IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT
ACCRA, A.D.2014

CORAM: J. ANSAH JSC (PRESIDING)
R. OWUSU (MS) JSC
J. DOTSE JSC
N. S. GBADEGBE JSC
J. B. AKAMBA JSC

CIVIL APPEAL
NO.J4/9/2014

17TH JULY, 2014

JULIANA RICHARDS **DEFENDANT /APPELLANT/APPELLANT**

VRS.

JIMMY NKRUMAH **PLAINTIFF/RESPONDENT/RESPONDENT**

JUDGMENT

AKAMBA, J.S.C:

The issue in controversy between the parties in this appeal falls within the narrow compass of what the true intention of the deceased husband and father respectively of the appellant and respondent was when he acquired Property Plot No 14, Old Bekwai Road Kumasi the subject of the present dispute.

BRIEF FACTS

The deceased, Francis Nkrumah, in 1987, purchased H/No 14, Old Bekwai Road, Kumasi as trustee for and on behalf of his infant children Gimmy Nkrumah aged twelve (12), Kofi Nkrumah aged five (5) and Nana Serwaa aged two (2). The transaction was evidenced by an indenture tendered at the trial. (See page 125 to 128 of ROA). The deceased eventually constructed a twenty-two room Hotel on a portion of the property. Thirteen years after the transaction, precisely in the year 2000, the deceased married Juliana Richards, the Defendant/Appellant/Appellant (herein after simply the Appellant). Francis Nkrumah died on 2nd January 2005 and in the listing of his estate for letters of administration, the Appellant sought to include the aforementioned house as part of the estate. The Appellant contended that her late husband by his conduct and dealings with the property rebutted any presumption of advancement. Furthermore the premises served not only as the matrimonial home, it housed a night club and restaurant business to which significant developments were made in order to operate a hotel thereon. Appellant also claimed to have lived on the property since 1995 and contributed to the development of the hotel. The Respondent as Plaintiff issued a writ at the High Court Kumasi which court after trial entered judgment in his favour.

RELIEFS SOUGHT AT THE HIGH COURT

The respondent in his writ at the High Court Kumasi sought against the appellant the following:

"1. Declaration that ownership to H/No 14 Old Bekwai Road Kumasi is vested in the plaintiff and Kofi Nkrumah by virtue of Advancement made to them by their late father Francis Nkrumah per a lease dated 11th June 1987.

2. Recovery of possession.

3. Damages for trespass.

4. An order for perpetual injunction restraining the defendant, her agents, servants and any person claiming title through her from interfering with the disputed Property."

The appellant filed a statement of defence and counterclaim seeking:

"1. A declaration that the property known as H/No 14 Old Bekwai Road Kumasi belongs to Francis Nkrumah (deceased) and forms part of his intestate estate.

2. An order for injunction restraining the Plaintiff either by himself or through his agents, representatives, assigns, privies, workmen and those claiming through, under or by him in anyway interfering with the property which must be distributed and/or shared in accordance with PNDCL 111 being part of the intestate estate of Francis Nkrumah (deceased).

3 Such further order(s) as the Honourable Court may deem fit."

Both the trial High Court and the Court of Appeal entered judgment against the appellant hence the further appeal before this court.

GROUNDS OF APPEAL

The appellant has filed the following grounds of appeal for the determination of this court, namely

a. The judgment is against the weight of evidence.
b. The Honourable Court erred in holding that the defendant/appellant/appellant had not rebutted the presumption of advancement.
c. The Honourable Court glossed over the evidence of how plaintiff/respondent/respondent acquired possession of Exhibit A which evidence dealt a mortal blow to the case of the plaintiff/respondent/respondent.
d. A substantial miscarriage of justice has been occasioned the defendant/appellant/appellant whose exertions in the 22-room hotel on the land been lost to her.

e. A substantial miscarriage of justice has been occasioned the defendant/appellant/appellant and the Estate of the deceased as a whole as two going concerns, a restaurant and a nite club business situate on the premises would be lost.
f. Further grounds to be filed upon receipt of a certified copy of the judgment."

CONCURRENT FINDING OF FACT

The Appellant has argued grounds A and B together. I will deal with all the grounds (A to E) together as they are closely related in this appeal. Without any measure of doubt this appeal being premised upon the contention that the judgment is against the weight of evidence, among others, is a call on us to rehear this appeal by analyzing the record of appeal before us, taking into account the testimonies and documentary as well as any other evidence adduced at the trial and arriving at a conclusion one way or the other. This is the import of the numerous decisions of this court on the point cited by both counsel. Notable among these are **Tuakwa vs Bosom (2001-2002) SCGLR 61; Djin vs Musah (2007-2008) 2 SCGLR 686.**

In the same vein, the appellant is urging on this court to overturn the concurrent decisions by the trial High Court and the Court of Appeal entered against her. This can only be granted subject to the appellant satisfying certain conditions or principles.

The principle is that where a finding of fact has been made by a trial court and concurred in by the first appellate court, the second appellate court (the Supreme Court) should be slow in coming to different conclusions unless it is satisfied that there are strong pieces of evidence in the record of appeal which make it manifestly clear that the findings of the trial and first appellate tribunals are perverse. A few such cases on the point include **Gregory v Tandoh (IV) and Hanson (2010) SCGLR 971, at 985; Obeng v Assemblies of God Church, Ghana 2010 SCGLR 300; Achoro v Akanfela (1996-97) SCGLR 209 (holding 2); Akufo-Addo v Cathline (1992) 1 GLR 377 per Osei Hwere JSC); Watt (or Thomas v Thomas [1947] 1 AER 582; 176 LT 49, HL; KoglexLtd (No 2) v Field [2000] SCGLR**

175; Jass Co Ltd v Appau [2009} SCGLR 265 which deals with circumstances justifying interference with findings of fact by the Supreme Court; and **Awuku Sao v Ghana Supply Co Ltd [2009] SCGLR 710.** The principle quoted above does not, so to speak, bar a second appellate court such as this court from coming to a different conclusion except that it should be resorted to upon a satisfaction that there are strong pieces of evidence which render such conclusion inevitable. This court in its majority review decision in **Koglex Ltd (No 2) v Field [2000] SCGLR 175** at 176 cited the dictum of Ollenu JA (as he then was) in **Kyiafi v Wono (1967) GLR 463 at p 466** in holding 1 that *"A second appellate court, like the Supreme court, must satisfy itself that the judgment of the first appellate court was justified or supported by evidence on record. Where there was no such evidence that finding ought to be set aside."* Secondly and relying on **Achoro v Akanfela** (supra) the court held further in holding 2, that *where the first appellate court had confirmed the findings of the trial court, the second appellate court would not interfere with the concurrent findings unless it was established with absolute clearness that some blunder or error, resulting in a miscarriage of justice, was apparent in the way in which the lower court had dealt with the facts.*

Thus it is not inevitable that this court would not come to a different conclusion following a concurrent finding by the lower courts but that each case would be dealt on its own merits. The appellant has the onerous duty to demonstrate that the judgments of the two lower courts were clearly wrong or that certain clear blunders were committed by them that resulted in a miscarriage of justice.

The Appellant contends that the respondent, who per his writ of summons purportedly laid his claim of advancement on a lease, and who at the trial tendered Exhibit A in apparent satisfaction thereof, which turned out to be an unregistered deed of assignment, the same could not pass title and ought to be overlooked. There is no merit whatsoever in this argument. The record of appeal at page 18 clearly discounts the Appellants claims. The exhibit A was registered in accordance with the Land Registry Act 1962 with Title No 5644 and serial No 542/87 on 3rd July 1987 before the Registrar of Lands Kumasi. The Respondents also led oral evidence per David Boateng Agyapong, a senior technical officer of the Lands Commission, corroborating their claim that the exhibit A was duly

registered. (See page 23 of ROA). The two lower courts rightly accepted the exhibit A in evidence.

EVIDENTIAL VALUE OF EXHIBIT A

Exhibit A was tendered in proof of the respondent's claim that the property in dispute was advanced to him and his two other siblings by their deceased father.

Indeed clause 7 of the indenture exhibit A (See page 13 of ROA) corroborates this as follows:

"The Assignee is purchasing the demised premises as Trustee for and on behalf of his three infants (sic) children named herein and will hold the said demised premises for the said children until they attain majority."

The three infant children have been named in the recital to the indenture wherein it states that:

"Francis Nkrumah of Kumasi acting as Trustee for and on behalf of his infant children Gimmy Nkrumah aged 12 years, Kofi Nkrumah aged 5 years and Nana Serwaa aged 2 years all infants (hereinafter called 'the Assignee' which expression shall where the context admits or requires include His Executors Administrators Successors and assigns) of the other part."

The law is settled that when a father obtains a conveyance in the name of his child, the presumption is that of advancement in favour of such child. (See **Twum v Sasu Twum (1976) GLR 23; Sidmouth v. Sidmouth, [Rolls Court (Lord Langdale, M.R), April 27, 28, 1840] 2 Beav. 447; 48 E.R. 1254.**

In this appeal, the relationship between the respondents and the deceased is one of 'child to father' which creates the results aptly stated **in Halsbury's Laws of England 3rd Edition Vol. 21 at page 201, Pt 2 Sect 1 item 447** on the subject of Presumption of advancement as follows:

"Where a father, or a person who has put himself in loco parentis, purchases either real or personal estate in the name of a child alone or in the joint names of the child and himself or a stranger, the father or other person is presumed to

have intended to make a gift to the child. The presumption does not exist where the purchase is made by a mother, but slighter evidence is sufficient to prove an intention on her part to advance the child than would be required in case of a purchase by a stranger. The presumption of advancement may be rebutted by evidence of a contrary intention collected from the acts or declarations of the parties before or at time of the transaction, subsequent acts and events being only admissible as evidence against the party who did or made them and not in his favour. The presumption may exist even though the parent has actually received the income during his life and made leases of the property."

Snell's Principles of Equity, 25th edition at page 168 elaborates on the effect of acts and declarations made after the purchase as follows:

"The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction are admissible in evidence either for or against the party who did the act or made the declaration; subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour."

It is also instructive to recount the English case of **Shephard and Anor v Cartwright and Anor 1954 3 AER 649, H.L.** in which the House of Lords held that: "The act and declarations of the parties before or at or immediately after the purchase, constituting part of the same transaction, were admissible in evidence for or against the party who did the act or made the declaration."

As a consequence of the authorities cited supra and the evidence clearly manifest in the record of appeal, more particularly exhibit A the respondents succeeded in establishing that the property in dispute was an advancement made to them, the children therein named. By the provisions of section **25 (1) of NRCD 323** the facts recited in a written document such as exhibit A are conclusively presumed to be true as between the parties to the instrument, or their successors in interest. The recital to exhibit A identifies the respondents herein as the beneficiaries of the advancement.

The Appellant's submission relying on section **35 of NRCD 323** that the owner of the legal title is presumed to be the owner of the full beneficial title hence title ought to have been applied in favour of the deceased is, with respect ill conceived. Counsel (for the Appellant) did not advert to the distinctions in the two sections under consideration. Whereas section **25 of NRCD 323** regards facts stated in recitals as creating a conclusive presumption in favour of those named, section 35 creates a rebuttable presumption in favour of the owner of the legal title to the property who is then presumed to be the owner of the full beneficial title. The clear distinction here is that whereas conclusive presumptions are irrebutable in the sense that when the basic facts that give rise to the conclusions are found or established in the action, no contrary evidence to the conclusively presumed fact/s may be considered by the tribunal of fact. On the other hand a party against whom a rebuttable presumption is entered may lead contrary evidence to rebut the conclusion which the tribunal of fact is obliged to consider.

From the record of appeal the question whether respondents became beneficially entitled or not depended on the presumption of their advancement and whether that presumption was or was not rebutted; and the evidence did not rebut the presumption which, therefore prevailed in their favour.

WAS THERE EVIDENCE TO REBUT PRESUMPTION OF ADVANCEMENT

The case of **In Re Sasu-Twum (Deceased); Sasu-Twum v Twum (1976) 1 GLR 23**, was cited in the course of these proceedings by the respondents. (See page 158 of ROA). The case supports the view that where a presumption of advancement had been established in favour of a child, the burden of rebutting that presumption lay on the party who disputed the advancement. The facts of the Sasu case are apposite to the present case. In that case, the deceased was survived by a wife and four sons who were all infants at the time of the action. The deceased acquired six houses in his lifetime, two of which were acquired in the name of his eldest son. Faced with challenges in the distribution of the properties of the deceased, the administrators of the estate applied to the court by originating summons for a declaration, among others, that the two houses acquired in the

name of the eldest son were held in trust for the said son. Counsel for the defendant argued that since the deceased had three other children, it was unreasonable for the deceased father to make provision for only one child and leaving out the other three. Counsel invited the court to construe the conduct of the deceased as to include all the four children to benefit from the two houses. **Abban J. (as he then was**) rightly in my view, declined the defendant's suggestion and underscored the position that where a father took a conveyance in the name of his child, the presumption would be that he intended to part with both his legal and beneficial interest in the property to the child. The learned trial judge reiterated that the party who disputed the presumption of advancement had the burden of rebutting that presumption, which rebuttal evidence, "must be strong, such as a contemporaneous- not subsequent-declaration or act of the father manifesting a clear intention that the child was to hold as a trustee."

There was evidence of subsequent activities by the deceased father before the court. There was evidence that upon completion of one of the houses, the father occupied it with the plaintiff and the children. He (deceased) later moved out and let it out to tenants. There was evidence also that the deceased collected the rents and made use of same. Of all these subsequent activities**, Abban J** held that such subsequent acts and dealings of the father in relation to the house were inadmissible to rebut the presumption. What could rebut the presumption was evidence that at the time he caused the houses to be put in the name of the eldest son, the father made some statements which tended to indicate that he never really intended to advance those houses to that son. The 'Sasu' decision is a correct summation of the present state of the law on advancement in Ghana, which we affirm. The Appellants attempt at rebuttal has been premised on the subsequent actions of the deceased which have not really discharged the burden. There is no evidence of any pronouncements preceding or contemporaneous to the subsequent developments on the property to the effect that the deceased never intended to advance those developments to the respondents. The attempt at rebuttal was thus a total failure. The two lower courts rightly concluded as they did.

The appellant has also sought reliance on article 22 of the Constitution 1992 which provides that no spouse shall be deprived of a reasonable portion of their deceased spouse's estate. The property in contention in this action was advanced to the respondents on 11th June 1987 long before the Constitution 1992 was promulgated. Since then the deceased held the property in trust for the respondents. From the date of the advancement, that property was no longer part of the deceased's self acquired properties for the purpose of determining his personal estate. In other words in construing what the deceased's personal estate was made of, the property advanced per Exhibit A would not be counted. Wherein lies the invocation of article 22 of the Constitution 1992 in this action? The article 22 is relevant to the distribution of the deceased's personal estate, i.e. his intestate estate. The respondent in his evidence in chief stated that the deceased had put up a flat for the appellant at a family residence at Suame and also completed a storey building at Abuakwa for the appellant. There is also a land at Konkromoase around Atasomanso which is developed to foundation level. These have not been seriously discounted by the appellant in cross examination.

(See pages 33 to 34 of ROA). By these provisions the appellants' contention that she had not been provided for is not borne out. In any case, the evidence on record shows that the appellant sufficiently benefited from the advanced property during the lifetime of the deceased. This aside, the appellant had the burden to show that she had not been provided for under the estate, which estate excludes the property covered by exhibit A. She failed to discharge the burden, hence the failure of her counterclaim.

POSSESSION OF EXBHIBIT A

The appellant also lamented that the trial judge glossed over the evidence of how the respondent acquired possession of exhibit A. Relying on the authority of Warren v Gurney (1944) @ AER 472, which decided that the retention of the title deeds by a father to the property constituted evidence of rebuttal of the advancement, appellant counsel argued that the deceased had meant to rebut the presumption in favour of his children. The Court of Appeal considered this argument and concluded that there was nothing on record which amounted to or

could justify a rebuttal of the advancement in favour of the respondents. Our view is that the retention of title deeds, per se, by a father is not conclusive to rebut the presumption of advancement arising from the purchase of the property in the name of a child. In this particular instance the evidence on record which was not seriously discredited was that the documents of title exhibit A were given to the respondent sometime before the deceased passed on. We think that even if the trial judge had found that the deceased retained possession of exhibit A until his death, there was no evidence showing that the deceased never intended to advance those developments to the respondents.

For these reasons the appeal fails. The concurrent judgments of the Fast Track High Court Kumasi and the Court of Appeal, Kumasi are hereby affirmed.

(SGD) J. B. AKAMBA

JUSTICE OF THE SUPREME COURT

(SGD) **J. ANSAH**

JUSTICE OF THE SUPREME COURT

(SGD) **R. C. OWUSU (MS.)**

JUSTICE OF THE SUPREME COURT

(SGD) J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) **N. S. GBADEGBE**

JUSTICE OF THE SUPREME COURT

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