IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF JUSTICE
ACCRA-GHANA

CORAM: ATUGUBA, JSC (PRESIDING)
AKUFFO (MS), JSC
BROBBEY, JSC
ANSAH, JSC
GBADEGBE, JSC

CIVIL APPEAL
NO. J4/6/2010
26TH MAY, 2010

1.	**DR. KWAME APPIAH POKU**		
2.	**DR. CHARLES KWAMENA ADU POKU**		
3.	**REV. FR. APPIAH POKU**		
4.	**NANA OSEI SARPONG**		
	C/O SCHOOL OF MEDICAL SCIENCES, KUMASI (EXECUTORS OF THE WILL OF FRANCIS KOJO POKU (DECEASED)	**...**	**PLAINTIFFS/RESPONDENTS/ APPELLANTS**
	VRS		
1.	**KOJO NSAFOA POKU**		
2.	**YAW ABOAGYE POKU**		
3.	**KWASI ADU POKU**		
4.	**FRANCIS KWABENA POKU**		
5.	**KOFI DARKWA POKU**		
6.	**HELENA AKYIAA POKU**		
	ALL OF FANKYEREBRA ESTATES, KUMASI	**...**	**DEFENDANTS /APPELLANTS/ RESPONDENTS**
7.	**DR. KWABENA ASUBONTENG OF SUNYANI GENERAL HOSPITAL SUNYANI**		

J U D G M E N T

ATUGUBA, JSC:-

On 29/4/2010 we unanimously dismissed the appeal in this case but reserved reasons.

We now proceed to give them.

Facts of the case

The late Francis Kojo Poku a well known industrialist by his last will and testament dated 11th October 2001 appointed the Appellants as executors of his will. The executors then applied and were granted probate on 11th February 2003 by the High Court, Kumasi. The Respondents herein then Plaintiffs in Suit No. CS 107/03 issued a writ in the High Court Kumasi against the Appellants then Defendants claiming, inter alia, a declaration that the grant of probate of the will of the late Francis Kojo Poku to the executors was null and void and ought to be revoked.

The High Court subsequently on 19th October 2004 gave judgment for the Plaintiffs in the said suit No. CS107/03 declaring that the will of the late Francis Kojo Poku was null and void in that the testator was blind and therefore could not have executed the will allegedly ascribed to him.
In arriving at its decision, it is alleged, the High Court had relied, inter alia, on the evidence of one Dr. Kenneth Asubonteng (PW4) the 7th Respondent herein. This is what the High Court allegedly said:

> "PW4's evidence coupled with the various instances the Plaintiffs gave in their evidence as constituting facts of their father's blindness I find to be sufficient proof that the late Mr. F.K. Poku as at October 11th 2001 was blind."

Subsequently the plaintiffs/appellants alleged that they had come by legally verifiable information which showed clearly that the evidence of Dr. Kenneth Asubonteng (PW4) in Suit No. CS 107/03 was fraudulent and the records and documents he had presented at the trial were complete fabrications. That Dr. Kenneth Asubonteng's evidence was false and its sole purpose was calculated to deceive the court, and in fact did succeed in misleading the court to arrive at its decision of 19th October 2004.

The Plaintiffs/Appellants thereupon sued in the High Court Kumasi, claiming, inter alia,

"(i) Declaration that the judgment of the Kumasi High Court dated 19th October 2004 in Suit No. CS107/03 delivered by Her Lordship Mrs. A. Dordzie in favour of the Defendants herein, *was obtained by fraud and therefore the same ought to be set aside."*

The Respondents herein unsuccessfully applied to the trial court to stay the said proceedings. On appeal the Court of Appeal allowed the same and dismissed the said action "*as frivolous and vexatious*." The appellants have appealed to this court.

Grounds of Appeal

(a) The court erred in exceeding its jurisdiction to determine the interlocutory appeal before it and went outside the scope of the appeal before it to make a definitive pronouncement on the merits of the case when no evidence had been led before it and rather imported perjured evidence in an earlier suit under challenge in the High Court to be admitted as findings of fact in the appeal before it.

(b) The court erred in relying on submissions filed by the Defendants/Appellants/Respondents out of time without an application for extension of time.

(c) Since a judgment obtained by fraud can only be set aside by a fresh action and since the appellants allege that the judgment delivered by Dordzie J was delivered by fraud and therefore brought a fresh action to set it aside. The learned justices of the court of appeal erred and occasioned a great miscourage of justice when they held that the appellants were wrong in instituting a fresh action to set aside the judgment obtained by fraud by so doing the judgment given by the learned justices of the Court of Appeal was given per incuriam contrary to decisions of the Supreme Court.

(d) Since the genesis of the appeal before the learned justices of the Court of Appeal was an application for stay of proceedings before the High Court and since the Supreme Court had ruled that the High Court had no jurisdiction to stay proceeding the learned justices of the Court of Appeal erred and acted per incuriam when they faulted the High Court Judge for failing to grant the application for Stay of Proceedings.

(e) The court erred in making findings of fact on disputed affidavit evidence.

(f) The court erred in exercising its inherent jurisdiction to dismiss the writ that has been filed by the Appellants to challenge the judgment delivered on the grounds of fraud and in the process encouraged fraudulent evidence thereby occasioning a grave miscarriage of justice.

(g) The court erred in its analysis and conclusions on circumstances when a judgment can be said to have been obtained by fraud.

(h) The court's recourse to hypothesis is impermissible, erroneous and misconceived as same had no relevance to the appeal before it.

(i) The court erred in holding that the judgment of Dordzie J would not have changed even if the perjured evidence of Dr. Asubonteng is expunged.

(j) *The court erred in dismissing the Plaintiffs/Respondents/Appellants suit as frivolous and vexatious and at the same time staying it permanently*.

(k) The court erred in holding that it will be wrong to try the issue of the validity of the Will of F.K Poku again."(e.s)

From the above, two matters of substance stand out. The first is that the appellants were right in bringing their action to impeach the earlier judgment of Dordzie J for fraud. The second is that the Court of Appeal erred in dismissing the said action under the inherent jurisdiction as being frivolous and vexatious.

(a) <u>The right to bring an action to set aside a judgment obtained by Fraud</u>

It is an entrenched trite principle of law that fraud unravels everything and that a judgment obtained by fraud can be impeached by fresh action.

<u>Incumbrances</u>

However this general rule is not a right conferred by the common law free from all incumbrances. One such incumbrance which is relevant to the facts of this case is the necessity to exercise diligence at the first instance. It is clearly established that if a party be actually or constructively cognisant of fraudulent matters in the first action but fails to avail himself of them at that time, he cannot thereafter seek to impeach the decree of the court on those grounds. This principle has been fully laid down by Adumua-Bossman J (as he then was) in *Anyimah III v. Kodia IV* (1962) 2 GLR 1. That was an action to set

aside the judgment of Dennison Jin the Land Court, Cape Coast "on *the grounds of fraud and collusion*". It was held as stated in holding (4) of the headnote thus:

> "(4) *Assuming even that all the allegations in the writ and statement of claim were true*, they nevertheless still did *not disclose any good or sufficient cause of action. The alleged misrepresentations should have been discovered at first instance through the use of ordinary diligence. Pon v. Fua* (1929) F.C. '26 -'29, 522 and *Flower v Lloyd* (1877) 6 Ch.D. 297, C.A. cited."(e.s)

To emphasise this principle, which appears to have suffered some obscurity in practice, we would quote certain excerpts from that judgment. At p.18 the learned judge states thus:

> "[I]n *Kojo Pon v. Atta Fua* in which the fraud alleged and relied on was alleged to consist in:
>
> "gross misrepresentation made in deceit of the Court by the linguists of the defendant in, 1916, as to a Native Tribunal competent to try the matter in controversy between the parties [being available or in existence] whereby the plaintiff's cause was referred."
>
> x x x
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> Michelin, J.....said:
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> "In the present case, the learned Chief Justice held, in the course of his judgment, that he was not satisfied upon the evidence that fraud had been proved, and he has also held that *the witnesses who gave evidence before him, were in Court at the original trial, and were available if their evidence was desired; and that they gave no new evidence in this action which could not have been used when the decree was made [in the first action.]"*(e.s)

Continuing, Adamua-Bossman J. said:

> "Let us then consider or examine again the allegations of fact set out in the writ and statement of claim, and attempt to apply the principles or rules disclosed in the cases reviewed to those allegations, bearing in mind what Cozens-Hardy, L.J. said in *Birch v. Birch"* that "A mere general allegation of fraud without particulars will not avail" and, therefore, taking the allegations set out in the writ and statement of claim as the "particulars of fraud" on which the plaintiff relies,

namely, *that the Dadiaso chief as plaintiff in the action before Dennison, J. conspired and/or colluded with Kofi Amankwa to give false evidence (or to tell deliberate falsehoods) and the conspiracy was actually carried out and the false evidence given, by which the court was misled to give judgment for the Dadiaso stool*. The false evidence alleged was (a) as to the witness Kofi Amankwa being a chief in the first place when he was no chief at all and as to his being in the second place the duly authorised representative of the Omanhene of Manso-Nkwanta when in truth and in fact he was not; and (b) as to Manso-Nkwanta having boundary with Dadiaso, when in truth and in fact the boundary was with Sefwi-Anwhiaso as determined by the Order in Council of the 22nd October, 1906. *The first question however, is that assuming those were falsehoods or misrepresentations, were they such as could not at the time, by the use of reasonable diligence, be exposed*? It would surely be idle to argue that *where a person in the course of evidence* in the Supreme Court during the years 1949-51 *misrepresents that he is a chief when in truth he is not a chief at all, he could not almost immediately after he had spoken the words, by reference to the chiefs list, or at latest the next morning by enquiry to the appropriate district commissioner's office, be exposed as being a nobody; equally, if the misrepresentation was that he was the duly accredited representative of an Omanhene, that at latest by the very next day by enquiry from the Omanhene himself, the imposter, if such he be, could not be exposed.*

Learned counsel for the plaintiff has urged and stressed that the misrepresentation by Kofi Amankwa that he was the representative of the Omanhene of Manso-Nkwanta, when in fact he was not, was particularly serious, because *in that false capacity, traditional evidence and history concerning the Manso-Nkwanta stool and its alleged relationship with the Dadiaso stool which he must have given as part of his evidence that Manso-Nkwanta and Dadiaso stool lands form boundary, was received and acted on by Dennison*, J. when otherwise such traditional evidence from him would not be admissible, and reliance is placed on the decision of the West African Court of Appeal in *Ofuman Stool v Nchiraa and Branam Stools*. *The argument however avoids and seeks to evade the more important question why*

the representatives of the Sefwi-Anwhiaso stool and their counsel did not exercise the ordinary or usual diligence necessary in these matters to discover that the representation by the witness was false."

He further observed at p.20 thus:

"Similarly with regard to the allegation that there was misrepresentation in swearing before the trial judge that the boundary was with the Dadiaso stool, when there existed an Order in Council, given publicity in a *Gazette* Notice and still further publicised by a public demarcation and fixing of boundary pillars *in situ*; *surely the fact ought to be so well known to the representatives of the Sefwi-Anwhiaso stool themselves that a veritable uproar should have been made by them and their followers in court as soon as the witness uttered what is alleged to be false evidence, so that the witness could have been immediately exposed to the judge, and possibly dealt with as he would have deserved to be.*"(e.s)

In *Lartey and Lartey Ltd v. Beany* (1987-88) 1GLR 590 Cecilia Kuranteng-Addow J had to grapple with a similar situation as portrayed, by the facts as stated, as far as relevant, in the headnote as follows:

"...the Gaisie Committee of Enquiry appointed by the government to investigate the business practices of a group of companies owned by A found that the sale by A of his 8,750 shares in SSF Ltd to one of the directors was invalid. Its recommendation that the shares be attached and sold was accepted and implemented by the Armed Forces Revolutionary Council (AFRC) in 1979. All the properties of HB and his brothers including SSF Ltd were confiscated to the State. On setting up of the special tribunal by the AFRC, HB and his brothers petitioned against the take-over of SSF Ltd. L also petitioned against the take-over. He claimed SSF Ltd as the property of LL Ltd and prayed that it should be absolved from confiscation and released to LL Ltd. The special tribunal ruled that the Gaisie Committee had no jurisdiction to inquire into SSF Ltd and therefore all the adverse findings against SSF Ltd and its shareholders were void ***ab initio***. It therefore absolved SSF from confiscation. The tribunal also directed that HB should continue to manage SSF Ltd until the determination in the High Court of the ownership of

SSF Ltd between LL Ltd and HB and his brothers. LL Ltd therefore brought an action against HB for, inter alia, a declaration that SSF was the property of LL Ltd and that the judgments and orders of the High Court given in May 1976 and February 1978 were avoid ***ab initio***. The defendants entered conditional appearance and brought the instant application under Order 25, r 4 of LN 140A and also the inherent jurisdiction of the court for, inter alia, an order that the action be dismissed on the grounds of ***res judicata*** and also that the action was frivolous, vexatious and abuse of the process of the court. In the supporting affidavit the defendants recited the circumstances surrounding the abortive sale and the subsequent High Court judgments between the parties in 1976 and 1978. *Subsequently, the plaintiff filed an amendment to the writ and their statement of claim under Order 28, r 2 by pleading that both the 1976 and 1978 judgments were obtained by fraud and should be set aside*. The particulars of the fraud alleged were that (i) HB falsely swore in the 1976 suit that he was a director of SSF Ltd; (ii) HB gave the impression that he was a shareholder when at the time LL Ltd held all the shares in SSF Ltd; (iii) HB falsely claimed that he had the consent and authority of the shareholders; (iv) HB fraudulently attempted to regain control of SSF Ltd by completing Form No 17 under the Companies Code, 1963 (Act 178); and (v) the solicitor of HB induced him to accept the terms of the settlement. In reply to the opposition of the defendants to the amendment, *the plaintiff contended that an amendment introducing fraud could be taken any time* upon the discovery of the fraud. *The court, found, inter alia, that all the allegations were within the knowledge of the plaintiffs at the time of the 1976 and 1978 suits*."(e.s)

Upon these facts it was trenchantly held as stated in holding (2) of the headnote as follows:

"(2) The amendments to the writ and statement of claim which sought to substitute a new cause of action for the plaintiffs were inoperative and would be struck out because:

(a) they were not the type which counsel was entitled to make without leave under Order 28, r 2 of the High Court (Civil Procedure) Rules, 1954 (LN 140A). And

although the court had wide powers under Order 28, r 2 and its inherent jurisdiction, if the justice of the case demanded it, to allow amendments subject to cost, *it was obvious that the amendments sought had not been made in good faith. All the particulars given of the alleged fraud were matters either within the knowledge of the plaintiffs at the time of those judgments or could have been detected with the least effort yet they were neither made at the time those judgments were given* nor when the statement of claim was filed in the instant case. It was apparent therefore that the amendments were being sought disingenuously only for the purpose of defeating the defence of the first defendant;

(b) an amendment adding an allegation of fraud should not be allowed except in very exceptional circumstances. In the instant case, the allegations were far from the truth. And *it was clear from the concessions and admissions of both parties that even if the amendments were granted the case it was seeking to raise was not likely to succeed*. Consequently even though the court would generally give leave to amend defects in pleadings rather than give judgment in ignorance of facts which should be known before rights were definitely decided, *since on the facts the amendment sought would not improve the case of the plaintiffs and was therefore useless it would not be granted."* (e.s)

Similarly in *Boateng (No. 2) v. Manu (No. 2)* [2007-2008]2 SCGLR 1117 where the appellant sought to impeach an arbitration award as having been induced by an alleged deliberately false piece of evidence of the Bosore chief, Atuguba JSC said at 1127-1128 thus:

"It cannot be said that the "evidence" of the Bosore Chief at the arbitration practised any fraud on the minds of the arbitrators. *If the plaintiff had raised the matter of the said police statement before the arbitrators the Bosore Chief might have satisfactorily explained it away, as he did in respect of the document he thought related to the electricity project.*

In any event it is very ill of the plaintiff, who called the Bosore Chief as his witness, not to have drawn the attention of the arbitrators to the said inconsistent statement of the Bosore Chief nor to have called evidence of it. If any fraud was

therefore practised on the arbitrators, the plaintiff by his default was ***particeps delicti****; and having thus been conducive to the alleged fraud, it would be an abuse of the court process to entertain his action. The evidence does not suggest that the plaintiff was unaware of the alleged inconsistent statement of the Bosore Chief when he participated in the arbitration proceedings. A person cannot take advantage of his own wrong:* see *Acquah v Oman Ghana Trust Holding Ltd* [1984-86] 1 GLR 157, CA. *Thus in Greenwood v Martin Bank* [1933] AC 51, HL *it was held that a man who knew of forgeries by his wife but did not disclose them could not sue for wrongful payments out of his account."*(e.s)

Appellant's grounds of Fraud

The appellants' grounds for launching their action to set aside the judgment of Dordzie J for fraud are as stated by Appau J.A in the Court of Appeal at 122-123 of the record of appeal, as follows:

"The gravamen of the respondents' case as pleaded in their statement of claim that accompanied the new action or fresh writ of summons was clearly captured under paragraphs 8 - 14 of the said statement of claim, which I reproduce below:

8. The plaintiffs say that the decision of the Court in the said suit as contained in the judgment dated 19th October, 2004 was that the Will was null and void for the reason that he late F.K. Poku was blind and therefore could not execute the Will allegedly ascribed to him.

9. The plaintiffs say that in arriving at the decision and reasoning in the judgment in Suit No. CS 107/2003 the Court relied substantially on the evidence of Dr. Kenneth Asubonteng (referred to as P.W.4) as corroborative of the evidence of the plaintiffs in that suit which indeed in law needed corroboration for its legal effect.

10. The plaintiffs say that it has been found that the evidence of the said Dr. Kenneth Asubonteng which was described in the judgment as credible and unbiased was in fact false and fraudulent.

11. The plaintiffs say that the said Dr. Asubonteng conspired and with the active connivance and encouragement of the plaintiffs in that suit practiced fraud on the

Court and the testator, so that the judgment rendered by the Court was based substantially on fraudulent evidence.

PARTICULARS OF FRAUD

12. (i) The 7th defendant Dr. Kenneth Asubonteng gave evidence under oath *that he was an eye specialist in 1995 when he had not qualified to be so*.

(ii) Dr. Asubonteng gave evidence under oath *that he was the Supervising Eye Specialist at Abesim Christian Eye Centre in 1997 when he was not*

(iii) Dr. Asubonteng gave evidence under oath *that he personally examined the eye sight of F.K. Poku (deceased) at Abesim Christian Eye Clinic on 3rd February 1998 when in fact he was at the Komfo Anokye Teaching Hospital as an intern*.

(iv) Dr. Asubonteng presented to the Court *forged Hospital Report containing false information of late F.K. Poku*.

(v) The other defendants as plaintiffs in the said suit, *especially 1st defendant*, gave evidence under oath *that he accompanied the late F.K. Poku to Abesim Christian Eye Centre on 3rd February 1998 and that F.K. Poku was examined by Dr. Asubonteng when he knew that such evidence was false*."(e.s)

Matching these grounds of fraud against the principle of the need for vigilance at the first instance as hereinbefore set out, it is obvious that the appellants' action was brought ***contra pacem curiae et legis*** and was rightly dismissed as frivolous and vexatious by the Court of Appeal. The said allegations of fraud ought to have been raised at the first instance. It is in this light that this court's decision in Poku v Poku [2007-2008] 2SCGLR 996 should be understood. The appellants' cry that they were not heard on that ground in the Court of Appeal does not now hold since they have had full opportunity of addressing that issue in this court. See *Gihoc Refrigeration & Household Products Ltd (No. 1) v Hanna Assi (No.1)* [2007-2007] SCGLR 1.

There are other reasons which we could further give in support of our decision but we feel the reasons hereinbefore set out by us, suffice.

It was for such reasons that we dismissed the appeal on 29/4/2010 aforesaid.

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

S. A. B. AKUFFO (MS)
JUSTICE OF THE SUPREME COURT

S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

J. ANSAH
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