IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2016

CORAM: ATUGUBA JSC (PRESIDING)
BENIN JSC
AKAMBA JSC
APPAU JSC
PWAMANG JSC

CIVIL APPEAL

No. J4/48/2015

27TH APRIL 2016

PARTNERS HEALTH SERVICES - PLAINTIFF/1ST RESPONDENT/ APPELLANT

VRS.

1. BIKKIA LIMITED - 1ST DEFENDANT/ 2ND RESPONDENT/ APPELLANT

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2 MOSES ANTWI - 2ND DEFENDANT

3 DANGSCHAFT GMBH - 3RD DEFENDANT

4 . DEPUTY SHERIFF - 4TH DEFENDANT
HIGH COURT ACCRA

5. SILVERCREST INVESTMENT LTD - 5TH DEFENDANT/APPELLANT/ RESPONDENT

JUDGMENT

PWAMANG, JSC.

By a certificate of Purchase issued by the High Court Registrar, Accra dated 12th October, 1998 Silvercrest Investments Ltd acquired the title and interest of Bikkai Laboratories Ltd in H/No. BA 181/182, Bantama, Kumasi. Then by an indenture dated 27th October 1998, Partners Health Services Ltd acquired the title and interest of Bikkai Ltd in the same property.

In the appeals before us we are called upon to determine which of the two purchasers stated above is entitled to ownership and possession of the property in dispute. In this judgment the plaintiff/respondent/appellant shall be referred to as "plaintiff", the 1st defendants/respondent/ appellant shall be referred to as "1st defendant" and 5th defendant/appellant/respondent as "5th defendant". The 2nd, 3rd and 4th defendants are not parties to this appeal and will continue to be referred to as such.

Having regard to the fact that the validity of the auction sale as well as the *bona fides* of the parties have been raised in this case, we deem it necessary to set out the detailed facts in a chronological order for ease of analysis. So here we go; In 1995, the 3rd defendant, a German pharmaceutical company, through its lawyer, Kwaku Ansa-Asare of Hencil Chambers, brought an action in the High Court, Accra against Bikkai Laboratories Ltd, a sister company of 1st defendant. The action was to recover certain sums of money owed 3rd defendant for pharmaceutical products supplied on credit to Bikkai Laboratories Ltd. On 26th April, 1995 judgment was entered in favour of 3rd defendant. Upon application by 3rd defendant the Registrar of the High Court, Accra sealed a writ of fi.fa dated 24th May, 1995 for the attachment of the property in dispute to be sold in satisfaction of the judgment. More than one year after the fi.fa was issued the Registrar

wrote to the 2nd defendant by letter dated 28th May, 1997, appointing him as the auctioneer to sell the property.

All this while the writ of fi.fa had not been executed by attachment of the property in dispute. It was when 2nd defendant received the authorization from the Registrar that he went to effect the attachment on 30th May 1996 and served the judgment debtor with a Notice of Auction to be held on 27th June, 1996. About the same time 2nd defendant published notice of the auction in the 6th June, 1996 edition of 'The Pioneer' newspaper in Kumasi.

Upon the attachment 1st defendant immediately filed a Notice of Claim, claiming ownership of the property. The Registrar therefore wrote to 2nd defendant dated 5th June, 1996 requesting him to suspend the sale because a Notice of Claim had been filed. The Notice of Claim in which 1st defendant claimed ownership of the property as against Bikkai Laboratories Ltd was served on the 3rd defendant, the judgment creditor. The parties attended court on the Notice of Claim and 1st defendant was ordered to file a statement of claim in order for the interpleader to be determined. He failed to do so and on 31st January, 1997, the interpleader was struck out.

No further steps were taken till 28th November, 1997 when the High Court Registrar, Accra wrote to inform 2nd defendant that the interpleader had been struck out so he should proceed with the sale of the property. However, on 3rd December, 1997 the Registrar again suspended the sale by a letter to 2nd defendant on the basis that a motion for stay of execution had been filed. By another letter dated 10th December, 1997 he wrote back to 2nd defendant indicating that the motion for stay of execution was in fact not affecting this case so he should proceed and sell. In the meantime 2nd defendant had published a notice of auction in 'The Pioneer' of December, 4, 1997 for the auction to be held on December, 12, 1997 (p.617).

Apart from the interpleader, the 1st defendant had taken other proceedings in the High Court, Accra, including Suit No. L610/97, to prevent the sale of the property but did not succeed. So the auction

took place on 12th December, 1997. There was a large crowd at the premises including the Managing Director of 1st defendant. Workers of 1st defendant resisted the auction and nearly disrupted it but for the presence of security personnel. 5th defendant emerged as the highest bidder and the hammer was brought down for him. Though 5th defendant bought the property at GH¢59,000.00, he did not pay the total amount on account of the circumstances of the auction. He paid only GH¢2,000.00 to Lawyer Kwaku Ansa-Asare on behalf of 3rd defendant on 15th December, 1997. The auctioneer did not file any report of the sale with the registrar as required by the rules of court and he kept the keys to the premises.

After the auction 1st defendant filed a number of suits in the High Court, Kumasi, against the other defendants all in a bid to recover the property. As these suits were pending 5th defendant held back further payments of the purchase price so 3rd defendant was not paid anything. 3rd defendant then decided to change its lawyer and engaged the law firm Hesse and Larsey of Accra to act for it.

Hesse and Larsey immediately conducted a search in the Registry of the High Court, Accra and it was detected that the writ of fi.fa had expired at the time of the attachment of the property. The new lawyers brought this fact to the attention of the Registrar who conceded that the writ had expired. The lawyers on 7th August 1998 therefore wrote on behalf of 3rd defendant requesting the Registrar to release the property from attachment which he did by writing to 2nd defendant. 2nd defendant thereupon handed over the keys to the disputed premises to 1st defendant.

Thereafter the new lawyers of 3rd defendant decided to settle their differences with 1st defendant and Bikkai Laboratories Ltd by entering into an agreement for the sale of the property by private treaty dated 15th August, 1998. The 1st and 3rd defendants also filed terms of settlement in Suit No. 610/97 which were adopted by the High Court, Accra.

Armed with the agreement and the release letter, 1st defendant offered the property to plaintiff herein for sale. Plaintiff's managing director met with 2nd defendant who confirmed the availability of the property for sale. Plaintiff conducted a search at the Lands Commission on 18th August, 1998 and the report was that the property was in the name of 1st defendant. After inspecting the property, plaintiff proceeded to purchase it by contract of sale dated September 28, 1998 from 1st defendant. 1st defendant paid the 3rd defendant the judgment debt plus an agreed top up. A deed of conveyance dated 27th October 1998 was executed for plaintiff which has been registered and it was put in possession.

However, unknown to 1st and 3rd defendants, 2nd defendant after meeting plaintiff, made contact with 5th defendant. He collected the balance of the auction purchase price and paid it to the Registrar in Accra and filed statement of account on 21st September,1998. Notwithstanding the fact that he had revoked the attachment of the property, the Registrar issued a Certificate of Purchase dated 12th October 1998, to 5th Defendant. The Registrar further sealed a writ of possession, without leave of the court, for 5th Defendant and same was executed by ejecting the plaintiff from the premises.

Plaintiff therefore brought an action in the High Court, Kumasi for declaration of title, recovery of possession, damages, injunction and cancellation of 5th defendant's certificate of title. The High Court gave judgment in favour of plaintiff and 1st defendant who counterclaimed for a nullification of the auction sale and damages. 5th defendant appealed against the judgment and the Court of Appeal allowed the appeal and set aside the judgment of the trial court. Being aggrieved, the plaintiff and 1st defendant have appealed against the decision of the Court of Appeal to this court.

It is trite learning that an appeal is by way of re-hearing which means the appellate court is required to peruse the whole record and come to its own conclusions and findings on the evidence and the applicable law and decide whether the findings in the judgment appealed against

are justifiable. See**. Nkrumah V Ataa [1972] 2 GLR 13 and Tuakwa V Bosom [2001-2002] SCGLR 61.**

In the appeals before us a number of issues arise for determination from the facts as narrated above, the grounds of appeal and the submissions of the three lawyers. In the first instance, questions have been asked by the plaintiff and first defendant as to whether the auction that took place on 12th December 1997 was carried out in accordance with law. The follow up question to that is; if breaches of the laws on auctions occurred did they invalidate the auction? In the second instance, the plaintiff and 1st defendant argue that, whether there were breaches of the auction laws or not, the judgment debtor had no title to the property so the whole exercise was void *ab initio* and illegal and in law conferred no title on 5th defendant. On behalf of 5th defendant, the defence of innocent purchaser for value without notice has been raised and we need to consider whether the principle is applicable in this case.

On the first issue, the execution was carried out under the provisions of the **High Court (Civil Procedure) Rules 1954 LN 140A** which, just as the current rules, provide that the life span of a writ of execution shall be twelve months subject to renewal before it expires. It is not in dispute that the writ of fi.fa in this case expired before it was executed without being renewed. The decisions of the courts on non-compliance with provisions of LN 140A maintained a distinction between provisions, breaches of which were considered irregularities rendering proceedings only voidable and those that made proceedings void ab initio. See **Azinogo v W E Augustt [1989-90] 2 GLR 278 and Amoako V Hansen [1987-88] 2 GLR 26.** In **Ofori v Lartey [1978] 1 GLR 490** the Court of Appeal held, basing on the provisions of LN 140A, that an expired writ of summons was dead and could not form the basis of any proceedings. That holding, which would be applicable to a writ of fi.fa, was the law in force at the time of the attachment in this case. What that means is that the attachment of the disputed property in this case was void ab initio so the auction sale was illegal.

In **Donkoh v Nkrumah [1964] GLR 739 S C**. the respondent's farm was sold by a writ of *fi.fa* to satisfy a judgment against him. In a suit in the High Court several years later to recover the farm from the successor of the purchaser, it emerged that no writ of fi.fa was ordered by the local court that gave judgment against respondent. The writ that was ordered to be issued was a writ of *Ca.Sa (capias ad satisfaciendum)* by which the person of the judgment debtor was to be seized until he paid the judgment debt. The Supreme Court held that since the local court order was for a writ of *Ca.Sa*, the sale under a writ of *fi.fa* was illegal. Where the auction sale is illegal, the purchaser gets nothing and there is no time limit to set same aside.

The 5th defendant is right when it stated in its statement of case that at an auction, the sale is completed when the hammer is brought down on the highest bid. That is the law but since we have held that the sale in this case was illegal, that position does not advance the case of 5th defendant. All the proceedings in execution taken by the High Court Registrar and the auctioneer on the back of the expired writ of *fi.fa* were null and void so a discussion of whether they were regular or not will be an academic exercise that we do not intend to engage in.

Even if we are wrong in holding that the sale was void and illegal on account of the expired writ of fi.fa, the evidence that the property that was attached belonged to 1st defendant cannot be disputed. The law is well-settled that a purchaser of property sold upon a writ of fi.fa gets only such title as the judgment debtor had in it. This is based on the principle *nemo dat quod non habet*. The provisions of **Or 51 R.21 of LN 140A** are as follows;

"After a sale of immovable property shall have become absolute in manner aforesaid, the Court shall grant a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right, title, and interest of the judgment debtor in the property sold and such certificate shall be taken and deemed to be a valid transfer of such right, title, and interest."

(Or 45 R 11(3)&(4) of the current High Court Rules 2004 C.I.47 are *in pari matera* with Or 51 R. 21 of LN 140A). For that reason the Certificate of Purchase that was issued to 5th defendant stated in unambiguous terms that it purchased the title, rights and interests of Bikkai Laboratories Ltd in the property in issue.

There is a long line of authorities on this position of the law. **See Chandirams v Ghana Commercial Bank [1960] GLR 178, Afari v Nyame [1961] GLR 599, Kuma v Hima[1977] 1 GLR 204 and Hammond v Lamptey[1987-88]1 GLR 327**. The principle of *nemo dat* is so well rooted and fundamental in the law that it cannot be disregarded by a court except on well-settled legal grounds. It is the foundation for the protection of property rights by the law and finds expression in Section 13(3) of the Conveyancing Act, 1973, (NRCD 175), Section 4(1) Mortgages Act, 1972 (NRCD 96) and Section 28 the Sale of Goods Act, 1963 (Act 137).

What the 5th defendant has to prove in this case is the nature of title or interest in law, if any, Bikkai Laboratories Ltd had in the property that was attached. This is so because in law 5th defendant derives its title from Bikkai Laboratories Ltd and a party relying on a derivative title must prove the title of his grantor.

DW1 for 5th defendant, Emmanuel Owusu Ansah (of blessed memory) who at one time acted as lawyer for 3rd defendant admitted that 1st defendant is the owner of the property. He however alleged that 1st defendant used the property as security for a credit facility extended to Bikkai Laboratories Ltd by 3rd defendant. That contention was denied under cross examination and he offered to produce documents in proof. He later in the trial tendered a letter from the Registrar-General's department dated 18th November 1996, a certified copy of Certificate of Registration of Mortgage or charge dated 15th November 1996 and an uncertified and undated particulars of a Mortgage. The document that the witness claimed was the actual mortgage deed was rejected when he sought to tender it and it was marked " R 1".

The documents tendered do not in any way defeat 1st defendant's ownership of the property. S.107 of the Companies Code 1963, Act 179, pursuant to which the alleged charge was registered, provides that every charge as security on a **company's property** shall be void unless the particulars of the charge together with the **original or a certified copy** are registered with the Registrar of Companies within 28 days of its creation. The important question here is; does the property belong to Bikkai Laboratories Ltd? If A permits B to use his property as security for credit, does that create an interest in the property in favour of B? We do not think so. There are clear rules in law by which interests in immoveable property are created and none has been proved in favour of 5th defendant.

We notice an attempt by the 5th defendant and the Court of Appeal to argue that because the uncertified particulars that were tendered by 5th defendant's witness stated the property against the name of Bikkai Laboratories Ltd, then it belongs to them. But that, with respect, is a circular argument. Where there is undisputed evidence as to the true owner of the property, there is no basis for relying on conjecture and presumptions.

Lawyer Emmanuel Owusu Ansah in his evidence under cross-examination contended that the Managing Director of 1st defendant delivered the title deeds on the property to his senior partner, Kwaku Ansa-Asare, as security for the credit extended to Bikkai Laboratories Ltd. If that were so then 3rd defendant through its lawyer knew all along that the property belonged to 1st defendant and not Bikkai Laboratories Ltd. We therefore fail to see any misrepresentation or fraud committed by 1st defendant on anyone. Granted that it used its property to secure a credit facility for a sister company, it does not lose its ownership of the property thereby.

In the absence of evidence that 1st defendant surrendered its interest in the disputed property to Bikkai Laboratories Ltd, we are unable to hold that the company had any interest that could pass to 5th defendant upon the auction sale.

The issue about the property being subject to a mortgage was not pleaded before the trial court but came up when 5th defendant's witness was in the witness box. If there indeed existed a valid mortgage that 3rd defendant wanted to rely on then it ought to have brought an action for judicial sale under the Mortgages Act and 1st defendant would have been made a party as the mortgagor. If that had been done the court would have been able to investigate the validity of the deed relied upon with regard to the provisions of the Mortgages Act and the Lands Registry Act 1962 (Act 122). In that case 1st defendant as mortgagor would have been entitled to seek relief against foreclosure under Section 18 of the Mortgages Act. To base a decision of this case on the alleged mortgage, which was not sufficiently proved any way, would do injustice to the 1st defendant by denying it statutory rights it otherwise would have been entitled to.

All the maters that 5th defendant is raising in answer to the question of the interests that Bikkai Laboratories Ltd had in the property are matters that, strictly speaking, only 3rd defendant might have been entitled to raise and not 5th defendant. 5th defendant was never a party to any of the alleged dealings in the property involving 1st defendant, Bikkai Laboratories Ltd and 3rd Defendant before the auction. 5th defendant came into the picture only upon reading the publication in 'The Pioneer' that there was going to be an auction. At that time 1st defendant did not do anything to mislead 5th defendant. The notices in 'The Pioneer' actually stated that it is the property of Bikkai Ltd (not Bikkai Laboratories Ltd) that were to be sold at the auction. It is totally out of place for 5th defendant to talk of any form of estoppels against 1st defendant.

3rd defendant through its first lawyer knew from the word go that ownership of the property was in 1st defendant and not Bikkai Laboratories Ltd. As a lawyer he could not have been misled as to the significance of the separate corporate identities of the companies. When 3rd defendant changed lawyers the new lawyers were quick to notice the flaws and took remedial steps by dealing with 1st defendant.

If 5th defendant were a prudent purchaser he would have conducted some preliminary investigations as to the propriety of the auction before attending and making an offer. If he had checked from the Registrar of the court or the auctioneer he would have known that there was a judgment against Bikkai Laboratories Ltd and a simple search in the records of the Lands Commission would have informed him that the property did not belong to Bikkai Laboratories Ltd but 1st defendant.

According to 5th defendant's managing director, he knew 1st defendant so he could have enquired from their office whether it was safe to buy the property at the auction. He did none of these. Furthermore, when he attended the auction the workers of 1st defendant were struggling with the auctioneer. 5th defendant nevertheless bid for the property. He stated in his evidence that after his bid was accepted he became anxious having regard to the attitude of 1st defendant's workers but the 2nd defendant herein urged him to make payment immediately. He obviously was not comfortable so he paid only GH¢2000.00 three days after the auction and waited until after about a year later that 2nd defendant led him pay the balance.

In **Sarpong v Atta Yaw and Anor [1964] GLR 419, SC,** a purchaser of a house at a public auction which turned out to have been carried out upon a void writ of fi.fa lost the house in an action by the original owners, his status as a bona fide purchaser for value without notice notwithstanding**.** At page 421 of the Report Apaloo JSC said as follows;

> "True, this may cause great disappointment and possibly hardship to purchasers in some case but people who speculate in the purchase of property put up for sale by the sheriff invariably take a certain amount of risk and must take the consequences of the sale turning out to be invalid."

Such is the fate of 5th defendant in this case. The judgment debtor had no title or interest whatsoever in the property put up for sale by auction so 5th defendant bought nothing.

On the other hand, when plaintiff was contacted to buy the property he took all the requisite precautions before purchasing and paying for it. The money he paid was used to satisfy the judgment debt and 3rd defendant gave a receipt to that effect. The purported auction sale did not in any way affect the title of 1st defendant in the property so plaintiff acquired the legal title to the property unencumbered.

As has been explained above, the relationship between 1st defendant and Bikkai Laboratories Ltd in their dealings with 3rd defendant regarding the property could not have influenced 5th defendant's decision to purchase at the auction. Consequently no fraud was perpetuated against 5th defendant on account of the separate corporate personalities of 1st defendant and Bikkai Laborarories Ltd to warrant a piercing of the corporate veil.

Before we are done, we wish to associate ourselves with the observations by the trial judge concerning the dishonest behavior exhibited by 2nd defendant, the auctioneer in this case. The record shows that his conduct as an auctioneer left much to be desired. The courts are, as far as possible, to avoid dealing with him with regard to auction sales.

For the reasons stated above, we allow both appeals. We set aside the judgment of the Court of Appeal and restore the judgment of the High Court. The money paid by 5th defendant is to be refunded to it.

(SGD) G. PWAMANG

JUSTICE OF THE SUPREME COURT

(SGD) W. A. ATUGUBA

JUSTICE OF THE SUPREME COURT

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA

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