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

CORAM: BROBBEY, JSC (PRESIDING)
ANSAH, JSC
OWUSU (MS), JSC
YEBOAH, JSC
GBADEGBE, JSC

CIVIL APPEAL
NO. J4/15/2009
26TH MAY, 2010

OKWEI NOI MENSAH
(ALIAS MENSAH MAMFE
(DECEASED) ACTING BY SAMUEL ADUMUAH OKWEI) … PLAINTIFF/APPELLANT/APPELLANT

VRS

1. THE ADMINISTRATORS OF ESTATE OF STEPHEN EBENEZER LARYEA (DECEASED) ACTING BY JOSEPH ASHIETEYE LARYEA
2. MADAM CHARITY SEDATOR

DEFENDANTS/ RESPONDENTS/ RESPONDENTS

J U D G M E N T

YEBOAH, JSC:

The plaintiff/appellant/appellant (who shall be referred to as the plaintiff) commenced an action against the defendant/respondent/respondent (who shall be

referred to as the defendant) in respect of a piece or parcel of the land at La forming part of the La, Abafum Quarter Lands claiming the following reliefs:

1. Declaration that the land in dispute in the two (2) judgments of

I. judgment in suit N0L132/1961 (High Court- presided over by Mrs. Justice Annie Jiagge) and

ii. judgment in Civil Appeal N014/1962 (Supreme Court – presided over by Korsah (CJ), Crabbe (JSC) touch and concern two parcels of the same contiguous stretch of land described as La, Abafum Quarter Lands.

2. Declaration that the Supreme Court's unanimous judgments entered on the 13th March 1963 in Civil Appeal suit N014/1962 reversed, overruled and superseded the High Court Judgment by Mrs. Annie Jiagge dated 23rd March 1962 in suit N0L132/1961.

3. Declaration that on the legal authorities enshrined in the said two judgments, 1st defendants said Deed of Gift dated 28TH March, 1945, Registered as N0211/1945 and the consequential Land Title Certificate N0 GA 1078 are both null and void having been procured by fraud and misrepresentation.

4. An order directing the Chief Executive, Land Title Registry to cancel the said Land Title Certificate N0 GA 1078 immediately as null and void and of no legal effect whatsoever.

5. Declaration of title of the land in dispute in the plaintiff's family as bona fide owners in possession.

Additionally, the plaintiff sought the ancillary reliefs of recovery of possession, perpetual injunction and damages. The facts on which the case turned, which

were found by the two lower courts not to be in controversy may be briefly stated as follows. One Okwei Noi Mensah who on the record is the plaintiff's predecessor in the title was sued by one Stephen Laryea the first defendant's predecessor-in-title in respect of a parcel of land at La, Abafum Quarter. The action was commenced in 1961 and the claim was for declaration of title to the said land, damages for trespass etc. The trial High Court judge Mrs. Justice Annie Jiagge on 23rd of March 1962 entered judgment against Okwei Noi Mensah and awarded damages of 50 pounds for trespass in favour of Stephen Laryea.

Okwei Noi Mensah who lost the case did not lodge any appeal against the judgment and later died. In 1997, however the plaintiff herein commenced an action at the High Court, Accra which has culminated in the instant proceedings by way of an appeal before this court. The basis for this action is that, Justice Annie Jiagge had relied on two authorities in her judgment which were subsequently overruled by the Supreme Court in the case of: ***NII ADOTEI ADOAKU V. J.K NYAMALOR*** in Civil Appeal N014/62 delivered on 13/03/1963. It is therefore the contention of the plaintiff that in view of the decision in the above case overruling Justice Jiagge's judgment, the said judgment (which was not even appealed against) has no legal effect whatsoever and further the deed of gift registered in the Lands Registry and the Land Title Certificate which were all obtained after the judgment are null and void. The plaintiff also pleaded fraud, which would be later addressed in this judgment.

The defendant, as expected, resisted the plaintiff's claim and pleaded inter alia, that as the plaintiff's predecessor-in-title did not appeal against the judgment of Justice Jiagge, he (the plaintiff) is estopped per rem judicatam from relitigating the ownership of the land in dispute. A counterclaim was also filed with a relief for trespass against the plaintiff.

Although the case as filed raised for the determination of the trial court a relatively simple and straight forward case several issues were unfortunately set out by the parties at the hearing of the application for directions. Included in the issues in respect of which directions were sought were two preliminary points of law that the court accepted to be heard. The said points of law if heard would have substantially disposed of the action but it appears from the record that no further directions as to the mode of trial were given by the presiding judge. Subsequently, however an order was made for the parties to file their respective written submissions on the preliminary points of law. On 20/02/2001, however, the plaintiff in spite of the pending order of the court to have the action determined by legal arguments mounted the witnesses' box and opened his case and called three witnesses thereafter, before his case was closed. As it is, the defendants also testified in support of their case and called one witness. The record of appeal before us is silent as to how a case which was to be determined by legal arguments and in respect of which submissions were filed pursuant to an order of the Court was allowed to proceed to a full scale trial. In any event, since no issue has been raised by the parties before us concerning what is obviously a procedural lapse nothing of consequence flows therefrom. I also think that the said lapse in procedure has not resulted in any miscarriage of justice as the parties were afforded equally opportunity to present their cases before judgment in the matter.

One other procedural irregularity that may be noted in the proceedings concerns the plea of fraud that was raised by the plaintiff in his statement of claim which was pleaded thus:

> ***'' 7. The Plaintiff further state that upon the above deed of gift and Justice Mrs. Annie Jiagge's judgment, the defendants procured and had Land Title Certificate N0 GA 1078 issued to***

them on 20th September, 1988. That the said Land Title Certificate was procured by fraud and misrepresentation.

PARTICULARS OF FRAUD

That the 1st defendant knew or ought to have known that Mrs. Annie Jiagge's judgment entered on 23rd March 1962 in suit N0L 132/1961 had been overruled and reversed by the Supreme Court judgment dated 13th March 1963 in Civil Appeal N0 14/62(i.e. Nyamalor's case)

In the particulars above, it was not averred that there was misrepresentation of facts that from the defendant made dishonestly by word or conduct with knowledge that same was false and intended for the plaintiff to rely on it to his detriment. Indeed, a careful perusal of the particulars above does not in the least conform with any standard known to rules of procedure relating to pleading fraud in a statement of claim. It must be pointed out that fraud qua fraud is such a serious allegation in legal proceedings that it should not be pleaded when counsel could not from available instructions form a strong opinion in favour of it. In Odger's Principles of Pleading and Practice, 18th Edition at page 202, the learned authors stated the positions as follows:

> **''Where fraud is intended to be charged, it must be distinctly charged, and its details specified. General allegations, however strong, are insufficient to amount to an averment of fraud of which any court ought to take notice. (Wallingford v Mutual Society (1880) 5 App C as at p. 697; Lawrence v. Lord Norreys (1890) 15 App. (as at p. 221). Counsel must insist on being fully instructed before placing a plea of fraud on the record. [Emphasis mine]**

In this case, it was not pleaded that the defendant made any misrepresentation to the plaintiff or the officers of the Land Registry and the

Land Title Registry by suppressing any facts with the intention of making them rely on those facts to their detriment. A representation must be a matter of fact. If there is a misrepresentation of a matter of law as to the legal consequences of admitted facts, in the absence of actual fraud no court will grant any relief based on fraud. Indeed, in the case of ***LAWRENCE v NORREYS*** (1890), 15 App Cas.210; [1886-1890] All E.R. Rep.858, the Court said that in the absence of such averments, the court may dismiss the action. Similarly, in the case of ***DAVY BROS., LTD*** **v** ***GARRETT*** (1878), 7 Ch. 218 Thesiger LJ said as follows:

> **"Plaintiffs say that fraud is intended to be alleged yet the statement of claim contains no charge of fraud. In the common law courts no rule was more clearly settled than that fraud must be distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts. It is said that a different rule prevailed in the Court of Chancery. I think this cannot be correct. It may not be necessary to use the word "fraud'-indeed in one of the most ordinary cases it is not necessary. An allegation that the defendant made to the plaintiff representations on which he intended the plaintiff to act, which representations were untrue, is sufficient. The word "fraud" is not used but two words are used pointing to the state of mind of the defendant,-that he intended the representations to be acted upon, and that he knew them to be untrue. It appears to me that a plaintiff is bound to show distinctly that means to allege fraud."**

See also the case of ***AKUFFO-ADDO V QUASHIE-IDUN*** [1968] GLR 667, at p. 668.

How counsel expected the court to make a finding of fraud against the defendants on the pleadings referred to looks quite incomprehensible to me and the more I read the record of appeal the more certain I was in my mind that on the state of the pleadings that it was inapplicable to the circumstances of the case. After receiving evidence from both sides the learned trial judge dismissed the claim of the plaintiff and stated that the plaintiff was estopped per rem judicatam by the judgment of Annie Jiagge J (as she then was). The plaintiff appealed to the Court of Appeal on several grounds but the appeal was dismissed.

Before this court, three grounds of appeal have been filed seeking the reversal of the judgment in favour of the plaintiff.

The grounds of appeal filed are as follows:

(i) The judgment was grossly against the weight of evidence

(ii) The Court of Appeal erred in law when it simply relied on, affirmed and/or gave a blank endorsement to the judgment of the trial court when the respondent failed to tender and/ or exhibit before the court the writ of summons, pleadings, record of proceedings along with the judgment of the 1961 suit to enable it study , scrutinize, discuss, compare and consider them (the court process) with the 1997 suit to determine their similarities or otherwise so as to arrive at a decision whether or not the respondents have satisfied all the ingredients of the doctrine of estoppels per rem judicatam.

(iii) The court of appeal erred in law and occasioned serious miscarriage of justice against the appellant when in its judgment it failed to consider and give indications in the form of reasons whether or not the respondents have established all the ingredient and/ or constituent elements to sustain a successful plea of estoppels per rem judicatam.

In considering the first ground of appeal it does appear from the pleadings that the case was not determined on contentious facts. Learned counsel for

the appellant appeared to have based his submissions on the fact that the evidence led before the trial court, which was affirmed by the Court of Appeal was grossly inadequate thereby occasioning a miscarriage of justice. He complained further that beyond tendering the judgment of Justice Annie Jiagge in evidence, no effort was made to tender the record of proceedings to enable the court ascertain the exact area in dispute and the matters in respect of which the decision was made such as to enable the court determine what was in issue in the 1977 case. I think that in so stating the matter, learned counsel went outside the scope of the decided cases on the point. The correct position discernible from the collection of cases on the point is that the judgment itself must be looked at and where there have been pleadings these should also be examined being part of the record Where, however as in this case there has been from the judgment an unambiguous determination in favour of one of the parties-the respondents herein, the court need not look at the pleadings for the purpose of attributing a different meaning to it. See: GORDON v GANDA [1955] 2 All ER 762.In the instant case, the appellant took out the writ of summons herein and averred that in the previous case in 1962, there was a determination in favour of the respondents against their predecessors in title in respect of the same subject matter and accordingly at the end of the pleadings there was no burden on the respondents to prove what was in issue and as such the mere production of the verdict was sufficient to enable the court determine whether the plea of estopel by judgment was established. I observe that having planked their case on the very existence of that prior determination, it sounds ill in the plaintiff's mouth subsequently in the absence of a retraction of the very words contained in their pleadings to turn round to say that the respondents must fail on the plea of estoppel arising out of the previous suit that they acknowledged and which must have informed their decision in the light of the subsequent judgment to mount the instant action. I think that when a party to a cause pleads certain facts on which reliance is placed by a court of law to come to a particular view on the matters before it, the party who pleaded to

those facts cannot afterwards be enabled to make any assertion to the contrary .That party is precluded from making any assertion to the contrary of that which is contained in pleadings filed on his behalf in the same cause. The court is entitled to act on it without reference to whether it is the truth or not and therefore the plea of estoppel ought in the circumstances of this case to be allowed. See: ***HUTT v MORELL (1849) 3 Exch 240, 154 ER 832.***

In my opinion having regard to the unequivocal nature of the reliefs claimed in the action herein and paragraphs 5-17 of the statement of claim filed on behalf of the plaintiff in the court below there has been a clear admission made by him that the decision delivered in 1963 was in respect of the same subject matter and between the same parties and it being so both the trial Court and indeed the Court of Appeal were bound to have given effect to it without waiting to inquire whether the said pleading is true or not. I think that the circumstances of this case particularly the fact that the question whether or not the previous judgment was in respect of the same subject matter and the parties was not in contention renders the case of ***APPEAH v ASAMOAH [2003-2004] SCGLR 226*** not applicable to the instant case. In the circumstances, in the absence of an order in their favour by a court of competent jurisdiction made in the same action to withdraw the said pleadings the appellants must not be allowed to reopen the facts; for those pleadings were not made only for the purpose of that action but for every purpose. This is the effect of the statement that a party to an action is estopped by a previous judgment from seeking to reopen the matter. This is in keeping with the fundamental doctrine f all Courts that there must be an end to litigation. When such a plea is made, it is to the effect that the whole legal rights and obligations of the parties have been concluded by the previous judgment that may have involved the determination of questions of law and findings of fact then in contention between them. See: ***COLLIER v WALTERS (1873) LR 17 Eq 252***. For the above reasons, the ground of

appeal that sought to impeach the judgment on the effect of the admitted evidence fails.

In seeking to be relieved from the effect of the previous judgment the appellants relied on fraud. But in the action, they also sought to rely on certain other facts not amounting to fraud contrary to the settled judicial opinion that a party who seeks to set aside a judgment on the ground of fraud must plead fraud and no other facts. See: (1) ***BRUTUW v AFERIBA [1984-86}1 G.L.R 25; (2) COLE v LANGFORD*** [***1896] 2QB 36.*** Delivering his judgment in the Brutuw case (supra), Francois JA (as he then was) at page 38 made the following pronouncement:

> **"An important observation must be made here. In a suit charging fraud there is clear impropriety for a plaintiff to reopen his entire case. Jonesco v Beard [1930] AC 298 at 300-301, HL is authority for the principle that where a judgment is attacked for fraud, fraud only must be in issue It is not a rehearing of the whole case……"**

It appears from the comments earlier on made in this judgment that the pleadings not having evinced a case of fraud in line with the requirements as to the content of pleadings, the Court ought to have had the pleadings struck out but unfortunately the action was allowed to proceed to a trial with the result that the appellants were not able to lead any evidence to substantiate the said incompetent pleading. In the case of ***AKUFFO ADDO v QUASHIE IDUN*** [1968] G.L.R. 667[Full Bench], Amissah JA (as he then was) made the following important observation that appears to be of much value to us in these proceedings:

> **"Even in the most ordinary of cases an allegation of fraud is a very serious matter. It is not lightly made. The Courts look**

with disfavour on a party who makes it and is unable to substantiate it, visiting his action sometimes with heavy penalties."

A careful reading of the matters relating to the land title certificate No GA 1078 that were averred as raising a case of fraud reveals that they relate to the attribute that a party who obtains a judgment against another that is not appealed has in the eyes of the law and as such do not come within the designation of facts such as to be a legitimate ground for a claim in fraud against the holder of the subsisting judgment. On principle therefore all the urgings made to this court in that behalf are wholly without merit and I propose not to spend any further time on it beyond saying that the claim relating thereto is a misconception as to the real effect and nature of the judgment delivered in 1962.Since that judgment was not on appeal in the Supreme Court case determined in Civil Appeal No 14/1962 even if the effect of the decision in the appeal was to overrule it, it cannot operate to nullify it as was contended on behalf of the plaintiff before us. The correct legal position that runs through all the cases on the point is that which appears in holding 3 of the head note in the case of ***CHANIN & SONS v EPOPE PRINTING PRESS*** as follows:

"An erroneous judgment is only voidable and even though an appeal may be pending execution lies on it as a matter of course unless a stay is granted by the Court. An erroneous judgment creates estoppel between the parties to it and when it is reversed, it cannot be treated as though it never existed."

I think that the above reasons are sufficient to dispose of the appeal herein in favour of the defendants, the result of which is that the instant appeal fails and the decision of the Court of Appeal is affirmed.

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

S. A BROBBEY
JUSTICE OF THE SUPREME COURT

J. ANSAH
JUSTICE OF THE SUPREME COURT

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