IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA-AD 2020

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

CIVIL APPEAL
NO. J4/12A/2019

5TH FEBRUARY 2020

DORA BOATENG ……. PLAINTIFF/RESPONDENT/APPELLANT

VRS

MCKEOWN INVESTMENT LTD ……. DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

AMEGATCHER, JSC:-

The events leading to this appeal which has ended up at the apex court started its journey from the Circuit Court, Koforidua. Being a civil case, its upward movement was routed on appeal to the Court of Appeal. The parties wishing to take full advantage of all the legal avenues open to them did not end the journey at the intermediate appellate court. The fight continued by invoking our appellate jurisdiction as the final court in the land, hopefully to give this land dispute its quietus. One gentleman called Kwame Kissiedu Kwaasi is at the centre of this land dispute. The actual role the said Kwame Kissiedu Kwaasi played and his legal capacity will be a determinant factor in this appeal.

For Dora Boateng, the plaintiff, the facts of her case from the record reveal that she bought a 20 acre plot of land situate at Okorase near Koforidua from Kwame Kissiedu Kwaasi, who described himself as the Head of Family and lawful representative of the Kissiedu Kwaasi Family of a section of the Anonkore Clan. The deed to the plot of land was executed between the plaintiff and Kwame Kissiedu Kwaasi in 2000 and registered in 2014. The plaintiff who is ordinarily resident in Switzerland states that she returned to the country to find that her land was being encroached on by persons she could not identify. She put up warnings and caused announcements to be made within the vicinity. Since she could not trace the said persons, she commenced an action at the Circuit Court, Koforidua against "The Developers" claiming against them, ejection from the land and perpetual injunction restraining the defendant and its assigns from interfering with the land. After substituted service, Mckeown Investment Ltd, the defendant, entered appearance and contested the case to its finality.

Mckeown Investment's Limited case is that it acquired a 46.98 acre land from Naggesten Farms. Naggesten Farms in turn acquired the plot of land from a family at Larteh to which Kwame Kissiedu Kwaasi, the plaintiff's grantor belongs and is its secretary. This land is said to include the 20 acres of land claimed by the plaintiff and in dispute in this appeal. The defendant counterclaimed against the plaintiff for the relief of declaration of title to the land as well as perpetual injunction retraining the plaintiff and her assigns from interfering with the land.

The trial Circuit Court gave judgment for the plaintiff on 30th October 2015, holding that on the balance of probabilities, she was the rightful owner of the land. It applied the **nemo dat quod non habet** rule, saying that since Alfred Naggesten (of Naggesten farms) claimed to have acquired his parcel of land from Kwame Kissiedu Kwaasi in 2006 (six years after the plaintiff), Kwame Kissiedu Kwaasi had no interest in the land to convey to him after the first sale.

Dissatisfied with the trial court's decision, the defendant lodged an appeal at the Court of Appeal. On 3rd May 2017, the Court of Appeal reversed the Circuit Court judgment, allowed the appeal and ruled in favour of the defendant for the reliefs endorsed on its

counterclaim. On the substance of the matter, the Court of Appeal relied on the recitals in the deed of conveyance between Kwame Kissiedu Kwaasi and the plaintiff in which the former was described as the "Head and Lawful Representative of the Kissiedu Kwaasi Family of a section of the Anonkore Clan". The said family was said to be granting the land with the consent and concurrence of the principal members of that family. The Court of Appeal held that since Kwame Kissiedu Kwaasi was not the head of the section of the Anonkore Clan of Larteh-Akuapem, the grant was void. The Court further held that, assuming the grant had been initiated by Kwame Kissiedu Kwaasi's mother (Madam Abena Frimpomaa), the inability of Kwame Kissiedu Kwaasi to take Letters of Administration or Probate after her death to clothe him with capacity to execute the transaction invalidated the sale.

Dissatisfied also with the decision of the Court of Appeal which reversed the judgment delivered in her favour, the plaintiff sought special leave of this court and subsequently lodged a further appeal to this court, on three grounds:

i. the judgment is against the weight of evidence
ii. the court below erred in admitting the notice of appeal filed on 26/01/2016 and treating same as additional grounds of appeal and
iii. the court below erred in applying the **nemo dat quod non habet** principle against the plaintiff when the evidence on record confirmed that both parties bought the land in dispute from the same grantor.

Ground 2 raises a procedural matter. We deem it appropriate to determine this before proceeding with an analysis of the grounds dealing with the ownership of the land in dispute.

The plaintiff had argued in the Court of Appeal that the defendant, after the trial court's judgment, filed a notice of appeal dated 13th November 2015 in which the sole ground of appeal was that the judgment was against the weight of evidence. However, the defendant changed lawyers and the new lawyer filed another notice of appeal on 26th

January 2016 in which three grounds of appeal were set out. Admittedly these two notices were all filed within the three month period prescribed by the rules for filing an appeal. The plaintiff invited the Court of Appeal to strike out the second notice of appeal filed without the leave of the court and to limit itself in the consideration of the appeal to the first notice of appeal. In its judgment dated 2nd May 2017, the Court of Appeal overruled the plaintiff and decided to treat the second notice of appeal as additional grounds of appeal. It was the position taken by the Court of Appeal which prompted the formulation of the second ground of appeal in the current appeal before us, i.e., that the court below erred in admitting the notice of appeal filed on 26th January 2016 and treating same as an additional ground of appeal.

Counsel for the plaintiff has submitted to us that the Court of Appeal ignored the fact that an appeal is a creature of statute whose rules and procedures should be strictly adhered to. According to counsel, the Court of Appeal in failing to do that committed a fundamental jurisdictional error. Counsel also submitted that the Court of Appeal erred in admitting the second notice of appeal and therefore all submissions founded on that notice were inadmissible and same should have been thrown out. Counsel also submitted that under the omnibus ground of appeal, the Court of Appeal erred in admitting 'issues' argued by the defendant as grounds of appeal and that it sinned against Rule 8(7) of C.I. 19 as well as the binding decision of the Supreme Court in the case of In **Re Asamoah (decd); Agyeiwaa & Others v Manu [2013-2014] SCGLR 909**. Counsel for the defendant supported the position taken by the Court of Appeal and insisted that the second notice was valid because it was filed within the time prescribed by the rules.

Rule 9(1), (2) and (3) of the Court of Appeal Rules C.I. 19 provides as follows:

9. Time limits for appealing

(1) Subject to any other enactment for the time being in force, no appeal shall be brought after the expiration of-

(a) **twenty-one days in the case of an appeal against an interlocutory decision;**

or

(b) **three months in the case of an appeal against a final decision unless the court below or the Court extends the time.**

(2) The prescribed period within which an appeal may be brought shall be calculated from the date of the decision appealed against.

(3) An appeal is brought when the notice of appeal has been filed in the Registry of the court below"

Also Rule 8(7) and (8) of C.I. 19 provides that:

(7) The appellant shall not, without the leave of the Court, urge or be heard in support of any ground of objection not mentioned in the notice of appeal, but the Court may allow the appellant to amend the grounds of appeal upon such terms as the Court may think just.

(8) Notwithstanding sub rules (4) to (7) of this rule, the Court in deciding the appeal shall not be confined to the grounds set out by the appellant but the Court shall not rest its decision on any ground not set out by the appellant unless the respondent has had sufficient opportunity of contesting the case on that ground.

The equivalent of the rules quoted above in the Supreme Court Rules, C.I. 16 is rule 6(6) and rule 8(1), (2) and (3).

Rule 6(6) The appellant shall not, without the leave of the Court, argue or be heard in support of any ground of appeal that is not mentioned in the notice of appeal.

(7) Notwithstanding sub rules (1) to (6) of this rule the Court-

(a) may grant an appellant leave to amend the ground of appeal upon such terms as the Court may think fit; and

(b) shall not, in deciding the appeal, confine itself to the grounds set forth by the appellant or be precluded from resting its decision on a ground not set forth by the appellant.

(8) Where the Court intends to rest a decision on a ground not set by the appellant in his notice of appeal or on any matter not argued before it, the Court shall afford the parties reasonable opportunity to be heard on the ground or matter without re-opening the whole appeal.

Rule 8(1) **Subject to the provisions of any other enactment governing appeals, a civil appeal shall be lodged within-**

(a) twenty-one days, in the case of an appeal against an interlocutory decision; or

(b) three months, in the case of an appeal against a final decision unless the court below or the Court extends the period within which an appeal may be lodged.

(2) The periods specified in sub-rule (1) shall-

(a) in the case of an appeal as of right, be calculated from the date of the decision appealed against; and

(b) in any other case, be calculated from the date on which leave is granted.

(3) A civil appeal is lodged on the date the notice of appeal is filed.

The import of rule 9 of C.I. 19 is that the jurisdiction of the Court of Appeal is invoked when a 'notice of appeal' is filed in the registry of the court. Only one notice of appeal is contemplated by the rule. After a valid notice of appeal has been filed any addition to the notice in the form of additional grounds or amendments must comply strictly with rule 8(7). The rule, however vests the Court with power to determine an appeal outside the grounds stated in the notice of appeal but this is a discretion granted to the court and not to the parties. An appellate court, therefore, should not without leave of the court permit any party to amend the grounds or argue grounds of appeal not stated in the notice of appeal.

The case of **Republic v Judicial Committee of the Central Regional House of Chiefs; Ex parte Aaba [2001-2002] SCGLR 545** which interpreted Rule 6 of C.I. 16, a rule which bears similarity to Rule 8(7) & (8) of C.I. 19 held that:

"Rule 6 of the Supreme Court Rules, 1996 (CI 16), did not permit an appellant to argue a ground of appeal that was not set forth in his notice of appeal. And rule 6(7)(b), which enjoined the court not to " confine itself to the grounds set forth by the appellant or be precluded from resting its decision on a ground not set forth by the appellant" was subject to rule 6(8); that rule meant no more than that the decision to rely on a ground not set forth by the appellant rested solely with the court when in any particular appeal before it the justice of the case required the court to rest its decision on a ground not relied on by the appellant in his notice of appeal. Rule 6(8) should not be taken as granting the appellant a general licence to abandon his obligations under the rules."

In the appeal before us, after the judgment of the trial court, the defendant invoked the jurisdiction of the Court of Appeal by filing a notice of appeal dated 13th November 2015 in which the sole ground of appeal was that the judgment was against the weight of evidence, adding that further grounds will be filed on receipt of the record of proceedings. No such further ground was filed. However, the defendant changed its lawyers and on

26th January 2016, the new lawyer filed another notice of appeal in which three grounds of appeal were set out. No leave of the court was sought to amend the notice of appeal or argue additional grounds of appeal in compliance with the rules. The second notice of appeal filed by the defendant is, therefore, alien to the rules and should have been struck out by the Court of Appeal.

It is important for counsel who wish to pursue their advocacy career in the appellate courts to be conversant with the rules of procedure and comply with its provisions when representing their clients. Failure to do that may have adverse and far reaching repercussions on the client's case as we have in this appeal. The Court of Appeal's reasons for treating the second notice of appeal as additional grounds of appeal was that the rules of court were supposed to be interpreted purposively to achieve speedy and effective justice which avoids delays and unnecessary expense to ensure that disputes between the parties may be effectively determined. The Court then cited the case of **Volta Aluminium Co. Ltd v Akuffo [2003-2005] 1 GLR 502 in** support of its decision.

We agree with the provision in Order 1 Rule 1 of the High Court Civil Procedure Rules C.I. 47 that rules of court are to be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided. In fact, this court in several decisions where the justice of the case required, has granted relief to parties caught by the failure to observe the rules. In the Valco case (supra) referred to by the Court of Appeal, this court ignored additional grounds of appeal filed without the leave of the court. Dwelling on the power vested in it by rule 6(7) of C.I. 16 not to rest its decisions solely on the grounds contained in the notice of appeal, the court exercised its discretion to take account of any of the void additional grounds which it considered helpful to the rehearing of the appeal. In exercising that discretion, the court relied on the rules but did not lay down any general rule that in all cases where the rules were not complied with, relief would come to the defaulting party.

In the case of **Republic v Judicial Committee of the Central Regional House of Chiefs; Ex parte Aaba (supra)** the appellant failed to exercise the right to file additional grounds of appeal on an issue before the Supreme Court. When the appeal came on for hearing, he invited the Supreme Court to consider grounds of appeal which were argued in the Court of Appeal but not repeated in the Supreme Court. Adzoe JSC, responding to the effect of breach of some provisions of the rules such as those dealing with appeals formulated the legal position in the following words at page 552:

"I find it difficult to accept that invitation. The Rules of the Supreme Court, 1996 (CI 16) (and all other courts) are there to be observed. They form an important component in the machinery of the administration of justice, and the courts must not, as a general rule, take lightly any non-compliance with them, even though technicalities are not to be permitted to undermine the need to do justice."

It is our understanding that the discretion given to the court to grant relief against non-compliance with the rules should be exercised on a case-by-case basis having regard to the facts of a particular case, the conduct of the parties, the wording of the rules breached and the justice of the case. There are some breaches of the rules which the ever loving arms of the saving grace provided in the non-compliance provisions will embrace. Other breaches which are cardinal ought to be strictly enforced to save the rules from the danger of being wiped off the statute books for non-compliance. In the case before us, the rules were deliberately or recklessly ignored by the defendant. The approach adopted by the defendant was not a breach of the rules so to speak but a line of action unknown to the rules. The two are different. The ratio in the Valco case cited by the Court of Appeal and the present appeal are different. We do not think we should treat the two alike. In our opinion, if the defendant had exercised diligence, it would have saved itself from this predicament.

The Court of Appeal after treating the second notice of appeal as additional grounds of appeal proceeded to determine those grounds. A reproduction of the grounds the Court of Appeal treated as additional grounds will bring to the fore the arguments being

presented by the plaintiff regarding the disparity between the grounds stated in the notice of appeal and the grounds argued in the written submissions. The grounds appearing in the second notice were as follows:

a. The judgment is against the weight of evidence.
b. The court erred when it proceeded to give judgment even though a site plan it had ordered had not been presented to the court by the Regional Surveyor.
c. The Court erred in awarding judgment to the plaintiff on the reliefs sought when the identity of the land had not been determined.
d. Further grounds of appeal will be filed on receipt of the Record of Proceedings.

However, reading through the written submissions filed by the defendant in support of those grounds, the defendant failed to present any arguments in support of the grounds. What the defendant argued before the Court of Appeal were described as "issues" which counsel couched as follows:

1. The first issue is whether or not the identity of the land in question was settled at the time the court ruled.
2. The second issue of our appeal is whether or not Kwame Kissiedu had capacity to alienate the land.
3. The third issue is whether or not the land in question is family land; if it is whether or not it was legally sold to the plaintiff when Kwame Kissiedu alienated the land single-handedly and without recourse to the family Head and the entire family.
4. The fourth issue to be considered in our opinion is whether or not the Nemo Dat Quod Non Habet rule cannot be exercised in favour of our client.

We wish to state for the benefit of the legal profession that issues for trial are set down in a trial court to form the basis of the matters the trial judge is called upon to determine. Issues have no place in the appellate courts. In those courts, submissions are made based on each ground of appeal stated in the notice of appeal or additional grounds of appeal permitted by the court. Apart from the grounds in the notice of appeal, an appellant cannot argue any ground not listed in the notice of appeal in compliance with Rule 8(7)

of C.I. 19 and 6(7) of C.I. 16. Such a default on the part of an appellant cannot be cured by any purposive interpretation of the rules or the comfort granted by the court in some cases of non-compliance with provisions of the rules.

In this court's case of **In Re Asamoah (decd); Agyeiwaa & Ors v Manu [2013-2014] 2 SCGLR 909** cited by counsel for plaintiff, a notice of appeal to the Supreme Court by the appellants in that case stated as the ground of appeal the omnibus ground that the judgment was against the weight of evidence. It further stated that the court erred when it held that in the absence of a counterclaim it could not grant the appellant's relief. Then, finally, that further grounds of appeal would be filed upon receipt of the record of proceedings. The appellants in that case did not apply for leave to argue additional grounds of appeal on receipt of the record of appeal in compliance with Rule 6 of the Supreme Court Rules, 1996, (C.I. 16), and none was filed. However, in their arguments contained in their statement of case, the appellants on their own initiative, abandoned the grounds filed in their notice of appeal and proceeded to argue grounds fashioned as "issues presented".

This court speaking through Akamba JSC at pages 916-917 held as follows:

"**the defendants appear to have adopted a totally different approach to arguing their appeal than is prescribed by rule 6 of the Supreme Court Rules, 1996 (CI 16). They appear to be oblivious of the requirements of CI 16 and, on their own initiative, merely abandoned the grounds filed in the notice of appeal and then proceeded to argue grounds fashioned as 'issues presented' in their statement of case……. The plaintiff refused to swallow the bait evident in the defendants' lapses which the plaintiff described as a failure to address the fundamental issues raised in their appeal. There being no record of any leave having been sought by and granted to the defendants to argue any additional grounds of appeal, the plaintiff also refused to respond to those grounds purportedly argued and rightly so; this court has no option than to strike out those so-called 'issues' presented and argued by the defendants, which we hereby do**.

The ratio in In Re Asamoah (supra) bears resemblance to the appeal before us. The sole ground of appeal was the omnibus ground. The other ground was that further grounds would be filed upon receipt of the record of appeal. No leave was sought to argue or file additional grounds and none was given by the court. What the defendant purported to argue as additional grounds were those contained in the second notice of appeal which were fashioned as 'issues' and very different from the grounds specified in the second notice of appeal. The purported grounds of appeal argued by the defendant in its written submission not having complied with rule 8(7) of C.I. 19 should have been struck out by the Court of Appeal. The failure to strike the defendant's submissions and treating them as additional grounds in its judgment was delivered per incuriam the decision of this court in **In Re Asamoah (decd); Agyeiwaa & Ors v Manu (supra)** which was binding on the Court of Appeal. We, therefore, allow ground 'b' of the plaintiff's appeal and strike out the second notice of appeal dated 26th January 2016 as well as the submissions fashioned as 'issues' in the written submission of the defendant filed on 13th October 2016. The implication of this order is that the defendant in the Court of Appeal having failed to put forward any arguments in support of the only ground filed, i.e., the judgment against the weight of evidence must fail in its bid to overturn the judgment of the trial court.

This conclusion should have disposed of this appeal. However, because an appeal is by way of rehearing and in view of the fact that the plaintiff further argued grounds 1 and 3 in the notice of appeal, we deem it our duty to review the evidence in this case and determine whether the trial court had any basis to arrive at the conclusion it did. Was the Court of Appeal justified in reversing the findings made by the trial court?

Grounds 1 and 3 will be considered together. The disposal of one will inevitably dispose of the other. The kingpin in this whole dispute as noted at the beginning of this opinion is Kwame Kissiedu Kwaasi. The Circuit Court held that Kwame Kissiedu Kwaasi after selling the land to the plaintiff had no other land to sell to the defendant. Thus, by the principle of **nemo dat quod non habet,** the defendant did not acquire any interest in that land. The court found the plaintiff to be the owner of the land and granted her the

reliefs sought. This finding of the trial court was reversed on appeal by the Court of Appeal which found that the land in dispute was family land and since Kwame Kissiedu Kwaasi was not the head of family, he could not validly alienate the land to the plaintiff without lawful authority of the family. In allowing the appeal the Court of Appeal also relied on the principle of **nemo dat quod non habet** against Kwame Kissiedu Kwaasi. Both courts therefore relied on the same principle of law in coming to different conclusions.

Counsel for the parties referred this court to pieces of evidence and case law which justified the conclusion reached by the court which decided in their client's favour. This must be resolved by this court one way or the other in order to bring closure to this litigation. Who owns the land which is the subject matter of dispute? Has Kwame Kissiedu Kwaasi any role to play in the disposal of the land?

In his evidence before the Circuit Court, Kwame Kissiedu Kwaasi who testified on behalf of the plaintiff stated that the land is the self-acquired property of his mother Madam Yaa Frimpomaa Thompson. In the document, exhibit A which is the indenture Kwame Kissiedu Kwaasi executed in favour of the plaintiff, he described the land in dispute as an ancestral land of Kissiedu Kwaasi family of a section of the Anonkore Clan of Larteh-Akwapim and himself as the head and lawful representative. There was, therefore, a clear conflict in the testimony of Kwame Kissiedu Kwaasi regarding the original ownership of the property in dispute. The Court of Appeal after reviewing the evidence concluded that since the oral evidence of Kwame Kissiedu Kwaasi conflicted with the documentary evidence in exhibit A, the court would prefer the averments in the documentary evidence to that of the oral one. The court, therefore, found that the property in dispute did not belong to Kwame Kissiedu Kwaasi's mother but was family property. Relying on the cases of **Kwan v Nyieni [1959] GLR 67 CA** and **Dotwaah v Afriyie [1965] GLR 257 SC**, counsel for the respondent justifying the Court of Appeal's ruling invited this court to follow the holdings in the two cases and dismiss the appeal.

In the case of **Kwan v Nyieni (supra)** after a purported removal of Osei Kojo as head of family and the appointment of Kojo Kwan as the new head, Osei Kojo together with

one female member of family mortgaged four cocoa farms belonging to the family to Kwesi Nyieni. Upon Nyieni's advertising the said four farms for sale in exercise of a power of sale under the mortgage, Kojo Kwan, purporting to act as head of the family, instituted an action against Osei Kojo and Nyieni. On appeal, Van Lare Ag. CJ expounded the principle that a deed of conveyance, mortgage or lease of family land which is on the face of it executed by the head and another member, upon proof timeously made that its execution was without the knowledge and consent of all the principal members of the family, is null and void. The other principle of law stated in this case is the head of family's capacity to represent the family in suits filed or brought against the family and the exceptions to that general principle. Kwan's cases did not go into validity of grants made by the family head without the consent of the principal members or grants made by the principal members without the family head or lastly grants by ordinary members of the family without the involvement of the head and principal members.

However, in the case of **Dotwaah v Afriyie (supra)**, the first defendant had mortgaged land originally belonging to one Addo, an Akan, who had died intestate to the second defendant, in spite of the protests of the plaintiff who claimed that she had been appointed successor to the one who had succeeded Addo and therefore constituted the immediate family of Addo. It was the case of the plaintiff that without her consent and concurrence no valid transaction with Addo's land could be effected. She sued for a declaration that the farm in dispute was family property, and that the mortgage of the farm was void and sought an order for recovery of possession.

On appeal, Ollennu JSC posited as follows:

The law regulating dealings with family property is well-settled, and is as follows: The head of the family or the successor is an indispensable person in the alienation of family land; and alienation of family property made by the head of the family or a successor purporting to be with the consent and concurrence of the principal members of the family is voidable at the instance of the family if they act timeously; but a conveyance made by any other member without the indispensable person, the head of the family or the

successor as the case may be, is void ab initio and confers no interest or title in the land on the purchaser or mortgagee.

We have no doubt about this proposition of the law. It is still valid in our jurisprudence. We, however, believe its proper application must depend on peculiar facts and the justice of a particular case. Thus, in the case of **Malm v Lutterodt [1963] 1 GLR** 1, the then head of the Lutterodt family, with the concurrence of the other principal elders of the family, conveyed a portion of the family land to R. L. in 1953. R. L. immediately took possession of the land and remained in undisturbed possession thereof until 1960, when C. M. entered the land, removed R. L.'s pillars and started to erect his own. When challenged by R. L., C. M. claimed that the land had been sold in 1943 to his late father, Peter Malm, by the Lutterodt family, and that it had now devolved upon himself and his sister. R. L. sued C. M. and his sister in the High Court, Accra. On appeal Crabbe JSC (as he then was) after reviewing the law that there can be no valid transfer of family property except by the head of the family acting with the consent and concurrence of the principal elders noted that in the instant case the head of the Lutterodt family and the principal members did not know about this sale of the family land. Crabbe JSC did not nullify the sale based on the general proposition of the law, but qualified the legal proposition that "**The principle here enunciated must depend for its application on the circumstances of each case**." Crabbe JSC then cited with approval Smith J's dictum in Insilhea v. Simons (1899) Sar. F.L.R. 104 which also gave judicial blessing to the Court of Appeal case of Bayaidie v. Mensah Smith J. (F.C.L. 150) which decided that in situations such as this, the sale is not void but capable of being opened up at the instance of the family, provided they acted timeously, and upon the revision of the contract, the purchaser can be fully restored to the position he stood before the sale. At the end of the day, Crabbe JSC did not void the sale but came to the conclusion that the Lutterodt family had full knowledge of the sale to Peter Malm by their member in 1943 and that by conduct adopted or ratified the transaction.

What then are the peculiar facts of this appeal which would warrant the strict application of the general principle enunciated in **Dotwaah v Afriyie** (supra), or Crabbe JSC's

qualification in **Malm v Lutterodt [1963] 1 GLR** 1? The plaintiff claims to have bought a parcel of land at Okorase near Koforidua in the year 2000 from Kwame Kissiedu Kwaasi representing the Kissiedu Kwaasi family. She initially wanted to purchase 50 acres, but due to financial constraints, purchased only 20 acres. Later, her grantors informed her they had sold the remaining 30 acres to Naggesten Farms. When she travelled outside the country and returned, she realised that portions of her land had been encroached on. She put up warnings and caused announcements to be made within the vicinity, and subsequently commenced an action at the Circuit Court against "The Developers" since she could not trace the said persons. After substituted service, Mckeown Investment Ltd., the defendant, entered appearance and contested the case to finality. The defendant claims to have acquired 46.96 acres of land from their grantor, Naggesten Farms, who themselves acquired it from a family at Larteh to which Kwame Kissiedu Kwaasi belongs. The defendant's land includes the 20 acres already sold to the plaintiff, hence the dispute. The Court of Appeal concluded that the land was a family land and Kwame Kissiedu Kwaasi not being a head of family had no capacity to sell the land to the plaintiff. The Court of Appeal also faulted the plaintiff for not exercising "**due diligence as the recitals in the conveyance executed by her and her grantor revealed that her grantor styled himself as the head of his family and she should have investigated but failed to do so**."

Is the disputed land for a family and if so which family? The plaintiff in her evidence contained in her title deed tendered as exhibit 'A' stated that the land in dispute belonged to the Kissiedu Kwaasi family of the Anonkore Clan of Laterh. However, DW1 Stephen Addo in his evidence at page 47 stated that the disputed land is family land and at page 50 provided particulars of the family Kwame Kissiedu Kwaasi and DW1 belonged to as Asona. This is confirmed in the title deeds, Exhibit 3, executed in favour of defendant's grantors, Naggesten. However, at page 53 line 9, DW1 changed his story on the ownership of the disputed land from the Asona family to the Danquah family.

This court has taken judicial notice of the fact that in Ghanaian traditional family practices, a person could belong to multiple family units with descriptions such as Clans, lineage,

wider family, immediate family, etc. Each of these family units have their own heads and principal members and own properties which may be communal and permeate the various branches. It is critical in such disputes where family land is an issue for the evidence to state precisely which unit within the family claims or owns the land. The case of **Atta v Amissah [1970] CC 73** is authority for the multiple units of the family and the need to identify which unit owns property. In that case the Court of Appeal held that:

"It is settled customary law that upon the death of a person intestate, although his self-acquired property becomes the property of the whole family, the immediate and the wider family together, the right to the immediate or beneficial enjoyment in it and to the control, use and present possession of it vests in the immediate or branch family alone. If the property is held by tenants, the right to the landlord's benefits vests also in the immediate family alone. It is the immediate family, and not the extended family, which has the power to alienate the property by virtue of its possession of the right to the beneficial enjoyment of the property."

Also in **Ennin v Prah [1959] GLR 44**, one of Kofi Nkum's nephews, Isaac Ennin, was away in the United Kingdom on scholarship for higher studies when the properties were sold, as he said, without his knowledge. In 1957 Ennin instituted proceedings against the purchaser Prah in the Agona Native Court "B" of Nsaba. His main contention was that Kofi Nkum's immediate family was itself only one of four branches of a larger Twidan family. Each branch had its head, and there was an over-all Head and Elders of the whole Twidan family. The sales had been without the knowledge and consent of the over-all Head and Elders, and were therefore bad. Isaac Ennin accordingly claimed a declaration that the sales of the farms were null and void, and should be set aside, and recovery of possession ordered to him.

Adumuah-Bossman J (as he then was), held that **"a claim to set aside the sale of family property on the ground that it was made without the consents required by customary law, must be made timeously, and under circumstances in**

which, upon the rescinding of the bargain, the purchaser can be fully restored to the position in which he stood before the sale."

This rule was enunciated by the Full Court in Bayaidie v. Mensah (Supra), and has since been applied in several cases, notably Manko & ors. v. Bonso & ors. (3 W.A.C.A. 62). It is clear that a claim made in 1957 to set aside sales made in 1941, 1942 and 1944 can hardly be said to be a "timeous claim." It would clearly be inequitable, and contrary to the rule in Bayaidie v. Mensah, to entertain and allow such a claim.

The question of identifying the family which owns this disputed land is made worse by the fact that two official search results from the Eastern Region Lands Commission to determine the registration and ownership status of the 50 acres of land tendered by the plaintiff, exhibits B and D have multiple grantors conveying different plots and acres of the land to prospective purchasers. A quick glance at the search results at page 116 would reveal vendors of the 50 acres of land between 1984 and 2014, mentioned as Beatrice Afua Obuo & Cardina Apparama, Emmanuel Kwabena Larbi, Opanyin Emmanuel Amponsah Atiemo, Benjamin Tetteh, Stephen Alfred Tagoe, Evelyn Doku, Madam Gladys Yirenkyiwah, Madam Elizabeth Darkoa, Emmanuel Kwasi Awuah, Emmanuel Owiredu Yirenkyi, Nana Yaw Osiakwan II, Kwame Kissiedu Kwaasi and Daniel Addo Danquah all registered in the records of the Land Commission. In circumstances like this, how will a prospective purchaser know the actual family which owns the property except to rely on the good faith of the prospective grantors? We find it more probable to believe that that large tract of land is owned by a large lineage from Larteh-Akwapim and that branches within the lineage could make grants to prospective purchasers as evidenced by majority of the names of the vendors mentioned above which bore semblance to Akwapim names. Three families are mentioned in this case. They are the Kissiedu Kwaasi family of the Anonkore Clan of Laterh, the Asona family and the Danquah family.

The challenges the courts continue to face with accurate maps, reports and data in resolving land disputes bring to the fore the unsatisfactory nature of land administration in this country. Twenty-Five years after the passage of the Land Title Registration Act,

1995, PNDCL 152, only the Greater Accra Region and Kumasi metropolis have been declared registrable districts for the purposes of title registration to land. The remaining fifteen out of the sixteen regions in the country continue to grapple under the weaknesses of registration of instruments affecting land under the Land Registry Act, 1962 (Act 122). Chief among these are wasteful and unprofitable litigation arising from uncertainties regarding interests in land by those who hold them and the extent of their interest.

The mischief the passage of the Act was sought to cure i.e. "**to give certainty and facilitate the proof of title; to render dealings in land safe, simple and cheap and prevent frauds on purchasers and mortgagees**" continue to elude prospective purchasers in almost all the regions in the country. Typically, with registration under Act 122, innocent purchasers for value no matter how diligent their inquiries are always susceptible to falling victim to unscrupulous members of families or subjects of stools who indulge in multiple sales of land.

Section 34 of Act 122 which makes it a second degree felony for a person to purport to make a grant of a piece of land to which he has no title or purport to make a grant of a piece of land without authority or makes conflicting grants in respect of the same piece of land to more than one person, has hardly been utilized to prosecute offenders in such double land transactions to deter them and others with like minds from continuing with their criminal activities.

Land represents the wealth of a nation. It plays a significant role in the economic developments of a country. Where a country's land administration is weak, it could have a negative impact attracting foreign investment. Investors, especially, prefer certainty and safe dealings in land. It is about time our policy makers came out with a comprehensive policy regarding land ownership, title and administration and research into why land transactions in some regions like Ashanti appears to be safe under Act 122. A second look could also be made at the current constitutional provision reverting land in the Stools and Families as against the pre-1969 land administration system where the Presidential Trusteeship of land was operational.

Apart from the real identity of the family which owned the land in dispute, there were other thorny issues worth considering. One piece of evidence on record which caught the eye of the trial judge but escaped the scrutiny of the Court of Appeal was the identity of the vendor who granted the land to the parties. It is undisputed that the plaintiff bought her land from Kwame Kissiedu Kwaasi purporting to be the head and lawful representative of the Kissiedu Kwaasi family of the Anonkore clan of Larteh. This can be found at paragraph 4 of her Statement of Claim, paragraph 7 of her Reply and in her evidence-in-chief.

In the case of the defendant, it deposed in paragraphs 5, 9 and 16 of its Defence and Counterclaim that it acquired the land from Naggasten Farms who were the bona fide owners of the land. On how Naggasten Farms came by the land, this is the testimony of DW1 Stephen Addo reproduced at pages 47-48 of the record:

"In 2004 I had information that someone had erected pillars around our land. I went to Larteh to ask my uncle about this development. My uncle is Kwesi Danquah. He told me he had not sold any land to anybody. I then came to Koforidua and asked my brothers about it. They said they heard Naggesten Company had bought the land. I went to Naggesten Company about whether he was the one who had bought the land. **The Company admitted and it was one Kwame Kissiedu who sold the land to them**. Naggesten said he bought 47.8 acres for GH50,000.00. I went back to inform my uncle Kwasi Danquah. Naggesten also said he had paid GH27,000.00 as part payment to Kwame Kissiedu. Kwasi Danquah said he would not accept GH50,000.00 for the large tract of land. The family met with Kwame Kissiedu and asked him to refund the GH27,000.00 he had collected. Kwame Kissiedu said the money was not there. As a result of this, we agreed to see Naggesten for a top-up. We met with Naggesten and we agreed to collect GH30,000.00 in addition to the GH50,000.00. Naggesten agreed and paid the entire sum in the presence of Kwame Kissiedu. **The land was sold by Kwame Kissiedu."**

During cross-examination of DW1 at page 51 of the record, the following dialogue is recorded between him and counsel for the plaintiff:

"Do you agree that it was Kissiedu who sold the land to Naggesten

A. **Yes**

Q. I am putting it to you that the shaded portion as indicated on the plan indicates the land you sold to Naggesten.

A. It is not correct. **Kwame Kissiedu sold the whole land to Naggesten**."

In the case of DW2, Alfred Naggesten Tetteh, the Director of the defendant's vendor, during his cross-examination the following dialogue ensued between him and counsel for the plaintiff at page 63 of the record:

"Q. You have told the Court you bought your land from **Kwame Kissiedu**. Is it correct?

A. **Yes, my Lord**.

Q. And that he sold 50 acres of land to you. Is that correct?

A. Yes, about 50 acres

Q. I put it to you that Kwame Kissiedu could not have sold about 50 acres of land to you because he had earlier on sold 20 acres out of the 50 acres in the year 2000 to the Plaintiff.

A. I insist that he sold 50 acres of land to me."

We have taken pains to quote in extenso the evidence of the defendant's witnesses not because we want to shift the burden of proof on the defendant in a land dispute. We have done so because the defendant having counterclaimed for a declaration of title then also equally bore the same burden as the plaintiff to prove its title. There is overwhelming evidence on record that it was Kwame Kissiedu Kwaasi, the grantor of the 20 acres to the plaintiff who sold the 50 acres of land including that of the plaintiff to the defendant's grantor. Before Naggesten was given the legal title, the head of the Asona family sourced for a top up sum of Ghc30,000.00 before executing the documents. This was paid in the

presence of Kwame Kissiedu Kwaasi before the document of title was signed by the head of the Asona family and witnessed by Kwame Kissiedu Kwaasi who is described as secretary to the family. Kwame Kissiedu Kwaasi, therefore, conveyed the equitable title while the head of the Asona family executed the legal title.

The evidence having been overwhelming that Kwame Kissiedu Kwaasi sold the property in dispute first to the plaintiff in 2000 and later to the defendant's grantor in 2006, the Court of Appeal erred in its opinion that it was the Asona family headed by Kwasi Danquah who sold the land to the defendant's grantor and therefore the defendant had its title from the person with legal authority to sell the land. Even if we were to apply the legal principle enunciated in **Dotwaah v Afriyie (supra),** the facts in this case reveal that the grantor of the parties held positions higher than a principal member of the immediate and wider lineage which is said to own the land. Thus, to avert any suspicion of collusion on the part of the family defrauding the plaintiff in the grant earlier made to her, this court will apply the Dotwaah v Afriyie principle to the peculiar facts of this case.

In our opinion, it would be inequitable to deny the plaintiff title to the land she was granted by Kwame Kissiedu Kwaasi. In the case of Dotwaah, the grantor was an ordinary member of the family who mortgaged the land while in the peculiar facts of this case the grantor is first recorded as the head of the Kissiedu Kwaasi family and later in the defendant's grantor's documents described as the secretary to the Asona family. In the peculiar facts of this case, one grantor conveyed the same land to both the plaintiff and the defendant's grantor which was not the case in the Dotwaah's case. Also, in the peculiar facts of this case, the plaintiff registered her land before evidence was taken and judgment delivered whereas the defendant who had counterclaimed had not registered his land. Further, in the peculiar facts of this case, the plaintiff was in possession of the land before the grant was made of the same land to the defendant. Though this fact became known to the Kissiedu Kwaasi, Danquah and Asona families, they took not step timeously to challenge the grant made to her and to set it aside.

We are not prepared to allow Kwame Kissiedu Kwaasi or his immediate and wider family to benefit from this double sale of the land in dispute. In as much as the plaintiff's

possession is earlier in time to that of the defendant and on the preponderance of probabilities, the trial judge was right in finding as a fact that the plaintiff bought her land first. The learned trial judge was also right in holding that the grantor of the plaintiff could not six years after the sale to her grant the same land to the defendant's grantor. We, therefore, allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the trial Circuit Court in favour of the plaintiff.

N. A. AMEGATCHER
(JUSTICE OF THE SUPREME COURT)

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

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

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

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