IN THE SUPERIOR COURT OF JUDICATURE
THE SUPREME COURT
ACCRA GHANA

CORAM: ATUGUBA JSC, (PRESIDING)
DR. DATE-BAH, JSC
ANSAH, JSC
OWUSU(MS.) JSC
BONNIE, JSC

CIVIL APPEAL
NO. J4/14/2007
20TH JULY, 2011

MENCE MENSAH … PLAINTIFF/APPELLANT/APPELLANT

VRS

E. ASIAMA … DEFENDANT/RESPONDENT/RESPONDENT

J U D G M E N T

BAFFOE-BONNIE JSC:

…In the case of **Achoro v Akanfela [1996-97] SCGLR** 209, at pg 214, Acquah JSC, (as he then was) made the following pronouncement:

"Now in an appeal against findings of facts to a second appellate court like this court, where the lower court had concurred in the findings of the trial court,

especially in a dispute, the subject of which is peculiarly within the bosom of the two lower courts or tribunals, this court will not interfere with the concurrent findings of the lower courts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice, is apparent in the way which the tribunal dealt with the facts. It must be established eg. that the lower courts had clearly erred in the face of a crucial documentary evidence, or that a principle of evidence had not been properly applied…… or as pointed out in ***Robins v National Trust Co [1927]AC515****, that the finding is so based on an erroneous proposition of the law that if that proposition is corrected the judgment disappears. In short it must be demonstrated that the judgment of the courts below are clearly wrong .* ***See Allen v Quebec Warehouse Co(1886)12 AC 101"***

Taking a cue from this quote, and having thoroughly reviewed the judgments rendered by both the trial judge and the Court of Appeal, particularly with regard to the concurrent findings of fact made by those two courts and having digested the submissions of both counsel before us, our initial reaction was to just dismiss the appeal and confirm the judgment of the Court of Appeal which we feel was very well thought out. However ,*ex abundante cautela*, and also to give permanent closure to an appellant who seems to be clutching at straws, we decided to give this appeal a more detailed treatment.

The facts in this case are fairly simple and admit of little controversy. At the High Court the plaintiff/appellant (hereafter appellant) issued a writ claiming:

"A declaration of title to all that piece or parcel of land more particularly described in the statement of claim

Recovery of possession

Perpetual injunction

And general damages"

The appellant's claim to title on the land was premised on the fact that he obtained his title under a grant from the Oshilanaa quarter of Labadi. The transaction was duly recorded and registered in the year 1959and he immediately started exercising rights of ownership over the land by erecting corner pillars on the land.

Sometime later the defendant/respondent(hereafter respondent) started to interfere with his quiet enjoyment of the land and when respondent failed to heed several warnings he issued a writ at the Circuit Court where he also succeeded in procuring an interim order of injunction. As a result of the persistence of the respondent in his tresspassory activities on the land he issued the writ at the High Court.

The respondent on the other hand traced his root of title to an auction sale of the land to one E.A Quarcoo who was the highest bidder at the auction. The certificate of purchase evidencing this transaction was issued on 24th April 1957. E. A Quarcoo in turn sold it to Palm Grove Estates who in turn sold a portion of the land to the respondents. He conceded that the appellant issued a writ and procured an injunction at the Circuit Court, but the case was struck out for want of prosecution when the appellant abandoned it. He said that when he remained on the land the appellant reported him to the national investigation committee's sub-committee on Labadi stool lands where his (respondent's)title was confirmed. The respondent in turn reported the conduct of the appellant to the police and he was arrested and charged.

At the High Court the learned Judge found for the respondent and dismissed the appellant's action. In her judgment the Honourable Trial Judge made some findings of fact and concluded as follows

"If on 24th April, 1957, C.S Commey was divested of ownership of the property and same vested in E.A Quarcoo it follows that in 1959, when he and or Anum Alormoshie and Tawiah Gbawe purported to make a grant of a portion of the land to the plaintiff, they had nothing and therefore gave nothing.

I find that the subject matter of the dispute forms part of a large tract of land sold at public auction to E.A. Quarcoo, the defendant predecessor in title upon the orders of the court made in the case of John Adeoje v. CS Commey

I therefore find that when in 1959, C.S. Commey and/or Alormosie and Tawiah purported to make a gift of the land to the plaintiff, they had nothing and therefore gave nothing to the plaintiff."

Dissaisfied with the judgment of the High Court the appellant appealed to the Court of Appeal on the following grounds;

1 That the learned High Court judge failed to consider the case of the plaintiff/appellant adequately.

2 That the judgment is against the weight of the evidence

3 Other grounds to be filed upon receipt of copy of judgment.

From the records, no additional grounds were filed.

In the submissions before the Court of Appeal, the appellant devoted a small measure of time to commenting on the trial judge's review of the evidence adduced at the trial by the appellant, and devoted the rest of time to challenging the evidence regarding the root of title of the respondent based on some research he had allegedly conducted at the archives, which according to him cast some doubt on the veracity of the so called auction sale and the resultant certificate of purchase. His research had shown that, there had never been a case with the title as given by the appellant that had given rise to the auction, that even though the certificate was supposed to have been issued by a High Court it was signed by a magistrate. He concluded that the certificate of purchase which seemed to ground the root of title of the respondent was forged.

At the Court of Appeal their Lordships made findings similar to those at the High court and came to similar conclusions.

After reviewing the evidence on record their Lordships noted thus;

"Since the plaintiff has confirmed the land was originally owned by C.S. Commey, how and when did he lose his title to make him not a grantor in his own right, but only an interpreter and a witness for the grantors? The plaintiff was totally silent on this. The answer was clearly and satisfactorily provided by the defendant when he said as a result of that case the court ordered this property to be sold hence the auction sale which E.A.Kwaku as the highest bidder secured title. So the trial judge was right when she held that " in the absence of any evidence to the contrary the sale became absolute and upon the issuance of the Certificate of Purchase, E.A. Qurcoo did

purchase the right, title and interest of C.S Commey". It follows and I hold that the plaintiff's grantors had no title to convey to him in 1959 since C.S. Commey who owned the land had lost his title to it. That explains why C.S. Commey did not sign as grantor. And those who purported to grant this land to the plaintiff did not claim to have obtained it from the original owner C.S. Commey. The only proper inference to be drawn from these facts is that C.S. Commey hid behind Anum Alormosie and Tawiah Gbawe to give away what he had already lost in litigation."

We have carefully digested these concurrent findings of fact made by their lordships of the High Court and the Court of Appeal and we find no reason to disturb them. Indeed in his submissions before us the appellant himself seems to have recognized the unsurmountabilty of the hurdles in trying to sway us from the findings of fact made, and therefore veered his criticism of the judgment to the genuineness or otherwise of the Certificate of Purchase which founded the root of title of the respondent.

The appeal before us has the following grounds;

1. The honorable Court of Appeal erred in holding that the certificate of purchase which constituted the defendant's root of title was a valid or genuine when the said certificate bore no suit number and was not signed by a High Court judge and when a cursory examination of the said certificate showed that it was a bogus document
2. The honorable Court of Appeal failed to critically examine and make a finding on the indenture of conveyance of Messrs Palm Grove Ltd and E. Asiama which contained serious contradictions/conflicts with regard to the certificate of purchase the root of title of the respondent viz. that the one and the same certificate of purchase was issued by "a Senior Magistrate" and by the "High Court"
3. T he whole judgment of the Court of Appeal was based on assumptions and speculations

(Further grounds of appeal to be filed when the record of proceedings is available).

These grounds like the one on the conflict in the evidence were canvassed at the Court of Appeal and they were roundly rejected by their Lordships. .

At the Court of Appeal counsel had submitted that;

A. The certificate that formed the root of title of the respondent was a complete forgery as it does not bear any suit number. It is said to have been signed by a Senior Magistrate although on the face of the document it a High Court case.
B. Next counsel submitted that based on some searches conducted at the national Archives it had been revealed that there was no record of the so called High Court case John Adjeode Doe v C.S. Commey.

These and others were several challenges to the certificate of purchase that were isolated by their lordships at the court of appeal and in our view were appropriately dealt with by them.

The first ground for rejecting these submissions bothering on the genuineness or otherwise of the certificate of purchase was articulated by their Lordships thus;

"This is an impressive argument. But I am sorry to say it lacks any valid foundation in law. For by Order 19, r.16 of the High Court (Civil Procedure) Rules, 1954, (L.N.140A), the party who seeks to rely on a plea that a document, which has been pleaded by his opponent, is a forgery must plead that fact. And he who alleges that a document is a forgery assumes the burden of persuasion, and this burden, according to **QUARM V. Y ANKAH II AND I OTHER, I WACA 80,** must be strictly discharged. And forgery being a crime, it must be proved beyond reasonable doubt though this a civil suit, as required by section 13(1) of the Evidence Decree, 1975 (N.R.C.D.323). Thus, even in the absence of pleadings the plaintiff who relies on forgery in defence to the document ought to lead the requisite evidence at the hearing and also during the cross-examination of the defendant, if no objection is raised. These documents, namely the certificate of purchase and the deed of conveyance had both been pleaded by the defendant. So the plaintiff was put on notice to attack same if he was so mindful. In a situation where the material fact is not pleaded at all, and no attempt is made to discredit the

document through cross -examination, it is plainly unjust to attack it as a forgery for whatever reason, especially so too as it went in evidence without any objection. Indeed during the cross-examination of the defendant he was not asked a single question about this certificate or the deed of conveyance. All the points now raised by counsel could have been answered if they had been raised at the trial, which is the appropriate forum for all questions of fact to be raised if they are known at the time"

On the question of the searches conducted at the national archives, their Lordships deprecated the method of introducing fresh evidence and said so, rightly in our view, in no uncertain terms. Their Lordships said;

" Counsel annexed photocopies of the said searches to his address to this court. To begin with, one wonders what sort of procedure counsel was employing in this case. I would have thought that if it was intended that the search results should form part of the record of proceedings the proper thing was to seek leave to use them as fresh evidence on appeal, if other legal requirements are met. A search result is not a matter of law, at best it is an issue of fact that may be used to buttress an issue in the case or if it is relevant for any purpose connected with the action. Being a matter of fact, the other side is entitled to be heard on it. At any rate a search result is not conclusive evidence of what it says. The court cannot therefore be called on to take any notice of these results, let alone to consider them in connection with the appeal. It must be stated that even if these results had been filed with the trial court before the case was concluded there, that court would not have been obliged to use them since they were not tendered in evidence. They will be ignored as irrelevant, not properly introduced and therefore taking the other side by surprise, it's in breach of the audi alteram partem rule.

Counsel's submissions with regard to the fraudulent nature of the certificate of purchase, were articulated this way before their Lordships at the Court of Appeal;

"Form 58 at page 511 of the High Court Rules 1954 is the Certificate of Purchase form one would expect to have been used in the matter if the Adjeode case is a genuine High Court case, which it is not; the High Court rules and forms came into force in 1954 three years before the so-called decree in the Adjeode case was issued. Herein lies the fraud perpetrated by the defendant Asiama on the High Court by using a bogus certificate of purchase to prop up his case."

Their Lordships' response was concise. They said;

"Once again the plaintiff never pleaded fraud as required by Order 19 r.16 of L.N.140A. Hence counsel cannot raise it now and I reject the argument accordingly."

Still attacking the certificate of purchase counsel had submitted before their lordships as follows;

> "One pertinent question to be asked is this: who was the High Court Judge who heard and determined the Adjeode case? And why did not the High Court Judge or any other Judicial Officer of the High Court sign the so-called Certificate of Purchase? And why is there no High Court suit number in the Adjeode case? And again why is there no record of the so called High court case in both High Court registry and the National Archives?"

Here again their Lordships answer was apt and to the point. They said:

"All these are legitimate questions that could have been asked the defendant when he took the witness stand. The plaintiff conducted his case with the active involvement of a lawyer. The plaintiff's case was presented to the court that his

grantor had the capacity and right to give the land to him and most important of all that he had registered his document long before the defendant purported to obtain a grant and to register same. So he did not bother about whatever case the defendant was setting up, a very poor strategy as it has turned out to be. It is too late to ask these questions which are purely matters of fact, at a time when the defendant has no way of answering them.

Their Lordships then concluded on this point as follows:

> "I think this is one case where the maxim *'omnia praesumuntur rite esse acta"* should apply. The authenticity of the certificate was not put in doubt. It was not objected to in any way. The evidence that it was issued after a judicial sale conducted on an order of court stood unchallenged. So this court will have to accept that everything about it was properly done. This maxim has been given legislative blessing by section 37(1) of the **Evidence Decree, 1975, (N.R.C.D.323)** and it provides: 'It is presumed that official duty has been regularly performed.' This presumption works in favour of the party who seeks to rely on the official act in question. So the burden is placed on the party who seeks to impugn it to lead the necessary evidence on fraud, forgery, mistake and what have you, the simple reason being that he it is who is asserting forgery, fraud,etc,etc. See **LEE V. JOHNSTONE (1869) L.R. I Sc. & Div. 426 (H.L.).** But if the plaintiff had made the authenticity of the certificate an issue at the trial, the defendant would have been compelled to satisfy the court on its genuineness, without relying on the presumption. But I think I have said several times over that there was never an issue about the court and/or the judge that heard the case or the status of the judicial officer who signed the certificate so the defendant was not obliged to establish anything more; he could rely on the presumption only."

In his submissions before us, the appellant has not, in our view, been able to surmount the three main legal hurdles identified by their lordships at the Court of Appeal. viz (a) failure to plead fraud, (b) failure to raise any objections to, or cross examine the respondents on, the documents which was their root of title and finally, (c)the method of adducing and presenting fresh evidence.
We thoroughly endorse their lordships reasoning on the fatality of plaintiff's failure to raise any objection at the time of the trial. In the case of **Kusi &Kusi v Bonsu [2010] SCGLR 60 at pg 101-2,** I said,

> "It is a basic principle in evidence that no evidence is necessary to prove an admitted fact. This is so basic as to admit of no dispute. In fact, at the summons for directions stage, it is only unadmitted or denied facts that are in issue and need to be proved. This principle has found expression in several decided cases. Ollennu JSC said in the case of **Fori v Ayirebi[1966]GLR627 at 647 SC that,**
> "When a party makes an averment and that averment is not denied, no issue is joined on that averment, and that no evidence need be led. Again, when a party gives evidence of a material fact and is not cross examined upon it, he needs not call further evidence of that fact."
> See also the case of **Western Hardwood Ent Ltd v West African Ent Ltd[1998-99]SCGLR105.**

On the question of when objection to admissibility of documents should be taken this is what I said at page 104 of the Kusi & Kusi v. Bonsu case

> "Tied to my position of no need to prove admitted facts is the provision on when objections to the admissibility of a document should be taken Section

6 of the Evidence Act, 1975(NRCD 323) provides as follows:

1. In an action, and at every stage of the action, an objection to the admissibility of evidence by a party affected by that evidence shall be made at the time the evidence is offered,

2 An objection to the admissibility of evidence shall be recorded and ruled upon.

The provision reproduced above provides the rules for admissibility of evidence generally. Act 122 is specific to the tendering of registered title deeds. So that if the specific procedure in Act 122 was not complied with, section 6 of the Evidence Decree guides the party against whom a document is tendered, on what to do and the time to do same. Not raising the objection at that point must be considered a waiver of that right. One therefore cannot be heard on appeal to be raising the objection he ought to have raised at the trial… It appears to me that the plaintiff/respondent is seeking to use the appeal process to cure defects in his case as conducted at the trial. It would be an abuse of process to allow him to do so."

On the question of failure to plead fraud I have quoted their Lordships treatment of it earlier in this judgment and we do not need to belabour the point. Suffice it to emphasize that forgery of a document ,like fraud, ought to be specifically pleaded with particulars and at the trial ought to be specifically proved. It can therefore not be raised after trial when the party against whom fraud has been raised has no way of answering same. We endorse their lordships rejection of the fraud that the appellant sought to introduce. See the case **of Nti v Anima 1984-86 2 GLR 134 where Abban J.A** (as he then was) said

"incidentally, the plaintiffs did not give particulars of the fraudulent design by the parties concerned. Not only that, they failed to lead any evidence on the so-called fraudulent design, and yet they expected the learned trial judge

> to make a finding of fraud against the defendants. I think the plaintiffs and their counsel demanded too much from the learned trial judge and it is appropriate that they they should be reminded of the oft-cited dictum of **Thesiger LJ in Davy v. Garrett** where the learned lord said
> "In common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts."

In seeking to mount a challenge on the genuineness of the documents tendered by the defendant and to set it up as fraudulent or forgery, the plaintiff attached some search results to the statement of case submitted before the court of appeal. Their Lordships reaction to this method of presenting evidence was genuine surprise. They said

> "……. Counsel annexed photocopies of the said searches to his address to this court. To begin with, one wonders what sort of procedure counsel was employing in this case. I would have thought that if it was intended that the search results should form part of the record of proceedings the proper thing was to seek leave to use them as fresh evidence on appeal, if other legal requirements are met."

In counsel's submission before us, even while conceding that this method of presenting fresh evidence was not the best, counsel still believes that in the interest of justice this court ought to take notice of this fresh evidence and act accordingly. This is what he said:

> " ……The search results indicated that there was no record of this so-called High Court case of John Adjeode v. Commey. I duly filed the result of the searches in the Court Of Appeal. The Court of Appeal thought what I had done was aberrant behavior. With the greatest respect to the Court of Appeal

I resent its condemnation of the method I adopted. Section (sic)26 of the Court of Appeal rules1997 C. I. 19 comes into focus here."
After quoting Rule 26 Counsel concluded thus:

"Admittedly, I fell foul of section (sic)26(2) of C.I.19, but if as appeared to the Court of Appeal, as it seems to suggest, that the result of the searches was essential to the issues before it, surely it had power under secction (sic)26 (1) of C.I.19 suo motu to require that evidence in the interest of justice. I humbly submit that in failing to do so the Court of Appeal went wrong and as a result miscarriage of justice occurred: I humbly implore this Hon. Supreme Court to put the Court of Appeal right,"

The rule regulating the adduction of new or fresh evidence at the Court of Appeal is Rule 26 of the Court of Appeal Rules 1997, C.I. 19 which reads:

(1) It is not open as of right to any party to an appeal to adduce new evidence in support of his original case but, in the interest of justice, the court may allow or require new evidence to be adduced; such evidence shall be in the form of oral examination in court, an affidavit or a deposition taken before an examiner or commissioner as the court may direct

(2) A party may, by leave of the court, allege any facts essential to the issue that has come to his knowledge after the decision of the court below and adduce evidence in support of the allegation.

This rule has been the subject matter of discussion and interpretations in several decided cases. See **Foli vAgyaAtta(consolidated)[1976]1GLR194CA; Karikari v. Wiafe[1982-83]; and Apori Stoolv. WorakeseStool1994]2 GBR629.**

From all these authorities what has been settled as the principles for considering the adduction of fresh evidence while the case is on appeal are:

(a) the evidence to be led must not have been known or available to the applicant at the time of the trial; (b) if it was not actually known or available during the trial, it must not be such as could have been known by diligent efforts; (c) it should have influence on the result of the case, though it need not be decisive;(d) the evidence must have been such that if accepted, it would have an important bearing on the result of the case.

In the latest and bench mark case on this subject, **[Poku V Poku] 2007-2008] SCGLR 996** the Supreme Court did not only reiterate these principles, but went ahead to construe "in the interest of justice" as found in the rule. In holding one of the report the court said,

> **"On construction, the adduction of fresh evidence "in the interest of justice" as provided in rule 26(1) was clearly delineated in 26(2). Consequently, in an application to lead fresh evidence before the Court of Appeal, the first criterion, which an applicant ought to establish, was whether the evidence sought to be adduced, was neither in the possession of the applicant nor obtainable by the exercise of reasonable human ingenuity before the impugned decision was given by the lower court. It was only after the first hurdle had been surmounted, that the court should proceed to determine the other pertinent question of whether or not the intended evidence would have a positive effect on the outcome. If the first criterion is not met no useful purpose would be served by examining the other factors."**

Applying these principles to the case before us, the question is, was the fresh

evidence being canvassed by the appellant i.e. the results revealed by the search and the various concerns raised on the certificate of purchase regarding case title and signatories, etc, available to the appellant or could it have become available with due diligence? The obvious answer to this question is in the affirmative. The fact is, the respondent made mention of the auction sale and the certificate of purchase and the subsequent deed of conveyance to him by Palm Grove Ltd in his statement of defence. He also went ahead to tender all these documents at the trial. Clearly, the appellant had been put on notice as to what documents the respondent was relying on. If he was doubtful of their authenticity he had sufficient time and information to check and double check. If he chose to be indolent the law will not come to his aid. As Asiamah JSC said in the **Poku v Poku** case.

> **"It is a salubrious principle of our jurisdiction that a litigant should have the opportunity of being heard , of telling his side of the story, of being free to present evidence and argument to buttress his case; but it is also settled law and dictates of common sense require also that once these opportunities have been extended to the litigant but the litigant decides not to avail himself of them within the period of the trial, he would not, on judicial considerations, be permitted to come later and plead for the reactivating of the very opportunities he declined to embrace. If such an indulgence is given, the public confidence in our judicial system would be seriously put at jeopardy and the resultant consequence would be the breeding of an inimical infestation of a cancerous judicial tumour in the very fabric of our judicial system…."**

The final comment we will like to make is on the method that the appellant adopted to have this so called fresh evidence on record. Rule 26 lays down the steps to take to procure and have fresh evidence admitted, and this did not include

attaching them to a statement of case which will not afford either the other party or the court the chance to challenge it through examination. It was like smuggling through the back window what he failed to do through the front door! No wonder their Lordships at the Court of Appeal deprecated this method.

To conclude it is our view that the findings of fact made by their Lordships at both the High Court and the Court of Appeal were very much supported by the evidence on record and we do not see any reason to disturb them. The Court of Appeal rightly rejected the fresh evidence and we endorse that.

The appeal is unmeritorious and same is dismissed.

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

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

(SGD) DR. S. K. DATE-BAH
JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) R. C. OWUSU (MS.)
JUSTICE OF THE SUPREME COURT

COUNSEL:

YVONNE AMOATEY FOR THE APPELLANT.

RICHARD AMOFA WITH HIM NANA SERWAAH GODSON-AMAMOO FOR THE RESPONDENT.