IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA- A.D. 2021

CORAM: DOTSE, JSC (PRESIDING)
PWAMANG, JSC
DORDZIE (MRS), JSC
AMADU, JSC
PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL
NO. J4/39/2021

29TH JULY, 2021

1. NORCON GHANA LIMITED
2. REYNOLD ABROKWA BOAMAH } PLAINTIFFS/RESPONDENTS/RESPONDENTS

VRS

1. ROSEHILL GHANA LIMITED
2. ERNEST MENSAH FRIMPONG } DEFENDANTS/APPELLANTS/APPELLANTS

JUDGMENT

AMADU JSC:-

(1) This appeal is from the judgment of the Court of Appeal dated 26th March 2020 which affirmed wholly the judgment of the High Court dated 7th January 2016 in favour of the Plaintiffs/Respondents/ Respondents.

(2) In the High Court Accra, the Plaintiffs/Respondents/Respondents *(hereinafter referred to as 'Plaintiffs')* by their amended writ of summons claimed against the Defendants/Appellants/Applicants *(hereinafter referred to as 'Defendants')* the following reliefs:-

"a. Declaration that the Madina Market Extension Project (LOT2) is jointly owned by the parties in the following manner:

i. 1st Plaintiff has 50% ownership.

ii. 2nd Plaintiff has 25% ownership.

iii. Defendants have 25% ownership

b. An order for the recovery of possession of 50% of the said Market complex for the 1st Plaintiff and 25% for the 2nd Plaintiff.

c. An order for the partitioning of the said Market Complex according to the ownership structure stated in relief (a) with the aid of the Court Registrar.

d. An order directed at the Defendants to give a comprehensive account of all the monies collected from the tenants, and the expenses incurred on the construction of the Market Complex Extension Project.

e. An order for the assessment of the expenditure incurred solely by the 1st Plaintiff on the initial construction works she carried out and a further order for the refund of one third (1/3) of the amount to the Plaintiff.

f. An order for the 2nd Defendant to deliver Land Title Certificate NO.GA 21 712 dated 13 September 2005 into court and a further order that it be cancelled.

g. Costs.

h. Any other reliefs as the Honourable Court may deem fit."

(3) At the end of the trial, the High Court entered judgment in favour of the Plaintiffs by granting all the reliefs endorsed on the Plaintiffs' Amended Statement of Claim and other consequential reliefs to give effect to the judgment. On appeal, the Court of Appeal affirmed the decision of the High Court and dismissed the appeal

in its entirety. This further appeal to this court demonstrates the Defendants' dissatisfaction with the Judgment of the Court of Appeal.

BACKGROUND-PLAINTIFFS' CASE

(4) The case of the Plaintiffs is that 2nd Defendant secured a contract with the Ga District Assembly by which he was to construct Lot.2 of the Madina Market Extension project for the Assembly. Because the 2nd Defendant lacked the funds, expertise and experience to execute the contract, he, through the instrumentality of the 2nd Plaintiff was introduced to the 1st Plaintiff, a reputable construction company which agreed to partner the 2nd Defendant to carry out the contract.

(5) According to the Plaintiffs, the agreement between the parties was partly in writing, oral and by conduct. Through those series of agreements, parties agreed to construct Lot-2 made up of 26 Shops of the Madina Extension Project for the Ga District Assembly. The 1st Plaintiff was to provide the initial capital needed to start the project with the remainder to be financed from monies to be collected from prospective tenants of the shops to be construed. In addition, the 1st Plaintiff was to provide technical expertise, workmen, equipment and apply its experience to the execution of the project. As consideration for its role, the parties agreed that the 1st Plaintiff would be entitled to 50% of the final project while the 2nd Plaintiff and the 2nd Defendant would benefit 25%.each.

(6) The Plaintiffs averred further that by a Memorandum of Understanding (MOU) dated the 9th day of August, 2000 between Norcon-Rosehill (Gh) Limited and the Ga District Assembly, Norcon-Rosehill (Gh) Limited agreed to construct 26 shops under Lot 2 of the Madina Market Extension Project at the cost of Seven Hundred and Eighty-Three Million, Nine Hundred and Fifty-Two Thousand, Five Hundred and Twelve Cedis (¢783,952,512.00).

(7) At the commencement of the project the 1st Plaintiff provided the initial funding needed to acquire the necessary building materials, and equipment as well as paying for the workmen. However, the Ga District Assembly's ownership of the land on which the construction work had began was challenged by one Mrs. Pearl Amarquaye who demanded valuable consideration for the use of the land for the project. The Assembly was unable to pay for the land and had no option than to opt out of the project.

(8) The parties particularly Plaintiffs and 2nd Defendant thereafter met and agreed to collect monies from prospective tenants and use these monies to pay for the land in order to proceed with the project. The first payment for the land was made by the 2nd Defendant in the company of the 2nd Plaintiff for the benefit of the 1st Plaintiff and the 2nd Defendant. Inspite of the material absence of the Ga District Assembly's offer of the land which formed the basis of the parties MOU, the project continued per the same ownership terms as agreed to by the parties to the MOU before the execution of the MOU. It is significant to place on record that at the time of the initial engagement between the Plaintiffs and the 2nd Defendant through the period of the execution of the MOU and the commencement of the project neither the entity known as Norcon-Rosehill Ltd. nor the 1st Defendant did not exist as they had not been incorporated.

(9) Subsequently however, 1st Plaintiff's representative, Mr. Barth had a health problem and left for Norway and has not to Ghana during the execution of the project and subsequent litigations while Mrs. Barth left the Madina project site to execute other construction contracts secured by 1st Plaintiff after the initial financial, equipment and other contribution by its workers. As a result, the construction of the Madina Market Extension project was left in the sole control of the 2nd Defendant who from the evidence not only concealed all developments towards execution and litigations from the 1st Plaintiff, but carried out an agenda

to own the entire project exclusively. It is this attitude of the 2nd Defendant to the project intended to deny the Plaintiffs of their interest which resulted in the suit culminating into the instant appeal.

(10) In fulfillment of his parochial agenda, the 2nd Defendant assumed sole ownership of the project and executed same in a design different from what the parties had agreed under the terms of the MOU. The 2nd Defendant subsequently incorporated the 1st Defendant on 8th September 2005 as a corporate vehicle for the project and succeeded in paying Mrs. Amarquaye after which he obtained a land certificate of the parcel of land on 13th September 2005 in the name of the 1st Defendant without the knowledge of the Plaintiffs. The Defendants have therefore refused to account for funds they procured from prospective tenants which they used to execute the project, and have since treated the entire project as exclusively owned by them. Hence the Plaintiff's action.

DEFENDANTS' CASE

(11) The case of the Defendants is that 2nd Defendant was offered the opportunity to construct the Madina Market Extension Project for the then Ga District Assembly together with a cold storage facility. That the 2nd Defendant solicited the help of Mr. and Mrs. Barth, owners and operators of 1st Plaintiff to carry out this project. Subsequently, Mr. and Mrs. Barth and 2nd Defendant through the 1st Plaintiff agreed to work together with the 2nd Defendant construct Lot-2 of the Madina Market Extension Project and share the proceeds in accordance with the percentage ratios contained in the MOU.

(12) According to Defendants, the agreement between 1st Plaintiff and them was that, 1st Plaintiff was to pre-finance the entire construction cost of the Project. Furthermore, 1st Plaintiff was to provide workmen, experience and expertise. Pursuant to this agreement, the parties agreed to incorporate a special purpose

vehicle to be called Norcon-Rosehill (Gh) Limited to carry out the project. Although Norcon-Rosehill (Gh) Limited was never incorporated, Norcon-Rosehill (Gh) Limited on the 9th day of August, 2000, entered into a Memorandum of Understanding (MOU) with the Ga District Assembly to construct 2 of the Madina Market Extension Project.

(13) The construction works actually based on the terms of the MOU commenced with the 1st Plaintiff providing monies, workmen and expertise. However, a few weeks later the Ga District Assembly asked Norcon-Rosehill (Gh) Ltd. to stop all works when one Mrs. Pearl Amarquaye claimed ownership of the land upon which the project was being executed. The Assembly conceded Mrs. Amarquaye's claim of ownership of the land and consequently directed Norcon-Rosehill (Gh) Limited to stop all works.

(14) The Defendants averred that, they decided to proceed alone to build the market project and that they approached the owner of the land and offered to purchase same. They then mobilized funds from a myriad of sources including 2nd Defendant's own savings, proceeds from the sale of his self-acquired assets as well as monies collected from prospective tenants. They subsequently redesigned and expanded the scope of works by increasing the number of shops from the originally 56 and two cold stores envisaged under the said Lots-1 and 2 to 135 and two cold stores for their own proposed market complex. In about two years, the Defendants built a 135-shop market complex which they named, Rosehill Heights Shopping Mall.

(15) Upon completion of the construction of Rosehill Heights Shopping Mall, a dispute lasting nearly eleven months arose between Defendants and the tenants from whom Defendants had collected monies. Unable to amicably resolve this dispute, the tenants numbering about one hundred constituted themselves into the Madina shopping Mall Traders Association and sued Defendants and one Jimmy Nufu *(as*

agent for 2nd Defendant) in the High Court, claiming *inter alia* ownership of the shops and thus sought an order for the conveyance of the shops in their favour. This dispute travelled to this Court which determined the matter in favour of the Defendants but ordered the Defendants to refund all the monies collected from the tenants together with interest thereon.

(16) The Defendants further averred that not too long after the judgment of the Supreme Court in the suit aforesaid, and about eight years after the Ga District Assembly had cancelled its contract with the said Norcon-Rosehill (Gh) Limited under the said MOU the Plaintiffs herein commenced this action in the High Court claiming 75% ownership of what would have been Lot-2 of the Ga District Assembly's Madina Market Extension project to give effect to the MOU executed between the 1st Plaintiff and 2nd Defendant, as Norcon-Rosehill, and the Ga District Assembly.

ISSUES SET DOWN FOR DETERMINATION AT THE TRIAL COURT

(17) The issues accepted and set down for determination by the Trial Court from the numerous issues proposed by the parties are as follows:-

a. *"Whether or not there was an agreement between the Plaintiffs and Defendants for the construction of the Madina Market Complex.*

b. *Whether or not there was an agreement between the Plaintiffs and the Defendants for the proceeds from the Madina market complex to be shared amongst them with 50% to the 1st Plaintiff, 25% to the 2nd Plaintiff and 25% to the 2nd Defendant.*
c. *Whether or not 2nd Defendant's registration of the land in the sole name of the 1st Defendant was taunted with fraud and misrepresentation.*
d. *Whether or not Plaintiffs' action is estopped by res judicata.*
e. *Whether or not the Plaintiffs' action is statute barred.*

f. Whether or not the Plaintiffs are estopped by acquiescence and laches from denying the Defendants' ownership over Rosehill shopping Mall."

At the end of the final trial and after an evaluation of the mass of evident oral and documents placed before it, the Trial Court found for the Plaintiffs and accordingly entered judgment in their favour.

APPEAL TO THE COURT OF APPEAL

(18) Dissatisfied with the judgment of the High Court, the Defendants appealed to the Court of Appeal on the following grounds.

"a) The Judgment of the High Court is against the weight of evidence.

b) The Learned Trial Judge erred in holding that the contract between the Plaintiffs/Respondents and the 2nd Defendant/Appellant subsisted after the contract between Norcon/Rosehill (Gh) Ltd. with the Ga District Assembly had been frustrated.

c) The Learned Trial Judge erred in holding that the Plaintiffs are entitled to 75% ownership in the Rosehill Heights Shopping Mall.

d) The Learned Trial Judge erred in holding that the parties jointly own the land upon which the Rosehill Heights Shopping Mall stands".

In its judgment, the Court of Appeal noted that the Defendants extensively argued ground (a) as set out in their notice of appeal but failed to address the other grounds of appeal. The Court of Appeal therefore agreed with the Plaintiffs contention that the Defendants be deemed to have abandoned the other grounds set out in the Notice of Appeal.

FINDINGS AND CONCLUSIONS OF THE COURT OF APPEAL

(19) In determining the appeal, the Court of Appeal considered only ground (a), the sole ground of appeal and made the following significant findings and conclusions:

(a) That there is no error on the part of the Trial Judge in reformulating the key issues for determination. It affirmed the conclusion of the Trial Court that there exists a valid contract between the parties capable of enforcement.

(b) There was no subsequent agreement between any of the parties and Mrs. Amarquaye. The construction and manifestation of the said edifice emanates from the agreements (written, oral and by conduct) that exist between the Defendants and the Plaintiffs at the genesis of their working relationship.

(c) It was clear that the agreement by the parties was to collect monies from the prospective tenants when Ga District Assembly was not able to buy Mrs. Amarquaye's interest in the land on which the market was constructed.

(d) There is overwhelming evidence that point to the fact that the Plaintiffs were involved in the construction of the Madina Marked Complex right from the onset till its completion. The Plaintiffs were part of the execution of the Madina Market Complex from the beginning up to its completion.

(e) The exit of the Ga District Assembly never truncated the agreement between the Plaintiffs and the Defendants. What the Assembly's exit did was to truncate the agreement between the Ga District Assembly and Norcon -Rosehill (GH) Limited. The interest of the parties on which basis the Madina Market Complex existed are as follows;

a. 1st Plaintiff - 50%

b. 2nd Plaintiff - 25%

c. 2nd Defendant -25%

(f) The 2nd Plaintiff's share of 25% is for his effort to bring on board the 1st Plaintiff as well as his errands and the secretariat services he rendered towards the successful execution of the project. Once the agreement has the requisites of an enforceable contract, it is binding on the parties.

(g) That changes do happen to an original design of a building to meet any new exigency as in the instant case. The change in the number of rooms and

design of the Market Complex did not change the entire agreement which binds the parties to it. The original contract between the Defendants and the Plaintiffs remained same, except for the aspect affecting the Ga District Assembly under the MOU, after they exited from the contract.

(h) What the law looks for is the outward manifestations of an agreement, not speculations. On the issue of lifting the veil of incorporation, the Court of Appeal held that, the Trial Judge used the term loosely to mean that the company, Norcon-Rosehill (GH) limited was never incorporated and so same never existed. The Trial Judge meant to say that, the actions of Norcon-Rosehill (GH) limited, if they will result in an illegality, then the promoters ought to be attached to face the liability thereof. The Court of Appeal further held that the issue of estoppel did not arise in this case under the circumstances.

(i) With respect to the allegation by the Defendants that from the conduct of the Plaintiffs, their action was either statute barred, caught by estoppel, acquiescence or laches, the Court of Appeal held that these defences would not avail the Defendants. This is because there are myriads of factors that pointed negatively to the Defendants per their conduct to the effect that, their hands are not clean and could not therefore rely on equitable defences.

On the basis of the above findings the Court of Appeal concluded that the suit involving the Madina Market Women Association in both the High Court through to this Court is not the same as the instant suit. The parties in the two suits are not the same while the subject matter was not the same. The two cases are therefore dissimilar in every sense. In the result, the judgment of the High Court was wholly affirmed by the Court of Appeal which dismissed the Defendants' appeal.

APPEAL TO THE SUPREME COURT

(20) Aggrieved by and dissatisfied with the decision of the Court of Appeal, the Defendants have mounted this appeal on the sole ground that ***"the judgment is against the weight of evidence".*** The effect of the appeal having been anchored on the omnibus ground of appeal is that, it constitutes an invitation to this court in the exercise of its power of rehearing to re-evaluate the entire evidence on record in order to arrive at its own findings and conclusions so as to determine whether the judgment of the Trial Court as wholly affirmed by the Court of Appeal is amply supported by the evidence on record. And where it does not upon our application of the relevant law, we will arrive at our own findings and conclusions.

(21) In the case of **Owusu-Domena V Amoah [2015-2016] SCGLR 790**, this court per Benin JSC at page 799 expatiated on the scope of factors an appellate court will take into consideration where an Appellant makes an appeal on the sole ground of appeal that a judgment is against the weight of evidence. He said as follows:-

"The sole ground that the judgment is against the weight of evidence, throws up the case for a fresh consideration of all the facts and law by the appellate court. We are aware of this court's decision in Tuakwa V Bosom [2001-2002] SCGLR 61 on what the court is expected to do when the ground of appeal is that the judgment is against the weight of evidence. The decision in Tuakwa V Bosom, has erroneously been cited as laying down the law that, when an appeal is based on the ground that the judgment is against the weight of evidence, then only matters of fact may be addressed upon. Sometimes, a decision on the facts depends on what the law is on the point of issue. And even the process of finding out whether a party has discharged the burden of persuasion or producing evidence is a matter of law; Thus, when the appeal is based

on the omnibus ground that the judgment is against the weight of evidence both factual and legal arguments could be made where the legal argument would help advance or facilitate a determination of the factual matters.

Based on the above practice, the totality of the evidence on record, will be re-examined within the context of the relevant applicable law.

SUBMISSION OF DEFENDANTS (APPELLANTS) IN STATEMENT OF CASE

(22) The main contention of the Defendants in their statement of case is that, the Trial High Court contrary to the laid down principles enunciated by the Supreme Court in granting reliefs not claimed by a party in the case of **Hanna Assi (No.2) Ghioc Refrigeration & Household Products Ltd (No. 2) [2007 – 2008] SCGLR 16** proceeded to award the Plaintiffs reliefs far in excess of their claim and that the Court of Appeal had erroneously endorsed that award wholly. In its judgment, the High Court declared the Plaintiffs 75% owners of the project in its ***"current morphed form"*** while the endorsement of relief in the Plaintiffs' statement of claim was for 75% ownership of the shops to be constructed under Lot-2. They submitted the current state of the Rosehill Shopping Mall eventually built by the Defendants is made up of 135 shops which was never contemplated by the parties at the time of their agreement. The Defendants argue that at no point during the proceedings did the Plaintiffs apply to amend the relief for 75% ownership of the shops built on Lot-2. The Defendants thus contend that the Court of Appeal had erred in affirming the judgment of the High Court which affected the subject matter far in excess of the Plaintiffs claim as per the endorsement in their writ.

(23) The Defendants further submit that the Court of Appeal failed to appreciate and apply the principles guiding the consideration of the appeal based on the ground that the judgment was against the weight of evidence. To that extent, they submit that, an appellate court has a duty to decide issues of law which arise from the

facts and evidence on record. It is the further submission of the Defendants that, the two lower courts did not draw the necessary inferences and apply the law from the facts established in the case. The Defendants submit that the Plaintiffs failed to discharge their burden of proof on the existence of a valid binding contract between the parties contrary to the conclusion of the Trial High Court and affirmed by the Court of Appeal.

(24) The Defendants contend further that an agreement is said to exist when parties are found to be ad idem on key terms of whatever they propose. They assert that the Plaintiffs were clearly not ad idem with respect to the terms of the agreement they sought to enforce. Furthermore, they argue that the oral testimonies contradicted the pleadings of the Plaintiffs and that it was a term of the agreement between the parties that 1st Plaintiff was to prove initial funding for the project. The Defendants contend that since the evidence of the 1st Plaintiff on the subject of funding contradicted that of 2nd Plaintiff, the conclusion by the two lower Courts that their evidence established the existence of an agreement is clearly not supported by the evidence on record. The Defendants have referred to the case of **Dam Vs. Addo and Brothers [1962] 2GLR 200-206** and submit that the Plaintiffs had set up a case different from that which had formed the basis of the parties' agreement resulting in a departure which the two lower courts glossed over resulting in substantial injustice to the Defendants.

(25) The Defendants argue further that 1st Plaintiff sought relief in court on the basis of its credentials as a reputable construction company that had the expertise, equipment and funds for the execution of the project. It was therefore expected to adduce evidence of the funds, expertise and equipment it provided. They contend further that contrary to the expectations of the 1st Plaintiff's role, funds were collected from prospective traders and income generated from the sale of 2nd Defendant's assets were applied to finance the construction of 135 shops.

Further that, the supervision of the construction was done by the Defendants exclusively. The Defendants have referred to the decision in **Hammond & Odoi [1982-83] GLR 1215** at **1235** and submit that, on the evidence adduced, no consideration was provided by the 1st Plaintiff and as such it is not entitled to 50% ownership rights of Rosehill Heights Shopping Mall to the current state of the project as built up as ordered by the High Court and confirmed by the Court of Appeal.

RES JUDICATA

(26) The case of the Defendants is that Rosehill Heights Shopping Mall (the final project) had been a subject of dispute which travelled from the High Court to the Supreme Court. The suit, **Madina Shopping Mall Association (Suing For Themselves & 88 Others*)* Vs. Rosehill (Gh) Limited, E. M Frimpong And Jimmy Nufu In Suit No.AL 11/2006** documentary evidence of which was tendered in evidence was commenced on 18th November, 2005. The Plaintiff association in that action, sought the following reliefs:-

a. A declaration that monies paid by individual members to the Defendants constituted full and final purchase price for the store/shops.

b. An order for the Defendants to provide electricity, water, toilet and other facilities for the Rosehill Heights Shopping Mall in accordance with Town & Country regulations.

c. An order for the Defendants to legally convey the stores/shops occupied by them.

d. Perpetual injunction to restrain the Defendants, Agents, servants, workmen, Assigns etc. from interfering in whatsoever manner with their use of the stores/shops".

(27) On the 25th day of April, 2010 this Court in determining the issues in that appeal, upheld the Defendants' ownership of Rosehill Heights Shopping Mall, and ordered

the refund with interest thereon of all monies they *(Defendants therein)* had received from the Plaintiffs in that suit. It is the case of the Defendants that the Court of Appeal erred when it failed to recognize that, the facts and issues of the earlier case were similar to the facts and issues in the instant case and therefore the outcome of the previous case created an estoppel per rem judicatam in favour of the Defendants herein against the Plaintiffs. The Defendants contend that the Court of Appeal erred in not applying the principle of res judicata to estop the Plaintiffs from re-litigating the same issues already adjudicated upon by this Court in the case under reference.

RIGHTS UNDER THE MEMORANDUM OF UNDERSTANDING (MOU)

(28) The Defendants submit that though the learned trial judge had found as follows:- ***"In my view, the agreement between Norcon-Rosehill and the Ga District Assembly was illegal on the ground that Norcon-Rosehill had then, and to date, not been incorporated as a legal entity,"*** the same trial judge however proceeded to find that the invalid agreement between Norcon-Rosehill and the Ga District Assembly did not: ***"eradicate or derogate from the agreement entered into between the Plaintiffs and the 2nd Defendant in the house of Mr. Barth and Mrs. Barth. That agreement withstood the unsuccessful agreement with the Ga West District Assembly .....that agreement persist and would have persisted as a side contract and the contract with the Ga District Assembly not unraveled".*** The Defendants have referred to the decisions in **Kimon Compania Naviera SARP V Volta Lines Limited (Consolidated) [1973] 1 GLR 140 and Naos Holding Inc. (Per Its Attorney Amarkai Amartefio V Ghana Commercial Bank [2005-2006] SCGLR 407** and submit that the non-existence of Norcon-Rosehill means no rights can automatically vest in any of the parties herein even if they had acted in one way or the other for Norcon-Rosehill Company Ltd.

THE PLAINTIFFS' STATEMENT OF CASE

(29) The Plaintiffs submit that the trial court properly evaluated the entire evidence in its judgment. The Plaintiffs have cited the decision of this case of **Hanna Assi (No.1) V Gihoc Refrigeration & Household Products Ltd (No.1) [2007-2008] 1** and submit that, the reliefs granted in their favour by the High Court and affirmed by the Court of Appeal were deemed sought as they were established by the totality of the evidence adduced at the trial.

RESPONSE TO THE SUBMISSION ON RES JUDICATA

(30) The Plaintiffs submit that if reliance is to be placed on the Defendants' submission that the Plaintiffs, not having joined Suit No. AL/11/2006 as parties, they are consequently estopped from litigating the ownership the subject matter, as between the parties, it would conversely mean that the other parties to Suit No. AL/11/2006 *(particularly the 2nd Defendant therein)* could lay claim to the subject matter. Relying on the authority of **Essoun V Boham [2015] 82 GMJ**, the Plaintiffs submit that the Defendants did not prove estoppel and could not have proved same by their failure to tender in evidence, *inter alia*, the Statement of Defence filed in the said suit together with the proceedings of the trial. The Plaintiffs further contend that the processes tendered in evidence with respect to the previous neither create a party nor issue estoppel and as such they could not be barred from litigating their claim before the High Court which has given rise to the instant appeal. The Plaintiffs submit that the Defendants have failed to demonstrate any errors of law or fact in the judgment of the Court of Appeal which warrants the intervention of this court. They urged that the instant appeal be dismissed.

DETERMINATION OF THE APPEAL

(31) Before dealing specifically with the issues arising from the sole omnibus ground of appeal settled and argued by the Defendants, it is necessary to dispose of the

legal issue of res judicata raised by the Defendants and argued in their statement of case. This is because, the issue of rem judicatam if resolved in favour of the Defendants will automatically result in a successful outcome of the Defendants' appeal on that legal issue alone without the necessity of a determination of any other ground or issue. The Defendants submit that, the Plaintiffs herein are guilty of standing by when the Defendants contested the action by the Madina Shopping Mall Association against them and one Jimmy Nufu which was finally determined in this court. Consequently, the Plaintiffs are estopped from litigating the same issues culminating in the instant appeal as the question of ownership of the entire project had already been determined by this count in the other suit.

(32) In determining this appeal, the Defendants have urged us to uphold the public policy doctrine of estoppel per rem judicatam and allow the appeal by dismissing the Plaintiffs' claim on that legal issue alone. With all due respect to counsel for the Defendants, it is difficult to appreciate their contention on this issue, as the doctrine of estoppel per rem judicatam does not on the authorities operate in the manner and on the facts urged on us by the Defendants in the instant case. See the cases of **Dahabieh V S.A. Turqui & Brothers [2001-2202] SCGLR, 498**; **Naos Holding Inc V Ghana Commercial Bank [2005-2006] SCGLR 407 & Agbeshie & Another V Amorkor & Another [2009] SCGLR 594.**

(33) The doctrine as has been applied by the courts can be summarized as follows. Where a final decision has been made by a court of competent jurisdiction, the parties their agents, assigns and privies cannot be heard to contradict any decision in the previous proceeding with respect to the same subject matter except as is permissible by law such as by way of appeal, review or other available procedural step. The rationale behind this principle of law and of public policy is that estoppel as a plea operates as a bar to subsequent litigation while as evidence, it is conclusive between the parties, their agents, assigns and privies. Therefore, the

plea applies not only on the points upon which the court was required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject matter of litigation and which the parties, exercising reasonable diligence ought to have brought forward at the time.

(34) In the instant case however, neither the parties, nor issues determined in the previous case against the Defendants and one Jimmy Nufu *(an agent of the Defendants herein)* and others which was finally determined by this court are the same as the parties and issues in the instant appeal. The Plaintiffs in the previous case are neither agents, privies nor assigns of the Plaintiffs in the instant case. The issues that came up for determination by the courts in the previous case are also far dissimilar to the issues before the courts in the instant case. Therefore, the doctrine being a limitation to parties and their privies or the subject matter as the case may be, cannot be invoked as a legal bar to the Plaintiffs' action in the instant suit. The Defendants' contention that the two lower courts ought to have applied the doctrine of res judicata as a defence in their favour is therefore totally misconceived and without merit. The Defendants' argument on the issue are untenable and accordingly dismissed.

(35) In the concurrent findings of the trial high court and the Court of Appeal, both lower courts found there exists an enforceable contract between the parties based on the oral agreements between them notwithstanding the fact that the MOU had been substantially undermined by the inability of the Ga District Assembly to provide the land on which the initial scope of the project was to be executed. The failure by the Ga District Assembly to discharge on their obligation to provide the land for the project in our view materially altered the position of the parties to the contract because under the MOU, the parties contemplated sharing of profits while the right of reversion was clearly vested in the Ga District Assembly which had failed to discharge on the crucial obligation of providing the land for the project.

(36) An examination of the MOU dated 9th August 2000 and tendered in evidence as Exhibit 'B' and will reveal that it was entered into between the Ga District Assembly and an entity known as Norcon-Rosehill Ghana Ltd. in which the latter had undertaken the construction of shops referred to as Lot-2 of Madina Market Complex Extension within twelve (12) months. The material terms of the MOU are:-

"2. Beneficiaries of shop will make allocation for payment in special account.

3. Payments will be made to the contractor as beneficiaries pay for the shops (i.e. allocation fees).

4. After all shops are allocated to beneficiaries, and the contractor is fully paid the physical facilities will remain the bonafide property of Ga District Assembly . . ."

The above terms were signed on to by the 2nd Defendant on behalf of Norcon-Rosehill (Gh) Ltd. and witnessed by Beatrice O. Barth while the Chief Executive of the Ga Assembly signed for the Assembly and his signature was witnessed by the District Co-ordinating Director.

(37) From the evidence on record, it is the above agreement which informed the formula for the ownership ratios agreed upon by the parties. Consequently, the reversionary interest of the project which is a freehold to be owned by the parties was not in the contemplation of the parties at the time of the MOU. The MOU itself failed to pass the test of legality as the entity known as Norcon-Rosehill (Gh) Ltd. had not been incorporated until much later in time. Similarly, Rosehill Ghana Ltd. which the 2nd Defendant used to procure a land certificate on the blind side of the Plaintiffs had at all material times during the agreements between the parties not been incorporated. The situation renders the claim to exclusive ownership of the project by the Defendants a mere scheme manifested by the 2nd

Defendant to overreach the Plaintiffs and to deprive them the benefit of their contribution in the execution of the project.

(38) The non-existence of the entity referred to as Norcon-Rosehill (Gh) Ltd. is verified by Exhibit 'EE1', the letter dated 13th April 2011 signed on behalf of the registrar of companies. Since the MOU did not exist, it had a consequence on the nature of the interest to be held by the parties as owners of the project. Therefore, the oral agreements found by the two lower courts to be enforceable ought to be varied by examining the actual contributions of all the parties if enforcing same will result in injustice. This is even more so because the eventual benefits to the parties at the time of the oral agreements have now changed from the sharing of profits to full ownership, of the freehold interest in the project there being no reversion to the Ga District Assembly as provided under the MOU.

(39) It is clear from the record that the 1st Plaintiff and the 2nd Defendant who subsequent to the MOU incorporated the 1st Defendant as a corporate entity to execute the project have made substantial contributions in developing the project to its present state. Apart from the 1st Plaintiff's contribution at the commencement of the project in terms of equipment, labour and expertise, there is documentary evidence on record contained in Vol.2 at pages 244 to 317 and 436 of the record evidencing payments for building materials, fuel for the machinery, utility bills etc. all of which were paid for by the 1st Plaintiff. Then from pages 364 - 438 there is on record documentary evidence of payment for building materials in the names of the 1st Defendant and the 2nd Defendant. It is in between this period that, the 2nd Defendant made payment of the sum of Fifty Million Cedis (now Ghc5,000) to the lawyers of Mrs. Amarquaye, of Reindorf, Chambers and obtained a receipt in his own name. This was in November 2001 *(See pages 358 and 395 of Vol.2 of the record)*. At all material times at this stage, the lawyers for Mrs. Amarquaye

had been engaging all the parties herein in the name of Norcon-Rosehill Ltd. See Exhibit 'U3' and 'U4' at pages 342 and 343 of the record.

(40) However, by a letter dated 8th May 2003, Exhibit 'U5' *(pages 345 of Vol.2 of the record)* from S.K. Kuada acting on behalf of the Defendants, a request was made for the receipt of payment for the land to be made in the name of the 1st Defendant only described in Exhibit 'U5' as the correct name of the client. From this stage Exhibit 'U6' the conveyance from Mrs. Pearl Amarquaye and the building permit obtained on 14th May 2002 *(pages 362 and 363 of Vol.2 of the record)* were procured exclusively in the names of the Defendants. The effect is that, the Defendants had clearly manifested the intention of excluding the Plaintiffs from any further role in the project. At the same time, the 2nd Defendant continued to brief the Plaintiffs about the progress of the litigation at the instance of the Madina Traders against the Defendants and one Jimmy Dufu. We find from the record that the documentary evidence of financial contribution, provision of equipment and labour by the 1st Plaintiff was neither challenged nor contradicted. Indeed, the entire evidence on expenditure by the 1st Plaintiff was admitted in evidence without objection. The evidence cumulatively support the Plaintiffs' claim for a substantial share of the project based on the agreement between the parties even though the MOU under which their contractual relationship is based is unenforceable.

(41) With respect to the 2nd Plaintiff, while the parties in their contract had alloted 25% of the project to him, his personal contribution is from the evidence on record minimal. From the evidence, it is not in doubt that it was the 2nd Plaintiff who brought the 2nd Defendant and the 1st Plaintiff together for the concept to be developed and actualized. There is also evidence that the 2nd Plaintiff was responsible for designing the shop allocation forms as per Exhibit '6' *(page 439 of Vol.2 of the record)* which was made in the name of Norcon-Rosehill (Gh).Ltd. used in collecting monies from prospective tenants which was signed by the same

2nd Defendant as Managing Director. The 2nd Defendant cannot therefore deny the roles played by the 1st and 2nd Plaintiffs in the execution of the project. The situation therefore requires an intervention which will adequately compensate the parties for their respective contributions. Such an intervention which seeks to achieve substantial justice on the evidence before this court should bring the dispute between the parties to finality and closure. Consequently, the 2nd Plaintiff's allotment ratio of 25% ownership of the project as ordered by the High Court and confirmed by the Court of Appeal is reduced to 10% while the ownership ratio of the Defendants is enhanced from 25% to 40%.

ATTITUDE OF 2ND APPELLANT COURT TO CONCURRENT FINDINGS OF TWO LOWER COURTS

(42) The law is settled from a rich line of judicial decisions that the concurrent findings of facts by two lower courts ought to not ordinarily be interfered with by the second appellate court unless the circumstances are so compelling and would be contrary to justice not to do so. As the second appellate court, we have attended to the findings and conclusions of the trial court as affirmed by the Court of Appeal guided by these principles in cases such as **Achoro V Akanfale [1996-97] SCGLR 209**, **Koglex Ltd. (No.2) V Field [2000] SCGLR 175, Sarkodie V F.K.A. Co. Ltd. [2009]2 SCGLR 79, Nana Amua Gyebu XV V Mondial Veneer (Gh) Ltd. [2011]1 SCGLR 466** etc. Upon our review of the evidence on record, we find that the Trial Court approached the evidence with the correct perception and ascribed to it the proper probative value and logical inferences before arriving at its conclusions. Consequently, the Court of Appeal did not err in accepting those findings as they are neither perverse, contrary to law, nor inconsistent with the evidence on record. Accordingly, save the variation of the ownership ratios of the 2nd Plaintiff and the Defendants as hereinbefore ordered, the appeal fails. The judgment of the Court of Appeal is hereby affirmed.

I.O. TANKO AMADU
(JUSTICE OF THE SUPREME COURT)

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS.)
(JUSTICE OF THE SUPREME COURT)

PROF. H. J. A. N MENSA-BONSU (MRS.)
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