IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA

CORAM: WOOD (MRS,) C.J (PRESIDING)
BROBBEY , JSC
ANSAH, JSC
DOTSE , JSC
AKOTO-BAMFO(MRS.) JSC

CIVIL APPEAL
J4/37/2011

30TH DECEMBER,2011

ERIC ANSONG - PLAINTIFF/RESPONDENT

VRS

MR. ALBERT GORMAN - DEFENDANTS/APPELLANTS
MRS. GORMAN

J U D G M E N T.

ANSAH JSC;

This is an appeal against the decision of the Court of Appeal affirming the judgment of the trial High Court. The appellants rely on the following grounds of appeal, namely,

1. "The Court of Appeal erred in affirming the judgment of the trial court because the pleaded contract of sale is inchoate, invalid and unenforceable since the subject matter properly is jointly owned, but the pleaded contract of sale is between respondent on the one hand and 1st Appellant on the other hand only.

2. The Court of Appeal erred in affirming the judgment of the trial court and dismissing appeal because even if the pleaded contract of sale of the subject-matter property were between respondent and 1st and 2nd Appellants jointly since the parties decided no longer to sell the house rescinded whatever agreement and returned the purported part payment there was no longer a subsisting agreement on which an order of specific performance could be based and there was no

circumstances as would have rendered it a fraud for appellants to have rescinded the contract.

3. The Court of Appeal erred when although it found that the contract of sale herein was in writing and not oral, it went outside the written contract and admitted parol evidence to vary the written contract of sale and rewrote the contact of sale for the parties.

4. Further grounds of appeal would be filed upon receipt of proceedings."

The facts of this case are not complicated. The parties a married couple are the joint owners of a house the subject matter of the dispute. The respondent claimed that he entered into negotiations with the appellants for the sale of their house. He further claimed that the terms of the sale were reduced into writing in the form of a receipt issued to him by the 1st appellant, upon the payment of the first instalment of the agreed price. The said receipt was signed by the first appellant only, purportedly on behalf of himself and his wife. The respondent then claimed a few days

later after he had paid the final instalment for the house, the 1st appellant brought back the money he had paid and indicated that they were no longer interested in selling the house. Several attempts were made to pay back the money to the respondent to no avail. Eventually, the money was paid back into court. The respondent then brought an action in the High Court seeking specific performance of the agreement of sale of the appellants' house, recovery of possession of same, general damages and costs. The High Court gave judgment in favour of the respondent in respect of all his reliefs. On appeal, the Court of Appeal dismissed the appellants' appeal unanimously. Dissatisfied with the Court of Appeal's decision, the appellants have appealed to this court for the following reliefs:

1. "That the judgment of the Court of Appeal dated 21st October 2010, and the Orders contained therein affirming the judgment of the trial court dated 25th October 2007 and dismissing the appeal to be set aside and judgment entered for Defendants/Appellants together with cost.

2. A Order that the Plaintiffs/Respondents retrieve the amount of ¢410 million cedis (four hundred and ten million cedis), being the purported part payment paid into court by Defendants/Appellants".

The facts above call for the resolution of the following issues:

1. Whether or not there was a valid contract between the appellants and the respondent.

2. Whether or not parol or extrinsic evidence could be admitted to alter in any way the written contract, if it existed.

3. Whether or not the remedy of specific performance availed the respondent.

I will deal with the first two issues together.

Valid Contract.

The appellants raised the issue of the propriety of the agreement of sale between them and the respondent. They claimed that since the house was jointly owned by the appellants the receipt, which was pleaded as the written contract of sale was inchoate because the sale was between the respondent on one hand and the 1st appellant only on one hand and the only on the other hand. The trial judge at the High Court and the Court of Appeal had both relied on the decision in Tahiru v Mireku [1989-90] 2 GLR 615 and held that the receipt satisfied the requirements of sections 1 and 2 of the Conveyancing Decree, 1973, NRCD 175. The appellants therefore contended that that the pleaded contract should have been construed strictly and if it had been construed strictly, the court would have come to the conclusion that there was no valid contract because the 2nd appellant who owned the house jointly, was not a party to the contract.

The general rule with regard to the construction of documents is that the court must give effect to the intention of the parties as found in the document. The decision of the Court of Appeal in the case of Akim Akroso

Stool & others v Akim Manso Stool and others [1989-90] GLR 100, CA, is instructive on the point

At page 106, the Court held thus:

"the intention of the parties must be gathered from the written instruments. The function of the court is to ascertain what the parties meant by the words which they have used: …The court is to declare the meaning of what is within the instrument and not what was intended to have been written so as to give effect to the intention expressed."

The courts are hesitant to construe private documents outside the four corners of the documents for god reason. Contracts and other written documents between private individuals are presumed, unless otherwise proven, to represent the intentions of the parties. Thus any undue interference by the courts flies in the face of the sanctity attached to such documents.

The general rule is not in any way absolute. Ultimately, interpretation of contracts or documents of any kind must give effect to the true intent of the parties. The courts are in duty bound to give effect to the parties written intentions. But the courts must also consider, in appropriate cases surrounding circumstances which go to elucidate the intentions of the parties. For interpretation must always be as near as possible to the mind of or intent of the parties as the law permits. See Halsbury's Laws of England (3rd edition), Vol. II, 381. Thus in Shore v Wilson 1842 9 Cl. & Fin 355, at 565 Tindal CJ held thus:

"The true interpretation however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps to speak more precisely, not so much an exception from, as corollary to, the general rule above stated, that *where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances the sense and meaning of the language may be investigated and ascertained by evidence dehors the instrument itself; for both reason and common sense agree that by the*

other means can the language of the instrument be made to speak the real mind of the party."

Indeed this court came to similar conclusions in the case of P.Y. Atta & Sons Ltd v Kingsman Enterprises Ltd. [2007-2008] SCGLR 946. The facts as set out in the head-notes provide thus,

"The plaintiff company held a lease from the Government of Ghana in respect of a plot of land at the Ring road south Industrial Area, Accra, for a term of 50 years from 11 May 1972. PYA put up buildings on the land and carried on its business there. In 1993, pursuant to the request of the defendant-company, Kingsman, for a lease of a portion of the land to construct stores for its business, the parties executed a document, exhibit B. Though as stated in the *habendum* of the document), PYA conveyed to Kingsman, "all the residue now unexpired of the said term of 50 years granted by the headlease," the terms of the agreement indicated among, that the Kingsman would pay rent, give two of the stores to be constructed to PYA and Kingsman could not assign or underlet any part of the stores

without the prior consent of PYA. Between 1993-97, the parties dealt with the terms of the Exhibit B as if it was a sublease and Kingsman complied with its terms, paid rents and the two stores to PYA. Subsequently, ie, in November, 1997, Kingsman wanted to construct another building on top of the stores for use as offices but PYA refused to give its consent as required under the agreement. Kingsman in response then alleged that it did not need the consent of PYA after all because by the *habendum* in the agreement, it was an assignment that was conveyed to it and not a sublease; and that consequently, it has never been a tenant of PYA. Kingsman therefore started the construction. PYA sued at the High Court for, *inter alia,* a declaration that Exhibit B, the agreement was a sublease and not an assignment; and for an order of rectification of the agreement by addition to the habendum the words less one day or less such other period as would make the agreement reflect the true character of a sublease. Kingsman counterclaimed for a declaration, inter alia, that, on its true and proper construction, the agreement constituted an assignment and not a sublease. The High Court found for Kingsman and the Court of Appeal affirmed the decision of the trial; court. PYA further appealed to the Supreme Court."

Brobbey JSC adopted a purposive approach in the construction of the document. At page 664, of the report, he held thus:

"Indeed in construing every agreement the paramount consideration is what the parties themselves intended or desired to be contained in the agreement. The intentions must prevail at all times….The general rule is that a document should be given its ordinary meaning if the terms are clear and unambiguous."

The learned justice continued on page 965:

"No one can really tell the intentions of parties. Even the devil it is said, does not know the state of mans mind. In conflicting situations, … the process of determining the intentions of the parties should be objective. "Objective approach" in this context implies the meaning that the words in the document will convey to a reasonable person seised with the facts of the case. *In such exercise, the entire document, the effect it has on the*

parties, the conduct of the parties and the surrounding circumstances will have to be taken into account."

From the foregoing it is clear that extrinsic evidence may be admitted to construe a document in certain circumstances. The question to answer is whether the facts of this case invite this court to consider evidence *dehors* the written intentions of the parties.

Extrinsic evidence may be employed where there are conflicting or contradictory terms or where such evidence will elucidate the intention of the parties. But extrinsic evidence cannot be admitted if that evidence is inconsistent with the intentions of the parties as expressed in the document. In my view, in order for the true intention of the parties to be uncovered in this case, extrinsic evidence was rightly admitted by the trial court. The purpose or intent at the core of the agreement was the sale of the house.

Considering the case as a whole, on a balance of probabilities, it is clear that the second appellant was very much aware of the sale of their house. The evidence on record showed that she was present at the negotiations and made no objections when the sale of the house came up for discussion and the title deeds were given to the respondent.

Counsel for the appellants was not able to refute this piece of evidence.//// To this end I would agree with the Court of Appeal in the case of Kwarteng v Addow [1991] 1 GLR 247 in which the owner of a company in Accra had contracted to sell the property to the defendant. However the owner subsequently revoked his offer to sell the property to the plaintiff and the defendant sued for specific performance. The owner then sold the property to the plaintiff. The plaintiff then went into possession of the property and to the knowledge of the defendant proceeded to carry out substantial improvement to the property. When an out-of-court settlement broke down between the owner and the defendant the defendant obtained judgment against the owner. The defendant then went into execution and took possession of the property. The plaintiff sued the defendant successfully for declaration of title and recovery of possession and the defendant

appealed the judgment to the Court of Appeal. Essiem JA dismissing the appeal, held as per the head-note thus:

"*the defendants' conduct in standing by without any protest would have encouraged any reasonable person to believe that he had either abandoned his interest in the property or that he had no interest in it*. The defendant was consequently estopped from laying adverse claims to the property because as soon as the defendant became aware that the plaintiff was renovating the existing property and constructing the uncompleted one he should have warned her that he still maintain his interest in the land."

Putting all the circumstances together, a reasonable man would come to the conclusion that the 1st appellant signed the contract with the blessing of the 2nd appellant. It would therefore not lie in the 2nd appellants' mouth to allege that the sale was concluded without her prior knowledge. She would be estopped by her own conduct from making such a claim.

This parol evidence does not contradict the written intention of the parties. It rather goes to show the identity of the real parties to the sale. Therefore, even though on the face of the document the 1st defendant was the only signatory to the contract, the surrounding circumstances and the conduct of the 2nd appellant showed that the 1st and 2nd Appellants were acting in concert.

Specific Performance.

Having held that there was a valid contract, the next issue was whether or not the remedy of specific performance avails the respondent. The appellants have argued in the alternative that even if there was a valid contract, the Court of Appeal erred in affirming the trial court because any agreement between the appellants and the respondent had been rescinded since the appellants decided not to sell the house. In effect, there was a subsisting contract on which to base an order for specific performance. The appellants relied on Smith v Blankson [2007-2008] SCGLR 374.

In that case, Sophia Akuffo JSC, delivering the judgment of the court, held that since the plaintiff had already sent a fax message which sought to end the contract of sale, its contents had effectively brought the transaction to an end and there was no more agreement on which an order of specific performance could be based.

It is important to put the courts decision into the correct perspective. In the Smith case supra, the first plaintiff had agreed to purchase property belonging to the defendant. He subsequently informed the defendant of his inability to advance the purchase price. He therefore gave the option of either selling the property to another person or waiting till the first plaintiff was able to make payment. Nevertheless, the first plaintiff commenced payment of various amounts of money in part payment of the purchase price and the defendant accepted these payments. The first plaintiff however sent a fax message asking the defendant to allow the second plaintiff to occupy the said property until a full refund of moneys paid for the purchase had been made to the plaintiff. It was in this context that the court held that in view of the fact that the first plaintiff terminated the

agreement, there was no agreement in the first place, on which to found a remedy of specific performance.

In my view, the facts of the *Smith* case are clearly distinguishable from this case. In the Smith case, it was the purchaser who ended the agreement. In such circumstances, the court reasoned that a specific performance would be unjustified. Simply put. It would have been unreasonable for the court to order specific performance when the plaintiff, in whose favour the remedy was being sought had himself repudiated the contract, by the fax message. But in the instant case, it is the vendors, the appellants who sought to terminate the contract after part payment of the agreed price had been made. I find it difficult to subscribe to the appellants claim that the remedy of specific performance cannot avail the respondent in this case. Indeed in the Smith case, the court noted the key role of the first plaintiffs fax message vis-à-vis part performance on his part. At page 384, Sophia Akuffo JSC noted:

"The payment of that amount constituted substantial part-performance and might have supported the plaintiffs claim for specific performance. However the record does not in reality support the application of such rules in favour of the plaintiffs and an order of specific performance would be unjustifiable. It would have been another matter had the first plaintiff not send the fax message. Unfortunately for the plaintiffs the first plaintiff did send it….."

The above notwithstanding, the court must consider whether or not the respondent is entitled to the remedy of specific performance. The rule on specific performance vis-à-vis payment as part performance was extensively discussed by Acquah JSC (as he then was) in *Koglex Ltd. (No 2) v Field [2000] SCGLR 175.*

After considering several authorities, His Lordship concluded that the current position of the law is that payment of money, whether in part or in full, renders a contract enforceable and specific performance would avail the purchaser. As earlier mentioned, this position find support in the *Smith* case, (supra). Acquah JSC then laid down the requirements for establishing part-performance:

" …to establish the fact amounting to part-performance, what is required of a plaintiff is to show that he had aced to his detriment and that the acts in question are such as to indicate, on a balance of probabilities, that they were performed in reliance of a contract with the defendant."

It must be noted at this point, that specific performance is an equitable remedy and it is granted at the discretion of the Court. It may be granted especially with regard to sale of landed property, as in the case, because there is no other remedy which puts the plaintiff in the same position as thought eh contract was performed. However, it trite law that specific performance will not be granted in certain situation: if damages will be an adequate remedy, where there is want of mutuality, where performance requires the Court's supervision, if it will be pointless to grant it, if the contract cannot be enforced in its entirety, if the order will cause severe hardship to the defendant and if eh defendant's personal freedom will be retrained by it. In essence, the Court will only exercise its discretion in grant of specific performance only if it is appropriate in the circumstances of the case to do so.

In the instant case, the respondent was in the process of making full payment of the purchase price when the appellants pulled out the agreement. The respondent had relied on he terms of the contract and the conduct of he appellants to his detriment. In such circumstances, it was appropriate for the trial High Court to make an order for specific performance to compel the appellants to execute the terms of he contract. There is a long line of cases to the effect that an appellate Court should be slow to set aside the concurrent findings of facts by two Courts unless the findings are so perverse and unsupported by the evidence on record.

For all the reasons already stated herein, it is clear that the trial Court's ruling was supported by evidence on record. It goes without saying the Court of Appeal rightly affirmed the High Court's decision. See Obrasiwah II v. Out (1996-97) SCGLR 618, Achoro v. Akanfela (1996-97 SCGLR 209, Koglex (No. 2) vs. Field, supra, Adu v. Ahamah (2007-2008) SCGLR 143 and Fosua & Adu-Poku v Dufie (Deceased) & Adu-Poku Mensah (2009) SCGLR 311

Accordingly, I would dismiss this appeal and affirm the concurrent decisions of the High Court and the Court of Appeal.

J. ANSAH
JUSTICE OF THE SUPREME COURT

CONCURRING OPINION

DOTSE JSC:

I have had the prior privilege and advantage to have read the reasons proffered by my brother Ansah JSC why this court on the 21st day of December 2011 dismissed the appeal herein lodged by the Defendants/Appellants (who will hereafter be referred to as Defendants) against the Court of Appeal decision of 21st October 2010 which was in favour of the Plaintiffs/Respondents/ (hereafter referred to as the plaintiffs).

Even though I am in full agreement that the said appeal be dismissed for the reasons which have been stated with particular clarity of thought in the

opinion of my brother Ansah JSC, I am compelled to add the following as my reasons mainly for the development of the law.

The facts of this case have very well been stated by my brother Ansah JSC that it is pointless to repeat them again. I will only refer to the facts if need be when there is the need to elucidate and support a particular reason with evidence on record.

Dissatisfied with the unilateral decision of the defendants to rescind the contract of sale of the house, the subject matter of this appeal, the Plaintiff took the matter to the High Court seeking the following reliefs

1. Specific performance of the Agreement for the sale of the Defendants house
2. Recovery of possession of the house
3. General damages

The High Court entered final judgment for Plaintiff for specific performance. On 21st October 2010, the Court of Appeal affirmed the trial court's judgment and dismissed the Defendants' appeal. Dissatisfied with the Court of Appeal judgment the Defendants have again appealed to this court with the following as the grounds of appeal.

GROUNDS OF APPEAL

1. The Court of Appeal erred in affirming the judgment of the trial court because the pleaded contract of sale is inchoate, invalid and

unenforceable since the subject matter property is jointly owned, but the pleaded contract of sale is between Respondent on the one hand and 1st Appellant on the other hand only.

2. The Court of Appeal erred in affirming the judgment of the trial court and dismissing the appeal because even if the pleaded contract of sale of the subject matter properly were between Respondent and 1st and 2nd Appellants jointly, since the parties to the contract decided to no longer sell the house, rescinded whatever agreement and returned the purported part payment, there was no longer a subsisting agreement on which an order for specific performance could be based, and there was no circumstances as would have rendered it a fraud for Appellants to have rescinded the contract.

3. The Court of Appeal erred when, although it found that "the contract of sale herein was in writing and not oral", it went outside the written contract and admitted parole evidence to vary the written contract of sale and rewrote the contract for the parties.

4. Further grounds of Appeal would be filed upon receipt of proceedings.

ISSUES PRESENTED ON APPEAL

The following issues stand out as emerging for determination in this appeal.

The three outstanding issues presented in this appeal are:

1. Whether 2nd Defendant was party to the sale of the house, the subject matter to the Plaintiff;

2. Whether the trial court and the Court of Appeal properly admitted parole evidence to vary an essential term in the sale relating to the parties thereof;
3. Even assuming for the sake of argument that 2nd Defendant knew and understood all that took place at the signing of the deed of sale and/ or was a party to the deed of sale, whether there is an enforceable contract of sale extant to ground an order of specific performance when it was admitted that Defendant ended the sale transaction by resiling from the agreement and returned the part-payment thereof.

The issues enumerated supra bring to the fore the discussions on areas of law relating to **specific performance**, **parole evidence rule** and **estoppel by conduct.** In this opinion, I will deal only with specific performance and parole evidence.

SPECIFIC PERFORMANCE

An order of specific performance is a discretionary remedy purely equitable in origin. In **Stickney v Keeble** [1915] A. C. 386, 419, the court held that the dominant principle is that equity will only grant specific performance, if considering all the circumstances, **it is just and equitable to do so.**

According to Bondzi-Simpson in his book, "The Law of Contract", in determining whether specific performance will be ordered the court considers a number of factors including the following:

1. Whether there is a contract at all in the first place;
2. Whether damages will be an adequate remedy;
3. The uniqueness of the subject matter;

4. Whether time is of the essence;

5. Whether the plaintiff has performed his part or is himself guilty of breach of the contrac;

6. Whether the plaintiff has sought the order in a timely manner;

7. Whether the conduct of the plaintiff makes it equitable and just for him to be granted the order of specific performance; and

8. Whether the third party purchaser has, in good faith, acquired a right or interest in the subject matter without notice of any defect.

On specific performance related to the sale of land, the learned authors da Rocha and Lodoh in their book *"Ghana Land Law and Conveyancing"* write that by an order of specific performance, a party to a contract of sale of land who attempts to repudiate it is compelled to carry out his obligations under the contract. Thus a vendor can be compelled to convey the land and a purchaser can be compelled to pay the unpaid purchase-money.

Section 2 and 10 of the Conveyancing Act, 1973, (NRCD 175) provides that a contract for the sale of land must be in writing signed by the person against whom the contract is to be enforced or his duly authorised agent. In discussing the signature requirement, the learned authors da Rocha and Lodoh write that the memorandum must be signed by the party or his agent, and the party who signs can be sued.

From the available evidence, it is quite clear that there is definitely a contract of sale in respect of the house the subject matter of this appeal. The contents of exhibit A, and B really confirm the intentions of the parties. Even though the principle of law is well settled that in such circumstances it is desirable to

confine oneself to the four corners of the contract, however, in this particular case, on the principle of doing substantial justice to the case, this court will affirm the decisions of the two lower courts that there is an enforceable contract of sale. I will return to this matter of doing substantial justice later on.

It is also to be noted that, damages however excessive in this case cannot adequately compensate the plaintiff. This is because the subject matter of the property is a house which the plaintiff has contracted to purchase and part performed. Damages will not restore the plaintiff adequately as specific performance of the contract would. In this case, the available oral and documentary evidence indicates that time is of the essence of the contract and that the plaintiff had performed his part of the contract and it was when he was in the process of paying other instalments agreed upon that the Defendants' unilaterally rescinded the contract. In all these matters, the plaintiff must be deemed to have acted timeously in seeking the reliefs from the court.

The plaintiff having performed all his obligations under the contract, he must be deemed entitled to the equitable relief of specific performance. What must be noted here is that, equity is not a warlord that is determined to do battle with the law.

Both equity and the law (statutory and common) are to be considered as part of a legal system which has mixed with each other so nicely that the result is aimed at achieving justice.

Using this admixture it is my considered view, that the Court of Appeal properly held that applying all the available evidence, the 2nd Defendant ought

to be considered as a party to the contract for the sale of the house and that the plaintiff is entitled to the relief of specific performance against both Defendants.

Looking at the case in its entirety, it is clear that to allow the Defendants to rescind would entitle them to be restored to the position they would have been had the contract not been made. However, the Defendants kept the plaintiff's money for a period and after that, unilaterally exercised the right to rescind. This is inequitable, and a court of law must frown upon such conduct, which as it were would result into absurdities if the defendants are allowed to rescind.

To me, the justice of the case, considering the conduct of the Defendants, i.e. in openly advertising the sale of their house and encouraging the plaintiff to proceed with negotiations towards the purchase of the house which culminated in Exhibit A and B, in which the 2nd Defendant was visibly present demands that the Defendants be held strictly by their conduct and be stopped from unilaterally rescinding the contract of sale.

This is what a court of law is mandated to do, by ensuring that parties before it get real substantial justice.

In my humble opinion, since the 2nd Defendant knew all along about the transaction that went on at the 18th February 2007 meeting and did not object to the transactions, she cannot now be heard to say that she did not agree to the contract of sale. As the trial judge rightly established in his judgment, the wife was privy to the transaction that took place in the home of the plaintiff, and did not object to the transaction. She had an obligation to object to the sale at the time that Nana Owusu, DW2, asked all the people present if anyone

had views to express on the proposed contract of sale. 2nd Defendant who remained quiet and raised no objection and thus induced plaintiff to go through the sale cannot now be heard to say that she objected to the contract of sale.

The learned trial Judge captured this part of the matter in the following words in the judgment as follows:-

> *"So clearly the 2nd defendant, wife of 1st defendant, saw and understood all that went on at that meeting of the 18th of February, 2007. It was that she kept quiet and when they got home before she decided to object. I think I have sufficient evidence to find that the 2nd defendant knew all along about the property put on sale and the sale to the plaintiff. I do not see the evidence concluding anything else that that she agree, consented to the husband selling their property and that is exactly what the husband sought out to do. I will say that she authorised the husband to transact the sale of their property and that is what the husband did*. ***Indeed there is evidence on record that the Defendants put up a notice on their house offering it for sale to the general public. Secondly, the 1st Defendant himself testified that because they were in hard times, they told a few friends that they wanted to sell their house. All these meant that both couple, 1st and 2nd Defendants were aware of the sale of the house."*** *emphasis*

The Court of Appeal also affirmed the findings of the trial judge because every part of the evidence established by the trial judge showed that the 2nd Defendant took part in the transaction and authorised the sale of their house.

She is therefore stopped from denying her representations to the plaintiff which induced the latter to go through with the sale.

Also, since plaintiff had performed his part of the obligation by paying the deposit and was ready to pay the second instalment(which was refused by the defendants), evidencing an intention to complete the contract of sale, the defendants must be compelled with an order of specific performance to fulfil their obligation. Specific performance must be ordered and the defendants cannot seek to repudiate the contract.

PAROLE EVIDENCE RULE

Parole evidence rule as a general rule is to the effect that where parties have formally recorded the whole of their agreement in writing, the written document is *prima facie* taken to be the whole contract and everything dehors the written document is excluded. Thus, no extrinsic evidence is allowed to add to, vary or contradict the terms of the written contract. Some exceptions however may be applied by the courts, in which case the court may admit extrinsic evidence. Even so, the courts will not admit extrinsic evidence for the purpose of re-writing the contract for the parties but only for the purpose of explaining the contract.

This rule is explained further by the Evidence Act 1975, NRCD 323. Section 177 of NRCD 323 reads:

> (1) Except as otherwise provided by the rules of equity, terms set forth in a writing intended by the party or parties to the writing as a final expression of intention or agreement with respect to those terms may not be contradicted by evidence of a prior declaration

of intention, of a prior agreement or of a contemporaneous oral agreement or declaration of intention, but may be explained or supplemented,

(a) by evidence of consistent additional terms unless the Court finds the writing to have been intended also as a complete and exclusive statement of the terms of the intention or agreement, but a will and a registered writing conveying immovable property shall be deemed to be a complete and exclusive statement of the intention of agreement; and

(b) by a course of dealing or usage of trade or by course of performance.

On the issue of parole evidence, defendants' argument as contained in their statement of case is untenable. In their statement of case, the defendants write:

> *"The Court of Appeal erroneously affirmed this wrong conclusion of the trial court (R.p. 382), when the extrinsic evidence admitted by the court varied the terms of the written contract by adding 2nd Defendant as a party thereto."*

What the trial court did by adding the 2nd Defendant as a party, which was affirmed by the Court of Appeal, in my opinion did not seek to alter the terms of the written contract as wrongly pontificated by the defendants. What the trial judge did is justified by the rules of contract, specifically as an exception to the parole evidence rule, supported by Section 177 of NRCD 323.

Under the exceptions to the parole evidence rule, Bondzi Simpson in explaining the effect of Section 177 of NRCD 323 writes as follows:

> *"It therefore follows that though evidence is not allowed of prior or contemporaneous intentions or agreements to contradict a written document that contains the final intentions or agreement of the parties, evidence is allowed if its purpose is not to contradict to but to explain or supplement the final written document, not to contradict it. Such explanations or supplements may be by evidence of* ***consistent additional terms*** *(emphasis mine) or by a course of dealing, or usage of trade, or by a course of performance."*

What the trial judge sought to do which was affirmed by the Court of Appeal, and in my opinion, rightly so, was to answer the issue whether 2nd Defendant was a party to the contract (since she did not sign the contract of sale, but only her husband did) based on the totality of the evidence available. What the trial judge did was not to alter the terms of the contract as argued by defendants but to explain the final document by a consistent additional terms, based on the available evidence which showed that 2nd Defendant indeed was a party to the contract, had agreed to the contract of sale and the sale of their property to the plaintiff. Indeed as was stated earlier, oral and documentary evidence confirmed the rightness of the trial and Court of Appeal decisions.

PRINCIPLE OF SUBSTANTIAL JUSTICE

One other ground upon which the defendants must fail in their bid to hold onto their property is by use of the principle of substantial justice which has been mentioned supra.

This court, and indeed all courts in Ghana have a duty which flows directly from a power granted by the Constitution 1992 i.e. articles 1 (1) and (2), 125 (1), (3), (5) and 126 (4) of the said Constitution which is to ensure that citizens of Ghana, get the justice which their case deserves.

The powers of the court flow from the Constitution 1992 and the courts should not hesitate to use the powers available to it in order to do justice in the cases that come before it.

The Supreme Court has given tacit approval to this principle of doing substantial justice when appropriate to do so in the landmark case of **GIHOC Refrigeration and Household Products Ltd. (No.2) v Hanna Assi (No.2) [2007-2008] SCGLR 16** where the Supreme Court by a majority decision of 6-1 allowed a review application and in the words of Prof. Ocran JSC held as follows:-

> *"The basic concern is that reviews should be motivated by a* ***desire to do justice in circumstances where the failure to intervene would amount to a miscarriage of justice****. The question was asked at some point in our last hearing, "What is justice". I would refer to justice in this context not simply in the Aristotelian sense of commutative or rectifiable justice,* ***but more importantly to justice as an external standard by which we measure the inner quality of law itself."*** *emphasis*

Using such philosophical principles, the majority of 6, held granting the application to review the earlier majority decision on the basis as was stated by Georgina Wood JSC as she then was:-

> *"I hold the view, respectfully, that the ordinary bench committed a substantial error when it ruled that the applicant was not entitled to those reliefs."*

And by those reasoning the applicant was granted a relief which he did not counterclaim for in the trial court because the justice of the case demanded that he be entitled to them.

The Nigerian Supreme Court, had the opportunity to comment and approve this principle of substantial justice in the celebrated case of **Rt. Hon. Rotimi Chibueke Amaechi v Independent National Electoral Commission & 2 others [2008] 5 N.W.L.R 227** where the court unanimously held on this and other issues as follows:-

> *"In the interest of justice and fair play, the Supreme Court cannot shy away from doing substantial justice without any undue regard to technicalities. In this case, there was no doubt that it was the appellant and not the 2nd respondent who was the P.D.P candidate for the 2007 gubernatorial elections in the Rivers State. In matters of this nature, the court will not allow technicalities to prevent it from doing substantial justice."*

And by so holding, the Nigeria Supreme Court further declared the appellant, Amaechi as the duly P.D.P elected governor even though he did not contest the election because of gross abuse of judicial process by the respondents therein.

Giving the rationale for the courts decision, Oguntade JSC, who delivered the lead judgment stated thus:-

"The sum total of the recent decisions of this court is that the court must move away from the era when adjudicatory power of the court was hindered by a constraining adherence to technicalities.

This often results in the loser in a civil case taking home all the laurels while the supposed winner goes home in a worse situation than he approached the court."

I think the time has definitely come for courts such as this Supreme Court to think likewise. Thankfully, the views of Sophia Akuffo JSC and Prof. Modibo Ocran JSC of blessed memory, in the original decision of the ordinary bench in this court in the case of **GIHOC v Hanna Assi [2005-2006] SCGLR 458**, espoused such views as per their dissenting opinions pages 483-495 which opinions crystalised into the majority decision in the review decision referred to supra.

Using the above principle, there is a lot to be argued that the plaintiff as against the defendants must succeed in this case. This is because contending that the 2nd defendant is not a party to the contract by the use of parole evidence rule on the basis of the Evidence Act will work a lot of injustice to the plaintiff. However, this principle of substantial justice will enable the court to do justice to the plaintiff's case.

Finally, it must be noted that, both the trial and the first appellate court made definite findings of fact against the defendants. The principles upon which this 2nd appellate court can set aside concurrent findings of fact made by two lower courts have been clearly stated in the lead judgment delivered by me in the case of **Gregory v Tandoh and Anr [2010] SCGLR 971** holding 2 thereof.

The Defendants have not succeeded in convincing this court as to why we should depart from those concurrent findings of fact and set them aside.

For these and the other compelling reasons, so ably set out in the reasoned opinion of Ansah JSC, this appeal fails and is dismissed accordingly.

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

G. T. WOOD (MRS)
CHIEF JUSTICE

S. A. BROBBEY
JUSTICE OF THE SUPREME COURT

V. AKOTO BAMFO (MRS.)
JUSTICE OF THE SUPREME COURT

COUNSEL:

KWADWO OWUSU AGYEMENG FOR THE DEFENDANTS/ APPELLANTS.

CHARLES ANDOH FOR THE PLAINTIFF/RESPONDENT.