IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- AD 2019

CORAM: YEBOAH, JSC (PRESIDING)

GBADEGBE, JSC

APPAU, JSC

MARFUL-SAU, JSC

KOTEY, JSC

CIVIL APPEAL
NO. J4/42/2018

30TH JANUARY, 2019

JUSTICE GILBERT MENSAH QUAYE
(SUBST. BY DANIEL MENSAH QUAYE) ..... PLAINTIFF/RESPONDENT/RESPONDENT

VRS

1. KOIWAH INVESTMENT CO.LTD. ..... 1ST DEFENDANT/APPELLANT/APPELLANT
2. GERSHON ADJIN
3. DR. ADU GYAMFI
4. INTERNATIONAL CENTRAL GOSPEL CHURCH

J U D G M E N T

MARFUL-SAU, JSC:-

This appeal is taken against the judgment of the Court of Appeal, which affirmed the decision of the High Court. In these proceedings we intend to give the parties the designation they had before the trial court. The 1st defendant who lost the contest

both at the High Court and the Court of Appeal now appeals to this court on the following grounds:-

1. The Court of Appeal erred when it held that estoppel was inapplicable to the Deed of Gift because it was the Deed of Purchase which was affected by the Judgment of Ollenu J, in Suit No. 151/1960 dated 27th July, 1962 entitled Borkete Osonoware & 23 Others v. Nii Odai Ayiku IV & Quaye Tawiah, when the said judgment nullified the Deed of Purchase made to the Plaintiff/Respondent/Respondent's father in 1958 or 1959 on the basis that the attesting witnesses whose consent and concurrence the Plaintiff/ Respondent/ Respondent relied on to prove the Deed of Gift were not the accredited elders whose consent and concurrence was necessary for a valid grant of Nungua Stool in 1958 or 1959.
2. The judgment is against the weight of evidence

From the record of appeal no additional ground was filed as indicated in the Notice of Appeal filed on the 28th November 2017. Ground (1) as formulated above clearly offends rule 6 (4) and (5) of the Rules of this court in the sense that it is argumentative and narrative in nature. Under Rule 6(5) of CI 16, any ground of appeal which is not permitted under the rule may be struck out by the court on its own motion or on application by the Respondent. However, since the ultimate objective of this court is to do justice on the merit of cases, we shall refrain from striking out that ground, but sever the offending parts and amend the said ground to read as follow: - **''the Court of Appeal erred when it held that estoppel was inapplicable to the Deed of Gift''.** Indeed, the severed parts of the ground are matters that could be addressed in the statement of case.

In **Attorney – General v. Faroe Atlantic Co. Ltd. {2005-2006} SCGLR 271**, this court had cause to strike out offending parts of two of the grounds of appeal and amended the two grounds of appeal for the Appellant. Similarly in **West Laurel Co. Ltd v. Agricultural Development Bank {2007-2008} 1 SCGLR 556**, the court found grounds (2) and (4) of the Appeal as argumentative and narrative and as such struck out ground (2) but waived non- compliance with the Rules in respect of ground (4). As indicated we in intend to follow the practice in this court as

demonstrated in the cases cited above and amend ground (1) of the Appeal, as stated above. We would like to sound a caution that by amending the offending ground instead of striking it out, this Court is not encouraging non-compliance of its rules. This Court shall in all appropriate cases insist on the strict adherence of the rules that regulate its proceedings. I now address ground (1) as amended by the court.

The fundamental complaint of the 1st Defendant against the judgments of both the High Court and Court of Appeal is that the court erred in holding that estoppel was inapplicable to the Deed of Gift because the Deed of Gift was not affected by the judgment of Ollenu J. There is no dispute on the record that in Suit No. 151/ 1960 entitled Borkete Osonoware & 23 Others v. Nii Odai Ayiku IV & Quaye Tawiah, a parcel of land which was conveyed to Quaye Tawiah by a Deed of Purchase was declared a nullity, by Ollenu J, in a judgment dated 27th July 1962. The main reason for which the Deed of Purchase was nullified was that the accredited elders whose consent and concurrence were necessary, by custom, for a valid conveyance of Nungua land were not obtained before the grant. The 1st Defendant's argument is that since the same unaccredited elders signed the Deed of Gift, the judgment of Ollenu J, ought to apply to nullify the Deed of Gift from Nii Odai Ayiku IV to Quaye Tawiah.

The appeal before us therefore, raises a fundamental issue to be resolved, which is, whether or not the judgment of Ollenu J, could operate as estoppel against the Deed of Gift, which was tendered at the trial as Exhibit A. Learned Counsel for the 1st Defendant has argued that estoppel should operate because Ollenu J, found and held that the Deed of Purchase to Quaye Tawiah was invalid because the accredited elders did not consent. This issue found by Ollenu J, according to Counsel for 1st Defendant, was equally applicable to the Deed of Gift, on grounds that the accredited elders did not consent to the gift to Quaye Tawiah. However, what counsel for 1st Defendant fails to appreciate is that for estoppel to operate apart from the issues in the two cases being the same, the parties or their privies must be the same and finally the subject matter of the two suits must also be the same. The trial court and the first appellate court rightly applied the law on estoppel per rem

judicata which is trite learning. The two courts below relying on cases such as **Poku v Frimpong {1972} GLR 230; In Re Sekyedumase Stool, Nyame v Kese alias Konto {1998-1999} SCGLR 476** and **Dahabieh v SA Turqui & Bros {2001-2002} SCGLR 498**, held rightly that Ollenu J's judgment could not operate as estoppel against the Deed of Gift, because the three requirements as above stated were absent. We find and hold that the two lower courts did not err in so holding that estoppel was inapplicable against the Deed of Gift.

In these proceedings evidence on record supports a finding that, the grantors of 1st Defendant, who claim to be the accredited persons, by custom to convey Nungua lands and their privies, rather are the ones caught by cause of action and issue estoppel. There is ample evidence from the 1st Defendant and his witnesses that at the time the elders went to court to get the Deed of Purchase nullified, they knew of the existence of the Deed of Gift, however, they initiated a cause of action against the Deed of Purchase without attacking the validity of the Deed of Gift. The elders who went to court, their privies and all claiming under them, including the Defendants are estopped from now raising the issue of the validity of the Deed of Gift. There is evidence at page 185 to 187 of the record of appeal that both the Deed of Gift and the Deed of Purchase were in existence before Ollenu J's judgment, but as indicated, the elders choose to litigate over the Deed of Purchase only. It will therefore be an abuse of the court process if the 1st Defendant is allowed to re-litigate on the validity of the Deed of Gift as he sought to do in this action.

It is trite learning that related to the principle of cause of action and issue estoppel is the doctrine of abuse of process, commonly referred to as the rule in **Henderson v. Henderson {1843} Hare 100**, whose essence was set out in the case of **Barrow v. Bankside Agency Ltd. {1996} 1WLR 257 at 260** as follows:

> **''The rule in Henderson v. Henderson {1843} Hare 100 is very well known. It requires the parties, when a matter becomes a subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to**

the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one will do. That is the abuse at which the rule is directed."

On the above principle of law the case of **Greenhalgh v. Mallard {1947} 2 All ER 255**, is very instructive and throws more light on the estoppel issues raised in this case. At page 257 of the report the court observed that ***res judicata:***

" is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in."

This principle of law has been applied by this court in several cases, such as **Brown v. Ntiri (Williams Claimant) {2005-2006} SCGLR 247**, and **Dahabieh v SA Turqui & Bros{2001-2002} SCGLR 498**, where the court stated at page 507 of the report that:

" it is well settled under the rule of estoppel that if a court of competent jurisdiction has tried and disposed of a case, the parties themselves and their privies cannot, thereafter, bring an action on the same claim or issue. The rule covers matters actually dealt with in the previous litigation as well as those matters which properly belonged to that litigation and could have been brought up for determination but were not raised."

The above principle of law clearly points to the fact that 1st Defendant is estopped from re-litigating the validity of the Deed of Gift as that claim belonged to the first

action that went before Ollenu J. On this legal point alone the 1st Defendant ought to lose this appeal.

Now, beside the issue of estoppel as discussed in this judgment, the general principle of law is that judgments are prospective in nature and not retrospective. For this reason, it will be wrong to apply Ollenu J's judgment to the Deed of Gift, as counsel for the 1st Defendant is urging this court to do. In other words, counsel for the 1st Defendant's argument would have been sound in law, if the litigation over the Deed of Gift, took place after the judgment entered by Ollenu,J. thus vesting him a cause of action in issue estoppel.

The argument put up by counsel for the 1st Defendant in the circumstances of this case, does not find favour with us because the Deed of Gift existed before the judgment of Ollenu J. We therefore reject that argument and by that, ground (1) of this appeal is dismissed.

The next ground is that the judgment entered by the Court of Appeal is against the weight of evidence. It is trite that such a ground of appeal enables the appellate court such as this court to review the evidence on record to ascertain whether the court below erred principally in evaluating the evidence adduced by the parties at the trial, or that the court below wrongfully applied a law. In our evaluation of the evidence on record, we find that before the land, the subject matter of dispute was conveyed to the 1st Defendant and for that matter the other Defendants, the Nungua Stool had already gifted that parcel of land to Quaye Tawiah in 1958. The 1st Defendant by his own counterclaim and evidence admits of the Deed of Gift to Quaye Tawiah. It is this Deed of Gift that he seeks to nullify in these proceedings, for reasons earlier on indicated in this judgment.

There is no doubt that the Deed of Gift was registered at the Land Registry as No. 2078/ 1960. This Deed of Gift has not been nullified by any court and as such it is still valid. What it means is that from 1958 when the gift was made, the Nungua Stool ceased to be the owner of the land, the subject of the Deed of Gift. The Stool therefore could not convey that same land to the 1st Defendant in 1992. The principle of nemo dat quod non habet clearly applies here. **In Sarkodie v. FKA Co Ltd {2009} SCGLR 65, this court held as follows:-**

'' an effective customary conveyance of land would divest the grantor of any further right, title or interest in the land; the same land could therefore not be conveyed or granted to a subsequent grantee.''

On this evidence alone we do not see how the 1st Defendant can even allege that the judgment of the Court of Appeal is against the weight of evidence. That ground is baseless in law and we do not intend to spend any further time on it, same is therefore dismissed.

In conclusion, we are of the opinion that the entire appeal is without merit and same is accordingly dismissed. The judgment of the Court of Appeal is hereby affirmed.

S. K. MARFUL-SAU
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

GBADEGBE, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

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

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

KOTEY, JSC:-

I agree with the conclusion and reasoning of my brother Marful-Sau, JSC.

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

COUNSEL

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WILFRED BABA AVIO FOR THE DEFENDANT/APPELLANT/APPELLANT.