IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2019

CORAM: GBADEGBE, JSC (PRESIDING)

BENIN, JSC

APPAU, JSC

PWAMANG, JSC

KOTEY, JSC

CIVIL APPEAL

NO. J4/22/2019

23RD OCTOBER, 2019

1. **MRS JENNIFER KANKAM NANTWI**
2. **MARTIN KANKAM NANTWI..... PLAINTIFFS/APPELLANTS/ APPELLANTS**

VRS

JOSEPH AMENYA ..... DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

THE UNANIMOUS JUDGMENT OF THE COURT IS READ BY GBADEGBE JSC, AS FOLLOWS-:

GBADEGBE:

In this appeal, for reasons of convenience, the parties will be referred to simply as plaintiffs and defendant. The circumstances in which the action herein arises may be stated shortly as follows. The plaintiffs issued the proceedings herein against the defendant seeking an order setting aside a prior judgment of the High Court, Accra in Suit Number L/187/2003 dated November 23, 2005 on the ground of

fraud. Also claimed as reliefs in the action are an order for the cancellation of a Land Title Certificate No GA 10930, and an order of perpetual injunction. Upon service of the proceedings herein on the defendant, he submitted himself unconditionally to the jurisdiction of the trial High Court and filed a defence to the action and counterclaimed among others for a declaration that the judgment dated 23rd November, 2005 entered in favour of the defendants herein in Suit L/187/2003 is valid and binding on the Plaintiffs. The said claim was expressed to be in the alternative to a declaration of title to the property in respect of which the previous judgment and the present action related to. The previous judgment, on which the proceedings herein turn is entitled: Joseph Amenyah v Edith Nyarko.

The plaintiffs, a husband and wife alleged that they had acquired the disputed property by purchase from one Kofi Boateng. The purchase was done in or about 2001 through the mother of the 1st plaintiff while the purchasers were said to be resident outside the country. Sometime after acquiring the disputed property, they caused the 1st plaintiff's mother to put up a residential dwelling for them. After the said building was completed around 2005, they caused utilities to be provided therein and they moved into occupation. Sometime in 2007, while in occupation of the property, the plaintiffs were served with a court process indicating that the defendant herein had obtained a prior judgment against, a person known as Edith Nyarko in respect of the same land. The plaintiffs who denied knowledge of the said Edith Nyarko informed the defendant herein who apparently was in the company of the process server that they had lawfully acquired the disputed property from the owners. In the face of the conflicting claim to the land by the defendants, which was acknowledged in the judgment sought to be enforced against them, the plaintiffs caused their proceedings herein to issue before the High Court, Accra seeking the reliefs herein before mentioned.

In his defence to the action, the defendant also alleged a purchase of the disputed property around 1995 from a source other than that asserted by the plaintiffs. Further to this he alleged that after acquiring the disputed property, he caused sand and stones to be deposited thereon and put up a fence wall to protect the land. Later, he was informed of acts of encroachment on the property by a person whose name was indicated as Edith Nyarko. The said person, it was alleged was engaged in the construction of a building on the land. Accordingly, he caused proceedings to be instituted against the encroacher resulting in the judgment, the

subject matter of the plaintiffs' action. According to him, as the said encroacher could not be personally served, processes by way of substituted service were affected on the land before the matter was tried. The defendant also said that before he purchased the land, he had seen a land title certificate in the name of his grantor who was described as the registered proprietor of interests to the disputed property from whom he obtained a conveyance to the disputed land. Based on these facts, the defendant lodged a counterclaim to the disputed property.

The plaintiffs' action suffered a dismissal both in the trial court and the intermediate appellate court. Both lower courts upheld the defendant's counterclaim for declaration of title together with the ancillary reliefs of recovery of possession and perpetual injunction. The plaintiffs, claiming to be dissatisfied with the judgment of the CA have appealed to us seeking an order of reversal of the decision in their favor. The appeal before us having been heard subsequent to the submission of written briefs by the parties, we now proceed to deliver our decision in the matter.

One significant matter emerging from the record of appeal before us is that both the trial court and the CA made a determination at pages 262 and 409 respectively of the record of appeal that the plaintiffs were not parties (or privies) to the previous action whose judgment they seek to annul. In view of this determination, their failure to obtain the consent of the defendant to the said proceeding before issuing the writ of summons herein deprived them of any cause of action flowing from the judgment. Consequently, as strangers to the previous action, the instant proceedings by which they seek among others an order annulling the previous judgment was improperly constituted. We find it quite puzzling that both the learned trial judge and the learned justices of the CA did not advert their minds to the obvious lapse in the proceedings. Indeed, having reached the same view of the matter as the trial court, the learned justices of the CA should have proceeded to strike out relief (1) by which an order was sought to set aside the previous judgment as it was improperly constituted. As the proceedings herein are in the nature of a re-hearing in which we have all the powers of the trial court, we are of the opinion that based on the determination that the plaintiffs lacked capacity to seek a relief related to the prior judgment entitled Joseph Amenyah v Edith Nyarko, it is right that we pause with a

consideration of the issues raised by the appeal to correct an obvious slip in the proceedings. In our opinion, in so acting, we are only applying the extensive power vested in us under section 2 (4) of the Courts Act, 1993, (Act 459) to make any order that ought to be made. The said section provides:

"For the purposes of hearing and determining a matter within its jurisdiction and the amendment, execution or the enforcement of a judgment or order made on any matter, and for the purposes of any other authority, expressly or by necessary implication given to the Supreme Court by the Constitution or any other law, the Supreme Court shall have all the powers, authority and jurisdiction vested in any court established by the Constitution or any other law."

In reaching the view that relief (1) contained in the writ of summons is improperly constituted, we were guided by the settled practice of courts where a person other than a party to an action seeks to intervene in an action as was decided in the case of Gbagbo v Owusu [1972] 2 GLR, 250. In his judgment in the said case, Abban J (as he then was) at page 253 thereof set out the applicable procedure and practice to be employed by third parties (strangers or interveners) who have been adversely affected by judgments as follows:

"It is well established that there are only two methods whereby a stranger to a judgment who is adversely or injuriously affected can set it aside. That is, he can obtain the defendant's leave to use the defendant's name and then apply in the defendant's said name to have the judgment set aside. Or where he cannot use the name of the defendant, he can take out a summons in his own name to be served on both the plaintiff and the defendant, asking to have the judgment set aside and for him to intervene..."

Having struck out relief (1), we proceed to consider the other claims which were properly before the court. We commence from the premise that as the two lower courts dismissed the plaintiff's claims and upheld that of the defendant, to succeed, the plaintiff must demonstrate that the said decisions particularly that of the CA was rooted in perversion such as to be an instance of miscarriage of justice. The attack on the judgment of the CA by resort to the omnibus ground that: " The judgment is against the weight of the evidence" is in our view, devoid of any merit as the learned justices carefully considered the various grounds of appeal which concerned the factual determination before proceeding to dismiss

the appeal before them. In our opinion, the decision reached by the learned justices of the CA are amply supported by the evidence and it would be an exercise in indiscretion if we were to reconsider the various grounds of appeal and reach our own view of the facts; that is something which we cannot do in the absence of a clear demonstration that the findings of fact were wrong. Indeed, in the case of Gregory v Tandoh IV and Hanson [2010] SCGLR 971, 975 Dotse JSC reiterating the settled practice of appellate courts regarding concurrent findings observed in a manner that is very relevant to the matter herein as follows:

"We have noted that the Court of Appeal in its judgment concurred in the findings of fact made by the learned trial judge. There is this general principle of law which has been stated and re-stated in several decisions of this court, namely; that where findings of fact (such as in the instant case), have been made by a trial court and concurred in by the first appellate court, in this case, the Court of Appeal, then the second appellate court (such as this Supreme Court) must be slow in coming to different conclusions unless it is satisfied that there are strong pieces of evidence on record of appeal which make it manifestly clear that the findings of the trial court and the first appellate court are perverse."

The plaintiffs in their submissions before us have failed to demonstrate that any of the findings made by the two lower courts suffers from error such as being contrary to documentary evidence placed before it or that a principle of law has been applied in error which when corrected has the effect of dissolving and or undermining the findings on which the concurrent findings are anchored. Further, there has not been any showing by the plaintiffs that vital pieces of evidence were glossed over or misread by the two lower courts or that there was no evidence to sustain the findings. As has been emphasised of the appellate function, the mere fact that we might take a different view of the facts is not sufficient to derogate from the effect of the concurrent findings warranting our interference. The burden that any appellant who seeks to have such concurrent findings overturned assumes is to demonstrate from the evidence contained in the record of appeal that the findings are not supported by the evidence or that any court composed of reasonable persons would not have reached the conclusion arrived at by the two lower courts; the requirement of perversion is to satisfy the appellate court that clearly the decision on the contested facts is wrong and that the other version of the matter is preferable. In our opinion, the

restraint that this court as the final appellate court is required to exercise regarding concurrent findings is not displaced by an allegation that "The judgment is against the weight of the evidence''; to succeed one must raise specific grounds of error in the process of evaluation preceding the making of the findings.

We think that the time has come for us as part of our responsibility in decongesting the court to develop a mechanism that will truly bear out the rule of wisdom in judicial proceedings regarding the approach to concurrent findings by for example, requiring appellants to demonstrate clearly by reference to specific instances of error and or blunder inherent in the findings under attack before us both in the grounds of appeal and statement of case. We do not think that the present practice of attacking such grounds under the omnibus ground is satisfactory as any party who appeals from concurrent findings to this court must appreciate that the burden which he assumes is not a very light one. In the celebrated case of Achoro and Another [1996-97] SCGLR 209, 214, the court specified what would suffice for it to interfere namely:

"It was well established with absolute clearness that some blunder or error resulting in a miscarriage of justice resulting in a miscarriage of justice, apparent in the way in which the lower tribunals dealt with the facts. It must be established, e.g., that the lower courts had clearly erred in the face of a crucial documentary evidence, or that the principle of evidence had not been properly applied; or that the finding was so based on erroneous proposition of law that if the proposition be corrected, the finding w will disappear……. It must be demonstrated that the judgments of the courts below were clearly wrong."

The same position was emphasised by Wood CJ in the case of Fynn v Fynn and Osei [2013] 1 SCGLR 727, 732-734. Earlier on, in the case of Bisi v Tabiri alias Asare [1987-88] 1 GLR 360, 368, Osei-Hwere JSC observed of the appellate function thus:

"I cannot believe that it was ever intended that the Court of Appeal (for that matter any appellate court) should move into a new era of regular questioning of decisions of trial judges on issues of fact, as distinct from law, which are supportable."

Since we have expressed our agreement with the concurrent findings of fact, we do not think that it is necessary to delve into the reasons. In the circumstances, we turn our attention to the plaintiff's attack on the counterclaim decreed in favor of the defendant and argued as ground (1) of the notice of appeal, which raises a purely legal question for our consideration. The said ground of appeal was formulated thus:

"The Court of Appeal erred by upholding the Defendant/Respondent's title to the land by virtue of his Land Certificate."

In respect of this ground, we wish to say that we find it incomprehensible that the plaintiffs placed great reliance on the argument that as title to the land is in the Government of Ghana, the failure by the defendant to take his grant from the owner was decisive of his claim of title to the land. In our view, this is a significant departure from the case pleaded at the Bar and quite frankly, a concession that their case had crumbled as they sought vainly to plank their case on a new foundation, which unfortunately may be likened to placing something on nothing. It is trite law as the learned justices of the CA held that as the owner of a land title certificate to the land, the defendant had an indefeasible title to the disputed land and in the absence of proof of any vitiating circumstances such as fraud and or mistake, the registered proprietor, the defendant herein was entitled to be adjudged as the owner of the area comprised in the land title certificate. This is a consequence of the registration as provided in section 43(1) of the Land Title Registration Law, PNDC L 152 of 1996 in the following words:

"Subject to subsections (2), (3) and (4) of this section, and section 48 of this Law, the rights of a registered proprietor of land whether acquired on first registration or by the order of the Court, shall be indefensible and shall be held together with all privileges and appurtenances attaching thereto free from all other interests and claims whatsoever."

Having been declared the registered proprietor, the defendant was entitled to the ancillary orders of recovery of possession and perpetual injunction contained in his counterclaim. The plaintiffs, in our view made a feeble challenge to the ancillary orders when they sought to rely on the fact that they had completed a building on the disputed land and as such are in effective possession. The submissions related to their possession is contained in their statement of case

and extensively discussed under the sub-heading "POSSESSION BY THE APPELLANTS" to which we next direct our attention to as follows.

We are of the opinion that as the plaintiffs did not raise any issue either on the pleadings or in the appeal herein on the question of estoppel by acquiescence or statute of limitation or both, their submissions related to the said possession is an unusual practice which must be deprecated by the court. In support of the said sub-heading, the plaintiffs, sought to rely on the fact that they are possessed of the building whose construction was resisted by the defendants by the issue of the previous action against Edith Nyarko and as such they can only be deprived of such possession by the true owner namely the Government of Ghana. That contention, in our view seeks to deprive the holder of a Land Title Certificate of the rights conferred on him under section 43 (1) of PNDCL 152 and finds no favor with us. Indeed, having regard to the declaration of ownership in the defendant, he is in the eyes of the law the true owner and accordingly the plaintiffs must yield their unlawful possession of the land in his favor. We think that the learned justices of the Court of Appeal were quite magnanimous when they expended time in their judgment at pages 415-416 in considering the effect of the said submissions before reaching what we consider to be the right conclusion that the plaintiffs claim should fail. By so doing, the learned justices preferred the defendant's version of the facts which was to the effect that the said possession was with full knowledge of the claim of the defendant that was accompanied promptly by the issue of a writ of summons and the service of processes on the land on which the building was being constructed by the plaintiffs.

We are of the view that the reasons provided by the learned justices are amply supported by the evidence on record and add that in the face of the posting of court processes on the land, the plaintiffs acted rashly to their own detriment when they continued with the construction works without giving any thought to the pending matter. That conduct is clearly wrong and we do not think that any court applying equitable principles should enable the wrongdoers to benefit from their own wrong as their hands are infected with iniquity. Perhaps, the plaintiffs labored under the erroneous impression that once the building works are completed, they might receive a favorable hearing that such possession is deserving of protection but unfortunately that is something that on the facts of this case no court of conscience will do in their favor. The conduct of the

plaintiffs, in our view was fraudulent and intended to overreach the defendant and accordingly cannot be the foundation of any order; for yielding to such a contention has the effect of allowing dishonorable conduct to prevail over societal expectations of the law representing the conscience of society in terms of that which is good and devoid of unworthy conduct.

For these reasons, the instant appeal fails and is dismissed. We proceed to affirm the decision of the Court of Appeal. The result is that the plaintiffs' claim as endorsed on the writ of summons is dismissed and judgment entered in favor of the defendant on his counterclaim as allowed by the trial High Court.

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

SGD A.A. BENIN
(JUSTICE OF THE SUPREME COURT)

SGD Y. APPAU
(JUSTICE OF THE SUPREME COURT)

SGD G. PWAMANG
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