reveal that Ollenu J. stated ‘the four principal methods by which a stool acquires land’ (My Emphasis). The word ‘*principal*’ in the statement could mean ‘*main*’, ‘*major*’, ‘*basic*’, ‘*dominant*’ or ‘*primary*’. ‘It does not however mean they were the **only** methods. For, if he had in mind ‘*principal methods*’, he might as well have recognized the existence of other ‘*minor*’, ‘*unpopular*’, ‘*uncommon*’ or ‘*secondary*’ methods.

³⁵ Ago Sai and Others v. Kpobi Tettey Tsuru III (2010-2012) 1 G.L.R. 231, S.C.

³⁶ In the English case of Perry v. Clissold (1907) A.C. 73, Lord Magnaughten held that where the true owner fails to assert his title within the prescribed period, his title is forever extinguished and the person in adverse possession acquires an absolute title.

Issues Arising

I have stated already that **Section 2 of Act 1036** deals with only how allodial title ‘*may have been acquired*’. We have also identified other modes of acquisition of the allodial title such as accession, re-acquisition, foreclosure, acquiescence, limitation by way of adverse possession and seizure of a stool’s property in execution of a Judgment debt. In view of the fact that Section 2 of Act 1036 does not mention these modes of acquisition of allodial title; the question is whether they can still be deemed as proper modes of acquisition?

If the legislature really intended to annul the accrued allodial title acquired through the modes other than what are stated under **Section 2 of Act 1036**, I believe it would have done so expressly.

In the converse, If the legislature really wanted to legislate comprehensively on every aspect of land law, it should have included all the modes of acquisition of allodial title known to Ghanaian law to avoid confusion in the application of the law.

Since some communities might have benefitted from the said modes of acquisition, their rights are deemed accrued (vested).³⁷ Ampiah JSC in the case of **Feneku v. John Teye**³⁸ held: “*Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attacks a new disability in respect of transactions or considerations already past, must be presumed, out of respect of the legislature, to be intended not to have a retrospective operation*”.³⁹

³⁷ See *Spokesman (Publication) Ltd. V. Attorney General* (1974) 1 GLR 88 and *Nii Okwei Kinka Dowuona VI v. G.C.B. Bank Ltd.* Suit No. LD/1089/2017, dated 25 July 2019 (DLHC 8789).

³⁸ *Feneku v. John Teye* (2001-2002) SCGLR 985 at 1000

³⁹ See *Maxwell on Interpretation of Statute* (7 ed.) page 100.

Bearing in mind the constitutional provision on accrued (vested) rights, it is doubtful whether the legislature actually intended to pass a law that will conflict with the express provisions of the constitution.

Article 107 of the 1992 Constitution provides:

“Parliament **shall have no power** to pass any law –

(b) which operates retrospectively to impose any limitations on, or to adversely affect the personal rights and liabilities of any person or to impose a burden, obligation or liability on any person ...”.

If the other modes of acquisition cannot be whittled away easily, then what did Parliament seek to achieve by specifically stating the methods by which allodial title ‘*may have been acquired*’?

Perhaps, Parliament should have left it to the courts to apply the law pertaining to the modes of acquisition of the allodial title, especially when it did not state how it can now be acquired.

There could be the temptation to interpret the word ‘*may*’ in the section to include other modes of acquisition not expressly stated. However, such an interpretation could be misleading in the light of the ‘*expressio unius est exclusion alterus rule*’.⁴⁰ For, an express mention of all the modes of acquisition of allodial title would necessarily exclude all others not expressly stated in the Act. The courts have applied the principle in a number of decisions. Last year, the Supreme Court relying on the Canon of Interpretation in the case of **David Apasera & 42 Others v. The Attorney-General & Ministry of Finance**⁴¹ resisted the invitation by some former Members of Parliament who sought to benefit under Article 71 of the 1992 Constitution when they were not so entitled.

⁴⁰ The express mention of one thing excludes the other. See the case of *R. v. Inhabitants of Sedgely* (1831)

⁴¹ *David Apasera & 42 Others v; The Attorney-General & Ministry of Finance* (2020) DLSC 9943.

In **Togbe Akpoma & Another v. Gladys Mensah**⁴², the Apex Court again applied the canon of interpretation by failing to extend the class of beneficiaries mentioned under **Section 5 (2) of the Intestate Succession Law, PNDCL 111** to encompass the deceased person's family.⁴³

Perhaps, the law maker could have adopted the *ejusdem generis rule*,⁴⁴ by not limiting itself to only the six modes of acquisition, but by speaking in general terms so that the court could be guided by the list and add on to it when necessary.

As it stands now, it is not known whether the courts are going to give effect to only the acquisitions stated by the law maker under **Section 2 of Act 1036** or they are going to recognize all the known methods of acquisition of the allodial titles, irrespective of whether they are stated in the law or not.

If the courts adopt the former approach, they would, in effect, be annulling all prior acquisitions relative to the said methods and that can create serious problems in the country.

On the other hand, if the courts take the latter path, the fundamental question would be; what then would have been the relevance of specifically stating how allodial title '*may have been acquired*' in the law?

Further, the courts would be overstepping its bounds if they attempt to rewrite the law to incorporate the methods of acquisition of allodial title not included in the section under the cover of adopting a purposive interpretation in a situation like this when Parliament has spoken in clear words. We should not lose sight of the fact that

⁴² Togbor Akpoma & Another v. Gladys Mensah (2017-2018) 2 SCGLR 144.

⁴³ See also cases like Kofitse Gakper v. The Republic (2019) DLCA 7769, C.A.; In Re Parliamentary Elections for Wulensi; Zakaria v. Nimakan (2003-2004) 1 SCGLR 628 and R. v. Secretary of State for the Home Department, Ex parte Crew (1982) Imm 941.

⁴⁴ See the case of Powell v. Kempton Park Racecourse (1899)

the courts role is give effect to the intention of the legislature and not to redraft the law for them. It is not for nothing that the courts are deemed to be the servants of the legislature. Guidance may be taken from the decision of **Republic v. High Court, Accra; Ex parte CHRAJ (Richard Anane, Interested Party)** where Georgina Wood JSC (as she then was) cautioned: *“The purposive rule is however, not a carte blanche for rewriting legislation ... and should never be used as a ruse, a cloak or guise to do so. The function of a court is to interpret legislation and give effect to it, even where the terms appear unpalatable. Care must be taken to avoid legislating under the guise of interpretation.”*⁴⁵

Professor Kludze JSC (as he then was) also had this to say in the case of **Republic v. Fast Track High Court, Ex parte Daniel**: *“Even in the area of statutory interpretation, we cannot amend a piece of legislation because we dislike its terms or because we suppose that the lawgiver was mistaken or unwise”*⁴⁶ (My emphasis).⁴⁷

The Ghanaian Conundrum

The 1992 Constitution prohibits the creation of a freehold interest or title in respect of a stool land.⁴⁸ BJ da Rocha and CHK Lodoh expressed worry over why a stool can transfer the allodial title which is a higher title than the freehold interest, but cannot create a freehold being a lesser interest out of the allodial title.⁴⁹ The learned lawyers looked up to the courts to provide an answer but their expectations could not be met before their glorious transition. Over twenty years after raising the issue, the law maker appeared to have added on to the confusion by extending the prohibition on the transfer of a freehold interest to cover family and clan lands,⁵⁰ while at the same time sanctioning the outright sale of the allodial interest by the

⁴⁵ Republic v. High Court, Accra, Ex parte CHRAJ (Richard Anane, Interested Party) (2007-2008) 1 SCGLR 213 at p. 250.

⁴⁶ Republic v. Fast Track High Court, Ex Parte (2003-2004) 1 SCGLR 364 at p. 370.

⁴⁷ See also Martin Kpebu (No. 3) v. Attorney General (2015-2016) 1 G.R 511, S.C. per Akamba JSC (as he then was).

⁴⁸ See Article 267 (5) of the 1992 Constitution.

⁴⁹ See page 8 of their book, Ghana Land Law and Conveyancing (Second Edition).

⁵⁰ See Section 9 (1) of Act 1036.

stool, skin, clan, or family.⁵¹ Until answers are received, we can only consider it as land law conundrum that baffles the understanding of Ghanaian legal experts.

The Foreigners Puzzle

Similar to the issue raised as the Ghanaian conundrum is one about foreigners. The 1992 Constitution prohibits the creation of a freehold interest⁵² or a leasehold interest of more than fifty years at any one time⁵³ in a foreigner. **Section 10 (1) & (2) of Act 1036** reproduces the constitutional provision by amplifying the prohibition to cover foreigners who may want to hide under the guise of marriage to acquire the said interests (freehold and leasehold above fifty years).⁵⁴

On the contrary, **Section 2 of Act 1036** recognizes the acquisition of allodial title by *individuals* through methods such as *gifts, purchase and agreement*. The law did not draw any distinction between the individuals who are permitted to acquire the allodial title and those who are not. It only speaks in general terms – ‘*individuals*.’ It may appear, therefore, that foreigners are not exempted from the ‘*individuals*’ who can purchase or acquire an allodial title which is a higher interest in land, although they are precluded from acquiring a freehold interest or leasehold interest above fifty (50) years at any one time. We are confronted with the same puzzle as to why the law appears to permit the acquisition of a higher title, but prohibits the creation of a lesser interest.

An argument could be made that by virtue of the express prohibition against foreigners in the acquisition of a freehold interest or leasehold interest above fifty

⁵¹ See Section 2 of Act 1036.

⁵² Article 266 (1) of the 1992 Constitution states: “No interest in, or right over, any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a freehold interest in any land in Ghana”. Also, clause 2 of Article 266 reads: “An agreement, deed or conveyance of whatever nature, which seeks, contrary to clause (1) of this article, to confer on a person who is not a citizen of Ghana any freehold interest in, or rights over, any land is void”.

⁵³ Article 266 (4) of the 1992 Constitution provides: “No interest in, or right over, any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a leasehold for a term of more than fifty years at any one time”.

⁵⁴ Section 10 (9) of Act 1036.

years in land, they are implicitly proscribed from acquiring an allodial title in land in Ghana. I am afraid this argument is feeble. This is because, although, Ghanaians are also prohibited from acquiring freehold interest in stool lands, skin lands, clan lands and family lands, Section 2 of the Act tends to recognize allodial titles acquired from the stools, skins, clans or families, notwithstanding the fact that a freehold interest is a lesser interest created out of the allodial title which is higher.

Conclusion

It is, therefore, my expectation that lawyers, judges, parliament, law students, surveyors, land officers, opinion leaders and all interested stakeholders would engage themselves on the issues raised in this article, pending the publication of my next edition on another provision of the Act.

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DEDICATION

This article is dedicated to my kind colleagues on the Bench who are celebrating their birthday - Justice Eric Kyei Baffour JA, Justice Olivia Obeng Owusu J. and Justice Ruby Aryeetey J.

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Watch out for the writer's book that is about to hit the market in the coming months.