IN THE SUPERIOR COURT OF JUDICATURE
SUPREME COURT OF GHANA
ACCRA

CORAM: SOPHIA AKUFFO (MS), J.S.C (PRESIDING)
SOPHIA ADINYIRA (MRS), J.S.C.
ANIN YEBOAH, J.S.C.
BAFFOE-BONNIE, J.S.C.
SULEY GBADEGBE, J.S.C.

CIVIL APPEAL
NO. J4/23/2010.
9TH FEBRUARY, 2011

1. BEN MIREKU
2. GABRIEL TETTEH MIREKU
3. KWASI BADU
...PLAINTIFFS/RESPONDENTS APPELLANTS

VRS

1. ARCHIBALD OKPON TETTEH
2. VICTORIA ATSWEI
3. ELIZABETH AJORKOR
4. ADMINISTRATORS OF THE ESTATE OF ADJEI TETTEH
... DEFENDANTS/APPELLANTS RESPONDENTS

JUDGMENT

SOPHIA ADINYIRA (MRS), J.S.C: Delivered the Judgment of the court

FACTS

The Plaintiffs/ Respondents/ Appellants hereinafter (Plaintiffs) are the beneficiaries and successors of the estate of the late Kwaku Mireku a Kwahu businessman. The 1st, 2nd, and 3rd Defendants/ Appellants/Respondents (hereinafter Defendants) are the children of the

late Abraham Narh Tetteh, the original owner of Plot No. D 774/3 Okaishie, Accra, (the subject matter in dispute,) who died in 1941. In November 1965,

the late Kwaku Mireku took a lease of the said land for a term of 32 years from Adjei Tetteh a son of the original owner. In accordance with the terms of the said lease agreement, the late Kwaku Mireku demolished existing structures on the land and constructed a three-storey building with stores for his own use which he named Mireku House; and a two storey-house for the use of the lessor. The definite term of the lease was for 32 years without any renewal clause.

By a letter dated 15 May 1996, the Defendants had their solicitor give notice to the Plaintiffs of the expiry of the lease on 31 October 1997 and their intention to recover possession of the Mireku House by 1 November 1997. The Plaintiffs by a letter dated 26 November 1996 acknowledged receipt of the letter and pleaded for a new lease of 50 years which the Defendants rejected.

Thereafter, the Plaintiffs on 7 August 1997 instituted an action before the High Court Accra claiming the following reliefs:

1. "An order varying the terms of a lease dated 2 October 1965 between Adjei Tetteh and Kwaku Mireku on grounds of unconscionability; or
2. In the alternative, a declaration that Plaintiffs are statutory tenants
3. Any further order(s) or relief(s) as the Court may deem fit."

In their statement of claim the Plaintiffs averred that they have had cordial relationship with the defendants and also created goodwill for their business in the area. That in 1984/85 there was a fire outbreak that destroyed a substantial part of the building. The building was not only

repaired and refurbished but a fourth floor was added to it to the knowledge of the defendants. The Plaintiffs claimed per Paragraph 12 of their statement of claim that:

> "Paragraph 12: "The Plaintiffs aver that it will be unconscionable to terminate the lease and seek relief under section 18 of the Conveyancing Decree, (NRCD 175).
>
> PARTICULARS OF UNCONSCIONABILITY
>
> 1. The lease agreement did not contain any covenant or term against renewal and therefore entitled the lessees to renewal.
> 2. The Lessee built a 2 storey building for the Lessor for his own use free of rent which building is now occupied by the family of the Lessor and strangers.
> 3. The lease required the Lessee to build a 3 storey building for him to enjoy a term of 32 years thus working into 10 years 8 months for each storey.
> 4. The extension of the 3 storey building into a 4 storey by the Lessee to the knowledge of the Lessor entitled it to a further term of 10 years 8 months on the basis of the 4 storey alone."

The 1st, 2nd and 3rd Defendants in defence claimed they "were never made aware of any fire outbreak and of any extension", and that there was a clear understanding that the lessor would take over the property at the expiration of the lease. They therefore counterclaimed for the following reliefs:

1. An order for immediate recovery of possession of H/No.D774/3,Kimberly Avenue, Accra, and structure known as H/No. 1167/4 Kimberly Beach Avenue, Accra.
2. Damages for trespass from 1 November 1997.
3. Perpetual Injunction restraining the Plaintiffs from in any way dealing with the said H/No.D774/3,Kimberly Avenue, Accra, otherwise known as H/No. 1167/4 Kimberly Beach Avenue, Accra.

The 4th Defendant who is the administrator of the estate of the late Adjei Tetteh filed a separate statement of defence. He claimed that any repair or refurbishment of the said premises was an obligation on the lessee under the lease agreement. The extension of the building to a four-storey building was done without the prior written or consent of the defendants or the family and it was therefore a breach of the terms of the lease. The 4th Defendant claimed further that the Plaintiffs have let out the 4th floor of the building to tenants for their sole benefit and can therefore not use the extension upon which to base their claim. He also counterclaimed for recovery of possession, damages for trespass and mesne profits from 1/11/97 to the date defendants recover possession of the premises.

The issues set down for determination at the trial were several but the High Court Judge after hearing of evidence set down only two issues arising for determination. These were:

1. Whether or not the agreement was unconscionable
2. Whether the Plaintiffs and others occupying the disputed property could properly be declared statutory tenants.

The High Court resolved both issues in favour of the Defendants, and dismissed the first and second reliefs sought by the Plaintiffs. He held that the lease agreement between the lessor and the lessee was not

unconscionable because it was prepared for the parties by a lawyer and the parties appended their respective signatures to the document indicating their acceptance of the terms agreed upon. The trial judge further held that from the nature and terms of the expired lease, even though the Plaintiffs have remained in possession of the premises after the expiry of the lease, they could not be declared statutory tenants by virtue of Section 1 subsection 2 (2) (c) of the Rent Act, 1963, Act 220. The said section reads:

1. "Application of the Act
   (1) Subject to subsection (2), this Act applies to all premises.
   (2) This Act does not apply to
   (c) a lease after the erection of the new premises, where the lease, whether entered into, before, or after the date of commencement of this Act was entered into as a lease of land on which there were premises but the premises were demolished and new premises erected within five years after the grant of the lease."

On the third relief the trial judge at page 218 of the record of said:

> "The third relief is stated as follows: 'Any further order[s] or relief as the Court may deem fit.' This is not a specific relief. The Plaintiffs are as it were, throwing themselves upon the Court to grant them any relief as the justice of the case required. Taking the whole circumstances of the case into consideration especially, the fact that the Plaintiffs predecessor in title put up two buildings at his own expense, one of which was given to the lessor; the Plaintiffs repaired the building when it was gutted by fire and added another story to the original three at their expenses; the Defendant do not need the premises for their own personal use and are likely to let out the premises to other

tenants; the goodwill built by the Plaintiffs over the years and the hardship that would be caused the Plaintiffs if they are asked to quit among others…"

The trial judge therefore ordered that the Defendants should renew the lease within three months of the judgment at a recoverable rent to be agreed by the parties or failing that to be fixed by the Rent Officer and all rent arrears to be paid to the defendants. He dismissed the counterclaims of the Defendants except the claim for mesne profits equivalent to the rent for the period 1November 1997 to the date of the judgment.

The Defendants being dissatisfied appealed against the judgment to the Court of Appeal on the ground:

> "The judge erred when he ordered the Defendants to renew the lease of the premises when indeed there is no renewal clause contained in the leasehold document governing the premises."

The Plaintiffs on the other hand cross-appealed on the grounds that:

1. "The trial court erred in law when it held that Exhibit 'A', the lease agreement between the lessor and the lessee was not unconscionable because it was prepared for the parties by a lawyer and the parties appended their respective signatures to the document indicating their acceptance of the terms agreed upon.
2. The trial Judge erred in his finding that the agreement was not unreasonable in any way without taking into account the totality of the circumstances of the lease notwithstanding the fact that the lease did not provide an option of a renewal."

The Court of Appeal dismissed the cross-appeal and upheld the appeal by the defendants and set aside the orders of the trial court and granted the

defendants their counterclaim. Their lordships were of the view that once the trial judge held that the lease agreement was not unconscionable and the Plaintiffs were also not statutory tenants, he erred in ordering the Defendants to renew the lease agreement. It is against this judgment that the Plaintiffs have lodged a further appeal to this Court.

The grounds of appeal filed by the plaintiffs before this court are:

1. That the judgment is against the weight of evidence.
2. That the Court of Appeal erred when it failed to give effect to the mandatory provision of section 18 of the Conveyancing Decree 1973, NRCD 175 and thereby misdirected itself on the law aforesaid.
3. That the judgment of the Court of Appeal was delivered per incuriam of section 18 of the Conveyancing Decree 1973, NRCD 175.
4. The Court of Appeal erred in law when it failed to consider the bargaining conduct of the parties their relative bargaining positions with respect to the commercial setting of the property in dispute and also the Appellants as lessees built a two-storey apartment for the lessor from their own resources which the lessor has remodelled into shops and rented out to tenants."

Grounds 2, 3, and 4

Grounds 2, 3, and 4 were argued together by counsel for the Plaintiffs in his statement of case which related to the issue as to whether the lease agreement was unconscionable. For purposes of clarity and brevity we will consider these grounds first.

Although in grounds 2 and 3 of the appeal Counsel complained that the judgment of the Court of Appeal was delivered per incuriam of section 18 of

the Conveyancing Act, 1973, NRCD 175, he did not mention the section in his statement of case even once. We find counsel's criticisms rather scandalous and frivolous and it is an indication that the Plaintiffs did not fully appreciate the judgment. The Court of Appeal did consider section 18 of the Conveyancing Decree of 1973 which we find unnecessary as it was not applicable to this case as the leasehold agreement under consideration was concluded in 1965. Nevertheless the said section was more or less a codification of the common law and practice in existence then and which both the trial and appellate courts considered and applied.

The learned trial judge's conclusion that the lease agreement was not unconscionable was endorsed by the Court of Appeal. The learned justices did avert their minds to section 18 of the Conveyancing Decree 1973, NRCD 175 as well as decided cases on the issue unconscionability. They referred to Black's Law Dictionary 8th Edition at page 1561 for guidance on the definition of the word unconscionable as contained in section 18. The dictionary described an unconscionable act or transaction as "showing no regard for conscience, affronting the sense of justice, decency of reasonableness".

Ayebi J.A. who delivered the judgment of the court referred to the old English case of *Fry vs. Lane [1888] 40 Chan. Div. 312,* and the Ghanaian cases of *Attitsogbe vs. CFC Construction Co. (WA)Ltd. & Read [2005-2006] SCGLR858 and Shahin vs. Cofie [1994-95] 1GBR 398,* where the Supreme Court per Amuah-Sakyi J.S.C. held that:

> 2. "The issue of unconscionability ought to be determined by reference to the circumstances prevailing at the time the agreement was entered into, not at any later date; otherwise, few agreements would escape censure."

After exhaustively evaluating the evidence and the law Ayebi J.A. said:

> "The lease Exhibit A was granted to Plaintiffs' predecessor on 2/10/65. There is no evidence of any procedural abuse on the part of the lessor during the transaction. There is no evidence that the terms of the lease are abusive of the need, ignorance or the means of the lessee, Mr. Mireku. The complaint of the plaintiffs is rather about the absence of a renewal clause in the lease. The Plaintiffs on the evidence did not blame the lessor for the absence of a renewal clause.
>
> Indeed the parties to the lease were literate. The lease was prepared for them by a lawyer and they appended their signatures thereby agreeing to the terms. The first Plaintiff at page 63 of the record of proceedings boasted that his father Mr. Mireku was an astute businessman who is well-known in the business community in Accra. As a Kwahu man, the business acumen of Mr. Mireku as published by the son cannot be doubted. From the terms of the lease, Mr. Mireku appeared to be a man of substance financially. The lessor rather appeared to be a poor land owner. The lessee agreed to and indeed built a three storey building on the land for himself and a two storey building for his lessor within the stipulated time frame at his own expense. He also agreed to pay the annual ground rent on the property. Finally he agreed to surrender the land together with the buildings he has put up for his own use to the lessor at the end of the 32 years.
>
> Until Mr. Mireku died in 1983, he did business in the three storey building he was permitted by the lease to put up for his own use. No questions were raised about the absence of a renewal clause in the lease....The three storey building put up by Mr. Mireku for his own use now called MIREKU HOUSE consists of shops which he gave out

to his children and family members and then tenants. As at 1965 when he was granted the lease, it is my view that Mr. Mireku found the terms commercially reasonable. He thus lived and worked with the lease throughout. Indeed any objective bystander in 1965 will hold this arrangement under the lease fair and reasonable."

In effect there is a concurrent finding by the two lower courts that the lease agreement was not unconscionable. We find no basis to reverse this decision based on the facts which the High Court and Court of Appeal have founded their conclusions. See the cases of *Achoro v. Akanfela [1996-97] SCGLR 209 and Koglex Ltd. (No.2) v. Field [2000] 175*.

A lease agreement is a contract for the lease of land and thus the terms of the contract has to be by mutual agreement. Whereas some covenants by the lessor/ transferor and the covenants by the lessee/transferee are implied by common law and statute, the option for renewal is not. Examples of such implied covenants on the part of the lessor/transferor are covenants for right to convey, quiet enjoyment, freedom from encumbrances; and on the part of the lessee/transferee, covenants relating to payment of rent, repair to adjoining premises, alterations and additions assignment or subletting, nuisance and sub-lease. See also sections 22 and 23 of the Conveyancing Act. Accordingly the option for renewal can only be conferred on a tenant by express mutual agreement of the parties and ought to be an express term in the lease agreement.

We affirm the decision of the Court of Appeal that the absence of a renewal clause in Exhibit A did not render the agreement unconscionable.

We find no merit in grounds 2, 3, and 4 of the appeal and they are hereby dismissed.

Ground One

The remaining ground of appeal to be considered is whether the judgement is against the weight of evidence. Counsel for the Plaintiffs urged upon this Court that the trial judge in making an order for the renewal of the lease:

> "...did not seek to make a contract for the parties but took into consideration the events that happened which was not within the contemplation of the parties at the time of the execution of the said agreement and for which the Plaintiffs/ Respondents/ Appellants adequately responded by committing substantial resources to same."

Counsel for the Plaintiffs concluded that:

> "My Lords, it is our humble submission that the trial judge order which he made after he had taken into consideration all the circumstances of this suit, was in accord with the principles of fair justice, fairness and good conscience and it is our prayer that the said order be restored".

The events or the circumstances that Counsel refers to are the refurbishment of the house after fire has destroyed part of it, the addition of an extra storey to three storey building, and the goodwill that the Plaintiffs have established in the area.

Counsel for the Defendants in their statement of case submitted that these same grounds were unsuccessfully canvassed at the trial court to have Exhibit 'A' to be varied as unconscionable but the trial judge refused. Counsel argued that, consequently there was no reason for the trial judge to turn about and order a renewal of the lease. It was for that conduct that the Court of Appeal chastised the trial judge and set aside the order for renewal.

We do not find any merit in this ground of appeal. The evidence that the Plaintiffs are basically relying on here are the facts that they repaired the three storey-building after the fire disaster and added a fourth floor to it. In respect of the repairs we note that there was an express covenant under the lease agreement for the plaintiffs as lessees to keep the three storey-building in repair by the Plaintiffs. There was also a covenant by the Plaintiffs to insure the house against any damage, fire, earthquake etc. and to use all monies received by virtue of such insurance in rebuilding or rehabilitating the said building to make up any deficit out of their own money. We consider these acts of the Plaintiffs as fulfilling their tenancy obligation under the lease agreement. Consequently the Plaintiffs could not stand on these repairs to insist on a renewal of the lease agreement.

The addition of the fourth storey is clearly an improvement on the building but once again there was no express term in the agreement for improvement or extension and compensation/re-imbursement for such. Moreover the Defendants denied granting any permission to the Plaintiffs for the extension. The Plaintiffs were unable to discharge the onus on them. There was evidence that the Plaintiffs rented out the fourth floor for commercial purposes for a period of 13 years before the expiry of the lease. We therefore do not see any inequity here as the Plaintiffs have economically benefited from the addition to the Mireku House.

Accordingly, the trial judge erred by relying on the refurbishment and expansion of Mireku House to order a renewal of the lease which he has ruled to be conscionable and cannot therefore vary. The Plaintiffs have merely repeated arguments that did not succeed at the appellate court. They have been unable to demonstrate that the appellate court's rejection of their submissions constituted such an error to warrant, the intervention by this Court.

We further agree with the learned justices that the order by the trial judge to the Defendants to renew the lease for the Plaintiffs was an imposition. It is not the duty of the Courts to make a new contract for parties on terms they have not mutually agreed upon. *Addison v. A/S Norway Cement Export Ltd. [1973] 2 GLR 151; City and Country Waste Ltd. vs. Accra Metropolitan Assembly 2207-2008] SCGLR 409*. We accordingly dismiss this ground of appeal.

For the above reasons the appeal fails and is accordingly dismissed. The judgment of the Court of Appeal is hereby affirmed.

[SGD] S.O.A. ADINYIRA (MRS.)

[JUSTICE OF THE SUPREME COURT]

[SGD] S. A. B. AKUFFO

[JUSTICE OF THE SUPREME COURT]

[SGD] ANIN YEBOAH

[JUSTICE OF THE SUPREME COURT]

[SGD] P. BAFFOE- BONNIE

[JUSTICE OF THE SUPREME COURT]

[SGD] N. S. GBADEGBE

[JUSTICE OF THE SUPREME COURT

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