IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- 2011

CORAM: ATUGUBA, JSC [PRESIDING]
ADINYIRA (MRS), JSC
OWUSU,(MS) JSC
DOTSE, JSC
BAFFOE BONNIE, JSC

CIVIL APPEAL
NO. J4/24/2012

23RD JANUARY, 2013

1. OSEI ANSONG - - - PLAINTIFFS
2. PASSION INTERNATIONAL SCHOOL /RESPONDENTS
/APPELLANTS

VRS

GHANA AIRPORTS COMPANY LTD - - - DEFENDANT
/APPELLANT
/RESPONDENT

J U D G M E N T.

SOPHIA ADINYIRA (Mrs.) JSC:

I start this judgment with a prefix,

"The judicial edifice was not construed
to lend ear to every cry of fraud
from suitors who had lost on the merits."

(Per Francois JSC in Dzotepe v. Hahormene [1987-88] 2 GLR 681 at 701)

This is an appeal by Mr. Osei Ansong and Passion International School, the Plaintiffs/Respondents/Appellant (hereafter Plaintiffs) from the judgment of the Court of Appeal dated 28 October 2011 which allowed an appeal by the Ghana Airports Ltd, the Defendant/Appellant/Respondent (hereafter Defendant) against

the ruling of the High Court, Kumasi dated 12 November 2010 presided over by Adzagli J. In that decision Adzagli J dismissed an application brought by the Defendant to set aside a writ issued by the Plaintiffs on the ground of abuse of court process.

Background

The Defendant in an earlier writ Suit No IRL/51/2010 dated 22 September 2010 before the High Court Kumasi claimed against the Plaintiffs the following reliefs:

a) a declaration that the defendant's conduct in constructing on the Dote end of the runway of the Kumasi Airport on land which is a part of the said Airport is trespassory, unlawful contrary to public good and the interest of the Plaintiff which is under the legal duty to ensure safety of the Kumasi Airport and its environs.
b) A declaration that the intended expansion of the said Passion International School is also trespassory and inhibitive of the intended extension of the Kumasi Airport.
c) An order of cancellation of any document or transaction purporting to in any manner granting title to or vesting part of the Kumasi Airport land to the defendant as any such document will be fraudulent and null and void ab initio
d) An order of perpetual injunction restraining the defendants its agents, representatives, assigns, officials, privies and persons or entities acting on its behalf and /or at its direction from in any way continuing the patent illegality
e) Recovery of possession of the portion of the said Kumasi Airport upon which the defendants have trespassed and develop in spite of warnings and entreating by the plaintiff.
f) General special exemplary and punitive damages for the defendant's fraudulent and wrongful conduct.
g) Such further orders as the honourable court may deem fit.

In that suit, the Plaintiffs herein admitted per their pleadings that the land, the subject matter of the dispute was the property of the Defendant herein and asked for time to relocate the school. Upon these admissions, the Defendant applied to the court under Order 14 of the High Court (Civil Procedure) Rules, 2004, C.I. 47 for summary judgment.

The High Court presided over by Baah J. entered judgment for Ghana Airports Ltd in respect of all their claims embodied in their writ of summons. The Defendant abandoned its claim for damages. Thereafter the Plaintiffs herein applied for extension of time to the Court of Appeal to appeal the judgment.

The Plaintiffs apparently abandoned the appeal and brought a fresh action before the High Court Kumasi presided over by Adzagli J, a court of co-ordinate jurisdiction, claiming that the earlier judgment be set aside on ground of fraud.

It was the case of the Plaintiffs that Ghana Airports Ltd knew at the time of instituting the previous action that the land did not belong to them but and on

these 'fraudulent misrepresentation, they obtained judgment. The Plaintiff alleged he was compelled to submit to judgment by stating in paragraph 6 of their statement of claim that:

> "Plaintiff say that by virtue of representations made to the under listed persons and bodies 1st Plaintiff had been put into a state of fear and was virtually compelled to accept that 2nd Plaintiff school; was sited on Kumasi Airport land;
>
> i. Lands Commission Kumasi
> ii. Regional Police Commander ,Ghana Police Service, Kumasi
> iii. Regional Coordinating Council, Kumasi."

The Defendant entered conditional appearance and brought an application to set aside the writ on the grounds of abuse of court process as the same matter had been litigated before a Court of co-ordinate jurisdiction.

However Adzagli J. held that the Plaintiffs have made allegation of fraud and has given particulars of the alleged fraud. Accordingly the Plaintiffs must be given the opportunity to prove his case as the court cannot without taking evidence come to any conclusion at that stage. He therefore dismissed the application to set aside the writ.

The Defendant successfully appealed to the Court of Appeal. The Plaintiffs being dissatisfied appealed to the Supreme Court on the following grounds:

i. The Court of Appeal erred in holding that the writ is an abuse of the Court process.
ii. The Court of Appeal erred in holding that the particulars of fraud set out in the writ did not disclose fraud, a matter that could only be resolved by evidence on trial, which error has caused miscarriage of justice.
iii. The judgment is against the weight of evidence.

Consideration

Grounds i) and ii) are inter related and will be considered together.

It is noted that the Defendant's argument before the trial court was that the whole suit was an abuse of the court's process as the matter was res judicata. The trial court was however of the view that despite the fact that the cause or matter was res judicata, it is competent for every court to treat as a nullity any judgment which can clearly be shown to have been obtained by manifest fraud.

Before the Court of Appeal the Defendant complained that the trial judge misconceived the ambit, scope and purpose of the application to strike out the suit on grounds of abuse of process.

Black's Law Dictionary 9th edition defines abuse of process as:

> "The improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope"

The Court of Appeal considered the doctrine of abuse of process, commonly referred to as the rule in Henderson v Henderson citing *Naos Holding Inc v*

Ghana Commercial Bank Ltd [2011] 1 SCGLR 492; [2011] 29 GMJ (PT 29) 1; and *Sasu vs. Amua-Sekyi and Anor* [2003-2004] SCGLR 742.

Prof. Date-Bah JSC, at pages 768 to 769 of Sasu case **supra** stated as follows:

> "In addition to cause of action and issue estoppels …there is the related doctrine of abuse of process, commonly referred to as the rule in Henderson v Henderson (1843) 3 Hare 100 whose essence was set out by the English Court of Appeal in Barrow v Bankside Agency Ltd [1996] WLR 257 at 260 as follows:
>
> "The rule in Henderson v Henderson requires the parties, when a matter becomes the subject of litigation between them in a Court of competent jurisdiction, to bring their whole case before the Court so that all aspects of it may be finally decided, (subject of course to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the Court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or cause of action estoppels. It is a rule of public policy based on the desirability, in the general interest as well as the parties themselves, that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed"

The exception to the rule in Henderson v Henderson is that there must be special circumstances to warrant the setting aside of the rule. The special circumstance must however be clearly spelt out. In this case the special circumstance seems to be the allegation of fraud. A party certainly has a right to set aside a judgment however obtained, it be by default or upon admissions or after a full trial on the ground of fraud.

The settled law and practice of the courts is that the proper method of impeaching a judgment on the ground of fraud was by action in which the particulars of the fraud must be exactly given and the allegation established by strict proof. See also Ord. 12 rule 12 of the Civil Procedure Rules (C.I. 47)

The trial Court was of the view that the Plaintiffs have made allegation of fraud and has given particulars of the alleged fraud and the case must therefore proceed for the Plaintiffs to prove their case. Counsel for the Plaintiffs also opined that once fraud has been raised, the Plaintiffs have issued a valid writ and must be allowed to go through a full trial.

The Court of Appeal held a contrary view and said per Korbieh J.A.:

> "The special circumstances must be set out. In the case on hand, the special circumstances seem to be the allegation of fraud, So if one were to take the arguments of counsel for the respondents at their face value, it would still be important for the respondents to demonstrate clearly in their pleadings that there is indeed a case of fraud for the appellant to

answer before the case is allowed to take its full course. But what was there to show that indeed the respondents had a cause of action based on fraud?"

It is now convenient to set out in full the relevant pleadings on the allegation of fraud. The Plaintiffs averred in Paragraphs 8, 9, 10, 12 and 13 of their Statement of Claim that:

> 8. Plaintiffs say that Defendant being actively supported and aided by an august body as the Lands Commission put 1st Plaintiff under the belief that the land was part of the Kumasi Airport land.
>
> 9. Plaintiffs say that those representations by the Defendant ably supported by the Lands Commission were not only false but fraudulent.
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> 10. Plaintiffs say that Suit No IRL/51/2010 was premised on these same fraudulent misrepresentations which suit was ultimately decided in favour of Defendant.
>
> Particulars of Fraud
>
> a) Defendant representing to the High Court Kumasi that the land on which 2nd Plaintiff School is sited is part of Kumasi Airport land when at the time of making those representations Defendant knew they were false.
>
> 12. Plaintiffs say that, in the course of trial, evidence shall be led to prove that at various times Defendant sought the assistance and influence of various persons and bodies to remove 1st Plaintiff and the School from the land, Defendant knew the school was not situate on Kumasi Airport land.
>
> 13. Plaintiffs say that having now exposed Defendant's fraudulent misrepresentation, if the judgment procured on the same fraud on 28 April 2010 in Suit No IRL/51/2010 is not set aside, the Defendant shall move into execution, demolish the 2nd Plaintiff School and do substantial miscarriage of justice to Plaintiffs.

The Court of Appeal considered the Plaintiffs' pleadings and said as follows:

> "The respondents averred in paragraph 10 of their statement of claim that the appellant had made certain representations which were fraudulent. They went on to say in paragraph 13 that they had 'now exposed the Defendant's fraudulent misrepresentations". But how did the respondents expose the appellant's misrepresentations? They merely alleged that the appellant had made certain misrepresentations which the respondent considered false and even fraudulent. I do not think that merely alleging that the appellants have made false or fraudulent misrepresentations was enough to have "now exposed" the appellant's alleged fraud. The allegation simply begs the question. One is not by any means suggesting that the respondents should have pleaded evidence, but it was important for the respondents to have pleaded facts or made averments that had the potential to demonstrate patently that the appellant had either admitted that it had deliberately

made false representations or acted in such a way that its claim to the land in dispute could be nothing but fraudulent."

We concur with the Court of Appeal. This Court stresses that fraud is not fraud merely because it has so been stated in a writ to excite the feelings of the courts. Francois JSC in his dissenting opinion in *Dzotepe vs. Hahormene III* **[**1987-88] 2 GLR 681 at 701 aptly put it as follows:

> "There is no denying that a judgment obtained by fraud is in the eyes of the court no judgment as it is not founded on the intrinsic merits of the case, but is borne of an attempt to overreach the courts by deceit and falsehood: See *Duchess of Kingston's Case (*1776) 20 St Tr 355 and *Lazarus Estates Ltd v.Beasley* [1956] 1 All ER 341. But the fact that the courts abhor fraud should not make them insensitive to the just claims of parties. The judicial edifice was not construed to lend ear to every cry of fraud from suitors who had lost on the merits. If charges of fraud are not examined closely, the stratagem would subvert the very administration of justice and undermine the hallowed principle that a victorious party is entitled to the fruits of his judgment and should not be deprived of his victory without just cause. In effect fraud must be clearly set out and effectively established."

Counsel for the Plaintiffs however submits that in the light of the averments contained in Paragraph 12 **supra**, the Court of Appeal erred in concluding that there was no basis for alleging the fraud. He contends that the allegation of fraud revolves round facts and circumstances known to the Defendant before and at the time of instituting the writ and this is contained in paragraphs 9, 10 and 11 of their affidavit in opposition to the Defendant's application for dismissal of his writ. The Plaintiffs in their affidavit attached an Exhibit A1 which they claim to be the approved planning scheme of the area the 2nd Plaintiff school is sited; and was fresh evidence discovered after the first case. They claim the planning scheme showed that where the Plaintiff School is sited does not form part of Kumasi Airport land and this was fresh evidence in proof of the allegation of fraud.

A close examination of Exhibit A1 shows that it is not an approved planning scheme of the area. Normally an approved planning scheme would show the various approved use of the land in the area e.g. residential, school, market ,church etc as the planning officers would deem fit. The only heading on Exhibit A1 is 'SITE FOR AIRPORT'; there is no marking or mention of the Plaintiffs or the school.

The said Exhibit A1 is a document which could easily be discovered had the Plaintiffs been diligent during the earlier suit. Moreover, the Plaintiffs did not even plead this so called planning scheme which they claim would show the Defendant knew the land does not form part of the Kumasi Airport land in their statement of claim. So clearly we do not see how Exhibit A1 would advance their allegation of fraud.

In *Kerr on Frauds and Mistakes* 7th edition referred to by the Plaintiffs; the learned author stated that fraud in all cases implies a wilful act on the part of anyone, whereby another is sought to be deprived, by illegal or inequitable means, of what he

was entitled to. The Plaintiffs in both suits never claimed the land was theirs. The Planning scheme of the area layout plan he exhibited to his affidavit in opposition to the motion to set aside his writ does not disclose that he had a claim of right to the land which was the subject matter in the first action.
The Plaintiffs further complain that the Court of Appeal in its attempt to demand sufficient detail regarding the alleged fraud was rather requiring unassailable proof of fraud from the Plaintiffs which was premature at that stage. We do not think so. On the facts the Plaintiffs submitted to judgment by conceding that the land on which they were constructing a school was not for them and asked for time to relocate the school. They now turn round to set aside the judgment on grounds of fraud without alleging any new facts in their pleadings to back the allegation of fraud. This clearly shows the action was brought in bad faith.
As correctly stated by the Court of Appeal, the Plaintiffs need not plead evidence but it was important for them to have pleaded facts or made averments that had the potential of showing that the Defendants had either admitted that it had deliberately made false representations or had acted in such a way that its claim to the land in dispute could be nothing but fraudulent. The pleadings should show that the court was deceived into giving the impugned judgment by means of a false case known to be false, or not believed to be true, or made recklessly without any knowledge of the subject. The pleadings however did not disclose any cause of action based on fraud.
From the foregoing we affirm the decision by the Court of Appeal that the particulars set out in the writ did not disclose fraud. Consequently we hold that the Plaintiffs' writ is an abuse of the Court process.
Grounds i) and ii) of the appeal are therefore dismissed.

Ground (iii): The judgment is against the weight of evidence
The Plaintiff under this ground of appeal is inviting this court "to make up its own mind on the facts and to draw inferences from them to the extent that the trial court could."
Although the general principle of law is that an appeal is by way of rehearing, it is well settled that: "where an appellant complains that a judgment is against the weight of evidence, he is implying that there were certain pieces of evidence on the record which, if applied in his favour, could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him": *Djin v Musa Baako* [2007-2008] SCGLR 686 at 687.
The evidence in this case was by affidavit and the onus is on the Plaintiffs to clearly and properly demonstrate to the appellate court the lapses in the judgment being impugned.
The Plaintiffs have failed to demonstrate that the judgment is against the weight of evidence. The appeal therefore fails on this ground.
From foregoing, the appeal is dismissed in its entirety.

(SGD) S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

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

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

(SGD) J. V. M. DOTSE
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