IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA – GHANA A.D. 2012

CORAM: ATUGUBA, JSC (PRESIDING)
ADINYIRA (MRS), JSC
YEBOAH, JSC
GBADEGBE, JSC
AKOTO-BAMFO,(MRS) JSC

CIVIL APPEAL
No. J4/61/2013

19TH MARCH, 2014

TENASSA PHAMARCUTICAL & TRADING CO. LTD .... PLAINTIFF/RESPONDENT /RESPONDENT

VRS

MR. ISSAKA KOANDA .... DEFENDANT/APPELLANT /APPELLANT

JUDGMENT

GBADEGBE JSC:

This is an appeal from the decision of the Court of Appeal by which the decision of the trial High Court was affirmed in this matter herein. By its decision, the Court of Appeal accepted the plaintiff's case in preference to that of the defendant. Being aggrieved by the said decision, the defendant-appellant-appellant (hereinafter conveniently referred to as the defendant) has appealed to this court seeking the reversal of the judgment, the subject matter

of these proceedings. In his effort to persuade us to yield to his invitation, the defendant through his counsel has in his statement of case argued three grounds of appeal that were contained in the notice of appeal and therein numbered as “a”,” b”, and “c” and expressed as follows:

> ***“(a) That the learned justices of Appeal erred in holding that the property in dispute was acquired by E B Asante for and on behalf of Asante Chemical Store notwithstanding the fact that Asante Chemical Store was a business name and not a legal entity and therefore could not enter into any legal transaction including a lease.***
>
> ***(b) The learned justices of the Court of Appeal erred in holding that the plaintiff was the successor of Asante Chemical Store and therefore owner of the property in dispute even in the absence of any evidence on record substantiating that fact.***
>
> ***(c) The learned justices of the Court of Appeal erred in holding that the defendant never acquired the said property in dispute from E B Asante contrary to the presence of a Receipt and Statutory Declaration executed by E B Asante in his lifetime in favour of the Defendant.”***

The questions which we have to determine in these proceedings turning on the said grounds are as follows: Who acquired the leasehold in regard to the disputed property? And if indeed, as the appellant contends, it was the deceased E. B. Asante, to whom the grant was made, was there any sale by E B Asante of the leasehold property to him? So stated, these questions raise simple questions of fact and law. The first of these questions calls for the construction of the leasehold document and the second only arises if the answer to the first question is supportive of the defendant’s case. The first

question turns on the combined effect of the first two grounds of appeal that were argued in the defendant's statement of case while the second question relates to the third ground.

Before turning to the task with which the court is faced, it is observed that from the record of appeal, there were only two persons who testified to the facts in dispute- a representative of the plaintiff company and an attorney of the defendant. The evidence placed at the disposal of the court compels me to the conclusion that while the witness of the plaintiff had no personal knowledge of the transaction from which the land was acquired, the defendant's attorney offered some evidence of matters that were personally known to him and material to our determination in these proceeding to the effect that he was approached by the deceased E B Asante to get someone to buy the disputed plot from him. The evidence contained in the record of appeal appears to hinge mainly on the question that concerns who took out the lease from the Tema Development Corporation (TDC).Within the context of such a contest, where there are available documents that speak to the transaction, they are preferable to the oral testimony tendered to the court by the rival parties.

Turning to the first question, while the plaintiff claimed through Asante Chemical Store, the defendant asserted his title through E B Asante. This calls for a scrutiny of the leasehold document which was tendered in the course of the proceedings variously as exhibit 1, exhibit 1K2 and exhibit TPTC 29. The said documents which are all to the same effect describe the parties to the agreement of leasehold as Tema development Corporation and Ernest Boamah Asante the Managing Proprietor of Asante Chemical Store- P O BOX 347 Tema, and indeed, he it was who executed the leasehold agreement in his own right without any words of qualification or limitation that would constrain me to place a different construction on the description of the lessee. It being so, and as the parties to the action herein claim their titles from the said leasehold agreement they are bound by the description of the parties in the premises of the lease. See: **African Distributors Limited v CEPS** [2011]

2 SCGLR 955. The determination of the question as to whom the lease was granted is in my opinion thus becomes a simple issue of law that involves construing the agreement in terms of the description of the lessee in the premises of the lease.

Having carefully looked at the lease, it appears that it was made in favour of E B Asante and not Asante Chemical Store. In coming to this view of the matter, regard has been had to the letter that accompanied the forwarding of the leasehold agreement from TDC to the lessee that is in evidence as exhibit TPC 28, and the allocation letter also from the TDC to the intended lessee as TPC 30. Although they relate to the transaction of leasehold, the statements contained therein have been superseded by the agreement of leasehold that unequivocally refers to E B Asante as the person to whom the conveyance was made and the utilisation of the words, "the Managing Proprietor of Asante Chemical Store" was merely intended by the parties to identify the particular E B Asante to whom the grant was made by the lessor. This view of the matter appears to be buttressed further by the insertion in the lease of the words "and having his place of residential addresses as House No 1/R. 80 Kortu-Gon (Community 11) Tema. It is interesting to note of the said words "and having his residential address as……." that the operative words "his residential address "were inserted after the words "its registered office ...." was deleted by using a type writer to cancel out the words for which they were substituted in order to provide a residential address of a living being instead of an entity other than a human being. Having determined the first question, we are precluded by the combined effect of **sections 24**, **25 and 26 of the Evidence Act, NRCD 323** in view of the answer received to the first question posed above from considering any other evidence to the contrary as the presumptions to which they relate are conclusive in nature. Reference is made to the said sections of the Evidence Act as follows:

"24. Conclusive presumptions

(1) Where the basic facts that give rise to conclusive presumption are found or otherwise established in the action, evidence contrary to the conclusively presumed fact may not be considered by the tribunal of fact.

(2) Conclusive presumptions include, but are not limited to those provided in sections 25 to 29.

25. Facts recited in written instrument

(1) Except as otherwise provided by law, including a rule of equity, the fact recited in a written document are conclusively presumed to be true as between the parties to the document, or their successors in interest.

(2) Subsection (1) does not apply to the recited of consideration.

26. Estoppel by own statement or conduct

Except as otherwise provided by law, including a rule of equity, when a party has, by that party's own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon that belief, the truth of the thing shall be conclusively presumed against that party or the successors in interest of that party in proceedings between

(a) that party or the successors in interest of that party, and

(b) ***the relying person or successors in interest of that person*.**"

It is difficult to comprehend that notwithstanding the very clear description of the lessee in the leasehold agreement the question of ownership of the leased property had to be determined in the courts below by reference to other matters such as the covenants and the issue of receipts for ground rents. Evidence extrinsic to a document can only be resorted to when there is some ambiguity but in the case before us there was clarity in the description of the lessee that such a course that was embarked upon in the courts below must be deprecated. The finding by the learned trial judge that EB Asante was

the sole proprietor of Asante Chemical Store renders the urging by the plaintiff touching and concerning the issue of the said receipts devoid of any legal significance.

The rule of preclusion created by section 24 of the Evidence Act to which reference has been made earlier in the course of this delivery, applies to the two lower courts as well and if the learned judges particularly of the Court of Appeal had adverted their minds to the nature of the presumptions brought into being by the answer to the question : who acquired the leasehold interest to the disputed property , they would not have proceeded in view of the statutory provision to consider the version of the matter that was strenuously pressed on them by the plaintiff. As the answer to this question is one of law and one that turns purely on the construction of a document, there is no fetter on us as a Court re-hearing the matter to correct what appears to be an obvious error of law committed by the Court of Appeal and indeed, the trial High Court by coming to a contrary conclusion. The error committed by these courts relates to the construction of a document that properly speaking is in the domain of law, and as such we are not constrained by the collection of cases of this court that include **Achoro v Akanfela** [1996-97] SCGLR 209 to the effect that where the decision on appeal to us seeks the reversal of concurrent findings of fact made by the two lower courts then we should only intervene when there was a blunder or error that that has resulted in a miscarriage of justice. The misconstruction of the document in itself is an instance of justice that had miscarried and therefore justifies our intervention as the High Court and Court of Appeal took into account matters that they were precluded by the mandatory provisions of **section 24 of the Evidence Act, NRCD 323** from considering. By not complying with the provisions of the **Evidence Act,** there was a resultant instance a miscarriage of justice. The observation is made that whenever any court takes into account matters that it is by statute precluded from considering, the decision reached acquires the attribute of miscarriage of justice and it behoves us as the court of last resort

to correct such an injustice in order to effectuate our oath of doing justice according to law.

When the controversy unfolded before us in these proceedings is substantively considered, one cannot escape reaching the conclusion that the plaintiff's claim to the disputed property looks improbable for the reasons that follow shortly. The claim to having succeeded to Asante Chemical Store is based only on the certificates of incorporation and commencement of business but without the regulations that serve the purpose of indicating who the subscribers to the company are and also whether in fact the incorporated entity has taken over the business that was formerly being undertaken by Asante Chemical Store. Additionally, if as the learned trial judge found Asante Chemical Store had as its sole proprietor, E B Asante who died long before the incorporation of the company then as a matter of law at the date of the incorporation there was nothing left of Asante Chemical Store that could have been succeeded to by anybody. Thus, on the evidence adduced by the plaintiff at the trial, in terms of **section 80 (2) (b) and (c**) of **the Evidence Act, NRCD 323** was unimpressive. In coming to this view of the matter one is reminded of the fact that the burden of proof in the matter was on the plaintiff as the defendant relied on his possession of the disputed property without making a counterclaim.

Then there is the name by which the plaintiff took out the writ of the summons in the action herein- Tenasa Pharmaceutical and Trading Company Limited. While it closely resembles the name on the certificate of incorporation, Tenasa Pharmacy and Trading Company Limited (as portrayed by TPTC 4) and that of the certificate to commence business, exhibit TPCT1 they are dissimilar. Also regarding the name of the company, while the name on exhibit TPCT 1 and TPCT 4 read "Tenasa Pharmacy and Trading Company Limited" with the first word "Tenasa" having one "s" that on the writ and other processes bear double "ss" and reads "Tenassa". These differences in corporate law have huge consequences as the name on the writ does not correspond with the registered entity and are enough to disentitle the plaintiff to the reliefs he

claims. The question that these dissimilarities raise for our determination in these proceedings remained unanswered at the end of the plaintiff's case. The said question is whether the incorporated entity which claims to be the plaintiff is Tenassa Pharmaceuticals and Trading Company Limited or Tenasa Pharmacy and Trading Company Limited?

Although getting rid of the question regarding the ownership of the disputed plot should be sufficient to dispose of the action herein in view of the fact that the parties have in their journey from the trial court to this court contested the case on a common understanding that requires the defendant in any event to establish the sale that he alleges, that question next comes to be considered. That approach, however, is contrary to the established judicial opinion that only parties to a contract can sue on it or take steps to enforce it. See (1): **Berkeley v Hardy** (1826) 5 B & C 355;(2) **Harmer v Armstrong** [1934] Ch 65 at 86 per Lawrence J; (3) **Re Foster, Hudson v Foster** [1938] 3 All ER 357. As the plaintiff does not claim to be the personal representatives of the deceased lessee, one would have thought that the defendant's dealings with the property which in their nature are adverse to E B Asante should not be of any concern to it at all. What this means is that the plaintiff does not appear in view of the adverse determination of the question of ownership to have the capacity to raise any issue regarding the disputed property. The plaintiff's case can be likened to a person who meddles in the estate of a deceased person-"**executor de son tort"**

By way of proof of his purchase of the disputed property, the defendant tendered a receipt of purchase issued to him by his grantor, E B Asante and also a statutory declaration that was made in his favour by the said grantor to the TDC together with a covering letter for the purpose of enabling a change of ownership to be made in his name on 4 November 1996. Again, the defendant went ahead and started building works on the land during the life of his grantor. Faced with these acts of ownership in the defendant's favour, the plaintiffs in particular answer to the receipt alleged in paragraph 11 of its Reply

that it was a forgery. At the trial, however, the plaintiff called no evidence to sustain the forgery and by the operation of rules of evidence not having led any evidence to sustain such a serious charge its silence must be deemed under the rule in **Bessela v Stern** (1877) 2 C PD 265 to be an admission. See also: **Wiedemann v Walpole** [1891] 2QB 534. It is interesting to note that on the very day that the grantor of the defendant swore to a declaration in his favour for a change of name, the defendant also made a similar declaration for the same purpose. In my view, in the absence of any credible challenge to these acts, the defendant has clearly established his purchase of the disputed property. The fact of purchase that these acts tended is not diminished by the absence of a document bearing the change of ownership as he being in possession at the date of the action requires a better title to oust him.

But that is not all. While the plaintiff's witness from his testimony was only engaged by the company in 2004, sometime after its incorporation in 2004, and for that matter lacked any personal knowledge of the matters he testified to, the witness of the defendant on the other hand, had some knowledge of the crucial circumstances in which the defendant was approached to buy the property. According to his evidence, he had previously assisted the owner of the property to sell some other land and so when he was looking for a buyer he approached him and he got the defendant to buy the property from him. The evidence of the representative of the plaintiff company, for example at page 132 of the record of appeal portrays him as one who did not have any personal knowledge of the facts in contention and yet in his narration before the trial court, he offered no explanation on how he came by the facts to which he testified. At that page, when led by his counsel in Evidence in Chief, he answered in relation to the version of the defendants thus:

> **"Q: He also says in paragraph 4 that at the time of purchasing the plot number D11/NKT/112/11 the said property were in the personal name of Ernest Boamah Asante and the lease document signed between TDC and said Ernest Boateng Asante was registered as 3296/1979 on 17 July 1971?**

A: it is never true. The receipt and document is still in the name of Asante Chemical Store."

The above cannot be true in the light of what appears on the leasehold agreement and it is surprising that even after it had been exhibited by the plaintiff earlier on in the proceedings to an application for interlocutory injunction, the witness would subsequently in the course of the same proceedings fall into the blunder of saying that it was in the name of Asante Chemical Store. This and other pieces of evidence on the record speak to his lack of knowledge about the matters in dispute.

Further, it is surprising that if indeed there was no sale of the property to the defendant he would have entered same and commenced building works in the life time of E B Asante without any challenge from him. When one considers the fact the fact that the defendant must have obtained permits to develop the property; the challenge to his ownership by the plaintiff company seems to be an afterthought. The question that one needs to consider is why was the challenge not made earlier than after 2004? The only reasonable explanation turning on the evidence is that the defendant had actually purchased the disputed property from E B Asante.

For these reasons, the appeal herein succeeds. In the result, the judgment of the Court of Appeal dated 17 May 2012 is set aside and in place thereof is substituted an order dismissing the plaintiff's claim.

N. S. GBADEGBE
JUSTICE OF THE SUPREME COURT

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

ANIN YEBOAH
JUSTICE OF THE SUPREME COURT

V. AKOTO BAMFO (MRS)
JUSTICE OF THE SUPREME COURT

DISSENTING OPINION

ATUGUBA, JSC

Since the facts of this case have been sufficiently stated in the judgment of my brother Gbadegbe JSC I would not repeat them.

Estoppel

It is trite law that for a statement to give rise to an estoppel the same must be clear and unambiguous. I do not see such clarity in the description of the parties as to unequivocally lead to the conclusion that the property was being

acquired personally by E.B Asante. I consider that if the recitals have the effect of an estoppels so do the succeeding statements tending to the contrary under sections 25-26 of the Evidence Act 1975(NRCD 323). In such a situation the common law rule is that where there are conflicting estoppel the matter should be determined free from estoppel.

However these provisions cannot debar the court from reading the document as a whole and in doing so there was a leaning towards corporate ownership of the property.

There is also the evidence that the documents evidencing the purchase of the property such as the receipt were issued in the name of Tenassa Pharmaceutical Trading Co. Ltd. whereas that company at the time of the purchase of the disputed property did not exist, in that name.

Also there was clear divergence in the signature of E.B Asante which counsel for the respondent did not dispute but sought to explain away on grounds of old age.

In such circumstances it cannot be said that the courts below were clearly in error and therefore ought to be reversed.

For these reasons I would dismiss the appeal.

W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

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