IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: AKUFFO (MS), JSC PRESIDING

YEBOAH, JSC

BAFFOE-BONNIE, JSC

BENIN, JSC

PWAMANG, JSC

CIVIL APPEAL
NO. J4/34/2016

31ST MAY, 2017

GUARANTY TRUST BANK (GH) LTD ..... PLAINTIFF/APPELLANT/ RESPONDENT

VRS

WESTERN STEEL & FORGINGS LTD AND OTHERS ..... DEFENDANT/RESPONDENT/ APPELLANT

JUDGMENT

BAFFOE-BONNIE, JSC:-

The facts in this case are fairly straight forward and generally uncontroverted. The respondent in this court, Guaranty Trust Bank, recovered judgement against the appellants in the High Court, Commercial Division, Accra, for various sums of money owed it as a result of appellants' default in repaying loan facilities it extended to them. Upon application, the High Court on 28th January, 2012 granted the appellants' prayer to stay execution and to pay the judgment debt by instalments. The appellants defaulted in the payment terms they themselves had *proposed*. Respondent caused the properties the appellants had mortgaged as security for the loans, to be attached in order that they would be sold in satisfaction of the judgment debt.

The attached properties were valued and the respondent applied for reserved prices for them. Claiming that the properties had been undervalued, the appellants prayed the High Court to order a second valuation of the properties at their expense, but later abandoned that prayer and agreed to the auction. The High Court made an order for the reserved price on 7th August, 2013. Thereafter the registrar appointed an auctioneer. The auctioneer advertised the auction in The Ghanaian Times Newspaper of 9th September, 2013, and stated that the auction would be conducted on 30th September, 2013.

Meanwhile, after the public auction had been advertised, the appellants again sought to stop or delay the sale by opening some form of negotiations with the respondents herein, for fresh terms to pay the judgment debt by instalment. These fresh negotiations yielded some results and the appellants actually made some payments pursuant to these fresh terms.

Clearly, both the court and the court appointed auctioneer were oblivious of these fresh negotiations and subsequent arrangements, because the public auction took place as advertised, on 30th September, 2013. Two out of the three mortgaged landed properties of the appellants were sold at the public auction to third parties who were subsequently put in possession by bailiffs of the High Court.

Pursuant to Order 45 rule 10 of C.I 47, the appellants filed a motion at the High Court praying for an order for stay of execution in respect of the third property for which there was no reserved price, and for an order setting aside the sale of the two houses. The main reason for the application to set aside the sale was that the auction was conducted in circumstances of deceit since at that time appellants were in negotiations with respondents for a settlement and respondents undertook not to sell the attached properties. The respondent vehemently opposed the application on the grounds of time and also that there had been no breach of the rules. The High Court overruled respondents' objection, granted the application, set aside the auction sale and ordered the parties to abide by proposed terms of settlement that were yet to be signed by respondent. He held as follows in his ruling;

"I find that the auction was conducted in deceit of the Applicant and it is therefore fraudulent in that at the very time he was being made to believe that the sale would not be conducted until the happening of the event, i.e. his failure to pay as expected, at that very time the sale has been conducted without his knowledge and behind his back. Thus, the representation made to the Applicant was a fraudulent one and in my view no injury could be caused the owner of the property than to deceive him into not attending the auction sale of his house."

What the trial judge considered as evidence of deceit and fraud was a letter dated 3rd October, 2013 written by the respondent bank to appellants' lawyer in which they

promised not to auction the attached properties unless appellants defaulted in payment of new instalments they had proposed.

Being aggrieved by the decision to set aside the sale, the respondent herein appealed against same to the Court of Appeal. Before the Court of Appeal, respondents argued that there was no irregularity with the auction as same was carried out after all procedures for execution had been complied with, so the sale ought not to have been set aside. Respondent further argued that since at the time of applying to set aside the auction appellants were in default of payment of the judgment debt, they were not entitled to any orders in their favour by the court. Finally, they argued that the rule pursuant to which the appellants had applied to set aside the auction, provided that, the application to set aside auction should be brought within 21 days of auction. The application before the High Court was therefore brought out of time. By a majority decision the Court of Appeal, Marful Sau JA dissenting, the court allowed the appeal. Being aggrieved the appellant has also appealed to us on a number of grounds;

GROUNDS OF APPEAL

a) *The Judgment is against the weight of evidence*
b) *Their Lordships erred by holding that there was no binding agreement (i.e. terms of settlement) between the parties*
c) *Their Lordships erred in holding that Estoppel by conduct did not apply because by the time plaintiffs letter dated 3rd October, 2013 was written the auction had already taken place*
d) *Their Lordships erred by holding that Defendants application to the High court was out of time*
e) *Their lordships erred by holding that defendants were bound by limitation of time under Order 45 Rule 10 of CI 47*
f) *Their Lordships erred by holding that the defendants could not claim to have no knowledge of the auction because same was advertised*
g) *Their Lordships erred by Holding that the Defendants were not deceived by the plaintiff to believe that the property had not been auctioned because the said auction was advertised*
h) *Further grounds of appeal may be filed on receipt of the records.*

Before us, as they did before the High Court and the Court of Appeal, the appellants relied heavily on the findings of the High Court Judge that with the opening of fresh negotiations, and particularly, with the promise made in the respondents letter of 3rd October, going ahead with the auction amounted to deceit and they were estopped by their own promise not to sell. In arguing the ground of appeal that the judgment of the Court of Appeal is against the weight of the evidence the appellants have

placed heavy reliance on the findings of the High Court and the opinion of Marful Sau JA who was in the minority at the Court of Appeal. In their statement of case they quoted the following passage from Marful Sau JA's opinion;

"I am of the opinion that the conduct of the appellant in the events leading to the auction of the properties was in bad faith….I am of the view that the conduct of the appellant amounted to deceit and the trial judge was right in setting aside the sale."

Marful Sau JA, just like the trial judge, based his decision on the respondent's letter of 3rd October, 2013 stating that he was relying on the doctrine of promissory estoppel and as legal authority he referred to Section 26 of the Evidence Act, 1975 (NRCD 323).This submission by the appellant, accepted by Marful Sau, had not swayed the majority in the Court of Appeal, who through Torkornoo JA, roundly rejected the arguments of appellants on the applicability of the equitable principle of promissory estoppels. The appellants have repeated those submissions for our consideration.

There is no evidence on record that before the actual date of the auction, respondent represented to the appellants that it would withhold the auction sale that had been advertised in accordance with the procedures of the court. The evidence relied upon by the appellants, the trial High Court and the minority of the Court of Appeal, is a representation made in the respondents letter dated 3rd October, 2013, three days after the auction had been carried out, and a document containing agreed terms of payment by instalments, signed by the appellants but not signed by the respondents. So In spite of the numerous grounds of appeal and the rather lengthy submissions on them, in our view, the simple issue to be resolved is whether the representations made by the respondents in their letter of 3rd October 2013 constituted promissory estoppels with regard to the auction that took place on 30th September 2013. The second issue is whether or not the application was out of time

Section 26 of the Evidence Act, !975 provides as follows

*"**Except as otherwise provided by law, including a rule of equity, when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to*** **believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively** ***presumed against that party or his successors in interest in any proceedings between the party or his successors in interest and such relying person or his successors in interest***"

The equitable doctrine of promissory estoppels was developed from a number of popular English cases but was finally articulated by Denning J in the case of **Central**

London Property Trust Ltd v High Trees House Ltd [1947] KB 130, also popularly known as the High Trees case. In that case Lord Denning noted as follows;

"where parties enter into an agreement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and is in fact acted on by the promisee, the Court will take the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even though the promise may not be supported by considerations in the strict sense"

Amissah JA relied heavily on this principle in the case of **COMET CONSTRUCTION CO LTD V GHANA COMMERCIAL BANK[1976]2 GLR 220 at230.** He said;

"if a person by his words or conduct makes to another a promise or assurance which is intended to affect the legal relations between them and to be acted on accordingly, then once the other party takes him at his word and acts on it, the person who has made the promise or assurance is not entitled and will not be permitted by a court of justice to revert to the previous legal relations as if no such promise or assurance has been made by him"

See also the case of TK SERBEH &CO, LTD MENSAH [2005-2006] SCGLR 303.

In the case of **IBM WORLD TRADECORPORATION V HANSEM ENTERPRISE LTD [2001-2002] SCGLR** ADZOE JSC said;

"It is clear from the authorities that a party who is relying on the principle of promissory estoppels must make out a case that such a promise was made, intended to be binding, intended to induce him to act on it and that he in fact acted on it."

On his part Lord Justice Asquith in the case of **COMBE V COMBE [1951] 1AER767 AT 770** broke down the principle as follows

"....when a promise is given which

(1) Is intended to create legal relations
(2) Is intended to be acted on by the promisee, and
(3) Is, in fact, so acted on, the promisor cannot bring an action which involves the repudiation of his promise or is inconsistent with it"

It is the case of the appellant that the respondent promised not to carry out the auction for as long as the renegotiated terms of settlement was not breached by the appellant. He had not breached the renegotiated arrangement and had even made

instalmental payments. It is the case of the appellant therefore that the respondent was estopped by his promise not to sell.

But clearly, the principle of promissory estoppel is not applicable to the facts in this case. As stated earlier in the narration of the facts, the only evidence cited by the appellant as evidence of respondents' promise not to sell, is the letter to their lawyers dated 3rd October 2013. The sale had taken place on the 30th September 2013. How could an action taken on 30th September be deemed to be in breach of a promise made 3 days after the event? The equitable principle of promissory estoppels and the rule of evidence contained in Section 26 of the Evidence Act, 1975 relate to representations of future conduct not past conduct. We therefore agree with the majority decision of the Court of Appeal that the principles of estoppels are not applicable to the facts of this case. The appeal therefore fails on this ground.

WAS THE APPLICATION TO SET ASIDE THE AUCTION SALE PROPERLY BEFORE THE COURT?

We do not think so. The appellants' brought the application to set aside on the 8th of November 2013, when the auction had taken place on the 30th of September. Before us, as they did before the High Court and the Court of Appeal, the appellants have submitted that since the auction sale was tainted by fraud and deceit, same was void and time does not run, or better still fraud vitiates everything. Counsel has cited for us Mosi v Bagyina and several allied cases.

Order 45 rule 10(1) of CI 47 pursuant to which the application to set aside the auction sale aside was brought reads;

Setting aside sale for irregularity.

10(1) At any time ***within 21 days from the date from of the sale*** of any immovable property an application may be made to the Court to set aside the sale on the ground of any ***material irregularity in the conduct of the sale,*** but no sale shall be set aside on the ground of ***such irregularity*** unless the applicant proves to the satisfaction to the court that he has sustained ***substantial injury by reason of the irregularity."(emphasis added)***

Three things must be emphasised here.

1 ***the application should be brought within twenty one days***

2 the irregularity must be in respect of the conduct of the sale and

3 the applicant must prove to the satisfaction of the court that he has sustained substantial injury as result of the irregularity.

The appellants have sought to downplay the importance of time by saying that there was fraud or deceit and that they were not aware that the auction had taken place. We find this rather hard to take. The fact is the auctioneer had advertised the venue and time for the sale. The advert was notice to the whole world. So he cannot plead lack of notice. Time is always of the essence in auction sales because of fluctuation in values, and more importantly the possibility of accrual of third party rights. Bringing the application 18 days after the allowable 21 days was very tardy. The appellants were out of time and should have been told so at the High Court.

That fraud vitiates everything and time does not run in matters of nullity, are legal truisms that need not engage our attention. But the question we ask is whether there was any fraud or irregularity in the conduct of the sale. It is not mere irregularity but irregularity in the conduct of the auction.

For example Order 45 rule 8(1) of CI 47 provides;

8(1) Sales in execution of judgment shall be made under the direction of the Registrar, and shall be conducted according to such orders, if any as the Court may make on the application of any party concerned.

8(2) Unless the Court authorises the sale to be made in any other manner, the sales shall be made by public auction

9(1) Subject to sub rule (3) of this rule no sale shall be made until after at least seven days' notice of the sale in the case of movable property, or in the case of immovable property until after at least twenty one days public notice, unless the judgment debtor in writing consents otherwise.

9(3) The Court may for any sufficient reason extend or reduce the period of notice in any case.

Even though the irregularities that could affect the conduct of an auction sale mentioned in Or 45 Rr 8 and 9 may not be exhaustive, they give you an idea of the types of irregularities that could bedevil an auction sale as contemplated by rule 10. For example, one could talk of serious irregularity if an immovable property is sold privately or in secret if the court has not so authorised, Rule 8(2), or if an immovable property is sold less than twenty one days after it has been advertised, Rule 9(1).

The appellants have not pointed to any substantial irregularity in the conduct of the auction sale to convince us to set aside the sale.

The third requirement under the rule 10 is for an applicant to prove that he has sustained substantial injury as a result of the material irregularity in the conduct of the sale. Here again no such proof was proffered by the appellants. They only point

to the various payments made since the auction sale took place. However, the evidence on record is that even the amount realised from the auction of the two properties was not enough to offset their indebtedness. So we do not see how the payments made in the course of the negotiations could be cited as proof of substantial injury sustained by the appellants.

The application was incompetent and out of time and the High Court should have thrown it out. The appeal lacks merit and so same is dismissed and the Judgment of the Court of Appeal is affirmed.

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

S. A. B. AKUFFO (MS)
(JUSTICE OF THE SUPREME COURT)

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(JUSTICE OF THE SUPREME COURT)

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