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

CORAM: WOOD (MRS), CJ (PRESIDING)
BROBBEY, JSC
DOTSE, JSC
YEBOAH, JSC
ARYEETEY, JSC

CIVIL APPEAL
NO. J4/31/2010
11TH AUGUST, 2010

NANA AMUA GYEBU XV
CHIEF'S PALACE, APOWA ..... PLAINTIFF/RESPONDENT/ RESPONDENT

- VRS -

MONDIAL VENEER (GH) LTD ..... DEFENDANT/APPELLANT/APPELLANT
APOWA INDUSTRIAL AREA
APOWA, TAKORADI

J U D G M E N T

WOOD (MRS), CJ:-

On the 28th July 2010, we, as the second appellate court, dismissed the appeal against the judgment of the Court of Appeal (Civil Division) dated 23rd July, 2009, and reserved our reasons for coming to that conclusion. We state those reasons now.

Because the facts leading to the commencement of the original action are indeed very simple, the issues of fact or law that arose for determination in the two lower courts and indeed in this court cannot by any stretch of imagination be described as complex. In 1993, the late Nana Amuah Gyebi XIV of Apowa, the predecessor of the Plaintiff/Respondent/Respondent (Respondent) respondent, acting with his elders,

granted a 61 acre piece of stool land to the appellant company. However, according to the respondent, after his enstoolment in 2001 as Chief of Apowa, he discovered to his utter dismay that Defendant/Appellant/Appellant (Appellant), had encroached on an additional 29 acres of land and was in the process of constructing a wall around this tract of land. When challenged, appellant claimed that they purchased this additional 29 acres from the grantor chief, the respondent's predecessor. Dissatisfied with appellant's conduct, the respondent caused a writ of summons to be issued against the appellant company for the following reliefs:

(i) Declaration of title to all the pieces or parcel of land measuring approximately 29 acres situate and lying at Apowa Industrial Area, and contiguous to a 61 acre land granted by the plaintiff's stool to the defendant company in or about September, 1993
(ii) Recovery of possession of the said 29 acre land
(iii) General and special damages for trespass

Perpetual injunction restraining the defendant either by itself or its servants, agents, workmen, assigns privies etc. from interfering howsoever with the said land.

After a full trial, the learned trial Judge gave judgment in favour of the respondent, a decision which was substantially confirmed on appeal, the only variation being a reduction of the general damages and costs awarded from GH¢40,000 and GH¢10,000 respectively, to twenty thousands and GH¢5,000 respectively. These reversals were based on the grounds that the damages awarded were too punitive and the costs too excessive and out of step with what were fair and reasonable in the particular circumstances of the case.

But, the appellant, still being dissatisfied with the decision of the appellate court, has questioned the correctness of the said decision on the oft used omnibus ground of appeal and some four other grounds. These are:

(i) The Court of Appeal fell into the same error the learned trial judge fell into when it evaluated exhibit 'C' and its effect on defendant's case as if it was introduced into evidence by defendant and same constituted the pivot of defendant's case.

(ii) The decision of the Court of Appeal in failing to fully appreciate and accord the necessary weight to the documentary proof of the lease (exhibit 1) between plaintiff's predecessor and defendant regarding the 90 acres of land (inclusive of the 29 acres in dispute) occasioned a miscarriage of justice.

(iii) The reasoned opinion of the learned justices of appeal that the presence of J.B. Eshun was crucial to defendant's; case and failure to call him spelt the death knell of its case cannot be supported given that in evidence plaintiff himself had said J.B, Eshun was dead at the time of the suit.

(iv) The learned Justices of the Court of Appeal ought to have determined whether the learned trial judge could in law 'rectify' any mistake in his judgment subsequent to the date of its delivery with respect to the amount of damages and costs before substituting its own award of damages and costs.

The circumstances, under which a second appellate court may interfere with the concurrent findings of fact of two lower courts is so well established it does not admit of any controversy. The following represent only a few of the long line of cases on this important legal point. These are Achoro v Akanfela [1996-97] SCGLR 209; Koglex Ltd (No. 2) v Field[2000]SCGLR 175; Ntiri v Essien 2001-2002]SCGLR 459; Sarkodie v F K A Co Ltd [2009] SCGLR 79; Jass Co Ltd v Appau [20009] SCGLR 266 and Awuku-Sao v Ghana Supply Co Ltd [2009] SCGLR 713.

That legal proposition, which undoubtedly, would be the main applicable principle in this appeal is articulated thus:

""(2) [I] In an appeal against findings of facts to a second appellate court like… [the Supreme Court], where the lower appellate court had concurred in the findings of the trial court, especially in a dispute, the subject-matter of which was peculiarly within the bosom of the two lower courts or tribunals, this court would not interfere with the concurrent findings of the two lower courts unless it was established with absolute clearness that some blunder or error resulting in a miscarriage of justice, was apparent in the way in which the lower tribunals had dealt with the facts. It must be established, e.g. 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, that the finding was so based on erroneous proposition of the law that if that proposition be corrected, the finding would disappear… It must be demonstrated that the judgments

of the courts below were clearly wrong. *Thakur Harihar Buksh v Thakur Umon Parshad* (1886) LR 141A7; *Allen v Quebec Warehouse Co* (1886) 12 App Cas 101 and *Robins v National Trust Co* [1927] *AC* 515 cited".

The decision of this court in the unreported case of suit No. J4/8/10 Sylvia Gregory v. Nana Kwesi Tandoh 1V and another, dated 12th May, 2010, provides further grounds on which a second lower court may disturb two previous concurrent findings. In that case this court held that:

"It is therefore clear that, a second appellate court, like this Supreme Court can and is entitled to depart from findings of fact made by the trial court and concurred in by the first appellate court under the following circumstances:

1. Where from the record the findings of fact by the trial court are clearly not supported by evidence on record and the reasons in support of the findings are unsatisfactory.

2. Where the findings of fact by the trial court can be seen from the record to be either perverse or inconsistent with the totality of evidence led by the witnesses and the surrounding circumstances of the entire evidence on record.

3. Where the findings of the fact made by the trial court are inconsistently inconsistent with important documentary evidence on record.

4. Where the first appellate court had wrongly applied the principle of law in Achoro vrs Akanfela (already referred to supra) and other decided cases on the principle, the second appellate court must feel free to interfere with the said findings of fact, in order to ensure that absolute justice is done in the case".

In this instant case, the only material common ground between the parties is the fact that the original grant of land to the appellant company was 61 acres. What clearly was in contention was whether or not an additional 29 acres was sold to the appellant company. In both courts, as indeed in this court, the simple but critical question for consideration is that which was clearly identified by the appellate court in these terms:

"What is in the issue is whether the stool subsequent to that grant made a conveyance of an additional 29 acres to the appellant. I think that in the court below, the learned

trial Judge considered this very question as the only issue, which was raised before him on the pleadings."

Indeed, the admission by the DW1 that the 60 acres land which was first acquired by the company had been completely fenced before the disputed 29 acres was allegedly purchased, reinforces the point that this clearly is the only pertinent issue for determination. Further, given the peculiar facts of this case, it is an issue that must be examined with utmost care.

Having examined the record, I do not think we ought to disturb the findings and conclusions of the appellate court which was that:

"After a careful and anxious consideration of the record of proceedings, I have come to the opinion that the appellant herein was unable to discharge the burden of proof that was on it having regard to the state of the pleadings. Having admitted the respondent's title to the disputed land, the appellant was obliged to introduce credibly sufficient evidence that would render the sale on which it relied more probable than its non-existence. There is no doubt that on the state of pleadings the burden to lead evidence on the sale and or purchase of the 21 acres of land was on the appellant having regard to the provisions of sections 11, 12 and 14 of the Evidence Act, N.R.C.D 323. See: Duah v. Yorkwa [1993-94] 1 G.L.R 217.

In my thinking the appellant failed to discharge the burden proof that he assumed by virtue of his claim for the following reasons. While he relied on the part payment in respect of the additional 29 acres he was unable for no apparent reason to call the person who he alleged received the payment on behalf of the stool. I think that the presence of J.B Eshun was crucial to the case of the appellant and as such it is difficult to comprehend why not having called him he offered no explanation for his absence. As it is the only reasonable inference that one can make for this default is that he thought that when called the witness would not be favourable to his cause. It is more difficult to appreciate the failure to call the witness when it is known that the stool occupant on whose behalf the payment was received was dead. In the circumstances in line with settled judicial opinion the appellant's version of the matter is required to be scrutinized with suspicion.

Then there is the evidence regarding the statutory declaration that was made by the appellant. The explanation for its making was that in the course of processing a document that was made in their favour by the stool it got missing in the Lands

Commission in Takoradi and consequently they had to rely on a self serving deposition. I do not find the explanation reasonable. After all, the stool is a corporate sole and if indeed there was any transaction regarding the 29 acres the natural thing to do was for the company to approach the stool and ask for a replacement document. I do not think that the stool would have refused to yield to such a request from the appellant. I think that if there was any such sale, there would have been persons present in the community that would speak to the transaction such as to enable those who might be unaware of it to be so informed. On the other hand by taking it upon itself to swear to a deposition and recite the facts on which it relied in support of the sale to it the appellant had in my opinion behaved in a manner that raised suspicion about its claim to have purchased the land in the life time of the previous occupant of the stool".

In my thinking, the appellant's attempt at proving the alleged acquisition via a statutory declaration (which was sought to be tendered but rejected), and not some other more reliable document, was most unfortunate. By paragraph 4 and 10, they swore as follows:

(4) "That sometime in January 1995 Mondial Veneer (Ghana) Ltd. Purchased from Nana Amua Gyebu XIV the then Chief of Apowa and Divisional Chief of Apowa in the Ahanta Traditional Area plots no. 84A, 84, 85, 86 and parts of 82, 83 and 87 all situate at Apowa in the Apowa Industrial Area".

(10) "Wherefore I make this Statutory Declaration claiming ownership of the subject plots as properties of the Mondial Veneer (Ghana) Ltd. by virtue of purchase from the Apowa Stool".

Their Lordships of the Court of Appeal properly concluded, in my view that:

"Also strange to relate is the fact that a close examination of the contents of the affidavit that was being processed for registration reveals that it refers to a single grant of 90 acres whiles the evidence at the trial on which there is no dispute is that the appellant obtained a prior grant of 61 acres and sought by the second purchase to acquire extra land to make up a total of 90 acres."

The court was right in its conclusion that "these facts tend to cast doubt on the appellants case."

We cannot fault the two lower courts for their findings and conclusions on this critical issue of whether or not the appellants acquired an additional 29 acres. The court of first instance on examining the evidence painstakingly, found no sufficient evidence in proof of the purchase price, nor the fact that same has been fully settled. The learned trial judge also rejected the claim that the land had been fully utilised, describing that assertion even if true, as clear evidence of tresspatory acts, rather than evidence of proof of ownership. These findings are supported by the record. There is no legal justification for disturbing them.

Given the nature of the pleadings, and the duty cast on the appellants, producing a self serving statutory declaration is definitely the most unreliable mode of proving ownership of the disputed property. The witnesses the appellant produced in court knew next to nothing about the actual transaction. In the words of the trial judge, they were in no position to produce primary evidence, which conventionally, is the most credible evidence in cases of this kind. Again, they allege that one Joseph Andoh, the man they claim has firsthand knowledge about the transaction is so ill he cannot testify. The chief against whom this serious charge is made is dead. J. B. Eshun, the gentleman who is alleged to have collected the money on behalf of the chief is also dead. True, the appellate court wrongly decided he was alive and consequently drew the wrong inferences from their failure to produce him as a witness. But this erroneous finding and inferences drawn therefrom do not invalidate the final decision of the court. The important point is that Eshun is also dead. Our jurisprudence has examined the approach courts must adopt when evaluating charges and assertions made against dead persons. We have firmly established the principle that real danger lies in accepting without questioning or close scrutiny, claims against a dead person. The caution that such claims must be weighed carefully is based on plain good sense and has consistently been applied in a number of cases including:

Fosua & Adu Poku vs. Dufie (decd) Adu Poku Mensah [2009-] SCGLR 310.
In Re: Krah (decd) Yankyeraah and ors. vs. Osei Tutu & Anor. [1989-90] 1 GLR 638.
Bisi v. Tabiri [1987-88] 1 GLR 360.

The principle as enunciated by Brett MR, in the case of In Garnett, In re; Gandy v Macauly [1886] 31 Ch D 1 at 9 C.A. is that:

"The law is that when an attempt is made to charge a dead person in a matter, in which if he were alive, he might have answered the charge, the evidence ought to be

looked at with great care; the evidence ought to be thoroughly sifted, and the mind of any Judge who hears it ought to be, first of all in a state of suspicion…"

Given these set of adverse facts - the death of all the crucial witnesses, coupled with the alleged loss of the original document allegedly prepared by the chief and deposited for processing was missing from the Lands Commission - it certainly lies ill in the mouth of the appellants to urge that we rely solely on their statutory declaration and a proforma from the Lands Commission, which document is said to contain nothing more than information extracted from the lost document, and so is not a primary source document, to reverse the findings of the two courts.
In land litigation, even where living witnesses who were directly involved in the transaction under reference are produced in court as witnesses, the law requires the person asserting title, and on whom the burden of persuasion falls, as in this instant case, to prove the root of title, mode of acquisition and various acts of possession exercised over the subject matter of litigation. It is only where the party has succeeded in establishing these facts on the balance of probabilities, that the party would be entitled to the claim. We would be committing a grievous error, if we glossed over these critical legal imperatives, proceed to overturn the clearly supportable concurrent findings of the two lower courts and find for the appellants on the threadbare evidence they produced at the trial. It is plain from the evidence that the appellants failed to establish the actual mode of acquisition, since none of the witnesses who testified were involved in the actual transaction.

The DW1 made two interesting revelations while being cross-examined. We reproduce answers he gave to the following questions asked under cross-examination.

"Q. Apart from Mr. Andoh whom you referred to initially during your evidence-in-chief and whom you said is indisposed, do you know of any other officer or official of the defendant company who is aware or was involved in the transaction affecting the additional 29 acres of land which is in dispute in this case?

A. Yes

Q. Who is that person?

A. There are two people, Mr. Biasi Sarafeno and the late Amanor who worked with the Lands Department."

Yet again, surprisingly, Mr. Biasis Sarefeno never appeared to testify. No explanation was however given as to why he was not produced at the trial. The appellants alleged the man who acted on behalf of the appellant company in this transaction, Mr. Joseph Andoh, the company's accountant at the time is very ill; afflicted by that unfortunate malady relating to memory loss known as amnesia. In the principal witnesses own words, it is "very difficult for him to recollect or recall any of his actions at this point in time." This assertion was made without any independent medical evidence in support of the fact. From every angle, this piece of information throws doubt, great doubt, if not suspicion on the appellant's case. Why? The court was not given the opportunity to see Mr. Andoh, who clearly is a material witness, to check the veracity of this allegation of memory loss. What this means is that in this case all the persons allegedly connected to the transaction are either dead or ill and original documents relating to it are completely missing from the Lands Commission, without any vital official document from which the crucial fact of the sale of some 29 acres at a subsequent date could be cross-checked or reasonably inferred. Interestingly, when the appellants discovered this great loss, they did not go back to their grantors to find out what assistance they can offer, but they rather chose to prepare for themselves a statutory declaration which in substance is a self-serving document!

But we would like to raise this question. Wherein lies the wisdom in keeping Mr. Andoh, this clearly sole material living witness away from the court? Is the appellant company in all honesty expecting the court to buy their claims about Mr. Andoh on their mere say so, and proceed to give judgment in their favour based on the non weighty evidence of persons who did not directly participate in the transaction, and on a self serving statutory declaration? In plain terms, the failure to make the witness available to the court to enable the trier of fact make its own independent judgment of whether or not he was suffering from amnesia, does militate against their own case. Courts do have inherent power to move to locations outside of the court room to take evidence from prospective witnesses who for one reason or the other cannot make a physical appearance in court. Indeed, the fact that no medial report, let alone a credible medical one was produced in support of the facts alleged, makes their claim about the witnesses illness suspect. It is trite learning that it is the preserve of any court before whom a prospective witness is to appear, to determine the issue of whether or not that person is fit to testify or capable of testifying. True, nothing stopped the appellants from testifying to that crucial fact about memory loss, but the risk or danger that lies in a failure to provide corroborative evidence of the fact is plain and obvious. Very little or indeed, no weight should be attached to the assertion.

Interestingly, in this simple case, in effect all three courts have been faced with the situation where the crucial witnesses are all dead, one of the living witnesses so ill, he can be of no use to a court of law, whilst the original documents are lost.

These are the reasons which compelled us not to disturb the findings and conclusions of the two lower courts, but rather endorse them.

G. T. WOOD (MRS)
CHIEF JUSTICE

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JUSTICE OF THE SUPREME COURT

J. V. M. DOTSE
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