IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: ANSAH, JSC (PRESIDING)
DOTSE, JSC
MARFUL-SAU, JSC
DORDZIE (MRS), JSC
AMEGATCHER, JSC

CIVIL APPEAL
SUIT NO. J4/35/2016

5TH FEBRUARY, 2020

BANK OF AFRICA LTD … PLAINTIFF/JUDGMENT/ CREDITOR/APPELLANT/APPELLANT

VRS

1. GRACEFIELD MERCHANTS LTD
2. DR. KOFI RUBEN ATEKPE
3. KOFI KWAKWA …….. DEFENDANTS/JUDGMENT/DEBTOR

AND

1. MIKE TWUM BARIMAH …….. 1ST CLAIMANT/RESPONDENT/RESPONDENT
2. ROBERT ALLEN …… 2ND CLAIMANT/RESPONDENT/RESPONDENT

J U D G M E N T

MARFUL- SAU, JSC: -

This appeal relates to interpleader proceedings taken at the High Court, Accra. The brief facts of the case are that the Appellant herein took judgment against the defendants in the original suit to recover an amount of GHC 7, 526, 234.29, being the balance including interest on a loan advanced to the defendants. In executing the judgment the Appellant attached the property of the 2nd defendant which was used to secure the loan. A Deed of

Mortgage was executed by the Appellant and the 2nd defendant on 4th May 2007. The record revealed that even though the Mortgage was executed in 2007, it was used as security for the loan taken by the defendants in the year 2010. Now, the 2nd defendant on the 11th November 2008 assigned his interest in a portion of the property the subject of the Mortgage to the 1st Claimant/ Respondent in this appeal. The 2nd defendant again on the 8th of July 2009 assigned another part of the mortgaged property to the 2nd Claimant/Respondent herein. The Appellant then got the mortgage registered only in the year 2010 after the 2nd defendant had assigned his interest in the properties to the 1st and 2nd Claimants herein.

Upon the attachment of the mortgaged property by the Appellant, in execution of the judgment against the defendants, the 1st and 2nd Claimants herein filed their respective claims which resulted in this interpleader proceedings initiated by the Sheriff of the High Court. The trial High Court in its judgment, found that the 1st and 2nd Claimants were innocent purchasers without notice and thus discharged the properties from the attachment. The Appellant appealed to the Court of Appeal and same was dismissed. The Appellant is now before this court praying that the decision of the Court of Appeal be set aside on the following grounds:-

a. The judgment of the Court of Appeal is against the weight of evidence on record.

b. The Court of Appeal erred in holding that on the balance of probabilities, the conclusions of the trial judge are reasonable and amply supported by the affidavit evidence.

c. The Court of Appeal erred in holding that the Plaintiff/Appellant/Appellant cannot enforce the mortgage.

d. The Court of Appeal erred in holding that the Plaintiff/Appellant/Appellant's appeal lacked merit and dismissed it.

We observed that though grounds (b),(c) and(d) are incompetent in that no particulars were provided for the alleged errors contrary to Rule 6 (2) (f) of the Supreme Court Rules, CI 16, the said grounds are in substance the same as ground

(a) since they all complain about the Court of Appeal's evaluation of the evidence on record. We will therefore address only ground (a) in this judgment and even under the said ground (a), we intend to deal with the issue whether or not the 1st and 2nd Claimants/Respondents in the circumstances of this case were bona fide purchasers for value without notice, since we find this to be the fundamental issue in the appeal. In this judgment the 1st and 2nd Claimants/ Respondents shall be referred to simply as the Claimants and the 2nd defendant who assigned his interest in the properties to the Claimants shall be referred as such.

From the record of appeal, the plea put up by Claimants as contained in their respective affidavit of interest is that they are bona fide purchasers for value without notice. In the case of **Hydrafoam Estates (Gh) Ltd v. Owusu (per lawful attorney) Okine & Others (2012-2014) SCGLR 1117**, this court held among others as follows: -

> *"Where a party had put up a plea of bona fide purchase for value without notice of any adverse title, the onus will squarely be on that party who had pleaded the same. Since the plea was to be considered as an absolute, unqualified and unanswerable defence, if upheld by a court of law, the law will require that evidence in support of the plea must satisfy the court……."*

The law thus required the Claimants to lead evidence that they had no notice of any title adverse to the 2nd defendant, who assigned the properties to them. Indeed, the Claimants had to establish that throughout the transaction leading to the assignment of the properties to them they acted prudently and in good faith. So how did the Claimants acquire the properties the subject of this appeal? First, we examine the acquisition by the 1st Claimant, Mr. Mike Twum Barima.

He acquired the property described as House Nos. 1 and 4, 15 Agostino Neto Road, Airport Residential Area, Accra, from the 2nd defendant by two Deeds of Assignment both dated 11th November 2008. He obtained the Lands Commission consent for the two Deeds of Assignment on the 6th November 2008. In all he paid an amount of US$ 625,000.00 to acquire the property from the 2nd defendant.

The 2nd Claimant acquired the property described as No 3, 15 Agostino Neto Road, Airport Residential Area, Accra, from the 2nd defendant at the price of US$380,000.00. A Deed of Assignment was executed between him and the 2nd defendant on the 8th July 2009. Before the Deed of Assignment was executed, he entered into a Sales Agreement with the 2nd defendant dated 1st December 2005 and also a Memorandum of Understanding on 30th March 2007, which detailed all payments made by the 2nd Claimant to the 2nd defendant towards the purchase of the property, which formed part of the mortgage. By the Memorandum of Understanding, it was clear that as at the date of its execution, that was 30th March 2007, the 2nd Claimant had made direct payments totaling US$ 377,500.00 leaving a balance of US$2,500.00 out of the purchase price of US$ 380,000.00. He obtained the consent for the Deed of Assignment on the 5th of November 2010. In fact from the Sales Agreement, the 2nd defendant agreed to construct a dwelling house for the 2nd Claimant at the price of US$ 380,000.00.

The record of appeal revealed that apart from applying and obtaining the consent of the Lands Commission for their respective Assignments, there is no evidence that both Claimants conducted official searches at the Lands Commission to ascertain whether the properties they were acquiring were encumbered. From evidence on record there is no dispute that the property acquired by the Claimants were owned by the 2nd defendant. However, the 2nd defendant had in 2007 mortgaged the properties to the Appellant for a loan. The Appellant failed to register the mortgage promptly and for that matter at the time 2nd defendant assigned his interest in the properties to the Claimants, there was no registered encumbrance on the properties to the notice of the public. The mortgage was

only registered in August 2009 after the 2nd defendant had assigned his interest in the properties.

We are of the opinion that in the circumstance of this case even if the Claimants had conducted official searches in 2008 and 2009, at the Lands Commission, as the law expected of prospective purchasers of landed properties, the search would not have revealed any encumbrance, as non - had been registered as required under the law.

In assessing whether a purchaser of land had acted prudently, and for that matter entitled to seek comfort under the plea of bona fide purchaser for value without notice, we think that each case must be determined based on its peculiar circumstances. In this appeal the evidence is clear that the Claimants could not have had notice of any interest adverse to that of the 2nd defendant, since evidence on record showed that the mortgage was not registered. There was also no evidence to demonstrate that the Claimants were aware of the mortgage transaction between the 2nd defendant and the Appellant. Further, there was no evidence that the Claimants were parties to any fraud against the Appellant.

From evidence on record the 1st Claimant for example negotiated with the 2nd defendant and made a one off payment of the total purchase price of US$625,000.00, through a cheque dated 6th October 2008, which is at page 207 of the record of appeal. He took possession upon the payment and subsequently put tenants in the properties. The 2nd Claimant, on the other hand, demonstrated through the Sales Agreement and the Memorandum of Understanding that as at 30th March 2007, he had paid a total of US$ 377,500.00 out of the purchase price of US$ 380,000.00, to the 2nd defendant. From the Memorandum of Understanding the 2nd claimant started paying for the property on the 29th November 2005, when he paid an amount of US$ 120,000.00 to the 2nd defendant. Clearly, therefore from evidence on record even before the 2nd defendant mortgaged the property on 4th May 2007, to the Appellant, he had started receiving payments to assign his interest in the same property to the 2nd Claimant, pursuant to the Sales Agreement,

(even though the Sale Agreement had a clause that title will pass under the agreement after final payment of the purchase price.)

Apart from the fact that the mortgage was not registered at the time of the assignments to the Claimants, it was not the case that there were tenants or occupiers in the properties, to prompt the Claimants to investigate the title of the 2nd defendant as the law expected of prudent purchasers.

All the Claimants did was to apply for the consent of the Lands Commission to enable the 2nd defendant assign his interest in the properties, since the land was a subject of government lease. In reviewing the record, we are satisfied that Claimants adduced credible evidence to establish that they purchased the properties without notice, actual or constructive of the mortgage to the Appellant. The Claimants therefore obtained a proper assurance in the nature of the assignment as bona fide purchasers for value without notice of any fraud or encumbrance.

It is trite that a mortgage in writing is an instrument affecting land and same ought to be registered under section 24 (1) of the Land Registry Act. A mortgage shall have no legal effect until it is registered. See **Asare v. Brobbey and Others (1971) 2 GLR 331 CA**. Further the Land Title Registration Act, PNDC 152, provides by its section 72 that a mortgage created after the coming into force of the Act shall not have any legal effect until registered in accordance with the Act. In the celebrated case of **Amuzu v. Oklikah (1998-99) SCGLR 141**, this court affirmed the efficacy of registered instruments affecting land subject only to fraud and notice of adverse title to the registered instrument. The law is thus clear that the Deed of Mortgage executed between the Appellant and the 2nd defendant had no legal effect for lack of registration, at the time of the assignments to the Claimants.

From evidence on record, this whole bizarre episode was caused by the greed and venality of the 2nd defendant and he must be ashamed of himself. Indeed, the Appellant cannot escape blame either for her lack of diligence after executing the mortgage. The Deed of Mortgage was executed on the 4th of May 2007. Clause 11 of the Deed of Mortgage

enjoined the 2nd defendant, who was the Mortgagor to immediately ensure the registration of the mortgage upon execution of same. The 2nd defendant failed to perform this obligation and the Appellant also went to sleep. Evidence on record showed that Appellant first filed the mortgage at the Lands Commission in 2009 and same was duly registered on the 18th August 2009, after the properties had been assigned to the Claimants for value by the same 2nd defendant.

Appellant, as the mortgagee, failed to ensure the registration of the mortgage by the 2nd defendant in compliance with the provisions of the mortgage. If the Appellant had been diligent and ensured that the mortgage was promptly registered as provided in the Deed of Mortgage by the 2nd defendant, the Appellant would not have been in the present situation. In the circumstances, Appellant can only blame the 2nd defendant who from the record appears to be fraudulent from the way he conducted the transactions with Claimants and the Appellant. The argument by the Appellant that it obtained the consent of the Lands Commission for the mortgage did not change the position that at the time of the assignment, the mortgage was not registered. The consent of the Lands Commission did not amount to registration and could not create an encumbrance on the property or constitute notice to the public. The option left for the Appellant is to enforce the judgment entered by the trial High Court on 10th August 2011 against the Defendants at the trial namely Gracefield Merchants Limited, Dr. Ruben Atekpe and Kofi Kwakwa.

In conclusion, we are satisfied from evidence on record that the Claimants were bona fide purchasers for value without notice and the lower courts were right in discharging or releasing the properties from attachment under the writ of fieri facias levied by the Appellant.

The appeal is therefore dismissed as without merit.

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

J. ANSAH

(JUSTICE OF THE SUPREME COURT)

V. J. M. DOTSE
(JUSTICE OF THE SUPREME COURT)

A. M. A DORDZIE (MRS.)
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