IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)
PROF. KOTEY JSC
OWUSU (MS.) JSC
TORKORNOO (MRS.) JSC
PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL
NO. J4/68/2021

6TH APRIL, 2022

KAMARU JAJI
(SUING PER HIS LAWFUL ATTORNEY - SIKIRU JAJI) **..... PLAINTIFF/RESPONDENT/RESPONDENT**

VRS

PAUL BOATENG **..... DEFENDANT/APPELLANT/APPELLANT**

JUDGMENT

DOTSE JSC:-

INTRODUCTION

On the 16th of March 2022, this court by a unanimous decision dismissed the appeal filed by the Defendant/Appellant/Appellant hereafter referred to as the Defendant, against the decision of the Court of Appeal dated 23rd July 2020 which affirmed an earlier trial High Court decision dated 9th October 2019, in favour of the

Plaintiff/Respondent/Respondent, hereafter referred to as the Plaintiff. We reserved our reasons for the said unanimous decision and and we proceed to proffer the reasons as follows:-

In view of the complexities of the facts which have led to the appeal, we have decided to set out in very clear details, the evolution of the facts in the instant appeal from the High Court, through the Court of Appeal to this court. It is also considered worthwhile to set out with clarity the facts of a related suit which commenced in the District Court, Kaneshie, Accra, ***Suit No. A2/21/11 intitutled Rosemary Onipayede – Plaintiff v Faustina Sakyi & Anr – Defendants***.

The 1st Defendant named supra is the wife of the Defendant herein.

PREAMBLE

The property at the center of this appeal for which the parties have litigated from the High Court all the way to the Supreme Court is described as H/No DF 17 Race Course, near Lapaz, Accra. This property was purchased by the Plaintiff hereinat a public auction where the property was being sold in satisfaction of a debt owed by the wife of the Defendant herein.

The Plaintiff was declared the highest bidder and upon the payment of GH¢ 65,000.00 was issued with a Certificate of Purchase on the 8th of January 2013, which was duly signed by a Judicial Officer and numbered J.S 7525900.

In March 2015, the Plaintiff was served with a Writ of possession from the High Court requesting him to vacate the purchased property on the grounds that the property belongsto Defendant.

The Plaintiff petitioned the Office of the Chief Justice concerning the matters arising after the judicial sale of the property.On 13th August 2015, the Judicial Secretary in response to his petition,stated thatinvestigations revealed that hehas been lawfully placed in possession of the purchased property. The Judicial Secretary advised the Plaintiff to seek redress through legal proceedings to vindicate his title to the property.

The Plaintiff therefore caused a writ of summons to be issued against the Defendant and also filed an application for injunction in the matter. The High Court at the conclusion of the entire proceedings gave judgment for the Plaintiff which decision was further affirmed by the Court of Appeal hence this appeal to the apex court.

PROCEDURAL HISTORY

As we stated in the introduction, for a proper understanding of the facts of this case, we must start the rendition of the facts from the District Court case which gave birth to the suit in the instant appeal.

District Court

In the District Court, Kaneshie, the wife of the Defendant herein was found to be liable for a debt in the case of Rosemary Onipayede v Faustina Sakyi and Rose Bemah Suit No: A2/21/11. The subject matter property in this suit that is, H/No. DF 7, Race Course, Near Abeka Lapaz, Accra was by a Writ of fifa attached to be sold in satisfaction of the debt.

The Defendant, the husband of the judgment debtor in the District Court, filed a Notice of Claim which was dismissed on the 5th April 2012 by the Kaneshie District Court as the Claimant was absent in court. The Appellant brought an application to set aside the dismissal of his Claim in the District Court but same was also dismissed on the merits on 24th September 2012.

After the dismissal of the claim, the Judgment Creditor, Rosemary Onipayede, proceeded to follow all the required procedure and the property was sold at a public auction where the Plaintiff herein purchased the property for GH¢ 65,000.00 and was given a certificate of purchase on the 8th January 2013.

On the very next day, that is, the 9th January 2013 the Defendant herein filed an application to invoke the supervisory jurisdiction of the High Court for amongst other things an order of certiorari to quash the decision of the District Court, Kaneshie dated the 5th April 2012.

The High Court, two years after the application was filed, on the 16th January 2014 granted the order of certiorari to quash the decision of the District Court delivered on 5th April 2012. ***The High Court proceeded to further order that "The property of the Applicant which was sold in execution of the Court's Judgment and Orders goes back to the owner, the Applicant herein".***

The Judgment creditor in the District Court filed an appeal against the certiorari and further filed an application for stay of execution. The application for stay of execution was dismissed by the Court of Appeal on the 23rd January 2015. After the dismissal of the application for stay of execution the Defendant herein sought leave to issue a Writ of Possession on the 27th January 2015 and on the 16th February 2015 the order for Writ of Possession was granted.

HIGH COURT SUIT THAT HAS RESULTED INTO THE INSTANT APPEAL

The Plaintiff after being served with the Writ of Possession wrote to the Chief Justice concerning the issues surrounding the purchase of the property at the auction. On the 13th August 2015 the Judicial Secretary wrote to the Plaintiff informing him that investigations reveal that he has been placed in lawful possession of the property He was further advised to commence legal proceedings to vindicate his claim.

On the very same day, the Plaintiff issued a Writ of Summons and also filed an application for injunction pending the final determination of the suit. The Writ of Summons was endorsed with the following reliefs:

i. **A declaration that the Plaintiff is the owner of the Property No. DF 17, Race Course near Lapaz, Accra having bought the said property at auction sale and being in possession since 2012.**

ii. **An order for a perpetual injunction restraining Defendant, his agents, workmen, assigns or who so ever claiming under him not to claim ownership of House No. DF 17, Race Course, property of Plaintiff.**

iii. **Cost**

The learned High Court Judge, Ackah Boafo J after hearing both parties on the injunction application granted the application. In his ruling granting the injunction the learned judge stated that the injunction application has raised two fundamental questions, namely:

1. Whether or not the Orders made in favour of the Defendant herein by the High Court differently constituted were legally justified based on the affidavit evidence before the court and counsel's submission? and
2. Whether or not the Plaintiff herein has made out a case for the grant of an interlocutory injunction?

In respect of the first issue, the learned trial judge after a careful consideration of the law on the Supervisory Jurisdiction of the High Court held as follows:-

> " *From the relevant law, as has been explained above therefore, it is my considered view that this court differently* ***constituted fell into error when after quashing the decision of the Kaneshie District Court, it did not remit same for redetermination of the Claimant's claim but went ahead to order that"The property of the Applicant which was sold in execution of the Court's judgment and orders goes back to the owner, the Applicant herein".***
>
> *In my respectful view, the* ***Court lacked jurisdiction to make that order in a Certiorari application****. Not only that, it seems the Court did not avert its mind to the fact that the claimant had to establish and prove his claim on the merits before a decision could be made.* ***Therefore, without hearing any evidence from the Judgment Creditor and/or claimant establishing his title but making the order as it did in a certiorari application was not***

just wrong in law but palpably wrong and same is therefore void*. Emphasis*

The above ruling meant that the legal basis for which theDefendant herein had issued the Writ of Possession has been declared void.The parties therefore proceeded with the main trial and on 9th October 2019 the learned trial Judge gave judgment in favour of the Plaintiff.

DECISION OF THE HIGH COURT

After an exhaustive and critical review of the pleadings, evidence, exhibits and arguments of law, the learned High Court Judge made the following significant findings of fact in his judgment in Suit No. AP/206/2015 on the 9th October 2019 as follows:-

> "I note that all the witnesses including the plaintiff's Attorney and the Defendant were subject to critical cross-examination by both counsel. From the total evidence heard, I make the following findings of fact:-

1. I find as a fact that further to a judgment obtained by a certain Rosemary Onipayede against one Faustina Sakyi, the property at the centre of the suit was attached and a judicial sale was conducted by the Judicial Service. The Plaintiff purchased the said property located at DF. 17, Race Course in Accra.
2. I also find as a fact that after the sale of the property, the Plaintiff was issued with a certificate of purchase by the Judicial Service of Ghana.
3. I further find as a fact that before the sale of the property, the Defendant filed an interpleader at the District Court, Kaneshie but same was dismissed. The Defendant then filed an application for Certiorari at the High Court and same was granted by the Court on 16th January 2014. The Court made certain orders together with quashing the District Courts order and also later granted the Defendant a Writ of Possession on 16th February 2015.
4. I also find as a fact that on 15th July 2016 this Court quashed the orders made by the High Court including the Writ of Possession as being null and void and of no effect."

Based on the above findings of fact which automatically and logically flow from the appeal record, the learned High Court Judge, concluded the judgment in the following terms:-

> *"From the totality of the evidence on record, the court holds that the Plaintiff succeeds in proving his reliefs endorsed on the Writ of Summons as (1) and (11) against the Defendant. Accordingly, judgment is entered for the Plaintiff against the Defendant's reliefs. In my view the plaintiff is also entitled to cost for the litigation having succeeded in proving his claim. However, based on the facts and the circumstances of this case, I shall award the Plaintiff only a nominal cost of GH¢5,000.00 against the Defendant."*

The Defendant aggrieved by the decision appealed to the Court of Appeal. But the Court of Appeal in a decision rendered on 23rd July, 2020 dismissed the said appeal in a unanimous decision. It is this judgment that is on appeal to this apex court.

After evaluating the appeal, the Court of Appeal in a unanimous decision concluded their rendition in a concurring opinion of the High Court decision as follows:-

> *"The fact of the matter is that where no application is made to set aside a sale, it would become absolute at the expiration of the period of twenty-one days, thereafter the court would not countenance any application to set aside the sale. See* ***Zakari v Nkusum Mart [1992] 2 GLR 1.*** *Whenever the court dismisses an application it would make a consequential order confirming the sale. Once the sale of immovable property becomes absolute or confirmed, the court would grant to the purchaser a certificate of purchase in proof of the right, title and interest of the judgment debtor in the property. The Certificate constitutes a valid transfer of the right, title and interest of the judgment debtor in the property sold. See S. Kwami Tetteh on Civil Procedure, at page 1020. Applying the principles enunciated above and from the totality of the foregoing analysis of the ROA,* ***this court is of the opinion that the learned High court Judge applied the right principle of law to the facts of the case. He also***

applied the evidence before the court properly to the facts. From the foregoing overwhelming evidence on the ROA, this court cannot but agree more with the trial High Court on his decision. We accordingly dismiss the appeal in entirety. The judgment of the trial High Court dated 9th October 2019 is therefore affirmed." Emphasis

It must therefore be noted and appreciated that, for the Defendant herein to succeed in his appeal to this court, he must overcome the burden that the two concurring findings and decisions of the two lower courts portend in a litany of established principles enunciated in locus classicus decisions of this court.

GROUNDS OF APPEAL TO THE SUPREME COURT

1. The Court below erred when it concluded at page 20 of the judgment that once a judicial sale becomes absolute, at the expiration of twenty-one days, the court will not countenance any application to set aside the sale.
2. The judgment is against the weight of evidence
3. The Court below erred when it held at page 9 of the judgment that the Appellant was not entitled at law, to a counterclaim.
4. The court below erred when it held at page 12 of the judgment that the Plaintiff/Respondent/Respondent had no prior legal duty to investigate the judgment debtor's title before purchasing the property at a judicial service organized public auction.

SUMMARY OF LEGAL ARGUMENTS

GROUND 1

THE COURT BELOW ERRED WHEN IT CONCLUDED AT PAGE 20 OF THE JUDGMENT THAT ONCE A JUDICIAL SALE BECOMES ABSOLUTE, AT THE EXPIRATION OF TWENTY-ONE DAYS, THE COURT WILL NOT COUNTENANCE ANY APPLICATION TO SET ASIDE THE SALE

Defendants Legal Arguments

Learned Counsel for the Defendant, Simon Okyere, commenced his submissions by referring to the Judgment of the Court of Appeal. He submitted that, the Court of Appeal erred when it held that "*where no application is made to set aside a sale, it would become absolute at the expiration of the period of twenty-one days, thereafter the court would not countenance any application to set aside the sale*", as an inaccurate rendition of the law, since illegal sales can be set aside at anytime.

Learned Counsel further stated that a judicial sale could be categorized as either being ***regular, irregular or illegal***. Learned Counsel then referred to the case of **Manu and another v. Yeboah[1982-83] GLR 34-46** where the Court stated as follows:-

> *"an auction sale could be categorised as regular, irregular or illegal. Where the sale was regularly conducted, the purchaser's title to the property could not be impeached; but where the sale was irregularly conducted, it was voidable and could be set aside if a timeous application to avoid it or set it aside was made and a substantial injury was sustained. In the case of an illegal sale, however, the sale was void ab initio and no title whatsoever passed; time was also no bar in such a case."*

He then proceeded to argue that the statement of the Court of Appeal is accurate in respect of irregular auction sales but where the auction sale was illegal it can be set aside at anytime. Learned Counsel in support of his argument referred to the cases of ***Afari v Nyame [1960] GLR 599; Marfo v Adusei [1964] GLR 364 SC; Kwabena v Aninkora [1964] GLR, 299 SC; Manu v Yeboah (supra): Partners Health Services v Bikkai Ltd &Ors Civil Appeal No: J4/48/2015 SC.***

Plaintiff's Legal Arguments

Learned Counsel for the Plaintiff, Longinus Chinedu Nwaehie submitted that the Court of Appeal did not err in their holding at page 20 of the Judgment. The Plaintiff stated that the Defendanthad referred only to a portion of the Court of Appeal decision and not the entire analysis leading to the said conclusion.

According to the Plaintiff, the Court of Appeal gave full consideration to all the relevant facts of the case and thus correctly stated the position of the law thatis; when a party fails to set aside a sale within 21 days the sale becomes absolute. The purchaser will then be given a certificate of purchase in proof of his right, title and interest in the property of the Judgment debtor.

The Plaintiff argued that the Defendant did not highlight any irregularity or illegality in the conduct of the sale organized by the judicial service. Furthermore, since the Defendant did not bring any application to set aside the sale, the Court of Appeal had stated the correct position of the law.

Analysis

Effect of Concurrent Findings by Two Lower Courts

To begin, the current appeal is against the concurrent findings of fact by the two lower courts. The authorities have established that this honourable court should be slow to interfere with the concurrent findings of fact by the two lower courts unless after combing through the entire record the Supreme Court determines that the two lower courts committed some obvious blunder in their analysis of the evidence and ultimately in the resolution of the issues raised in the case which has resulted in a miscarriage of justice.

This principle has been established in a number of cases, one such case is **Achoro & Anor v Akanfela & Anor [1996-97] SCGLR 209 at Page 214**, where Acquah JSC, (as he then was) stated as follows:

> *"Now in an appeal against findings of facts to a second appellate court like this court, where the lower appellate court had concurred in the findings of the trial court, especially in a dispute, the subject-matter of which is peculiarly within the bosom of the two lower courts or tribunals, this court will not interfere with the concurrent findings of the lower courts unless it is established with absolute*

clearness that some blunder or error resulting in a miscarriage of justice, is apparent in the way in which the lower tribunals dealt with the facts."

This principle was further stated by the Supreme Court in **Gregory v Tandoh IV and Hanson (2010) SCGLR 971** at pg 986-987, where the court in a unanimous rendition stated thus:

"It is therefore clear that, a second appellate court, like this Supreme Court, can and is entitled to depart from findings of fact made by the trial court and concurred in by the first appellate court under the following circumstances: -

First, where from the record of appeal, the findings of fact by the trial court are clearly not supported by evidence on record and the reasons in support of the findings are unsatisfactory;

Second, where the findings of fact by the trial court can be seen from the record of appeal to be either perverse or inconsistent with the totality of evidence led by the witnesses and the surrounding circumstances of the entire evidence on record of appeal;

Third, where the findings of fact made by the trial court are consistently inconsistent with important documentary evidence on record;

Fourth, where the 1st appellate court has wrongly applied the principle of law (see Achoro v Akanfela) supra the second appellate court must feel free to interfere with the said findings of fact in order to ensure that absolute justice is done in the case."

From the above, for this honourable court to depart from the concurrent findings of the two lower courts, the Defendant must demonstrate that one of the above stated grounds has been established, barring such a conclusion the appeal must fail.

In the unreported Ruling of this court in ***Suit No. CM.J7/4/2022 dated 16th March 2022 intitutled Saviour Church of Ghana – Plaintiff/Applicant v Abraham***

Kwaku Adusei and 4 Others – Defendants/Respondentsthis court by a majority decision in a review application by the Plaintiff/Applicants therein, took the opportunity to review the distinguished and notable pronocements of this court on the principle that a second appellate court like this Court must be very slow in departing from the concurrent findings of fact by the trial High Court and concurred in by the intermediate Court of Appeal. Some of the cases referred to are

- ***Achoro & Anr v Akanfela supra***
- ***Gregory v Tandoh IV and Anr. supra***
- ***Obeng v Assemblies of God [2010] SCGLR 971***
- ***Akufo-Addo v Cathline [1992] 1 GLR, 377***
- ***Fosua & Adu Poku v Dufie (Deceased) and Adu Poku Mensah [2009] SCGLR 310 at 313 and***
- ***Nene Narh Matti and 2 Others; Oyortey v Teye (Consolidated) [2017-2018] 1 SCGLR 746 (Adaare Report***)

The combined effect of these decisions can be re-stated by a formulation as follows:-

> "*Where a trial court makes definite and positive findings of fact which are verifiable from the appeal record and are relevant and have been concurred in by an intermediate appellate court, then a second appellate court like this Supreme Court, must be very slow in departing from the settled findings of fact. This court may only depart from the findings where the said findings are perverse and have no bearing or relevance to the appeal record. Where however as in this instance, the said findings are supported bythe evidence on record, this court has no business whatsoever to depart from the said concurrent findings of fact made by the two lower courts.*

The above formulation will thus be used as guidelines in evaluating the appeal that has been filed by the Defendant herein against the decision of the Court of Appeal.

Analysis of Ground 1 of Appeal

The decision of the trial High Court contains a fuller rendition of the law in respect of the different kinds of auction sales that is, regular, irregular and illegal sale.

It is to be noted that a careful reading of the Court of Appeal decision as a whole and not a single paragraph as highlighted by the Defendant, will reveal that the Court did not err in arriving at this conclusion as the analysis of the relevant facts of the case was in respect of an irregular sale.

It is further submitted that a sale is considered to be irregular when there is found to be some material irregularity in the conduct of the sale and that irregularity leads to substantial injury. An applicant must within 21 days after the sale of any immovable property apply to the court on the basis of some material irregularity in the conduct of the sale for it to be set aside. Failure to do this would mean the sale becomes absolute. The High Court Civil procedure rules C.I 47 provides at Order 45 rule 10 and 11 as follows"

> *"10. Setting aside sale for irregularity*
>
> *(1) At any time within twenty-one days from the date of the sale of any immovable property, an application may be made to the Court to set aside the sale on the grounds of any material irregularity in the conduct of the sale, but no sale shall be set aside on the grounds of such irregularity unless the applicant proves to the satisfaction of the Court* ***that he has sustained substantial injury by reason of the irregularity.***
>
> *(2) If the application is granted by the Court, the Court shall make an order setting aside the sale for irregularity, and thereupon the purchaser shall be entitled to receive back any money deposited or paid by the purchaser on account of the sale, with or without interest, to be paid by such parties and in such manner as the Court may direct.*
>
> *11. When sale becomes absolute*

(1) If no application is made under rule 10, the sale shall become absolute.

(2) If an application made under rule 10 is dismissed, the Court shall make an order confirming the sale.

(3) After a sale of immovable property becomes absolute or is confirmed under this rule, the Court shall grant a certificate to the person who was declared the purchaser at the sale to the effect that that person has purchased the right, title and interest of the judgment debtor in the property sold.

(4) A certificate of purchase granted under sub rule (3) is a valid transfer of the right, title and interest of the judgment debtor in the property sold."

The above procedure requires an applicant who complains that a sale has been irregularly conducted to apply to the court within 21 days to set same aside on the basis that he has sustained substantial injury by reason of the irregularity. In the case of **Manu and Another vs Yeboah [1982-83] GLR 34-46** the court discussed the three categorizations of auction sale when it stated:

"an auction sale could be categorised as regular, irregular or illegal. Where the sale was regularly conducted, the purchaser's title to the property could not be impeached; but where the sale was irregularly conducted, it was voidable and could be set aside if a timeous application to avoid it or set it aside was made and a substantial injury was sustained. In the case of an illegal sale, however, the sale was void ab initio and no title whatsoever passed; time was also no bar in such a case"

The Defendant in this appeal has sought to argue that the sale conducted was an illegal sale. What may constitute an illegal sale has been discussed in the case of **Partners Health Services v Bikkai Ltd &Ors Civil Appeal No: J4/48/2015 SC.** For ease of reference we will quote in extenso the discussion of this court:

" On the first issue, the execution was carried out under the provisions of the High Court (Civil Procedure) Rules 1954 LN 140A which, just as the current rules, provide that the life span of a writ of execution shall be twelve months subject to renewal before it expires. It is not in dispute that the writ of fi.fa in this case expired before it was executed without being renewed.

The decisions of the courts on non-compliance with provisions of LN 140A maintained a distinction between provisions constituting breaches of which were considered irregularities rendering proceedings only voidable and those that made proceedings void ab initio. See ***Azinogo v W E Augustt [1989-90] 2 GLR 278 and Amoako V Hansen [1987-88] 2 GLR 26****.*

In Ofori v Lartey [1978] 1 GLR 490 the Court of Appeal held, ***basing on the provisions of LN 140A, that an expired writ of summons was dead and could not form the basis of any proceedings. That holding, which would be applicable to a writ of fi.fa, was the law in force at the time of the attachment in this case. What that means is that the attachment of the disputed property in this case was void ab initio so the auction sale was illegal.***

In ***Donkoh v Nkrumah [1964] GLR 739 S C****. the respondent's farm was sold by a writ of fi.fa to satisfy a judgment against him. In a suit in the High Court several years later to recover the farm from the successor of the purchaser, it emerged that no writ of fi.fa was ordered by the local court that gave judgment against respondent. The writ that was ordered to be issued was a writ of Ca.Sa (capias ad satisfaciendum) by which the person of the judgment debtor was to be seized until he paid the judgment debt.* ***The Supreme Court held that since the local court order was for a writ of Ca.Sa, the sale under a writ of fi.fa was illegal. Where the auction sale is illegal, the purchaser gets nothing and there is no time limit to set same aside****.*

The 5th defendant is right when it stated in its statement of case that at an auction, the sale is completed when the hammer is brought down on the highest bid. That is the law but since we have held that the sale in this case was illegal, that position does not advance the case of 5th defendant. ***All the proceedings in execution taken by the High Court Registrar and the auctioneer on the back of the expired writ of fi.fa were null and void*** *so a discussion of whether they were regular or not will be an academic exercise that we do not intend to engage in.*

Even if we are wrong in holding that the sale was void and illegal on account of the expired writ of fi.fa, the evidence that the property that was attached belonged to 1st defendant cannot be disputed. The law is well-settled that a purchaser of property sold upon a writ of fi.fa gets only such title as the judgment debtor had in it. This is based on the principle nemodat quod non habet." Emphasis

The above authority sets out some instances where the sale of property in an auction sale will be deemed to be illegal. Without creating an exhaustive list of cases of illegality, it is to be noted that a sale shall be declared as illegal where: it is established that there was some fraud or collusion in the sale of the property, where the writ of fi. fa had expired and where it is found that no writ of fi. fa was issued for the sale of the property. In any of these instances the sale will be declared as illegal and set aside as null and void.

It is quite clear from the above that lack of interest of a judgment debtor in a subject matter property was not included in the list of things that make a sale illegal. The lack of interest of a judgment debtor in an attached property may entitle a person to commence an interpleader action or where the property is sold in a regular auction sale and a certificate of purchase issued, entitle a person to commence legal proceedings to prove his title to the property.

The Defendant's claim that the sale is illegal is on the basis that the property in question according to the Defendant does not belong to the Defendant's wife that is, the judgment debtor at the District Court. What appears to be lost on the Defendant is that he has arrived at the fact that the sale is illegal because he is advancing his case and not that, the ownership of the property has been determined to belong to him.

A look at page 12 of the judgment of the Court of Appeal would reveal that they found as a fact that the Defendant had not led sufficient evidence to prove ownership of the property sold in execution of the property. The Court of Appeal stated as follows

> *"…If the Appellant had succeeded on his quest to set aside the judicial sale and then adduce before the court a better title than recalled Will; that is, an indenture bearing his own name rather than that of Faustina Sakyi's, he would not have been in this situation."*

The above clearly indicates that the basis for which the Defendant has strenuously argued that the sale was illegal was never upon a finding of fact by the two lower courts which have been found to be perverse. The two lower courts never found that the property belonged to the Defendant. If the ownership of the property was never determined to belong to the Defendant but rather his wife, that is the judgment debtor at the District Court, then what is illegal about the sale?

Aside the Defendant's continuous argument about ownership, he failed to argue or canvass any points to challenge or identify any irregularity in any of the procedures that led up to the sale of the disputed property. The sale of the property was therefore regular.

It is to be noted therefore that a proper consideration of the entire judgment of the Court of Appeal will reveal that they did not err when they held that failure to set aside a sale after 21 days makes the sale absolute. This is because the finding of the Court is in line with Order 45 rule 11(1) that provides that "If no application is made under rule 10, the sale shall become absolute." The Defendant herein has failed to prove any

irregularity or illegality in the conduct of the sale. This ground of appeal thus fails and is accordingly dismissed.

GROUND 2

THE JUDGMENT IS AGAINST THE WEIGHT OF EVIDENCE

Defendants Arguments on Ground 2

Learned Counsel for the Defendant correctly argued that the burden was on Defendant to prove that the property in dispute was owned by him and not his wife, the judgment debtor.

To prove his ownership the Defendant argued that he adduced both oral and documentary evidence in proof of his claim. Firstly, he tendered his last will and testament which he had deposited at the High Court dated 10th May 2007. He submitted that according to Section 1(1) of the Wills Act, Act 360 a person can only dispose of his self-acquired property, and since he had made a bequest of the property in dispute to his wife and children then it was prima facie evidence of ownership.

Secondly, he tendered in electricity bill and receipt for the payment of property rates bearing his name. He further submitted that by reason of the Local Government Act, 1993 (Act 462) it is the owner of the property that pays property rates in respect of the property.

In respect of the oral evidence adduced at the trial, the Defendant submitted that he called his brother, Isaac Osei Boateng and one of the workers who built the property, George Badu. The Defendant submitted that it was his brother who gave him the property as a gift.

The Defendant submitted that on the totality of the evidence adduced and even the cross examination by the Plaintiff's Counsel pointed to the fact that the real owner of the disputed property was the Defendant at the time the property was sold. Furthermore, the Plaintiffreferred to an indenture bearing the name of the Defendant's wife but no such document can be found on the entire record.

Learned Counsel for the Defendant argued that the learned Judge's show of sympathy can be a reasonable inference that indicated that the property belonged to the Defendant at the time it was sold. Furthermore, the Plaintiff only presented the certificate of purchase to prove his claim. The Defendant argued that the Plaintiff acquired no title in the property since the judgment debtor had no title, and thus, *nemodat quod non habet* principle therefore applied.

The Defendant then referred to the case of ***Afari v Nyame [1960] GLR 599*** and ***Partners Health Services v Bikkai Ltd & Orssupra*****,** in support of his argument. In the Partners Health Services case (supra) the court held:

> *"Even if we are wrong in holding that the sale was void and illegal on account of the expired writ of fi.fa, the evidence that the property that was attached belonged to 1st defendant cannot be disputed.* ***The law is well-settled that a purchaser of property sold upon a writ of fi.fa gets only such title as the judgment debtor had in it. This is based on the principle nemodat quod non habet.****"Emphasis*

Plaintiff's Arguments on Ground 2

Learned Counsel for the Plaintiff argued that when anappellant states that a judgment is against the weight of evidence, he is inviting the Appellate Court to review the entire record and arrive at a decision, that on the preponderance of probabilities, the conclusion of the trial judge is reasonably and amply supported by the evidence on record. He referred to **Tuakwa v Bosom (2001-2002) SCGLR 61** in support of this point.

Learned Counsel for the Plaintiff then argued forcefully that on the totality of evidence, the Defendant did not prove on the balance of probabilities that he owned the property. The Respondent highlighted that, the disposition in the Will is not referable to the

property sold in execution of the judgment debtor's debt. Also, the indenture relating to the property sold bore the name of the Defendant's wife, the judgment debtor.

Furthermore, payment of electricity, water bills and property rates bythe Defendantdoes not confer ownership on the Defendant as he purported to argue.

The Defendant finally argued that, the case *of* ***Partners Health Services v Bikkai Ltd & Orssupra*****,** was inapplicable to the present case as the auction sale conducted in respect of the property was regular. The Plaintiff referred to an enquiry sent to the office of the Chief Justice that confirmed that the sale of the property was regular. As such, the Defendanthad 21 days to set aside the sale if there was any irregularity. This the Defendant failed to do. The Plaintiff was thus given a certificate of purchase in respect of the property and thereafter the sale became absolute.

Analysis and Conclusions On Ground 2

It is trite and settled legal principle that appeals are by way of rehearing; this requires the Court to examine and analyse the entire record and make a determination whether the decision of the trial court is amply supported by the evidence on record. This has been discussed in the oft cited case of ***Tuakwa vs. Bosom supra***where it was stated as follows:

> " *an appeal is by way of rehearing, especially where the appellant alleges in his notice of appeal (as in the instant case) that the decision of the trial court is against the weight of evidence. In such a case, although it is not the function of the appellate Court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate Court,* ***in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence." Emphasis***

See also cases of ***Djin v Musah Baako [2007-2008]SCGLR and Mary Akyaa Boakye v Presiding Bishop of Methodist Church and 4 Others [2020] DLSC 10169*** *at page 3 per Marful-SauJSC.*

A careful consideration of the entire record of Appeal will reveal that the most essential **determination in this appeal is whether or not the property sold in execution of the debt of the Defendant's wife actually and in fact belongs to the Defendant and his wife.**

At page 5 of the written submission of the Defendant, he clearly and accurately identified the burden on him when he stated:

> *"My Lords, the burden on the Defendant in this case was to prove that he was the owner of the property (and not the judgment debtor) prior to the sale."*

Furthermore, the learned trial Judge also rightly identified the main issue in this appeal when he stated in the judgment as follows:

> *"To my mind, the main issue before me is not about the process of the sale rather whether the Plaintiff has a valid title to the property. I say so because Counsel for the Defendant did not question the authenticity of Exhibit B, that is the certificate of purchase and Exhibit D, the letter dated August 13, 2015 from the Office of the Judicial Secretary except the fact that counsel rather questioned the Plaintiff's Attorney with regards to whether the auction was advertised and whether the plaintiff participated in a public sale."*

A look at the written submissions of the Defendant and the entire record of appeal, reveals that, the Defendant sought to prove that he was the owner of the property by adducing the following evidence:

1. By recalling and tendering his Last Will and testament – Exhibit 1
2. By tendering Electricity Bills and Receipts for the payment of property rates bearing Appellant's name – Exhibit 2 (137-138 ROA)
3. By the Appellant giving testimony himself as a witness

4. By calling his brother Isaac Osei Boateng who is alleged to have given him the land.
5. By calling George Badu (mason), one of the workers who is alleged to have built the property in dispute.

The High Court after a thorough analysis of the evidence on record and a full consideration of the written submissions of the Defendant in the judgment stated that on the totality of the evidence on record, the court holds the view that the Plaintiff succeeds in his claim.

The Court of Appeal also concurred in the decision of the trial High Court

Evaluation of the Evidence

As has been stated already in this submission the burden was on the Defendant to prove that he owned the property. This is because the Plaintiff had tendered into evidence Exhibit B, that is the certificate of purchase and Exhibit D, the letter dated August 13 from the Office of the Judicial Secretary.

After the interpleader action was dismissed by the District Court, there was no impediment for the conduct of the sale. According to Exhibit D the letter by the Judicial Secretary she stated ***"I am directed by the Honourable Lady Chief Justice to inform you that investigations in the allegation revealed that you were put in possession of the property by lawful means. You are however, advised that if you contend that someone is challenging your title, then you may use the legal process for redress."***

A clear inference from the above letter indicates that all lawful processes required to put the Plaintiff in possession of the property had been followed.

The Defendant having had notice of the attachment of his property and after the dismissal of the interpleader action was required if he had any issues with the sale to apply to set aside the sale within 21 days. Failing which the sale became absolute.

The learned trial judge found at page 12 of the Judgment that "*the sale took place after the interpleader action was dismissed and therefore one would have expected that the Defendant's reaction ought to have been directed at setting aside the sale, but there is no evidence of that." Emphasis*

These two documents Exhibit B and D raised a presumption of regularity in favour of the Plaintiff. According to section 37 of the Evidence Act NRCD 323:

> *"Presumption of regularity*
>
> *37. Official duty regularly performed*
>
> *(1) It is presumed that an official duty has been regularly performed.*
>
> *(2) Subsection (1) does not apply to an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant."*

The official conduct of the auction sale was under the direction of the Registrar based on the orders of the Court as provided for under Order 45 rule 8 of C.I 47 that provide as follows:

> *"8. Sales in execution of judgments*
>
> *(1) Sales in execution of judgments shall* ***be made under the direction of the Registrar, and shall be conducted according to such orders, if any, as the Court may make on the application of any party concerned.***
>
> *(2) Unless the Court authorises the sale to be made in any other manner, the sale shall be made by public auction.*
>
> *(3) An order relating to sale may be made at the time of issuing a writ of fieri facias or afterwards."*

Once this presumption operated in favour of the Plaintiff as provided for under Section 20 and 21 of the Evidence Act NRCD 323 the burden was cast on the Defendant to prove the contrary. Sections 20 and 21 of the Evidence Act NRCD 323 provides as follows:

"20. Effect of rebuttable presumptions

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.

21. Applying rebuttable presumptions

In an action where proof by a preponderance of the probabilities is required,

(a) a rebuttable presumption requires the tribunal of fact to assume the existence of the presumed fact, unless the party against whom the presumption operates proves that the non-existence of the presumed fact is more probable than its existence;"

The question then is, was the evidence adduced by the Defendant on the preponderance of probabilities capable of rebutting this presumption?

It is respectfully submitted that the documentary evidence, that is, the Will and the receipts do not and cannot be deemed to point to the conclusion that the property belonged to the Defendant.

These pieces of evidence would have carried much weight particularly the receipts if the title in contest was between the Defendant and a stranger. In this case, the one who is alleged to be the true owner of the property is the wife of the Defendant. It is therefore not far-fetched for the name of the Defendant to appear on receipts of payments of utilities of the property belonging to his wife.

Furthermore, the Court of Appeal found as a fact that the Defendant had not led sufficient evidence to prove ownership of the property sold in execution of the property. The Court of Appeal stated as follows

*"…If the Appellant had succeeded on his quest to set aside the judicial sale and then adduce before the court a better title than recalled Will; that is**, an***

indenture bearing his own name rather than that of Faustina Sakyi's, he would not have been in this situation."

It must be stated that the indenture bearing the name of the Defendant's wife was not part of the Record of Appeal. However, the existence of same had been so admitted throughout the hearing of the case, such that it cannot be ignored.

One such reference to the indenture was during cross-examination of DW 1 that is Isaac Osei Boateng on the 13th February 2019, he stated as follows:

Q: Do you know one Faustina Sakyi

A: Yes I do

Q: Who is she to you?

A: The wife to my brother Paul Boateng

Q: Are you aware that judgment was taken against her at the District Court Kaneshie

A: I heard of it

Q: Are you also aware that she took a loan from one Rosemary Onipayede

A:I have heard it

Q: You are also aware that the indenture she presented before the loan was granted to her related to the house in question

A: No. Not Really

Q: I am putting it to you that the indenture she presented relates to the house in question the subject matter of this suit and that house has been sold in satisfaction of the debt she owed.

A: Ok"

This piece of evidence is very revealing.

The evidence on record therefore makes the documents presented by the Defendant carry very little weight. Also, the testimony of witnesses for the Defendant did very little to assist him prove his claim.

It is therefore our respectful conclusion, that on the totality of the evidence adduced and after a careful consideration of the law, the Defendant herein has not succeeded in rebutting the presumption of regularity of Exhibits B and D. Furthermore, the Defendant has not shown why the concurrent findings of the two lower courts should be disturbed. This ground of appeal also fails and is accordingly dismissed.

Ground 3

THE COURT BELOW ERRED WHEN IT HELD AT PAGE 9 OF THE JUDGMENT THAT THE APPELLANT WAS NOT ENTITLED AT LAW, TO A COUNTERCLAIM.

Defendants Arguments On Ground 3 Of Appeal

In respect of this ground, Learned Counsel for the Defendant argued that the trial judge erred in holding that the failure of the Defendant to counterclaim for the declaration of title meant that there was no legal basis by which the court could grant the Defendant the relief.The Defendant referred to the case of ***Hanna Assi (No. 2) v GIHOC Refrigeration & Household Products Ltd. (No. 2) [2007-*2008] 16**where it was held that:

> *"In the instant case, the majority of the ordinary bench erred in affirming the decision of the Court of Appeal which had held that in the absence of a counterclaim, the trial court had no jurisdiction to grant the reliefs of declaration of title and recovery of possession of the disputed property to the defendant i.e. the applicant. Those reliefs were clearly established on the evidence. In such a situation, the essential consideration was whether there was surprise or unjust denial of opportunity to meet the matter concerned. In the absence of such unsatisfactory features, it would be unjust to allow the majority decision to stand."*

The Defendant on the basis of the above case submitted that the case of Hanna Assi (supra) was the legal precedent binding on the two lower courts that a Defendant who fails to counterclaim for a relief can still be granted that relief even in the absence of a formal counterclaim, so long as no surprise leading to miscarriage of justice arises against the plaintiff.

The Defendant further submitted that the Court of Appeal erred when it held that he could not counterclaim because he was never a party to the suit at the District Court, that is, in the case of **Rosemary Onipayede vrs Faustine Sakyi & another suit no A2/21/12.**The Defendant therefore argued that the present suit is an appeal from a High Court decision and not the decision of the District Court.

Plaintiff's Response

In response to this ground the Plaintiffsimply argued that the Defendant was never a party to the case at the District Court and as such a non-party cannot file a counterclaim in a suit in which he is not a party. In this regards, the case of Hanna Assi (supra) does not apply.

Analysis And Conclusions On Ground 3

The Defendant has argued that the Court of Appeal erred when it held in its judgment that the Defendant was not entitled to a counterclaim. The Court of Appeal expatiated on this as follows:-

> *"We arrive at this conclusion on the basis that the Appellant was never a party to the suit, he cannot counterclaim and in fact, did not counterclaim for any relief. In addition, his interpleader application was also dismissed. The learned judge in our opinion did not err in holding so, we therefore dismiss this ground of appeal."*

This determination of the Court of Appeal was also held by the Learned trial judge when he stated as follows in the judgment:-

"I have chosen to re-state verbatim Counsel's submission only to make the point that with respect both Counsel and the Defendant have sadly missed the main issue in this suit. First and foremost counsel's submission that the Defendant is entitled to a declaration of title is without any legal basis ***because the Defendant did not counterclaim for any declaration of title and therefore this court will have no basis to make such order."***

In the case of ***Hanna*** **Assi (No 2) v GIHOC Refrigeration (No. 2) supra, 16 at 42** where Her Ladyship Wood, JSC (as she then was) stated

"I concluded that the statutory rule requiring the filing of a formal counterclaim was not absolute and that when applied alongside other statutory rules of procedure, on even our evidentiary rules, it would be subject to certain exceptions. I thought, one such clear exception is where a defendant's pleadings proper or his or her evidence demonstrates that he or she is, indeed, entitled to some judicial relief."

The court further stated as follows:-

"In the instant case, the majority of the ordinary bench erred in affirming the decision of the Court of Appeal which had held that in the absence of a counterclaim, the trial court had no jurisdiction to grant the reliefs of declaration of title and recovery of possession of the disputed property to the defendant i.e. the applicant. Those reliefs were clearly established on the evidence. In such a situation, the essential consideration was whether there was surprise or unjust denial of opportunity to meet the matter concerned. In the absence of such unsatisfactory features, it would be unjust to allow the majority decision to stand."

The above authority serves as a basis for a court in doing substantial justice between parties to hold that even in the absence of a counterclaim a defendant may still be entitled to a claim if on the evidence such a claim is clearly established. However, this does not mean that parties can willfully

ignore the compliance with the rules of court. Order 12 of C.I 47 provides as follows:-

> *"1. Counterclaim against plaintiff*
>
> *(1) A defendant who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in an action in respect of any matter, whenever and however arising, may, instead of bringing a separate action, make a counterclaim in respect of that matter.*
>
> *(2) The defendant shall add the counterclaim to the defence."*

The above rule requires a defendant who has a claim against a plaintiff instead of commencing a fresh action to mount such a claim as a counterclaim. A party who fails to counterclaim in the pleadings would be breaching the cardinal rule of pleadings, that is to give the other party knowledge of the case he intends to put across.

In **Standard Bank Offshore Trust Co. Ltd. Vs. National Investment Bank Ltd. & 2 Others [2017-2018]1 SCGLR 707** this court stated that:

> *"The rules of court form an integral part of the laws of Ghana, see article 11(1)(c) of the 1992 Constitution. Consequently, they must be treated with equal amount of respect in order to produce sanity in court proceedings."*

Exceptions have been made to the rules to do substantial justice between the parties. These exceptions do not serve as a basis for parties to ignore the rules that have been laid down for the orderly conduct of civil proceedings.

Under the circumstances we conclude that a court can only consider granting a counterclaim not pleaded only where it is clearly established from the evidence before the court. Where a party such as the Defendant herein was not successful in leading evidence to prove his case, then there will be no basis for a court to consider the question of a counterclaim. It was only after a court has found a party's case to be clearly established on the evidence, and the only thing absent in doing justice in the case is the counterclaim, that a court in doing substantial justice will grant a

counterclaim not pleaded for. See ***Hanna Assi (No 2) v GIHOC Refrigeration (No 2)*** supra.

On the basis of the above, it is our view that the Court of Appeal did not err in holding that the Defendant was not entitled to a counterclaim. Ground 3 accordingly fails and is also dismissed.

GROUND 4

THE LEARNED JUDGE ERRED WHEN HE HELD AT PAGE 12 OF THE JUDGMENT THAT THE PLAINTIFF/RESPONDENT/ RESPONDENT HAD NO PRIOR LEGAL DUTY TO INVESTIGATE THE JUDGMENT DEBTOR'S TITLE BEFORE PURCHASING THE PROPERTY AT A JUDICIAL SERVICE ORGANIZED PUBLIC AUCTION.

Defendant's Legal Arguments on Ground 4

The Defendant submitted that the position of the two lower courts that a purchaser at a judicial sale has no prior legal duty to investigate the title of the judgment debtor before purchase, is respectfully erroneous for two reasons:

Firstly, there is no doctrine of infallibility of the conduct of judicial officers involved in judicial sale of property. The Judicial Service being a human institution is bound to make mistakes. Therefore, a judicial sale cannot be deemed to be unimpeachable, if it were then it would suggest that the interest of the judgment debtor in the property for sale is absolute.

Secondly, the decisions of the two lower courts are inconsistent with the established equitable principle that a prudent purchaser of property must investigate the title of the seller before purchasing the property.

In support of the above arguments counsel referred to the cases of ***Brown v Quashigah (2003-2004) 2SCGLR 930, Amuzu v Oklikah (1998-99) SCGLR 142*** *and* ***Boateng v Dwinfour (1979) 360.***

Defendant further argued that failure of the Plaintiff to investigate the property before purchasing same at the advertised auction is fatal; and that, if he were diligent, he would have discovered that the Defendant was the actual owner of the property and not the judgment debtor. Counsel then referred to the case of **Chandiram v Mensah (1958) 3 WALR 518** where it was stated:

> *"The law is clear that a purchaser of a property under the execution of a fi. fa. steps into the shoes of the judgment debtor, and purchases no more than the estate of the judgment debtor in the property. In other words, what is sold and what is bought at a sale in execution is the right, title and interest of the judgment debtor (Dadzie v. Kojo and Another (1)).* ***It therefore follows that, if certain property which is attached under execution by way of fi. fa turns out to be in any way encumbered, the purchaser buys subject to that charge or encumbrance."***

On the basis of the submissions made in respect of the aboveground of appeal, the Defendant prayed that the judgment of the court below be set aside and consequential orders be given to set aside the sale of the property and for a declaration of title and recovery of possession of the property in favour of the Defendant.

Plaintiff's Legal Arguments on Ground 4

Learned Counsel for the Plaintiff argued that the two lower courts did not fall into any error when they confirmed the sale to the Plaintiff. It is rather the interpretation the Defendant has placed on the statements by the two lower courts that is erroneous.

According to the Plaintiff, the two lower courts found that the procedure for the conduct of a judicial sale was duly followed. That is, the property was duly advertised in the

daily Graphic newspaper, it was made public and many people participated in the bidding for the sale of the property and it was eventually sold to the Plaintiff.

Learned Counsel for the Plaintiff concluded by praying that this honourable court dismiss the appeal and affirm the judgment of both the High Court and the Court of Appeal.

Analysis And Conclusions On Ground 4

The Defendant has submitted that a purchaser of property at an auction sale has a prior legal duty to investigate the title of the property he is purchasing. In support of this argument the Defendant cited the case of **Chandiram v Mensah supra,** where it was held thus:

It is therefore to be noted that, a purchaser at an auction sale purchases only the interest of the judgment debtor in the property. As such, if after the sale for some reason the sale is set aside Order 45 rule 10(2) of C.I 47 entitles the purchaser to the amount paid. Order 45 rule 10(2) provides as follows:

> *"If the application is granted by the Court, the Court shall make an order setting aside the sale for irregularity, and thereupon the purchaser shall be entitled to receive back any money deposited or paid by the purchaser on account of the sale, with or without interest, to be paid by such parties and in such manner as the Court may direct."*

It is therefore prudent for a purchaser to investigate the title of the property he is purchasing If possible, because the time afforded a purchaser from the posting of the notice of the auction sale and the auction itself cannot be sufficient time to conduct an investigation into the ownership of the property being purchased.

The safeguards for the purchase of property lies in the notice period provided for by the rules. According to Order 45 rule 9 of C.I 47

> *"Periods of notice of sale*

(1) Subject to subrule (3) of this rule no sale shall be made until after at least seven days' notice of the sale in the case of movable property, or in the case of immovable property until after at least twenty-one days, public notice, unless the judgment debtor in writing consents otherwise.

(2) Whatever notices are made elsewhere, the notices shall be made in the town or place where the property to be sold is situated, and if the sale is to take place in any other town or place the notices shall also be made at the place of sale.

(3) The Court may for any sufficient reason extend or reduce the periods of notice in any case."

This period requires any person with an interest in the property to come forward to lay claim to the property. This serves as a basis for the commencement of an interpleader action. The purchaser who mayonly see the auction notice some few days to the sale cannot be tasked with the duty of investigating the title of the judgment debtor he does not know. The notice period and the wide publicity of the sale of the property serves as enough notice for anyone who has a claim to the property, to make his interest known.

It is therefore clear that the Court of Appeal did not err in holding that there is no prior legal duty on the plaintiff to investigate the title of the judgment debtor before purchasing property at a duly constituted and conducted public auction sanctioned by the law courts.

This ground of appeal equally fails and is accordingly dismissed.

Conclusion

In our considered opinion, the case for the Defendant has been badly conducted by his previous legal advisers when he put in the Interpleader summons during the pendency of the suit at the District Court. Having failed in his bid to lay claims of title to the property the subject matter of the instant suit, the Defendant should have sought proper legal advice that time is of the essence in any action that he was to take.

Under the circumstances, we fail to appreciate any substance in the appeal lodged by him against the Court of Appeal judgment dated 23rd July 2020.

The Appeal fails and is accordingly dismissed. We therefore affirm not only the Court of Appeal decision of even date, but that of the High Court, dated 9th October 2019.

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

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

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)
(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N. MENSA-BONSU (MRS.)
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