IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT OF GHANA

ACCRA-GHANA

CORAM: DOTSE, JSC. [PRESIDING]

ANIN YEBOAH, JSC.

GBADEGBE, JSC.

AKOTO - BAMFO (MRS), JSC,

PWAMANG, JSC.

CIVIL APPEAL

NO: J4/5/2014

9TH MARCH 2016

JOHN KWADWO BOBIE - PLAINTIFF /APPELLANT /APPELLANT

VRS

1. 21ST CENTURY CONSTRUCTION CO. LTD DEFENDANTS

a.k.a 21ST CENTURY REAL ESTATE LTD RESPONDENTS/

2. OBAA AHEMA ENTERPRISES LTD RESPONDENTS

3. ADOM SPINNING CO. LTD

4. GELINA PACKAGING CO. LTD

5. GELINA TROPICAL CO. LTD

6. KOFI ASMAH

7. THE REGIONAL LANDS OFFICER

LANDS COMMISSION, CENTRAL REGION, CAPE COAST

8. 21ST CENTURY CONSTRUCTION LTD

JUDGEMENT

PWAMANG, JSC.

FACTS

On 7th April 2005 defendants/respondents/respondents (herein referred to as defendants) filed a motion on Notice for Judicial Review in the form of mandamus against the Central Regional Lands Officer in the High Court, Cape Coast, praying for an order compelling the Regional Lands Officer to register a number of land instruments in the names of the defendants. The instruments are in respect of lands at Kasoa and Nyanyano in the Central Region.

Defendants stated in the affidavit in support of the application for mandamus that they submitted their documents to the Central Regional Lands Commission in March 2000 and since then the Lands Commission registered some to their documents but were refusing to register some on grounds which the defendant considered were not justifiable.

When the Lands Commission was served with defendants' application for mandamus they opposed it on the grounds that they had a number of concerns about defendants' documents in respect of unpaid rents, absence of consents from defendant's grantors and apparent errors and discrepancies contained in their documents.

From the record it appears both parties filed statements of case as required under **Or 55 of the High Court (Civil Procedure) Rules, 2004 (C.I.47)** and the application was placed before His Lordship Justice K. K. Acquaye (of blessed memory) for determination.

However before K. K. Acquaye J. could determine the application for mandamus the defendants and the Regional Lands Commission settled almost all the issues arising on the application and filed Terms of Settlement. By the settlement the Regional Lands Officer agreed to accept and plot defendants documents provided consent by their grantors was obtained. Nonetheless the parties agreed to abide by any directives the court would give in respect of the refusal of defendants' grantors to give consent. There was also an issue of whether a new Legislative Instrument, LI 232, which required local publication of applications before registration, was applicable to defendants' applications for registration.

K. K. Acquaye J. gave a ruling on the application on 19th September 2005 granting the order of mandamus. He held that defendants' grantors were unreasonably withholding their consent so the Lands Commission should go ahead with the plotting and registration without

the consents. He also held that the defendants' applications for registration of their instruments were lodged before the passage of LI 232 so they were not caught by the requirement for local publication.

Despite this decision of the court the defendants were still facing problems with the plotting and registration of some of their documents so they filed a motion for committal against the Regional Lands Officer for contempt of court for not fully complying with the order of mandamus. This motion for committal for contempt against the Regional Lands Officer too was settled and terms of settlement dated 28th December, 2006 were filed in court.

The motion for contempt was called on 31st July, 2008 before His Lordship Justice Ayimeh, and from the record of proceedings it would appear that the Regional Lands officer raised the issue of the registration of third party documents that conflicted with the defendants' documents. From the record the Lands Officer himself was taking steps to reverse the third party registrations so the court made an order for him to expunge those registrations. The Regional Lands Officer expunged the documents of the plaintiff/appellant/appellant, hereafter referred to as plaintiff, which conflicted with defendants' documents, from the records of the Central Regional Lands Commission and notified him by letter dated 17th September 2008.

IN THE HIGH COURT

Plaintiff after eleven months of the letter deleting his registration filed a writ of summons in the High Court, Cape Coast on 29th August, 2009 against the defendants praying for;

a) An order setting aside the order of the Cape Coast High Court dated 31st July 2008 on the grounds of fraud.

b) An order declaring null and void the order dated 31st July 2008 for having been obtained without notice or hearing of plaintiff.

c) An order setting aside the order dated 31st of July, 2008 as not the order sought for in the contempt application.

d) An order expunging the records of the 1st to 6th defendants and their grantees based on the order dated the 31st July, 2008.

e) An order compelling the 7th defendant to reinstate plaintiff's document No. 543A/98 at the Lands Commission, Cape Coast.

f) Perpetual injunction restraining the defendants herein, their servants, assigns, grantees etc. from interfering in any way with the plaintiff recorded interest at the Lands Commission, Cape Coast.

The main grounds for plaintiff's charge of fraud against the defendants was that when they applied for the order of mandamus to compel the

Regional Lands Officer to plot their documents they failed to disclose to the court that the plaintiff was counterclaiming for the land covered by their documents and that they were in court over ownership of the land. Plaintiff also stated in his statement of claim that he was not served with any process by the court before the order for his documents to be expunged was made and that the order was void.

In their defence defendants denied the allegation of fraud against them and contended that they proceeded against the Regional Lands Officer for mandamus because he had a public duty to discharge towards them under the **Land Registry Act, 1962 (Act 122)** and they could not have joined plaintiff who had no such duty to discharge. Defendants also stated that plaintiff's title deeds were null and void *ab initio* so there was no obligation to join him. Defendants pleaded extensively about their root of title to the lands covered by their documents and plaintiff's root of title and contended that plaintiff's title to the land is void.

After a full trial the High Court presided over by Justice J. K. Dorgu gave judgment on 27th March 2012. He dismissed all the reliefs claimed by plaintiff except relief (f), which was a claim for perpetual injunction. The trial judge held that although he would not set aside the orders for the plotting of defendants' documents as same were not obtained by fraud, plaintiff demonstrated that he had equitable title whereas defendants proved legal title to the land. He therefore granted the injunction prayed for by plaintiff pending a determination of the respective titles of the parties by a court of law.

IN THE COURT OF APPEAL

The plaintiff was dissatisfied with the judgment and appealed against it to the Court of Appeal. Defendants too felt aggrieved by the findings in respect of plaintiff's equitable title and the grant of interlocutory injunction so they also cross-appealed.

The Court of Appeal in its unanimous judgment dated 21st March, 2013 dismissed plaintiff's appeal except to set aside the injunction and the findings of the High Court regarding the respective interests of the parties in the land. The reason the Court of Appeal gave for setting aside those findings of the trial High Court, which we fully endorse, is that the case that was before the trial High Court was not about ownership of land so the judge had no legal basis to determine whether a party had equitable or legal interest in the land. Plaintiff has further appealed to this court, being dissatisfied with the decision of the Court of Appeal.

IN THE SUPREME COURT

In the appeal before this court the plaintiff has stated three grounds of appeal as follows:

> "(a) The Court of Appeal erred in holding that the appellant could not prove fraud against defendant (respondent) in procuring

orders pursuant to which appellant's recorded transaction with the 7th defendant/respondent was expunged.

(b) The Court of Appeal erred in failing to set aside orders procured without notice to plaintiff/appellant based on which plaintiff/appellant recorded transaction with the 7th defendant/respondent was expunged.

(c) The judgment is against the weight of the evidence."

Plaintiff indicated in his notice of Appeal that additional grounds of appeal shall be filed upon receipt of the record but none has been filed.

It is well settled that where a second appellate court is called upon to reverse concurrent findings and conclusions on evidence by two lower courts, the second appellate court has to be slow in coming to a decision to reverse those findings and conclusions. However, the rule does not bar the second appellate court from reversing concurrent findings and conclusions where there is a reason to do so. The grounds upon which a second appellate court may reverse concurrent findings and conclusions have been stated in several cases decided by this court including the following**; Achoro and Anor v. Akanfela [1996-97] SCGLR 209; Koglex Ltd (No.2) v. Field [2000] SCGLR 175; and Gregory v. Tandoh & Hanson [2010] SCGLR 971.**

These cases lay down the grounds upon which a second appellate court may interfere and set aside concurrent findings as follows;

(i) Where the said findings are not supported by the evidence on record or where the reasons in support of the findings are unsatisfactory.

(ii) Where the findings are based on a wrong proposition of law or principle of evidence, such that if that wrong proposition is corrected the findings will cease to exist.

(iii) Where the findings are inconsistent with a crucial document or other undisputed evidence on the record.

(iv) Where the findings are otherwise substantially or seriously perverse and unjustified so as to occasion a grave miscarriage of justice.

It is trite learning that an appeal is by way of rehearing and especially where an appeal is against findings and conclusions based on evidence, it is the duty of the appellate court to peruse the whole record and review the evidence to determine if the findings and conclusions in the judgment appealed against are justified having regard to the evidence and the applicable law. See**. Nkrumah V Ataa [1972] 2 GLR 13, Tuakwa V Bosom [2001-2002] SCGLR 61.** We shall now consider the grounds of appeal in the order in which plaintiff filed them.

GROUND (A)

The Court of Appeal erred in holding that the appellant could not prove fraud against defendant (respondent) in procuring orders pursuant to which appellant's recorded transaction with the 7th defendant/respondent was expunged.

In respect of Ground (a) of the appeal plaintiff in his statement of case before this court basically repeated his case before the High Court to the effect that defendants were aware of his claim to the land and the registration of his document but when they applied for mandamus against the Regional Lands Officer they did not disclose those facts in their affidavit in support of their application. He has also stated that in the course of the trial of this case in the High Court it was shown that the documents defendants applied to be registered at the lands commission contained forgeries.

The defendants in their statement of case have maintained their position that their conduct in not joining the plaintiff in the mandamus application is not tantamount to fraud. They have urged this court to associate itself with the findings on the issue of fraud by the High Court and the justices of the Court of Appeal.

The question that needs to be answered is; did plaintiff adduce evidence to establish that the order of mandamus was obtained by fraud? The well known rule of evidence is that when fraud is alleged even in civil proceedings it must be proved beyond reasonable doubt. See. **S. 13(1) of the Evidence Act, 1975 (NRCD 323).** The position of the law is that for a judgment or an order of a court to be impeached on grounds of

fraud, it must be shown that the alleged fraud related to the central issue for determination before the court and that it was the main ground for the judgment. Put in another way, the party impugning a judgment on grounds of fraud must first prove the alleged fraud and further demonstrate that if the fraud is taken out, the judgment cannot stand. **See Dzotope v. Hahomene 1984-86 1 GLR 289 CA.**

The widely acknowledged definition of fraud, which plaintiff referred to and which was relied on by the High Court and the Court of Appeal in their judgments, is Lord Hershell's definition of fraud in **Derry v. Peak (1889) 14 AC 337 at 374** where he said:

> "fraud is proved when it is shown that a false representation has been made (1) knowingly, (2) without belief in its truth or (3) recklessly, careless whether it be true or false. To prevent a false statement being fraudulent there must I think always be, an honest belief in the truth and this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief.

Going by this definition the plaintiff has not pointed to anything in the legal processes filed in the High Court leading to the orders he complains of, in which the defendants knowingly alleged falsehood which they knew to be false or which they had no honest belief in its truth. What it appears plaintiff is relying on is the principle in contract law which is that, in certain circumstances concealment may give the truth which is told the character of falsehood. See the case of **Oakes v.**

Turquand (1867) LR 2HL 325. That principle mostly applies where the person accused of non disclosure is required to make a disclosure of what he has concealed and his failure to make the disclosure is borne out of an intention to deceive the other party. But that is not the situation in this case.

In the circumstances of this case the defendants' application for mandamus was targeted at having their document registered in the records of the Lands Commission. The record shows that prior to going to court, there had been several meetings between the defendants and Lands Commission of the Central Region concerning their applications. The settled law is that registration of instruments affecting land under the Land Registry Act, 1962 (Act 122) is not a guarantee of title to the land where the person who is registered is not the true owner of the land. **See Kwofie V Kakrabe [1966] GLR 229, Botchway V Okine [1987-88] 1 GLR 1.** We do not find any evidence of fraud by the defendant on the record and the failure to join plaintiff to the application does not amount to fraud.

Plaintiff in his statement of case has drawn our attention to what he says are forgeries in some of the defendants documents that came up during the trial of this case in the High Court and has argued that they amount to fraud by the defendants. May we remind the plaintiff that we have fully endorsed the holding of the Court of Appeal that the High Court was not seized with jurisdiction to try the merits of the respective titles of the parties to the land but was only to determine whether the orders that plaintiff complained of were procured by fraud. These

matters that plaintiff is raising, though serious, were not in issue when the High Court considered and ruled on the application for mandamus. Those issues can only be effectively determined by a court properly seized with jurisdiction to determine the ownership of the land and it will be inappropriate for us to comment on them in this judgment.

We are inclined to agree with the Court of Appeal that if counsel for plaintiff in this case had exercised a dispassionate professional judgment he would have realized that the facts that he was relying on did not meet the requirements of the law for impeaching a judgment or order of a court on ground of fraud. The finding of the High Court and the Court of Appeal that fraud was not proved by plaintiff is supported by the record so we affirm that finding and accordingly dismiss Ground (a) of the appeal as being without merit.

GROUNDS (B)

The Court of Appeal erred in failing to set aside orders procured without notice to plaintiff/appellant based on which plaintiff/appellant recorded transaction with the 7th defendant/respondent was expunged.

Under this ground of appeal the plaintiff stated in his statement of case that the High Court judge was made aware of 3rd parties' interest in the subject matter before him. Consequently the court was required to either order that the third parties be joined to the proceedings or served with notice and the failure to do so renders the order for expunging plaintiff's document null and void. Plaintiff referred to the cases of

Republic v. Lands Commission, Ex Parte Vanderpuye Orgle Estates Ltd [1998-99] SCGLR 677 and In Re Ashalley Botwe Lands; Adjetey Agbosu & Ors v Kotey & Ors [2003-2004] SCGLR 420. He has submitted that the order for his document to be expunged without hearing him is a violation of the Rule of Natural justice and his right to hearing guaranteed under Article **19 of the 1992 Constitution.**

In answer to the plaintiff's submissions, defendants have argued that if even the courts that considered the applications for mandamus and contempt committed any errors, those errors do not entitle the plaintiff to issue a writ if summons to have the orders declared null and void. Defendants quoted the following statement of the trial judge at page 447 of vol 2 of the record;

> "It is trite law that if a court has jurisdiction to enter into a matter, then that court could either get it right or wrong. If it gets it wrong, that does not negate the jurisdiction but such wrong orders or judgments are appealable or could be subject to judicial review in the nature of certiorari. It cannot be fraudulent or void, neither can it qualify as a breach of the rules of natural justice."

Without intending to lower the great importance of the right to a hearing in civil proceedings in a court or before any quasi judicial body, it must be pointed out that the right to fair hearing that has been guaranteed by the Constitution is in respect of criminal trials only. Article 19 of the 19992 Constitution, which is headed; Fair Trials,

contains elaborate provisions for criminal trials and at paragraph (1) thereof provides as follows;

> "A person charged with a criminal offence shall be given a fair hearing within a reasonable time by a court".

In our understanding, the substance of plaintiffs complaint under this ground of appeal is a submission that the High Court court in hearing the application for mandamus did not comply with the requirements of the rules of this court on applications for judicial review particularly **Or 55 R 5(1) & (2) of the High Court (Civil Procedure) Rules, 2004 (CI. 47) which provides as follows;**

> **"Notice of Application**
>
> **5(1) Notice of the application shall be served on all parties named in the applicant's affidavit as being directly affected by it.**
>
> **(2) The court may order that notice of the application shall be served on any person not named as being directly affected by the application if in its opinion it is desirable that the person should be given notice."**

The legal point which the trial judge raised and defendants have relied on in this appeal before us is that the fact that the judges in

the mandamus and contempt applications did not fully comply with the rules of court does not entitle the plaintiff to bring a fresh action seeking to have the orders declared null and void.

By the provision of Or 55 R5(2) of C.I.47 it is clear that, as far as judicial review applications are concerned, the court is given a discretion, where it gets to know of the interest of a non party in a matter before it, to order that he be given notice or not. What this means is that the Or 55 R5 (2) of C.I. 47 envisaged that in certain situations a court may make an order that has the potential of affecting a person without hearing that person. Of course as with all discretions in law, that discretion has to be exercised judicially. However the question that arises here is; can a person aggrieved by a failure on the part of the High Court to serve him notice of proceedings in which he is interested, go before another High Court of co-ordinate jurisdiction to seek to nullify what has been done by the earlier High Court?

In the case of Punjabi Brothers v. Namih [1962] 2GLR 48, the Supreme Court per Adumua-Bossman JSC stated as follows at page 50 of the report;

> "I apprehend that although it is open to a party against whom judgment has been given to institute a fresh action to claim the setting aside of that judgment on the ground of fraud and/or misrepresentat**ion (see Kojo Pon v. Atta Fua, (sic) (1929) F.C '26-29' 552. in which the leading English cases on the subject**

are discussed) it does not appear to be open to him, without first getting the judgment set aside, and while it is still subsisting, of full force and effect, to ask another court of co-ordinate jurisdiction in another case in which other issues are raised, to pronounce a judgment of a superior court, which has not been set aside, to be null and void. The law seems to be clearly enough settled that so long as a judgment of a superior court remains undischarged and of full force and effect, it is not competent to another court of co-ordinate jurisdiction to pronounce against its validity, however palpably erroneous it may appear to be..... If, therefore, there are features about a judgment as to render it liable to be set aside, clearly the proper step to take is to get it set aside first."

Adumua-Bossman JSC made reference to the case of Flower v. Lloyd (1877) 6 Ch D 297 C.A in which James LJ said as follows at pages 301 to 302;

"I agree with what has been said by the Master of the Rolls, that in the case of a decree (or judgment as we call it now) being obtained by fraud there always was power, and there still is power, in the Courts of Law in this country to give adequate relief. But that must be done by a proceeding putting in issue that fraud, and that fraud only. You cannot go to your adversary and say, "You obtained the judgment by

fraud, and I will have a rehearing of the whole case" until that fraud is established. The thing must be tried as a distinct and positive issue; "you" the Defendants or "you" the Plaintiff "obtained that judgment or decree in your favour by fraud; you bribed the witnesses, you bribed my solicitor, you bribed my counsel, you committed some fraud or other of that kind, and I ask to have the judgment set aside on the ground of fraud." That would be tried like anything else by evidence properly taken directed to that issue, and wholly free from and unembarrassed by any of the matters originally tried. That was the old course of the law, and there seems to be no reason why that should not be now followed;"

See also the case of Brutuw v Aferiba [1984-86] 1GLR 25.

Plaintiff was therefore within his rights to institute this suit seeking to set the judgment aside on grounds of fraud, but then it is only the fraud that could be relied upon and no other ground. There is a tendency by litigants to use the cover of allegation of fraud against a judgment to get a court of co-ordinate jurisdiction to question the validity of a judgment of a sister court but the courts have to be firm in disallowing that course of proceeding. The policy rationale is not difficult to see for, if the validity of judgments and orders of superior courts can easily be questioned in a court of co-ordinate jurisdiction next door, except on grave grounds such as fraud, litigation will be unnecessarily protracted and the effectiveness of judgments of the superior courts will suffer.

Plaintiff in this case was not without remedy when the Lands Officer wrote to inform him of the cancellation of his document. He could have filed the appropriate processes before the same High Court in the same suit and asked it to set aside its orders or he could have applied for prerogative orders from this court within the time allowed by the rules of this court. From the record we do not find any explanation by plaintiff for failing to take any step to seek relief until about eleven months had passed. But even now he still has a pending substantive case to determine ownership of the land and that should address his grievance in a more fundamental manner.

As far as this appeal is concerned, our judgment is that the High Court was not competent to determine the grounds other than the allegation of fraud on which plaintiff prayed it to declare the orders of 30th July,2008 null and void. The circumstances in the cases of Ex parte Orgle Estate Ltd and In Re Ashalley Botwe Lands are different from this case as the trial courts in those cases were competent to hear the claims filed before them. Plaintiff's claims apart from the fraud placed before the High Court in this case were misconceived and ought not to have been entertained by the trial court. We accordingly dismiss ground B of the appeal.

Since we have already held that the evidence on record does not establish fraud, we do not consider it necessary to decide ground C of the appeal. The appeal in its entirety is dismissed.

G. PWAMANG

JUSTICE OF THE SUPREME COURT

V. J. M. DOTSE

JUSTICE OF THE SUPREME COURT

ANIN YEBOAH