IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: ATUGUBA, JSC (PRESIDING)
DOTSE, JSC
YEBOAH, JSC
GBADEGBE, JSC
BENIN, JSC

CIVIL APPEAL
NO. J4/05/2016

20TH DECEMBER, 2017

NIEF SIMON AKILL
(SUBSTITUTED BY VIDA AKILL) ... PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. JAMES CHRISTOPHER O. LAMPTEY
(SUBSTITUTED BY EMMANUEL O. W. CHRUICHANK)

2. SERWAA BONSU ... DEFENDANTS/APPELLANTS/RESPONDENTS

JUDGMENT

GBADEGBE, JSC:-

This is an appeal from the unanimous decision of the Court of Appeal, which reversed the decision of the trial High Court and entered judgment for the defendants/appellants/respondents herein on their counterclaim. In view of the fact that the two lower courts differed on the issues of fact which turned on the pleadings, it is

necessary for us as the final appellate court to interrogate the two decisions for the purpose of determining which of the said judgments can be supported having regard to the admitted evidence placed before them. In this regard, we are to consider the probabilities which arise from the rival versions of the dispute on all the evidence tendered by the parties and contained in the record of appeal herein on which our jurisdiction in the appeal herein has been invoked in the nature of a re-hearing for the purpose of determining that which is more probable. This requires a careful scrutiny of the two judgments of the courts below in terms of the burden of proof and persuasion; and as the decision in both courts turned on the question of the admissibility of leasehold agreement that was rejected by the trial court (exhibit "Rejected 3"), we are required to turn our attention to the question arising therefrom as indeed, the appellants seek from us in relation to ground one of the notice of appeal before us. For reasons of convenience, the parties shall hereafter be referred to by the designation that they bore in the trial High Court.

In his judgment, the learned trial judge after setting out the facts placed before him, rejected the version of the defendants which was planked substantially on a leasehold agreement between the 1st defendant's predecessor in title and tenants who have a coterminous interest in the subject matter with the plaintiff. The case of the 1st defendant placed great reliance on the leasehold document, which was not accepted in evidence when the learned trial judge upheld an objection to its admissibility in the course of the trial at pages 392-394 of the record of appeal. His reasons for rejecting the document, which was as a result marked as "Rejected 3" (not 'Reject 3') is that firstly, it was not signed and also that it contained insertions in ink although without any attestation. Pausing here, we would like to say that insertions in type-written documents or any document for that matter are not required to be attested but initialed by the maker. The word 'attestation' imports bearing witness to the execution of a document, as for example, in the case of deeds and wills as part of the requirements of formal validity. We think that the learned trial judge slipped when he used "*attestation*" instead of signed and would deal with the matter on this understanding. Consequent upon the rejection

of the said document, the learned trial judge basing himself solely on the rejection of the leasehold agreement did not attach any value to the oral evidence preferred by the defendants which sought to establish the possession of the property by Azar and Aschkar under 'Rejected 3'. In our view, having rejected the leasehold document and any oral evidence tending to prove the facts recited therein including the possession of the property by the lessees as well as acts derivable only from the lease such as the payment and receipt of rents, there was little left of the defendants case in the dispute which from the evidence was fought by the contestants on very tenuous facts. In the said circumstances, it is not surprising that the learned trial judge preferred the case of the plaintiff to that of the defendants when he came to evaluate the pieces of evidence led before him at pages 506 – 520 of the record of appeal.

Before the learned justices of Appeal, the decision of the learned trial judge on the admissibility of the lease document was overruled. Before us in these proceedings, the plaintiff has raised an objection to the decision of the court below on the admissibility of the lease document that appears in ground (1) of the notice of appeal to which we must first turn our attention. We have carefully considered the reasons provided by the learned justices of the Court of Appeal that are contained in the delivery of Acquaye JA and are satisfied that he expounded the law on the matter correctly. In the said judgment, the learned justices at pages 150-151 of the record of appeal came to the conclusion that the leasehold agreement satisfied the conditions for its admissibility under the applicable evidentiary rules contained in the Evidence Act, NRCD 323 of 1975 and consequently admitted '*Rejected 3'* in evidence. As it was a rehearing, we think that having disagreed with the learned trial judge on the admissibility of the said document, they should have had it formally admitted into evidence as an exhibit and marked as such. We do not, however think that their omission so to do has any dire attribute. In our thinking as the document was a certified true copy and had clearly indicated thereon in ink on its last page by the person before whom it was proved, the Registrar of Deeds that it had been 'Compared and verified with the original', the said document had the mark of regularity arising from section 37 of the Evidence Act by virtue of the fact the process of registration

of documents qualifies as an official act. When section 37 is read together with section 126 of the Evidence Act to which reference was made by the learned justices in their judgment in the court below, the error of the learned trial judge in upholding the objection to the leasehold document, which had previously been tendered without objection by the plaintiff in application for judgment under Order 25 of the repealed High Court Rules, LN 140 A and in respect of which no issue as to its authenticity was raised on the pleadings becomes quite apparent. We observe from the absence of any challenge to the authenticity of the said leasehold agreement that parties should not be enabled by courts to raise challenges to the admissibility of documents on grounds that are not contained in their pleadings particularly in cases where from the rival cases pleaded by them, there is an indication by the other party of its reliance on such a document.

But that is not all. There is the further requirement in section 130 regarding ancient documents to which the said leasehold having been made as far back as 07 March 1929 belonged. At the date that it was being tendered at the trial court on 06 June 2007, it was 78 years old - seventy-eight years more than the required number of years provided for in section 130 of the Evidence Act. In our view, the insertions which formed the basis of the rejection of the document by the learned trial judge that are expressed in the words to wit, `*where the context admits shall include the Revisionary….´* when read together with the words which appear before it and those which come immediately thereafter namely `*which expression´* and *'for the time being immediately expectant upon the terms hereby created´* deal with matters that are implied in any conveyance for consideration as spelt out in section 22 (1) of the Conveyancing Act, NRCD 175 of 1975 as follows:

> *"In a conveyance for valuable consideration there shall be implied the covenants for right to convey, quiet possession, freedom from encumbrances and further assurance in the terms set out in Part One of the Second Schedule."*

Although the lease in question was executed in 1929, section 22(1) of the Conveyancing Act was just a restatement of the position prevailing under the Statute of Frauds and therefore the mere insertion of those words ought not to have detracted from its admissibility. In the circumstances, we are of the opinion that the learned justices of the court below were right when they overruled the exclusion of the leasehold document by the learned trial judge. But before we end our consideration of this aspect of the matter, we are of the view in regard to the insertion of some writing in ink into the agreement that a better approach to the objection raised was to have given effect to it without the said insertion. Accordingly, the ground of appeal numbered as (1) and formulated as follows fails:

> "*That the learned Justices of the Court of Appeal erred in law and on the facts by admitting the Deed of lease tendered and rejected by the Defendant/Appellant/Respondent at the trial court*"

As the question of admissibility of a document is one of law for the judge who presides at the trial of an action, the formulation of ground (1) by the appellant should properly speaking have left out the words '*and on the facts'*. Although the ground as expressed tended to create the impression contrary to section 1(1) of the Evidence Act that questions of admissibility may turn on facts, as was the unfortunate impression created that the rejection of the document in the trial court was done by the defendants. We have in our determination of the issues raised in the appeal herein construed ground (1) to mean that the learned justices of the Court of Appeal erred in law when they admitted the said exhibit. We are hopeful that by adopting this approach, we occasion no injustice to the respondent as both parties contested the appeal on the common understanding that it concerns a question of law whether the learned justices of the Court of Appeal were right in admitting "*Rejected 3*."

Having had the document admitted into evidence, we think that it was proper for the learned justices of the Court of Appeal to take it into consideration before reaching a decision on the appeal before them. Taking the said document into account, we are of

the opinion that the possession of the land by persons through whom the plaintiff claimed was consequent upon its execution as pleaded by the defendants. There is also the fact that although the learned trial judge for reasons which are obviously in error rejected the evidence of the defendants based on acts unequivocally performed under the leasehold agreement including possession of the land by lessees and the receipt of rents from them which properly form part of acts which in equity constitute part performance thereby rendering the agreement exempt from the strict requirements of a writing under sections 1 and 2 of the Conveyancing Act, NRCD 175. In our opinion, had the learned trial judge properly adverted his mind to the position of the law on acts such as part performance, he would in all probability have reached a different view of the facts as the totality of the acts performed by the lessees under the agreement rendered the evidence of the plaintiff to the contrary inherently improbable when tested in the light of recent acts in relation to the disputed property. Indeed, the following passage from his judgment at page 514 leaves us in no doubt that but for the rejection of the lease document, which resulted in his misapprehension of the value to be attached to the oral evidence of the defendants in support of acts done by the lessees (through whom the plaintiff claims), the learned trial judge would not only probably have reached a different view of the matter but in reality have decided in favor of the defendants:

> *"Had the lease document not been rejected, defendant's claim of possession of the building, at least the ground floor for a period of 50 years in the first place would have been well grounded. This would have been so because of the occupation by Obaamra's lessees namely Azar and Aschkar. But since the lease document was rejected, the defendant's claim of possession must fail."*

We venture to say that the above words which fell from the lips of the learned trial judge brought the matter within the scope of section 5(3) of the Evidence Act and entitled the learned justices of the court below to set aside the judgment of the trial court on the ground that the ends of justice were not well served by the erroneous exclusion of the

lease document. See: **Oppong v Anarfi** [2011] 1 SCGLR 556. It is clear that the exclusion of the document from evidence was the foundation of the outright rejection by the learned trial judge of oral evidence concerning the said agreement and must have occasioned great prejudice to their case, a situation which as hereinbefore alluded to in this delivery is a proven instance of miscarriage of justice within the contemplation of section 5 (3) of the Evidence Act. As the leasehold agreement is part of the exhibits contained in the record of appeal, having overruled its erroneous exclusion from the evidence, the learned justices of the court below acted rightly when they took it into account before determining the appeal before them. We think that by section 5(3) of the Evidence Act, the mere erroneous exclusion of evidence at a trial is not a sufficient ground for setting aside the judgment founded thereon, the appellate court is required from the words by which the section is expressed to go further and consider whether the erroneous exclusion resulted in a miscarriage of justice.

There is the issue relating to the defendant's inability to produce any document from which their predecessor derived title before making the grant of a lease to the plaintiff's predecessors. The fact that persons through whom the plaintiff derived title-Obaamra's lessees acknowledged her as the owner of the disputed property, estops the plaintiff by conduct within the scope and extent of section 26 of the Evidence Act from contending to the contrary and indeed, it being a matter that falls under conclusive presumptions, we are also precluded by section 24 of the Evidence Act from considering any evidence contrary to the conclusively presumed fact. Reference is made to sections 24 and 26 of the Evidence Act as follows:

> *(24) "When the basic facts that give rise to a conclusive presumption are found or otherwise established in the action, no evidence contrary to the conclusively presumed fact may be considered by the tribunal of fact.*
>
> *(26) Except as otherwise provided by law, including a rule of equity, when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be*

true and to act upon that belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest."

Then there is section 27 of the Evidence Act which in our opinion also has some relevance to the action herein, which from the case of the defendants raises the relationship of landlord tenant between them and the plaintiff's predecessors in title who were lessees of Obaamra. Section 27 of NRCD 323 provides as follows:

> *"Except as is otherwise provided by law, including a rule of equity, against any claim by a tenant the title of the landlord at the time of the commencement of their relationship is conclusively presumed to be valid*."

In our view, when sections 24, 26 and 27 I are read conjunctively the case of the plaintiff totally crumbles as we are statutorily barred from giving consideration to a contrary view of the matter; we can only reach the decision that the defendants' predecessors in title are the owners of the disputed property.

In the light of the foregoing, we are of the opinion that the learned justices of the Court of Appeal came to the right conclusion on the effect of the evidence that the case of the defendants was more probable than that of the plaintiff. In reaching this view of the matter upon all the evidence, we are not disregarding the very clear reasons provided by the learned justices of the court below for the judgment on appeal to us. But as we are in agreement with them on the inferences reached by them from the evidence contained in the record of appeal, we do not think that it is necessary for us to repeat those reasons. Having reached the same conclusion as the learned justices of the Court of Appeal, we do not think it is necessary to detain the precious time of the court in considering the cross-appeal of the defendants and the same is accordingly struck out.

For the above reasons, we disallow the appeal and affirm the decision of the Court of Appeal.

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

W. A. ATUGUBA
(JUSTICE OF THE SUPREME COURT)

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

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

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