

**THE SUPERIOR COURT OF JUDICATURE**  
**IN THE SUPREME COURT**  
**ACCRA-AD 2019**

CORAM: GBADEGBE, JSC (PRESIDING)  
MARFUL-SAU, JSC  
DORDZIE (MRS), JSC  
AMEGATCHER, JSC  
KOTEY, JSC

CIVIL APPEAL  
SUIT NO. J4/27/2019

11<sup>TH</sup> DECEMBER 2019

**JOANA NYARKO                    .....                    PLAINTIFF/RESPONDENT/APPELLANT**

**VRS**

**1. MAXWELL TETTEH**  
**2. BEATRICE TETTEH**  
**3. KWESI AFFRAM                    .....                    DEFENDANTS/APPELLANTS/RESPONDENTS**

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**JUDGMENT**

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**THE UNANIMOUS JUDGMENT OF THE COURT IS READ BY KOTEY JSC, AS FOLLOWS:-**

**BACKGROUND**

Before us is an appeal against the judgment of the Court of Appeal partially reversing the decision of the trial High Court. This appeal is asking this court to overturn those aspects of the decision that reversed the trial High Court and to fully restore the findings of the High Court.

This is essentially a probate and administration matter interspersed with issues of ownership of portions of the estate.

The testator in the case died sometime in 1998. His Will was admitted to probate on 10<sup>th</sup> March, 2005. The estate comprised land and buildings known and described as House No. 229/19, Darkuman-Kokompe, Accra. On the said land were two constituent buildings, a large storey building, and sixteen stores. A major beneficiary of the Will was his widow, the Plaintiff and her children. When by 2011 the Plaintiff was dissatisfied with the administration of the estate by the 1<sup>st</sup> Defendant, the executor and the intermeddling in the estate by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the Plaintiff instituted action in the High Court seeking the following reliefs;

- a. Account of all the proceeds from the renting of the 13 stores since 1995.
- b. Account of the stewardship of the estate to the beneficiaries.
- c. Distribution of the parts of the estate to the beneficiaries.
- d. Provision of the original copy of the probate.
- e. Cost of litigation.

The Plaintiff is the widow of the testator. The 1<sup>st</sup> Defendant is the executor of the Will of the testator, husband of the 2<sup>nd</sup> Defendant and son-in-law of the testator. The 2<sup>nd</sup> Defendant is a daughter of the testator and wife of the 1<sup>st</sup> Defendant. The 3<sup>rd</sup> Defendant is a son of the testator and brother of the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant are children of the testator by a previous wife, Agnes Ama Serwaa who features in the case as DW1.

In her defence, the 2<sup>nd</sup> Defendant claimed that the testator had gifted a portion of the land to her before his death. She tendered a Deed of Gift dated 16<sup>th</sup> December 1997, Exhibit "I", in support of her claim.

The 3<sup>rd</sup> Defendant in his defence claimed that he is the beneficial owner of the whole property described as House No.229/16, Darkuman-Kokompe, Accra. He alleged that the testator had in fact purchased the land in his name for him soon after his birth and that at all material times the testator was holding the property in trust for him and therefore the testator had no testamentary capacity over the property. He tendered Exhibit "C" in support of his claim. The 3<sup>rd</sup> Defendant therefore counterclaimed as follows;

- a. A declaration that the late Samuel Kwabena Affram had no testamentary capacity over H/No.229/16, Darkuman-Kokompe, Accra.
- b. An order deleting the said house from the devise in the Will of the late Kwabena Affram as well as the probate covering the property.
- c. An order of ejectment of the Plaintiff from House No.229/16, Darkuman-Kokompe, Accra.

After a full blown trial and on the totality of the evidence adduced, the trial High Court found that Exhibits "I", "C" and "E" were fraudulent, that the 3<sup>rd</sup> Defendant's story of the purchase of House No.229/16 Darkuman-Kokompe, Accra in his name, and for him was a crude concoction and that the sixteen stores were constructed by the testator. The learned trial judge therefore granted all the reliefs being sought by the Plaintiff and dismissed the counterclaim of the 3<sup>rd</sup> Defendant.

Dissatisfied with the decision of the trial High Court, the Defendants appealed to the Court of Appeal.

The Court of Appeal in its judgment of 24<sup>th</sup> May, 2018 varied the judgment of the trial High Court by affirming one of the findings of the High Court but allowing the appeal and setting aside other findings of the High Court. Specifically, the Court of Appeal held as follows;

1. Affirmed the findings of the trial High Court that the land on which House No.229/16, Darkuman-Kokompe stands was acquired by the testator and was not in the name of and/or for the benefit of the 3<sup>rd</sup> Defendant.
2. That contrary to the findings of the trial High Court, Exhibits "I", "C" and "E" and the conduct of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant were not fraudulent and should not be cancelled.
3. That contrary to the finding of the trial High Court the 16 stores were not constructed by the testator but by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant s and their deceased brother, Korankye.

### **GROUND OF APPEAL**

Aggrieved by the decision of the Court of Appeal, the Plaintiff has appealed to this court on the following grounds;

- i. The learned judges of the Court of Appeal erred when they overturned the decision of the trial judge and held that the stores in House No.229/16, Darkuman-Kokompe, Accra were constructed by 2<sup>nd</sup> and 3<sup>rd</sup> Appellants and their deceased brother, Korankye when same is not supported by the evidence on record.
- ii. The learned judges of the Court of Appeal erred when they concluded that the late Samuel Kwabena Afram, the testator had by his conduct altered or changed his Will dated the 21<sup>st</sup> day of March, 1989, in allowing 2<sup>nd</sup> and 3<sup>rd</sup> Defendant s/appellants/respondents and their deceased brother Korankye to develop H/No.229/16 Darkuman-Kokompe, Accra and thus had no testamentary capacity to devise the stores in the said property to the Appellant and her children.
- iii. The learned judges of the Court of Appeal erred when they set aside the finding of fraud against 2<sup>nd</sup> and 3<sup>rd</sup> respondents made by the trial judge contrary to the evidence on record and upheld the grounds of Appeal (a), (b), and (f) of 3<sup>rd</sup> respondent.

- iv. The judgment of the Court of Appeal is against the weight of evidence on record.

In effect the Plaintiff is asking for a reversal of those portions of the decision of the Court of Appeal which overturned the findings of the trial High Court and a restoration of all the findings of the trial High Court. These relate to two issues, namely;

1. Whether Exhibits "I", "C" and "E" and the conduct of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were fraudulent.
2. Who was responsible for the construction of and whether the testator had testamentary capacity for the sixteen stores on House No.229/16 Darkuman-Kokompe, Accra.

We have a situation where the trial court and the first appellate court have reached different conclusions on the evidence. In a situation like this, the law is that the proceedings before the final appellate court are by way of rehearing. See Republic v Conduah exparte Aaba (substituted by Asmah) [2013-2014] 2 SCGLR 1032. The task of this court is to re-examine and evaluate the totality of the evidence adduced at the trial and determine which of the two rival findings of fact is supported by the evidence. See Tuakwa V Bosom [2001-2002] SCGLR 61, Quarcoopome v Sanyo Electric Trading Co. Ltd. [2009] SCGLR 213, Nartey (No.2) v African Institute of Journalism and Communication & Ors (No. 2) [2013 -2014] 1 SCGLR 703 and Oppong v Anarfi [2011-2012] 2 SCGLR 556.

In view of the centrality of the issue of fraud in this case we intend to deal with that issue first.

## **FRAUD**

The trial High Court found that the conduct of the 2<sup>nd</sup> Defendant had been dishonest and fraudulent and held that Exhibit "I", the alleged Deed of Gift of the 2<sup>nd</sup> Defendant

was a forgery and Exhibit "E", the resultant substituted Land Title Certificate which the Lands Commission had issued to the 2<sup>nd</sup> Defendant was procured by fraud and ordered their cancellation.

The trial High Court also found that Exhibit "C", relied upon by the 3<sup>rd</sup> Defendant in support of his claim that the testator purchased the entire Darkuman-Kokompe land for him and in his name was fraudulent and ordered its cancellation.

The Court of Appeal overturned these findings of the trial High Court. The Court of Appeal held that fraud had not been pleaded nor proved by the Plaintiff. It also held that though Exhibits "I", "C" and "E" were not authentic, that did not amount to fraud.

It must be noted, that an appellate court is not at liberty to overturn the findings of fact of the trial court and to substitute its own conclusions except in clearly established circumstances.

The appellate court can only vary the trial court's findings of fact where on the totality of the evidence, the findings are clearly not supported by the evidence, are unreasonable or perverse, are inconsistent with important documentary evidence, or the trial court has wrongly applied a principle of law. See Achoro v Akanfella [1996-97] SCGLR 207, Fosua & Adu-Poku v Dufie & Adu-Poku Mensah [2009] SCGLR 310 and Gregory v Tandoh IV & Hanson [2010] SCGLR 975.

Counsel for the appellant has urged us to restore the findings of fraud made by the trial High Court. Counsel has argued that Exhibits "I", "C" and "E" were crude *ex post facto* and fraudulent attempts by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to establish title to the whole or part of the testator's land in an attempt to deprive the Plaintiff and her children of their inheritance. Though Counsel admitted that the Plaintiff did not plead fraud, he submitted that Plaintiff was not aware of the existence of the said exhibits

I, C and E and that it was only during the trial that these were tendered by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Counsel therefore submitted that on the peculiar facts of this case, failure to specifically plead fraud ought not to be fatal.

Counsel further contended that there was sufficient evidence of dishonest conduct on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in relation to Exhibits "I", "C" and "E", and in their attempt to establish claim to the whole or part of the testator's land and deprive the Plaintiff and her children of their inheritance to support the trial judge's finding of fraud.

Counsel for both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the 3<sup>rd</sup> Defendant supported the reversal by the Court of Appeal of the finding of the trial court on the issue of fraud. They both placed great premium on the fact that the Plaintiff did not plead nor particularise fraud and fraud was not set out as an issue for trial at the application for directions stage. For both counsel this was fatal and the trial judge erred in finding fraud against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. Counsel relied on a number of authorities including Nti V Anima [1984-86] GLR 134.

Both counsels further argued on the facts that the Plaintiff failed to establish fraud beyond a reasonable doubt as required by section 13(1) of the Evidence Act, 1975 (NRCD323).

### **Failure to Plead or Particularise Fraud**

Dealing first with the issue of the Plaintiff neither pleading nor particularizing fraud, we agree with the decision of the trial High Court, that this is not fatal. This Court has held in a number of cases such as Amuzu v Oklikah [1998-99] SCGLR 141 and Ecobank Nigeria Plc v Hiss Hands Housing Agency [2017-2018] 1 SCGLR 355 that though it is preferable to plead and particularise fraud, failure to do so is not fatal in all circumstances. In the Oklikah case, Atuguba JSC stated at page 183 as follows:

“In this case fraud has not been distinctly pleaded. But in view, especially of the provisions of sections 5,6 and 11 of the Evidence Decree, 1975 (NRCD 323) regarding reception of evidence not objected to, it can be said, that where there is clear but unpleaded evidence not objected to, the court cannot ignore the same, the myth surrounding the pleading of fraud notwithstanding”

And in the Ecobank Nigeria Plc case (supra), Gbadegbe JSC, after referring to the requirement of order 11 rule 12 (1) (a) of the High Court (Civil Procedure) Rules, 2004 (C.I.41) that particulars of fraud shall be specifically pleaded, continued at page 367;

“Although the rule is expressed in mandatory language, our courts have held that where a party fails to comply with the requirement of order 11 rule 12 (1) (a) but his opponent fails to object to evidence in support of the allegation of fraud, a court of law cannot shut its eyes to the evidence so led but must take it into account in deciding the dispute before the court.”

So, in the Ecobank Nigeria Plc case, (supra) where the court found that funds have been transferred into the accounts of the first defendant improperly and with a view to depriving the plaintiff of the benefit of his money, this court found that fraud had been established. This court held that the dishonourable and unconscionable conduct of the first defendant amounted to fraud.

It must be emphasized that the Plaintiff’s case was not based on fraud. The Plaintiff’s action was a simple probate and administration action demanding that the 1<sup>st</sup> Defendant, the executor of the estate, account to the beneficiaries for his administration and that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants cease intermeddling with the estate. The Plaintiff could not therefore have pleaded or particularized fraud in her pleading. It was the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who claimed ownership of the whole or



parts of the estate and tendered Exhibits "I", "C" and "E". Fraud was found by the trial judge on the totality of the evidence at the conclusion of the trial.

Fraud in this case, was used by the Plaintiff as a shield and not a sword. We therefore agree with the trial High Court that in a situation such as this, not pleading or particularising fraud is not fatal and did not preclude the court from concluding that the conduct of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had been fraudulent.

### **The Evidence on Fraud**

We now proceed to examine whether the conduct of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants amounted to fraud.

As we have pointed out, our task here is to determine whether on the totality of the evidence, the Court of Appeal properly exercised its discretion in overturning the trial court's finding of fraud. In other words, on the totality of the evidence, was the trial court's finding of fraud clearly not supported by the evidence, was it unreasonable or perverse or was it inconsistent with important documentary evidence.

From the totality of the evidence adduced at the trial, it is palpably clear that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants engaged in dishonest conduct and attempted to cheat the Plaintiff and deprive her and her children of their inheritance. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant by their dishonest conduct have also attempted to mislead the court and pervert the course of justice.

The 3<sup>rd</sup> Defendant forged Exhibit "C". He sought to change his father's name on the Title Deed to the entire property from Samuel K. Affram to his name, Samuel Kwesi Affram; and yet, the evidence showed quite clearly that when his father bought the land in 1961, he had not been born. He was born in 1972.

The 3<sup>rd</sup> Defendant and his witness DW1, his mother, also perjured themselves by giving palpably false evidence in connection with the purchase of the land. The 3<sup>rd</sup> Defendant and his mother, a former wife of the testator, concocted an Ananse story that the land was bought by the testator in the name of and for the 3<sup>rd</sup> Defendant with the proceeds realized from the 3<sup>rd</sup> Defendant's naming ceremony. This was a complete fabrication. The Deed of Purchase, tendered by the 3<sup>rd</sup> Defendant as Exhibit "C" recited that the land had been purchased by the testator from the Asere Stool in 1961 (when the 3<sup>rd</sup> Defendant had not been born) and the formal indenture executed in 1973, when the 3<sup>rd</sup> Defendant would have been only 2 years old.

This was a crude attempt by the 3<sup>rd</sup> Defendant and his mother to perpetrate fraud and we condemn it in the strongest terms.

The 2<sup>nd</sup> Defendant on her part claimed that the testator gifted a part of the land to her in 1999. But the 3<sup>rd</sup> Defendant is claiming the entire land by virtue of Exhibit "C". So whilst the 2<sup>nd</sup> Defendant was claiming a portion of the land on the basis of a purported gift from the testator, their father, the 3<sup>rd</sup> Defendant, her brother, was claiming the entire land by virtue of Exhibit "C". Nothing could be more disingenuous.

The 2<sup>nd</sup> Defendant in support of her claim of a gift from the testator relied on a purported Deed of gift, Exhibit "I" and a resultant substitute Land Title Certificate, Exhibit "E". Exhibit "I" purports to be a Deed of gift executed by the testator in favour of the 2<sup>nd</sup> Defendant in 1999, 2 years after the construction of the 16 disputed stores by which the testator purported to gift four shops and one room to the 2<sup>nd</sup> Defendant. The trial judge noted that the 2<sup>nd</sup> Defendant did not plead or remotely raise Exhibits "I" and "E" and found that the testator's purported signature on Exhibit "I" is different from his signature on Exhibit "A", which is accepted and acknowledged by all the parties as the signature of the testator. The trial court did not also look favorably upon the substituted Land Title Certificate. The court noted that by the Land Title

Registration Act, 1985 (PNDCL 152) a substitute Land Title Certificate can only be issued by the Registrar where a proprietor has established that she had been issued with an original Land Title Certificate which is lost, and that the 2<sup>nd</sup> Defendant had led no such evidence. The trial court therefore found Exhibits "E" and "I" as *ex post facto* attempts by the 2<sup>nd</sup> Defendant to mislead the court and deprive the Plaintiff and her children of their inheritance.

The Court of Appeal did not consider the conduct of the 3<sup>rd</sup> Defendant with the same opprobrium as the trial court. The Court agreed with counsel for the 3<sup>rd</sup> Defendant that the failure of the Plaintiff to plead and particularise fraud was fatal. They relied on order 11, rule 12 of C.I 41 and section 13(1) of the Evidence Act, 1975.

On the other hand, it held that the failure of the 3<sup>rd</sup> Defendant to plead Exhibits "I" and "E" as the basis of her claim was not. Furthermore, though the Court of Appeal noted that the trial court had found that the purported signature on Exhibit "I" was not that of the testator, it nonetheless found that this did not establish fraud beyond a reasonable doubt as required.

The 3<sup>rd</sup> Defendant also tendered Exhibits "H" and "5". Exhibit "H", dated 3<sup>rd</sup> November 2014 is a search report issued by the Lands Commission indicating that the land is recorded in the name of Samuel K. Affram at the Land Registry. Exhibit "5" is a receipt issued by the Lands Commission, dated 17<sup>th</sup> December 2015 when a second application for search was filed by the 3<sup>rd</sup> Defendant. The name stated on Exhibit "5" is not Samuel K. Affram but Samuel Kwesi Affram.

The Court of Appeal, however, explained all these untruths, contradictions and inconsistencies away and found that these do not amount to fraud. We have considered the evidence very carefully and cannot support the decision of the Court of Appeal. The 3<sup>rd</sup> Defendant set out to steal his father's land and set up an

elaborate scheme of forgery, dishonesty, perjury, misleading of the court and perversion of the course of justice in this dastardly act; and the Court of Appeal says this is not fraudulent. The Court of Appeal quoted with approval the dictum of Taylor, JSC in SA Turqui & Brothers v Daliabieh [1987-88] GLR 486 at pages 502-503 that:

“In my opinion a charge of fraud in law can be taken to be properly made against a party who knowingly or recklessly whether by conduct or words, uses unfair, wrongful or unlawful means to obtain a material advantage to the detriment of another party. It is an insidious form of corruption and it is therefore a charge involving moral obloquy. Bluntly put without equivocation it is a species of dishonest conduct.”

The Court of Appeal also approvingly quoted Kerr on the Law of Fraud and Mistake, 7<sup>th</sup> edition, by Denis McDonnell and John Munroe, at page 18 as follows:

“There is fraud in law if a man makes a representation which he knows to be false or does not honestly believe to be true and makes it with a view to induce another to act on the faith of it, he does so accordingly, and by so doing sustains damage...”

And yet, the Court of Appeal overturned the trial judge’s finding of fraud. There can be no doubt that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acted dishonestly and that by their conduct and words, sought to secure a material advantage to the detriment of the Plaintiff and her children. And these acts of dishonesty permeated the land administration system of the country and sought to mislead the court. It is in the words of Taylor JSC, insidious corruption involving moral obloquy.

We have carefully re-examined and evaluated the totality of the evidence at the trial and are of the considered opinion that the trial court’s finding of fraud was not clearly contrary to the evidence, unreasonable or perverse or inconsistent with important

documentary evidence. The Court of Appeal therefore erred in overturning the trial court's finding of fraud.

We reverse the finding of the Court of Appeal overturning the trial court's findings of fraud against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant. We accordingly restore the trial High Court's finding of fraud against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and the cancellation of Exhibits "C", "E" and "I".

## **CONCLUSION**

As is well known, fraud vitiates everything. The conduct of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant is dishonest and unconscionable and they must lose any rights they may have acquired by building on or contributing to build on the testator's land with his permission. After all, the 3<sup>rd</sup> Defendant, after claiming that the land was acquired in his name and for him by the testator, counter-claimed for the entirety of the testator's property. The 2<sup>nd</sup> Defendant also aligned herself with her brother, the 3<sup>rd</sup> Defendant, even in her amended statement of defence. At paragraph 9 of the amended statement, the 2<sup>nd</sup> Defendant and her husband, the 1<sup>st</sup> Defendant stated;

"At all material times the facts are that the testator held the land and managed it in trust for the 3<sup>rd</sup> Defendant".

The Defendants must swim or sink together. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sought to steal their father's land and to disinherit and eject their father's widow (their step mother) and her children (their half siblings) from his bona fide property. They have failed and must end with nothing.

Furthermore, in view of the dishonesty of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant and the false testimony that they proffered to the court, this court finds them untrustworthy and views their evidence in relation to the construction of the sixteen stores with suspicion.

We therefore reverse the finding of the Court of Appeal that the sixteen stores were constructed and owned by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and their brother Korankye and affirm the finding of the trial High Court that the sixteen stores were constructed and owned by the testator.

In light of the foregoing, the appeal is allowed in its entirety. We reverse the findings of the Court of Appeal overturning the decisions and orders of the trial High Court and restore the findings and orders of the trial High Court in their entirety.

**SGD. PROF. N. A. KOTEY**  
**(JUSTICE OF THE SUPREME COURT)**

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

**SGD. S. K. MARFUL-SAU**  
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