IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
DOTSE, JSC
BAFFOE-BONNIE, JSC
GBADEGBE, JSC
BENIN, JSC

CIVIL APPEAL
NO. J4/37/2016

31ST JANUARY, 2018

THERESAH HALIGAH ..... PLAINTIFF/APPELLANT/APPELLANT

VRS

DUKE BANSON ..... DEFENDANT/RESPONDENT/RESPONDENT

J U D G M E N T

ADINYIRA, JSC:-

This is an appeal against the judgment of the Court of Appeal, Accra, dated 17 March 2016 which affirmed the decision of the High Court Accra in a dispute over the sale and purchase of House No. 10 Nii-Owoo Street, Green Hill (Kisseman) West Legon, and now House No. 15 Westlands Boulevard, West Legon, Accra.

Theresa Haligah, the Plaintiff/Appellant/ Appellant [Plaintiff]] is an hotelier and Duke Banson, the Defendant/ Respondent/Respondent [Defendant] is a businessman. The plaintiff issued a writ at the High Court Accra on 28/1/05 claiming:

1. A declaration that the defendant is estopped from acting differently from his representations and offers to sell a house which was accepted by the plaintiff and duly relied upon.

2. A declaration that the purported tenancy agreement is null and void as same is a forgery.

3. Specific performance of the terms of the agreement entered into between the plaintiff and the defendant for the sale and purchase of House Number 15 Westland Boulevard, West Legon, Accra the subject matter of this suit.

4. Perpetual injunction restraining the defendant, his agents, assigns successors and agents from harassing and or interfering with the plaintiff's rights to occupation, possession, enjoyment and use of her property.

The defendant denied the plaintiff's claim and counterclaimed for:

a) A declaration that the defendant is the legal and beneficial owner of the disputed premises.

b) An order for the recovery of possession of the premises.

c) Payment of mesne profits from 1st July 2004 to date of judgment together with interest thereon.

d) Perpetual injunction restraining the plaintiff from advertising and or renting out the premises during the pendency of this action.

e) Costs and such further order or orders as the Honourable Court may deem fit.

The plaintiff's case was that she rented the house in dispute in August 1999 from Mrs. Esther Caroline Augustus at a rate of ¢350,000 [GH¢35] per month. Later a daughter of the landlady introduced the defendant to her as having bought the house. When her tenancy with Mrs. Esther Caroline Augustus ran out she wrote to the defendant that she would rent the premises from the defendant at ¢500,000.00 [GH¢50] a month. She tendered the letter dated 11th October 2001 in evidence as Exhibit E. Subsequently she agreed to purchase the house from the defendant for $60,000 which was later reduced to $50,000. According to the plaintiff they agreed that the purchase price will be paid in installments as a result of which she paid $10,000 to the defendant and due to a friendship which had developed between them they agreed that the receipt on the part payment of the $10,000 towards the purchase of the house should be described as rent. She tendered this receipt dated 8 July 2002 in evidence as Exhibit A. The plaintiff said that Joe Aboagye Debrah, a lawyer, (who gave evidence as PW1), attested to her signature on Exhibit A and after reading the receipt he asked why the receipt did not express the intended sale and he was assured that the documents for the sale of the house will be prepared after the full purchase price had been paid. The plaintiff continued that after the part payment of the $10,000 in June 2002, she became the owner of the house and so she did not pay any rent to the defendant. According to the plaintiff the defendant sued her at the District Court, Madina, for non-payment of rent and obtained an order for her ejection. The plaintiff said the tenancy agreement that the defendant relied on at the District Court was a forgery as the signature on the agreement is not hers. She tendered this tenancy agreement in her evidence at the High Court as Exhibit G5. The plaintiff thus contended that the defendant fraudulently obtained Exhibit A and G5 from her. She therefore asked for specific performance of the agreement for the sale and purchase of the house.

The defendant's case was that the plaintiff became his tenant when he purchased the house from Annette Augustus in the year 2000 and tendered three documents Exhibits 1, 2 and 3 in proof of his title. He decided to sell the house, so he gave the plaintiff, the sitting tenant, the first option to purchase. Negotiations for the sale were through

their respective lawyers but it became apparent that the plaintiff was not in the position to purchase the house and his lawyer wrote a letter dated 16 November 2000 to revoke the offer. He said when the plaintiff's term as a sitting tenant expired; they entered into a tenancy agreement of the premises for two years at a rent of $10,000 which was evidenced by the receipt. He said later they executed a tenancy agreement, Exhibit 4. The defendant testified that the plaintiff did not abide by the terms of the lease because whilst the premise was let as a residential property, the plaintiff was using it for commercial purposes. The defendant tendered in evidence a newspaper advertisement placed by the plaintiff offering hotel facilities in the said premises. As a result he caused his solicitor to write to the plaintiff and her solicitor and they replied admitting the landlord tenant relationship between them but denied the plaintiff had changed the use of the premises. The defendant sued the plaintiff at the District Court, Madina in 2004 and obtained an order of injunction restraining the plaintiff from using the property as a hotel. The defendant denied that he defrauded the plaintiff into signing Exhibits A and 4 and that the agreement for sale of the premises to the plaintiff was revoked by a letter tendered by the plaintiff as Exhibit D7. The defendant prayed the court to dismiss the claims of the plaintiff and uphold his counterclaim.

The main issue for determination before the trial court was whether there existed an agreement for the sale of House No. 15 Westland Boulevard, West Legon, Accra to the plaintiff for which she made a part payment of $10,000, or whether there was a tenancy agreement between the parties as contended by the defendant; who relied on Exhibits A and 4 to support his claim that the transaction he had with the plaintiff was solely for the rental of the property in dispute.

We summarise the primary findings made by the learned trial judge on the strength of the record, which were affirmed by the Court of Appeal as follows:

i) The defendant is the owner of the house No. 15 Westlands Boulevard, West Legon, Accra the subject matter of the dispute.
ii) That there was no contract of sale of the said house between the parties

iii) That the amount of US $ 10,000 was for rent for a two year period from 1 July 2002 to June 31, 2004

iv) That the plaintiff was a statutory tenant and has to pay the least rent at a mesne profit of ¢3, 333,000.00 [GH¢333.00] per month with interest from 1 July 2004 till the time that Plaintiff vacates the said house.

v) The defendant was entitled to an immediate recovery of possession of the house No. 15 Westlands Boulevard, West Legon, Accra, from the plaintiff.

It is settled law that an appellate court such as this ought not to disturb findings of fact by two lower courts unless the findings are perverse. In **Achoro v Akanfale [1996-97]** SCGLR 209 at 214 to 215, per Acquah JSC (as he then was):

> "Now in an appeal against findings of facts to a second appellate court such as this court, where the lower appellate court had concurred in the findings of the trial court, especially in a dispute, the subject matter of which is peculiarly within the bosom of the two lower courts or tribunals, this court will therefore not interfere with the concurrent findings of the lower courts unless it is well established with absolute clearness that some blunder or error resulting in a miscarriage of justice, is apparent in the way in which the lower tribunal dealt with the facts."

The Court proceeded to mention three such blunders as:

> "Error in the face of a crucial documentary evidence, or that a principle of evidence had not properly been applied, or that the finding is so based on erroneous proposition of the law that if that proposition be corrected the finding disappears. In short it must be demonstrated that the judgments of the court below are clearly wrong." The cases of *Thakur Harihur Buksh v* Thakur *Union Parshad (1886)* LR 151A7*; Robins v National Trust Co* [1927] AC 515*, Allen v Quebec Warehouse Co* (1886) 12 App Cas 101. "

See also *In Re Okine (Decd); Dodoo and Another v Okine and Ors* [2003-2004] SCGLR 582

In as much as the two courts below are agreed on the findings of facts itemized above it is not pertinent to set out the evidence produced at the trial in much detail but to proceed to consider the grounds of appeal to determine whether there is any justification in the submissions by counsel for the Plaintiff that, there has been some blunders or errors on the part of both the trial court and the Court of Appeal in dealing with facts of the case which has resulted in a miscarriage of justice to warrant a reversal of the decision of the Court of Appeal.

The grounds of appeal are:

i) The judgment is against the weight of evidence.

ii) The Court of Appeal wrongly granted immunity to defendant to breach a Parliamentary Act by its reliance on exhibit 4, a tenancy agreement which had no attesting witnesses and date of execution, in a patent miscarriage of justice against plaintiff.

iii) The learned Justices of the Court of Appeal erred in law by failing to hold that the monthly payments of GH¢50.00 which plaintiff made to defendant, pursuant to exhibit "E" and determination of the tenancy agreement created by exhibit "B" were statutory rent payments.

iv) The Honourable Court further erred in law by failing to fully consider plaintiff's case, including the history and circumstances of exhibit "A".

v) The awards of mesne profits and costs to the defendant were too excessive and unsupported by the evidence on record

The crux of the submissions before this Court by counsel for the plaintiff is against the findings by the lower courts in relation to Exhibits A, E, 4 and the determination of the mesne profit and costs due to the defendant. We will consider the appeal in this order while reviewing the whole record of proceedings since the plaintiff alleges the evidence is against the weight of evidence. If the totality of the evidence on record sufficiently support the conclusions reached by the Court of Appeal, it is our duty to affirm their lordships' decision.

Exhibit A

Exhibit A is a receipt on which the plaintiff relied as proof of part payment of $10,000 out of $50,000 of the agreed purchase price of the house. Counsel for the plaintiff submits that: "the two courts below did not consider the degree of certainty of existence of evidence adduced by the plaintiff that the payment of her entire end of service benefits from her former employers, as a deposit against the purchase of the subject matter as being more probable than the defendant's case that the plaintiff agreed to pay a monthly rent of GH¢333.30 a time when plaintiff had given up her job and was not expected to receive any interest as she was out of job and was not working." Counsel submitted further that: "The courts did not also consider that on the eve of Exhibit A, the plaintiff had been paying a monthly rent of GH¢50 as a statutory tenant for the same property and that it would have taken something very substantial for plaintiff to have agreed to pay a new rent per month of GH¢333.30"

This submission by counsel has agitated our minds a bit and we have given due consideration to it and examined the whole record, including exhibits and submissions by both counsel before the courts below as it is trite law that an appeal is by way of rehearing.

We have examined Exhibit A and it does not show it was a receipt for the payment of $10,000 as part payment for the purchase of the house. Exhibit A on the face of it is a

receipt for the payment of $5,000 and GH¢2,000 for rent for a two year period; and the balance of $ 2,500 to be paid later. For purposes of clarity we reproduce Exhibit A:

RECEIPT

"This is to acknowledge receipt of an amount of Five Thousand United States Dollars (US$5000.00) and Twenty Million Cedis (¢20,000,000.00) [GHC2,000] being part payment of rent for House numbered 15, Green Hill, off Westlands Boulevard, West Legon for the period July, 1, 2002 to June 31[sic], 2004 on the understanding that the outstanding balance of Two Thousand and Five Hundred United States Dollars (US$2,500.00)shall be payable by Ms Theresa Haligah (The Tenant) on or before August 16, 2002.

DATED AT ACCRA THIS 8TH DAY OF JULY, 2002

SIGNED: **DUKE BANSON (LANDLORD**

WITNESSES:

1. SIGNED **JOE ABOAGYE DEBRAH**
2. SIGNED **DAVID BANSON**
3. SIGNED **THERESA HALIGAH"**

We find that the trial judge, Owusu- Arhin J. (Mrs.) painstakingly examined the evidence led by both parties on the circumstances that led to the execution of Exhibit A. Her findings were that PW1's evidence did not corroborate the Plaintiff's evidence that there was a sale of the house for which she made a part payment of $10,000 to the defendant in his presence. The trial judge held that PW1 witnessed the payment of only $5,000.00 US dollars and GH¢2,000 on the 8th July 2002 and his evidence did not cover the alleged meetings and terms of the contract of sale that the plaintiff said she had with the defendant.

The trial judge did not find the Plaintiff's evidence reasonably probable when she expressed her view on the issue thus:

> "[T]he plaintiff herself admitted typing Exhibit A and signing it voluntarily. The plaintiff stated in evidence that at the time of the signing of Exhibit A she knew the subject matter was about the sale and purchase of the defendant's property in dispute. As a matter of fact the plaintiff is literate and given her status, it is doubtful she will throw all caution to the wind and sign Exhibit A which was clearly not in her interest. An act which calls into play the legal maxim of `*volenti non fit injuria*."

The trail judge went on to say that:

> " Furthermore, the plaintiff's witness a lawyer by profession stated in evidence that he cautioned the parties, especially the plaintiff about Exhibit A because its contents did not reflect what she (the plaintiff) had discussed with him that she was buying the property in dispute from the defendant."

We do not think it is appropriate for counsel for the plaintiff to urge on us that Exhibit A was "not by all standards authentic" when same was prepared and signed by his client, against the advice of PW1. This smacks of lack of candour on the part of counsel.

Weighing the preponderance of the probabilities of the evidence adduced before the court; we do not think both the trial judge and the Court of Appeal erred in coming to the conclusion that Exhibit A was a receipt for rent paid. We therefore affirm this decision.

Exhibit 4

Exhibit 4, a tenancy agreement was neither attested to nor dated. Counsel for the plaintiff submits that: "wrongly believing that Exhibit 4 was a valid agreement enforceable at law, the Court of Appeal fell into error of law in purporting to assign weight to it."

Even if we discount Exhibit 4, it does not advance the plaintiff's case in any way as it does not affect the primary finding of facts by the trial court and as affirmed by the Court of Appeal that the house in dispute is the property of the defendant and that there was no contract of sale. We do not find any evidence of miscarriage of justice as we find on the evidence that the defendant's lawyer wrote on 16 November 2000 (Exhibit D7) to the plaintiff's lawyer to revoke the offer of sale as the plaintiff failed to pay the purchase price within the agreed period. After the revocation, the plaintiff's lawyer wrote to the plaintiff to vacate the premises and she replied her tenancy with Mrs. Augustus has not expired. See ***Achoro v Akanfela supra*** and ***Obrasiwa v Otu*** [19976-97] SCGLR 618 at 624 where it was held that it is important for the appellant to point out and establish that the said error has led to a miscarriage of justice.

.**Mesne profit**

Mesne profit is usually based on the least rent payable in a dispute such as this where the plaintiff was unable to purchase the house and continued to live in it without paying rent from July 2004 as established by the court. Counsel for the plaintiff made extensive submission on Exhibit E, a letter dated 11 October 2001 written by the plaintiff offering to remain in the house in dispute for six months when her tenancy agreement with Mrs. Augustus expired and offering to pay GH¢50.00 a month as rent while hoping to raise money to purchase the house. Counsel concluded that the plaintiff became a statutory tenant after the expiration of her lease in September 2001. This submission is misconceived as after the term of the plaintiff as a sitting tenant expired, it can be reasonably inferred from her letter, Exhibit E and the receipt, Exhibit A that she made a part payment of rent to the defendant as his tenant. Counsel tried to link Exhibit E with Exhibit A to demonstrate the plaintiff's intention to pay for the house, but this was a fruitless effort as the offer to sell the house has been revoked months earlier and there was no evidence that a fresh offer for sale was made by the Defendant.

Before the trial court the plaintiff disputed the payable rent and the matter was referred to the Land Valuation Division of the Lands Commission, which assessed the

rent as ¢246,000.00 [GH¢24.60]. We take note that the trial court did not rely on the monthly rent assessed by the valuer but chose to rely on the rent of GH¢333.30 per month as stated in Exhibit 4. The trail judge's reasoning that "the rents arrived at must not have effect on the tenancy voluntarily contracted between the defendant and the plaintiff as evidenced by Exhibits A and 4" is in error in view of our finding on Exhibit 4.

Taking into consideration all the surrounding circumstances of this case, we see no justification for the trial judge in disregarding the least rent of GH¢24.60 assessed by the court witness, as the valuation was based on the sale and rental of properties in the area where the house was situated. We find the amount of GH¢ 24.60 to be reasonable.

We will therefore vary the mesne profit awarded by the court to reflect that of the valuation from the Lands Commission.

From the foregoing we affirm the decision of the Court of Appeal subject to the variation of the mesne profit which is to be assessed at GH¢24.60 with interest calculated at the current bank rate at simple interest from 1st July 2004 till when the plaintiff vacates the premises.

The appeal is dismissed subject to variation of the mesne profit.

S. O. A. ADINYIRA (MRS.)
(JUSTICE OF THE SUPREME COURT)

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