IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2017

CORAM: YEBOAH, JSC PRESIDING
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
AKOTO-BAMFO, JSC
APPAU, JSC

CIVIL APPEAL

NO. J4/13/2017

10TH MAY, 2017

ROULA ZRAIK
(SUING AS THE MAJORITY SHAREHOLDER
IN CREAM TIMBER MOULDING
COMPANY LTD.) - PLAINTIFF/RESPONDENT/RESPONDENT

VRS

1. TRANSLAS LIMITED - 1ST DEFENDANT/RESP./RESPONDENT
2. HUSSEIN ZRAIK - 2ND DEFENDANT/RESP./RESPONDENT
3. MILLICENT APPAH - 3RD DEFENDANT/APPELT./APPELLANT

JUDGMENT

YAW APPAU, JSC:-

The fundamental issue raised in this appeal, which is a second appeal by the Appellant, having lost the first appeal in the Court of Appeal is; ***Whether or not the ownership of the disputed properties***

described as Plot Nos. D3, D4, D6, D7, D8, D9 and D14, Apremdo – Takoradi, had already been determined between the two parties by a court of competent jurisdiction as at the time the Respondent instituted this action in the trial High Court on 11th February, 2011.

The genesis of this appeal is that; the Respondent herein instituted action in the High Court, Sekondi as the majority shareholder in a company by name Cream Timber Moulding Company Limited (hereinafter referred to as Cream Timbers). Her claim, initially, was against two defendants, namely; TRANSLAS LIMITED and her own uncle by name HUSSEIN ZRAIK, as 1st and 2nd Defendants respectively. The reliefs sought in the claim against the Defendants jointly and severally were for:

1. *An order setting aside whatever agreement existing between the Defendants, which agreement gave the 1st Defendant the right to reside and carry on business on Cream Timbers' premises on Plot Nos. D3, D4, D6, D7, D8, D9 and D14, Apremdo Industrial Area, Takoradi as illegal and invalid;*
2. *An order of perpetual injunction restraining the 1st Defendant, whether by itself , its agents, assigns, privies, servants etc. and the like howsoever from entering the said plots of land either to reside or to carry on business thereon; and*
3. *Damages for trespass.*

Her case in brief was that the said properties belonged to Cream Timbers of which she was the majority shareholder with 60% shares while the 2nd Defendant was the minority shareholder with 40% shares. She became a majority shareholder by succession per a judgment of the High Court dated 26th July 2002. However, she did not know how the 1st Defendant came to settle on the land. She was therefore praying the trial court to nullify any purported agreement entered into between the 1st Defendant and the 2nd Defendant that permitted the 1st Defendant to settle on the properties, since she was not a party to any such agreement. She also prayed for an order to restrain the 1st Defendant from entering and doing business on the said properties and damages for trespass. The Appellant herein, from whom the 1st Defendant rented the property in dispute, successfully applied to join the action as the 3rd Defendant.

From the totality of the evidence on record and particularly the unchallenged case put across by the defendants, the 1st and 2nd Defendants did not even know each other so they could not have entered into any agreement over the disputed properties. In fact, the Respondent did not establish in any way that there existed any agreement between the 1st and 2nd Defendants which the trial court had to nullify as she prayed. The 1st relief sought by the Respondent in her claim was therefore dead from birth. However, aside of the 1st relief, the Respondent prayed for two other reliefs. These were: ***(i)*** *an injunction to restrain the 1st Defendant and her agents, etc. from entering the premises in dispute; and* ***(ii)*** *damages for trespass, as quoted above.*

It is trite law that where a plaintiff claims an injunction in addition to damages for trespass, title is automatically put in issue because such a claim postulates that the plaintiff is either the owner of the property in dispute, or was in exclusive possession of same prior to the trespass complained of. In the instant case, the contention of the Respondent (then plaintiff) was that, the disputed properties belonged to Cream Timbers, a company in which she held majority shares. She therefore took the action to assert Cream Timbers' interest in or ownership of the disputed properties.

The defence put up by the defendants in its totality also disclosed that Cream Timbers, on whose shoulders the Respondent mounted the action, lost its interest in the subject properties since 2003 when it assigned same to a company by name Dalebrook Limited. Dalebrook also lost its interest in the said properties to the Appellant as purchaser when the properties were attached by a court order and sold at public auction ordered by the High Court on 11th October 2008. Though Cream Timbers tried to set aside the public auction in an action mounted immediately after the sale to Appellant, it did not succeed in its bid. The action in question was titled**: 1. Cream Timbers Moulding Company Ltd; 2. Hussein Zraik v 1. Joris Wartemberg; 2. Millicent Appah.** The suit number was E1/27/09 and the reliefs sought in that action were:

i. *Order to set aside the auction sale of 11th October 2008;*
ii. *Perpetual Injunction restraining the defendants, their agents, assigns, etc. from taking any rights arising from the said auction sale;*

iii. *Perpetual Injunction restraining the defendants, etc. from doing any acts inconsistent with plaintiffs' rights as lessees of the plots in issue; and*

iv. *General damages for trespass.*

The judgment of the High Court in that case was dated 29th June 2010, which the Appellant tendered in evidence during the trial. The claim by the Appellant therefore that she was the new owner of the disputed properties per the judgment in question so the Respondent was estopped per rem judicata from re-litigating the issue, constituted adverse title claim to the subject properties. The question of ownership to the disputed properties between the Appellant and Cream Timbers therefore emerged indisputably and both the trial court and later the Court of Appeal were under an obligation to address it, which they failed to do.

The Appellant graphically demonstrated her adverse claim of title to the disputed properties without any challenge from the Respondent when she appeared before the trial court and on appeal to the Court of Appeal, but the two lower courts decided to express muteness on this crucial issue. In fact, this was the preliminary issue the trial court should have resolved before delving into the propriety of the actions of the 2nd Defendant as the Managing Director of Cream Timbers; whether elected or self-imposed which, in our view, was secondary. The two lower courts, however, raised the secondary issue *suo motu* and determined the matter before them on that basis, albeit erroneously and contrary to the Company's Act, 1963 [Act 179].

Appeal to the Supreme Court

The prayer of the Appellant in this appeal is for this Court to set aside the judgment of the Court of Appeal that affirmed the judgment of the trial High Court. The Appellant repeated almost all the grounds of appeal canvassed in the Court of Appeal. The most fundamental amongst them, as stated supra in the first paragraph of this judgment, is the question as to whether or not the issue regarding the ownership of the disputed properties, as between Cream Timbers and the Appellant, is *res judicata*, same having been put to rest by a judgment of the High Court, Sekondi per Batu, J. as at the time the Respondent instituted her action over the same properties. If this Court's answer to the above question turns out to be in the affirmative, then there would be no need to waste time on the

other grounds of appeal as that finding alone settles the appeal in favour of the Appellant. This is because; the law debars the same parties from litigating a second lawsuit on the same matter or claim, or any other claim arising from the same transaction. This is the principle known in law as ***Estoppel per rem judicatam*** or ***Res Judicata*** in short, as canvassed by the Appellant in her statement of case.

However, if this Court finds that the issue with regard to the ownership of the properties had never been determined by a court of competent jurisdiction as at the time Respondent instituted her action, which means the *res judicata* principle does not apply, then the fundamental issue that would arise for determination would be; whether or not both the trial High Court and the Court of Appeal erred when they nullified the transactions entered into between Cream Timbers on the one part and Dalebrook Ltd on the other part, on the ground that the 2nd Defendant who acted for and on behalf of Cream Timbers as Managing Director, had no authority to do so.

An appeal is said to be by way of re-hearing. As was settled by this Court in the case of **TUAKWA v BOSOM [2001-2002] SCGLR 61** and a host of other authorities; it is the duty of an appellate court, in determining an appeal before it, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial, before arriving at its decision as to whether or not, on a preponderance of probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence. This requirement that an appellate court must evaluate the evidence on record as if the case is being heard afresh before concluding on the correctness or otherwise of the judgment of the trial court is not lessened where the appellate court exercising that authority is a second appellate court like ours.

The principle of *Res Judicata*

As the Appellant rightly contended in her statement of case filed on 27th June 2017, the principle of *res judicata* is based on the public policy that there must be an end to litigation, which is expressed in the latim maxim; '*interest reipublicae ut sit finis litium'*. In the words of Acquah, JSC (as he then was) in the case of **IN RE SEKYEDUMASE STOOL; NYAME v KESE 'alias' KONTO [1998-99] SCGLR 478**: *"The plea of Res Judicata can be invoked in respect of any final judgment delivered on the merits by a judicial tribunal of a competent jurisdiction. Such a judgment is*

conclusive as to the rights of the parties and their privies and as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action". See also the cases of CONCA ENGINEERING (GH) LTD v MOSES [1984-86] 2 GLR 319; SASU v AMUA-SAKYI & Anor [2003-2004] 2 SCGLR 742 and BOAKYE v APPOLLO CINEMAS & ESTATES (GH) LTD [2007-2008] SCGLR 458; ASSAFUAH v ARHIN DAVIES [2013-2014] SCGLR 1459 and ATTORNEY-GENERAL v SWEATER & SOCKS FACTORY LTD [2013-2014] 2 SCGLR 946 at PP 951-952.

In the *A –G v Sweater & Socks case* (supra), this Court stressed that even where a party fails to specifically plead the defence of *estoppel per rem judicatam*, same is not fatal to the party's case because the need for substantial justice must not be sacrificed on the altar of technicality of rule procedure. The Court held; ***"Thus, where the plea has not explicitly been set out, but the defendant's statement of case points unequivocally or substantially to the plea, the court is bound to consider it as if same has been specifically raised by the defendant".***

In the instant case before us, the Appellant did not only explicitly set out the plea in her pleadings in the trial court; she led unchallenged evidence to prove or establish it. She also raised it as a ground of appeal in her notice of appeal to the Court of Appeal when the trial court failed to consider the plea. The Court of Appeal also ignored it completely. The evidence on record, however, suggests without any doubt whatsoever that the properties described by the Respondent in her Writ of Summons as belonging to Cream Timbers for which she sued the Appellant and the others, have once been litigated over between Cream Timbers (i.e. the Company she represents) and the Appellant herein. The Appellant demonstrated this in her evidence (both oral and documentary) beyond all doubts. This determination was in the case of: *Cream Timbers & Another v Joris Wartemberg and Millicent Appah* (i.e. the Appellant) referred to supra, which the Appellant brought to the attention of the trial court as the record shows. Cream Timbers lost in the action but did not appeal against that judgment. The effect of that judgment was that the disputed properties belonged to the Appellant. The present case on appeal before us is therefore a revival of the old case fought between Cream Timbers and the Appellant in suit No E1/27/2010 with regard to

Appellant's ownership of the subject-property but robed in different clothing. The action was carved as if the Respondent was attacking her uncle the 2nd Defendant for his acts as a director of Cream Timbers when in fact and indeed, it was intended to re-litigate the ownership of the disputed properties as between Cream Timbers and the Appellant, which is a closed chapter. The law does not permit her to do that as the case is caught by the estoppel principle.

If the Respondent has any claim at all with regard to how Cream Timbers was managed by the 2nd Defendant, that may be against Cream Timbers qua Company and probably the 2nd Defendant as a Director. It cannot be against the Appellant whose ownership of the disputed properties is grounded in law and cannot be reversed at this stage until fraud in the acquisition of same has been proved or established since fraud vitiates everything. Undoubtedly, fraud was not an issue at all in this case. The trial court and particularly the Court of Appeal should not have been hoodwinked by this disguise. They both strayed from the real issue at stake before them and that was; ***whether or not the issue with regard to the ownership of the subject-properties as between the parties herein had been given a final judicial blessing as at the time Respondent initiated her action against the Appellant and the two others***.

Since the Respondent's claim was buttressed on the point that she had interest in the disputed properties as majority shareholder of Cream Timbers, which she said owned the properties, she is a privy to Cream Timbers and equally bound by the judgment the Appellant obtained against Cream Timbers on 29th June 2010. She is therefore estopped per rem judicata from re-litigating the issue of ownership of the disputed properties with the Appellant in the name of Cream Timbers. It is unfortunate that the two lower courts glossed over this undisputed fact as clearly demonstrated by the Appellant in her testimony on record and erroneously found for the Respondent. On this ground alone, the appeal succeeds.

Having so concluded, we do not think it is worthy to consider the other grounds of appeal as the judgment of the High Court as affirmed by the Court of Appeal was erroneous in law and must be set aside without any hesitation. The appeal is accordingly allowed.

SGD **YAW APPAU**
(JUSTICE OF THE SUPREME COURT)

SGD **ANIN YEBOAH**
(JUSTICE OF THE SUPREME COURT)

SGD **PAUL BAFFOE-BONNIE**
(JUSTICE OF THE SUPREME COURT)

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

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(JUSTICE OF THE SUPREME COURT)

COUNSEL

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