IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: DOTSE, JSC (PRESIDING)
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
BENIN, JSC
APPAU, JSC

CIVIL APPEAL
NO. J4/32/2015

6TH DECEMBER, 2017

MURIEL ABREFI ODURO ..... PLAINTIFF/APPELLANT/RESPONDENT

VRS

ISAAC KWAME ACHEAMPONG ..... DEFENDANT/RESPONDENT/APPELLANT

JUDGMENT

BAFFOE-BONNIE, JSC:-

This is an appeal against the majority decision of the Court of Appeal in Suit No. H1/159/10 dated 9th May, 2013 Coram Mariama Owusu (Miss) Margaret Welbourne (Mrs.) JJA and K. A. Acquaye, JA (dissenting) pursuant to special leave granted by Benin JSC on 1st August, 2013.

The facts in this case are quite simple. By an amended writ of summons, the plaintiff/appellant/respondent (hereafter, plaintiff), claimed against the defendant/respondent/appellant (hereafter, defendant), among others, a declaration of title to land at Dome in Accra, recovery of possession, perpetual injunction and damages for trespass. The defendant, after entering appearance, also counterclaimed for, declaration of title to the land in dispute, recovery of possession, perpetual injunction and an order for the demolishing of the development by the plaintiff.

The plaintiff's case was that she leased a parcel of land from the Gbese Korle Stool in 1990, constructed a five -bedroom house on one part of the land and moved in 1992. She pleaded also that she erected a fence wall around the whole land comprising about four and half plots. She later applied to the Ga District Assembly and was given a building permit after paying a penalty. In 1996, the Gbese Korle Stool gave her an indenture evidencing the lease. Later however, a surveyor called Rockson, came and told her that the land belonged to one Mr. Nelson Cofie and when they went to see Mr. Nelson Cofie, the latter told her that he had obtained judgment against all those on the land so the said Mr. Nelson Cofie, a lawyer, made the husband of the plaintiff pay the judgment debt and costs of 170, 000,00 Cedis for which a receipt was issued. Lawyer Nelson Cofie told them that for building on his land without permission he will sell the building and the land to her for 10,000,000.00 Cedis. They bargained and arrived at 8,000,000.00 Cedis out of which the plaintiff paid 5,000,000.00 by instalments. The plaintiff testified that she travelled to Europe and on her return Mr. Nelson Cofie told her that she should consider the 8,000,000.00 Cedis arrived at earlier as extinguished because she could not produce the receipts and demanded payment of another 10 million old Ghana Cedis for the same parcel of land. After bargaining they agreed on 8million Cedis out of which she immediately paid 5 million Cedis to Rockson. Two weeks later she heard that Mr. Rockson was sick and he died soon thereafter. The plaintiff testified that she travelled in 2002 and when she returned she was informed that somebody had demolished her wall. She found out that it was the defendant, who lived in the same area with her, who had demolished the wall. The plaintiff reported the

trespass to the local police at Kwabenya and subsequently commenced this instant action against the defendant.

In the defendant's response to the charge of trespass against him, he admitted demolishing part of the fence wall constructed by the plaintiff. He however claimed that he acquired the subject matter of dispute by a deed of gift from lawyer Nelson Cofie dated 3/05/2002. Subsequently, in the same pleadings he averred that he bought the land from Mr. Nelson Cofie who gave him a document which he registered at the Lands Commission. He tendered the document in evidence.

In the course of the litigation, the defendant caused further demolition of the plaintiff's property and began construction of other buildings on a part of the plaintiff's property. The plaintiff had to be restrained by the High Court from carrying out further development of the subject matter.

At the trial, Mr. Nelson Cofie, who was mentioned in the pleadings of both parties as their grantor, gave evidence at the behest of the plaintiff. He told the court that he disposed of the land he owned at Dome including the subject matter of this appeal because he had no intention of developing same. He also said that in all cases, purchasers were led to him by a surveyor called Rockson, now deceased. The witness further told the court that Rockson led various persons to him and he negotiated with him and they paid him. He added that when Rockson led people to him, he, Mr. Nelson Cofie, did not follow them to inspect the land physically. He did not have time to go to Dome to inspect the land.

The trial judge found as a fact that the land belonged to Lawyer T.A. Nelson Cofie, but observed that the receipts tendered by the plaintiff do not indicate the size of the land allegedly sold to the plaintiff by Mr. Nelson Cofie. He also found from the evidence that the plaintiff did not pay for the full cost of the land to enable a written conveyance to be made in her favour by the vendor so she cannot pray for a declaration of title. The judge further remarked on the want of description of the land the plaintiff sought title for as she did not describe her boundaries. The trial judge considered the evidence of

the defendant, his title deed and the fact that at the time of the trial the defendant had built two houses on the land.

He dismissed the plaintiff's claim and entered judgment for the defendant on his counterclaim

Dissatisfied with the judgment of the trial Circuit Court, the plaintiff appealed to the Court of Appeal. By a majority of 2.1, the Court of Appeal allowed the appeal and entered judgment for the plaintiff.

The Court of Appeal found that from the facts, there was an unwritten contract for the transfer of the land between the plaintiff and Lawyer Nelson Cofie. This contract was partly performed by the part payment made by the plaintiff and her effective occupation and possession of the land over a decade prior to the trespass. Additionally, from the Record of Appeal, the defendant could not be described as bona fide purchaser for value without notice. He was fully aware of the plaintiff's possession and occupation of the land in dispute prior to the purported transfer of the subject matter by the deed of gift or sale.

According to the dissenting judge however, there was sufficient evidence on record to support the trial judge's finding of title in the defendant's favour.

Dissatisfied with judgment of the Court of Appeal, the defendant has appealed to us on the following grounds;

a. The judgment is against the weight of evidence
b. The majority of the learned judges erred when they substituted their own findings for those of the learned trial judge.
c. The court erred in applying the principle of part performance and adverse possession to ground it decision when they had not been pleaded and when indeed they were not applicable
d. The identity of the land in dispute being crucial in the plaintiff's claim for declaration of title, the court erred when it preferred the identity of the land as

contained in a documents given to the plaintiff by an acknowledged non owner to the contradicted evidence of the owner of the land who the plaintiff herself called as a witness (PW 1);

e. It was wrong for the court to have visited more or less the "sins" of the plaintiffs own grantor if any on the Defendant when the plaintiff has not taken any action against him (grantor) for those alleged sins but rather call him as a witness
f. The court failed to consider adequately the evidence of the defendant, the finding by the court that the defendant has used his financial superiority highly prejudiced the court's fair consideration of the defendant's case;
g. The court erred in dismissing the defendant's counterclaim and
h. Additional grounds with leave of the court when the record of proceedings is received.

Summary of submission by the parties to the Supreme Court

Before us the defendant has submitted that the judgment of the Court of Appeal was against the weight of evidence adduced at the trial court. In the opinion of the trial court, the admission by the plaintiff that at the time she obtained Exhibit A from the Gbese Korle stool she knew very well that the land did not belong to the stool and yet went to obtain documents from the Stool, is an admission of fraud.

On the description of land, the Court of Appeal held as follows;

"Therefore it is our respectful view that it is not so much arithmetic accuracy in the description of the land that will give one title. On that score, we would opine that the trial judge fell into error"

The defendant submitted that this is not borne out by the evidence as same is not only contrary but inconsistent since the whole land in issue was 4 plots and not four and one half plots as the witnesses of the plaintiff portray.

The defendant further submitted that all the findings made by the trial court were supported by the evidence and the Court of Appeal had no grounds to set them aside and substitute its own. He further submitted that the Court of Appeal failed to adequately consider the case of the defendant. **He cited the case of Re: Okine (Deceased) Dodoo & Anor Vrs Okine & Ors [2003-2004] SCGLR 582** where the principle was laid down as*:*

"an appellate court must not disturb findings of fact made by a trial Court, even if the appellate court would have come to a different conclusion, unless the findings of fact made by the trial judge were wholly unsupportable by the evidence."

The defendant cited **Order 19 Rule 16 of the High Court (Civil Procedure) Rules 1954 (LN 140 A) and Order II ('8)(1) of the High Court (Court Procedure) Rules 2004 (CI 47),** and further submitted that the Court of Appeal also erred in applying the principles of part performance and adverse possession to ground its decision when they had not been pleaded and when indeed they were neither applicable nor relevant in the case. According to the defendant, the plaintiff never raised the issue of specific performance, neither did she raise the issue of adverse possession under the statute of limitation. Thus, the Court of Appeal could not suo motu raise the issue as well as invoke the provisions of the Limitations Act and give judgment for the plaintiff on it.

Order 19 Rule 16 of the High Court (Civil Procedure) Rules 1954 (LN 140 A) provides that;

"*the defendant or the plaintiff (as the case may be) must raise by his pleadings all matters which show the action or counter claim not to be maintainable, or that the transaction is either void or voidable in point of law, and such grounds of defence or reply, as the case maybe, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings as, for instance, fraud, statute of limitations, release, payment, performance, facts showing illegality either by statute or common law or statute of fraud".*

Finally, the defendant submitted that the Court of Appeal erred in dismissing his counterclaim. He submitted he gave sufficient evidence on his grant and tendered a conveyance of the transaction in writing and the trial judge evaluated the probabilities and gave judgment in his favour. He reiterated his earlier point that an appellate court has no power to set aside findings of fact made by the trial court unless these findings were not supported by the evidence or when it is clearly shown to be wrong or the judge did not take all the circumstances into account. According to the defendant the only ground for dismissing the defendant's counterclaim was that he had known of the presence of the plaintiff on the land yet had gone to purchase the land, a conduct the Court of Appeal viewed as fraudulent. The defendant submitted that the conclusion that was arrived at by the learned judges of the Court of Appeal was harsh and unsupportable and indicates that no consideration was given to his case.

In conclusion he submitted that the trial judge was justified in the judgment it gave and the Court of Appeal rather erred in setting aside the judgment.

On his part the plaintiff submitted that the defendant departed from his earlier pleadings without amending the writ. She argued that the defendant pleaded in paragraphs 9, 10 and 12 of his amended statement of defence that the disputed land was gifted to him by PW1 and was covered by a Deed of gift dated 3/05/02. However, without amending his pleadings, the defendant pleaded another case of purchase of the disputed property in paragraphs 17 and 18 of the same amended statement of defence. The plaintiff thus argued that this departure in pleading sinned against Order 11 r.10 of C.I 47 which provides that **"A party shall not in any pleading make any allegation of fact or raise any new ground or claim, inconsistent with a previous pleading made by the party."** In court, the defendant continued with his inconsistency as he departed again from his pleaded case of gift to one of purchase. She supported this argument with the decision of the Supreme Court in **Frabina Ltd v. Shell Ghana Ltd [2011] 1 SCGLR** where the court held that

"*the essence of pleadings is, inter alia, not only to inform the opposing party of the case it will meet but also to put the opposing party on notice so as to prepare its case*

in response to the facts pleaded against it. In the instant case, the contention by the plaintiff that the payment of GHS 10,000 was a refundable deposit was not only an afterthought; it was also belated attempt to change its case from that of working capital to refundable deposit. That change would fly in the face of the known principles of pleadings; especially as provided in the High Court (Civil Procedure) Rules, 2004 (C.I 47), Order 11, r 10(1).

Thus the plaintiff submits that the trial circuit court could not have considered the deed of gift (exhibit 3) of the defendant, let alone made findings thereon for him, under any circumstance.

On the issue of possession and occupation of land, the plaintiff submitted that the defendant knew of the plaintiff's occupation and possession of the said property in dispute before he purported to obtain same from their common grantor. This fact was corroborated by the PW3(carpenter) and PW4(mason). That this fact was not challenged by the defendant's lawyer during his cross examination of the plaintiff and the two witnesses was an admission of the truthfulness of that fact.

According to the plaintiff, the reliance on documents alone in proof of ownership of land as defendant was seeking to do, is not the position of the law. She cited the case of Crentsil v Kweinua [1979] GLR 348 where the court held inter alia:

"In an action which raises a question of title to land... long possession and acts of ownership afford pregnant evidence of title in the person possessed, notwithstanding the non-production of his title deeds, and even against some evidence of title in the other party."

Plaintiff further submitted that PW1's interest in the land was extinguished after sale to her, and therefore had no interest to pass to defendant or anybody else. He cited on the case of **Sasu v. Amua Sakyi [2003/04] SCGLR Vol.2, 742** holding 4, the court said on the nemo dat rule as follows*:*

"By virtue of the principle of nemo dat quod non habet the same stool had no land to sell to the defendant. Therefore the defendant acquired no valid title to the land when

he bought it in 1973… that meant that as between the 2nd plaintiff and the defendant, the defendant had no valid title to the land…"

The plaintiff contended that the Court of Appeal was right when it held that the defendant sought to use his financial superiority to quickly commence the construction of three buildings on the land in dispute.

On the final ground of appeal that the Court of Appeal erred in dismissing the defendant's counterclaim, the plaintiff submitted that this allegation is not supported by the evidence. She observed that it was strange on the part of the defendant to argue that because the PW1 had not given any lease document to the plaintiff, the Court of Appeal should have ignored the overwhelming evidence before them and thus not tamper with the decision of the trial court. The plaintiff in turn submitted that on the basis of pleadings, and evidence before the Court of Appeal, the court was very right in overturning the judgment of the trial court after evaluation and assessment of the record.

She ended by intimating that the courts must do justice not only by looking at legal rights. However dubious or questionable the circumstances of the acquisition are, equitable rights were as secure as legal rights.

Before proceeding to tackle the appeal which we intend to do under the omnibus ground of "Judgment is against the weight of evidence", we wish to comment on two things which may seem peripheral to the appeal but are equally important.

IDENTITY OF THE LAND.

One of the main grounds for the dismissal of the plaintiffs case by the trial judge was that plaintiff had failed to describe the boundaries and the dimensions of the land for which she seeks a declaration of title. He cited the case of **NYIKPLORKPO V AGBODOTOR 1987-88 1 GLR163**, where the court said

"To succeed in an action for a declaration of title to land, recovery of possession and for an injunction, the plaintiff must establish by positive evidence the identity and the limits of the land which he claimed…. No court of justice could be expected to give a declaration of title or recovery of possession to a plaintiff in respect of an area whose boundaries were so uncertain."

Axiomatic as this legal statement is, it only becomes applicable when identity and dimensions of a subject land is in issue or dispute. In this case the identity and dimension of the land is not in dispute. This was a piece of land sold by the same grantor to two different persons at different times. It involved 4-4/12 plots. The plaintiff had put up a fence wall around it. Yes, it is true that the exhibit C series which evidenced the sale of the land to the plaintiff did not specifically identify, or give dimensions of the land, but between the plaintiff and the grantor they knew what area of land they had contracted over. If the plaintiff was claiming beyond the area purchased, it was the grantor and not the defendant who, clearly, is a trespasser, who has to say so. The Court of Appeal rightly put it when it said

"in our respectful view it is not so much the arithmetic accuracy in the description of the land that will give one title"

ISSUES OF SPECIFIC OR PART PERFORMANCE AS UNPLEADED FACTS

The next issue that needs to be addressed is the issue of unpleaded facts. Unpleaded facts are facts that do not appear in the pleadings of a party, either in his statement of claim or statement of defence; and unless the pleadings are amended the courts will not allow a party to make claim or submissions on it. The function of pleadings is well espoused in the case of **DAM v. J. K. ADDO AND BROTHERS** [1962] 2 GLR 200 where the Supreme Court held that,

"The function of pleadings is to give fair notice of a case which has to be met, so that the opposing party may direct his evidence to the issue disclosed by them. To condemn a person on a ground of which no fair notice has been

given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

The learned Judges of the Court of Appeal held that the evidence adduced at the trial pointed to the existence of an unwritten contract between the plaintiff and Nelson Cofie, which she partly performed by the payments of large sums of money. So Nelson Cofie could not have validly sold the land again to the defendant.

According to the defendant, the issues about part performance was not raised by the plaintiffs therefore it was wrong for the learned judges of the Court of Appeal to have raised their own issues and hence adjudicate in favour of the plaintiff.

To support his argument, he quoted **Order 19 Rule 16 of the High Court (Civil Procedure) Rules 1954 (LN 140 A) which provides that**

"*the defendant or the plaintiff (as the case may be) must raise by his pleadings all matters which show the action or counter claim not to be maintainable, or that the transaction is either void or voidable in point of law, and such grounds of defence or reply, as the case maybe, as if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings as, for instance, fraud, statute of limitations, release, part performance, facts showing illegality either by statute or common law or statute of fraud".*

Again true as this statement may be, it does not apply in this case. This provision is a caution to the parties in the case so as to avoid "surprises" to contending parties before the court in the course of trial. If the suit had been between the plaintiff and Nelson Cofie then the plaintiff may have been required to plead part performance and lead evidence in support of same. Even then since from the evidence there was no denial by Nelson Cofie of payments made by plaintiff to him towards the purchase of the land, the plaintiff was not required to lead any further evidence on that. So the Court of Appeal's holding that there was in existence an unwritten contract was borne out of the evidence on record. Where a particular relief is not specifically claimed but evidence has been led that supports a claim for that relief, a court is bound to consider same.

In the case of **Drane Vrs Evangelou [1978] 2 ALL ER 1437** it was held that

"the judge was entitled of his own motion to raise the issue of trespass even though it had not been pleaded, because the facts were sufficient to warrant a claim for trespass and as they are set out in the particulars of claim the defendant could not claim that he had been taken by surprise when the judge raised the issue."

Again, even though the general position is that the court shall not grant a relief which has not been sought, the exception is that where it is in the interest of justice and fairness it may be granted. Such exception was applied in the case of **AFRIYIE v. DOTWAAH AND ANOTHER** [1962] 1 GLR 458 where the court held that

the plaintiff, as successor to Pramang, is however, entitled to accounts from the first defendant. Although no such claim has been made against the first defendant the court will order him to account to the plaintiff, otherwise justice will be defeated by a mere technicality. To this end it is immaterial that the first defendant is not physically in possession of the farm. It would be wrong to allow him to evade his liability to account by his own wrong."

Apaloo J (as he then was) said in that case that

"I have come to the conclusion that to refuse to make the order only on the ground that the plaintiff misappreciated her right as to who was legally accountable to her would suffer justice to be defeated by a mere technicality."

See also **AKUFO-ADDO v. CATHELINE [1992] 1 GLR 377** where the Supreme Court held,

"So it can be said that the Court of Appeal should not decide in favour of a defendant on a ground not put forward by him unless the court is satisfied beyond doubt, first, that it has before it all the facts or materials bearing upon the contention being taken by it suo motu; and secondly, that the point is such that no satisfactory or meaningful explanation or legal contention can be advanced by the party against whom the point is being taken even if an opportunity is given him to present an explanation or legal argument; for example, void matters as in this case."

See also the case of **Hanna Asi (No.2) v. GIHOC Refrigeration & Household Products Ltd (No.2) (2007-2008) SCGLR 16.**

In the course of adjudicating cases justice and fairness need to be seen to be done. We believe that it was just fair for the learned judges of the Court of Appeal to advert their minds to the issue of part payments and specific performance in this case which were issues that flowed directly from the findings of fact made by the trial court.
In the case of **Kotey v Korletey [2005-2006] SCGLR 368** it was held that:

"The doctrine of part performance referred to in section 3(2) of the Conveyancing Decree, 1973 (NRCD 175), is an equitable remedy. Thus where a contract for the sale or other disposition of land was not evidenced in writing, it might nevertheless be enforced by a decree of specific performance if it had partly been carried into effect. And an act of part performance in equity must be (i) referable to the contract alleged and no other title; (ii) the act must be such as to render it fraud in the defendant to take advantage of it not being in writing; (iii) the contract in its own nature must be enforceable by the court"

From the facts of this case the plaintiff made substantial payments towards the purchase of the subject land and had therefore acquired an equitable interest in same pending only a formal conveyance upon her completing payment. Thus it will be inequitable on the part of Nelson Coffie to sell the land to another person without giving the plaintiff the opportunity to finish paying for it. The principle in law has always been that where a plot of land is sold or leased unconditionally and the buyer or lessee makes part payment of the purchase price, the right course of action open to the seller or lessor is to sue for recovery of the unpaid balance, possibly with interest. He cannot ask for cancellation of the agreement or the return of the land. And he definitely cannot purport to sell to another person without being caught by the ***nemo dat qoud non habet rule.***

We hold that the learned Justices of the Court of Appeal did not err in law when they suo motu raised the issue of part payments and specific performance which in our view had been adequately covered by the findings in the court room..

Having addressed these two issues we now turn to the other grounds of appeal which we will take together under the omnibus ground.

Judgment is against the weight of evidence

My lords before us, the defendant alleges that the judgment of the Court of Appeal was against the weight of evidence. He further asserts that the Court of Appeal should not have interfered with the findings of the trial court except where it is clearly shown to be wrong, or the judge did not take all the circumstances into account or that the findings are not supported by the evidence.

Where a defendant complains that a judgment is against the weight of evidence, it implies there are certain pieces of evidence on record which if applied in his favour, could have changed the decision in his favour or certain pieces of evidence were wrongly applied against him. It is trite learning that where the defendant alleges that the judgment is against the weight of evidence, the appellate court is under an obligation to go through the entire record to satisfy itself that a party's case was more probable than not. As was held by their Lordships in **Tuakwa v Bosom [2001-2002] SCGLR 61,**

"an appeal is by way of re-hearing, particularly where the Defendant alleges in his notice of appeal that the decision of the trial court is against the weight of the evidence… In such a case, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that on a balance of probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence".

With greatest respect to the learned trial judge, he proceeded on an erroneous assumption that the plaintiff had a greater burden of proof than the defendant. In his conclusion at the trial, he stated,

"From the totality of evidence on record, I will hold that the plaintiff has failed to prove her claim on the balance of probabilities as is required of her by law. I will therefore dismiss the plaintiff's claim and enter judgment for the defendant on his counterclaim."

In this case, both parties are asking for a declaration of title. Therefore, there is an equal responsibility to prove their title on the preponderance of probabilities. In the case of **Jass Company Ltd & Anor v. Appau & Anor [2009] SCGLR 265,** the Supreme Court speaking through our worthy brother **Dotse JSC** said,

"The burden of proof is always put on the Plaintiff to satisfy the court on a balance of probabilities in an action for declaration of title to land. Where the defendant has not counterclaimed, and the Plaintiff has not been able to make out a sufficient case against the defendant, then his claims will be dismissed. Whenever a defendant also files a counterclaim, then the same standard or burden of proof will be used in evaluating and assessing the case of the defendant just as it was used to evaluate and assess the case of the Plaintiff against the defendant."

From the findings on the record of appeal, it is not in dispute that the land belonged to Nelson Cofie who was the grantor to both parties. So the main issue for determination of this case is "who has a better or valid title to the land"? Thus since each party had claimed for a declaration of title, in pursuance of **section 11(4) and 12(1) of the Evidence Decree, NRCD 323,** each of the parties has equal burden to prove sufficiently their entitlement to the land.

The plaintiff, led evidence to establish that she had a subsisting agreement with Mr. Nelson Cofie for the sale of the land to her. This is borne out by the exhibit C series, which were receipts of part payments issued by Nelson Cofie who gave evidence at the behest of the plaintiff. He confirmed this in his evidence in chief and cross examination. The plaintiff also led witnesses to corroborate the fact that he had been in possession of the land for the past decade. All these witnesses were not challenged by the defendant during cross examination on these vital facts of the case. Clearly, from her

unchallenged evidence the plaintiff had established that had she acquired equitable interest in the subject property.

On his part the defendant, in his amended statement of defence, initially said the land was gifted to him by a Deed of Gift dated 3/05/2002, but later in the same pleadings and on oath abandoned the entire idea of gift and rather stated that he purchased the land from Nelson Cofie. He said he purchased the land after visiting the land with Nelson Cofie. But Mr. Nelson Cofie stated emphatically that he never had time to go onto the land with any prospective purchaser. One would have expected the defendant to subject PW1 to cross examination on this point. But he did not. In the case of **WIAFE v. KOM [1973] 1 GLR 240**, the court held;

"Where a witness testified on oath on certain vital matters and the opposing side was silent in his cross-examination on those matters, he would be taken to have admitted those matters."

In the absence of any cogent evidence from the defendant shifting the probabilities in his favour we hold that on the preponderance of probabilities the plaintiff has discharged the burden of proof sufficiently as against the defendant whose averments is shrouded in inconsistencies.

We hold therefore that from the payments , the plaintiff had acquired equitable interest in the land. We also find that the plaintiff was in effective occupation, built on the land and constructed a fence wall around the land.

This finding of prior equitable interest acquired by the plaintiff should dispose of the appeal. However to put the frivolity of the appeal beyond doubt we proceeded to find out if the defendant's interest could be saved by the principle of ***"bona fide purchaser for value without notice".***

It is trite learning that a bona fide purchaser for value without notice can acquire a valid title. In the case of **TAHIRU v. MIREKU AND ANOTHER [1989-90] 2 GLR 615**, the court held that,

"the co-defendant having been a party to this fraudulent deal cannot be a bona fide purchaser. The court also found on the preponderance of the evidence, that the co-defendant had notice of the prior interest of the plaintiff in the house. Accordingly, I hold that she is not a purchaser for value without notice."

From the record of appeal in this instant case, there is no doubt that there was a transaction of conveyance between Nelson Coufie and the defendant in which the land in dispute was alienated to the defendant, although there is a doubt as to the form of alienation that took place, gift or sale. Pursuant to this alienation, the defendant went to the Lands Commission for his land to be plotted. But did the defendant have notice of the plaintiff's prior interest in the land at the time of registration? We think so. In **Megary and Wade on The law of Real PROPERTY, 5th edition, p.142**, the learned authors said this of notice of prior interest

"The relevant time for the operation of doctrine of innocent purchaser is the time of purchase and not subsequently."

From the evidence adduced before the trial court, the defendant was sufficiently aware of the interest of the plaintiff in the land, which is the subject matter of the dispute. This can be seen from the unchallenged testimony of the plaintiff, PW3 and PW 4.
The plaintiff testified that she and defendant were neighbours. At page 91 of the records of appeal she said:
"As neighbours when there is shortage of water we go to the defendant's house to fetch some and the defendant's children and my children attend the same Bible class."
This evidence was not challenged when the counsel for the defendant had his turn to cross examine the plaintiff.
PW3, the carpenter who worked on the disputed land for plaintiff said this under cross examination as follows;

"when we put up the building, I did not know Mr. Akyeampong. Nobody came to claim the land. We all knew the land belonged to the plaintiff. I know where the defendant lives. The defendant's house is not far from the plaintiff's property. I was the carpenter who flowed(sic) the main building and I also put the box for the pillars for mason to mold blocks to fence the house."(p. 102)

Again, this testimony by the witness was not challenged.

PW 4, the mason, testified that he built the wall and plaintiffs building on the land. This is what he had to say, at page 104, lines 16-19:

"When I was working for the plaintiff I knew the defendant and know his residence… When I was working for the plaintiff, the defendant was living nearby weaving kente cloth."

He then adds, from lines 22 -27 on the same page that :

"While working, nothing happened to suggest that the plot belongs to somebody else. Defendant never came to claim that the plot belongs to him. I used to converse with the defendant. My store was on their road and when he passes that area we conversed. Defendant saw me working on the land. And he knows that the land belonged to the plaintiff."

Again this testimony was not challenged. This leads to a firm conclusion that the defendant knew about the prior interest and occupation of the plaintiff on the land. It would have been fair on the part of the defendant as neighbours to have consulted the plaintiff or his agent when Nelson Cofie sought to sell the land to him

In the English case of ***Kingsnorth Finance Trust Co ltd v Tizard [1986] 1 WLR 783,*** the court held that;

"a bona fide purchaser will not be bound by equitable interests of which he/she does not have actual, constructive or imputed notice, as long as he/she has made 'such inspections as ought reasonably to have been made'".

In the case of **Boateng v Dwinfuor [1979] GLR 360 holding 3** the court stated that:

"The general principle of equity was that a purchaser was deemed to have notice of all that a reasonably prudent purchaser would have discovered. Thus where the purchaser

had actual notice that the property was in some way encumbered, she would be held to have had constructive notice of all that she would have discovered if she had investigated the encumbrance. In the instant case D admitted in evidence knowledge that B was living in the disputed house as tenant at the time she bought it; she would therefore be deemed to have had constructive notice of and to have been bound by B's tenancy and its terms, including equities which as a tenant, he had against A."

This reasoning has been confirmed in the case of **MOASA CO v SAARA [1999-2000] 1 GLR 538** where the court held that:

"*the law was that a grantor should not derogate from his grant. Accordingly, since the Odorkor stool had earlier granted the land in dispute to the defendant, it had no right to regrant that land to the plaintiff or to any other person, since the defendant had not breached a condition of the grant that could have led to steps being taken by the stool to re-enter. In any case, since the plaintiff was aware of the fact that ownership of the land in dispute was vested in the defendant and had seen clear acts of her possession on the land, he could not claim to be a bona fide purchaser for value without notice. The evidence of possession had made it obligatory on him to make the necessary inquiries on the terms on which the person was occupying the land. He was not relieved of the onus to investigate even if the grantor had failed to disclose the relevant facts or even lied to him, since registration per se did not guarantee title to a person who otherwise had none."*

In sum, in this case the defendant had actual notice of the plaintiff living on the land and never made an attempt to consult him when Nelson Cofie was about to or after he had sold the land to him in 2002. However, immediately the land was sold to him he went about demolishing the wall already erected. Thus he was not a bona fide purchaser for value and any interest he purportedly acquired by subsequent plotting at the lands commission and registering the land was void ab initio.

In conclusion, we find the decision of the Court of Appeal unassailable and we confirm same. For the avoidance of doubt, we find that the plaintiff succeeds in his claim and the defendants counterclaim is dismissed.

POST SCRIPT

We deprecate the behaviour of Lawyer Nelson Cofie and condemn in no uncertain terms his actions and inactions which have resulted in this judgment. As a member of the noble profession of lawyers, his behavior cannot pass without comment. Collecting various sums of money from purchasers without ensuring that such purchasers are given the right land without any encumbrances, or selling the same parcel of land to different purchasers, is highly irresponsible and borders on criminality! And he had the impudence to stand before a court of law and say gleefully and unapologetically admit that he was too busy to visit the land with prospective purchasers after collecting their monies, preferring to leave that to his surveyor, who incidentally is deceased! This creeping phenomenon where land owners sell lands to 2 or more persons must stop. We hope that victims of such illegalities like the defendant will have the courage and boldness to bring actions against the perpetrators of such acts no matter their station in life.

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(JUSTICE OF THE SUPREME COURT)

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

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