IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2018

CORAM: ANSAH, JSC (PRESIDING)
ADINYIRA (MRS), JSC
BAFFOE-BONNIE, JSC
AKOTO-BAMFO (MRS), JSC
APPAU, JSC

CIVIL APPEAL
NO. J4/19/2018

12TH DECEMBER, 2018

1. NANA AMUA GYEBU XV
(SUING FOR AND ON BEHALF OF THE STOOL OF APOWA)

2. EBUSUAPANTIN AHMED NOORDEIN AZIANGO
(SUING FOR ON BEHALF OF ROYAL ASAMAGAMA FAMILY
OF OPOWA) ……. PLAINTIFFS/RESPONDENTS/RESPONDENTS

VRS

FRANK ISAAC MENSAH
alias PAPA MENSAH or UNCLE EBOW ……. DEFENDANT/APPELLANT/APPELLANT

JUDGMENT

ANSAH, JSC:

This is an appeal against the judgment of the Court of Appeal (Civil Division), Cape Coast, dated 27th June 2017, coram: C J Honyenuga, (presiding): Alhaji Saeed Kwaku Gyan and G. S. Suurbareh JJA. The first Plaintiff-Respondent hereinafter called the respondent, is

the occupant of the Apowa Stool and the second, the head of the Asamankama Stool Family of Apowa; the defendant is the appellant herein. The land in dispute called Sankoba, measured about 559.17 acres, and was acquired by J.F. Scheck at an auction in 1896, for farming purposes. Subsequently, J.F. Scheck and his successors held title to the land and had exclusive possession without any let or hindrance from anybody. All those who farmed the land did so with the permission of Scheck's successors. However, in recent times the defendant appellant and his predecessors in title granted a greater part of the land to people for residential and commercial purposes. The defendant appellant asserted that all litigations over the land ended in his favor.

The case for the defendant appellant was that the land in dispute acquired by J.F. Scheck at a public auction, was situated at Apremdo but not Apowa and that it measured 988.23 acres but not 599.17 acres. Furthermore, the contents of all the previous statutory declarations published in respect of the land in dispute at the instance of the appellants indicated that the land J.F. Scheck bought at the auction was 599.17 acres. Also, all judgments obtained by the appellants' forebears in connection with the land in dispute were falsified. His predecessors also falsified the acreage and the location of the land in dispute. The respondents therefore initiated an action before the High Court, Sekondi, for the reliefs on the writ of summons. The trial judge entered judgment in favor of the respondents, whereupon the appellant appealed to the Court of Appeal, Cape Coast which affirmed the judgment of the High Court Sekondi, and the appellant lodged this appeal to this court on the following grounds, namely, that:

Grounds of appeal to the Supreme Court:

i) T**he Court of Appeal erred in law by not applying Sections 10, 1, 2 and 6 of the Limitation Act, 1972, NRCD 54, to the determination of the case.**

ii**) The Court of Appeal wrongly decided the case by ignoring Section 4 of the Limitation Act, 1972, Act 54, to the determination of the case.**

iii) The Court of Appeal was wrong in determining the case without recourse to the ratio on fraud in the case titled "In re Poku (deceased) Appiah Poku v Nsafoa Poku and ors. Civil Appeal No. 14/10/2010 in the determination of the case.

iv)The Court of Appeal decided the case wrongfully by not applying the principle of issue estoppel established in Henderson v Henderson (1843) 3 Hare 100 to the determination of the case.

v) The judgment of the Court of Appeal is against the weight of evidence, adduced at the trial.

I shall begin this opinion by referring to ground one of appeal quoted above; it mentioned subsections 1, 2, 4, 6 and section 10 of the Limitation Act, 1972, NRCD 54, which provided as following:

> "1 Application of Part one
> This Part has effect subject to Part Two which provides for the extension of the periods of limitation in certain prescribed circumstances.
> 2. Actions barred after two years
> A person shall not bring an action after the expiration of two years from the date on which the cause of action accrued, in the case of
> (a) An action claiming damages for slander or seduction,
> (b) An action to recover a contribution against one or more concurrent wrong-doers, or
> (c) An action to recover a penalty or forfeiture, or a sum of money by way of penalty or forfeiture, recoverable under an enactment.
> 4. Actions barred after six years
> (1) A person shall not bring an action after the expiration of six years from the date on which the cause of action accrued, in the case of

(a) an action founded on tort other than an action to which sections 2 and 3 apply;

(b) an action founded on simple contract;

(c) an action founded on quasi – contract;

(d) an action to enforce a recognizance;

(e) an action to enforce an award, where the arbitration is under an enactment, other than the Arbitration Act, 1961 (Act 38); or

(f) an action to recover a sum of money recoverable by virtue of an enactment, other than an action to which sections 2 and 5 apply.

(2) Subsection (1) applies to an action to recover seamen's wages but shall not otherwise apply to a cause of action within the jurisdiction of the High Court in maritime matters which is enforceable *in rem.*

(3) A person shall not bring an action for an account in respect of a matter which arose more than six years before the commencement of the action.

(4) An arrears of interest in respect of a debt which is not recoverable after the expiration of six years from the date on which the interest became due.

6. Exemptions for equitable reliefs

(1) Sections 2 to 5 do not apply for specific performance of a contract or for an injunction or any relief.

(2) Subsection (1) does not prevent a Court from applying by analogy a provision of sections 2 to 5 in proceedings where in the opinion of the Court the interests of justice so require.

10 Recovery of recovery land

(1) A person shall not bring an action to recover a land after the expiration of twelve years from the date on which the right accrued to a person bringing it or, if it first accrued to a person through whom the first mentioned claims to that person.

(2) A right of action to recover land does not accrue unless the land is in the possession of a person in whose favor the period of limitation can run.

(3) Where a right of action to recover land has accrued, and before the right of action is barred, the land ceases to be in adverse possession, the right of action does not accrue until the land is again taken into adverse possession.

(4) For purposes of this Act, a person is in possession of a land by reason only of having made a formal entry in the land.

(5) For the purposes of this Act, a continual or any other claim on or near a land does not preserve a right of action to recover the land.

(6) On the expiration of the period fixed by this Act for a person to bring an action to recover land, the title of that person to the land is extinguished.

(7) For the purposes of this section adverse possession means possession of a person in whose favor the period of limitation can run."

It can be seen from the sections quoted above that section 10 of the Limitation Act, 1972, dealt with actions dealing with recovery of land and prescribed the period within or after which a person's right to bring action for the recovery of land would accrue or be extinguished, in section 6.

The gist of the plaintiffs' action was that the appellant herein wrongfully interfered with the ownership of the respondent's title to the land in dispute.

I have read "in re Poku deceased", Civil Appeal no 14/10/2010 delivered by this court, on 26th May 2010 which was an appeal decision, one of the holdings was that "since a judgment obtained by fraud can only be set aside by a fresh action and since the appellants allege that the judgment delivered by Dordzie J. was delivered by fraud and therefore brought a fresh action to set it aside. The learned justices of the Court of Appeal were wrong in instituting a fresh action to set aside the judgment obtained by fraud by so doing the judgment given by the learned justices of the Court of Appeal was given per in curiam decisions of the Supreme Court.

This court held inter alia that it is a trite principle of law that fraud unravels everything and that a judgment obtained by fraud can be impeached. In in re:

Poku [deceased); Appiah Poku v Nsafoa [Poku & ors Civil Appeal] No14/10/2010, this court held that if a party was actually or constructively cognizant of fraudulent matter in the first matter but failed to avail himself of them at the time he could not therefore seek to impeach the judgment of court on those grounds.

We have read in re Poku (op cit.) but we were not satisfied the Court of Appeal in this instant appeal determined the case before it without recourse to the ratio of fraud in that case in the determination of that case. We therefore do not find any merit in that ground (iii) of appeal and dismiss it accordingly.

Ground 4 of appeal considered briefly Henderson v Henderson supra (considered in our courts); it was said in NAOS Holding v Ghana Commercial Bank Ltd. [2012-12] 2 GLR 546 at 552 per Dotse JSC, explaining the issue of the abuse of the court process that:

"in addition to the cause of action and the issue estoppel …there is the related doctrine of abuse of process, commonly referred to as the rule in Henderson v Henderson (1843) 3 Hare 100…, whose essence was set by the English Court of Appeal in Barrow v Bankside Agency Ltd. [1996] 1 WLR 257 at 560 as follows:

"The rule in Henderson v Henderson … require the parties, when a matter becomes the subject between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject of course to any appeal), once any appeal, once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defenses which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag forever and that a defendant should be oppressed by successive suits when one would do."

The principle was applied in re Sekyedumase Stool; Nyame v Kesse alias Kontoh [1998-99] SCGLR 476.

The principle of abuse of process was based on the fact that where matters in controversy had been determined by a court of competent jurisdiction between the same parties basically on the same subject matter, it would be an abuse of the process of the court to allow a suitor to have an open ended opportunity to litigate over again in respect of the issue which had over the period and in previous decisions been decided against him.

We uphold the rule in Henderson v Henderson (infra), which operates where issues whether factual or legal, have either already been determined in previous proceedings between the parties (issue estoppel in the strict sense), otherwise known as the principle in Henderson v Henderson (1843) 3 Hare 100: see also ..the rationale underlying this last estoppel is to encourage parties to bring forward their whole case so as to avoid a succession of related actions and apply it in this appeal; in view of the previous decision on the same subject matter in the previous decision the issue had been decided already and the parties are estopped from re-litigating over them in this suit. We accordingly allow the appeal in ground (iv).

Ground V of appeal was that the judgment of the Court of Appeal is against the weight of evidence adduced at the trial. An appellant who appeals on the ground that the judgment is against the weight of evidence is in effect saying that the judgment was unreasonable having regard to the evidence on record. In Gregory v Tandoh IV and Hanson 2010 28 GMJ 1 held as follows:

"It is well settled that where findings of fact such as in instant case had been made by the trial court and concurred in by the first appellate court, i.e. the Court of Appeal, then the second appellate such as the Supreme Court, must be slow in coming to different conclusions unless it was satisfied that there were strong pieces of evidence on record which made it manifestly clear that the findings of trial court were perverse. However, the second appellate court like the Supreme Court, could and was entitled to depart from the findings of

fact made by the first appellate court under the following circumstances; first, where from the record of appeal, the findings of fact by the trial court were clearly not supported by evidence on record and the reasons in support of the findings were unsatisfactory, second, where the findings of fact by the trial court could be seen from the record of appeal to be either perverse or inconsistent with the totality of evidence lad by the witnesses and the surrounding circumstances of the entire evidence on record; third, where the findings of fact made by the trial court were inconsistent with important documentary evidence on record; and fourth, where the first appellate court had wrongly applied a principle of law. In all such situations, the second appellate court must feel free to interfere with the said findings of fact, in order to ensure that absolute justice was done in the case."

We bear in mind the above mentioned principle in the cases cited above in support;

the appellant submitted that the contents of exhibits 2 and 3A, and the conduct of the respondents in standing by and watch the appellants family possess and control the disputed land for over 100 years were inconsistent and at variance with the contents of Exhibit C and rebutted the contents of Exhibit C.

The 5th ground of appeal was the hackneyed omnibus ground that the judgment was against the weight of evidence, which on the authority of Tuakwa v Bosom (2001-2003) SCGLR 61 said at 65 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 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 analyze 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 the preponderance

of probabilities the conclusion of the trial judge are reasonable and amply supported by the evidence", per Sophia Akuffo JSC.

As we bear this principle in mind, we do not agree that the judgment by this court was against the weight of evidence and we do affirm the judgment of the Court of Appeal.

Finally, the Court of Appeal speaking through Suurbareh JA said

"In any case, in terms of probative value and credibility, exhibit C is the authentic account of the sale transaction. It is also in reality and practice that in an auction sale made under a court order a purchaser would be given liberty to pay for the property by instalment. From the above analysis, this court finds no merit in grounds (i) to (v) of the grounds appeal and same are therefore dismissed."

We have studied Exhibit C and the entire record of appeal put before us and given it our most anxious consideration and come to the conclusion that the appeal has no merit.

We proceed to dismiss same and affirm the decision of the Court of Appeal.

J. ANSAH

(JUSTICE OF THE SUPREME COURT)

ADINYIRA (MRS), JSC:-

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

S. O. A. ADINYIRA (MRS.)

(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

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

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

AKOTO-BAMFO (MRS), JSC:-

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

V. AKOTO-BAMFO (MRS.)

(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

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

Y. APPAU

(JUSTICE OF THE SUPREME COURT)

COUNSEL

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