IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2021

CORAM: DOTSE, JSC (PRESIDING)
PWAMANG, JSC
DORDZIE (MRS.), JSC
PROF. MENSA-BONSU (MRS.), JSC
KULENDI, JSC

CIVIL APPEAL
NO. J4/35/2020

26TH MAY, 2021

1. KOFI KYEI YAMOAH-PONKOH
2. ANDREWS OKYERE — PLANTIFFS/RESPONDENTS/
3. AMOAKO BLANKSON — RESPONDENTS
4. ALL SHOP OWNERS OF ANOMANYE STORES COMPLEX FOR THEMSELVES AND ON BEHALF OF 29 OTHERS

VRS

ASOMDWE HOUSE CO. LTD. …… DEFENDANT/APPELLANT/APPELANT

JUDGMENT

PROF. MENSA-BONSU (MRS.) JSC:-

This is an appeal arising out of a case that has produced a multiplicity of suits. It arose out of a desire by a group of traders to regularize their stay on land and to formalize the acquisition of same, to create permanent structures for themselves.

BACKGROUND AND FACTS

Sometime in 1998, a group of traders and artisans plying their trade from kiosks they had erected on land belonging to a School, St Joseph's Catholic Junior High School, approached the school and church authorities to regularize their stay. Following consultations between Kumasi Metropolitan Authority and the school, the traders were granted permission to remain on condition that they would build a bungalow to house the Headmaster; improve the School's playing field; and build a Fence wall for the school. The group agreed, and proceeded to satisfy the conditions. In order to build their shops, they decided to levy themselves fixed sums of money to raise the needed funds. Those already in occupation or "occupiers" paid Ghc700, and "outsiders" ie those not already trading on the premises who came in to join upon invitation, were levied a slightly higher sum of Ghc 900. Later the contributions were increased to Ghc900 and Ghc 1,200 for the occupiers and "outsiders" respectively. In 1999, the group began construction of shops with the funds so levied. Lands Commission, Kumasi, stepped in after the chief of the area, petitioned them that the land was Stool land; and that some unauthorised development was taking place on it. Lands Commission stopped the development and consequently the group put together a delegation of four persons to resolve the issue with Lands Commission on behalf of the group. The members of the delegation were three of their number, Daniel Kwame Bonsu; Takyi Brefo; Akwasi Amanfo; and the fourth was the Assembly-member of the area, George Owusu-Afriyie, The delegation was successful and the Encroachment Committee of the Lands Commission, Kumasi gave permission for the development to continue, subject to the payment of a penalty imposed upon them for initiating the development without permission. The conditions were duly fulfilled, and construction resumed.

Later, information filtered through that the members of the delegation had clandestinely formed a company called 'Gabbat Co Ltd.' (also spelt 'Gabat Co Ltd') (a name coined from an initial each, of the names of the members of the delegation); and that it was in the name of this company that the Lease had been taken from the Lands Commission. The artisans and shopkeepers were outraged and organized themselves as the '

'Artisans and Storekeepers Association of Anomangye Nkwanta' (also spelt 'Anomanye'), and protested this development. A series of actions, both legal and political ensued. Frustrated at the inability to take on the leaders by civil suit, some members of the Association reported the matter to the police in April, 2001, and a prosecution was mounted on 26th July, 2001. It was in the course of this prosecution, Suit No C.C 572/01, that the court, realising the true nature of the dispute underlying the criminal complaint, adjourned for a settlement to take place. The Settlement Report, produced in 2008, was as follows:

> *"SETTLEMENT COMMITTEE REPORT AS AT 22/08/08 ON THE ISSUES AGREED BY THE PARTIES AT OUR SITTINGS TO RESOLVE THE IMPASS [sic] BETWEEN THEM ON THE OWNERSHIP OF THE ANOMANYE NKWANTA STORES WHICH IS BEFORE THE COURT"*
>
> *A. We, the parties here in the case, have agreed that GABBAT CO LTD which holds the lease on the property in this case be set aside and a new company formed to take over the ownership of the ASSETS AND LIABILITIES of the Anomanye Nkwanta Stores Building Project, which is in the custody of the above company.*
>
> *B. That a new replacing organization will be a limited liability company formed by the parties here in this case.); and that*
>
> *"C. The parties will hold shares in the new company and Directors will be picked from all sides.*
>
> *D. That the name of the new replacing company will be decided by the parties here in the case.*

E. That all documents on the building which is in the custody of Gabbat Co Ltd will be legally transferred to the new company…"

The settlement did not end the dispute, however.

While all these protest actions were going on, the defendant-appellants, using the vehicle of Gabbat Co Ltd, continued to exercise acts of ownership over the premises, such as entering into 'tenancy agreements' in late 2001 and 2002, as 'landlords' with some of the contributors to the project as well as new people to whom the stores had been rented out. Those "tenants", who were among those who had contributed money to the project, but had been excluded from membership of the new Company, resisted payment of rent, contending that they owned their shops.

In the meantime, and as part of the settlement, a new company limited by shares was to be formed to include those who had contributed to the project. However, the manner of implementation of the terms left some, mainly those described as "outsiders", out of the membership of the company. The defendant-company herein, *Asomdwee House Ltd*, was supposed to be the new company to take over the assets and liabilities of the GABBAT company as per the Settlement. The "original occupants" appear to have been satisfied with the new arrangement, for the secretary to the 'Artisans and Storekeepers Association of Anomangye Nkwanta' and the company limited by Guarantee, 'Anomangye Nkwanta Store owners Association' became secretary to the defendant-appellant company and was, in fact, its only witness for the defendant-appellant in the trial court.

In 2008, the defendant-appellants, under the rubric of Gabat Co Ltd/Asomdwee House Ltd, sought to enforce the agreement by terminating the "lease' of some of the "outsiders" for failure to observe covenants of the agreement, including non-payment of rent. Three of those persons initiated action in the High Court for themselves as "*shop owners at Anomanye Stores Complex … and on behalf of 29 Other shop owners whose*

names are on the Schedule attached" to the writ. Per the writ and statement of claim, the plaintiffs, claimed a number of reliefs including a declaration that they were :

> *"(a) …the rightful owners of the respective shops they occupy*
>
> *(b) Declaration that any purported tenancy [agreement] executed between the occupiers and the defendant or its predecessor is null and void*
>
> *(c) Damages;*
>
> *(d); other just relief*
>
> *(e) perpetual injunction*."

The defendants also counterclaimed for reliefs, including declaration of title; declaration that the plaintiffs "are potential tenants"; and recovery of possession. The High Court found for the plaintiffs, and also dismissed the defendants' counterclaim, on 24th June, 2016. The defendants appealed to the Court of Appeal, but on 30th July, 2019, the appeal was dismissed. The defendants then filed the instant appeal to this honourable court.

GROUNDS OF APPEAL

The defendant-appellants, filed two substantive grounds of appeal and the omnibus ground. The substantive grounds were:

> *i. Their Lordships of the Court of Appeal erred in law when they set aside the tenancy agreement duly executed between the appellant and the respondents when the said agreement was voluntarily and freely executed by the parties.*

ii. Their Lordships of the Court of Appeal erred in law when their Lordships failed to decree ownership of the disputed property in the Appellant despite leasehold agreement duly executed between Lands Commission, Kumasi, establishing exclusive ownership thereof in the Appellant."

iii. The judgment is against the weight of evidence on record."

For reasons that should be obvious, ground (*iii*) of the appeal would be taken first, for by this ground of appeal, the defendants invite this honourable Court to review the entire evidence since an appeal is by way of re-hearing, as a long line of cases show. See *Akufo-Addo* v *Catheline* [1992] 1 GLR 377, per Kpegah JSC at p. 391; *In re Bonney* (Decd) *Bonney v. Bonney* [1993-94] 1 GLR 610 per Aikins JSC at p. 617: *Tuakwa* v *Bosom* [2001-2002] SCGLR 61 per Akuffo JSC (as she then was) at p.65; and *Asamoah & Another* v. *Offei* [2018-2019] 1 GLR 655. In *Tuakwa* v *Bosom* [2001-2002] SCGLR 61, at p.65, the law was re-stated in the oft-quoted words of Sophia Akuffo JSC (as she then was), thus:

"*an appeal is by way of a re-hearing particularly where the appellant, that is the plaintiff in the trial in the instant case, alleges in his notice of appeal 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 the documentary evidence adduced at the trial before it arrives 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*".

More recently in *Asamoah & Another* v. *Offei* [2018-2019] 1 GLR 655, the defendants' omnibus ground of appeal that the judgment of the Court of Appeal was against the weight of evidence adduced at the trial, opened the way for the Supreme Court to exercise its power of re-hearing the case. Speaking for the Court, Appau, JSC stated the law at p.660 thus:

> The authorities are legion that an appeal is by way of rehearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial court was against the weight of evidence. In such a case, it is the duty of the appellate court 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 on record. And it is immaterial whether the appeal is a second one from the Court of Appeal to the Supreme Court.

This court is thus well-placed to review the entire record of proceedings.

Before examining the substantive grounds of appeal, it would be well to deal with a matter that counsel raised, which could go to the very root of the action by plaintiffs in the instant case. In paragraph 8 of the 'summary of written submission', and also at the tail end of the very lengthy submissions of counsel for appellant, counsel submitted that this court should declare the writ of summons and statement of claim null and void, because, according to him,

> *"it is also clear that the Respondents writ of summons and statement of claim were not issued by a lawyer properly so called via Act 32 but were issued by Minkah-Premoh & Co which was not a lawyer but an artificial entity. I humbly submit that the said writ and statement of claim appearing at pages 1 to 4 of the record of proceedings be declared null and void."*

Nothing more was said or argued by Counsel in respect of this invitation to this honourable court to do this grave act of declaring respondents writ of summons and statement of claim "null and void". Although nothing more was said in the body of the submissions, it found its way into the conclusions as well, showing that defendant-appellants regarded it as a serious matter. It must therefore receive attention from this honourable court.

This point was a completely new legal ground, not set down in the grounds of appeal. What is the consequence of proceeding in this manner and making a submission on a completely new point of law in an appeal? This question boils down to what may be the subject of submissions when a ground of appeal is that "*the judgment is against the weight of evidence on record*". In a long line of cases, the question of whether or not pleading the omnibus ground allows for only facts or law to be argued, has been answered. In *Owusu-Domena* v *Amoah* [2016]1 SCGLR 790, the Supreme Court held per Benin JSC "*Where the omnibus ground is pleaded, both factual and legal arguments could be made*". In the same vein, the Supreme Court in *Republic* v *Judicial Committee of the Asogli Traditional Council Ex-parte Avevor (Azameti & Ors. Interested parties*) [2018-2019]1 GLR 698, the Supreme Court, relying on *Attorney-General* v. *Faroe Atlantic* [2005-2006] SCGLR 277 and *Owusu-Domena* (supra), held that both factual and legal arguments could be made. In *Faroe Atlantic* (supra), the Supreme Court held per Georgina Wood JSC (as she then was) at p.308 that, "*The general ground of appeal is therefore not limited exclusively to issues of fact. Legal issues are within its purview".*

In all the cases cited, however, the omnibus ground had been pleaded as the sole ground of appeal. What about when there are other grounds, and it is merely tagged onto the list to "make assurance doubly sure"? Should the applicable principle be the same? In the recent case of *Atuguba and Associates* v *Holam Fenwick Willian LLP* [2018 -2019] 1 GLR 1, the Supreme Court seized on the opportunity to clarify the issue. In that case, the facts were that the plaintiff/respondent/appellant (herein referred to as 'appellant' to avoid confusion) was a law firm based in Ghana, while the 2nd defendant/appellant/respondent (herein also referred to as 'respondent'), was a Limited Liability Partnership registered in the United Kingdom, also offering legal services. The 1st defendant was also based in, and ran its business in, the United Kingdom. Sometime in 2014, the respondent sought to engage the services of appellant to act for 1st defendant in civil suits brought against it in the courts of Ghana. After the exchange of a number of emails it was agreed that the appellant would offer legal services to the 1st defendant at agreed hourly rates. Subsequently, a dispute arose between appellant and 1st defendant regarding the invoices for payment of legal fees. The appellant commenced a suit against 1st defendant and respondent for the cost of legal services rendered, interest, general damages for breach of contract and costs. The respondent invited the trial court to exercise its discretion to strike the respondent out of the suit as a party. The trial court refused this invitation, maintaining that the respondent was a necessary party. The respondent appealed to Court of Appeal which allowed the application, and ordered the respondent to be struck out of the suit. The appellant therefore brought this interlocutory appeal against that decision, and pleaded only one ground i.e. the omnibus ground, that the decision was against the weight of evidence.

In support of the sole ground of appeal, the appellant therein filed a statement of case arguing certain points of law. In doing this, however, the Appellant had not sought leave to file any additional grounds. On the point of whether law and facts could be pleaded under the omnibus ground, the Supreme Court distinguished between the cases in which omnibus ground was an only ground, from those in which the omnibus

ground was only one of a number of grounds of appeal. At p.10, Amegatcher JSC clarified the position thus:

> *"Based on the exception given by the court in the Owusu-Domena v Amoah case [supra] the current position of the law may be stated that where the only ground of appeal filed is that the judgment is against the weight of evidence, parties would not be permitted to argue legal issues if the factual issues do not admit of any. However, if the weight of evidence is substantially influenced by points of law, such as the rules of evidence and practice or the discharge of the burden of persuasion or of producing evidence, the points of law may be advanced to help facilitate a determination of the factual matters. The formulation of this exception is not an invitation for parties to smuggle points of law into their factual arguments under the omnibus ground. The court would, in all cases, scrutinize such points so argued within the narrow window provided*".

Is the instant case a proper occasion for the application of the *Owusu-Domena* v *Amoah* (supra) exception? It is not, for there does not seem to be good reason to do so.

In the recent case of *Ama Serwaa* v. *Gariba Hashimu and Another*; Suit No. J4/31/2020; delivered on 14th April 2021; the Supreme Court held that a failure to seek leave to argue points of law not pleaded on the grounds of appeal contravened Rule 8(7) of The Court of Appeal Rules, 1997, (CI 19) as amended; and mutatis mutandis, Rule 6(7) of the Supreme Court Rules, 1996 (C.I. 16), as amended. In the instant case, the defendant-appellants should have asked for Leave before arguing this new point of law in their statement of case. In *Sandema-Nab* v *Asangalisa* [1996-1997] SCGLR 302, the Supreme Court, per Acquah JSC (as he then was), stated at p.307

"Now it must be appreciated that an appeal is a creature of statute and therefore no one has an inherent right to it. ... [w]here a right of appeal is conferred as of right or with special leave, the right is to be exercised within the four corners of the statute and the relevant procedural regulations, as the court will not have jurisdiction to grant deviations outside the parameters of the statute".

Since an appeal must be prosecuted within the "*four corners of the statute*" set down to govern appeals under CI 16 , The defendant-appellants failed to comply with the rules, and cannot now argue new grounds without leave to amend the grounds of appeal. The importance of compliance with the rules governing appeals was made forcefully in *The Republic* v *Central Regional House of Chiefs Judicial Committee: Ex Parte: Aaba* (2001-2002) 1 GLR 221 by the Supreme Court, speaking through Adzoe JSC, at pp 229-230 thus;

"*The rules of the Supreme Court (and all other Courts) are there to be observed. They form an important component in the machinery of the administration of justice and the courts must not, as a general rule, take lightly any non-compliance with them, even though technicalities are not to be permitted to undermine the need to do justice. The Supreme Court Rules, C.I. 16, set out the appeal procedure. Rule 6 deals with notices of Appeal in a case of this kind. It provides: —*

"6(2) A notice of civil appeal shall set forth the grounds of appeal and shall state……

(b) whether the whole or part of the decision of the court below is complained of and in the latter case the part complained of;…

6(5) No ground of appeal which is vague or general in terms or discloses no reasonable ground of appeal shall be permitted, except the general ground that the judgment is against the weight of evidence;…

These rules do not permit an appellant to argue a ground of appeal that is not set forth in his notice of appeal. Of course, there is rule 6(7)(b) which enjoins the court not to confine itself to the grounds set forth by the appellant or be precluded from resting its decision on a ground not set forth by the appellant; but that rule is subject to rule 6(8) which provides that 'Where the court intends to rest its decision on a ground not set forth by the appellant in his notice of appeal or on any matter not argued before it, the court shall afford the parties reasonable opportunity to be heard on the ground or matter without re-opening the whole appeal'….The rule should not be taken as granting an Appellant a general license to abandon his obligations under the rules."

From these provisions it is clear that were the Supreme Court minded to accept the invitation of the defendant-appellants to declare the writ and statement of claim "null and void", it would have to rest its decision on a point of law introduced without leave or notice to the plaintiff-respondents, and without giving them an opportunity to be

heard on the point. The precondition for arguing such matters not having been fulfilled, this court must decline the invitation.

Another issue arising out of pleading the omnibus ground in the instant case is that the defendant-appellants are inviting this honourable Court to use the power of re-hearing as a second appellate court, to set aside concurrent findings of the High Court and Court of Appeal by rehearing of the case. Fortunately, this invitation to a second appellate court to interfere with concurrent findings of a trial court and first appellate court is nothing new, and the principles are well settled in a long line of cases, such as, *In re Bonney (decd) Bonney* v. *Bonney* [1993-94] 1GLR 610; *Achoro* v *Akanfela* [1996-97] SCGLR 209; *Koglex Ltd (No 2)* v. *Field* [2000] SCGLR 175; *Obeng* v. *Assemblies of God Church, Ghana* [2010] SCGLR 300; *Gregory* v. *Tandoh IV and Hanson* [2010] SCGLR 971; In *In re Bonney (decd) Bonney* v. *Bonney* (supra), Aikins JSC speaking for the court when dismissing the appeal stated at p 617:

> "Counsel has argued that an appeal is by way of rehearing and therefore the appellate court is entitled to make its own mind on the facts adduced and inferences from them. That may well be so. But what has to be borne in mind is that the appeal court should not under any circumstances interfere with the findings of fact by the trial judge except where they are clearly shown to be wrong, or that he did not take all the circumstances and evidence into account, or has misapprehended certain of the evidence, or has drawn wrong inferences without any evidence to support them or he has not taken proper advantage of his having seen and heard the witnesses."

In *Koglex Ltd (No.2)* v *Field* (supra), Acquah JSC (as he then was) at p.185 re-stated the law and outlined the circumstances thus-:

"(i) where the said findings of the trial court are clearly unsupported by evidence on record; or where the reasons in support of the findings are unsatisfactory.

(ii) Improper application of a principle of evidence; … or where the trial court failed to draw an irresistible conclusion from the evidence …

(iii) Where the findings are based on a wrong proposition of law …

(iv) Where the finding is inconsistent with crucial documentary evidence on record.

The very fact that the first appellate court had confirmed the judgment of the trial court does not relieve the second appellate court of its duty to satisfy itself that the first appellate court's judgment is like the trial court's also justified by the evidence on record. For an appeal, at whatever stage, is by way of re-hearing and every appellate court has a duty to make its own independent examination of the record of proceedings"

In the later case of *Obeng* v *Assemblies of God Church, Ghana,* (supra), Dotse JSC at p.323,

"The position can thus be stated that where findings of fact made by the trial court are concurred in by the first appellate court, the second appellate court must be slow in coming to different conclusions unless it is satisfied that there are strong pieces of evidence on record which are manifestly clear that the findings of the trial court and the first appellate court are perverse."

In *Gregory* v *Tandoh IV and Hanson* (supra) again Dotse JSC at pp. 986-987, explained the powers and responsibilities of a second appellate court in respect of concurrent findings 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… 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 all of these authorities, it is clear that while a second appellate court is within its powers to review concurrent findings of the trial and appellate court, it must proceed with caution and ensure that the bar set under the numerous authorities, has been met. Has the appellant in the instant case met this bar? No, it has not done so.

In this closely-argued appeal, the defendant-appellants have argued strenuously that the plaintiff-respondents should not be allowed to resile from a tenancy agreement which they had voluntarily entered into, and that they should be held to those terms,

whilst the plaintiff-respondents insist that by the settlement, they are not tenants of defendant company, but ought to be part owners. The Court of Appeal closely reviewed the evaluation of the evidence as conducted by the High Court, and came to the conclusion that there was nothing amiss.

In the instant appeal, the defendant-appellants are, indeed, fixated on establishing the validity of the tenancy agreement, whilst the plaintiff-respondents are equally intent on denying same. The issue may be resolved, not by looking only at the agreement itself, but by examining the history of the relationship between the parties.

Any examination of the issues arising from the decision of the High Court and Court of Appeal must begin with how the settlement, whose terms were agreed upon by both parties, came to be. As already recounted in the 'Background and Facts' herein, the answer lies in events that took place sometime in 1998, and the bid by a group of traders and artisans to formally acquire land on which they had settled, and to construct permanent structures thereon, for their trading activities. The plaintiffs-respondents relate the basis of their claims, from events that occurred in 1998. On their part, the defendant-appellants prefer to use the lease obtained by Gabbat Co Ltd. from the Lands Commission, Kumasi, in September, 1999; and the tenancy agreements they executed with the parties in 2001 and 2002 as the basis for their claims. However, the defendant-appellants concede in their account that there were traders on the land prior to their takeover in September 1999, but maintain that, "*Before the said grant all the traders were licensees of the Lands Commission".* Although both groups admit that the traders undertook to pay monies towards the construction of the shops, the plaintiff-respondents contend that those were levies that gave them ownership of their own shops, and interest in the rest of the property made up of 125 shops in total, whilst the defendant-appellants insist that the monies paid were for rent to Gabbat Co Ltd which owned the shops, and that the plaintiff-respondents have no proprietary interest in the property. These disagreements resulted in Suit No IRL.10/2011 in the High Court which has produced this appeal.

The High Court found as a fact that the settlement agreement of 11th August 2008, which was adopted and entered as a judgment of the Circuit Court, and marked 'Exh 3', was the agreement that would have resolved the conflict but for the shortfalls in implementation of its exact terms. The High Court recognized that those who formed Gabbat were supposed to represent the interests of a group, and not to take the benefit for themselves. Again, they had funded the project from levies paid by the contributors, and could not now seek to exclude them from enjoying what they paid for. This situation was thus not one of resulting trust, but a classic case of another form of implied trust - constructive trust. It is a constructive trust that would enable the beneficial interest to be enjoyed by all who contributed money to bring it into being, as beneficial owners, even though the legal ownership of the lease was in Gabbat Co Ltd. This position was in accord with existing authority. In the *Soonboon Seo* v *Gateway Worship Centre* [2009] SCGLR 278, a Korean missionary announced that he was going to Korea to raise money for the benefit of a church based at Ashaiman near Tema, in the Greater Accra Region. The money was raised, and paid into his personal account. Upon his return to Ghana, he announced in church that he had been able to raise some money, but did not disclose how much. Subsequently, he bought land with some of the money. The church brought action against him for, *inter alia*, declaration of title to the land. The Supreme Court held, per Sophia Akuffo JSC (as she then was) at p. 296 "*The facts clearly support the creation of a constructive trust (an implied trust*)". Basing her decision on Taylor JSC in *Saaka* v *Dahali* [1984-86] 2 GLR 774 at 784 which cited Halsbury's Laws of England (3rd ed) vol 14 para 1155, a 'constructive trust' was defined as follows:

> *"A constructive trust arises when, although there is no express trust affecting specific property, equity considers that the legal owner should be treated as a trustee for another. This happens, for instance, when one who is already a trustee takes advantage of his position to obtain new legal interest in the property as where a trustee of*

leaseholds takes a new lease in his own name. The rule applies where a person although not an express trustee, is in a fiduciary position …"

She concluded that "*Consequently, in the instant case the defendant-appellant held the funds in question on a constructive trust for the second plaintiff church"*

The learned authors, Michael Haley and Lara McMurtry in *Equity and Trusts*, Sweet and Maxwell, London, 2017, explain and expound on the law on 'Constructive Trusts'. At p.445, they define the concept of 'Constructive Trust', as follows:

"A constructive trust arises in order to prevent one party from resiling from an understanding as to the beneficial entitlements in circumstances where it would be unconscionable to do so. This will occur primarily where the estate owner has by words or conduct induced the claimant to act to his detriment in the reasonable belief that, in so acting, he will obtain a beneficial interest in the properties

Again, at p.372 , the learned authors cite the English case of *Westdeutsche Landesbank Girozentrale* v *Islington LBC* [1996] AC 669, in which Lord Browne-Wilkinson stated the law on this equitable concept at p.705 thus:

(*i)Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust)*

(ii) Since the equitable jurisdiction to enforce trust depends upon the conscience of the holder of the legal interest being effected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, ie until he is aware that he is intended to hold the property for the benefit of others in the case of an

express or implied trust or in the case of constructive trust, of the factors which are alleged to affect his conscience.

(iii) In order to establish a trust there must be identifiable trust property. The only apparent exception to this rule is a constructive trust imposed on a person who dishonestly assists in the breach of trust who may come under fiduciary duties even if he does not receive identifiable trust property.

(iv) Once a trust is established, as from the date of its establishment the beneficiary has in equity a proprietary interest in the trust property, which proprietary interest will be enforceable in equity against any subsequent holder of the property …other than a purchaser for value of the legal interest without notice."

From this statement of law, the authors opine that two key ingredients must be established to show there was a common intention as to what to do with the property: 1. The plaintiff must convince the court that there was *"a common intention to share the property beneficially*"; and 2. The claimant must demonstrate that he changed his position because of the unexpressed common intention. *The* court may, therefore, look at "*conduct both prior and subsequent to the acquisition of the property"* Where there is no evidence of an express discussion having occurred between the parties, the court must examine the conduct of the parties into some detail *"with the prospect of presuming a common intention to share beneficial ownership*."

Even more apposite to the situation in the instant case is the English case of *Paragon Finance Plc* v *Thakerar & Co*. [1999] 1 All E. R. 400. At p. 408 per Millett L. J. explained that,

> *"A constructive trustee is really a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff.*

His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property for his own use is a breach of that trust."

In the instant appeal, the delegation of leaders had been put together to advance the interests of all members of the group in a piece of land. There would be no doubt as to such common intention. Indeed, from the settlement, it was clear that the basis of membership of the new company had to be inclusive of all those who had made contributions to the project. Why did this sensible approach fail to achieve the desired peace? It did not because, in the implementation of the settlement, a distinction was drawn between those who had paid the levies, as previous occupiers of the land, and those who had equally been invited to pay the levies but were described as "outsiders". With such categorization, the nature of their contribution to the project had been changed from equity into an interest-free loan to the company, though politely named as "advance payment of rent". How does one calculate rent, or take a tenancy and pay rent, in a yet-to-be-realised building project? When the plaintiff-respondents claimed to have pre-financed the project, they were right, and to hold otherwise would mean that those who paid the same amounts would acquire ownership of their stores only because they were "licensees of Lands Commission" (as the defendant-appellants described them). As defendant-appellants submitted at p.37 of their Statement of Case,

"it is clear that the respondents are claiming ownership because they contributed. But the respondents are not members of the appellant company but form part of the members called outsiders. Their names did not appear in the Company's regulations compared to the original members whose names appeared in the appellants' regulations."

The defendant-appellants state the case for the respondents well, for it is precisely because they contributed into a fund for the acquisition of property that they must be part-owners. This discriminatory treatment of the "outsiders" is unconscionable, for it is the money that built the premises, and not the prior license or whatever stature the "occupiers" held. Therefore, a determination that they should be deemed to be subscribers of the new company that was to be established, was well-grounded in Equity. As Michael Hale and Lara McMurtry outline in *Equity and Trusts*, (supra), at p.332 quoting Lord Browne-Wilkinson again in *Westdeutsche Landesbank Girozentrale* v *Islington LBC* (supra), at p.708

> *"Equity presumes, however, that the property belongs to the person who advances the purchase money. Where A makes a voluntary transfer to B or pays (wholly or in part) for the purchase of property which is vested in B alone, there is a presumption that A did not intend to make a gift to B: the property is held in trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B of shares proportionate to their contribution."*

Why should respondents contribute money into a project which has not yet been completed in order to provide funding in the nature of interest-free loans to a company, unless they have sufficient interest in the property to risk their money as investment?

It is clear from the posture of the defendant-appellants, that they did not believe the plaintiff-respondents had any share in the property, hence their total exclusion in the implementation of the settlement. For instance, a name for the new and more inclusive company, '*Asomdwee House Ltd*' was decided on, but it is unclear who was involved in the decision. Equally unclear, is whether the new company was formally registered as ordered; and whether the assets and liabilities of Gabbat Co were legally transferred to it as agreed under the Settlement. Certainly no documents showing the status of *Asomdwee House Ltd*., was exhibited on the record. Again, from the settlement,

Directors were supposed to be selected from across the groups, but if this was ever done, it was to the exclusion of the plaintiff-respondents. The essential point of note here is that this was how the united front of the 'contributors' was split, and plaintiff-respondents came to be excluded. But with the exclusion, went the chance for peace and reconciliation.

It became obvious to the High Court, on the evidence, that the crux of the problem, was that *Asomdwee House Ltd*., though formed pursuant to the settlement, did not measure up to the terms of the settlement by its failure to comply with the exact provisions. Consequently, the High Court held that,

> *"After the consent Judgement has been fully complied with and all the contributions are allotted shares in the limited liability company so formed, they will be entitled to dividend to be declared by the company. Until the consent judgement is complied with to the letter, the plaintiffs and for that matter all the contributors will have a legal right to remain on the property and operate the stores they occupy*."

This view of the facts was supported by the Court of Appeal, and we also affirm our agreement with the Court of Appeal.

In support of ground (ii) of the appeal, the defendant-appellants submit that they announced that there were shops available and that anyone who was interested in acquiring one should see the Financial Secretary of the company to execute tenancy agreement. Further, that it was this announcement that the plaintiffs acted on, and subsequently signed tenancy agreement "voluntarily and with their eyes open". At pp.42-43 of the Statement of Case, they query that

> *"if the respondents knew in 2008 that Gabat Co Ltd was not the owner of the stores then why did the respondents sign*

the agreement with the Appellant company described it as the landlord of the Stores (then Gabat Co ltd) in 2001"?

With respect, in 2001, did Gabbat Co Ltd know it was a constructive trustee and that the contributors were beneficial owners of the property? If they did not, why then hold it against the plaintiff-respondents that they did not know either, when, from the get-go, and to the knowledge of the defendant-appellants, the contributors had consistently challenged the ownership of Gabbat Co Ltd, but to no avail?

In the Statement of Case, the defendant-appellants attacked the determination by the Court of Appeal and labelled it as "unsustainable" and questioned at p.39 of the Statement of Case how the Court of Appeal came to the conclusion that,

"Therefore the tenancy agreements, exhibit 3, 4 and 5 will not hold once it has been agreed that Gabat Co Ltd was not the rightful company to hold the disputed property on its own and on the principle Nemo dat quod non habet, Gabat Co Ltd cannot give what it did not have"

In response to this conclusion of the Court of Appeal, the defendant-appellants submit at p.42 of the Statement of case that,

The new company was the appellant and before the appellant was eventually formed, the directors of the appellant's predecessor entered into tenancy agreement. And their Lordships at the Court of Appeal held that Exhibit B [The settlement Agreement] the appellant's predecessor had no such power or rights to enter into that tenancy agreement. But what my lords at the Court of Appeal … did not address their mind to was that the leasehold agreement between the Lands commission Kumasi and Gabat Co Ltd (now appellant) had not been set aside by any court of

> *competent jurisdiction and the said leasehold agreement was legally in existence at the time the respondents came to court. Furthermore that company, ie Gabat Ltd, a company limited by shares and was in legal existence as* ***the company had not been liquidated or dissolved at the very material time the tenancy agreement was duly executed.*** *Besides the powers of the company had not been suspended in any way legally or otherwise in Exhibit B…"*(emphasis in original).

On this point, it is conceded that the defendant-appellants are right. Gabat Co Ltd had been properly formed and registered, even though it ought to have included more members, (as required by the settlement), than it did. This, however, did not make the company invalid, as its existence was legal. Therefore, Gabbat Co. Ltd. was in existence legitimately. In that capacity, it could take and hold a lease as legal owner, even though in the circumstances of an implied trust, the lease was held in trust for the beneficial owners. Since Gabat Co Ltd had capacity to hold a lease and transact other lawful business, it could also enter into tenancy agreements. The tenancy agreements executed, with the exception of those to be presently shown to be void on grounds of common mistake, were thus valid and could legally be taken over by Asomdwee House Ltd.

The defendant-appellants also maintain in their submissions that

> *"****The Respondents forget that what parties had voluntarily and lawfully put together, the court will not without any permissible compelling reasons/justification or vitiating factor put them asunder****.* (emphasis in original)

That is certainly a correct statement of law. However, they concede, equally correctly, that the presumed validity of a contract may be undermined by the existence of well-

recognised vitiating factors. They, however, believe that none of those grounds exist in this particular case, for they argue thus:

> *There was no evidence on record that the agreement was inconsistent with either the 1992 Constitution of Ghana or any parliamentary statute[sic], Common Law of Ghana, or was tainted with fraud. Undue influence, duress, mutual mistake, and the like.*

Consequently, the defendant-appellants now say that the plaintiffs-respondents are estopped from contending the contrary, that the shops and the land do not belong to them ie the defendant-appellants.

This is also a correct statement of law, but the list of vitiating factors of a contract mentioned by the defendant-appellants does not provide an exhaustive list. Although "mutual mistake" features on it, no other form of mistake makes the list. However, mutual mistake is not the only form of mistake that can vitiate a contract. The existence of a 'common mistake' also vitiates a contract.

MISTAKE IN CONTRACT

In contract law, Mistake may take many forms. According to Christine Dowuona-Hammond, the learned author of *The Law of Contract in Ghana*, Frontiers Printing and Publishing Company, Accra 2011, at p. 187, "*to be mistaken is to be wrong as to a matter of fact that influences the formation or making of a contract*." Such mistake may affect the party with whom one is entering the contract, the subject-matter of the contract, or the circumstances under which the contract is executed. The particular factor concerned may, depending upon its nature, vitiate a contract altogether, or make it voidable. In defining what "vitiating factors" are, and explaining their effect on a contract, Christine Dowuona-Hammond (supra), states that "*'vitiating factors' are simply legally recognized factors, which make an apparent contract lose its validity when it comes to its enforcement.* …"

From the submissions, the defendant-appellants recognized the legal effect of a vitiating factor such as 'Mistake' in the law of Contract, but chose to land on 'mutual mistake' rather than the more correct 'common mistake'. The error may be small, but its effect may, nevertheless, be significant as in this case. 'Mutual Mistake', is explained by the learned author, at Chapter 8.2.1 on pp.189-190, thus:

> *"Mutual mistake is said to exist where, although to all outward appearances the parties are agreed, there is in fact no genuine consensus between them because one party makes an offer to the other, which the other accepts in a different sense from that intended by the offeror. Here, the two parties, unknown to each other are at cross purposes, in that each party is mistaken as to the other party's intention, even though neither party realizes that their respective promises have been misunderstood". (Footnotes omitted.)*

From this definition, counsel for defendant-appellants is right that there is no mutual mistake as far as the evidence in this case goes. However, that is not the end of the story. More apposite to the circumstances of the instant appeal is 'common mistake'. In Chapter 8.2.3 on p.190, the learned author (supra) explains:

> *"Common mistake exists where even though there is genuine agreement between the parties, the parties have both contracted in the mistaken belief that some fact which is the basis of the contract is true when in fact it is not. This kind of mistake is common to both parties, that is, both parties make the same mistake about the circumstances surrounding the transaction."*

In the English case of *Cooper* v *Phibbs* (1867) L.R. 2 H.L 49, the petitioner agreed to become the tenant to respondent, of a salmon Fishery. It turned out that he was, in fact, the owner of the Fishery which he thought belonged to the respondent who was a

trustee. On the other side, the trustee had been given the impression by his father that he (the father) was the owner, and that he, the respondent, and his siblings had inherited the Fishery from their father. When the petitioner found out the real state of affairs, he sought to have the agreement set aside. Lord Cranworth agreed with him and set the agreement aside, holding that,

> *"the aforesaid agreement … was made and entered into by the parties to same under mistake, and in ignorance of the actually existing rights and interests of such parties in the said fishery."*

In the instant appeal, the situation is quite akin to what occurred in *Cooper* v *Phibbs* (supra). Here were two parties, each believing they stood in the relationship of 'landlord' and 'tenant' to each other, when it was not in fact so. On account of the fact that the 'tenant' had a beneficial interest in the property, and so could not be a 'tenant' properly-so-called, for one cannot be a 'tenant' in one's own property. At the same time, the supposed 'landlord' was in fact, only a legal owner holding a constructive trust in favour of the 'tenant' as beneficial owner, and so was mistaken in signing as 'Landlord." The common mistake of the parties thus vitiates the 'Tenancy Agreement'. The Court of Appeal was, therefore, not wrong in supporting the finding of a constructive trust in favour of the plaintiff-respondents. With that finding it follows that as beneficial owners, the plaintiff-respondents cannot be 'tenant' in their own property. We also agree that the finding is well-grounded in law. "Equity regards as done, that which ought to be done" is a maxim that would serve everyone well when kept in mind. Once the court ordered that a new company be formed to include all those who qualified, such as the plaintiff-respondents herein, the right thing should be deemed to have been done. Therefore, the plaintiff-respondents are deemed to be members of the new company – Asomdwee House Co Ltd. Accordingly orders will issue to the Company to rectify its Register of Members as provided for under section 33(2) of the Companies Act, 2019, (Act 992).

In addition, the tenancy agreement is questionable on more than one score. On the face of the tenancy agreements, the shops were let to the tenants "*for (fifty years 50) certain commencing from [the place is left blank] – SUBJECT to the Governments, cancelation and stipulation here after stated.*" This was the form for all the Tenancy Agreement exhibited. Some of these agreements had been executed in 2001 and 2002, based on a lease whose lifespan was of 50 years duration, with effect from 1st day of June 1999 to 31st May 2049. Thus the tenancy agreement based on it, and executed in 2002, was promising a term of fifty (50) years certain, i.e. up to 2052 when the lease would expire in 2049. Under this same Lease, Gabbat Co Ltd had covenanted in paragraph 2 (m) that

> *"at the expiration or sooner determination of this term quietly to yield up the demised premises together with the building or buildings thereon in such state of repair and condition as shall be in accordance with the covenant hereinbefore mentioned*'

Could the lessee-company grant what it did not have? Thus, on its face, the agreement was in breach of its own covenant under the lease.

Again, the mistake is strengthened by the fact that plaintiff-appellants claim they signed the document on grounds of illiteracy. The 'Tenancy Agreement' had a history, and did not spring from the skies. Therefore, if a court finds that it was signed due to a poor understanding of the effect of the document they were signing and which they captured as "illiteracy", that should not lead anyone to the conclusion that the Court of Appeal had not "carefully and thoroughly assessed and considered Exhibit B" before coming to its conclusions." It thus sounds almost unkind for counsel for defendant-appellants to submit in paragraph 2 of the Summary of Appellant's case in the Statement of Case, that the Court of Appeal was perfunctory in its approach to the matter.

The appellant also complains that the High Court had relied on a decision in a related case of *Amoako Blankson* v *Nana Bonsu* ; Suit No H1/8/2016, delivered on 10th May,

2016, which it claimed was binding on it. In that case, one of the traders, now also one of the plaintiff- respondents, had taken issue with a decision by the leaders not to grant him the store he believed himself entitled to occupy. The Court of Appeal had ruled, per Torkonoo JA (as she then was), that by the time of the lease with Gabbat, that the original traders had gone beyond being mere licensees and therefore there was a proprietary estoppel created. The Court of Appeal in the instant case was, therefore, not wrong in supporting the finding. We also agree, that the finding is well-grounded in equity, even though it is in the nature of a constructive trust rather than 'resulting trust'.

Following from the above, the High Court's finding on the status of Gabbat Co Ltd., also called the legitimacy of the tenancy agreements executed by that body into question. Citing the *Nemo Dat Quod non Habet* maxim, the court held that a body which could not execute a valid agreement, could not pass on any such valid agreement to its successor body. As the court put it in response to the defendants' counterclaim that the plaintiffs be ruled to be "potential tenants" of the company, it was consequent upon the finding that Gabbat Co Ltd was not formed in strict compliance with the Settlement agreement and subsequent consent judgment that,

> *"any agreement executed between any of the plaintiffs with the defendant either by itself, or with its predecessor is null and void and cannot operate as estoppel against the plaintiffs in any form. Since the defendant company was not formed in accordance with the consent judgement which is binding on the parties, the defendant cannot execute any tenancy agreements in respect of Anomangye Stores Complex with the plaintiffs or any of the contributors. Therefore, the plaintiffs cannot be potential tenants of the defendant company in its present form and I so find."*

In view of the discussion that has gone on before, we do not believe that the Court of Appeal was wrong in supporting the conclusion that the High Court arrived at, albeit by a different route from that which we here have taken, and re-affirm that as the agreement is vitiated by common mistake, in respect of those who belong to the class of contributors, such as the plaintiff-appellants, it cannot stand. However, those on the property who are tenants in the true sense of the word, remain tenants of Asomdwee House Ltd.

Again, the Court of Appeal is criticised by defendant-appellants as having "*preferred oral and conflicting pieces of evidence to indefeasible and unimpeachable documentary evidence which on the authorities is impermissibly unacceptable."* The admission of oral evidence is not completely impermissible if the conditions for so admitting, fall within the exceptions set down in section 177 (2) and (3)(a) of the Evidence Act 1975, (NRCD 323). Under these provisions, it is provided that

> *(2) Nothing in this section precludes the admission of evidence relevant to the interpretation of terms in a writing.*
>
> *(3) For the purpose of this section-*
>
> *(a) "a course of dealing" means a sequence of previous conduct between parties to a particular transaction which is fairly to be regarded as establishing a common basis for understanding for interpreting their expressions and other conduct."*

Consequently, the road the parties had travelled and what had gone on between them from the time of the negotiation with the School authorities, through the collection of the levies, to the conclusion of the settlement, clearly had an effect on the context of the execution of those "tenancy agreements". As the Court of Appeal in the *Amoako Blankson* case (supra) pointed out, the defendant-appellants' failed to honour the exact terms of the settlement agreed to by the parties. As for evidence, there were letters,

court records and other documents to back up the story of the plaintiff-respondents. For instance, one Alhassan Kwabena, one of the "occupiers", who successfully brought action against the leaders and Gabbat Co. Ltd in the Circuit Court, when he was denied the shop he believed he was entitled to occupy, i.e. Store No 8. Although he had been allocated a shop, it was on the First Floor of the building, and much smaller than Store No. 8, on the Ground Floor to which he believed he was entitled. The grounds for allocating the much smaller shop on the First Floor of the building was that he did not pay his share of the levies on time. He resisted this attempt to re-locate him, and provided credible evidence of promises made by the leaders to the "original occupiers" as to where their shops would be located. He was consequently adjudged entitled to Store No 8. This decision of the Circuit Court was tendered by the plaintiff-appellants at the High Court, admitted in evidence and marked Exhibit "J". Therefore, it is not correct to claim that the Court of Appeal "*preferred oral and conflicting pieces of evidence to indefeasible and unimpeachable documentary evidence*". The history of how the lessee- company came into existence was every bit, a part of the matters into which the High Court had to inquire. Therefore, if the Court of Appeal relied on evidence properly admitted by the High Court, there could be no legitimate reason to castigate the Court of Appeal for so doing.

The appellant further submits in para 3 of the statement of case that "*aside from the fact that the Respondents did not tender any receipt in evidence of their contributions as alleged members of the appellant towards the construction of the stores the Respondents failed to establish how they acquired ownership rights or title to the stores*." With respect, this point of law can hardly be maintained. To begin with, there were numerous occasions on which both parties admitted that those payments had been made. Thus, there was never any doubt or dispute as to whether payments had been made by anyone, and the quantum of such payments. The secretary of the defendant-appellant company, who was incidentally the secretary to the loose association of traders formed to protest the formation of Gabat Co Ltd., had testified on 7th May 2914, and confirmed the payments. He stated as follows:

> I was one of the persons on the land including Nana Kwame Bonsu, Kwabena Num and the 3rd plaintiff. The other plaintiffs were not on the land. The 125 on the land store[sic] were not constructed by the Defendant company.
>
> The building of the stores was financed by those on the land. It is never correct that the building was pre-financed by the traders who were there. Those who were originally on the land pre-financed the construction of the 125 stores.
>
> The traders who pre-financed the building initially paid Ghc 700 and later adjusted to Ghc 900 as a result of prices of items going up…"

Although he kept contradicting himself, the sums he named were consistent with all the testimony given by others in various documents. Having made the formal admission, albeit blowing hot and cold at the same time, about "pre-financing" of the project, the evidence was useful in confirming the payments. There was thus no need to provide any more proof of such payments by producing receipts which would, in the end, have only established facts already admitted. From the record, there was ample evidence for the Court of Appeal to come to the conclusion it did.

In view of all the discussions above, we have no hesitation in dismissing the appeal. We hereby make the following orders: the head lease between Lands Commission and Gabbat (Gabat) Co Ltd shall be formally assigned to the defendant-appellant herein; that the tenancy agreements that were executed with the plaintiff-respondents, who are beneficial owners of the property, be cancelled. The plaintiff-respondents are entitled to be treated in the same manner as those whose membership of Asomdwee House Ltd has already been recognized. Further, that the defendant-appellants, Asomdwee House Ltd, should rectify the Register of Members as provided by section 33(2) of the Companies Act, 2019 (Act 992), to include the plaintiff-appellants herein, as Members. These orders notwithstanding, the building and its appurtenances must be

maintained. Therefore, arrangements for payment of utilities, common services and insurance premiums that apply to the other "owners" should be made applicable to the plaintiff-respondents, because those are legitimate costs. The Court further directs that the company should be re-organised, and be enabled to conduct its business in accordance with the provisions of Act 992.

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