IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)
PWAMANG, JSC
TORKORNOO (MRS.), JSC
HONYENUGA, JSC
PROF. MENSA-BONSU (MRS.), JSC

CIVIL APPEAL
NO. J4/36/2019

25TH NOVEMBER, 2020

EDWARD KWASI SANTENG
(NII OWORSHIKA) ……. PLAINTIFF/APPELLANT/RESPONDENT/RESPONDENT

VRS

1. DR. EDWARD ACQUAH
   PER HIS WIFE, AGENT, REPRESENTATIVE/LAWFUL
   ATTORNEY JOYCE ACQUAH (MRS.) ……. 1ST DEFENDANT/RESPONDENT APPELLANT
2. MRS. JOYCE ACQUAH ……. 2ND DEFENDANT/RESPONDENT/APPELLANT
3. MERCY OFORWAA ……. 3RD DEFENDANT/RESPONDENT/APPELLANT

S. O. DARKO …… CO-DEFENDANT/RESPODENT/RESPONDENT

JUDGMENT

HONYENUGA, JSC:-

Introduction

On the 25th day of November, 2020, we delivered judgment in this appeal but deferred our reasons, which we now give. We unanimously dismissed the appeal and affirmed the judgment of the Court of Appeal.

The parties in this appeal would finally see the end of litigation for having been litigating in the Courts of competent jurisdiction for about twenty years. This appeal is from the Judgment of the Court of Appeal dated the 16th day of February, 2017. The appellants (that is the defendants/co-defendant/respondents/appellants) were the defendants and Co-defendant respectively in the High Court. The Co-defendant/respondent/appellant was a counterclaimant in the trial court and succeeded in his Counterclaim but lost on appeal at the Court of Appeal when the respondent herein (that is the plaintiff/appellant/respondent) appealed against the judgment of the trial High Court. In this appeal, the first, second and third defendants/respondents/appellants together with the co-defendant/respondent/appellant would be designated as the first, second and third appellants and the co-defendant/appellant respectively. The plaintiff/appellant/respondent would be referred to as the respondent.

Background to the Appeal

The respondent's case is that on the 14th October 1999, the 1st appellant agreed to sell his piece or parcel of land situate lying and being at Oyarifa – Accra to him at an agreed purchase price of Forty-two Million old Cedis (¢42million). The respondent averred that it was agreed that, he paid a deposit of Four Million cedis (¢4million) at the rate of ¢4,500 to the English Pound (£) as part-payment for the land and a receipt dated 14th October 1999 was issued to him. The said amount was to be used by the first appellant to prepare an Indenture to convey the land to him. The respondent further averred in his statement of claim that the receipt issued to him is entitled "LAND SALE RECEIPT", which expressly stated that the first appellant had relinquished his interest in the land and it states:-

> *"This is to certify that I the undersigned Edward Acquah … of Post Office Box ….. in the Greater Accra Region of the Republic of Ghana have received the sum of four million cedis only (¢4,000,000.00) being PART payment of purchased money made to cover a plot of land sold and delivered to Mr. Edward Kwasi Santeng of P. O. Box 1397 Accra ….*

This land is situate lying and being at OYARIFA – Accra in the Greater Accra Region of the Republic of Ghana being the BONAFIED property of the said Mr. Edward Acquah and the same is free from all encumbrances whatsoever and as free from any family on tribal claims as possible.

This land is hereby entirely and delivered to the said Mr. Edward Kwasi Santeng of Accra of his heirs, administrators or assigns forever for the said amount paid in acknowledgment of which I hereby give this receipt.

Dated at Accra this 14th day of October 1999".

This sale Receipt was signed by both the Vendor and the Purchaser and witnessed by two witnesses.

He pleaded that the second appellant, the wife of the first appellant who is his agent went to the respondent's Solicitor and assured him that an Indenture was being prepared to enable the land to be conveyed to the respondent. He further pleaded that the second appellant provided the particulars of her bankers to the respondent to pay the outstanding balance of the purchase price when an Indenture was executed between the parties but a demand of ten million cedis (¢10million) was rather made on the respondent. Instead of presenting an Indenture, the second appellant rather threatened to sell the land to the third appellant. As a result, the respondent caused a writ to be issued at the Circuit Court and paid the outstanding purchase price of Thirty-Eight Million old Cedis (¢38million) into Court but had to discontinue the action. The respondent averred that he had earlier deposited sand and stone on the land in dispute. The respondent had to retrieve the outstanding balance of the purchase price and paid it into the joint account of the first and second appellants. The respondent was forced in the circumstances to institute a fresh writ at the High Court which was amended claiming specific performance of the said agreement, damages for breach of contract in lieu of or in addition to specific performance, general damages for trespass, an order setting aside the purported sale to the co-defendant/appellant and perpetual injunction. After the institution of the High Court action, the respondent joined the co-defendant/appellant because he pretended that he was settling the land dispute between him and the third

appellant, who scattered the respondent's sand and stone deposited on the land, but the co-defendant/appellant turned round to state that he had rather purchased the land in dispute.

On the other hand, the appellants (first, second, third defendants and co-defendant) pleaded that the first appellant was in dire need of money to solve some pressing issue and so agreed to sell his land to the respondent. However, time was of the essence of the agreement to sell the land. The appellants averred in their Statement of Defence that the agreed purchase price was Eight Thousand, Seven Hundred and Fifty British Pounds (£8,750.00) and the full purchase price was to be paid within three months. Further, the first and second appellants gave their bank account details to the respondent to pay in the agreed purchase price within the stipulated period. They further averred that the respondent failed to pay the balance as agreed and consequently, the first appellant terminated the agreement, negotiated with the co-defendant/appellant and sold the land in dispute to him. According to the first appellant, he duly informed the respondent about the re-sale and tried to refund his money to him but he declined it. The 1st appellant further stated that the respondent's inability to fully pay for the land hampered his inability to provide an accurate indenture. The co-defendant/appellant then proceeded to lodge a counterclaim for a declaration of title to the land in dispute as a bonafide purchaser for value and perpetual injunction restraining the respondent, his agents and assigns from interfering with his land.

Upon hearing the parties and their witnesses, the learned trial High Court Judge dismissed the respondent's claim and entered judgment for the co-defendant/appellant on his counterclaim. The respondent appealed to the Court of Appeal and on the 16th December 2017, the Court reversed the judgment of the High Court and granted the Respondent's claim and dismissed the co-defendant's/appellant's counterclaim. The appellants have lodged the instant appeal before this Court, seeking the reversal of the judgment of the Court of Appeal. The appellant has thus filed a sole ground of appeal as follows:-

Ground of Appeal:

The Judgment is against the weight of evidence.

It is trite that an appeal is by way of rehearing and this Court in **Okine & Anor v Amoah VI [2013-2014] 2 SCGLR 1358** and other respectable authorities succinctly stated that by this, an appellant is in a good position as the trial Court to determine the real issue in controversy from the pleadings and evidence and to draw inferences from the specific fact that are established. Further, a ground of appeal which involves such an omnibus ground therefore invites this court to look at the facts on record to ascertain whether the conclusions reached by the Court of Appeal are borne out or not and to arrive at its own conclusions. In **Republic v Conduah; Ex parte Aaba (Substituted by) Asmah [2013-2014] 2 SCGLR 1032 Holding (2)**, this Court held that the effect of an appeal on the ground that "the judgment is against the weight of evidence" was to give jurisdiction to the appellate court examine the totality of the evidence before it and come to its own decision on the admitted and undisputed facts. By that ground of appeal, the appellant was implying that there were pieces of evidence on record which, if applied properly and correctly, could have changed the decision in his favour, or that certain pieces of evidence had been wrongly applied against him. The onus in such instance was on the appellant to clearly and properly demonstrate to the appellate court, the lapses in the judgment being appealed against. See also **Djin v Musah Baako [2007-2008] 1 SCGLR 686 at 687 holding (1), Akufo-Addo v Catheline [1992] 1 GLR 377 SC, Abbey & Ors. v Antwi V [2010] SCGLR Holding (4)** and a host of other authorities.

Before we proceed, it must be stated that on the 14th July, 2020, Counsel for the respondent sought leave and was granted to withdraw the preliminary legal objections to the notice of appeal filed on the 9th March, 2020 and same was struck out.

On this ground, the complaint of Counsel for the appellants is that the Court of Appeal was wrong to have ordered specific performance for the contract of sale in favour of the respondent who failed to pay for the plots of land when he was supposed to do so.

Specific performance is a remedy available to a party if the other party refuses to complete the sale. It is an equitable remedy which is granted at the discretion of the court. Specific performance is the principal remedy for breach of contract for the sale of land. It is noted that there is no doubt that the two lower courts i.e. the High Court and the Court of Appeal after reviewing the authorities, acknowledged that specific performance would lie in respect of section 3(2) of the Conveyancing Act, 1973, Act 175 which permits the rules of equity relating to unscionability, fraud, duress and part-performance to override the requirements of section 2 of Act 175. The trial Court, on pages 332 to 333, held as follows:

> *"In the instant, the 1st Defendant acknowledged receipt of the sum of Four Million Cedis paid by the plaintiff in Exhibit A. The exhibit among others state that the amount represented "part-payment of the purchase money", covering the sale of the disputed land to him by the 1st Defendant. I accordingly hold that the payment of the money constituted sufficient act of part performance which could justify a grant of an order of specific performance".*

However, the trial court, after holding that specific performance would lie concluded at page 336 of the record of appeal, thus:-

> *"On the available evidence, the plaintiff did not show himself ready desirous, prompt and eager to perform his portion of the bargain. I shall accordingly refuse the order of specific performance and same is dismissed".*

For the learned Justices of the Court of Appeal, they after citing **Koglex Ltd. (No.2) v Field [2000] SCGLR 175** came to the conclusion at page 79 (Volume 111) of the record of appeal that the money paid by the respondent (plaintiff) constituted an act of part performance for which an order of specific performance would lie. The learned Justices further declared thus:-

> *"Thereafter instead of making a finding on whether or not the plaintiff was entitled to the remedy of specific performance sought, the court suo motu went into a discussion about the failure of the plaintiff to pay the purchase price on time".*

Indeed, **Koglex Ltd. (No. 2) v Field** supra, this Court held in holding (4) in a review of the majority decision thus:-

> *"(4) The relief of specific performance would lie whenever, as in the instant case, agreement between parties had got to such a stage that it would amount to fraud on the part of the other party to refuse to perform his side of the bargain. And contrary to the decision of the majority of the Supreme Court, there had been a trend towards accepting that payment of money could be a sufficient act of part performance to support an order of specific performance …."*

Acquah JSC (as he then was and of blessed memory) at page 178 of the report succinctly stated as follows:-

> *"Indeed to establish facts amounting to part performance, what is required of a plaintiff is to show that he had acted to his detriment and that the acts in question are such as to indicate, on a balance of probabilities, that they were performed in reliance of a contract with the defendant"*

See also **Kotey v Koletey [2005-2006] SCGLR 368 Holding (1).**

We are in agreement with the finding and holding of the learned Justices of the Court of Appeal that specific performance should lie against the appellants for it is clear from the evidence on record that the payment of Four Million cedis as stated in the Exhibit A, the comprehensive receipt constituted an act of part performance on the part of the respondent.

Furthermore, a perusal of the pages 333 to 335 of the Judgment of the trial High Court revealed that the learned trial Judge did not evaluate the evidence on record before coming to his conclusion thus:-

> *"From Exhibit A and the evidence generally, there is little indication as to when the full purchase price was to be paid. According to the statement of defence, it was to be paid within three months. This the plaintiff denied".*

The respondent testified that the amount was to be paid upon the preparation and execution of the title documents. It is noteworthy that the first appellant did not testify in these proceedings, neither did anybody testify on his behalf. The allegations in the statement of defence having been denied, the onus shifted onto the first Defendant to prove same by acceptable evidence. See Section 11(1), 12 and 14 of the Evidence Act, 1975, NRCD 323.

Since pleadings do not constitute evidence, I hold the allegations of the payment within three months unproven. The respondent testified that the full purchase price was to be made upon the preparation and execution of the indenture. In answer to a question in cross-examination, he replied:-

> *"the onus shifted onto the 1st Defendant to provide a correct indenture before full payment was made by me".*

Having earlier satisfied himself through a search (Exhibit C) that the land belonged to the 1st appellant, the respondent explained why he still did not make full payment in the following words:-

> *"because 1st Defendant did not have …. correct indenture"*

At page 335 of the record of appeal, the learned trial judge continued as follows:-

> *"From Exhibit C, however, I am of the view that nothing prevented the plaintiff from making prompt payment of the full purchase price if, he was minded to. This I fix at the end of December 1999 given the fact that the plaintiff claimed, money was not his problem".*

A perusal of the judgment of the Court of Appeal reveal that it thoroughly reviewed the evidence and the judgment of the trial Court from pages 70, 71, 72 and 75 of the record of appeal (Volume III) and upheld the respondent's ground of appeal thus:

> *"It is admitted that this answer would seem to contradict the basis of plaintiff's refusal to accept Exhibit D and making full payment. This seeming contradiction does not remove from this Court's position that the High Court's finding that*

plaintiff's insistence on a correct indenture was unjustified is not borne out by the evidence on record. The ground of appeal that the judgment is against the weight of evidence succeeds and it is hereby upheld".

Additionally, Counsel for the appellants admitted the respondent's case at page fourteen (14) paragraph 19 of his Statement of Case and confirms the Court of Appeal's findings that the indenture given to the respondent was not proper and that the respondent's refusal to accept the Deed of Gift Exhibit 'D' instead of a conveyance for the sale transaction is commonsensical. We have verified the said paragraph 16 and found the statement attributed to learned Counsel to be correct.

Moreover, the refusal of the respondent to pay fully for the land must be attributed to the failure of the first and second appellants who were to provide the respondent with Exhibit 'D' an Indenture and not Exhibit 'C'. It is on record that the respondent refused to sign Exhibit 'D' upon the advice of his Lawyer because it was a deed of gift and not of a deed of sale. It is also on record that the respondent later paid Thirty-Eight Million old Cedis (¢38million) into the bank account of the first and second appellants but they refused to accept same. The trial High Court was wrong in fixing December 1999 as the reasonable time the respondent should have paid the balance of the money due. It is in respect of that that we adopt the finding and holding of the Court of Appeal on page 80 of the record of appeal (Volume III) that:-

"There is no doubt that the amount of Four Million Cedis was paid by the plaintiff because of the agreement of sale between him and the 1st defendant, that, upon 1st Defendant's refusal to accept the balance due, he further paid an amount of Thirty-Eight Million Cedis (¢38,000,000.00) into the bank account of the 1st Defendant. Surely, it was fraudulent on the part of the 1st Defendant who had failed to produce the proper document as agreed upon to sell the land to another person".

In the **Koglex case** (supra), the Supreme Court held thus:-

"The relief of specific performance would lie whenever, as in the instant case, agreement between parties had got to such a stage that it would amount to fraud on the part of the other party to refuse to perform his side of the bargain".

A perusal of Exhibit 'A' indicate that indeed from the evidence on record, the first appellant breached the agreement to submit a proper indenture to the plaintiff to enable him effect the balance of the money due and in any case, the respondent did pay the balance agreed upon. The first appellant rather breached the agreement and fraudulently sold the same land to the co-defendant/appellant. It is to these that the Court of Appeal rightly concluded that:

"Clearly, from the evidence on record, the plaintiff has been able to satisfy the above requirement. We find that the 1st Defendant was indeed in breach of the agreement to sell the disputed land to plaintiff".

In the circumstances we would reject the submission of Counsel for the appellants and the conclusion reached by the trial Court that payment by the respondent on the 29th June 2000 was unreasonable having regard to the decline of the cedi in relation to major currencies.

Furthermore, by sections 5 and 6 of the Evidence Act, 1975 (NRCD 323) and the authorities, the failure of the plaintiff to plead fraud did not preclude the court from considering it, if there was evidence to that effect on the record. The principle is that, even if fraud was not pleaded, but evidence is admitted on the record without objection and the evidence is not rendered inadmissible on legal grounds, the court cannot ignore it unless it will result in a miscarriage of justice. In the recent decision of this Court in **Banahene v Shell Ghana Limited [2017-2018] 2 SCGLR 338 at 371**, per Benin JSC, where negligence was not pleaded but because it arose from the record and was admitted into evidence, negligence was considered. The learned Justice of the Supreme Court, succinctly stated the principle of law after quoting sections 5 and 6 of the Evidence Act, 1975 (NRCD 323) as follows:-

"Moreover, in cases where fraud was not pleaded but the record disclosed that some evidence was led on fraud at the hearing of the case, the court accepted and relied on the evidence to establish fraud. See the cases of ***Edward Nasser & Co. Ltd. V McVroom & Another [1996-97] SCGLR 468; Amuzu v Oklikah [1998-99] SCGLR 141, Appeah & Another v Asamoah [2003-2004] 1 SCGLR 226; Gautret v Egerton, 15 WR 638.*** *The principle deducible from these cases is applicable to an issue founded on negligence, that even if it is not pleaded, but evidence is admitted on the record without objection and the evidence is not rendered inadmissible on legal grounds, the Court cannot ignore it, unless it will result in a miscarriage of justice.*

The position is not different from what has obtained in England. For instance, in the case of SS Pleiades & Page v SS Jan & Lesser [1891] AC 259 65 LT 169 60 LJ PC 59, it was held that where negligence was not raised on the pleadings and no evidence of it was led by either party at the hearing, it could not be raised for the first time at the final appellate court".

See also **Seidu v Mohammed v Saanbeye Kangberee [2012] 2 SCGLR 1182 at 1185.**

A perusal of the record of proceedings indicate that fraud was not pleaded but arising out of the evidence on record it could be deduced that the appellants were fraudulent in dealing with the respondent in the sale of the property. There is sufficient evidence on record that the 1st appellant knew very well that he had sold the land to the respondent and issued a comprehensive purchase receipt Exhibit 'A' which virtually transferred the property to the respondent and yet without producing the correct indenture to enable the balance of the purchase money to be paid to him, and to his knowledge that the respondent had paid the balance of the purchase price into his account and later into court, he fraudulently sold the land to the co-defendant/appellant.

Further, an intending purchaser must make reasonable enquiries in respect of the property he seeks to acquire. This court speaking through Marful-Sau JSC in **Susan**

Bandoh v Dr. Mrs. Maxwell Apeagyei-Gyamfi and Alex Gyimah [2019] DLSC 6502 at page 11, stated the law succinctly as follows:-

> *"Notice does not mean only notice of registration of the title but also notice of possession by the first purchase, grantee or lessee or their agent as the case may be. That is why an intending purchaser must make reasonable enquiries in respect of the property he seeks to acquire. This involves legal searches at the land registry, but more critically it involves a physical inspection of the land to ensure it is free from encumbrances".*

In the instant case, the co-defendant/appellant stated at page 233 of the record of appeal (Volume I) as follows:-

> *"At the time of purchase, I did not know plaintiff, there was sand and gravel on it, but I did not know it belonged to the plaintiff".*

It is thus clear that the co-defendant/appellant did not make reasonable enquiries and physical inspection of the land to ensure that it is free from encumbrances before he purchased it. Had he done critical enquiries about the person who deposited the sand and stones (Exhibit E3) on the land, he would have realized that they belonged to the respondent and therefore the land was encumbered.

It is also on record that after the sale to the co-defendant/appellant, the receipt offered him did not acknowledge the price of the land and the subsequent indenture prepared thereon is a deed of gift marked as Exhibit '8' instead of a sale. From the record of appeal it is also clear that Exhibit 9, the land title certificate issued to the co-defendant/appellant is also fraudulent. Fraud vitiates everything – see **Appeah v Asamoah [2003-2004] 1 SCGLR 226 Holding (4); Dzotepe v Hahormene III [1987-88] 2 GLR 681, SC; Okofo Estates Ltd. V Modern Signs Ltd. [1996-97] SCGLR 233 at 253; Amuzu v Oklikah (supra) and Seidu v Mohammed v Saanbaye Kangberee [2012] 2 SCGLR 1182 at 1185** and other authorities. Since fraud vitiates everything, the sale of the land to the co-defendant/appellant by the first appellant is null and void.

Furthermore, land once sold by a grantor cannot resell same to another person since he had divested himself of his interest. See **Tetteh & Another v Hayford (Substituted) by Larbi & Accker [2012] SCGLR 417 Holding (4); Sasu v Amua-Sakyi [1987-88] 2 GLR 221 and Darkey v Lartey [1963] 1 GLR 62 SC.**

In the instant case, it is clear that the first appellant having sold the land to the respondent had divested himself of his interest in the property and therefore had nothing to have sold to the co-defendant/appellant. In effect, the doctrine of *nemo dat quod non habet* applies. The sale and registration of co-defendant/appellant's title in Exhibit 9 the Land Title Registration is null and void and of no legal effect.

Counsel for the appellants criticized the Court of Appeal for holding that at the time the Co-defendant/appellant purchased the property, he was aware that there was a suit in respect of the subject matter at the High Court. It is noted that the Co-defendant/appellant relied on the defence of a bona fide purchaser without notice. The plea of bonafide purchaser for valuable consideration is a defence which must be proved by supporting evidence to the satisfaction of the Court. This Court as rightly cited by the Court of Appeal in their judgment in **Hydrafoam Estates (Gh) Ltd. v Owusu [2013-2014] 2 SCGLR 1117 Holding (3) at page 1119** stated the law as follows:-

> *"(3) Where a party put up the plea of bonafide purchaser for value without notice of any adverse title, the onus would 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 would require that evidence in support of the plea must satisfy the court …"*

See also **Kusi & Kusi v Bonsu [2010] SCGLR 60 Holding (8); Mahama Hausa v Baako Hausa [1972] 2 GLR 469, 487.** After a careful perusal of the evidence on record, we are satisfied that the Court of Appeal reviewed the evidence and rightly

dismissed the Co-defendant/appellant's plea of bonafide purchaser for value without notice of any adverse title.

Conclusion

On the whole, we find no merit in this appeal as the Court of Appeal adequately resolved all the issues in accordance with law. We therefore dismiss the appeal.

C. J. HONYENUGA
(JUSTICE OF THE SUPREME COURT)

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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