**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA**

**CORAM: WOOD (MRS.) CJ, (PRESIDING)**

**ANSAH, JSC**

**DOTSE, JSC**

**BAFFOE BONNIE, JSC**

**AKAMBA, JSC**

**CIVIL APPEAL**
**NO. J4/22/2013**

**29TH JULY 2015**

**1. KWABENA OFORI ODURO**

**2. MARY ODURO**

**3. AGNES ODURO - - - PLAINTIFFS/RESPONDENTS/RESPONDENTS**

**VRS.**

**ISAAC KWASI OWUSU**

**(SUBSTITUTED BY ADU BAFOUR) - - - DEFENDANT/APPELLANT/APPELLANT**

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## JUDGMENT

## AKAMBA, JSC:

On 23rd December 2014, this court determined two of the grounds of appeal, namely grounds (a) and (d) filed for determination of this appeal. The two grounds alleged that the Court of Appeal had failed to resolve completely all the matters raised in the appeal by its failure to order a retrial after acknowledging that parts of the evidence of the Defendant/Appellant (hereinafter simply referred to as Appellant) were not recorded by the trial judge. We granted the two reliefs in favour of the Appellant and directed, pursuant to rule 23 (3) of CI 16, that the High Court, Accra should re-hear the concluding part of the Appellant's evidence in chief and the cross examination as well as re-examination thereon, if any, and transmit the outcome to this court for final determination of this appeal. The order having been duly complied with and the record of appeal now complete, we proceed to deliver on the remaining grounds of appeal in this judgment.

BRIEF FACTS

In retrospect this appeal is from the decision of the Court of Appeal of 21/10/2010.

The plaintiffs/respondents (hereinafter simply referred to as respondents) who initiated this action in the High Court, Accra, are the children of Augustus **Kofi** Oduro, (deceased), the undisputed owner of the house in issue. The said Augustus **Kofi** Oduro died intestate on 4th November 1981. On 17th December 1982, the High Court, granted letters of administration to his grandson Augustus **Yaw** Oduro to administer the estate. Augustus **Yaw** Oduro's letters of administration

(hereinafter simply L/A) was however revoked on 23rd March 1983. Eleven years after the aforesaid revocation and precisely on 22nd September 1994, the plaintiffs applied for and were granted new letters of administration to administer the estate. The plaintiffs in the course of administering their late father's estate discovered that the house in issue had been sold by the discharged administrator. The purported sale was evidenced by a Deed of Conveyance No 461/1985 dated 27th September **1980**. The plaintiffs discovered that the vendor and purchaser perpetuated fraud because the recitals in the Deed of Conveyance are inconsistent with the date of execution.

The respondents as plaintiffs in their writ of summons issued against appellant as defendant dated 23rd November 1995 sought the following reliefs:

i. Declaration that the sale of H/No C383/2 Amugi Avenue, Adabraka, Accra by a deed of conveyance No 461/1985 to the Defendant by the vendor therein as a fraud and therefore null and void.
ii. A declaration that whether or not the defendant was aware of the fraud, the sale was null and void because the vendor had no power to sell the property and the sale passed no title to the Defendant.
iii. An order of the Court setting aside the sale.
iv. An order of the Court ejecting the Defendant and or his agents forthwith from the house.
v. Perpetual injunction restraining the Defendant from exercising any rights of ownership or possession over the property.

The trial high court entered judgment for the plaintiffs that the 27/9/**1980** entered as the date of the conveyance was entered for fraudulent reasons and that at the said date the intestate was alive. Another reason given was that the conveyance could not have been executed before the date of the re-conveyance in 1984 by which date the letters of administration granted the named vendor had been revoked. It was therefore an attempt to fraudulently conceal this fact that the vendor inserted the date of the conveyance as 27/9/1980.

The appellant filed the following grounds for this court's determination namely:

(a) The Court of Appeal failed to resolve completely all matters raised in the appeal and thereby disabled itself from considering the real issues raised in the appeal

(b) The Court of Appeal misdirected itself on the facts and law raised by the appeal when it failed to consider the payment made by the appellant, on the direction of the deceased owner of the house in pursuance of the contract for the sale of the property to redeem the property from the mortgage at the Ghana Commercial Bank.

(c) The Court of Appeal erred in law when it failed to consider the effect of the payments made by the Appellants towards the purchase of the property directly to the owner of the house before his death.

(d) The Court of Appeal erred in law when it failed to order a retrial after acknowledging that parts of the evidence of the Defendant/Appellant were not recorded by the trial judge.

(e) The Court of Appeal erred when it imputed fraud on the Defendant/Appellant without positive evidence of proof of fraud on the part of the Appellant.

(f) The Court of Appeal erred in law when it failed to sever the contract and enforce that part of the transaction not tainted with illegality and give effect to the intention of the parties for which the Appellant paid money to redeem the property from the mortgage.

ARGUMENTS BY APPELLANT'S COUNSEL

As indicated supra, grounds (a) and (d) have been dealt with culminating in the orders of 23rd December 2014 hence the present exercise will be confined to appellant counsel's arguments in support of the remaining grounds of appeal.

The first issue argued by Counsel for the Appellant was that the Court of Appeal erred when they refused to consider the date entered on the conveyance as a wrong which warranted the application or invocation of the maxim 'falsa demonstratio non nocet' – a false description does not vitiate. Also, since the conveyance was capable of two meanings the court ought to construe the document to give effect to the meaning that effectuates the instrument in accordance with the intention of the parties on the principle of 'ut res magis valeat quam peret' – meaning, to give effect to the matter rather than having it fail. Furthermore, exhibits 1 and 1A (at pages 164 and 165 of the ROA) amply demonstrate that the date on the indenture was wrongly stated which would have led to a different conclusion by the appellate court.

Secondly, there was incontrovertible evidence on record to support the view that at the direction of the deceased owner of the property the Appellant paid money to the Ghana Commercial Bank to redeem the property then under mortgage. In spite of the finding that at the time of the alleged sale, the vendor's authority as an administrator had been revoked, the payment was to the benefit of the estate as it was by virtue of the said payment that the property was redeemed from mortgage. Consequently this court being a court of equity should not overlook the legal effect and significance of the said payment which was not tainted by any fraud.

Thirdly, there is ample evidence on record (at pages 77, 78 and exhibit 1A at page 165 of the ROA) that the transaction for the purchase of the house was initiated with the deceased owner prior to his demise and for which the purchase price was paid directly to him. The payment and the redemption of the mortgage, according to counsel, constituted part performance of the agreement with the intestate himself to sell the property to the appellant which ought to be upheld. Even if the execution of the conveyance was tainted with fraud, this would be an appropriate case for the court to sever the contract and enforce those aspects not so tainted.

ARGUMENTS BY RESPONDENT'S COUNSEL

It is the case of the Respondent that the appellants had missed the thrust of the Court of Appeal decision because the emphasis was not whether or not the appellant and the vendor had put a wrong date on the instrument but that the vendor sold the house when his L/A had been revoked and therefore he did not have power to sell the house. As to the second ground he contended that there is

no indication either direct or indirect that any money had been paid to redeem the property from mortgage, on the direction of the deceased owner. This is because the exhibits 1, 1A and 2 all bear dates ranging from 23rd March 1983 to 23rd May 1983, which are about one and half years after the demise of the owner of the property, which occurred on 4th November 1981. Exhibit 1 and 1A are correspondences between the two counsel while exhibit 2 is a bank pay in slip, all concerning the transaction. The exhibits represent a fraudulent scheme by two persons bent on disposing of the property of the deceased.

As to the third ground, the respondents submit that no acceptable evidence of any payment was made to the deceased before his death. The trial court construed that the letters of administration granted to Augustus **Yaw** Oduro was effectively revoked on 23rd March 1983. This was affirmed by the Court of Appeal.

ANALYSIS OF ARGUMENTS

Since it is the appellant who complains that the Court of Appeal judgment is against the weight of evidence, he is implying that there are pieces of evidence on record which if applied to his benefit could have changed the decision in his favour or certain pieces of evidence have been wrongly applied against him. The onus in such an instance is on him (the appellant) to clearly and properly demonstrate to this court the lapses in the judgment being appealed against. (See Djin vs Musah Baako (2007-2008) SCGLR 686 at 687, holding 1).

As a second appellate court dealing with this ground of appeal, it is within our power to independently evaluate the evidence on record and determine whether the conclusions arrived at were based upon proper findings and facts on the record. (See Akufo-Addo vs Catheline (1992) 1 GLR 377 SC).

In the case of Koglex Ltd (No. 2) vs Field [2000] SCGLR 175, at 185 this Court held that:

> "The very fact that the first appellate court had confirmed the judgment of the trial court does not relieve the second appellate court of its duty to satisfy itself that the first appellate court's judgment is, like the trial court's, also justified by the evidence on record. For, an appeal, at whatever stage, is by way of rehearing; and every appellate court has a duty to make its own independent examination of the record of proceedings"

In the case of Tuakwa v Bosom [2001-2002] SCGLR 61, this court again re-iterated that an appeal is by way of re-hearing and the appellate court has power to review the evidence and ascertain whether the decision of the trial court is supported by the evidence on record.

In this determination we would deal with the remaining grounds of appeal, namely grounds (b), (c), (e) and (f) together since there is a common thread between them.

The appellant invites us to consider that the date on the conveyance, is a wrong date which should be considered or determined as an error in line with the latin maxim 'falsa demonstratio non nocet' – meaning a false description does not vitiate. To our minds, such an invitation must be premised not only on the inaccuracy of the date in question but also on pointers to a date properly demonstrated to be the correct date which was erroneously omitted in place of the one entered. According to **Halsbury's Laws of England, 4th Edition, Volume 50, Paragraph 454, under 'Misdescription of Property or Persons – Effect where description is inaccurate'**, the learned authors state that "if, when examined, the words of description do not fit any subject with accuracy, and if there must be some modification of them in order to place a sensible construction on the will,

then the whole must be looked at fairly in order to see what are the leading words of description and what is the subordinate matter, and generally how the subject, whether the property or the donee, intended by the testator can be identified. For this purpose extrinsic evidence has always been received and this may now include evidence of the testator's intention in certain circumstances… Where, however, the context shows that the testator was not merely misdescribing an actually existing subject, but was under an erroneous impression that the subject did exist as described, or that he could dispose of it, the gift may fail." At paragraph 456 they continued, "Where the description is wholly false, so that no known existing person or thing satisfies the description, but the context of the will and the circumstances of the case show unambiguously whom or what the testator meant, the description is rejected and the testator's intention is effectuated."

It is clear from the authorities that the "Falsa demonstratio non nocet" rule of construction which applies to all written instruments, including wills, applies if of various terms used to describe a subject matter – be it a person or property – some are sufficient to ascertain the subject matter with certainty but others add a description which is not true, these other terms are not allowed to vitiate the gift.

The rule in its full form is 'falsa demonstratio non nocet cum de corpore constat.' The second part of this maxim is an essential part of it. The case of **Re Brocket, Dawes v Miller (1908) 1 Ch 185 at 194** illustrates the full import of the maxim. This case emphasizes that a false description of a person or thing will not vitiate a gift in a deed or will **if it be sufficiently clear what person or thing was really meant** (emphasis mine). The false description must merely be added to that

which is otherwise clear and need not come at the end of the sentence. In the case of **Cowen v Truefitt Ltd (1899) 2 Ch 309 at 311, CA,** the English Court of Appeal held that where in a grant or devise the description of parcel is made up of more than one part, and one part is true and the other false, there, if the part which is true describes the subject with sufficient legal certainty, the untrue part will be rejected as falsa demonstration, and will not vitiate the grant or devise. This doctrine is not to be confined to cases where the first part of the description is true and the latter untrue. It is immaterial in what part of the description the falsa demonstration occurs.

The record of appeal appears to bear out the position urged by the appellant. This is so because we think that for a proper answer to the situation presented by this appeal it must be emergent from the appeal record what proper date is evident as the correct date than the 27th September 1980 stated in exhibit C, the deed of conveyance, purportedly made between Augustus Yaw Oduro, the Vendor and Isaac Kwasi Owusu, the Purchaser to warrant the application of the 'falsa demonstratio' rule discussed supra. (See Page 157 of ROA). Put differently, what extrinsic evidence was led by the appellant to assist the court below arrive at a date purported to be the correct date?

The appellant relies on exhibits 1 and 1A at Pages 164 to 165 of the ROA. Exhibit 1 is dated 23rd May 1983 whilst exhibit 1A was issued on 23rd March 1983.These two exhibits are exchanges between the two solicitors S.K Osei-Nyame and Doris A. Ocansey representing the respondents and appellants respectively at the time and overseeing the sale transaction. The fact that these two counsel were involved in the negotiations for the sale transaction is significant as it is clear that

prior to the issuance of exhibit 1A by Doris A. Ocansey she had been in discussion with Mr Osei-Nyame the previous day the 22nd March 1983.

Owing to their significance we would quote the exhibits 1 and 1A here below respectively:

Exhibit 1

"Miss Doris A. Ocansey, 23rd May '83
Comcam Chambers,
P.O.Box 2547,
Accra.

Dear Madam,

RE: ADVANCED PAYMENT FOR DISCHARGE OF
LOAN MORTGAGED PROPERTIES ESTATE –
OF A.K. ODURO. (DECEASED)

I refer to your letter of March 23, 1983 on the above subject and wish to confirm that paragraph 2 of your said letter reflects accurately the understanding reached between our respective clients in the matter.

We are in active communication with the Ghana Commercial Bank for the release of the documents and the re-conveyance of the premises, and as soon as that is done, we hope to bring the transaction to a speedy conclusion to the full satisfaction of both sides.

Assuring you of my co-operation at all times.

Yours faithfully,

S.K. Osei-Nyame."

[Underlined for emphasis]

The document bears the stamp of S.K. Osei-Nyame of Ringway Chambers, P.O.Box 6489, Accra.

Exhibit 1A on the other hand is written on the letter head of Doris A. Ocansey, Barrister and Solicitor of the Supreme Court of Ghana as follows:

Exhibit 1A

" 23rd March, 1983

Dear Sir,

Re: Advanced Payment for Discharge of
Loan on Mortgaged Properties –
Estate of A.K.Oduro, Deceased

This is to confirm our discussions yesterday, the 22nd March, 1983 at your office on the above entitled subject-matter.

It is to be understood that the provision of the sum in the region of ninety thousand cedis (90,000.00) by my client to the Ghana Commercial Bank in the discharge of the mortgage debt of A.K.Oduro, deceased is to be treated as an advanced payment towards the purchase of one of the houses mortgaged which house also forms part of the estate of the deceased.

My client informs me that discussions regarding the sale have long advanced and that the only delaying factor is the release of the documents on the houses now

being held by the Bank. I do hope that as soon as the money is paid to the Bank, the rest of the transaction will be swiftly carried through.

Counting on your usual co-operation.

Yours faithfully,
SGD
Doris A. Ocansey

Mr. Osei-Nyame,
Ringway Chambers,
P.O.Box 6489,
Accra."
[Underlined for emphasis]

It is evident from the two exhibits quoted above that the provision of the sum 'in the region of ninety thousand cedis' had not been effected by the **23rd March 1983**. As per Exhibit 2, the Ghana Commercial Bank (GCB) pay-in slip (see page 166 of ROA) the payment was made the next day the **24th March 1983** in the sum of ninety-one thousand, eight hundred and seventy eight old cedis and eighty three old pesewas (¢91,878.83) to the High Street Branch of GCB to the credit of "Government Mortgage Loan per A.K.Oduro (deceased)". This transaction following closely on the heels of exhibit 1A appears to demonstrate counsel's desire to implement the common understanding. It also means that when exhibit 1 was written by Mr Osei-Nyame, counsel then representing the respondents, his chambers was "in active communication with the Ghana Commercial Bank for the release of the documents and the re-conveyance of the premises, and as soon as that is done, we hope to bring the transaction to a speedy conclusion to the full satisfaction of both sides." Nothing could be clearer as to the state of the transaction between the two sides at this point in time.

The respondents' real reason for mounting their claim is summed up in the evidence in chief of the 1st Plaintiff (at page 52 of the ROA) as follows: "We are praying per the writ of summons, the vendor of the house is a grandson to my father. We did not like the manner he sold the house, he did not have any right to sell the house. We have the letters of administration the vendor does not. He once had an Letters of Administration but court revoked it. We conducted a search at the Registry and it revealed that the Letters of Administration had been revoked. I have document from the court to that effect, I want to tender it in evidence."

DW1 Charlotte Afoe Osei testifies to the payments made to the grandson - an obvious reference to Augustus Yaw Oduro - who had exhibited a document 'authorizing him to act in the absence of the oldman' – also a reference to the Letters of Administration granted him. As a result DW1 and the others went to inform their lawyer who in turn accompanied them to lawyer Osei Nyame to satisfy herself that they had effected payment. They were given an indenture covering the house. The original indenture was taken away by the brother, the original defendant. The DW1, states in her answers under cross examination that the indenture exhibit C to which she was a signatory was prepared by her lawyer, Lawyer Doris Ocansey and given to Augustus Oduro who in turn took it to his lawyer. The DW1 also gives 1983 as the year in which the final payment of one million old cedis was made for the purchase of the property as well as when exhibit C was prepared.

The final payment for the sale transaction and the preparation of exhibit C could not precede or predate exhibit 1 issued on 23rd May 1983 because counsel for the

respondent was still waiting for the release of the mortgage documents by the Ghana Commercial Bank (GCB). The 23rd March 1983, was the date when the L/A granted Augustus Yaw Oduro was revoked.

A close examination of two clauses in the recitals in Exhibit C will further confirm the absurdity of the date of execution therein stated being the 27th September 1980 and rather compel a search for the right date of execution thereof:

"5 . All moneys intended to be secured by the said Mortgage to the Ghana Commercial Bank had been fully repaid to the bank in discharge of the debt by the Vendor as Administrator of the Intestate.

6. By a Deed of Re-Conyeyance dated the 5th day of June, 1984 and registered as No 2624/1984 with AC. No. 3946/84 the Ghana Commercial Bank re-conveyed the hereditaments and premises comprised in or otherwise assured by the Mortgage to the Vendor."

If indeed the exhibit C was made on the **27th September 1980,** how could reference be made in clause 6 of its recitals to a deed of re-conveyance dated **5th June 1984**, as having been made to the Vendor, in respect of the same transaction? The execution date could not pre-date or be earlier in time to the date of re-conveyance and we have no doubt that the **1980** stated thereon as the year of execution is 'falsa demonstratio'. It is unfortunate that this obvious error escaped counsel's detection. Be that as it may, the record shows that the monies secured by the mortgage had been paid and a deed of re-conveyance effected on 5th June 1984. The conveyance exhibit C could only be made after **June 1984** and not before.

The respondent's contention that the 27th September 1980 stated on exhibit C is a clear indication that that date was entered for fraudulent reasons because at that time the intestate was alive is rather simplistic and also not borne out by any evidence. The record does not bear any indication of fraud particularized and proven by any evidence beyond the mere speculation that because the 1980 inserted on exhibit C is wrong for its absurdity it necessarily infers a conclusion of fraud. An allegation of fraud must be particularized and evidence led in proof thereof. We therefore conclude that exhibit C was made on 27th September 1984 and not the 27th September 1980 wrongly inserted. By this determination, it is evident that DW1's testimony that payments were made in 1983 culminating in the preparation of exhibit C also in 1983 are untrue and we so hold. Notwithstanding the above conclusions, it still has to be shown that Augustus Yaw Oduro had the mandate of the estate of Augustus Kofi Oduro at the time he entered into exhibit C which would be determined here below.

EFFECT OF DEALING IN THE DISPUTED PROPERTY AFTER 23RD MARCH 1983

The most contentious issue to resolve in this appeal is what effect the revocation of the letters of administration (L/A) granted Augustus Yaw Oduro has on his (Augustus Yaw Oduro's) dealing in the sale transaction now that it has emerged that exhibit C could only have been made after June 1984.

It would be recalled that Augustus Yaw Oduro's L/A was revoked by the High Court on 23rd March 1983. It would also appear from the dates on exhibits 1 and 1A that whatever transactions the two counsel and their clients entered with Augustus Yaw Oduro took place after 23rd March 1983 perhaps unaware that his legal mandate to deal in the property had been revoked. While it is correct to

observe that the High Court which set aside Augustus Yaw Oduro's L/A which was granted on 17/12/82 on 23/03/83 ordered that "Kwame Amoako and Augustus Yaw Oduro are to submit fresh application for the grant of letters of administration" there is no indication that the two complied with the order. It is also obvious that the respondents were not the ones ordered to submit fresh application for the grant of the letters of administration under the orders of the court. Indeed at the time of the order the respondents were minors and could not have applied for same. In any case this is not one of the grounds of appeal for determination. Without doubt and with the continued dealings in the property by the said Augustus Yaw Oduro, could the appellant be classified as an innocent purchaser for value without notice? Section 97 (1) of Act 63 (1961) the Administration of Estates Act provides as follows:

"*A conveyance of an interest in movable or immovable property made to a purchaser before or after the commencement of this Act by a person to whom probate has been granted or letters of administration have been granted is valid, despite a subsequent revocation or variation before or after commencement of this Act, of the probate or administration."*

The above provision will avail a purchaser who at the time the conveyance was made, the grantor had a valid grant of probate or letters of administration as the case may be. This appears not to be the case in this presentation. This is because as the evidence on record amply demonstrates, the exhibit C was made in 1984 by which time Augustus Yaw Oduro's L/A was long revoked. There is also no evidence of a new grant having been made to him and Kwame Amoako as per the court order. On the other hand the appellants failed in their bid to show that the

parties had been in negotiations long before the revocation of Augustus Yaw Oduro's L/A. The discussions referred to in exhibit 1A could only relate to events after the 23rd March 1983. The defendants' (appellants) evidence in support of their assertions are littered with conflicts between their two witnesses testimonies particularly as to dates and to whom payments were allegedly made that same could not be relied upon.

In addition, section 72 of the Administration of Estates Act, Act 63 of (1961) affords protection for persons making payment in good faith in circumstances where the representation is revoked as follows:

**"72. Protection of persons on probate or administration**

(1) A person making or permitting to be made a payment or disposition in good faith under a representation shall be indemnified and protected in so doing, despite a defect of circumstances affecting the validity of the representation.

(2) Where a representation is revoked, the payments and dispositions made in good faith to a personal representation before the revocation are a valid discharge to the person making them.

(3) The personal representative may retain the moneys due to that representative in respect of the payments or dispositions made which the person to whom representation is afterwards granted might have properly made."

Unfortunately for the appellant the above provision cannot avail him because as at the date of execution of exhibit C, now determined to be 27th September 1984 and not 27th September 1980, for reason advanced supra, Augustus Yaw Oduro had since the 23rd March 1983 ceased to have the mandate to represent the estate of the late Augustus Kofi Oduro and so was simply not a representative of

the said estate so as to make representations to benefit anyone as envisaged by the above provisions. Besides, the appellants' claim that some payments were made to the late Augustus Kofi Oduro, in his lifetime without obtaining receipts at which time the transaction was being supervised by the two counsel, defies belief. For the above reasons, we find no merit in the appeal and hereby dismiss same.

We however note that it was the payment of the sum of ninety one thousand eight hundred and seventy eight old cedis and eighty three pesewas (¢91,878.83) made by the appellants to the GCB High Street branch, Accra that redeemed the property from mortgage and to the benefit of the estate. Consequently and in the interest of justice and notwithstanding the dismissal of the appeal, we hereby order the respondents' to pay back the sum of (¢91,878.83) at the prevailing rate with interest from the 24th March 1983 to the date of payment to the appellant.

(SGD) **J. B. AKAMBA**
**JUSTICE OF THE SUPREME COURT**

(SGD) **G. T. WOOD (MRS)**
**CHIEF JUSTICE**

(SGD) **J. ANSAH**
**JUSTICE OF THE SUPREME COURT**

(SGD) **V. J. M. DOTSE**
**JUSTICE OF THE SUPREME COURT**

(SGD) **P. BAFFOE BONNIE**
**JUSTICE OF THE SUPREME COURT**

**COUNSEL**

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