IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
DOTSE, JSC
YEBOAH, JSC
BAFFOE-BONNIE, JSC
APPAU, JSC

CIVIL APPEAL
NO. J4/25/2017

24TH OCTOBER, 2018

MFUM FARMS AND FEEDMILL LTD …… PLAINTIFF/RESPONENT/RESPONDENT

C/O AFRICANA CHAMBERS
OTB 584, ASOMFO ROAD
ADUM-KUMASI

VRS

MADAM AGNES GYAMFUA – DECEASED …… DEFENDANT/APPELLANT/APPELLANT
(SUBSTITUED BY MRS LOVIA OPOKU BANDOH)

OF H/NO 30 BLOCK C, ABUAKWA-MAAKRO
KUMASI - ASHANTI

JUDGMENT

DOTSE, JSC:- This is an appeal by the Defendant/Appellant/Appellant, hereafter referred to as Defendant, (who was by order of this court, substituted in place of the

original Defendant-now Deceased) against the judgment of the Court of Appeal, Kumasi, dated the 16th day of April, 2015. The said Court of Appeal judgment affirmed the trial High Court decision of 10th May 2006 which granted the reliefs claimed by the Plaintiff/Respondent/Respondent hereafter Plaintiff against the Defendant.

RELIEFS CLAIMED BY PLAINTIFF IN THE HIGH COURT AGAINST DEFENDANT

In the trial High Court, the Plaintiff claimed the following reliefs against the Defendant:-

1. **A declaration of title and recovery of possession of all that piece or parcel of land known as plot No. 17, TUC Estate Adiembra, Kumasi.**

2. Damages for trespass

3. Perpetual injunction against the Defendant, her servants, agents and assigns from interfering with the said land.

BRIEF FACTS

The Plaintiff contended that Plot No. 17, TUC, Adiembra, Kumasi was leased to it on 15th October 1992 by the Workers Housing Society for 50 years with effect from 1st April 1971. They further contended that the said lease was registered at the Land Registry on 11th March 1993 under Land Title No. 15298 and Serial No 168/93. The anchor of the Plaintiffs case at the trial High Court had been the said Land Title document which they tendered as Exhibit A. it is this Exhibit A, which the two lower courts accepted and relied upon despite the many issues raised about it's authenticity and reliability.

It was the case of the Plaintiff that the Defendant had trespassed on the said land by depositing cement blocks and other acts preparatory towards development of part of the land and had refused to vacate and or quit, despite repeated demands and mediation attempts which failed.

The Defendant on the other hand, whilst denying the averments of the Plaintiff, asseverated that, she was on the 21st day of August 1971 allocated Plot No. 17B under

the Ghana Trade Union Congress Housing Estate outright and Hire Purchase Scheme per Depositor's Pass Book Account No. HP/CK on 21st August 2011. She further contended that there were other allocations of Plot Nos. 17A, 17C and 17D to other persons and that all of these persons including herself had performed overt acts of ownership on the lands without let or hindrance from anyone whatsoever. The Defendant finally pleaded the statute of limitation and argued that the Plaintiff is barred by effluxion of time in raising the issue of title and or ownership in respect of this Estate House No. 17 B Adiembra, Kumasi.

BEFORE THE HIGH COURT

At the High Court, Kumasi, both parties testified and were cross-examined. They also called witnesses and tendered documents in respect of their rival contentions.

DECISION OF THE HIGH COURT JUDGE

The trial judge held inter alia that on the balance of probabilities; in considering the evidence and all facts and circumstances of the case, the Defendant could not set out the limits and dimensions of the land she claimed as her own and as such it fell to reason that she had indeed trespassed on the Plaintiff's land since the Plaintiff - company had been able to provide evidence and facts which proved its claims. The learned trial Judge declared thus:

> *"The Plaintiff-company have proved their case on the balance of probabilities and they are entitled to succeed in this case.* ***I therefore enter judgment for the plaintiff-company against the defendant and declare that the Plaintiff-***

Company are the lawful lessees of plot No. 17 Block D TUC Estate, Adiembra Kumasi. *I order the defendant to pay the sum of ¢30,000,000 as general damages to the Plaintiff-company and to remove the offending structure which occupies a portion of the land leased to the Plaintiff-company forthwith emphasis. Supplied*

Dissatisfied with this decision, the Defendant filed appealed to the Court of Appeal and sought to have the judgment of the High Court set aside.

DECISION OF THE COURT OF APPEAL

The Court of Appeal took the same view as the High Court, dismissed the appeal in its entirety and affirmed the decision of the High Court. The Court of Appeal, in a unanimous decision, reasoned as follows:-

"In the instant case, I think that the Respondent satisfied all these requirements before the trial Court and therefore the identity of Plot 17 Block D not being in dispute by the production of a contradicting site plan, the principles held in the cases of ***Nyikplokpo v Agbodotor [1987-88] 1 GLR 165*** *and* ***Anane v Donkor [1965] GLR 188*** *on proper identification of lands to be reduced to scale where reliefs for declaration and perpetual injunction are sought are in my view not relevant."*

Still dissatisfied with the decision of the Court of Appeal rendered on 16th April 2015, the Defendant filed the following grounds of appeal to the Supreme Court.

GROUNDS OF APPEAL TO THE SUPREME COURT

i. That the learned Appeal Court Judges failed to exercise their discretion judicially.

ii. The judgment is against the weight of evidence.

iii. Further Grounds would be filed on receipt of the record of Appeal

Further Ground of Appeal and Particulars of Law were filed on 30th January, 2017 as follows:-

1. That the Court erred in Law when it admitted and relied on the lease (Survey Plan) Site Plan attached thereto for its decision. Emphasis

PARTICULARS OF LAW

The admission of the Lease, the Site Plan attached thereto contravenes Section 3 of LI 1444, the Survey (Supervision and Approval of Plans) Regulations 1989.

In the course of deliberations towards preparations for the delivery of judgment in this case, it was observed that the dispute between the parties in this case is mainly a boundary dispute.

As a result, this court on the 14th day of March 2018 ordered a Survey Plan of the land in dispute to be drawn up. This was to delineate not only the land of the parties and houses thereon, but also other features that will help to superimpose the land parcels of the parties on the ground vis-à-vis their respective site plans and or documents of title.

Specific orders were thus made by the court, directed at the parties and or their counsel to file Survey Instructions to the Regional Surveyor of the Ashanti Region in Kumasi. In

addition, the Supervising High Court Judge in Kumasi was directed to take the evidence of the Surveyor and transmit same to this court. Learned counsel were also directed to file further written submissions if found necessary.

It is gratifying to observe that all the parties and or counsel have complied with the above directives with varying degrees of compliance.

After the reception of the Survey Plan and the evidence that was adduced as a result of the orders of this court rendered on 14th March 2018, it was considered useful to limit our decision in this appeal on the omnibus ground of appeal which is to the effect that, ***"The judgment is against the weight of evidence."***

It is trite law that an appeal is by way of re-hearing, particularly in cases where an appellant, such as in this appeal in which the Plaintiff has indicated in his notice of appeal that the decision is against the weight of evidence.

This principle had been stated very lucidly by Sophia Akuffo (JSC) (as she then was) in the celebrated case of ***Tuakua v Bosom [2001-2002] SCGLR 61*** as follows:-

> *"An appeal is by way of re-hearing, particularly where the appellant – 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 an 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 it arrives at it's decision, so as to satisfy itself that, on a preponderance of probabilities, the conclusions of the trial Judge are reasonably or amply supported by the evidence.*" Emphasis

This hallowed principle of law has been followed in a phlethora of cases such as ***Oppong v Anarfi [2011] 1 SCGLR 557, at 565***, ***Opare Yeboah v Barclays Bank Ghana Limited [2011] I SCGLR 330, at 345, Sai v Tsuru [2010] SCGLR, 762,*** particularly at 791 and finally ***Gregory v Tandoh IV and Hanson [2010] SCGLR 971 at 996***, just to mention a few.

Indeed if the learned trial Judge, and our learned brethren in the Court of Appeal, had considered the proper application of the above principles, they would have applied themselves differently to the conclusions reached therein in their respective judgments. The following are some of the apparent reasons why the judgment of the lower courts was against the weight of evidence.

CLAIM OF PLAINTIFF

In the High Court, the Plaintiff claimed against the Defendant inter alia a declaration of title and recovery of possession of all that piece or parcel of land known as plot No. 17 **TUC Estate, Adiembra, Kumasi.**

However, when Nana Kwasi Mfum, PW1 who described himself as Director of the Plaintiff company testified, he stated as follows:-

"Q. Do you know the Defendant?

A. I know her

Q. Why have you brought her to court?

A. I purchased a plot of land at TUC Kumasi. I have documents covering this land.

Q. Do you know the land in dispute?

A. I know the land in dispute

Q. Where is it situate and what is the house number?

A. It is situate at TUC Plot No. 17 Block D estate, Adiembra Kumasi"

Furthermore in the evidence in Chief of the Plaintiff's PW1, he stated as follows:-

Q. You said you went on the land and you saw that she was making development on a portion of your land.

A. She trespassed unto my land. I advised her to stop but she refused to stop that development.

Q. What precisely has she done on the land

A. The extension she made has entered into our land".

Then during cross-examination of the plaintiff by learned counsel for the Defendant, the following is what transpired:-

Q. This lady has been on her plot for more than 30 years now.

A. She has her land there and I also have mine there. That does not mean I do not have land at that area.

Q. The Defendant had been on her land for more than 30 years

A. She has a building there but she has made an extension and trespassed into my land. It is no (sic) T.U.C Housing Estate who made this extension for her." Emphasis

Then under re-examination, the Plaintiff re-emphasised the fact that, even though he obtained a permit for his development on the land he did so on 21st March 2001.

We have indicated supra, that the Plaintiff's anchored their claims entirely on Exhibit "A" which is their registered land title document. Despite it's many imperfections, both the

learned trial Judge and our brethren in the Court of Appeal accepted it as authentic and credible.

The Defendants have alleged throughout the trial court that this exhibit "A" is of a dubious origin, lacks credibility and is a fraudulent document.

The court appointed Surveyor who testified and tendered exhibit "CWA" stated as follows during cross-examining by counsel for the Defendant.

Q. The alleged authenticated site plan of the plaintiff when was this dated.

A. I cannot see any date on the plan.

Q. Again on the lease that was submitted to you by the Plaintiff can you show to the court who signed for the workers housing society?

A. I do not know who signed it but there is a signature on it.

Q. Can you show to the Court the signature of the workers housing society?

A. I do not know who signed, but there is a signature on it.

Q. The first signature represents the witness for Workers Housing Society**, the name is R. P. Adompreh** and the other signature from the Lands Commission certifying the document.

A. That is so

Q. **So is this lease authenticated by workers housing society?**

A. **No" Emphasis**

We have also studied this exhibit A, and found on the observations made by the Defendant's lawyer during cross-examination of the plaintiff and his two witnesses, PWI and PW2 as well as the Court appointed Surveyor to be correct. These are:-

1. There is no date on the site plan attached to the Lease document to indicate when it was prepared.

2. The site plan is not signed by the person who prepared it in other words, it is not authenticated by the surveyor who prepared it.

3. Thirdly, there is an alteration on the site plan where plot No. 17 is written, indicating serious tempering with the said document.

4. On the Lease document itself, since it is supposed to be a deed between The workers Housing Society and the Plaintiffs, there ought to have been a signature of the Lessors therein to authenticate and validate the document.

5. It therefore meant that the Lands Commission acted recklessly in rushing to register it when basic formalities as to form and substance had not been complied with.

6. All these prove conclusively that, exhibit A, which is a document allegedly made and executed in 1993 or thereabout, was backdated to dates in April 1971 and February 1975 respectively in the Lease documents just to lend credence to the longevity of the Plaintiffs on the land.

7. From our observations, the answer given by the Plaintiff during re-examination that he obtained a permit for his development on the land in or about 21st March 2001 represents the actual date that the plaintiff entered the land, started his acts of development at the time the Defendant and her neighbours were already firmly settled and enjoying their houses.

8. That the Plaintiff company stated in their evidence in chief that they purchased this plot No. 17, Block D, Adiembra Estate, Kumasi from the T.U.C.

9. The above is completely different from the description of the Plaintiff's land as stated in the endorsement on the writ of summons, which is stated as Plot No. 17, TUC Estate, Adiembra, and not Plot No. 17 Block D.

10. The Plaintiffs have openly admitted that the Defendant has land in the vicinity and has an already built house to which she was making extensions to. This phenomenon can only happen if the defendant is already an owner of property and had commenced extensions to the existing building.

DEFENDANT'S EVIDENCE

In her evidence, the Defendant who did not counterclaim denied the Plaintiffs' claims. She stated that she owns Plot No. 17 B, TUC Estate, Adiembra in Kumasi. When asked as to how she came to own this house, she answered as follows:-

> "TUC put up estate houses at Adiembra, Kumasi for workers. At that time I was working at Ghana Commercial Bank and plot No. 17B was given to me.
>
> Q. Can you tell us the condition under which you came. You said they gave it to you, what do you mean by gave.
>
> A. In 1971, the TUC said it had put up Estate houses for workers and so those who had paid their dues should apply.

According to the Defendant, she applied and was allocated the Estate House in 1971 upon payments of a deposit of ¢300.00 and the rest by monthly instalment payment of ¢17.45 which was deducted from her salary. In proof of the above, the Defendant tendered exhibits 2, 3, 4 and 5 (see pages 105-130) of the appeal record.

These exhibits conclusively established the following undeniable facts:-

1. That the defendant paid the initial deposit of ¢300.00 in August 1971 to the Ghana TUC for the Estate House No. 17 B, Adiembra which had been allocated to her.

2. Thereafter, the Defendant paid the monthly instalment of ¢17.44 from 1971-1980 which had been recorded and acknowledged until the Estate House was fully paid for.

3. There is also evidence that the Defendant paid property rates to the Kumasi Metropolitan Assembly from 1978 to 2003 or thereabout.

The rationale of the above observations is that, the Court of Appeal, being an appellate court should have taken all the above pieces of evidence into consideration when evaluating the appeal. This is because, as was stated from the beginning, an appeal is by way of re-hearing especially as the Defendant had indicated that the judgment of the trial court was against the weight of evidence.

From the survey plan that was prepared and tendered into evidence as Exhibit "CWA" before the High Court, Kumasi at the instance of this court, it must have been clear to the Plaintiffs that, before they went to the land, the Defendant was already comfortably ensconced on the land and had completed her extensions and living in it.

From our study and observations of this Survey Plan, we are of the firm opinion that the Defenant genuinely owned this property as far back as 1971 before the Plaintiff commenced his acts which we consider to be trespass onto the Defendants land.

As a matter of fact, if the superimposition of the respective site plans of the parties and of the Houses in the neighbourhood are taken into consideration, it shows clearly that it is rather the Plaintiff who has trespassed unto the Defendants land as well as road

reservations in the approved layout. All the other Estate Houses the Defendant mentioned as being her neighbours have been plotted on this survey plan as Nos. 17C, 17D etc. this is notwithstanding the fact that the Surveyor who testified and tendered this plan, Nathaniel Dawuso has not been very credible. This is because, even though he had stated in paragraph 3 of the report, that there is no plot NO. 17A, 17B, 17C and 17D and 17 per the approved layout, he nonetheless indicated the entire block as TUC Estates and denoted the said numbers to the Houses. The Surveyor then proceeded to make specific references to the same plot Nos. 17A, 17B etc in the same report as well and indicated them on the Survey Plan. This court will thus evaluate the Survey Plan Exhibit "CWA" and accept it based on other pieces of evidence which we have already reviewed in this rendition. In coming to this understanding, we are not unaware of the legal position stated in a good number of respected judicial decisions that, a court is not bound by the evidence relating to an experts opinion such as the surveyor given in this case. See cases such as ***Sasu V White Cross Insurance Co. Ltd. [1960] GLR 4, CA, Darbah v Ampah [1989-90]1 GLR 598, at 606, CA and Tetteh & Anr v Hayford (substituted by) Larbi & Decker [2012] 1 SCGLR 417 at 423,*** where the Supreme Court stated as follows:-

> *"It is generally understood that a court is not bound by the evidence relating to an expert opinion given by an expert such as the Surveyor in the instant case."*

But where a court decides to disregard the evidence of an expert, good reasons must be given for this rejection.

In the instant case, even though the Surveyor was at pains to conceal some evidence as was evident in his oral testimony and cross-examination, there was very little he could do in the pictorial representation of the parcels of land of the parties as was ordered by this court to be done by the superimposition.

We find it really necessary at this stage to refer to the unreported judgment of this court in ***Suit No. CA. No. J4/3/2915 intitutled Rosina Aryee –***

Plaintiff/Appellant/Appellant v 1. Shell Ghana Limited – Defendant/Respondent/Respondent, 2. Fraga Oil – Co-Defendant/Respondent/Respondent dated 22nd October 2015.

In view of the similarities and peculiarities of the facts in the case referred to supra and the instant appeal, we deem it somewhat appropriate to set the facts out in some detail. The facts in this Rosina Aryee case admit of no complexities whatsoever. They are as follows:-

FACTS OF THE CASE

State Housing Company, hereafter referred to as the Company, leased the land in dispute situate at Adentan Housing Estate to the Plaintiff/Appellant/Appellant, hereafter Appellant. The Appellant leased the land to the Defendant/Respondent, hereafter Respondent for a term of 15 years under the terms of the lease agreement, the Respondent paid the appellant rent advance for 10 years, with the rent for the remaining 5 years to be paid later, when the appellant went to demand payment for the remaining 5 years of the term, the respondent refused saying the appellant was not the owner of the property and that the land was owned by the Co-Defendant/Respondent/Respondent hereafter Co-Defendant.

The appellant took out an action against the respondent, claiming inter alia ejectment for denial of title. In their defence the respondent maintained their position that the land was owned by the Co-defendant. The respondent counterclaimed for a refund of their money inter alia. The Co-Defendant was subsequently joined as such, and they in turn pleaded that they were bonafide purchasers for value and had also duly registered their title in accordance with law. In response to the Co-Defendants case and claims, the appellant denied those averments and contended ***that they were in possession***

at all material times and that they carried out business on the land. It turned out that, the State Housing Corporation had granted the same land to the Co-Defendants in May 2003, having already granted same to the appellant much earlier in 1997.

Upon the above facts, the case was contested, and at the end of the trial, the High Court found the claims of the Co-defendant to have been established and so gave them judgment.

An appeal by the appellant to the Court of Appeal was similarly dismissed whereupon the appellant headed to the Supreme Court.

In the Supreme Court, coram: Wood (Mrs) C. J, presiding, Ansah, Dotse Yeboah and Benin JJSC, the court speaking through our illustrious and respected brother Benin JSC, stated as follows:-

> *The trial court Judge rejected the plaintiff's claim for what he termed lack of independent and corroborative evidence. In the same vein the Court of Appeal rejected it because among other things she failed to call her boundary owners; which is understood to mean supporting evidence. It must be pointed out that in every civil trial all what the law requires is proof by a preponderance of probabilities. See section 12 of the Evidence Decree, 1975 NRCD 323. The amount of evidence required to sustain the standard of proof will depend on the nature of the issue to be resolved. The law does not require that the court cannot rely on the evidence of a single witness in proof of the point in issue. The credibility of the witness and his knowledge of the subject-matter are determinant factors; see this court's decision in the case of* ***William Ashitey Armah vs. Hydrafoam Estates (Gh.) Ltd, Civil Appeal J4/33/2013, dated 28th May 2013, unreported****. Indeed even the failure by a party himself to give evidence cannot be used against him by the court in assessing his case. See this court's decisions in these cases:* ***In re Ashalley Botwe Lands; Adjetey***

Agbosu and Others vs. Kotey and Others (2003-2004) *SCGLR 420, per Wood, JSC (as she then was) at page 448 and* ***William Ashitey Armah vs. Hydrafoam,*** *referred to above.*

After giving some other examples and referring to the facts in the Rosina Aryee case supra, the Supreme Court per Benin JSC stated the law in the following cogent and succinct terms:-

> ***"Thus the courts below were bound by the law to examine every piece of evidence on record in order to reach a decision whether the plaintiff had discharged the burden of producing evidence and persuasion on a preponderance of probabilities.*** *She did not require to call any boundary owner/s or witness/es to confirm that she had a structure on the land or that she conducted business on the land prior to the date she handed over the land with the erected structure thereon to the defendant.* ***If you go through her entire evidence and cross examination you will not fail to notice that these facts stood unchallenged"***

Concluding it's decision in this case, the Court stated the law with such certainty that it is useful to set it out in full again as follows:-

> "***As earlier pointed out the court below did not pay regard to all these pieces of vital evidence.*** Indeed they did not pay heed at all to exhibit B and the site inspection report contained in exhibit I which was very critical to a determination of **whether the Co-defendant was fixed with notice of any encumbrance on the land. The result is that, the co-defendant was a reckless purchaser and not an innocent one and did not acquire title validly." Emphasis**

As can be seen, there are indeed several similarities between the case referred to in extenso supra and the instant appeal.

1. In the first place, the Defendant herein and her neighbours had been living on the land since 1971 or thereabout and this fact had been confirmed by the Plaintiffs when they testified under cross-examination. See also Defendants exhibits 1 through to 7 series on record.

2. Secondly, in the instant case, both parties claim title through the workers Housing Society, and so the first person in point of time on the land has priority over the other.

3. Thirdly, the plaintiff herein recklessly sought and registered his lease Agreement in respect of land that is certainly not the land the Defendant is occupying as Plot No. 17 B. Even if it is, on the doctrine of priorities, and the fact that the Plaintiff's acquisition of title being later in point of time than that of the Defendant, the Plaintiffs must be deemed not to have done due diligence before rushing to acquire and fraudulently register the said title documents.

4. As a matter of fact, if you go through the entire record, you will notice that the presence of the Defendant on the land and her activities on the land stood unchallenged and in some material particulars were admitted by the Plaintiffs as referred to supra. See exhibits 1 – to 7 series.

5. Having dissected exhibit "A" as a document of doubtful origins with fraudulent undertones, it is clear that being the rock of Gibraltar upon which the Plaintiffs case had been founded same must collapse.

Under the circumstances, it is apparent that if the two lower courts, especially the Court of Appeal had considered their task as a re-hearing of the appeal in line with the established principles earlier referred to supra, there is no doubt that the Plaintiffs should have lost their case.

CONCLUSION

There is therefore no dispute or doubt that the plaintiffs have not been able to establish their case against the Defendant on a balance of probabilities as they are required by law to do. See section 12 of the Evidence Act, NRCD 323. There have been so many inconsistencies in the plaintiff's case that it is surprising these were glossed over and ignored by the lower courts. We thus accordingly set aside the judgments of the High Court and that of the Court of Appeal dated, 10th May 2006 and 16th April 2015 respectively. The appeal by the Defendant thus succeeds, and judgment is therefore entered in favour of the Defendant.

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

ADINYIRA (MRS), JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

S. O. A. ADINYIRA (MRS)
(JUSTICE OF THE SUPREME COURT)

YEBOAH, JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

P. BAFFOE-BONNIE
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

COUNSEL

KWAME ASIEDU-BASOAH FOR THE DEFENDANT/APPELLANT/APPELLANT.

ADU-GYAMFI FOR THE PLAINTIFF/RESPONDENT/RESPONDENT.