IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2017

CORAM: ATUGUBA, JSC (PRESIDING)
DOTSE, JSC
YEBOAH, JSC
GBADEGBE, JSC
BENIN, JSC

CIVIL APPEAL
NO. J4/01/2017

14TH NOVEMBER, 2017

HANNAH KWARTENG
(SUBSTITUTED BY KWADWO OPPONG) ..... PLAINTIFF/ APPELLANT/RESPONDENT

VRS

1. **ADWOA TIWAA**
2. **ADWOA FOSUAA**
   (SUBSTITUTED BY DIANA MENSAH) ..... 2ND DEFENDANT/ RESPONDENT/APPELLANT

JUDGMENT

GBADEGBE, JSC:-

The question for our decision in this appeal is which of the two lower courts came to the right conclusion on the evidence placed before them in the matter herein? For reasons of convenience, the parties to the appeal herein shall bear the description which they bore in the trial court. While the learned trial High Court judge accepted the case of the defendants, the learned justices of the Court of Appeal by a split decision

preferred the version of the matter tendered before them by the plaintiff. In the circumstances, the determination of our task in this appeal is dependent on our consideration of the record of appeal in the nature of a re-hearing by which we are enabled to reach our own conclusion on the evidence tendered by the parties so however, that in so acting we can only interfere with the decision of either of the two lower courts when satisfied from a consideration of all the evidence that the verdict was unreasonable or perverse. Reference is made to the settled attitude of appellate courts in such matters as emphasised by the decision of the Supreme Court in **Tuakwa** v **Bosom** [2001-2002] SCGLR 61. From the decisions, a decision is perverse or unreasonable when it is reached without supportive evidence as indeed, was the case in the **Tuakwa** v Bosom (supra) justifying the Supreme Court in interfering to set aside the decision of the two lower courts in the matter. Justifying the interference of the Supreme Court, Sophia Akuffo JSC (as she then was) said at page 69.

> "**After reviewing the record, it was therefore, our conclusion that, on a preponderance of probabilities, the judgment of the trial judge in favour of the defendant, i.e. the respondent, was not supported by the totality of the evidence and the Court of Appeal erred in confirming the same without any scrutiny of the record.**"

Before proceeding any further, it is useful to state that at the trial of the action and indeed at the first appellate court, there was no dispute between the parties on certain crucial facts. These facts may be stated shortly as follows. The disputed property was purchased by Kwadwo Oppong (deceased) in the name of his nephew, Frank Oppong Bediako also known as Kweku Forkuo, (deceased) who was the husband of the original plaintiff. Kweku Forkuo exclusively dealt with the property in the life time of his uncle and in his own life by renting it out and receiving the rental incomes accruing therefrom and interestingly exercised acts in respect of the property including in particular, ejecting the head of family from stores located within the property. He also allowed a person not being a member of the family to utilize the disputed property as a collateral for a contract of debt from a bank. In my view, from the uncontested facts, the real issue for us to decide is whether

the facts proved at the trial were such as to have rebutted the presumption of resulting trust in favor of Kwadwo Oppong (deceased) who had acquired the property with his own funds in the name of his nephew? Should the presumption remain unrebutted at the end of the trial then the property remained that of the purchaser. But if the acts performed by his nephew were material and sufficiently credible to dislodge the presumption of a resulting trust then, the property belonged to the plaintiff' deceased husband and cannot be regarded as falling into the residual estate of the purchaser.

It is important at this stage to caution ourselves that the allegation of the plaintiff that the purchaser intended his nephew to benefit from the property having been made after the death of the purchaser should be by means of cogent and credible corroborative evidence that compels any reasonable tribunal to the conclusion that such an intention was proved by the effect of the admitted evidence as provided in sections 20 and 21 of the Evidence Act, NRCD 323. It is beneficial for the trier of fact to pause and ask himself whether the effect of the evidence led by the plaintiff in support of her case when considered in the light of all the evidence renders the existence of a gift more probable than its non-existence. Although the presumption of resulting trust is a creation of equity , which now is a component part of the common law by virtue of the sources of law in Ghana as provided in article 11(1)(e) and (2)of the 1992 Constitution, I am of the considered view that being a rebuttable presumption arising out of the undisputed fact of the property having been acquired by the uncle of the plaintiff's predecessor with his own funds, we are to approach the question in the same manner as rebuttable presumptions contained in the Evidence Act (NRCD 323). When so considered, the position is that the burden of persuasion shifts to the plaintiff to rebut the presumption of a resulting trust in favor of the purchaser. A careful consideration of the statutory position regarding rebuttable presumptions contained in sections 20 and 21 of the Evidence Act leaves compels me to the view that it has the same standard as that which was observed by the Supreme Court of Canada in the case of **Pecore v Pecore** [2007] SCC No 17 as follows:

"**A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is led to displace the presumption. The presumption shifts the burden of persuasion to the opposing party who must rebut the presumption**."

Reference to the Ghanaian position contained in section 20 of the Evidence Act makes the above assertion tolerably clearer. Section 20 of the Evidence Act provides as follows:

"A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non-existence of the presumed fact."

Proof of a rebuttal presumption is not limited to only acts which accompany the purchase but may extend to acts performed subsequently such as the conduct of the purchaser and the person in whose name the legal title resides although proof of an intention that is sufficient to displace the presumption that is contemporaneous with the purchase of the property has an inherent probative quality. Therefore, in approaching the task with which we are faced in these proceedings, we are not limited to considering only the evidence proximate to the acquisition of the property by the plaintiff's uncle but all acts done or omitted to be done by either of them which are sufficiently credible and corroborative of the intention of the purchaser regarding the property. The said acts should be unequivocally referable only to the disputed property.

Observation is made of the fact that at the trial, the plaintiff placed reliance on a gift from his uncle, which unfortunately was unproved. The mere failure of the plaintiff to prove the allegation of a gift and its accompanying provision of "aseda" by her deceased husband cannot in my opinion on account of such failure only result in invalidating her claim to the property that is also based primarily on the perceived intention of his uncle in acquiring the property in the name of his nephew , then an adult and acts and or conduct that he subsequently exercised in relation to the property that are contended by

the plaintiff as explicable only in terms of the uncle intending to make a gift of the property to him. The several acts of ownership exercised during the life time of the purchaser according to the plaintiff to which reference has been made earlier in the course of these proceedings are consistent with his uncle assenting to her deceased husband's overt assertion of such rights over the property. It is necessary to remind ourselves that in matrilineal societies to which the parties belong, the reality of social life is that uncles tend to provide for their nephews and nieces being children of their sisters as indeed, the plaintiff's husband was to the purchaser. While such a reality of social life cannot have the effect of likening such persons to children or wives of the purchasers as to bring gratuitous purchases to them within the common law notion of advancement, we are not precluded from taking such a relationship into account when considering the totality of acts rendered or performed in relation to the property on which this action turns for the purpose of determining the issue in controversy before us. It is therefore quite surprising that the learned trial judge merely by virtue of the plaintiff's predecessor not being a child of the purchaser failed to consider the totality of the evidence before him regarding acts that were unequivocally in relation to the property which were urged before him by the plaintiff in support of her claim that that on a preponderance of probabilities those acts tended to show that the purchaser did not intend to divest his nephew of the legal title to the property.

Also to be noted is that the allegation of a gift by the plaintiff was not inconsistent with the other ground of claim namely the purchase of the property by his uncle in his name and the subsequent acts done by him in regard to the property during the life time of his uncle who from the evidence acquired several properties in his own name and that of his sister's children including the predecessor in title of the plaintiff. The evidence which was not controverted in regard to four such properties acquired in the name of his nephew (plaintiff's deceased husband) and nieces was that those in whose name the legal titles were, dealt exclusively with the properties without any objection from the purchaser during his life time or by the family thereafter. The purchaser's conduct in not interfering with acts of ownership exercised in relation to such properties in my view is a significant

piece of evidence that has the effect of leading one to the reasonable conclusion that in all such cases, the purchaser must have intended to make a gift of the properties to them. In the face of such cogent evidence which the defendants admit, one finds it difficult to understand their contention regarding the disputed property that in relation only to it, the purchaser intended a different result. That assertion which runs contrary to the conduct of the purchaser; to be a good ground for rejecting the plaintiff's case that a gift of the property was intended in favour of the plaintiff's deceased husband must fall from the lips of the purchaser himself and cannot be urged by the defendants long after he is gone as the defendants would be serving their own interests by such a bare assertion. But then there is also another piece of evidence arising out of the omission of the purchaser to make provision in his will for any of the properties purchased by him in the name of his nephew and nieces, which I need turn my attention to.

In my opinion, when a person who acquired several houses as was done by the uncle of the plaintiff's deceased husband also purchases properties in the name of a nephew and nieces allows them in his life time to deal exclusively with the property without any reference to him seeks to retain ownership of such properties then he should in order to negate the effect of the exclusive acts of ownership exercised in relation to the properties by those in whom legal title to the properties reside, make specific provision for the devolution of those properties in his testamentary document. Where he expressly fails to make any such provision, I do not think that we can reasonably having regard to all the evidence come to the conclusion that he intended such properties to belong to his residual estate particularly when there is also the evidence that his customary successor, the 1st defendant sometime after the death of the purchaser surrendered the documents of title to the husband of the plaintiff. It seems probable that in surrendering the documents of title on the property to Kweku Forkuo, the customary successor (1st defendant herein) intended to effectuate the intention of the purchaser by facilitating Kweku Forkuo's enjoyment of the property without any reference at all to her. Her conduct which was done before the action herein looks more probable to be true than the attitude that she has manifested in the course of these proceedings.

On all the evidence, the reasonable inference that arises from the purchaser allowing his nephew to deal exclusively with the property in his life time, as well as the absence of any provision in his last will regarding the said property is that it may be likened to the situation in Browne v Dunne (1893) 6 R. 67 where his silence might be construed to be an admission of the ownership rights exercised by his nephew in relation to the property. It is observed that in construing residual clauses in testamentary documents, courts must look at all the evidence on the record and in any event, such a construction to be a good objection to the reasonable inference from admitted facts must be in the nature of a pronouncement from a court on the status of the residual clause. I have no doubt that from the available evidence, such a construction of the residual provision that the defendants place great reliance on might not find favor with a court of law. In approaching our task as judges, we need consider every case on the basis of the evidence tendered before us instead of relying on general principles which have been displaced by the compelling effect of the evidence before us. The circumstances which unfold before us as tribunals of fact differ from case to case and a better approach to resolving disputes is to deal with them on case by case basis depending upon the evidence and as said of circumstantial evidence, it has a stronger and more compelling effect in discerning the intention of a purchaser than even direct evidence.

My Lords, for the reasons above, I have reached the conclusion that the version of the matter accepted by the majority of the Court of Appeal is derived from a reasonable consideration of the evidence contained in the record of appeal and accordingly I am unable to yield to the demand contained in the appeal before us by which a reversal of the said decision is sought. The appeal is dismissed and the decision of the Court of Appeal is hereby affirmed. The result is that the decision of the trial High Court in the matter herein is set aside and in place thereof is substituted a decision allowing the claim of the plaintiff to the disputed property.

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

W. A. ATUGUBA
(JUSTICE OF THE SUPREME COURT)

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

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I have been privileged to read the opinion of my worthy brother in this appeal but after considering the issues in controversy I am unable to agree with the opinion. I, however, prefer to offer my reasons for the dissent.

My brother Gbadegbe JSC, in his usual clarity has set out the facts in this appeal and it would serve no purpose for me to repeat same, moreso when the facts appear not to be contentious in any way.

The case for the plaintiff/appellant/respondent who for sake of brevity shall be referred to as the plaintiff was in my respectful view based on a gift allegedly made by the original acquirer of the property in dispute one Opanin Kwadwo Oppong. It appears that in the original statement of claim filed together with the writ of Summons the alleged gift was not pleaded in any manner or form. However, in the amended statement of claim filed on 20/10/2008 pursuant to Order 16 rule 3 of CI 47, the plaintiff, who under the rule was at liberty to amend without leave pleaded thus in paragraph 3:

"3. The plaintiff avers that the property known and called H/No. OTB 141 Adum was acquired by the late Agya Oppong who subsequently gifted same to Frank Oppong Bediako @ Kwaku Fokuo absolutely"

In my respectful view, the alleged gift by the original acquirer of the property is the root of title of the plaintiff and no more. The plaintiff obtained leave on 17/08/2012 to amend the amended statement of claim. On 25/03/2013, the plaintiff after obtaining the leave to amend again filed yet another Amended Statement of Claim and repeated the alleged gift from Opanin Kwadwo Oppong to Frank Oppong Bediako.

In all the two amendments, the plaintiff was very categoric about the alleged gift from Opanin Kwadwo Oppong to his father.

The case was contested on the amended statement of claim in so far as the root of title of the plaintiff was concerned. In other words, the plaintiff served notice on his amended statement of claim that even though Agya Oppong acquired the property in dispute he gifted same absolutely to Frank Oppong Bediako.

In view of the repetition of the alleged gift on the pleadings, I prefer to deal with this issue first.

It is an elementary rule of law that in actions commenced by writ, parties file their pleadings are bound by their pleadings and would not be permitted to set up a case contrary to and inconsistent with their pleadings. I remind myself of the observation made by Crabbe JSC in the case of Hammond v Odoi [1982-83] GLR 1215 at 1235 as follows:

"Pleadings are the nucleus around which the case – the whole case-resolves. Their very nature and character thus demonstrate their importance in actions, for the benefit of the court as well as for the parties. A trial judge can only consider the evidence of the parties in the light of their pleadings. The pleadings form the basis

> of the respective case of each of the contestants. The pleadings bind and circumscribe the parties and place fetters on the evidence that they would lead". [emphasis mine]

See the case of ARMAH v ADDOQUAYE [1972] IGLR 109 CA. Indeed, pleadings bind not only the parties but the court itself and its influence on the case prevails through the proceedings from the trial court to the final court. Like my sister in dissent at the Court of Appeal, I find it very simple to determine this matter by insisting that the plaintiff who had pleaded the alleged gift as his only root of title, be it under customary law or otherwise to have offered such evidence to prove his root of title, which was the alleged gift from Opanin Oppong to Frank Oppong Bediako.

At the trial court on 24/07/2012 the plaintiff in his evidence-in-chief stated thus on oath:

> "This house was purchased by Opanin Kwadwo Oppong and gifted to my father Kwaku Fokuo"

He continued further and repeated the alleged gift as follows:

> "My father's mother Akua Amoah and Adwoa Nsiah are aware of the gift made by Opanin Oppong to my father"

The evidence was indeed rejected as unconvincing by the learned trial judge. At the Court of Appeal, His Lordship AYEBI JA who offered the lead opinion held on the alleged gift as follows:

> "In the instant case, although there is no direct evidence of customary gift of the house by Agya Oppong to Kwaku Forkuo as pleaded by the plaintiff, there are other evidence on record to show that Agya Oppong intended to gift the house to Kwaku Forkuo when he put the assignment in Forkuo's name as Exhibit "B". The

assignment therefore created as advancement in favour of Kwaku Forkuo as the beneficial title owner"

In my view, the case of the plaintiff fell flat after he had woefully failed to lead evidence to convince the two lower courts that the said property in dispute was gifted to his father. This finding made by the learned Court of Appeal judge in support of the finding of lack of evidence to prove the alleged gift should have resulted in the dismissal of his claim. In actions of this nature the plaintiff must prove his root of title. See the case of AKOTO v KAVEGE [1984-86] 2 GLR 365 CA, TETTEH v HAYFORD [2012] ISCGLR 417.

The other judges at the Court of Appeal were also of the similar opinion that the alleged gift, proof of which was squarely on the plaintiff had failed on the evidence. In this court the fact that the alleged gift was not proved has not been disputed at all.

The majority in their opinion resorted to the presumption of advancement to make a case which had fallen flat. With due respect to the majority, the resort to the presumption of advancement or the fact that the said Agya Oppong intended to gift the property to Frank Oppong Bediako will certainly run counter to the settled law that a court ought not to accept a case contrary to and inconsistent with the one put forward by the parties.
In any case, a gift in law is conceptually different from intention to make a gift. The two are certainly different and should be observed as such. Indeed, Apaloo JA (as he then was) made it clear in BENNEH v THE REPUBLIC [1974] 2 GLR 47 CA [Full Bench] when he said as follows at page 94:

"for the court itself to raise this issue and found a conclusion on it, even in part, would hardly conform to out conception of the role of a judge in our adversary system of administering justice. Such appellate decisions as OLOTO v WILLIAMS [1944] 10 WACA 23; DAM v ADDO [1962] 2 GLR 200 SC; ODOI v HAMMOND [1971] 2GLR 132 CA and the English decision of ESSO PETROLEUM CO. LTD v SOUTHPOST CORPORATION [1956 AC 218 HL, counsel a court against founding

on an issue not raised or canvassed by the parties or pronouncing for a party on a case inconsistent with the one he put up [emphasis mine]

A more detailed pronouncement of the law was stated by Adade JSC in the case of BISI & ORS v TABIRI alias ASARE [1984-86] 2 GLR 282 holding 4 thus:

> "4. The principle enunciated in Dam v Addo [1962] 2 GLR 200 at 203, SC, to the effect that a court must not substitute for a party a case contrary to and inconsistent with that which the party himself had put forward by his pleadings and evidence was clear and unexceptionable. The general principles guiding the application of that principle deducible from the cases were that: (a) the new case was not pleaded either expressly or by necessary implication (b) the new case was raised after obvious difficulties with, or failure of the old case, the party clearly turning a complete somersault (c) sufficient notice of the new case was not given, it was not contested. It was raised either at the address stage or an appeal or by the court itself; (d) the new case was irrelevant to the resolution of the issues on hand; the new case was not just a matter of interpreting and giving effect to a document relevant to the issue and properly tendered in evidence. (emphasis mine). It should be observed that resort to apply the presumption of advancement is clearly against the settled principles of law".

I would have, on my part allowed the appeal based on the lack of evidence on the alleged gift, but both the trial court and the Court of Appeal indeed discussed the presumption of advancement with such zeal that this court owes a duty to them to also discuss it in this judgment as the final appellate court.

At the end of the trial the learned judge found that the alleged gift was not proved. It appears on record that the plaintiff changed course and resorted to rely on advancement made by the said Opanin Kwadwo Oppong in favour of Frank Oppong Bediako. In the judgment at the trial High Court, Kumasi, the learned judge indeed went to town and

discussed the issue of advancement in detail and cited the well-known local and foreign cases like: CAVIELER v CAVIELER [1971] 19 F.L.R. 199 EYKYN'S TRUST [1877] 6 ch D 115, RE PARADISE MOTOR Co. [1968] IWLR 1125, REINDORF alia SARCKER v REINDORF [1974] 2GLR 36, USHER v DARKO [1977] IGLR 476, IN RE FIANKO AKOTUAH (D'CED) FIANKO & OR v DJAN & ORS [2007-08] SCGLR 165, QUIST v GEORGE [1974] IGLRI and others.

On the presumption of advancement, basic legal principle which runs through all these cases on the issue of advancement and its applicability appears to have been settled in the case of SOAR V FORSTER [1858] 4 K&J in 152 at pages 160-161 by PAGEWOOD V-C where he limited the class of beneficiaries in presumption of advancement as follows:

> "The rule which raises a presumption that a purchase in the name of another was intended as an advancement or provision for the latter, so as to preclude a resulting trust from arising for the purchase until that presumption has been rebutted, is applicable where the purchase was made in the name of a legitimate or illegitimate child. Or in the name of a grandchild whose father is dead or in the name of the wife of the purchaser. In all these cases, the rule is definite and clear that the purchase is prima facie to be taken as a provision or advancement for the person in whose name the purchase has been made".

From the evidence on record the said Frank Oppong Bediako never fell into the class of people who are within the ambit of advancement. The uncle Agya Oppong did not stand in loco parentis in any way whatsoever. In my view, assuming that the presumption of advancement was properly applied at the stage of the proceedings at all, its applicability is clearly erroneous. The common law which under Article 11 of the Constitution includes principles of equity has never applied the presumption of advancement under such circumstances. It could certainly be a sad day in our jurisprudence if in applying a basic principle of the common law we expand its scope just for convenience of the case under consideration. The presumption of advancement has stood for close to two centuries and

the common law courts have been very strict in limiting the class of people who can raise the presumption in their favour.

Another point which was raised was the reliance on section 35 of the Evidence Act, NRCD 323 of 1975 which states thus:

> "35. The owner of the legal title to the property is presumed to be the owner of the full beneficial title"

As pointed out earlier in this dissenting opinion the plaintiff pleaded and gave evidence of the gift of the property to their father by the acquirer, Opanin Kwadwo Oppong. They never in all the amendments ever pleaded or in the evidence said that the said Opanin Kwadwo Oppong intended to gift the property as it has been held by my very respected colleagues. The presumption under section 35 was recently raised in this court in the case of RICHARDS (JULIANA) v NKRUMAH [2013-14] 2SCGLR 1577. This court fully discussed it through Akamba JSC in a case on presumption of advancement which a father took a lease in the name of his son. In this case the pleadings which is the nucleus of the case never raised any issue of presumption of advancement in any manner or form. It will therefore, in my respectful opinion, be contrary to the settled jurisprudence of this court for us to apply it after the plaintiff had woefully failed to prove the gift which was pleaded in the amended statement of claim and the evidence from the plaintiff himself.

It is also the opinion of the majority that the said Opanin Kwadwo Oppong did not devise the said property in his Will, he having died testate. The Will which was not contentious provided for residuary clause. In law residuary clause can take care of any property which the testator owned or would be entitled after his death. I do not, with due respect think that this should be applied against the estate of the testator.

It is for the above reasons that I find myself in dissent as the reasons for affirming the judgment are not in my respectful opinion convincing enough. I will therefore allow the appeal and restore the learned High Court judge's judgment.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

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