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

CORAM: OWUSU (MS.) JSC (PRESIDING)
DOTSE, JSC
ANIN YEBOAH, JSC
BAFFOE BONNIE, JSC
GBADEGBE, JSC

CIVIL APPEAL
No. J4/62/2013

26TH MARCH, 2014

1. **NANA YAW OWUSU** (SUING PER HIS LAWFUL ATTORNEY MICHAEL NII OKINE)
2. **PAUL NYANTAKYI**
3. **MADAM ELLEN MENSAH**

.... **PLAINTIFFS/APPELLANTS/ RESPONDENTS**

VRS

HYDRAFORM ESTATES LTD **....** **DEFENDANT/RESPONDENT/ APPELLANT**

J U D G M E N T

ANIN YEBOAH, JSC:

The plaintiffs/appellants/respondents herein who (shall be referred to in this judgment as the respondents) instituted an action against the defendant/respondent/appellant herein who (shall be referred to in this judgment as the appellant). By their writ of summons sealed on the 7th of October 2008, the respondents claimed against the appellant only one relief as follows:

"Perpetual injunction restraining the defendant company, its agents, assigns, servants, privies and workmen or otherwise howsoever be from interfering with the plaintiffs peaceful and quiet enjoyment and possession of their land"

It must be pointed out that the indorsement was not for any substantive relief known in law. No objection was taken by defendant on the recent authority of ROCKSON V ILIOS SHIPPING CO. SA and WILTEX LTD [2010] SCGLR 341 which affirmed this court's previous decision in R v High Court, Tema; Ex PARTE OWNERS OF MV ESSO SPIRIT (DARYA SHIPPING S.A INTERESTED PARTY) [2003-2004] 2 SCGLR 689 that such a claim is void in law. In this case however, upon reading the writ together with the accompanying Statement of Claim the defect in the writ was cured by the Statement of Claim filed together with the writ. This is the current position of the law as ably expounded by our worthy brother Gbadegbe, JSC in the more recent case of OPOKU [№ 2] v AXES CO. LTD [№ 2] [2012] 2 SCGLR 1214 in which our able brother said as follows:

"The writ of summons ought to be read together with the statement of claim in order to determine if there was any cause of action before the court. This is so because a statement of claim may, in appropriate cases as provided for in rule 15 (2) of Order II of the High Court Civil (Procedure) Rules, 2004 (CI 47), amplify or diminish the scope of the writ on which it is founded"

The defect on the writ was in our view cured by the accompanying statement of claim which was filed together with the writ. The cause of action of the plaintiff was amply pleaded in the Statement of Claim.

THE FACTS

The respondents pleaded among other things, that the first respondent on 27/05/2004 purchased four plots of land measuring 100 * 100 per plot each from one Ranas Odoi Freeman for GH¢40,000.00. Prior to the purchase the first respondent said his vendor showed him a copy of a judgment of a High Court dated the 5/12/2002 declaring ownership in his vendor. His vendor later gave him a copy of an indenture covering the land which had been prepared by the allodial owners being the Nungua Stool. The first respondent later sold portions to the second and third respondents who pursuant to the transaction developed their respective lands. According to the second respondent he even contacted Ayikoi Otoo Esq, a lawyer, to ascertain the validity of the judgment out of which the first respondent derived his title and the response was in the affirmative.

It was in the course of developing their respective plots when the agents of the appellant confronted them and prevented them from further developments. The managing director of the appellant's company contended that the judgment out of which the respondents herein derived their titles to their respective lands had been set aside. As the respondents insisted that they were purchasers of their respective lands for valuable considerations at the time the judgment was subsisting, they commenced action against the appellant company for the solitary relief referred to earlier in this delivery.

The appellant disputed the facts on which the case for the respondents was founded. The appellant pleaded that it was a bona fide owner of the land in dispute which formed part of a large tract of land covering an approximate area of 75.53 acres.

According to the appellant it acquired the land from one Alhaji Komieteh by virtue of a lease agreement made the 25/11/1994, stamped same as LVB 9103A/95 and registered same at the Lands Registry as №2697/1995. It contended that the alleged grantor of the respondents had no title to the land as at far back as 2000 it had issued oral notices to the said Ranas Freeman warning him of the acts of trespass to the land in dispute but the said Ranas Freeman fraudulently obtained a default judgment in 2002 at a time when he was aware that the appellant owned the land. Further, the default judgment in the suit intituled as: Suit № L430/2000 RANAS FREEMAN V HYDRAFOAM ESTATES LTD was set aside on 20/07/2006. The appellant proceeded to lodge a counterclaim for declaration of title to the land and the usual ancillary reliefs.

The judgment which was obtained in that suit was indeed set aside in 2006 and the defendant was given leave to defend. On this basis the appellant contends that the respondents could not rely on the default judgment as a basis of their title.

It did appear in that suit that Ranas Freeman was asking for damages for trespass and perpetual injunction against the appellant herein. Appearance was entered for

the defendant in that suit but it failed to file a statement of defence. Interlocutory judgment was thus entered for the plaintiff on the 5th of December 2002 and the suit was adjourned to the 27th of January 2003 for damages to be assessed. A perusal of the exhibits from the record of proceedings does not disclose that damages were assessed. On 21st of June 2006, however, the default judgment was set aside, that was, exactly three and half years after the judgment had been entered against the said defendant. It was not disputed that it was within the period of three and half years when the judgment was subsisting that the respondents obtained their grants from the said Ranas Freeman through the first respondent herein.

After close of pleadings few issues emerged for determination. On record, the parties filed notice of list of documents they intended to rely on by way of evidence. After hearing both parties, the High Court on 25/02/2010 dismissed the plaintiffs' claim for trespass and held inter alia that the plea of estoppels or res judicata which the respondents were relying on to support their title could not hold. The trial judge proceeded to enter judgment for the appellant on its counterclaim including damages for trespass.

The respondents lodged an appeal at the Court of Appeal, Accra, on several grounds to seek the reversal of the judgment of the trial High Court. On the 28th of March, 2012 the Court of Appeal in a unanimous decision allowed the appeal in part and granted possession of the land in dispute to the respondents. This second appeal to this court is at the instance of the defendant company, seeking the

reversal of the judgment of the Court of Appeal and restoration of the High Court's judgment which dismissed the claim of the respondent in its entirety and granted the appellant's reliefs indorsed on the counterclaim. Before us, the appeal has been argued on several grounds which for clarity of record is reproduced below:

GROUNDS OF APPEAL

a. The judgment was against the weight of evidence.

b. Having found that the respondents had "*failed to establish their claim to the disputed land, their interlocutory judgment not sufficient for that purpose";* the Court of Appeal erred in law and on the facts when it reversed the judgment of the trial High Court , and granted the respondents "*an order protecting their right to possession of the disputed plots".*

c. In upholding the respondents' appeal the Court of Appeal erred in law and in breach of the principle in **Dam v Addo [1962] 2 GLR 200, SC** when it substituted a case proprio motu for the respondents.

d. The Court of Appeal erred in law and on the facts when it granted to the respondents an order protecting their possession to the disputed land on the ground that they were innocent purchasers for value without notice, by failing to appreciate:
    - That in the trial court the respondents had relied solely on the interlocutory judgment as the basis of their title to the disputed land.
    - That the respondents' case before the trial court was neither premised on good faith purchase nor possession.
    - That the aforesaid interlocutory judgment (found by the Court of Appeal to be "*empty"* and "*not sufficient to pass title*", and which on

its face named the appellant as a party, constituted clear notice to the respondents of the appellant's rival claim of title to the disputed land.

- That the respondents had a duty to further investigate their grantor's title by conducting the requisite searches at the Land Registry since it was self-evident that the interlocutory judgment did not declare any title in him.

- That the respondents took possession and carried out developments on the land in dispute in bad faith, having received prior notice and warning from the appellant of its rival interest therein.

e. The Court of Appeal erred in law and on the facts when it held that the appellant had failed to prove its counterclaim for title to the disputed land, especially when the appellant's evidence on the issue was not challenged at all in cross-examination.

f. Additional grounds of appeal will be filed upon receipt of the record.

As apparent in his written statement of case, learned counsel for the appellant argued grounds (b), (c) and (d) together. The crux of his argument on these grounds was that the Court of Appeal was in error for granting possession to the respondents when from the indorsement on the writ of summons, the respondents did not ask for the relief of possession in any manner or form and at no point in course of the trial did they seek leave to amend the relief sought to include any other relief. To simplify his lengthy submissions on these grounds, counsel relied on the case of DAM v ADDO [1962] 2 GLR 200 SC. It was submitted that the Court of Appeal was in error and ought not to have substituted a case contrary to and inconsistent with the one brought forward by the respondents moreso when the

respondents had indeed failed to prove their title to the lands. It does appear to us that there was no answer to this legal point raised in favour of the appellants. Learned counsel for the respondent, however, in an attempt to answer the submissions of counsel for the appellant on this point, took us through the evidence on record to demonstrate that the evidence conclusively established that the respondents had developed their respective lands up to different levels and submitted that it was a proper case for the grant of the relief of possession by the Court of Appeal.

The principle of law enunciated in the case of DAM v ADDO, supra, which entirely relied on the case of ESSO PETROLEUM CO.LTD v SOUTH PORT CORPORATION [1956] WLR 81 is well established proposition of law and it is applicable in matters relating to pleadings. Lord Normand at page 87 said as follows:

> "The functions of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them"

He continued thus:

> "To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded"

The Court of Appeal did not substitute a case contrary to and inconsistent with the one put forward by the respondents. In the judgment of the Court of Appeal, their Lordships said as follows:

"We have found that the plaintiffs failed to establish their claim to the disputed land, their interlocutory judgment not sufficient for that purpose. We have found that the defendant also failed to establish their counterclaim. The necessary consequences that follow is to examine the relief to protection of possession claimed by the plaintiff. The evidence is undisputed that it is the plaintiffs who are in possession, in fact physical possession of the disputed land. The statutory presumption of ownership that is conferred on a person in possession avails the plaintiffs in this case. Section 48 of the Evidence Act, NRCD 323 which confers this presumption states that things which a person possesses are presumed to be owned by him and a person who exercises acts of ownership over property is presumed to be the owner of it. We hereby grant an order protecting their right to possession of the disputed plots"

As it has been pointed out earlier in this delivery, the respondents confined themselves to the only solitary relief indorsed on the writ of summons up to this final stage of these proceedings. Even though the respondents did not set up a case contrary to their pleadings for the court to invoke the time-honoured principle in DAM v ADDO, supra, it was clear that the relief of possession was never asked for. This court like the two lower courts is of the view that the evidence led in support of the title of the plaintiffs was woefully insufficient for any court to grant them any relief sought.

As they sought injunction against the appellant, they certainly put their title in issue and were as such enjoined by law to have proved their title as expected of any party who sues in court for declaration of title to land. See YAA KWESI v ARHIN DAVIES [2007-08] I SCGLR 580 and the opinion of our worthy brother Dotse JSC in the recent case of TETTEH v HAYFORD [2012] ISCGLR 417 and ISSIW v WIABU IV [1970] CC 108 CA.

In these proceedings, the appellant as the defendant at the trial High Court counterclaimed to put the title of the plaintiffs in issue. It therefore behoves the respondent to have offered evidence sufficient to prove their title. The Court of Appeal relied on Section 48 of the Evidence Act, NRCD 323 of 1975 to bolster the presumption of ownership in favour of the respondents. It must be pointed out that the common law has recognized this presumption over a century ago in the case of LORD ST. LEONARDS v ASHBURNER [1870] 21 LT 595.

If the respondents had proved their title to the disputed land but had not endorsed the writ with a relief borne out by the evidence on record, substantial justice would have permitted this court on the authority of the landmark case of HANNA ASSI (№ 2) v GIHOC REFRIGERATION & HOUSEHOLD PRODUCTS LTD № 2 [2007-2008] ISCGLR 16 to grant the relief of possession in the manner the Court of Appeal did. As it turned out, the evidence never supported any relief known to us. In our view, the Court of Appeal was in error when it proceeded to grant the relief of possession which was not supported by the evidence on record and when there had not been any formal amendment of the only relief indorsed on the writ of summons.

Another interesting ground which was argued was ground (d) which dealt with the plea of bona fide purchaser for value. The learned High Court judge was of the opinion that the respondents could not rely on the plea as a basis for their title to their respective lands. In the judgment he made findings of facts to support his opinion. The Court of Appeal did not quarrel with the findings made by the High Court but drew inferences from the findings to hold that the plea holds. In this case, it must be made clear that the plea was being used not as a defence but as a sword. It was the case of the appellants that the respondents did not conduct proper searches expected of any prudent purchaser of land but sought to rely on a default judgment as a basis for their title. In the view of the appellant, no documentary searches were made by the respondents.

The Court of Appeal delivered itself on this formidable equitable defence in a manner which ought to be discussed in detail. It said as follows:

> "What is expected of the plaintiff lay persons is to conduct a search that every reasonable person will find necessary in the circumstances of the case not a legal search. When looked at from this angle we think that a court judgment, which was followed b an enquiry by one of them to a lawyer whether the judgment is worth relying on should qualify as a reasonable search. A lay person should not be expected to go beyond this judgment to the Lands Commission to conduct a search. That the judgment was subsequently found by a court of law as unreliable should not defray the reasonableness of the search since they were not expected to conduct legal searches. Of course where they have engaged the services of a lawyer it

may then be possible in certain circumstances to go further into legal searches in determining the title that they intend relying on for the purchaser".

The plea of a bona fide purchaser for value has been repeatedly appeared in several cases. If a party puts up that plea the onus is squarely on the party who pleaded it. This court in the recent case of DUODU v BENEWAH [2012] 2 SCGLR 1306 citing YEBOAH v AMOFA [1997-98] IGLR 674, OSUMANU v OSUMANU [1995-96] IGLR 672 and TOURE v BAAKO [1993-94] IGLR 342 SC held inter alia; that the party putting forward the plea must establish it. See PILCHER v RAWLINGS [1871-72] 7 LR Ch App 259, at 269 where James LJ said:

"such a purchaser when he has once put in that plea may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the bona fides or mala fides of his purchase and also the presence or the absence of notice; but when he has gone through the ordeal and has satisfied the terms of the plea of purchaser for valuable consideration without notice then according to my judgment this court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that advantage which he has obtained whatever it may be".

As the plea is considered as an absolute unqualified and unanswerable defence if it is upheld by a court of law, the law requires that evidence in support of the plea must satisfy the court. In the recent case of KUSI & KUSI v BONSU [2010] SCGLR

60, the law as clearly stated, requires more than what the respondents did in this case. In the judgment of the majority, Her Ladyship the Chief Justice said at page 88 as follows:

> "It is trite learning that any person desirous of acquiring property ought to properly investigate the root of title of his vendor. In this case there was no evidence of such prudent search conducted by the defendants. In their own pleadings, they asserted that they only inspected the title deeds of the assignor coupled with the permit for construction and were satisfied. The record does not show that they even sought professional advice before entering into the transaction. In our view the steps they took are not the adequate steps of a prudent purchaser of this particular property. Indeed, had they extended their search to the Lands Department, Kumasi, the statutory body that kept official records of lands in Kumasi, they would have known that the land was encumbered".

Even though the facts of each particular case may determine how prudent a purchaser of land must act under such circumstances, we think that, at least, official searches at the Lands Commission in this case would have clearly established that the land was not designated as the property of the vendor of the respondents. An official search at the Lands' Commission, Accra to make inquiries as to the official records covering the land would have alerted the respondents about the ownership of the disputed property. The fact that they were not professionals but were laymen in our view did not take away the necessity to be prudent under the circumstances. It is indeed a notorious fact that persons

seeking to acquire any interest in land in Ghana resort to conducting searches to ascertain whether the vendor or transferor has title to pass. The Lands' Commission is a governmental agency set up for keeping of official records of land transactions in Ghana. In these proceedings, the hard facts conclusively establish that no effort was made to conduct proper investigations. A certified true copy of a default judgment could not under the circumstances be accepted as a basis for the plea. In any case, the default judgment was subsequently set aside, it not being final in every respect.

We are of the opinion that the respondents as purchasers were not prudent in the whole transaction when they limited themselves to only the default judgment. No investigations were done to further their desire to acquire good title to the land. See OSUMAWU v OSUMAWU [1995-96] IGLR 672 CA.

It is therefore clear that the Court of Appeal was in error in upholding the plea of bona fide purchaser for valuable consideration when indeed the evidence on record did not in anyway support the plea. The learned trial judge at the High Court was right in rejecting the plea for want of evidence.

Another ground of appeal which was argued by counsel for the appellant related to the dismissal of the counterclaim by the Court of Appeal. From the argument of counsel, it does appear that he formed the view that as the respondent had no title the counterclaim ought to be upheld on the evidence. At common law, a defendant is not bound to counterclaim against a plaintiff. If a defendant puts in a counterclaim it must be proved to the satisfaction of the court, as a counterclaim is

an independent action. In the case of FOSUHENE v ATTA WUSU [2011] I SCGLR 273 this court had the opportunity to point out the nature of a counterclaim and held that it is an entirely independent action which for convenience of procedure may be combined in one action. In this case as the appellant was asking for declaration of title and other ancillary remedies in the counterclaim, basic rules of evidence required that the appellant had to prove his title to the satisfaction of the court. In the case of ARYE & AKAKPO v AYAA IDRISSU [2010] SCGLR this court held as follows:

> "A party who counterclaims bears the burden of proving his counterclaim on the preponderance of probabilities and would not win on that issue only because the original claim had failed. The party wins on the counterclaim on the strength of his own case and not on the weakness of his opponent's case.

See also the case of MONDIAL VENEER (GH) LTD v AMUA GYEBU XV [2011] I SCGLR 466 where it was held as follows:

> "In land litigation, even where living witnesses, directly involved in the transaction, had been produced in court as witnesses, the law would require the person asserting title and on who bore the burden of persuasion, as the defendant company in the instant case, to prove the root of title, mode of acquisition an various acts of possession exercised over the disputed land. It was only where the party had succeeded in establishing those facts, on the balance of probabilities, that the party would be entitled to the claim"

In this case the statutory declaration out of which the appellant derived its title was found by the Court of Appeal on the authority of IN RE ASHALLE BOTWAY LANDS [2003-04] I SCGLR 420 as no evidence of title in the appellant's grantor and indeed self-serving. We are of the opinion that the reasons canvassed by the Court of Appeal in dismissing the counterclaim was very convincing, based on the evidence offered by the appellant, which was just a mere tendering of its title deeds. The fact that learned counsel did not cross-examine on the statutory declaration would not under the circumstances perfect its defective title.

We cannot rest our judgment without commenting on the performance of the original counsel on both sides who are not arguing this appeal before us. We find that their performance, with due respect never assisted the court in dealing with the real issues in controversy between the parties. In a suit of this nature, the respective grantors of the parties were not joined to the suit to prove their respective titles, if any.

The appellant who lodged a counterclaim and sought the relief of declaration of title merely tendered the statutory declaration and the lease which was registered subsequent to it. It is not clear from the evidence that the vendor of appellant was aware of the litigation, but if he was, and sat by for not applying to be Joined, he would be bound by the outcome of this appeal on the authorities of FISCIAN v TEETH [1956] 2 WALR 192 and AKWEI v COFIE [1952] 14 WACA 143.

By their inability to assist this court, the ownership of the land in dispute was on the evidence left unresolved. The result is that the respondents on the evidence

failed to prove their title and we accordingly set aside the **"right of possession"** granted by the Court of Appeal. The dismissal of the counterclaim by the Court of Appeal on the grounds that it was not proved is hereby affirmed.

(SGD) ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

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

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

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