IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA-GHANA

CORAM: WOOD (MRS.) CJ, (PRESIDING)
DOTSE, JSC
YEBOAH, JSC
BENIN, JSC
AKAMBA, JSC

CIVIL APPEAL
NO. J4/21/2012
24TH MAY, 2013

MADAM NAFISA IDDRISU : PLAINTIFF/RESP./RESPONDENT

VRS

NORGA GRUMAH : DEFENDANT/APPLT./APPELLANT

J U D G M E N T

WOOD (MRS.), CJ;

It is rather unfortunate that what started off and was intended as a straightforward land transaction between the parties have caused needless financial and emotional pain and suffering to both parties through this protracted litigation which has spanned a period of eleven long years. It is even sadder still, that as the facts clearly demonstrate, this is as a result of the intransigence of the Lands Commission (Commission), the State organ with the constitutional responsibility of ensuring that property rights of individuals are protected. Evidently, it was their blatant failure to recognise the constitutional right of the appellant and give effect to it that has led to this long drawn out legal wrangle. I am led to believe that plainly, the matter posed such a grave dilemma to the Plaintiff/Respondent (Respondent), that she found herself so stuck between a hard place and a rock, she probably

surmised it was more prudent and the lesser of the two evils to sue the defendant/appellant (appellant), from whom she initially took steps to acquire the property, rather than the Commission, the powerful organ of State, who was proving very difficult at the time. I shall demonstrate that sadly, that step over what appears not to be a particularly big piece of land was her undoing.

A fair summary of the facts which triggered the action would promote a greater understanding of our judgment in this appeal. About 1994, the Government of Ghana (GoG), in exercise of its eminent domain powers, compulsorily acquired property No G 20 Sabonjida (G20) from the appellant, for the Tamale roads construction works. He received full compensation for the acquisition. At the conclusion of the road works, the appellant, who happened to be still in occupation of the unutilized portion of the land, believing that he was the owner in possession of that unused portion of the G20, sold it to the respondent for ¢4,000,000.00 or GH¢400.00 in today's economy and duly executed a deed of assignment in her favour.

The Commission however, challenged the validity of the transaction and declined to perfect the respondent's title on the basis that since on compulsory acquisition, the appellant received full compensation from the State, the unused portion remained the property of the State, for which reason, the appellant on the principle of nemo dat quod non habet, lacked the legal capacity to convey it to a third party.

Following the Commission's refusal to vest title in the respondent, and upon their advice, she applied formally to the Commission for a lease of the said property, only to fall into another trap. The appellant flatly refused to yield vacant possession to her on the strength of the purported lease by the Commission to her. Caught in this vortex, she sued the appellant in the District Court, per an amended writ of summons for the following reliefs:

1. "1. A declaration that the plaintiff is the rightful lessee of plot No. G. 20, Tamale.

2. Recovery of possession of plot No. G. 20, Tamale.
3. Return of ¢4,000,000.00 by defendant to plaintiff for failure to pass title or at all to plaintiff on the contract between plaintiff and defendant with House No. G.20, Tamale as the subject matter.

4. An order of perpetual injunction restraining the defendant whether by himself, his assigns, workmen, servants or any other person whosoever claiming by or through the defendant from interfering with the rights of plaintiff to occupation of the said plot No. G. 20, Tamale.

5. Special and General Damages for trespass to House No. G. 20, Tamale.

Indisputably, her claim for declaration of title and ancillary reliefs of recovery of possession and perpetual injunction was anchored on the purported acquisition from the Commission. It definitely was not based on the failed transaction between her and the appellant, hence, the demand for the return of the consideration of GH¢400.00 that she paid to the respondent. The statement of claim filed on the orders of the trial court also buttresses this point. The trial Magistrate however declined to decree title in the respondent, but ordered a return of the purchase price of GH¢400.00 to her. The decision was premised on the conclusion that the lease was obtained in violation of the appellant's constitutional right of first option to re-acquire the unutilized property.

The High Court on appeal overturned the decision in its entirety, and by substitution granted all the reliefs claimed by the respondent, (save the return of the GH¢400.00, and damages of GH¢200.00), reasoning that the fundamental finding that the lease was unconstitutional was not supported by the record. The Respondent successfully secured a reversal of that decision from the Court of Appeal, per the following orders:

(a) The Lands Commission comply (sic) with Article 20(6) of the constitution by giving the appellant the first option to re-acquire property No. G20, Sabonjida, Tamale.

(b) The lease dated 20th March, 2001 executed between the Lands Commission and the Respondent is called up and cancelled.

(c) With the appellant's right of a first option to reacquire now confirmed, the appellant is hereby ordered to execute a new assignment in favour of the Respondent in respect of House No. G20, Sabonjida, Tamale within 30 days."

This appeal turns on the two amended grounds of appeal filed on the 28th of March 2012 by the leave of this court. These are that:

"The judgment is against the weight of evidence;

The Court of Appeal erred in law when it ordered the Appellant to execute a new assignment in favour of the Respondent in respect of House No. G20 Sabonjida Tamale within 30 days because Appellant's right of first option to re-acquire G.20 has now been confirmed by the Court. "

In this connection, the order which has generated much controversy is their Lordship's order that the appellant executes a deed of assignment in respondent's favour within 30 days of the order. In this appeal, in which we are urged to set aside the said order, the thrust of the argument is that the respondent armed with the full complement of the facts, chose as a principal remedy a return of the purchase money of GH¢400.00 paid to the appellant, for total failure of consideration and consequently failure to pass title. She additionally sought damages for trespass, which the High Court on appeal also granted. Allowing the order to stand, we have been urged, would amount to unjust enrichment on the respondent's part, given that she has, been fully compensated for all losses arising from the failed land

transaction. In other words, having been fully restored per monetary compensation to the original position in which she were, firstly by the return of the GH¢400.00 and secondly by pecuniary damages for trespass, it would be altogether wrong in law and equity to additionally order an assignment by the appellant in her favour, based on nothing more than the confirmation of his right to re-acquire the unused property.

All three courts made some crucial findings of facts, which we find no legal basis for disturbing. A long line of judicial authorities prohibits us from interfering with concurrent findings of trial and appellate courts which are clearly supported by the record. The authorities include such cases as Achoro v Akanfela [1996-97] SCGLR 209, Obrasiwa v Otu [1996-7] SCGLR 618, and more lately, Obeng v Assemblies of God Church [2010]SCGLR 300, Gregory v Tandoh [2010] SCGLR 971,Agyenim-Boateng v Ofori and Yeboah [2010] SCGLR 861, Mensah v Mensah [2012]SCGLR 611 and P.S.Investment Ltd .v Central Regional Development Corporation and Others [2012]SCGLR 611.

But, the Court of Appeal drew a key inference, which I find erroneous, and at any rate, at variance with evidence on the record and must therefore be corrected. The evidence no doubt established that the appellant remained in possession of the disputed property even after the acquisition. But then the court relied on this fact alone to uphold the appellant's claim, which claim had been stoutly challenged by the Commission that the disputed property fell outside the compulsory acquisition. By this, the court rejected the concurrent finding of the two lower courts that the disputed property falls within the compulsory acquisition. No compelling reasons were assigned by the court for preferring a finding based purely on an inference. As was rightly concluded by the trial court and affirmed by the appellate High Court, the Commission's evidence per the official record proves that the disputed land falls within the compulsory acquisition. In the absence of very cogent reasons, an inference drawn from a proved

fact cannot certainly be superior to the fact proven by direct evidence. I would thus endorse the concurrent finding of the trial and first appellate court and hold that the disputed property falls within the compulsorily acquired property, G20.

In relation to the arguments advanced in support of the appeal grounds, two other critical questions remain for our consideration. The first fundamental question relates to the person or persons in whom the disputed G20 was vested at the date of the transaction between the respondent and the Commission. Was it vested in the appellant or the State at the time the latter sought to convey it to the respondent? The second critical question is whether or not the Court of Appeal erred in ordering the appellant to convey it to the respondent on account of the declaration, or in the words of their Lordships, a "confirmation of his constitutional right to re-acquire same?"

The importance of the latter question cannot be overlooked. All the three courts below rightly concluded that upon compulsory acquisition, the whole of G20 became vested in the State. The critical legal question is what of the unused portion, the subject of this raging dispute? The answer lies in the article 20 (5) and (6) of the 1992 constitution, which provides:

"20(5) Any property compulsorily taken possession of, or acquired in the public interest or for a public purpose, shall be used only in the public interest or for the public purpose for which it was acquired"

"20(6) where the property is not used in the public interest or for the public purpose for which it was acquired, the owner of the property before the compulsory acquisition shall be given the first option for acquiring the property and shall, on such re-acquisition refund the whole or part of the compensation paid to him as provided by law or such other amount as is commensurate with the value of the property at the time of the re-acquisition."

From these constitutional provisions, where the State in the exercise of its eminent domain powers, compulsorily acquires property in the

public interest or for public use in accordance with article 20(1) of the 1992 constitution, the State is under a constitutional obligation to use it for the declared or intended purpose. Where the State is, for some reason unable to use it or uses only part of it for that intended purpose, the original owner, that is the person(s) from whom the property was compulsorily acquired, is entitled as of constitutional right to the first option to re-acquire the unused property.

A crucial question arises for determination. Until full ownership in the unused property is restored to the original owner, what is the nature of the interest or right of the owner as well as the State in the unused property? Their respective interest is limited to a contingent or conditional ownership in the unused property. In other words, until the owner utilises or declines to utilise the constitutional right of re-acquisition, none of them has absolute title or absolute ownership, namely, the bundle of full ownership rights and entitlements, including the right to convey it to others, in the unused property. Contingent or conditional ownership is ownership in which title is imperfect, namely that the potential owner does not have full right to the property but would only acquire full ownership if specific conditions are met or fulfilled. Stated differently, the ownership is contingent upon those specific conditions being met in order to perfect the title. The person thus becomes entitled to full ownership only if those specific conditions are fulfilled or occur. Thus, in compulsory acquisitions under the 1992 constitution, absolute ownership of the property would vest in or revert to the original owner who in exercise of the right to re-acquire unused property fulfills the conditions circumscribed by the constitution; otherwise full title to the property would vest in the State.

What are the constitutionally prescribed conditions to be met by an original owner for contingent ownership to blossom into absolute ownership or full title? The constitution imposes a mandatory duty on the State to either expressly or impliedly (with the greater likelihood of it being the former) invite the original owner first to exercise the

option to re-acquire the unused property. It also means an acceptance or rejection of the offer in like manner by the original owner beneficiary; with the two parties having agreed on the quantum of refund and possibly other related matters, as for example, the terms of payment. The quantum of refund is either "the whole or the part of the compensation paid to him by law or such other amount as is commensurate with the value of the property at the time of the re-acquisition."

I have analysed the constitutional provision of the right of first option to re-acquire unused compulsorily acquired property from one angle only; the Commission inviting the owner to exercise the constitutional right of first option. But there is no legally justifiable reason why an original owner on discovering the existence of the unused portion cannot write in demand of the constitutional right to re-acquire the property on the prescribed terms. But it must be emphasised that if the past owner rejects the offer to re-acquire or is unable to meet the constitutional conditions, then the absolute title to the property passes on to the State, with full power and authority to deal with the property as it deems fit.

As was concluded, rightly in my view by both the trial court and the Court of Appeal, these constitutional provisions are applicable to this case. Thus, the High Court's finding that they are not; on the basis that their applicability was neither specifically pleaded nor raised at the hearing is flawed. In all trials, it is the fundamental duty of a court to address all factual and legal questions arising from the admitted evidence, which is lawful evidence, received without objection and apply the law correctly, ensuring the law is upheld and not undermined. This is the rationale underlying the legal principle that even on appeal; a court has power, proprio motuo, to raise for the first time a pertinent constitutional or legal question which was never addressed at the hearing provided no additional evidence was needed for that determination. The only rider is that parties must be given fair opportunity to address the issue. Two decisions clearly spell out this

court's jurisprudence on this important legal point. In A-G v Faroe Atlantic Co. Ltd.[2005-2006] SCGLR 271 at 309, I had opportunity to examine the legal position on this point. My opinion was that:

"The salutary and well known general rule is that where a point of law is relied on in an appeal, it must be one which was canvassed at the trial. But there are exceptions to this rule; the question of jurisdiction being one of them. A jurisdictional issue can therefore be taken or raised at anytime, even for the first time, on appeal. Another exception is where an act or contract is made illegal by statute."

I included constitutional questions in the exceptions, reasoning that:

"…where the legal question sought to be raised for the first time is substantial and can be disposed of without the need for further evidence, it should be allowed. Substantial constitutional issues, such as the one before us, fall neatly into this category."

In SG-SSB v Hajara Farms Ltd. [2012], this honourable court had occasion to determine, inter alia, the circumstances under which a court suo motu may raise an issue not canvassed by any of the parties. In throwing further light on the law as it stood, the court per Dr. Date-Bah JSC concluded that:

"…it is desirable and prudent for an appellate court to invite arguments on propositions of law it intends to rely on other than those canvassed by the parties before it, there is no absolute bar on appellate court from deciding a case on the basis of such a proposition of law."

Given that the respondent's case was purely founded on the purported transaction between her and the Commission, the court was, from the facts, duty bound to address the fundamental question of the constitutional validity of the purported leasehold agreement between the Commission and the respondent. To decide that question correctly required an examination of the scope and effect of article 20 (5) and (6) of the 1992 constitution, the provisions governing the unused portions of compulsorily acquired property, hence the relevance of the constitutionality issue, irrespective of whether or not it was pleaded or raised by either party.

Based on the facts and the law, (the relevant constitutional provisions) the Court of Appeal's confirmation of the appellant's right to re-acquire the unused property represents an accurate statement of the law and must not be disturbed. Similarly, we hold that at the date of the purported assignment, the Commission lacked the capacity to carve out leasehold interest in favour of the respondent. That the Commission flatly refused to recognise the appellant's constitutional right to re-acquire the property cannot be disputed. The High Court's conclusion that "the finding of fact made by the trial magistrate that the Lands Commission did not give the defendant the first option to re-acquire the land" is clearly in error and is hereby reversed. The PW1, Richard Bonah, a principal technical officer of the Commission, whose testimony on behalf of the respondent touched also on notices the Commission issued to the appellant to yield vacant possession of the property, explained his continued occupation of the property in the following terms:

"As at the time of the valuation, the whole property was to be affected so full compensation was paid. The contractors however demolished only part of the building in the course of their work." and further that "Defendant was supposed to quit that structure the very day he took the compensation."

The respondent maintained persistently that the property was vested in the State since the appellant had been given a full compensation. How does the Commission extend an invitation to a person to take advantage of a non -existent constitutional right?

The next critical question is whether the resultant order that appellant convey the property to the respondent is well premised. I do not think it is. There are a number of reasons why the order must be reversed. Firstly, the order is based on the confirmation of the appellant's right to re-acquire the property and the cancellation of the respondent's leasehold interest. It must be noted however that the order of confirmation is only a declaratory relief or judgment. That order, merely established the rights and other legal relations of the parties,

viz a viz the Commission. It did not vest full ownership of the property in the appellant. To order a conveyance based on a mere declaratory relief, where there are constitutional terms yet to be negotiated, conditions yet to be fulfilled and without any certainty that ownership will finally vest in the respondent within the thirty days as ordered or at all, is premature, highly speculative and legally incorrect.

Secondly, we would be violating the time tested and hallowed principle in Dam v Addo (JK) & Brothers [1962] 2GLR, 200SC and followed in a host of subsequent cases, namely that a court ought not to substitute a case proprio motu or accept a case contrary to, or inconsistent with that which a party himself puts forward. (See the cases of SG-SSB v Hajaara Farms Ltd. (supra), and National Labour Commission v Ghana Telecommunication Ltd. [2012] SCGLR 342.)

The respondent based her claim for declaration to the leasehold title on the purported lease by the Commission, hence her demand for the return of the consideration of GH¢400.00 on the grounds of a failed bargain. She has recovered this amount. She could have, but she never sought an order for specific performance. Therefore the order that the appellant assigns the property to her clearly falls outside the parameters of her own case and a clear substitution of an altogether new case. Particularly also, this order of the Court of Appeal, which reads:

(b) The lease dated 20th March 2001 executed between the Lands Commission and the Respondent is called up and cancelled.", ought to be set aside.

It is to be noted that the respondent never petitioned for this order. In actual fact it runs counter to her claim and the lines along which she fought her case. The orders of the Court of Appeal against the Commission, who are not parties to the action, cannot stand, given that in an action inter parties, the duty of the court is limited to defining the rights and obligations of only the adverse parties in the

light of the claim as per the pleadings, evidence presented and the existing law.

Allied to the above is this third reason. In breach of contract for sale of land disputes, the remedies which are open to a disappointed purchaser include specific performance and rescission of the contract. In this instant case, the respondent, in the exercise of her right of choice, and I presume on grounds of what she believed to be legally justifiable, chose not to sue for specific performance, the well known and oft used principal remedy. Based on the transaction between her and the Commission, the respondent opted to sue to recover from the appellant the purchase money and damages for trespass. From the record, she has received full satisfaction for these and no cross appeal lies relative to the orders made in respect to these reliefs. The impugned order is therefore plainly erroneous not only on the grounds of illogicality and incongruity, but unjust enrichment. We cannot perpetuate this inequity; the order must be set aside and we so order.

In the result, the appeal succeeds. We set aside the decision of the Court of Appeal and the orders made there-under. Based on the facts and the law we make the following orders which we find consistent with the appellant's claim:

Reliefs 1, 2 and 3, for the orders of declaration of title, recovery of possession and perpetual injunction restraining the appellant whether by himself or through his assigns etc in respect of the disputed property G20 are denied. The orders for the return of the sum of GH¢400.00 to the respondent, being the purchase money, is affirmed. Similarly, the award of the sum of GH¢200.00 as general damages for trespass by the High Court is affirmed.

[SGD] G. T. WOOD (MRS.)
CHIEF JUSTICE

[SGD] J. V. M. DOTSE

JUSTICE OF THE SUPREME COURT

[SGD] ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

[SGD] A. A. BENIN
JUSTICE OF THE SUPREME COURT

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