IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: YEBOAH, JSC PRESIDING
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
APPAU, JSC
PWAMANG, JSC

CIVIL APPEAL
NO. J4/1/2015

6TH APRIL, 2017

ALHAJI MUMUNI -- PLAINTIFF/APPELLANT/RESPONDENT

VRS

1. AKUA SERWAA NYAMEKYE)
2. YAA TENEWAA)
3. LANDS COMMISSION, KUMASI) -- DEFS/RESPS/APPELLANTS
4. REGISTRAR, LANDS COMMISSION, KUMASI)
5. EXECUTIVE SECRETARY, LANDS COMMISSION, ACCRA)

JUDGMENT

GBADEGBE, JSC:-

My lords and respectful brethren, the question for our determination in this appeal turns on whether the decision of the Court of Appeal in upholding

the plaintiff's writ was in accordance with the settled practice of the court and also whether there were legitimate grounds for the Court of Appeal to reverse the decision of the trial court on the disputed questions of fact? In this delivery, the parties will conveniently be referred to by the designation which they bore in the trial court.

As the question raised by the appellant concerning the validity of the writ affects the jurisdiction of the trial court in the matter, I would turn my immediate attention to it. I have carefully considered the respective briefs of the parties to the appeal herein and the record of appeal before us and have reached the conclusion that as the right of the plaintiff to the order of perpetual injunction was resisted by the 2nd defendant who also counterclaimed for a declaration of title to the disputed property, the plaintiff was required to prove his title to the property and consequently there was before the court a claim that was substantive in nature. It is well established without any conflict of opinion that a court cannot consider the plaintiff's right to a permanent injunctive relief without first considering the right on which such a claim is based. In my view therefore, the writ, which was taken out by the plaintiff in the action herein on May 02, 1986 was competent.

Although generally, an injunction may not be granted for actionable wrongs where damages would suffice as adequate remedy, there are situations in which the wrong is irreparable and or in respect of a contact or agreement which is 'sui generis' such as that for the purchase of a

building as in the case before us. In such cases, a court may intervene at law if the right to the remedy is clearly established from the evidence placed before the court. Describing the cases in which the court will intervene to grant injunctive reliefs, the learned authors in Halsbury's Laws of England, Fourth edition para 926 at page 522 state as follows:

> *"By Irreparable injury" is meant injury which is substantial and could never be adequately remedied or atoned for by damages."*

It appears from the authorities that the fact that the plaintiff may have a right to be awarded damages is no objection to the court's exercise of the jurisdiction to grant an injunction in his favor. See: **(1) Bloxam v Metropolitan Rly Co** (1868) 3 Ch. App 337 at 354; (2) **Colls v Home and Colonial Stores Ltd**[1904] AC 179 at 188.In the action with which we are concerned in these proceedings, the plaintiff sought the injunctive reliefs to prevent the 1st defendant from making an improper transfer of the property to the 2nd defendant; a relief which is in its nature substantive within the scope and intendment of Order 2 rules 2 and 3 and 6 and Order 3 rule 3 of the High Court (Civil Procedure) Rules, 2004, CI 47. There can be no justification in principle for damages being in their nature substantive and denying to perpetual injunction a similar attribute as the right to either relief is based on the clear establishment of a right to such relief. Such is the substantive nature of injunctive reliefs that in appropriate cases, damages may be awarded in addition. Dealing with the claims for the determination of the trial court, there is the common claim of both the

plaintiff and 2nd defendant by which they each seek injunctive reliefs against the plaintiff. Whiles the plaintiff seeks an order of perpetual injunction restraining the 1st defendant from making a transfer of the disputed property to the 2nd defendant, the 2nd defendant seeks to restrain plaintiff from making a transfer of the property to the plaintiff. There can be no doubt that in the circumstances, the court was required to decide as between the said claimants and the 1st defendant who had a better title to the property at law; a consideration which rendered the writ before the court substantive in nature.

The 2nd defendant in his submissions before us placed great reliance on the case of **Republic v High Court, Tema Ex parte Owners of MV Essco Spirits** [2003-2004] SCGLR 689 but the said decision does not advance his case as the facts in that case are distinguishable; the plaintiff having only endorsed the writ with an order to furnish security for an arbitral award then pending between the parties in London. In the instant case, the writ was endorsed for perpetual injunctions. As said in the preceding paragraph, perpetual injunctions are substantive reliefs and I have no doubt that if from the nature of the application with which the learned justices were concerned in the Exparte Owners of MV Essco case (supra), it was open to them to have considered the relief of perpetual injunction for the purpose of reaching a decision in that matter, they would have included it in the examples of substantive reliefs to which reference was made. The non-inclusion of perpetual injunction in the categories mentioned in that judgment does not therefore mean that it is not in its

nature a substantive relief. It follows that the interpretation which the 2nd defendant sought to place on the passage of the judgment to which reference was made in support of his contention as the only instances in which endorsements on a writ of summons might raise substantive claims for determination is not only wrong but strained. The reliefs or remedies mentioned in the said passage are all like injunctions dependent upon the establishment of a right to be awarded executory remedies by a court. Damages, like injunctions are executory remedies or reliefs which a court might grant to a party but such reliefs are not on their own but predicated upon the clear establishment by the claimant of a right either under contract or statute in his favor against the party who denies the existence of any such right. The question of the validity of the writ having been properly determined by the Court of Appeal, I now turn my attention to the appeal on the merits.

The decision of the Court of Appeal that is under attack before us was from a careful reading of judgment reached after the learned justice who authored the opinion to which his colleagues expressed agreement, carefully evaluated the rival versions of fact placed before the trial court as contained in the record of appeal on which the re-hearing was based. I think that the judgment discloses a well thought out approach and find no legitimate complaint in regard to the reasons provided by the Court of Appeal for intervening to reverse the decision of the trial court which was to a very large extent influenced by the order for a vesting of the property in the 2nd defendant. In my view as the tribunal which made the order was

exercising a criminal jurisdiction, it lacked the legal authority to have made an order, which is only available in civil proceedings. It is trite learning that when a party relies on a judgment before a court in a subsequent case as the basis of his title, the first question that the court must be satisfied on is whether the decision was made within jurisdiction. As this aspect of the matter has been dealt with in great detail by my worthy brother Pwamang JSC, whose draft opinion I have had the advantage of reading and with which I express my agreement, I am content to leave any further consideration of the said point beyond saying that it was an act made in excess of jurisdiction and for that matter nothing of consequence attaches to it.

On the preference of the Court of Appeal for the version related by the plaintiff , I would like to say that the uncontroverted evidence of the 2nd defendant that when his vendor was taking him to the property, he abandoned him is a clear indication that he knew that the transaction was one in respect of which he could not give the purchaser, vacant possession and it having been testified to by the 2nd defendant as part of her case is decisive to the trier of fact of the fact that the vendor, the 1st defendant knew that some other person had a better right to the property namely the plaintiff herein. It is clear from this evidence which is one against the interest of the 2nd defendant that in the circumstances of this case, her cause of action must be against the 1st defendant. The question which arises from the facts is why the plaintiff should bear the consequences of 1st defendant's fraudulent conduct which was subsequent to his purchase

of the property. It seems to me that the circumstances in which the 1st defendant abandoned the 2nd defendant in the course of taking him to the property are such that there was a duty on him to speak and his silence must be construed as an admission of the title of the plaintiff. Equally baffling is the silence of the 2nd defendant when his grantor decamped from him at a very critical time in the chain of events by which he was required to handover possession of the property to him. The conduct of the 1st defendant is explicable only in terms of fraud and justified the Public Tribunal in convicting him on that charge. On a total consideration of the evidence as we are indeed, bound to do, the learned trial judge reached an unreasonable and or perverse verdict on the question of ownership of the property and justified the learned justices of the Court of Appeal to intervene for the purpose of making a judicial correction in terms of the effect of the evidence contained in the record of appeal and by so doing putting an end to a glaring instance of miscarriage of justice.

The appeal before us accordingly fails and I affirm the decision of the Court of Appeal in the matter herein. The result is that the decision of the trial High Court is set aside and in place thereof is substituted an order allowing the claim of the plaintiff. As earlier on said, from the nature of the contest, the plaintiff's right to the injunctive reliefs is predicated on title being proved by him as the learned justices of the Court of Appeal found. Accordingly, the plaintiff succeeds on the reliefs claimed by the amended writ of summons. On the facts of this case, the learned justices of the Court of Appeal were right in amending the claim of the plaintiff herein to

include a declaration of title in order not to defeat justice by a mere technicality as the action was substantively contested by the main parties on the question of who had a better title to the property.

SGD. N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

My Lords, I had the benefit of reading beforehand the lead judgment and agree with the reasoning and conclusions stated eruditely therein by my respected brother Gbadegbe, JSC that this appeal be dismissed. However, I wish to comment on the appellant's ground of appeal in which she complains that the Court of Appeal purported to interpret the 1992 Constitution and in the process exceeded its jurisdiction by questioning an order of a Public Tribunal established by the erstwhile Provisional National Defence Council (PNDC).

The brief facts relevant to this delivery are that the original owner of the house in dispute indulged in a double sale of it to the parties in 1985. When the appellant herein was being taken to the house after his purchase, the owner abandoned him and ran away on approaching the house. The appellant got to know that the original owner behaved that way because she had earlier on sold the same house to the respondent herein who was in occupation of it. The appellant reported a case of fraud against the original owner wherefore she was prosecuted in the Ashanti Regional Public Tribunal, Kumasi. After convicting her the Tribunal made an order

vesting the disputed house in the appellant who was the complainant in the case and then sentenced the original owner to 3 months IHL. The appellant thereafter laid claim to the house wherefore the respondent brought an action against the original owner and the appellant in the High Court, Kumasi for injunction and other reliefs. The respondent led evidence to prove that his purchase was earlier in time to that of appellant but the High Court in its judgment dated 23rd July, 2010 held that the order of the Ashanti Regional Public Tribunal vesting the property in the appellant prevailed over whatever interest respondent acquired in the house. The High Court further held that it was precluded by Section 34(3) of the Transitional Provisions of the 1992 Constitution from questioning the order of the Public Tribunal.

Upon an appeal the Court of Appeal reversed the High Court decision stating that the 1992 Constitution has given every aggrieved person a right to appeal or seek judicial review so in the era of Constitutionalism, the order of the Tribunal which was made contrary to the jurisdiction conferred on it by the Public Tribunals Law, 1984 (PNDCL 78) could not stand. In her appeal to this court, the appellant has re-stated her case that the order the Public Tribunal made in her favour cannot be questioned in any court by virtue of the indemnity provisions of the Constitution. As legal authority she referred to the cases of; **In Re Nungua Stool Affairs; Odai Ayiku IV v Attorney-General (Borketey Laweh XIV Applicant) 2010 SCGLR 413** whereby this court stated that no court has jurisdiction to question the **Nungua Chieftaincy Affairs (Nii Odai Ayiku IV)(Prohibition) Instrument 1983 EI.18)** since it was an Executive action of the PNDC indemnified under Section 34(3) of the Constitution. There is also **Ellis v Attorney-General [2002] SCGLR 24** where this court declined jurisdiction to question PNDCL 294, a legislative action of the PNDC, on account of Section 34(3) of the Transitional Provisions of the Constitution.

Section 34 (3) and (4) of the Transitional Provisions provide as follows;

"For the avoidance of doubt, it is declared that no executive, legislative or judicial action taken or purported to have been taken by the Provisional National Defence Council or the Armed Forces Revolutionary Council or a member of the Provisional National Defence Council or the Armed Forces

Revolutionary Council or ***by any person appointed by the Provisional National Defence Council or the Armed Forces Revolutionary Council*** **in the name of** ***either the Provisional National Defence Council or the Armed Forces Revolutionary Council*** *shall be questioned in any proceedings whatsoever and, accordingly, it shall not be lawful for any court or other tribunal to make any order or grant any remedy or relief in respect of any such act.*

(4) The provisions of subsection (3) of this section shall have effect notwithstanding that any such action as is referred to in that subsection was not taken in accordance with any procedure prescribed by law."

It cannot be disputed that the indemnity provided for in Section 34 (3) and (4) of the Transitional Provisions of the Constitution and upheld by this court in the two earlier decisions cited above appears to be very wide. However the issue in this case is different because we are not here dealing with an action of the PNDC as was the case in the two earlier cases but here it is at best an action of appointees of the PNDC since the panel members of the Tribunal were appointed by the PNDC. A close reading of Section 34(3) of the Transitional Provisions reveals that when it comes to actions of appointees of the PNDC and AFRC, it is only those actions that were taken in the name of the PNDC or AFRC that cannot be questioned by any court. From a reading of the provision, it seems to me that actions that were not taken in the name of the PNDC or AFRC are not covered by the provision. This is the plain meaning of the words of the provision and it ought to be applied since the intention of the framers of the Constitution is thereby made abundantly clear. So the matter to consider in this case is whether the summons that issued from the Ashanti Regional Public Tribunal and its proceedings were conducted in the name of the PNDC.

I have examined PNDCL 78 though it has been repelled but there is nothing in it to suggest that Public Tribunal proceedings were to be conducted in the name of the PNDC. The Public Tribunals established under PNDCL 78 exercised criminal jurisdiction and by the provisions Section 62 of the Criminal Procedure Code 1960 (Act 30), criminal summons are to be issued in the name of the Republic. However, the Public Tribunals were mandated to determine their own procedures and

they conducted their proceedings in the name of the People. The proceedings of the Ashanti Regional Public Tribunal that were tendered at the trial and can be found from pages 268 to 283 of the ROA stated as follows; "Case No. 287/85, The People Vrs Akua Nyamekye Serwaah". What this means is that the proceedings of the Ashanti Regional Public Tribunals were conducted in the name of the People and therefore not covered by the indemnity provisions in Section 34 (3). The substantive difference between criminal summons and proceedings in the name of the President (and here you can substitute PNDC) as against in the name of the Republic (or the People) was underscored in the Supreme Court case of **Tsatsu Tsikata (No. 1) v Attorney-General [2001-2002] SCGLR 189.**

Consequently the Court of Appeal was right in dismissing the contention of the appellant premised on Section 34(3) of the Transitional Provisions that it had no jurisdiction to question the order of the Ashanti Regional Tribunal though it assigned wrong reasons for its conclusion. In my considered opinion the order of the Ashanti Regional Public Tribunal that is being questioned in this case was not an action taken in the name of the PNDC and therefore is not covered by Section 34(3) of the Transitional Provisions of the 1992 Constitution so the courts have jurisdiction to question it and grant relief in respect of it.

SGD. G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

SGD. ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

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