IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA – GHANA, AD. 2016

CORAM: **DOTSE, JSC. (PRESIDING)**
YEBOAH, JSC.
GBADEGBE, JSC.
AKAMBA, JSC.
PWAMANG, JSC.

CIVIL APPEAL
NO. J4/6/2013

28TH JULY,

2016

J.K. OWUSU (FOR AND ON BEHALF)	**PLAINTIFF/**
OF HIMSELF & OTHER MEMBERS OF HIS	**RESPONDENT/**
FAMILY H/№ OTB 218 "B", KUMASI	**APPELLANT**

VRS.

JOSEPH TUFFOUR OSEI	**DEFENDANT/**
PLT 2 BLOCK F. NHYIAESO	**APPELLANT/**
KUMASI (BY ORIGINAL ACTION)	**RESPONDENT**

AND

1. J.K.OWUSU

2. FRANK OBENG APHRAM

J U D G M E N T

ANIN YEBOAH, JSC.

The appellant herein commenced an action at the High Court, Kumasi, in his capacity as a principal member for an on behalf of himself and other members of William Buachie Aphram family of Abrepo. The action was for a declaration of title to a property described as H/№ OTB 589, Asomfo Road, Kumasi, and other ancillary reliefs against the respondent herein.

From both the pleadings and the evidence placed before the trial court, certain material facts were not in controversy. The said William Buachie Aphram acquired the leasehold, the subject-matter of these proceedings from the Asantehene in February of 1945 for a period of ninety-eight years and two months. The lessee put up a building on the leasehold property. Later the said Buachie Aphram granted a sub-lease of the property in dispute to one John Melekos for a period of fifty years. The sub-lease expired on 27/02/2001. Upon the expiration of the sub-lease the plaintiff wrote to the defendant to vacate the property but the defendant refused to vacate. It appears that there were some people occupying the property which the trial court and the Court of Appeal described as trespassers. The plaintiff wrote to them to vacate but he was equally ignored. However, in August of 2001 the defendant wrote a letter to the plaintiff that the occupants/trespassers were his tenants. It thus appeared that the defendant asserted title to the property at that point in time.

On the part of the defendant, it was pleaded that indeed there was the original lease and sub-lease on the property but that when Buachie Aphram died and before the sub-lease expired, the sub-

lessee, John Melekos acting per his attorney one Nicholas Smyrnioudes by a deed and for valuable consideration in March of 1968 assigned the residue of the sub-lease to the defendant.

After the death of the original lessee William Buachie Aphram on 20th September, 1973, one Frank Obeng Aphram his successor and head of family, obtained financial assistance of Gh¢10,000,000.00 from the defendant to repay same without interest on or before the 31st of December 2000 and offered the property in dispute as security with the promise that upon default the defendant would have the right to take possession and the plaintiff would forfeit his right to the property. This transaction was reduced into writing and executed by both parties in presence of two members of the appellant's family who as illiterates thumbprinted. The respondent, based on the facts pleaded put up a counterclaim for an order of specific performance against Frank Obeng Aphram. The respondent also sought perpetual injunction as an ancillary relief. When the counterclaim was served on Frank Obeng Aphram, he entered appearance and filed statement of defence.

Given the nature of the case and the fact that several admissions were made, few issues emerged for determination by the learned trial judge. On the 23/4/2007, the trial judge after considering the evidence on record gave judgment for the appellant and proceeded to dismiss the counterclaim of the respondent.

The respondent lodged an appeal to the Court of Appeal, Kumasi, on two main grounds; namely: "The judgment is unreasonable and cannot be supported having regard to the evidence and lastly, the award of damages against the defendant is erroneous in law"

The Court of Appeal on 28/10/2011 allowed the appeal by reversing the judgment of the trial High Court and proceeded to enter judgment for the respondent on the counterclaim. It is against this judgment of the Court of Appeal that the appellant has lodged this appeal before us on several grounds stated in the notice of appeal as follows;

(a) The judgment is against the weight of evidence
(b) The Honourable Court erred in drawing wrong inferences from the findings of fact made by the trial court.
(c) The Honourable Court substituted speculation and hypothesis for the positive findings of fact, analysis and sound reasoning of the trial court.
(d) The resort to and reliance on a dissenting opinion in a case which if properly understood and appraised would have supported the case of the plaintiffs/respondents/appellants is impermissible and erroneous in law.
(e) The inferences with the discretion of the trial court relative to damages is erroneous and unwarranted in law.
(f) A substantial miscarriage of justice has been occasioned the plaintiffs/respondents/appellants by the erroneous analysis and conclusions of the Honourable Court.

In arguing the grounds of appeal, learned counsel had little to complain against the judgment of the Court of Appeal. In his lengthy statement of case filed on behalf of the appellant no effort was made to demonstrate the pieces of evidence on record which were erroneously ignored against his client. As pointed out earlier in this delivery, several matters were devoid of controversy. In the judgment of the Court of Appeal, they stated thus:

> "From the evidence of the parties, it is clear and undisputed that H/№ OTB 589, Adum-Kumasi was the self-acquired property of William Buachie Aphram. He was granted a lease of plot №OTB 509 by the Asantehene on 5th February 1945. The lease is evidenced by Exhibit "A". On 28th February, 1951 William Buachie
>
> Aphram granted a sub-lease of the property to John Melekos for a term of 50 years which is evidenced by Exhibit "D". Before the expiration of the sub-lease, John Melekos assigned the residue of his sub-lease to the defendant Joseph Tuffuour Osei on 15th March 1968. The assignment was registered at the Lands Registry as № 585/1969 and tendered as Exhibit "1".
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> There is evidence on record to support the finding made by the trial court that up till date Frank Obeng Aphram had not repaid that loan to Joseph Tuffuour Osei"

Of all the grounds set down for this appeal ground B appears to be the contentious one. As pointed out in this delivery, the parties do not dispute the findings made by the trial judge. The Court of appeal affirmed the learned trial judge's finding that Frank Obeng Aphram received financial assistance of Gh¢10 million from the defendant. We think that where the trial judge and the Court of appeal differed was whether the transaction in Exhibit "2" was executed to transfer the interest of William Buachie Aphram's family by way of sale to the defendant herein.

To appreciate the real transaction between Frank Obeng Aphram and the respondent herein it must be made clear that the parties

executed Exhibit "2" which was tendered through the second defendant in the counterclaim at the trial court. The said agreement expressly sought to evidence the transaction between the parties whereby the said Frank Obeng Aphram received an amount of Gh¢10,000,000.00 and used the subject-matter as security with the understanding that if the debt was not repaid on or before the 31/12/2000, the respondent herein was to have possession of the property.

One crucial issue which the Court of Appeal ignored to consider in detail was the legal effect of exhibit "2". The said Frank Obeng Aphram did not deny ever executing the document, in favour of the respondent. It was therefore the duty of the trial court to ascertain from the evidence on record whether the document purported to transfer ownership of the property in dispute to the respondent. Since the parties were bound by the document which was admitted in evidence the court ought not to have dwelt so much on oral evidence to contradict what the parties themselves had put up to bind them.

In the case of YORKWA v DUA [1992-93] GBR 278 CA, the Court of Appeal made it clear that where there exists (a) documentary evidence preference must be given to it than oral evidence provided the when documentary evidence is found to be authentic. The court at page 293 said:

> "Whenever there is in existence a written document and oral evidence over a transaction, the practice in this court is to consider both the oral and the documentary evidence, especially where the documentary evidence is found to be authentic and the oral evidence conflicting"

See the case of Wood (subs) by ASANTE-KORANTENG v TAMAKLOE & DERBAN [2007-08] 2 SCGLR 852

The learned trial judge and the Court of Appeal did not allow extrinsic evidence to contradict the document which formed the basis of the transaction. The learned trial judge found as a fact that Exhibit "2" was indeed executed by the said Frank Obeng Aphram. He however proceeded to evaluate the evidence to ascertain whether as a mere customary successor the said Frank Obeng Aphram had the authority to deal with the property so as to pass ownership to the respondent.

The customary law position in matrilineal system of inheritance before the Intestate Succession Law, PNDCL III of 1985 is that upon the death intestate of a person all his self-acquired property vests automatically in the matrilineal family. This is trite learning. See Mahama Hausa & Ors v Baako Hausa & Or [1970] CC 73 CA. The customary successor could not alone as head of the immediate family of the deceased dispose of the land to a stranger. It calls for the Head of Family and the principal members concurrence to validate such a transaction. The learned trial judge based on the available evidence found that the two members of the family of the original lessee executed Exhibit "2" but they were not principal members. He reasoned as follows;

> "There is nothing on record to support a finding that Abena Adade and Opanin Atta Kwame thumprinted the loan agreement (Exhibit 2) as principal members of Boachie Aphram family. If they did so as principal members of that family, an alienation or transfer of such family property by Frank Obeng

Aphram and only two of the principal members of the family cannot be valid"

The trial judge proceeded to cite several old cases on the alienation of family property like Agloe v Sappor [1947] 12 WACA 137, Acolatse v Ahiableame [1962] 2 GLR 34 SC and Awortchie v Eshon [1947] 12 WACA 187 to support his opinion that lack of consent from principal members of the family invalidated the alienation. It must be pointed out that as a trial court it was enjoined to make primary findings of facts on the available evidence. In this appeal before us, it was clear from Exhibit "2" that it was not executed for and on behalf of the family which by operation of well known canons of customary law had become a family property. The operative part of the promissory note, that is, Exhibit "2" states as follows;

"THAT the said FRANK OBENG APHRAM alias KWABENA NYAMEKYE has used his House № OTB 589, Adum, Kumasi as security and in default of payment of the said sum within the stipulated period, i.e. 31st day of December, 2000 the said FRANK OBENG APHRAM alias KWABENA NYAMEKYE will forfeit his House № OTB 589, Adum, Kumasi and J.T.Osei has every right to take possession of the said House № OTB 589, Adum, Kumasi"

As pointed out earlier in this delivery, Frank Obeng Aphram was just a customary successor of William Buachie Aphram the original owner of the property. Under customary law he as the successor of the late William Buachie Aphram became the head of the immediate family. This is well settled by authorities like DOTWAAH v AFRIYIE [1965] GLR 257 and ATTA v AMISSA & OR [1970] CC 73 CA. The issue which the learned trial judge rightly considered was whether

he as customary successor could alienate the property in the manner he did. A customary successor, whether he vests the property in himself or not has very limited powers in dealing with inherited property in matters of alienation as the property is owned by the family. As the property had become a family property he had no legal right to transact with the property the way he did. Indeed the jurat apparent on exhibit "2" makes the deed more problematic to rely on. The two witnesses who the respondent throughout the case contended were principal members of the appellant's family thumbprinted exhibit "2" in a manner which shows that it did not even describe any of them as (a) principal members of William Buachie Aphram's family. For a more detailed examination of the jurat it is reproduced as follows:

> "Thumbprinted by the within-named Frank Obeng Aphram alias Kwabena Nyamekye after the contents have been interpreted and explained to him in the Twi language by KWABENA DANKWA of Kumasi when he seemed perfectly well to understand same before making his mark in the presence of
>
> 1. Madam Abena Adade
> 2. ATTA KWAME
>
> MEMBER OF APHRAM FAMILY OF ABREPO, KUMASI"

Assuming the nature of the document or the circumstances of the case called for extrinsic evidence, no such evidence was led by the respondent who sought to heavily rely on it to assert ownership of the property in dispute in the face of stout denial by the appellant. The learned trial judge was on the evidence left with no options than to hold that the alienation of the property in dispute was invalid.

The learned Justices of the Court of Appeal, however, held that there was the consent and concurrence of the principal members of the family of the appellant. With due respect, it was wrong inference drawn from the undisputed facts and the documentary evidence on record. As an appellate court it ought not to reverse findings of facts which were supported by the uncontroverted evidence on record unless the finings were perverse which was not the case in this appeal. Adade JSC in Bisi V Tabirs alias Asare [1987-88] 1 GLR 360 SC said at page 368 as follows:

> "I cannot believe that it was ever intended that the Court of Appeal (or any appellate court for that matter) should move into a new era of regular questioning of decisions of trial judges on issues of fact, as distinct from law, which were supportable. For this reasons there could be no grounds for caviling at the judge's exercise of discretion on duty in the selection of witnesses to believe or in stating his findings of fact"

This is the time-honoured principle which has guided appellate courts in exercising their appellate jurisdiction when findings of facts made by the trial courts are in issue on appeal. See Bruce v Attorney-General [1967] GLR 170. As the inferences drawn from the findings were wrong we proceed to set it aside and hold that the two witnesses to the transaction were not, from the evidence, shown to be principal members of the family of the original lessee.

We could have rested the allowance of this appeal on the above ground alone but learned counsel for the appellant put in a lot of industry to demonstrate in his written statement of case that the transaction was a mortgage. This was certainly countered by the

respondent's counsel. We think we owe it a duty not to ignore these submissions from both counsel.

The transaction which is in issue was duly entered into by two natives in Kumasi, Ghana. It was obvious from the evidence before the court that they executed Exhibit "2" to regulate the transaction. One cannot go beyond Exhibit "2" and draw inferences outside its clear terms like what the Court of Appeal proceeded to do.
In principles of Customary Land Law in Ghana by N.A Ollenu at page 94, the learned jurist described pledge as follows:

> "… the delivery and custody of property, real or personal, by a person to his creditor to hold and use until the debt due is paid, an article borrowed is returned or replaced, or obligation discharged"

The transaction under consideration clearly fits into the above definition of a pledge. Both parties were natives, as pointed out earlier in this delivery. If they had sought to resort to any other mode of transaction they could have spelt same out in Exhibit "2". Exhibit "2" was executed on 21/09/1975 and was indeed prepared by a solicitor. We think that even though section 2 of the Mortgages Act, 1972 NRCD 96 was in force when it was executed, the section did not however abolish customary pledges. Section 2 states as follows:

> "Every transaction, which is in substance a mortgage of immovable property, whether expressed as a mortgage, charge, pledge of title documents, outright conveyance, thrust for sale on condition, lease, hire-purchase, conditional sale, sale with the right of repurchase or in any other manner, shall be

deemed to be a mortgage of immovable property and shall be governed by this Decree"

The difference between customary pledge and mortgage should be made clear even though both transactions afford security for money. Under customary law, a pledge affords immediate possession of the property by the pledgee and he may exercise their right of possession enjoy proceeds therefrom but he cannot exercise any power to sell the pledged property. Under a mortgage, even though title deeds are usually surrendered by the mortgagor for a loan, there is no right of possession of the property by the mortgagee. It is only upon default that he has to resort to legal remedies in the Act or sell the property to defray the debt in strict compliance with the Mortgages Act. We have examined Exhibit "2" and "H" and the only conclusion we can reasonably draw is that the transaction was not a mortgage but a pledge.

Assuming without admitting that the transaction was a mortgage and therefore regulated by the Mortgages Act NRCD 96 of 1992, the respondent's rights under the transaction should only be enforced under sections 15, 16, 17 and 18 of the Act and no more. The respondent could sue the said Frank Obeng Aphram for enforcement of the covenants, appointment of receiver on default, giving thirty days' notice in writing to take possession or to resort to judicial sale in a court of law. On the evidence none of the remedies spelt out in the statute was resorted to by the respondent.

On the issue of damages, as it is now clear that the transaction in this case was a pledge and not a mortgage, we do not think that it would be fair to award damages against the respondent as in law he

is entitled to possession and enjoyment of rents accruing from such occupation.

In conclusion we allow the appeal and set aside the judgment of the Court of Appeal and restore the judgment of the High Court, save for the issue of damages.

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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

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

(SGD) J. B. AKAMBA
JUSTICE OF THE SUPREME COURT

PWAMANG JSC;

I had the privilege of reading beforehand the lead judgment delivered by my esteemed brother, Anin Yeboah JSC and I agree with his reasoning and conclusion that the appeal be allowed. Nevertheless, I

wish to add a few words of my own. As has been rightly held in the lead judgment, the transaction evidenced by Exhibit "2" in this case was a purported customary law pledge and not a mortgage as contended by the appellant. Appellant ought not to allow the fact that the parties signed a memorandum covering the transaction to becloud his appreciation of the character of the transaction which permitted the defendant, who was the lender, to keep possession of the property. The distinction between mortgage and customary law pledge is determined by which of the parties has possession of the property used as security so it the substance and not the form of the transaction that matters. See the cases of **Kwansa v Brahima [1966] GLR 784** and **Cook v Kutsoatsi [1960] GLR 96.**

In the document evidencing the pledge transaction in this case, it is stated that in the event the customary successor defaulted in payment of the financial assistance received from defendant within the time agreed upon, he will forfeit the house used as security and defendant will take it. The issue that arises is whether, under the law applicable to the transaction, it was right for a court to give effect to the signed document and allow the defendant to take the house as the Court of Appeal did. In the 18th Century English case of **Vernon v Bethel (1762) 28 ER 838,** the court was faced with the same issue under similar circumstances as in the instant case**.** There, Lord Henley L C said as follows at page 839 of the Report;

> "The principal question in this cause is, whether, upon the whole of this transaction, the plaintiff ought to be decreed a redemption of this Antigua estate, or that I should consider Mr. Bethell as the absolute purchaser thereof bona fide, and for his absolute benefit under deed of the 25th of August 1738.

> This court, a court of conscience is very jealous of persons taking securities for a loan and converting such securities into purchases. Therefore I take it to be an established rule that a mortgagee can never provide at the time of making the loan for an event or condition on which the equity of redemption shall be discharged and the conveyance absolute. And there is great reason and justice in this rule for necessitous men are not, truly speaking, free men, but to answer a present exigency, will submit to any terms that the crafty may impose on them."

That necessitous men are not free men is a statement of general truth valid at the time Henley L C spoke those words and today. The words of Henley L C quoted above provided the policy justification and are reputed to be the foundation for the equitable maxim "once a mortgage always a mortgage", meaning any condition stated in a mortgage transaction that clogs the mortgagor's right to redeem the mortgage is void and of no effect.

This position of equity towards mortgages is comparable to what prevails at customary law in respect of pledges, which in time past were also referred to as native mortgages. Customary law has consistently maintained that a pledge is perpetually redeemable hence our jurisprudence has adopted the postulate "once a pledge always a pledge", coined from the equitable maxim. See the cases of **Agbo Kofi v Addo Kofi (1933) 1 WACA 284; Kuma & Anor v Kofi & Ors (1957) 1 WALR 128; Dadzie & Boateng v Kokofu [1961] 1 GLR 91 SC; Kwaku v Krah & Anor [1967] GLR 50; Agyemen VI v Nkum & Anor [1982-83] 1 GLR**

520. In the above cases the courts held that no matter the length of time over which a pledge or defaulted in the payment of money

borrowed in a pledge transaction, he or his successors can tender the sum borrowed and take back the pledged property.

The provisions in Exhibit "2" that convert the customary pledge to a sale upon default of payment of the loan is obviously inconsistent with the right of the pledgor to redeem pledged property as generally recognised at customary law. In the case of **Dapaah v Poku (1950) Ollennu Customary Law Cases p. 173**, the West Africa Court of Appeal held as follows;

> "It has been argued by Mr Asafu-Adjaye for the respondent that the provision in Exhibit "A" that the mortgagor was to regain possession of the farm at the expiration of thirteen years is inconsistent with it being a native mortgage. One might, however, put it in another way and say that if it is a native mortgage, any condition inconsistent with the native customary law would be invalid; in other words that a mortgagee could not defeat the fundamental principles of native law, by making such a condition. I am disposed to thinking that this is the correct way of looking at it."
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> In his book **"Ewe Law of Property",** 1973, Professor A. K. P. Kludze, in explaining the scope of the maxim "once a pledge always a pledge", also said at page 240 that "…..nothing in the transaction or thereafter may defeat or clog the right of the pledgor to redeem his property at any time, however long after the pledge."

So the position of customary law on the question facing the court is clear and it is that the provisions in Exhibit "2" which convert the pledge to a purchase are void. I find the customary law rule that forbids clogging the right of a pledgee to redeem pledged property to be equitable, reasonable and fair for those who pledge their property as security for loans or financial assistance usually do so out of necessity. That makes them vulnerable so they deserve to be protected against the crafty who will want to take unconscionable advantage of them.

Any condition stated in a customary law pledge that is inconsistent with or repugnant to the character of perpetual redeemability of a pledge is void and cannot be enforced. The defendant in this case sought to take advantage of the customary successor so even if the transaction was binding on plaintiff family, it will be contrary to customary law for a court to allow defendant to take and keep the pledged property forever. The right at customary law to redeem the pledge was not taken away by the provision for forfeiture in the memorandum covering the pledge in this case.

(SGD) G. PWAMANG

JUSTICE OF THE SUPREME COURT

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