IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA- GHANA, A.D.2014

CORAM: WOOD, C. J. (PRESIDING)
ANSAH, J.S.C.
DOTSE, J.S.C.
BONNIE, J.S.C.
AKAMBA, J.S.C.

CIVIL APPEAL
NO. J4/22/2013

23RD DECEMBER, 2014

1. KWABENA OFORI ODURO - - - PLAINTIFFS/ RESPONDENTS
2. MARY ODURO /RESPONDENTS
3. AGNES ODURO

VRS.

ISAAC KWASI OWUSU - - - DEFENDANT/APPELLANT
(SUBSTITUTED BY ADU BAFFOUR) /APPELLANT

JUDGMENT

AKAMBA, JSC:-

This appeal is from the judgment of the Court of Appeal entered against the Defendant/ Appellant/Appellant (hereinafter simply the Defendant) on 21/10/2010 in an action commenced by Plaintiffs/ Respondents/Respondents (hereinafter simply the Plaintiffs) per a writ of summons issued on 23/11/1995.

The Plaintiffs sued the Defendant seeking the following reliefs:

> " i. A 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 was 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."

BACKGROUND

The plaintiffs are the children of the late Augustus Kofi Oduro, the undisputed owner of the house in issue. A year after the demise of Augustus Kofi Oduro, the High Court, on 17th December 1982, granted letters of administration to his

grandson, Augustus **Yaw** Oduro to administer the estate. Augustus Yaw Oduro's letters of administration 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 suspected that the vendor and purchaser perpetuated fraud because the recitals in the Deed of Conveyance are inconsistent with the date of execution.

The trial court entered judgment for the plaintiffs. The court reasoned that the date of 27/9/1980 on the conveyance was entered for fraudulent reasons and that at the said date the intestate was alive. Another reason advanced 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 defendant 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.

It is generally settled that where findings of fact made by a trial court are concurred in by a 1st appellate court, a 2nd appellate court must hasten slowly in disturbing the findings or coming to a different conclusion unless it is manifestly clear that the findings of the two courts are not supportable on the evidence or perverse. In such circumstances, this Court has the power to review the evidence as a whole and find whether the conclusions by the High Court as affirmed by the

Court of Appeal are supported by the evidence. (**See Achoro vs Akanfela (1996-97) SCGLR 209; Koglex (No2) v Field (2000) SCGLR 175; Obeng v Assemblies of God Church, Ghana (2010) SCGLR 300; Gregory v Tandoh and Anor (2010) SCGLR 971).**

Where the appellant alleges that the judgment is against the weight of the evidence led, the court is enjoined to independently evaluate the evidence on record and determine whether proper findings and facts were made and same supported by the conclusions reached.

We have reiterated time and again that whenever an appeal is based on the omnibus ground for consideration the appellate court has jurisdiction to examine the totality of the evidence before it and come to its own decision on the admitted and undisputed facts. (See **Akufo-Addo vs Catheline (1992) 1 GLR 377 SC). In Tuakwa v Bosom 2001-2002 SCGLR 61** this Court delivered itself thus: "an appeal is by way of rehearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial Court is against the weight of evidence. In such a case, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that on a balance of probabilities, the conclusions of the trial Judge are reasonably or amply supported by the evidence".

Thus when an appellant complains that the judgment is against the weight of evidence, he is implying that there are pieces of evidence on record which if applied in his favour, 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 that appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against. **(See Djin vs Musah Baako (2007-2008) SCGLR 686 at 687, holding 1).**

GROUNDS (a) and (d)

We propose to resolve grounds (a) and (d) together first because they have a common bearing on each other and secondly should the burden be discharged, could render the determination of the remaining grounds unnecessary or defer consideration for the time being. The two grounds allege that:

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

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.

ARGUMENTS OF COUNSEL

The pith of the defendant's dissatisfaction is that, notwithstanding the acknowledgment of counsel on both sides in this appeal and also at the 1st appellate court that portions of the evidence adduced at the trial court were either not recorded or if recorded, was not included in the record of appeal, the court of appeal did not accept that such omission was fatal to the presumption of regularity of the judgment entered. In other words the court of appeal concluded that those omissions were not fatal to the judgment entered by the trial court.

The plaintiff for his part considers the defendant's stance as pure scuttling and a refusal to cooperate. The plaintiff's conclusion is in reaction to the defendant's refusal to disclose, as an officer of the court, what specific evidence, known to him, which has been left out.

ANALYSIS

By contending that the court of appeal failed to resolve completely all matters raised in the appeal and thereby disabled itself from considering the real issues raised, the defendant in essence is saying that the judgment arrived at is against the weight of evidence.

As we have intimated in numerous authorities a few of which have been cited above, such a ground of appeal is an invitation to this court to rehear the matter and "to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that on a balance of probabilities, the conclusions of the trial Judge are reasonably or amply supported by the evidence".(See Akufo Addo vs Catheline, supra)

Counsel for the defendant impugns the integrity of the trial judge's record on account of its failure to include the closing portions of the defendant's evidence in chief and the beginning of the cross examination of his client. They were either not recorded at all by the trial judge or if recorded, were not included in the record of appeal. The record of appeal bears testimony to the concerns raised. The evidence in chief of defendant Adu Baffour Kwadwo, is recorded at page 68 to 69 of the record of appeal (ROA). The case was then adjourned to "25th, 26-7-01 for continuation". The record for the 25th July 2001 is at page 70 when the suit was adjourned to 26th July 2001 because of the absence of counsel for the defendants. There is no record of any proceedings on the 26th July 2001 in the appeal record. The next entry in the ROA is at page 71. It records events made on 5th August 2002 when the court ordered that hearing notices be issued to the defendants and their counsel who were both absent. The 1st Plaintiff and his counsel were however present. The next significant entry is at page 72 with the following entry:

"I am informed the exhibit docket cannot be traced. Suit is accordingly adjourned to 28th August, 2002 by which date it is hoped the docket will have been found to enable counsel for the plaintiffs to ***further*** cross examine defendant." (Underlined for emphasis)

The obvious and reasonable inference discernible from the above entry is that the defendant had already completed his evidence in chief and cross examination of the witness already commenced. The adjournment to the 28th August 2002 was to enable counsel for the plaintiff to further cross examine the defendant. It is an understatement to say that the record of the completion of the evidence in chief and the beginning of cross examination is very germane for the determination of the dispute before the court. Its significance arises from the fact that one response or statement be it positive or negative, can turn the tables one way or the other in the trial. Also, the material nature of the evidence is not determined by how elaborate or terse it is. I think it is appropriate to state that inherent in the right to be heard, otherwise stated as the audi alteram partem rule, is the requirement of fair hearing or trial in a timely manner or within a reasonable time as envisaged under article 19 (13) of the Constitution 1992. The rules of natural justice are meant to provide justice through procedural fairness and to guarantee fair trials, unbiased and transparent judgments to all persons who resort to the law. (See per **Bamford-Addo, JSC in Republic v High Court, Denu; Ex Parte Awusu II (No 2) (2003-2004) SCGLR 907 at 910)**

Indeed nothing better guarantees fair trial and transparent judgments than the production of accurate records of events which gave rise to those results. Incidentally it is not a mark of courtesy or favour to be furnished with accurate records of a trial when required, and not least in a civil suit such as the present but subject only to the fulfillment of laid down rules if any. Can the record of proceedings, as it stands devoid of the concluding testimonies of the defendants' evidence in chief and the beginning of his cross examination be a basis for concluding that the trial and the judgment arrived at are unbiased and transparent?

In any case when the Registrar of the trial High Court was ordered by the Court of Appeal to rectify the record of appeal to include the omissions stated above this is what the Chief Registrar M.W.K.Kwara wrote back on 17th June 2008 to say:

"With reference to your letter No 353/H1/84/2007 dated 23rd day of March, 2008 I return herewith, four (4) certified true copies of the appeal records together with

the mother docket. No omissions or mistakes were found in the Records. Please acknowledge receipt."

One inference from the above response is that the trial judge failed to record those proceedings or deliberations. Another inference is that the Registrar simply got everything wrong. How could there be no mistakes or omissions from a record in which the evidence in chief simply hangs in the air without indicating an end or the cross examination continuing midstream without showing a beginning? The Registrar could not be right when he stated that there were 'no omissions or mistakes' in the records which speak to the contrary.

If these inferences are correct, would it be fair to rely on the record as it stands – incomplete as it is? I think the omissions are not only grave but indeed call into question the integrity of the court's records. Either way, the court cannot take advantage of its own wrongs or shortcomings. No matter whose lapse this was, whether the trial judge or the registrar or officers of the court, this court views with the greatest disfavor such actions which have the effect of stultifying any considerations that this court could give to matters before it for determination.

Yet, in spite of these grave omissions from the record of appeal, the Court of Appeal regrettably found no merit in this ground of appeal and dismissed same. The reasons given by their Lordships of the Court of Appeal for their refusal to grant the defendant's prayer for an order for a retrial are as follows:

"The record of appeal is produced from the record of proceedings. The two are not exactly the same. Aspects of the record of proceedings may be omitted from the record of appeal either because they are not considered relevant to the appeal or because they are not available for one reason or the other, even though they are relevant to the appeal. It is possible for the record of proceedings to suffer harm or damage after judgment to the effect that aspects of the record may be lost, obliterated, mutilated or be otherwise unavailable. But whatever the cause of the harm or damage, since it is likely to occur after judgment, unavailability of any aspect of the record of proceedings for the purpose of compiling the record of appeal does not necessarily establish that that aspect of the record of proceedings was not available at the time the judgment of the court written. The presumption

is that an official duty has been regularly performed and, in the absence of evidence to the contrary, I will hold that no irregularity attended the writing and reading of the judgment of the trial court. I think it will be a dangerous precedent to hold the judgment of a court of competent jurisdiction invalid or otherwise flawed merely because aspects of the evidence adduced at the trial cannot be found after judgment. In the present case, I do not accept the omissions pointed out by counsel as sufficient evidence to rebut the presumption of regularity of the judgment of the trial court."

Regularity of a judgment is not coterminous with the correctness of the record of proceedings upon which same was derived. In my view, this ground of appeal in so far as it impugns the correctness of the trial judge's conclusions, based upon the facts led before him, the same set of facts and other pieces of evidence put before him must be placed before us to independently assess and arrive at our own conclusion. In this case, the trial judge must have considered all the evidence that was led before him including the defendant's concluding evidence in chief and the opening cross examination before rendering his decision appealed from. It is this very platform that ought to be provided to us by way of the full record of proceedings, devoid of the omissions complained of, to facilitate the re-hearing by this court. That is the essence of 're-hearing' of an appeal on the records. It is not enough to presume that the trial judge regularly performed his duty in this case. On the contrary the trial judge would have regularly performed his duty if he recorded all the evidence at the trial of this case but not otherwise. If the view espoused by the court of appeal is to hold sway, it would set a very dangerous precedent and compromise the integrity of the judicial trial process. It would justify laxity and decadence in our trial system. Why would a court which fails to produce accurate and reliable records of its trial sessions be exonerated from its flaws simply because it is a court of competent jurisdiction? Significantly, the High Court is a court of record which means that it is obliged to keep a record of its proceedings. This record must be a true and correct entry of what actually took place in the trial. As it stands now, one can at best know only part of the defendant's story and this is no true knowledge. It is indeed very unsavory for a case to travel this far only to have to be sent back for a new trial. However in the

absence of the full record of proceedings of all that transpired before the trial judge being put before this court to do justice to both parties, the only option might be to travail that path. The missing records which have necessitated this option, include records not only of the concluding portion of defendant's evidence in chief, but also those of his opening cross examinations and answers thereto. As **Jessel, M.R** correctly stated in **Ex Parte Firth, In re Cowburn (1882) C.A, Vol XIX (1881-1882) The Law Reports (Chancery Division), 420 at 426;** an appellate court cannot decide an appeal in the absence of the evidence on which the order appealed from was founded. Such defect is however curable as occurred in *ex Parte Firth (supra)* wherein the court relied on some other pieces of evidence. This is recalled *per Jessel, M.R at p. 426 of the report* as follows: "*Before us that defect has been cured by the admission of a newspaper report, which appears to be full. Therefore we know the evidence which was before the County Court Judge, and we find that the evidence of one of the witnesses for the present Respondent, the solicitor who attested the bill of sale, was entirely disbelieved by him."*

CONCLUSION

We are not privy to such other reliable pieces of evidence that would place us in a position to do justice in this matter as in the *ex Parte Firth* case (supra). Given the circumstances of this case, we do not see it as one that merits a full re-trial in the sense of hearing the whole case from scratch. We are also mindful of our duty to achieve speedy and effective justice, avoid delays and unnecessary expense and ensure that as far as possible all matters in dispute between the parties advanced at the trial are effectively determined. It was in order to achieve these noble objectives that this court adopted the same sound policy reasoning to chart a new path in **suit No J4/42/13, Adomako Anane v Nana Owusu Agyemang (Subst by Nana Banahene) & 7 ors, of 26th February 2014 (unreported)** to obviate a trial de-novo. Some of the reasons stated therein against de-novo trials include: "(i) the protracted trials and delay in the delivery of judgments; (ii) they afford parties undue advantage to reconstruct their case and thus waste more time; (iii) they encourage parties to seek to embellish or improve their case if they believe that their performance or the performance of their witnesses did not go the way they

wanted; (iv) they can sometimes lead to denial of justice where the witness or party is dead or otherwise unavailable and there is no other means of haring the truth except to rely on what has already been reproduced by the court under cross-examination in the previous proceedings; (v) there will be denial of justice where vital exhibit is lost or otherwise unavailable but details of it are on the record and could have been used to write the judgment if the previous proceedings had been adopted; and (vi) in fact in the event of the last two reasons, trials may have to be discontinued or cases abandoned or justice denied when, indeed, adoption of the record would have saved the continuation of the trial and the entire case."

We would, therefore state the law as follows: In civil proceedings, the ultimate question of whether or not evidence should be taken over again i.e. tried de novo, because the judge's or court's notes are lost, should be taken by the court depending upon whether or not the defect may be cured.

In appropriate circumstances the appellate court or court may accept short hand notes taken of the proceedings in court, counsel's/ solicitor's notes all properly verified by affidavit in order to fill in the missing evidence. Other recognized means of curing such defect may be by admission of reliable newspaper reports or publications by legal correspondents of the issue. In our present times reliable electronic recordings of the missing evidence may be considered. This is not an exhaustive list and may be added to subject to reliability and accuracy.

In the present case, in the light of the stage at which this appeal has reached, the nature and extent of the missing evidence, the dearth of any reliable material thereon and in order to have a full complement of the evidence necessary for the determination of this appeal, this court, relying on rule 23 (3) of CI 16 directs the High Court, Accra to re-hear the concluding part of the defendant's evidence in chief and the cross examination as well as re-examination thereon, if any, and same transmitted to this court for inclusion and ultimate determination of the appeal which is before us. We think that the ends of justice would best be served by obtaining the full record of proceedings by this directive so as to deal with this appeal once and for all. The appeal therefore succeeds to the extent of the above

directive. The decision of the Court of Appeal is accordingly set aside. The trial high court should comply with this directive and furnish the outcome to this court within forty-five (45) days of this order. Upon receipt of the outcome of the order, the final judgment of this court would be delivered. The Honourable Chief Justice shall give the requisite direction as to which High Court Judge shall carry out the order in view of the passing on of the trial judge.

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

(SGD) P. BAFFOE BONNIE
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