IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

KUMASI AD 2022

CORAM:

A. M. DOMAKYAAREH (MRS) J. A. PRESIDING

A. B. POKU-ACHEAMPONG, J. A.

S. K. A. ASIEDU, J. A.

SUIT NO.: H1/28/2022

DATE: 28th April, 2022

1. JOSEPH JOHN RADDY
2. JOHN BITAR
3. VIKIL ABDULLA ESSAKA — **3RD & 4TH DEFENDANTS /APPELLANTS**
SUBSTITUTED BY YUSIF IBRAHIM
4. ABUBAKA ESSAKA

VRS

NANA TUTU AMPEM II
FOR HIMSELF AND THE STOOL LAND — **PLAINTIFF/RESPONDENT**
PEOPLE OF AKYINAKROM, ASHANTI

J U D G M E N T

POKU-ACHEAMPONG, J.A.:

This is an appeal against `a judgment of the Kumasi High Court dated 26th July 2006 by the 3rd and 4th Defendants/Appellants.

For the purposes of this judgment and for reasons of convenience the Plaintiff/Respondent shall be referred to as "the Respondent" and the Defendants/Appellants as "the Appellants".

The Respondent per a writ of summons filed on 11th May 1988 on his own behalf and on behalf of the Akyinakrom Stool claimed against the Appellants jointly and severally the following reliefs:

a. A declaration that the instrument executed between the Plaintiff and the 1st and 2nd Defendants and dated 8/7/55 with 1-9-1965 as the commencement date is a Tenancy Agreement for four stores built on plot Number OTB 106, Kumasi and not a devise (sic) assigning 12 years and 30 days being the residue of the term of 50 years granted to Plaintiff by a head lease to the 1st and 2nd Defendants.
b. A declaration that as between the Plaintiff's stool and the Defendants, Plaintiff is better entitled to the renewal of the Head-lease referred to supra.

The 3rd and 4th Appellants entered appearance on 12th May 1988 and filed their defence on 14th June 1988 which was amended on 15th December 1988.

The 1st and 2nd Defendants/Appellants also entered appearance on 18th May 1988 and filed their defence on 22nd June 1988.

Issues

The parties put forward the following issues for determination.

1. Whether the document attached to the writ of summons is a tenancy agreement for 4 stores only in H/No. OTB 106 Adum, Kumasi or not.
2. Whether the Plaintiff's action is vexatious or not.
3. Whether or not there was any residue unexpired of the term of 50 years granted in the Head-lease of plot H/No: OTB 106 under the agreement.
4. Whether or not the action is statute-barred.
5. Any other issues raised by the pleadings.

The Trial Judge in his judgment set down the following issues as relevant for determination of the matter:

(a) Whether or not Joseph John Raddy and John Bitar entered into a tenancy agreement with Akyinakrom Stool.
(b) Whether the document attached to the writ of summons is a tenancy agreement for 4 stores only in H/No.: OTB 106 Kumasi or not.
(c) Whether or not there was any residue unexpired of the term of 50 years granted in the Head lease of Plot No H/No. OTB 106 under the agreement.

Plaintiffs Case:

The Plaintiff averred that the Lands Commission in its capacity as the Trustee for the Golden Stool of Ashanti granted a Lease in respect of Plot Number OTB 106, Adum, Kumasi for a period of fifty (50) years to Nana Kwaku Nsebetuo the Akyiawkromhene in Ashanti on 19/10/1927.

Subsequent to the destoolment of Nana Kwaku Nsebetuo, as Akyiawkromhene, one Kwaku Mensah and others who were stool elders of Akyiawkrom instituted an action against Nana Nsebetuo claiming that even though the Lease in respect of Plot Number OTB 106, Adum,

Kumasi was made in the personal name of Kwaku Nsebetuo, it was actually made for the benefit of Akyiawkrom stool. In a judgment dated 4th October, 1930, the Circuit Court ruled in favour of Kwaku Mensah and others and declared the Property Number OTB 106, Kumasi to be the property of Akyiawkrom Stool (See paragraph 3 and 4 of the Statement of Defence of the 1st and 2nd Defendants on this).

It is the case of the Plaintiff that during the reign of Nana Kwaku Nsebetuo as Akyiawkromhene he agreed with Naja David to build four storerooms, four bedrooms, a kitchen and a toilet on Plot Number OTB 106, Kumasi. The Plaintiff and members of his stool were to benefit from the residential unit of the property, i.e. the four bedrooms, kitchen and the toilet whilst Naja David was to take the commercial unit of the property which was the four storerooms.

The Plaintiff further averred that in addition to the resources that Naja David applied for the development of the property he also granted a loan of £300 to Nana Kwaku Nsebetuo with the agreement that the cost of the construction of the property and the £300 loan were to be amortized using rents payable in respect of the four storerooms that came into the possession of Naja David.

It is the case of the Plaintiff that by the 20th July, 1952 Naja David had been fully reimbursed for the cost of development of the property as well as the loan of £300 granted to Nana Kwaku Nsebetuo.

In 1955 Nana Owusu Achiaw II who had then become the Chief of Akyiawkrom and one Boakye Agyemang, a linguist of Akyiawkrom stool entered into an agreement with the 1st

and 2nd Defendants by which the four storerooms were let to them on specific terms, covenants, conditions and stipulations for a period of 12 years and one month.

According to the Plaintiff the 1955 agreement with the 1st and 2nd Defendants related to only the four storerooms and that the residential unit of the property continued to be in the possession of the Plaintiff Stool.

It is the case of the Plaintiff that before the expiry of the term granted by the 1955 agreement the Plaintiff noticed the presence of one Aisha Nana whose Administrators are the 3rd and 4th Defendants in the four storerooms under the pretext that the 1st and 2nd Defendants the tenants or sub-lessees had assigned Property Number OTB 106, Kumasi to her. The Plaintiff thus instituted a number of suits against the 1st and 2nd Defendants with the instant suit being the last one.

The case of the 1st and 2nd Defendants

The case of the 1st and 2nd Defendants is contained in their Statement of Defence filed on 22nd June, 1988 (see page 20 of the Record of Appeal (ROA). The 1st and 2nd Defendants failed to appear in court to testify and so the court proceeded under Order 36 rule 2(1) of the High Court Civil Procedure Rules, 2004 (CI 47) with the hearing of the matter without them.

By their Statement of Defence the 1st and 2nd Defendants averred that the property in dispute was a subject matter of a lease dated 19th October, 1927 in favour of Kwaku Nsebetuo. They continued however that by a judgment of the Circuit Court dated 4th October, 1930 in the suit entitled Yaw Mensah and Others Versus Ex-Chief Kwaku Nsebetuo the property became vested in the Akyiawkrom Stool for the residue of the term unexpired.

The 1st and 2nd Defendants contended further that by an indenture dated **8th July, 1955** (Exhibit A) the Plaintiff Nana Owusu Achiaw II on behalf of the Akyiawkrom stool assigned House Number OTB 106 to them for the residue then unexpired of the 50 years lease granted by the 1927 lease.

The 1st and 2nd Defendants admitted that they required consents of the Golden Stool, the Government and the Plaintiff to part with the possession of the property but they contended that the requirement for those consents became unnecessary by virtue of Section 1(6) of the Lands Commission Act, 1971.

The case of the 3rd and 4th Defendants

The 3rd Defendant testified for himself and on behalf of the 4th Defendant. According to the 3rd Defendant it was his wife by name Aisha Nana who told him that some Lebanese were selling their property. According to the 3rd Defendant he then sought the assistance of the 1st Defendant to help him and his wife, Aisha Nana to acquire the property since the 1st Defendant was a Lebanese himself. The 3rd Defendant stated that after discussing the issue with the 1st Defendant he told him, the 3rd Defendant, that he also had a building which he was selling and asked the 3rd Defendant if he was interested.

The 3rd Defendant went further to say that he requested to see the documents that the 1st Defendant had on the building. When the 1st Defendant brought the documents he took same to his Lawyer at the time who, after going through the documents, advised him and his wife to buy it if they had money. On the advice of their Lawyer, by name Lawyer Acheampong, they purchased the subject property.

Contrary to the case of the 1st and 2nd Defendants 3rd and 4th Defendants averred that by an indenture dated **5th July, 1955**, the Plaintiff assigned to the 1st and 2nd Defendants the residue unexpired of the 50 year Lease granted by the 1927 head lease.

The 3rd and 4th Defendants contended that the suit is vexatious because before this present suit the Plaintiff had instituted three other suits against the 1st and 2nd Defendants two of which according to the 3rd and 4th Defendants are still pending. They further contended that the present suit is statute barred.

Exhibits

The main exhibits tendered by the parties in the trial court were the following:

Exhibits of Plaintiff:

Exhibit A – The 1955 Indenture made between the 1st & 2nd Defendants of the one part and the Plaintiff stool acting through the occupant of the stool, Nana Owusu Akyiaw.

Exhibit B – Inventory of Akyiawkrom Stool properties which included Plot No.106 Adum, Kumasi.

Exhibit D – Building permit procured by Nana Owusu Akyiaw, in respect of the buildings on Plot No. 106 Adum Kumasi.

Exhibits of 3rd & 4th Defendants/Appellants

Exhibit 1 - The title file which contains the 1927 lease between the Government of Ashanti and Nana Kwaku Nsebetuo.

Exhibit 2 – Letters of Administration in respect of estate of Aisha Nana tendered and wrongly labelled as Exhibit 1 instead of Exhibit 2.

Exhibit 3 – Assignment between 1st & 2nd Defendants on one part and Aisha Nana on the other part.

Exhibit 4 – the Land Title Certificate.

Judgment:

After the trial the Learned High Court Judge delivered judgment in favour of the Plaintiff as follows:

> *"The Plaintiff has proved his case on the balance of probabilities and he is entitled to succeed in this action. I therefore enter judgment for the Plaintiff against the Defendants jointly and severally".*

The Learned Judge granted the two reliefs sought by the Plaintiff in his claim and further ordered:

> *"The 3rd and 4th Defendants to yield their possession and occupation of the four storerooms situate on plot no OTB 106 Adum Kumasi to the Akyiawkrom Stool forthwith, … and I order the cancellation of the lease issued in favour of Aisha Nana and ask the Land Commission to issue a fresh lease covering the plot No. OTB 106 Adum, Kumasi in favour of Akyiawkrom Stool.*

Grounds of Appeal:

Aggrieved and dissatisfied by the judgment the 3rd and 4th Defendants/Appellants appealed against same on 26/7/2006 on the ground that:

1. The judgment is against the weight of the evidence.

This evinced their intention to file additional grounds upon receipt of the record of proceedings.

On 9th November 2018, i.e. after a period of 12 years, the Appellants filed additional grounds as follows:

1. The Honourable Trial Court erred when it ordered the cancellation of the fresh lease in favour of the Defendants/Appellants when there was no mandatory obligation on the Plaintiff's grantor to renew the lease in the Plaintiff's favour.
2. The Honourable Trial Court erred when it held that the Plaintiff/Respondent was the Lessee when at the time of the renewal of the lease in favour of the 3rd and 4th Defendants/Appellants there was no subsisting lease in favour of the Plaintiff/Respondent.
3. The Honourable trial court erred when it held that Aisha Nana had never been in possession of the premises and at the same time ordered the 3rd and 4th Defendants/Appellants who were her assigns and privies to yield possession and occupation of the premises.
4. The Honourable Trial High Court erred as it contradicted itself by holding that the Defendants did not obtain the consent of Otumfuo in renewing the Lease after having found on evidence that the Lands Commission renewed the lease on behalf of Otumfuo Osei Tutu for the 3rd and 4th Defendants/Appellants.

Ground One

This is the omnibus ground that the judgment is against the weight of evidence. It is trite law that an appeal to this Honourable Court is by way of re-hearing. See Rule 8(1) of the Court of Appeal Rules 1997 C.I. 19.

The obligation on the court when such a ground of appeal is canvassed has been outlined in the oft-cited cases of ***Tuakwa vrs Bosom 2001-2002 SCGLR 612.***

Brown vrs Quashigah 2003/2004 SCGLR 930.

Ampomah vrs VRA (1989-1990) 2GLR page 28.

Oppong Vrs Anarfi 2011 1SCGLR 556 Holding 4.

Again the onus on an Appellant who puts forward such a ground of appeal is eloquently stated in the locus classicus case of ***Djin vrs Musah Baako (2007-2008) SCGLR 686.*** It is that such an Appellant should demonstrate fully and clearly to the Appellate court the errors, weaknesses and faulty findings or conclusions made in the judgment appealed against which if corrected will tilt the verdict in his/her favour.

The Appellant sought to discharge this obligation by putting forward the following points.

1. The failure of the Respondent to tender the Head-lease that establish their root of title in evidence. Counsel for the Appellants contends that Exhibit 1 (found at pages 162-165 of the ROA) shows that the said lease was between the Government of Ashanti and Kwaku Nsebetuo in his personal capacity. Counsel contends, that the Respondent thus left a gap in tracing or establishing his root of title. The finding of the trial court that the lease was engrossed in the name of the Respondent is not supported by the evidence on record, Counsel argued.
2. Secondly Counsel argues that the relief endorsed on the writ of summons shows clearly that at the time of the execution of Exhibit A (See pages 166-173 of the ROA) the unexpired term of the Lease between the Respondent and the Government of Ashanti was 12 years 30 days. For the Trial Court to conclude that Exhibit A is an assignment or tenancy agreement the major determinant is not the description of the

parties therein but the interest the Respondent sought to transfer to the 1st and 2nd Defendant.

Counsel then referred to paragraph 1 of Exhibit A and contended that the finding of the Trial court at page 153 of the ROA to the effect that:

> *"There is therefore evidence on record to support a lease that in the year 1955, the Akyiawkrom Stool entered into a tenancy agreement with John Raddy and John Bitar and let the four storerooms situate on Plot No OTB 106 Adum Kumasi to them for a period of twelve years"*
>
> is not supported by the evidence on record.

Counsel reiterates the point that since paragraph 1 of Exhibit A makes it clear that the transaction was for a term of twelve (12) years and thirty (30) days the finding of the trial court that the lease was for a term of 12 years is not supported by the evidence on record. Counsel remarked that these erroneous conclusions reached by the Trial court had serious consequences on the outcome of the case.

He added further that a court of law was bound by the evidence on record and could not import what did not happen or was not before it into the record. If and when that happens the Appellate court was enjoined to strike out same.

Counsel relied on the case of ***Iddrisu vrs Amartey (2009) SCGLR 670*** at 672 holding 4 in support of this contention. This is in respect of a case in which there was no record of a ruling purported to have been delivered by the Trial Judge. The Supreme Court held that in the absence of the record such an event could not be accepted as having taken place.

In concluding his arguments on the omnibus ground he stated that since the unexpired period is the same as the interest the Respondent intended and infact transferred to the 1st and 2nd Defendants irrespective of the description of the parties and the covenants in Exhibit A, the transaction that took place was an Assignment and not a Tenancy Agreement.

Finally Counsel stated that no evidence was led by the Respondent to prove that the 1st and 2nd Defendants were paying rent to the Respondent as their landlord.

In a riposte to these arguments Counsel for the Respondent put forward the following arguments.

On the issue that the head lease Exhibit 1 was engrossed in the personal name of Kwaku Nsebetuo and therefore the Plaintiff could not draw a link between the Respondent Stool and Kwaku Nsebetuo, Counsel argued that this was not correct.

Counsel for the Respondent argued that in his examination in chief the Respondent traced its root of title as follows:

Q: To the best of your knowledge who owns that property or what entity owns that property (OTB 106, Adum Kumasi).

A: It belongs to the Akyiawkrom Stool.

Q: Can you tell us how the Akyiawkrom stool came by this property?

A: Yes

Q: Tell us.

A: During the reign of Kumasihene all his subjects owned land at Adum and they were living around him at Adum. Akyiawkromhene at the time had two parcels of land at Adum.

Q: What is the number of the other plot of land?

A: It is OTB 107, Adum.

Q: You said that Akyiawkrom Stool had two parcels of land there. Now who was the Akyiawkromhene at that time.

A: Nana Kwaku Nsebetuo (see pages 58-59 of the ROA).

Counsel argues that from the above the Respondent is asserting that the subject plot OTB 106 and plot Number OTB 107 Adum Kumasi were allocated to the Akyiawkrom Stool by the Kumasihene at the time Nana Kwaku Nsebetuo was the Chief of Akyiawkrom. Though the grant was to the stool the head-lease was executed in the name of Nana Kwaku Nsebetuo who was the occupant of Akyiawkrom stool at the time.

Acting on this knowledge and fact some elders of Akyiawkrom issued a writ against Nana Kweku Nsebetuo when he was no longer Akyiawkromhene for a declaration that the property in question was the property of Akyiawkrom Stool which relief was granted by the Circuit Court.

The said Circuit Court Judgment, Counsel contends was admitted by 1st and 2nd Defendants in their statement of defence at paragraph 4 (See page 20 of the ROA) and the judgment was registered at the Lands Commission. In the light of this evidence the contention by Counsel for the Appellants that the Respondent left a gap in tracing his root of title is therefore not correct.

Thus, the learned Trial Judge was right in making the following finding of fact

> *"I hold that the Golden Stool leased Plot No. OTB 106, Adum Kumasi and Plot No. 107, Adum Kumasi to Akyiawkrom Stool."*

In response to the argument of Counsel for Appellants that the most important factor for determining whether Exhibit 'A' was an assignment or a Tenancy Agreement is the interest

that was stated in the document as being conveyed and that the other issues such as the description of the parties and the other covenants, conditions and stipulations are irrelevant, Counsel refers us to the case of ***P. Y. Atta & Sons Limited v. Kingsman Enterprises Ltd. [2007-2008] SCGLR 946.***

We have studied closely the *Atta v. Kingsman Enterprises* case and believe it is almost on all fours with the instant case and should be given much weight in determining this case.

In P. Y. Atta & Sons (supra), the Plaintiff Company, was a lessee of the Government of Ghana in respect of a plot of land located at the Ring Road South Industrial Area, Accra for a term of 50 years effective 11th May, 1972. Sometime in 1993, at the request of the Defendant Company, for a lease of a portion of the land to construct stores for its business the parties executed a document (Exhibit B) conveying to the Defendant ***"all the residue now unexpired of the said term of 50 years granted by the head lease."*** There were other terms of the agreement including payment of rent by the Defendant-Company. When subsequently, the Defendant wanted to undertake a further development on that portion of the land granted to it pursuant to Exhibit 'B' which required the consent of the Plaintiff but the consent was denied or refused, the Defendant contended that it did not need the consent from the Plaintiff because it was an assignment that was conveyed to it and not a sublease.

In delivering its judgment which reversed the decisions of the High Court and the Court of Appeal the Supreme Court held, inter alia, as follows:

> "(2) In considering every agreement, the paramount consideration was what the parties themselves intended or desired to be contained in the agreement. The intention should prevail at all times. The general rule was that a document should be given its ordinary meaning if the terms used therein were clear and unambiguous. In conflicting situations like those in the instant case, the process of determining the intentions of the parties should be objective. Objective approach in that context,

implied the meaning that the words in the document would convey to a reasonable person seised with the facts of that case. In such exercise the entire document, the conduct of the parties and the surrounding circumstance will have to be taken into account. And where two or more clauses in a document were found to be inconsistent, effect was to be given that which was calculated to give real effect to the intention of the parties. In the instant case, the terms in the agreement, Exhibit "B" were contradictory; while the use of the words "unexpired residue" suggested assignment, the terms inserted in Exhibit B had the effect of indicating that the document had created a sublease. In such a situation, the rules of interpretation would mandate that the document must be interpreted in a view that will cause the intention of the parties to prevail …"

In addition to holding 2 which Counsel for Respondent refers us to, holding 3 is also very relevant for the determination of this matter and can guide us in arriving at the right decision.

I therefore will like to quote same in extenso:

"(3) The contention of the defendant company that it had acquired an assignment and not a sublease could not be correct. At the trial, the managing director of the defendant company in cross-examination, in almost all his answers, indicated that at the start of the transaction between the parties, he knew the defendant company took a sublease. On the evidence, the defendant company, which claimed to have taken an assignment and was therefore an assignee, complied with almost all the covenants in the agreement, exhibit B. Those covenants included renewal of rents every five years, giving stores to P YA, the supposed "assignor" upon completion of the building, build within a specific time and according to specifications to the satisfaction of the "assignor" and seek the "assignor's" written consent in given situations. The fact that the defendant company conducted its affairs within the terms of exhibit B and

complied with its terms in full indicated that the defendant company knew (per its managing director) all the time that it had acquired a sublease and not an assignment".

The Supreme Court thus pronounced that the document (Exhibit "B") was a sub-lease notwithstanding the use of the phrase conveying to the Defendant *"all the residue unexpired of the said term of 50 years granted by the head lease."*

Applying the principle in the P.Y. Atta case to the instant case Exhibit 'A' describes Nana Owusu Achiaw II and Boakye Agyeman as Ohene and Linguist respectively and as the representatives of the elders and Councillors and people of the said Stool of Akyiawkrom as the "Landlords" and Joseph John Raddy and John Bitar as Tenants.

The parties are Landlord and Tenants not Assignor and Assignees.

Again, the lawyers who drafted the agreement described Exhibit 'A' as a sub-lease indicating that in the mind of the said lawyers they knew they were not preparing an assignment. At the back page of the indenture the following is clearly written:

Sub-Lease of Plot No.106 Old Town Section B, Kumasi.

Term: 12 years, 1 month.

Commencing: 1965 September, 1st

Expiring: 1977 September 30th.

Rent as within

In the case of ***Kofi Kyei Yamoah Ponkoh, Andrews Okyere, Amoako Blankson and All Shop Owners of Anomanye Stores Complex for themselves and on behalf of 29 others vrs Asomdwe House Co. Ltd [2021] DLSC 10762***, the Supreme Court per Prof. Mensa Bonsu (Mrs.) JSC, stated that the issue of whether or not the Plaintiffs / Respondents in that case

were tenants or part-owners should not only be resolved by closely looking at the agreement itself but also by examining the history of the relationship between the parties (Emphasis mine).

If this test is applied it will be seen that in this case there was provision for rent in Exhibit A. "The Tenant" also needed the consent of "the Landlord" and the Asantehene to dispose of any interest in the property in question. Several other covenants as rightly pointed out by Counsel for the Respondent were compatible with a landlord and tenant relationship.

All these are pointers to the fact that Exhibit A was intended to be a tenancy agreement.

Also in the case of ***Street Vrs Mountford [1985] UKHL 4*** the House of Lords set out principles to determine whether someone who occupied a property had a tenancy (i.e. a lease) or only a licence. Lord Templeman's judgment laid down the three essential elements that must be present for a tenancy to exist.

First, there must be exclusive possession.

Second there must be consideration in the form of a premium or periodical payments.

Third, there must be a grant of the land for a fixed or periodic term. If these three features are present then there is a tenancy.

In this case in Exhibit A the Agreement – There was exclusive possession given to the Appellants and this is not denied by the Appellants when they assert on several occasions that they were in effective possession of the stores.

Second there was a fixed period of 12 years and 30 days.

Third and finally there was an agreed rent in Exhibit A which is stated at page 2 of the Indenture (page 167 of the ROA) as follows:

"Paying therefor during the term hereby created and the yearly rent of Ninety-one pounds thirteen shillings and four pence (£91,13.4) which at the Tenants request is hereby aggregated at the sum of Eleven Hundred Pounds (£1100)".

Exhibit 'A' at page 8 of ROA the very last portion shows evidence of the payment of rent as follows:

"Received the within mentioned sum of Eleven Hundred Pounds (£110) to be by the within-named Joseph John Raddy and John Bitar paid to us in satisfaction and discharge of all rent hereby discharged."

The other covenants and the Right of Entry provisions all point to a Tenancy Agreement and not an Assignment.

We have carefully evaluated the arguments of Counsel for the Appellants on the omnibus ground and are of the view that he has not been able to discharge the burden that the trial court has failed to take into account certain pieces of evidence which would have helped his case if that was done, or that the Trial Judge has made wrong findings which has denied him victory in the case.

The argument of the gap in the tracing of the Respondent's title is not valid as shown above. The issue of lack of evidence in the payment of rent is also not valid as seen above.

We do not agree with Counsel for the Appellants that Counsel for Respondents reference to the Circuit Court judgment which involved some of the parties in respect of the property in dispute meant the Respondent was putting up a case inconsistent with their pleadings. We are of the firm view that the principle enunciated in the ***Dam v. J. K. Addo & Brothers case [1962] 2 GLR 200*** is inapplicable here.

There was no instance of a sudden departure and abandonment or jettisoning of the Respondents pleadings or earlier position.

It is our considered view that this ground is without merit and has not been made out and it is therefore dismissed.

Second Ground of Appeal (Additional Ground 1)

> ***"The Honourable trial court erred when it ordered the cancellation of the fresh lease in favour of the defendants/Appellants when there was no mandatory obligation on the Plaintiff's grantor to renew the lease in the Plaintiff's favour".***

In support of this ground, Counsel contends that the Trial Judge in making an order for the cancellation of the lease in favour of the Appellants because the Respondent was better entitled to renewal of the lease and ordering the Lands Commission to issue a fresh lease in favour of the Respondent sought to make a contract for the Respondent and the Government of Ghana who was not a party to the present suit.

There was no obligation on the Respondent's grantor to renew the lease thus there was no reason for the Trial Judge to turn around and order a renewal of the lease.

Counsel argued and cited the case of ***In Re Mireku & Tetteh (Dec'd) Mireku & Ors. vs. Tetteh [2011] 1 SCGLR 520.***

At page 531-532 the apex court stated as follows:

> ***"We further agree with the learned justices that the order by the Trial Judge to the Defendants to renew the lease for the Plaintiffs was an imposition. It is not the duty of the courts to make a new contract for parties on terms they have not mutually agreed upon. Addison vs. A/S Norway Cement Export Ltd. [1973] 2 GLR 151, City and Country Waste Ltd. vs. Accra Metropolitan Assembly [2007-2008] SCGLR 409."***

Counsel argues further that this decision of the court loses its strength when it's analyzed in the light of the functions of the Lands Commission under the 1992 Constitution and the *Lands Commission Act 2008, Act 767*.

Counsel argues that on the basis of the above constitutional provision and statute, the Lands Commission had the sole discretion in the management of public lands. That being so, any person alleging that the Commission had acted unfairly must lead evidence clearly to establish that unfairness.

This, in Counsel's view, was not done as the Respondent and his Counsel barely referred to the issue of unfairness in the proceedings apart from a brief cross-examination of a Lands Commission witness at pages 110-111 of the ROA.

Counsel contends that there is nothing on record to suggest or indicate that the Commission acted unfairly. He argues further that as at the time the present action was initiated, none of the parties had any interest in the disputed property and none had a contractual right to the renewal of the lease. Thus, anyone at all was entitled to apply for a fresh lease.

The cancellation of the lease and ordering the issuance of a fresh lease in favour of the Respondent was clearly at variance with the law. He therefore urged this court to allow the appeal on this ground and set aside the judgment of the trial court.

Counsel for the Respondent, as expected, fiercely opposed these arguments. According to Counsel for the Respondent, the Trial Judge considered the evidence on record and decided that between the Respondent and the Appellants, the Respondent was better entitled to the renewal of the lease in his favour.

The decision by the Trial Judge was, according to Counsel, informed by the following valid reasons:

(1) The Respondent was the owner of the property that was situated on Plot No. OTB 106, Kumasi and was also in possession of a portion of the property.

The fact that the Akyiawkromhene and subjects of the Stool were occupying the residential unit of the property was supported by the evidence of PW1.

(2) Again, the Appellants themselves agreed that there was a residential structure on Plot NO. OTB 106, Kumasi but they chose to describe it as unauthorized. (See pages 69, 73, 74 of the ROA on the cross-examination of the Respondent by Counsel for the Appellants)

DW2 the Metropolitan (City) Engineer admitted according to Counsel that there was an existing building on the land which was covered by the building permit obtained by the Stool of Akyiawkrom. (See page 119 of the ROA).

(3) Counsel makes the point that at the time the Appellant applied for renewal of the lease, the Respondent Stool had a property on Plot NO. OTB 106 and was in possession of same.

There is further evidence to show that as far back as 1960, the Respondent had written to the Lands Commission offering to surrender the unexpired term of the lease executed in its favour for a longer lease to be granted it. (See page 137 folio 80 for a copy of the said letter).

Thus, the Respondent, was the first to apply for renewal of the lease.

(4) Again, when it came to Respondent's attention that the 1st and 2nd Defendants were assigning the property to Aisha Nana the Respondent through its solicitors, at the time, Mmieh & Co. wrote to the 1st and 2nd Defendants with copies of the letter to Lands Commission and Solicitors of Aisha Nana informing them that the 1st and 2nd defendants were sub-lessees who lacked the capacity to assign the property. (Page 134 of the ROA).

In explaining the unfairness in the Lands Commission decision Counsel for the Respondent observed that pursuant to the application by the Respondent the Lands Commission engrossed a lease in favour of the Respondent Stool (See pages 224-229 of the ROA).

However without giving the Respondent Stool a hearing the Commission came to the conclusion that the Akyiawkrom Stool had no title to plot No OTB 106 and as a result returned to the Respondent a lease that had been engrossed in its favour (see pages 189-191 of the ROA).

The only reason this was done was that it was Akyinakrom and not Achiawkrom that had title to the property. Counsel contends and rightly so, that the Commission should have invited the Respondent to clarify whether the name of his stool is Achiawkrom or Akyinakrom since such misdescriptions could occur.

The Commission rather decided to grant a lease in respect of the property to the 3rd and 4th Defendants when they did not own the buildings that were situated on the plot.

Counsel argued further that the above mentioned decision of the Lands Commission to return the engrossed lease to Respondent on the unverified allegation that the Respondent was not the owner of the property because of the misdescription of the stool name was unfair and did not follow due process of law which requires that each side must be given a hearing.

In support of this contention Counsel cited the case of ***Nunofio Vrs Farmers Services Co Ltd (2007 – 2008) SCGLR 926 w***hich teaches that the Constitutional requirements imposed by Article 296 of the 1992 Constitution would apply only if "the source of the discretionary power complained of emanates from the constitution or statute. Where the discretionary authority is derived from a private contract Article 296 would not apply …"

Since the Lands Commission is a body created by the 1992 Constitution and is governed by statute i.e. Lands Commission Act, 2008, Act 767 it is caught by the provision. See also the case of ***Republic Vrs Court of Appeal & Tomford Exparte Ghana Chartered Institute of Bankers (2011) 2SCGLR 941 at page 953*** where the apex court held as follows:

> ***"The terms of the provision in Article 296 of the 1992 Constitution dealing with the exercise of discretionary power are mandatory and obviously require observance of natural justice especially the audi alteram partem rule involved here. The rule has therefore been elevated to constitutional pedestal and its breach has the constitutional consequences laid down in Articles 1 and 2 of the 1992 Constitution, namely such breach voids the act in question".***

Counsel argues that the Lands Commission's grant of the lease to the 3rd and 4th Defendants/Appellants in the circumstances of this matter was arbitrary and capricious and amounted to a breach of natural justice and thus the Trial Judge was right in declaring same null and void.

Counsel concludes on this ground that the use of Akyinakrom on Exhibit A instead of Achiawkrom was a mere misdescription and for that matter a misnomer which on the basis of the authority in cases like ***Najat Metal Enterprises Ltd Vrs Hanson (1982-83) 2GLR 81*** could be easily amended.

In the Najat case the Plaintiff Najat Metal Enterprises Ltd was part of the Dakmak Group of Companies. In 1979 the AFRC the then Government confiscated the Dakmak Group of Companies to the State. Among the Companies listed for confiscation was one called "Najat Company". The Plaintiff Company claiming that it was not the entity called Najat Company named in the directive brought an action, inter alia, for a declaration that it was not the company confiscated to the State.

The High Court presided over by Cecilia Koranteng-Adow J (of blessed memory) held as follows:

> ***"As a general principle the test in cases of misnomer … was not what the writer of the document intended or meant but what a reasonable man reading the document would understand it to mean. Where in all circumstances and looking at the***

document as a whole the mistake was that the party was not accurately described, then it was a mere misnomer and could be cured. But where the inaccuracy raised doubts about the identity of the party intended then the mistake was fatal …"

We find the arguments of the Respondent on this ground more persuasive and are inclined to agree with same. We are of the view that the Lands Commission did not exercise its discretion properly as required under Article 296 of the 1992 Constitution.

It was patently wrong to have granted a lease to the Appellants as against the Respondent solely on the basis of misdescription of the Stool name when it was clear that the Commission itself had documents in its custody in which the stool had variously been described as Achiawkrom or Akyinakrom stool.

The least the Commission could have done was to invite the Respondent to clarify the issue of the dual names on the documents available to them at the Lands Commission.

Again it is clear that the Respondents were in possession of a part of the property as against the Appellants and thus were better entitled to a lease renewal.

In the Trial Judge's judgment at page 3 (page 148 of the ROA) he referred to the evidence of DW2 Charles Ampomah Mensah, Metropolitan Engineer of KMA who was called as a witness by the 3rd and 4th Defendants but who corroborated the evidence of the Plaintiff on the construction of a building on plot No OTB 106 Adum, Kumasi.

In response to questions under cross-examination he stated that the records of Kumasi Metropolitan Assembly show that it was Akyiawkrom Stool which applied for a building

permit (Exhibit D) to put up a building on plot No OTB 106 Adum, Kumasi. He pointed out that the 3rd and 4th Defendants only applied for a permit to make extensions to the existing building.

We agree with the Trial Judge that this evidence coming from a witness called by the Appellants, i.e. 3rd & 4th Defendants is advantageous to the claim of the Plaintiff/Respondent. The Trial Judge cited the case of

Oworsika III vrs Amontia IV Part 1 (2006) 1 MLRG 61 in support of his position as follows:

> ***"Where your adversary has admitted a fact advantageous to your cause what better evidence do you need to establish that fact than by relying on its own admission".***

Counsel for the Appellant referred to the cases of ***In Re Mireku, Addison Vrs A/S Norway Cement Export Ltd [1973] 2 GLR 151; City and Country Waste Ltd Vrs Accra Metropolitan Assembly (2007-2008) SCGLR 404*** in support of the Appellants position. We would like to comment on these cases.

First, whilst in the ***Mireku*** case there is a clear imposition on the parties to renew a lease which the Trial Judge had found not unconscionable there is no such imposition on the parties in the instant case.

The **Addison Vrs A/S Norway Cement Export Ltd** case was a business contract between A/S Norway a foreign Company and a Ghanaian businessman Dr. Addison who served as a promoter. The business deal was in respect of the then Government's attempt to reorganize the Ghana Cement Works in the mid 1960's. There was a dispute on the terms of the settlement which the parties had come to and this led to a court action. A majority decision was given by the Court of Appeal on the matter.

In a dissenting judgment Anin J.A. stated as follows:

> ***"That the Law is quite settled that if the terms of an agreement are so vague or indefinite that it cannot be ascertained with reasonable certainty what is the intention of the parties, there is no contract enforceable at all. The parties must make their own contracts and the courts will not make a contract for them out of terms which are indefinite or illusory".***

It must be remarked that in the first place this is a dissenting opinion and the facts of the case are completely different from the instant case although the legal principle above may be valid.

The issue at stake here is the Trial Judge's pronouncement on the unfairness in the exercise of the discretion by a Constitutional body, the Lands Commission and thereby overruling its decision.

We do not see how this amounts to an imposition and the making of a new contract for the parties by the Trial Judge.

Again the ***City and Country Waste Ltd Vrs Accra Metropolitan Assembly*** case was a service contract in which the Plaintiff which carried on the business of waste collection, disposal and management was employed by AMA to render waste disposal services. The Plaintiff performed its obligations under the contract which was later on terminated on grounds that it was an illegal contract as it had not been properly awarded or entered into. Plaintiff sued for breach of contract and for payment of the cost of services rendered.
In holding 1 the apex court stated as follows:

"The Trial Judge had erred in purporting to exercise his discretion to vary the fee payable under the contract which he had declared illegal by ordering payment of what was in effect, damages based on what he had considered to be a fair rate per ton. The Trial Judge had also not adequately explained the basis of the discretion he purported to exercise. What the Trial Judge did was to purport to revise the parties contract and conclude a new contract for them, contrary to orthodox common law contact doctrine."

This case is also clearly distinguishable and cannot serve as a binding authority in the instant suit. The facts and circumstances therein are clearly different from this case.

In the instant case, the Trial Judge adequately explained the basis of the discretion he exercised and why the discretion exercised by the Lands Commission flouted Article 296 of the 1992 Constitution as it was arbitrary and capricious. The Trial Judge also did not impose a new contract on the parties or revise their contract.

On the basis of the above we are of the view that there is no merit in this second ground of appeal.

Grounds 3 & 4 (Additional Grounds 2 & 3)

3. *The Honourable trial court erred when it held that the Plaintiff/Respondent was the lessee when at the time of the renewal of the lease in favour of the 3rd & 4th defendants/Appellants there was no subsisting lease in favour of the Plaintiff/Respondent.*

4. *The Honourable trial court erred when it held that Aisha Nana had never been in possession of the premises and at the same time ordered the 3rd and 4th defendants/*

Appellants who were her assigns and privies to yield possession and occupation of the premises.

It appears Counsel for Appellants in his written submission made no comment at all about the 4th Additional Ground which would have been the 5th Ground of Appeal. In line with this we would consider that ground as having been abandoned sub silentio by Counsel for the Appellants.

Grounds 3 & 4 appear in the written submissions of both Counsel to contain issues that have already been dealt with and in a sense are a rehash of arguments already discussed.

We will therefore be relatively brief in dealing with these grounds.

Counsel for the Appellants main argument in these two grounds, which were argued together, is that, by the end of the year 1977, the 50 year lease made between the Respondent and the Government had expired. The issue or question therefore is what interest did the Respondent have at the time of the commencement of the instant action.

He argues further that after the expiration of the lease whoever was in possession of any portion of the disputed property was in possession as a Licensee of the Government. Thus, the Respondent and Appellants were in an equal position to apply for a fresh lease in respect of the disputed property. It was therefore wrong for the Trial Judge to refer to the Respondent as lessee who was better entitled to a renewal of the lease.

Counsel argues that the cross-examination of Charles Ampoma Mensah (DW2) Metropolitan Engineer of KMA (pages 118-119 of the ROA) shows that the Appellants were in effective possession of the property.

Thus, according to him the finding made by the Trial Judge at page 158 of the ROA was wrong and was not borne out by evidence on the record.

He argued further that the Trial Judge substituted a case proprio motu for the Respondents. Throughout the pleadings and the trial, the Respondent never premised his claim on misrepresentation. Unfortunately however, the Trial Judge premised his judgment on misrepresentation and claim which was never put up throughout the proceedings.

Before we deal with the counsel for Respondents' response to the ground, we would like to state that indeed the Respondents did not plead fraud or misrepresentation by the Appellants in their pleadings. It is also true that at page 158 of ROA (i.e. page 13 of the judgment) the Trial Judge observed as follows:

> ***"Aisha Nana therefore obtained a fresh lease of that plot by falsely representing that she had acquired same from Joseph John Raddy and John Bitar."***

Does this really mean that the whole judgment of the trial court was based on a false representation? Definitely not. We see this phrase more as an obiter dictum, a comment in passing, and not the major reason for which the Trial Judge made a finding or decision for the Respondents.

We agree with the Counsel for the Respondent that essentially what the Trial Judge meant was that Aisha Nana was not the Lessee or sub-lessee of the property in dispute.

The Lessee of the property was Nana Kwaku Nsebetuo and subsequently the Achiawkrom Stool, the only sub-lessees on record were Joseph John Raddy and John Bitar.

The main point of the Trial Judge was that Joseph John Raddy and John Bitar had no title to convey that property to Aisha Nana.

The principle of Nemo Dat Quod Non-Habet was discussed in the case of ***Ernestina Opokuah Vrs Adwoa Nyamekye substituted by Emmanuel Osei Kissi and the Chief Registrar, Land Title Registry [2021] DLSC 10761*** where the apex court per Baffoe Bonnie

JSC observed that on the principle of Nemo Dat Quot Non-Habet the family had nothing to grant to the Plaintiff's predecessor in title in 1995.

Thus Aisha Nana in the instant case should not be allowed to benefit from the transaction she entered into with the 1st and 2nd Defendants.

In response to Counsel for Appellant's reliance on the cross-examination of DW2 at pages 118-119 of the ROA to conclude that Aisha Nana was in possession, Counsel contends that at the time the Lands Commission granted the lease to the 3rd & 4th defendants, the matter was already pending in court.

The lease was renewed for the 3rd & 4th defendants in 2001 whilst the instant suit started in 1988. The 3rd & 4th defendants knew of the pendency of the suit. The Lands Commission having been notified of the pending suit by a letter dated 21/8/1989 (see page 196 of the ROA) still went ahead to execute a lease in favour of the Appellants.

The case of ***Chellaram & Sons (GH) Ltd. vs. Halabi [1963] 1 GLR 214 at 218 SC*** on the principle on conveyances made during the pendency of a suit states as follows:

> ***"A voluntary conveyance pendente lite has on it the badge of fraud, unless the pending action is frivolous or speculative."***

The issue of the onus on a purchaser of land to be diligent and not reckless and to conduct thorough investigations into the title of his vendor also comes up in this matter. In the case of ***West African Enterprises Ltd. v. Western Hardwood Enterprise Ltd. [1995-96] 1 GLR 155.***

At page 174 the Court of Appeal stated as follows:

> ***"Apart from investigating the deeds, a prudent purchaser will inspect the land itself. If any of the land is occupied by any person other than the vendor, this occupation is constructive notice of the estate or interest of the occupier, the terms of the lease tenancy or other right of occupation and of any other rights of his…"***

See also ***Osumanu vs. Osumanu [1995-96] 1 GLR 672 at 674.***

We are further strengthened in this view by the case of ***Rosina Aryee vs. Shell Ghana Ltd. & Fraga Oil Ltd. 2019-2020 1SCGLR page 721 at page 730.***

where Benin JSC as he then was stated as follows:

> ***… "For registration under the law does not dispense with the requirements of the equitable doctrines of fraud and notice.***
>
> ***… Notice does not mean only notice of registration of the title but also Notice of possession by the first purchaser, grantee or lessee or their agent as the case may be. Intending purchaser must make reasonable enquiries in respect of the property he seeks to acquire. This involves legal searches at the land registry but more critically it involves a physical inspection of the land to ensure it is free from any encumbrances".***

Also in the recent case of ***Olivia Anim (suing per her lawful Attorney Diana Mensah Bonsu) vrs William Dzandzi [2019] DLSC 6503*** the Supreme Court cited the case of Attram vrs Aryee (1965) GLR 34 where it was held, inter alia, that the Plaintiff cannot be said to be a Bona Fide Purchaser because she did not show any efforts made by her to investigate her root of title.

See also the case of ***Isaac Ackon vrs Mr Emmazala & 16 Ors and Abigail Obaka (2020) DLCA 8852*** where the Court of Appeal cited with approval the Supreme Court case of ***Kusi & Kusi vrs Bonsu (2010) SCGLR 60 (see Holding 9).***

From the above authorities the Appellants failed the test of a diligent purchaser and cannot be considered a Bona Fide Purchaser For Value Without Notice. The grounds 3 and 4 are also dismissed as without merit.

Conclusion:

In our considered view all the grounds of appeal have not been made out and the appeal is dismissed in its entirety.

The judgment of the Trial Judge dated 26th July 2006 is hereby affirmed.

(SGD)

ALEX B. POKU-ACHEAMPONG

(JUSTICE OF THE COURT OF APPEAL)

(SGD)

I agree, **ANGELINA M. DOMAKYAAREH (MRS)**

(JUSTICE OF THE COURT OF APPEAL)

(SGD)

I also agree, **SAMUEL K. A. ASIEDU**

(JUSTICE OF THE COURT OF APPEAL)

COUNSEL:

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