IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ACCRA – GHANA

CORAM: MARGARET WELBOURNE JA PRESIDING

P. BRIGHT MENSAH JA

J. ADJEI FRIMPONG JA

SUIT NO. H1/109/2021

28TH APRIL 2022

BETWEEN:

WRANGLER GHANA … PLAINTIFF/APPELLANT

vs

SPECTRUM INDUSTRIES PVT LTD … DEFENDANT/RESPONDENT

JUDGMENT

BRIGHT MENSAH JA:

The instant appeal launched by the plaintiff/appellant herein [hereinafter simply referred to as appellant] is against the decision of the High Court [General Jurisdiction], Accra

delivered 20/03/2020, which judgment went in favour of the 1st defendant/respondent [also hereinafter referred to as the respondent]. The judgment complained of, appears on ***pp 358-390 of the record of appeal [roa].*** Per a notice of appeal filed with this court on 30/04/2020, the appellant gave the grounds of appeal that run as follows:

a) Judgment is against the weight of evidence.

b) The learned trial judge erred in law by admitting Exhibit 9 [witness statement in suit No. EL/107/2014] in evidence and relying on same which occasioned a substantial miscarriage of justice to the plaintiff.

Particulars of error

i. That Order 38 rule 3G (1) of CI 87 provides that a witness statement not put in evidence at a hearing held in public is inadmissible.

ii. That the said witness statement (Exhibit 9) was not sworn to, and neither was it put in evidence at a hearing held in public rendering same inadmissible.

c) Further grounds of appeal to be filed upon receipt of record of appeal. See: ***pp 391-393 [roa].***

The writ of summons:

On record, the appellant initially caused the writ of summons to be issued in the registry of the High Court, Accra [Land Division] against the respondent only, claiming the reliefs

as endorsed on the writ. See: ***pp 1-2 [roa].*** A 14-paragraph statement of claim accompanied the writ that appears on ***pp 3-6 [roa].*** Subsequently, the appellant successfully applied for, and joined the Lands Commission to the case as the 2nd defendant. Pursuant to an order of joinder made 27/07/2017, the writ was amended accordingly, to reflect the joinder. See: ***p. 182 [roa].***

Now, in an amended writ of summons sealed on 13/01/2017 the appellant claimed against the respondent and the Lands Commission, the following judicial reliefs as appearing on ***p. 184 [roa]***:

i) A declaration of title to all those piece of land situate and being at Motorway East Industrial Area, Accra containing an approximate total area of 1.99 more particularly described in paragraph 4 of the amended Statement of claim;

ii) Recovery of possession;

iii) Damages for trespass;

iv) An order of perpetual injunction restraining the defendant, its agents, assigns, privies and any other person claiming through it or whosoever describe from ever entering unto, trespassing on and dealing with the said piece of land in any way;

v) An order of the court cancelling or otherwise expunging certificate No. TD 1305 from the records of the Lands

Commission

vi) Any further order(s) as this honourable court may deem fit.

Significantly, whereas the respondent herein entered appearance to the writ and filed in addition a defence to contest the claim, the Lands Commission did only enter appearance but failed or refused to file a defence. Consequently, the appellant recovered an interlocutory judgment against the Lands Commission. However, the lower court stayed any action on the judgment pending the final determination of the suit. See: ***p 209 [roa].***

By the Lands Commission's default, the battle was dagger-drawn between the appellant and the respondent only.

Statement of defence and allegation of fraud:

The statement of defence filed on behalf of the respondent appears on ***pp 162 – 164 [roa]*** denying substantially, the claim of the appellant**.** The respondent never counterclaimed but averred in their defence that there were inconsistencies in the story of the appellant's grantor as to how he acquired the land in dispute. Accordingly, Christian Ahiabor [appellant's grantor] obtained the land by fraud, the respondent averred further. The respondent gave particulars of the fraud in paragraph 18 of their statement of defence as follows:

"18. The defendant says that the inconsistency in plaintiff's grantor's statements raises doubt and goes to confirm defendant's grantor's position that Christian Besa Yao Ahiabor procured the registration in his name through fraud.

Particulars of fraud

1. *Deed of gifts being relied on by plaintiff's grantor was never witnessed by the named witness in the documents.*

2. *The said witness never appended his signature to the documents relied on by plaintiff's grantor.*

3. *The defendant's grantor's father was an illiterate (cannot read and write) who purportedly thumb printed the deeds of gift and registers it as a deed of gift and but states on oath that he bought the land and was given receipts for payment.*

4. *Failure to perform the customary requirement of publicity as there were no witnesses to support plaintiff's grantor's customary aseda."*

See: ***p. 164 [roa]***

Appellant's Reply:

It is pertinent to observe that the appellant in his Reply filed 21/03/2017, denied the respondent's allegation of fraud and demanded strictest proof of same. See: ***pp 170-171 [roa].***

The effect of the denial in the Reply is that issues were joined and therefore put the matter at large.

Summary of facts of each party's case:

It is the case of the appellant that by a lease executed on 10/01/2012 made between Christian Besah Yao Ahiabor and the appellant company and stamped as LVD 1358/2015 the lessor, Yao Ahiabor leased all that piece or parcel of land situate, lying and being at

the Motorway East Industrial Area, Baatsona to the appellant for 99 years commencing from 01/06/2006. The size of the land is stated as 1.99 acres.

The appellant traces its root of title to a deed of conveyance made 15/03/1971 between Nii Odai Ayiku IV, Paramount chief of Nungua and Joseph Abli Charway and family. Following that, by series of 3 deeds of gifts the said Joseph Abli Charway conveyed to Christian Besah Yao Ahiabor absolutely and forever, the lands described in the deeds. The said Besah Yao Ahiabor then conveyed this particular land in dispute to the appellant. According to the appellant, it went into possession by raising boundary pillars on the disputed land and put a Hickson Agbanabu in charge who was clearing the land from time to time. The appellant applied for registration of the disputed land with the Lands Commission and was issued with lodgment card. However, in the course of processing its title the appellant received information that the respondent had also applied to register the same parcel of land so it lodged a protest against the second registration of the same land. Regardless of the caveat, the Lands Commission went ahead to register the disputed land in the name of the respondent, which registration the appellant considers fraudulent, hence the writ.

The respondent, on the other hand, claims that it purchased the disputed land from the Charway family and an indenture dated 30/04/2014 executed in its favor. The respondent claims its grantors are the children of the late Joseph Abli Charway who had become owners of the land by virtue of a deed of gift dated 15/03/1971 made between Nii Odai Ayiku IV and Joseph Abli Charway. According to the respondent, its grantors inherited the disputed land from their father. Subsequently it built a wall around a portion of it and proceeded to register the land whereupon it was issued with a land title certificate.

The respondent pleaded in paragraph 13 of his defence that the Land Registration Division of the Lands Commission in response to a letter the lawyer for the appellant wrote on 15/11/2016, stated that the land delineated in the deed of gift the appellant

submitted did not affect the land that was being registered in respondent's favour. The respondent claims further that the persons named in the deed of gift as being witnesses to the grant to the appellant denied ever witnessing or signing any such document for the appellant. It contended again that the appellant's grantor, Christian Besa Yao Ahiabor had indicated in a witness statement in an earlier suit that he actually bought the land from Joseph Abli Charway and was given receipt for it. The respondent, therefore, claims that the documents the appellant relied on for the prosecution of its case were obtained through fraud.

Issues listed for trial:

At the close of the pleadings, the issues raised for trial were:

1. Whether or not the plaintiff [appellant] is the lawful lessee of the land in dispute.

2. Whether or not the 1st defendant's [respondent] grantors had title to the land in dispute.

3. Whether or not the land, the subject matter in dispute could have been registered by the 1st defendant when it was already registered in the name of the plaintiff's grantor.

4. Whether or not the 1st defendant procured the land certificate No.

TD 13057 Vol. 018 Folio 2852 by fraud.

5. Whether or not the 2nd defendant, without regard to its own process side-stepped registered interest of the plaintiff's grantor and plaintiff's caveat proceeded to issue a Land Certificate with registration No. TD 13057 in the name of the 1st defendant.

6. Whether or not plaintiff is entitled to its claims.

See: ***pp 197-199 [roa].***

As recounted supra, after the trial the lower court dismissed the claim the appellant mounted. Being aggrieved with the decision, the appellant has filed the instant appeal on the grounds stated in the notice of appeal.

In the judgment that appears on ***pp 358-390 [roa],*** the learned trial judge made some findings of fact notably, that the search report **[Exhibit G]** the appellant relied on, contained some inconsistencies and therefore cannot be a proof that the appellant's grantor had good title; a kiosk on the land was proof that respondent's grantors were in possession; the appellant failed to prove fraud against the 2nd defendant with regard to the registration of the disputed land in favour of the respondent.

The appeal:

The law is certain that an appeal is by way of re-hearing the case. The Court of Appeal Rules, **C.I 19** per **rule 8(1)** provides that any appeal to the court shall be by way of re-hearing. This rule has received ample judicial interpretation in a legion of cases to mean that the appellate court is enjoined by law to review the whole evidence led on record and to come to its own conclusion and to make a determination as to whether both on the

facts and the law, the findings of the lower court were properly made and were supportable. Put differently, the appellate court is under legal obligation to examine the findings of the lower court or the trial court, and to determine on the evidence led on record, whether those findings are supportable in law.

On the authorities, where a trial court that heard the evidence has made findings based on the evidence and come to the conclusion in a case, an appellate court is not required ordinarily, to disturb those findings except where there is lack of evidence to support the findings or the reasons for the findings are unsatisfactory. As Pwamang JSC stated in ***Prof Stephen Adei & Mrs Georgina Adei v Grace Robertson & Sempe Stool (Civ. App. No. J4/2/2015) delivered 10/03/2016) (unreported)***, an appellate court may reverse findings of a lower court where they are based on a wrong proposition of law or a rule of evidence or the findings are inconsistent with documentary evidence on record.

Indeed, it is settled law that where the findings are clearly unsupported by evidence or where the reasons in support of the findings are unsatisfactory, the appellate court reserves the power to upset those findings of the trial court. See: ***Kyiafi v Wono [1967] GLR 463 @ 466.***

It is important to stress also that where the findings are based on wrong proposition of law, the judgment of the lower court is liable to be set aside. The case, ***Robins v National Trust Co. [1972] AC 515*** illustrates the principle that where the finding is so based on erroneous proposition of law the appellate court is empowered to correct it and having corrected it, the impugned findings then disappear.

We now proceed to consider the merits or otherwise of the appeal.

Ground (a) – The judgment is against the weight of evidence.

The appellant per his 1st ground of appeal claims that the judgment of the lower court is against the weight of evidence. That being the case, the appellant carries the burden to

clearly demonstrate that there were lapses in the evidence led on record and which if applied in his favour, ought to have titled the scale of justice in his favour or that certain pieces of evidence were wrongly applied against him. Simply put, the appellant carries the burden to demonstrate that the judgment was wrong either in law or fact or both. See: ***Tuakwa v Bosom [2001-2002] SCGLR 61***.

The omnibus ground of appeal that the judgment is against the weight of evidence throws up the entire case for consideration and determination by the appellate court. The principle was reiterated in ***Owusu-Domena v Amoah [2015-2016] SCGLR 790*** in which case the apex court stated that the sole ground of appeal that the judgment is against the weight of evidence throws up the case for a fresh consideration of all the facts and law by the appellate court. The court ruled:

> *"The decision of Tuakwa v Bosom has erroneously been cited as laying down the law that when an appeal is based on the ground that the judgment is against the weight of evidence then, only matters of fact may be addressed upon. Sometimes, a decision on facts depends on what the law is on the point or issue. And even the process of finding out whether a party has discharged the burden of persuasion or producing evidence is a matter of law."*

The Supreme Court in the oft-quoted case, ***Djin v Musah Baako [2007-2008] SCGLR 686*** had propounded the law 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 could have changed*

the decision in his favour, or that there are certain pieces of evidence that had been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against."

The vexed question:

Did the learned trial judge in the instant appeal fail to draw inferences from the established facts? Were her findings of facts unsupportable as the appellant has strenuously canvassed or is it demonstrable that the judgment is fraught with lapses for which reason it may be liable to be set aside?

As a matter of emphasis, we chronicle below some salient facts established by the evidence led on record that remained undisputed in the instant case, namely that:

1. both parties trace their roots of title to Joseph Abli Charway and family;

2. per a deed of conveyance made 15/03/1971 between Nii Odai Ayiku IV, the Paramount chief of Nungua and Joseph Abli Charway and family, the said Joseph Abli Charway and family became the beneficial owners of a larger piece of land which the disputed land formed part;

3. the appellant's grantor was the first in time to acquire the disputed land in 1988 from Joseph Abli Charway and registered it the same year under the Lands Registry Act, 1962 [Act 122];

4. the appellant purchased the disputed land from its grantor, Christian Ahiabor in **2012** and took steps to apply to the Land Title Registry for a land title certificate

and was given a lodgment No. 003110/2016 and issued with a yellow card; ***see: pp 3 – 5 [roa]***

5. the 1st respondent later in **2014** purchased the same parcel of land from the children of Joseph Abli Charway and was able to register it under PNDC Law 152 exhibited by Land Title Certificate No. 13057 Vol. 018 folio 2852; ***see: p 163 [roa]***

6. the appellant through its lawyer protested when the disputed land was being registered for the respondent but in response the Lands Commission upon a letter authored by a Paul Dzadey on its behalf, claimed that the land the appellant's grantor had earlier registered fell outside the one being registered for the respondent;

7. the surveyor's report, which report was made pursuant to the order of the trial court upon the parties filing their respective surveyor's instructions, puts the matter beyond any dispute that the subject matter of this litigation is the same and does not fall outside the land the as Lands Commission claimed. See: ***pp 201BW and 201BX [roa].***

It bears stressing that the search report, **Exhibit G** issued by the Lands Commission at the appellant's instance showed the history of the initial grant of, and the transfer of a larger parcel of land that included the disputed land, from the original allodial owners ie Nana Odai Ayiku IV and the Nungua stool to Joseph Abli Charway and others. According to the search report, the transfer of the whole land was a gift made on 15/03/1977. Subsequently, the following events/transactions were/are also recorded in the records of the Lands Commission concerning the land:

a) gift dated 27/09/1979 from Joseph A. Charway and family to

Latifi Koso;

b) surrender dated 05/02/1988 from Latifi O. Kosoko to Joseph Abli Charway and family;

c) gift dated 12/09/1988 from Joseph A. Charway and family to Christian B.Y. Ahiabor by which Ahiabor acquired a portion of the land that originally moved from the Nungua Stool to the Charway and Family.

The search report, **Exhibit G** further revealed the following:

i) per an assignment dated 18/02/2003 made between Christian B.Y. Ahiabor and Eurofood (Gh) Ltd, Christian Ahiabor granted a portion of the land he acquired from the Charway Family to Eurofood (Gh) Ltd.

ii) Furthermore, it is recorded that on 12/11/2002, Christian B.Y Ahiabor leased a portion of the land to Afrotropic Cocoa Processing Ltd. Following that, Afrotropic Cocoa Processing Ltd mortgaged the land it took from the said Christian B. Y Ahiabor to the Prudential Bank Ltd.

iii) Then in the year, 2012 Christian B.Y Ahiabor granted the disputed land to the appellant herein.

The transactions so recorded on **Exhibit G** are apt that Joseph A. Charway and his family after acquiring that larger portion of land from Nii Odai Ayiku and the Nungua Stool which the disputed land formed part, have either leased or gifted to other persons,

portions of the land including the disputed land. But in her judgment particularly, as appearing on ***p.389 [roa]***, the learned trial judge held that there were inconsistencies in the Search Report, **Exhibit G** and on the basis of the inconsistencies dismissed the appellant's claim.

It needs reiterating that the respondent stoutly pleaded in their defence that the appellant's grantor procured the grant of the land in dispute through fraud and particularized the fraud in paragraph 18 of the defence. Sufficiently set out in ***pp 44-5 [roa]*** are the particulars. The mainstay of the allegation of fraud is that those described in the recital of the deed of gift as witnesses to the deed of gift made between the Joseph Abli Charway and the appellant's grantor, Christrian Ahiabor have denied flatly that they ever witnessed such deed of gift. It is noted however, that the appellant denied the allegation of fraud in their Reply and demanded strict proof.

So, whose burden is it to prove fraud? The law makes it imperative for a party imputing fraud to prove it beyond reasonable doubt. For, it is provided in **S. 13 of the Evidence Act, 1975 [NRCD 323]** that in a civil litigation or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt. The question is whether the respondent and or witnesses were able to pass the litmus test as demanded by **S. 13 of the Evidence Act, 1975 [NRCD 323].**

We have critically evaluated the evidence led on record and do roundly uphold the submissions of learned Counsel for the appellant that the judgment was against the evidence for the reasons listed hereunder.

First, we hold the respective view that on the evidence and the law, the respondent was unable to prove fraud against the appellant and by extension, its grantor Christian Ahiabor. It is quite important to state that the respondent's representative admitted under cross-examination that they were unable to prove fraud against the appellant's

grantor. For purpose of clarity, we reproduce here below, that aspect of the evidence that formed part of the lower court's proceedings held on **04/03/2019** that runs as follows:

"Q. You know as a fact that your grantors are not parties in this action, do you agree with me.

A. Yes, I do.

Q. And so, they are not inviting our grantor to answer any question before this court.

A. I cannot speak to that.

Q. ***If Mr Ahiabor were a party in this case, can you on your own, stand and defend the case against him that he acquired his interest in the land by fraud.***

A. I don't have any dealing with Mr Ahiabor; it is the Charways we are dealing with.

Q. So you agree with me that you cannot contest any case against Mr Ahiabor before this court.

A. Yes, I do." [emphasis added] See: ***p. 280 [roa]***.

The answers the respondent's respondent volunteered under cross-examination are clear admission of a fact advantageous to the cause of the appellant. **For, the settled position of the law is that where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish the fact than by relying on such admission, which is an example of estoppel by conduct.** [emphasis supplied]. It is a rule whereby a party is precluded from denying the existence of some state of facts

which he had formally asserted. That type of proof is a salutary rule of evidence based on common sense and expediency. See: ***In re: Asere Stool; Nikoi Olai Amontia IV (subt'd by Tafo Amon II) v Akotia Oworsika III (subst'd by Laryea Ayiku III) [2005-2006] SCGLR 637 @ 651*** per Seth Twum JSC

Significantly, the learned trial judge also made a finding of fact that the respondent was unable to prove fraud against the appellant. See: ***p. 389 [roa]***

So, what is the legal consequence if fraud was not proved against the appellant or his grantor? It is that the appellant's grantor never committed any fraud when the grantor, Christian Ahiabor acquired the land from the Charway Family represented by the Head of Family, Joseph Abli Charway together with principal members of the family, part of which is in dispute in this case. Furthermore, Christian Ahiabor has a valid title to the disputed land and reserved the right to lawfully transfer his interest to the appellant.

Next, the lower court erred in law when it held that because the appellant did not invite its grantor to prove the gift, its claim must fail. The lower court has held at ***pp 379-381 [roa]*** that the appellant did not provide any evidence that there were witnesses present to the act of gifting the land to their grantor. Additionally, it held that there was the lack of evidence of presentation of 'thanks' or 'aseda' by the appellant's grantor or that members of the family of the late Joseph Charway who would succeed to his property were present at the gifting ceremony. The lower court reasoned further that the appellant did not provide any evidence to prove that publicity was given to the gift.

It cannot be over-emphasized that once the respondent made the allegation of fraud but which allegation was denied by the appellant in its reply and demanded strictest proof from the respondent, on the law, the respondent carried the burden to prove fraud. And the question is, did the respondent prove fraud? A party who alleges wrongdoing carries the higher burden to prove the criminality by proof beyond reasonable doubt as required

by **S. 13 of the Evidence Act, 1975 (NRCD 323)**. Under **S. 15 of NRCD 323,** it is provided: "*unless and until it is shifted, the party claiming that a person is guilty of a crime or wrong doing has the burden of persuasion on that issue*".

In view of the serious allegation the respondent in the instant appeal made imputing criminality that is to say, fraud against the appellant, the burden was cast on the former to lead evidence to prove it beyond reasonable doubt. See: ***Okofoh Estates Ltd v Modern Signs Ltd & anr [1995-96] 1 GLR 310.***

On general principle, the court is not to find fraud unless particulars thereof has been distinctly pleaded and proved strictly, for a finding of fraud is not to be made without clear and cogent evidence upon it. See: ***Thomson v Eastwood [1874-77] 2 AC 215 HL @ p.233*** per Lord Cairns L.C.

In an attempt to prove those allegations of fraud, the respondent invited as witness, not the supposed witnesses to the deed but a person who claimed to hold a power of attorney donated to him by the children of Joseph Abli Charway, the respondent's grantors. The witness for the respondent, **Dennis Aryee Charway [DW1]** in his witness statement filed with the lower court that appears on ***pp 201AY, 201AZ*** and ***201BA [roa]*** had averred, *inter alia,* that their late father, Joseph A Charway never gifted the disputed land to Christian Ahiabor, the appellant's grantor. He averred in particular in paragraphs 10 and 11 of his witness statement as follows:

> *"10. I am firm in my belief that the deeds of gift being relied upon*
>
> *by the plaintiff's grantor are fraudulent because the persons named*
>
> *in the deed of gift as witnesses have all denied flatly ever witnessing or signing documents to that effect.*

11. The claim by plaintiff's grantor as contained in the recitals of the deed of gift that he offered 2 live sheep and 2 bottles of whisky as aseda or thanksgiving fee is also untrue because nobody witnessed this act being referred to by plaintiff's grantor."

Now, against the backdrop of the respondent's admission that they could not prove fraud against the appellant's grantor and the lower court's finding of fact that the respondent never proved fraud against the appellant, we are of the respectful view that the respondent could only have succeeded in dislodging the presumption of the valid deed of gift to the appellant's grantor if they called those persons described in the recitals of the deed of gift as witnesses to rebut that presumption. Regrettably they failed to do so. Those persons remained material witnesses in the trial of this case, whose evidence would have decided the case one way or the other. The evidence of those witnesses was crucial. The burden would have shifted unto the appellant to have invited its grantor to demonstrate that it was a valid gift only when those material witnesses had testified repudiating the gift.

Under the English Common Law, a witness whose evidence is likely to be sufficiently important to influence the outcome of a trial is a material witness who must be invited to assist the court. To us, a witness whose testimony is likely to decide the matter one way or the other is a material witness whose presence in the trial is quite indispensable. Failure to call such a material witness is fatal to the case of the party that ought to call such witness. For, the law as we understand it, is that failure to call one witness whose evidence would settle the case one way or the other is fatal to the case of the party that ought to call him. The authorities on this point are legion. See: ***R v Ansere [1958] 2 WALR 385.*** See also: ***Ogbarmey-Tetteh v Ogbarmey-Tetteh [1993-94] 1 GLR 353 SC***.

The holding of the lower court as appearing on ***p. 374 [roa]*** that since the appellant would not be able to speak to the challenge to the deed of gift the most obvious person that the appellant ought to have invited to speak to it was the appellant's grantor flies in the face of the law. It is worth repeating that it was the respondent that pleaded that the alleged witnesses whose names appear in the recitals of the deed of gift had denied flatly that they were not authors of that document. Therefore, they carried the burden to prove it and not the appellant to prove otherwise.

It is pertinent to observe that the respondent's witness **Dennis Aryee Charway [DW1]** was not privy to the transaction himself. Therefore, all that he said about the gift was hearsay. We are also of the respectful view that the witness repeated on oath, what was contained in his witness statement and the respondent's pleadings. That is at variance with the time-honoured principle in ***Majolagbe v Larbi [1959] GLR 190***. That principle is to the effect that where a party makes an averment capable of proof in some positive way, eg., by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the court can be satisfied that what he avers is true.

The *Majolagbe principle* was explained better in ***Zabrama v Wegbedzi [1991] 2 GLR 91*** wherein the Court of Appeal speaking through Kpegah JA [as he then was] ruled that the correct proposition is that, a person who makes an averment or assertion which is denied by his opponent, has the burden to establish that his averment or assertion was true. And he did not discharge the burden unless he led admissible and credible evidence from which the fact or facts he asserted could properly and safely be inferred. The court continued, the nature of each averment or assertion determined the degree and nature of

that burden. The case of *Majolagbe v Larbi* should therefore not be taken to have stated a general principle on proof in law.

We hold, given the evidence on record, that the customary law gift from Joseph Abli Charway and family to Christian Ahiabor was valid, to all intents and purposes. Customary gift of land conveyed by deed of gift still remained a customary gift and it continued to be subject to the incidents of customary law. Some of such incidents being that: every gift when completed is irrevocable, except in gifts between parent and child, which can be recalled or exchanged at any time or by his Will or dying declaration. See: ***Sese v Sese [1984-86] 2 GLR 166 C/A @ 174*** per Abban JA as adopted and applied in ***Okai v Okoe [2003-2004] SCGLR 393*.**

Furthermore, we think that the judgment was against the weight of evidence on the issue of double registration of the same piece of land.

It is noted for the record that the lower court acknowledged that the appellant through their lawyer wrote to the Lands Commission caveating the registration of the same piece of land to the respondent. The learned trial judge also observed that the Lands Commission has the mandate to ensure that there was no double registration of the same parcel of land. She, nevertheless, held that the respondent never perpetrated fraud on the appellant when the Commission went ahead to register the disputed land in favour of the respondent because the appellant never proved that the respondent was aware of the appellant's caveat. See: ***pp 388-389 [roa]***

It is uncontroverted, however, that the appellant through his lawyer wrote to the Land Title Registration Division of the Lands Commission objecting to the registration of the respondent's interest in the land. This letter of protest was tendered in evidence as **Exhibit H**. See: ***pp 178-179 [roa].***

By this letter of protest/caveat**, Exhibit H** the Land Registrar of the Land Registration Division of the Lands Commission was enjoined by law to have referred the appellant's claim to the Land Title Adjudication Committee established under the law in terms of **S. 22 of PNDC Law 152** to make a determination on the issue. Regrettably, instead of applying the law to the claim or protest the appellant launched, the Registrar rather recklessly wrote a letter to say that the land the appellant claimed in its caveat/protest fell outside the land being registered for the respondent. The basis for which he came to that conclusion has not been explained with any degree of certainty. We set out here below in verbatim for its effect and force, the letter from the Lands Commission:

"LANDS REGISTRATION DIVISION

LRD/002167/16 15TH NOVEMBER 2016

THE WRANGLER GHANA LIMITED

C/O SEDI LEGAL BUREAU

P.O BOX CT 5434

CANTONMENTS-ACCRA

Dear Sir,

RE: OBJECTION TO LODGMENT NO. 002167/16 FOR

SPECTRUM INDUSTRIES PVT. LTD

Your objection letter dated 22nd August 2016 concerning the above refers.

We wish to inform you that the land delineated in the deed of gift dated 12th September 1998 does not affect the land in issue. In other words, the land in issue falls outside the said deed.

In the light of the above, your objection is untenable and is hereby set aside.

Yours faithfully

(Sgd) ? ? ? ?

PAUL DZADEY

REGIONAL HEAD

FOR DIRECTOR." See: ***p. 180 [roa]***:

So, there is that acknowledgment by the Lands Commission that the appellant caveated the registration of the disputed land to the respondent.

At the risk of sounding repetitive, there is that unchallenged evidence that the appellant's grantor having assigned his interest in the land to the appellant in the year, 2012 the appellant took the necessary steps to register its interest in the disputed land under the PNDC Law 152 **[now repealed by the Land Act, 2020 (Act 1036) but the relevant and operating law at the beginning of this suit]**. As a preparatory step, it applied to the Land Title Division of the Lands Commission and was issued with a yellow card. The evidence further established it was later in 2014 that the respondent purportedly acquired the same piece of land and applied to the Land Title Division to register it regardless of the appellant's pending application disputed land. Quite interestingly, however, the lower court in its judgment as appearing on ***p. 388 [roa]*** had reasoned that the appellant never satisfied the court that the respondent was aware that the appellant earlier in time been registered in its name at the time the respondent's land title certificate was issued to it. Regrettably, the reasoning of the lower court is contrary to both the facts of the case and the law.

Significantly, at the time the respondent's land title certificate was issued on 06/10/2016 **[**see: ***p.201BK roa]*** the appellant's application was still pending for approval and to be issued with land title certificate. It is clear quite on record that the appellant lodged their

caveat on 22/08/2016**.** *See:* ***pp 201AP – 201AQ roa].*** The Lands Commission's response that the land fell outside that of what the appellant was protesting about was authored 15/11/2016. *See:* ***p 201AR roa].*** Although the appellant was earlier in time to lodge its application and was issued with yellow card on 12/05/2016 ***[****see:* ***pp 201AK-201AL roa],*** the Land Commissioner nevertheless went ahead to issue a land title certificate to the respondent on 06/10/2016**.** See: ***p 201BK [roa].***

It is undisputed that the appellant's grantor had since the year, 1988 that he acquired the land from the Charway Family part of which is in dispute, registered it under the Lands Registry Act, 1962 (Act 122). Registration of land under the Lands Registry Act, 1962 (Act 122) is a notice to the whole world. Since from the available evidence, both the registration of the appellant's grantor under Act 122 in 1988 and the appellant's submission of application for registration under PNDC Law 152 on 12/05/2016 were earlier in time the appellant's grantor's registration and the appellant's application enjoyed priority over the instrument/certificate of the respondent issued on 06/10/2016. In those circumstances, the earlier registration and submission of application prevailed over the respondent. See: ***Ernestina Opokuah v Adwoa Nyamekye (subst'd by Emmanuel Osei Kissi) & The Chief Registrar, Land Title Registry [2021] DLSC 10684*** per Baffoe-Bonnie JSC.

In the light of these compelling facts, it is reasonable to hold that the land in dispute was encumbered when the respondent set out to purchase it. See: ***Kusi & Kusi v Bonsu [2010] SCGLR 60.*** In ***Kusi & Kusi v Bonsu (supra)*** the Supreme Court stated the law in ***Holding 3*** in the headnotes as follows:

> *"The purpose of sections 19 and 27 of the Land Registry Act, 1962 [Act 122] construed as a whole, was to facilitate proof of registration of instruments. Provision was therefore made under section 19 for searches to be made in any of the official documents in the registrar's custody, namely, book, register, or list. Additionally, under it, a request might be made for certified copies of or of a duplicate or copy of a registered*

instrument filed in the registry, obviously for use in civil proceedings. The procedural requirement of notice in writing, as set out in section 27 would arise only where a party had sought to tender any such copy, or extract, or certificate in evidence. It would allow a party to procure evidence of a registered instrument from proper sources, ie the custody of the registrar, while providing adequate opportunity to the opposing party to have advanced knowledge of the fact so that the genuineness or otherwise of those instruments could be ascertained before being tendered at the trial. That procedure would enable justice to be served as the party against whom the instrument was sought to be tendered, and who therefore could exercise his or her right of waiver of notice in writing and would enable justice to be served as the party against whom the instrument was sought to be tendered, and who therefore could exercise his or her right of waiver of notice in writing and would not be caught by surprise or prejudiced in any many, while unnecessary delay would altogether be avoid. Thus sections 19 and 27 of Act 122 were meant for the mutual benefit of parties in civil litigation; their primary purpose being to facilitate the smooth, fair and speedy conduct of land litigation."

Invariably, searches serve dual purpose. That is to say, the search enables a prospective purchaser of land to have knowledge of the status of land he purports to purchase. Additionally, it assists both parties to a civil litigation and the court to ascertain the true status of the land when the feuding parties proceeded to buy and register it.

Learned Counsel for the respondent though concedes that registration is notice to the whole world, he nevertheless argues that registration under Act 122 does not guarantee title to the registrant. Furthermore, relying on ***Kwofie v Kakraba [1966] GLR 299*** he articulates that there is nothing in the Land Registry Act 1962 [Act 122] that states that the validity of any deed of conveyance or any instrument cannot be questioned or challenged in any court of law after it has been registered.

Counsel has also referred us to a decision of this court in ***West African Ent. v Western Hardwood Ent. Ltd [1995-96] 1 GLR 155*** to reiterate that registration under Act 122 only gave of the fact of registration of the instrument but did not give validity to the transaction evidenced by the registered instrument.

Admittedly, a registration under the Lands Act, 1962 [Act 122] did not give guarantee of title and that such a registration may be challenged or questioned. We think, nevertheless, that until steps were taken to set aside or cancel it, the registration was a valid notice to the whole world including all prospective purchasers that the land was encumbered.

From the available evidence, we hold that the Land Title Registry violated its own statute and rule of procedure when it disregarded the appellant's protest but went ahead to issue a land title certificate to the 1st respondent in respect of the same piece of land. It cannot be over-emphasized that the provisions in the Land Title Law, PNDC Law 152 are elaborate as regards, for eg., the application for registration of interest in land; dispute resolution in the event of a caveat/protest to registration, among other related issues. The procedure of first registration, for eg., is detailed in **S. 14 of PNDC Law 152** as follows:

1. *the first registration of a parcel shall, whichever last occurs, be affected by the Land Registrar*

    a) *on the expiry of the period specified in the notice issued under S. 1(1) in respect of the district in which the parcel is situated; or*

    b) *on the expiry of the notice issued under paragraph (b) of sub-section (1) of S. 13 in respect of the parcel; or*

c) *on the determination by the Adjudication Committee of a dispute referred to it concerning the claim of a person to be registered as proprietor of the land or interest in the land."*

It is also provided under the statute that where a party has lodged a protest or a caveat against registration, as the case may be, the matter has to be referred to the Adjudication Committee. The Adjudication Committee then assumed jurisdiction to go into the matter to establish between the contesting parties whose interest is to be registered. See: **S. 22 of PNDC Law 152.**

Now, on presumption that all the due processes were followed and a land title certificate issued, the certificate may only be impeached on ground of fraud provided for under **S. 43(1) of PNDC Law 152** states as follows:

"Subject to sub-section (2), (3) & (4) of this Section and to Section 48, the rights of a registered proprietor of land whether acquired on first registration or acquired subsequently for valuable consideration or by an order of a court, are indefeasible and shall be held by the proprietor together with the privileges and appurtenances attaching to the land free from any other interest and claims."

It is also significant that before a land certificate is issued the particular land is identified, the ownership is ascertained, a parcel plan is prepared and therefore the ownership, identity and limits of the land cannot be in doubt. Again, a land certificate issued to a person can be impeached only on grounds of fraud.

Now, having regard to the overwhelming evidence in the instant case that the appellant's grantor had in 1988 upon acquisition of a larger whole of land which the disputed land formed part successfully registered it under Act 122; the appellant took the necessary peremptory steps to register it under PNDC Law 152 and obtained a yellow card pending the final issue of the land title certificate; that the appellant's application was still pending when later in the respondent purchased the same piece of land from the respondent in 2014 and the appellant filed a caveat against the registration by the respondent of the same piece of land, we roundly uphold the submissions of learned Counsel for the appellant that the Lands Commission acted contrary to its own rules and regulations, which decision is subject to be impeached on grounds of procedural impropriety. The Supreme Court in re-echoing this time-honoured principle in ***Tema Development Corp. & Musa v Atta Baffour [2005-2006] SCGLR 121,*** adopted with approval, the law as espoused by the House of Lords in ***Council of Civil Service Unions v Minister for Civil Service [1984] 3 All ER 935*** and held thus:

> *"By procedural impropriety was meant not only failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who would be affected by the decision but also failure by an administrative tribunal to observe procedural rules expressly laid down in legislation by by which its jurisdiction was conferred, even where such failure did not involve any denial of natural justice."* **[emphasis added]**

We conclude, therefore, that the Lands Commission was reckless in its response that the land fell outside the one registered for the appellant. Lack of being meticulous by the Lands Commission occasioned a grave miscarriage of justice against the appellant. We

shall revisit the issue when we proceed to consider whether the respondent was a *bona fide* purchaser for value without notice.

Proof of better title.

There is that argument that the respondent's grantors were administrators of the late Joseph Abli Charway and granted the disputed land in their capacity as Administrators. Therefore, the respondent were able to prove better title to the disputed land than the appellant. Indeed, the lower court held that the appellant failed to prove the root of their title to the land. In support, the lower court relied on the case, ***Ogbarmey-Tetteh v Ogbarmey-Tetteh [1993-94] 1 GLR 353 @ 416*** wherein the law was stated thus:

> *"In an action for a declaration of title, a plaintiff who failed to establish the root of his title must fail because such default was fatal to his case. Consequently, where rival parties claimed property as having been granted to each by the same grantor, the evidence of the grantor in favour of one of the parties should incline a court to believe the case of the party whose favour the grantor gave evidence unless destroyed by the other party."*

Relying on the case of ***Odoi v Hammond [1971] 1 GLR 375 @ 382*** that is to effect that in an action for declaration of title to land the onus is heavily on the plaintiff to prove his case and that he cannot rely on the weakness of the defendant's case, the lower court held that the appellant was unable to prove its case to its satisfaction. Equally, the trial court held that the appellant was not the lawful lessee of the disputed land.

Admittedly, as a general rule, a party whose title is derivative as in the instant case must show that his predecessor had good and or a valid title. Therefore, where the foundation for establishing a valid title was weak or tainted, the superstructure is equally tainted. See: ***Agyemang (subt'd); Banahene v Anane [2013-2014] 1 SCGLR 241.***

However, we are of the view that ***Banahene v Anane [supra]*** is distinguishable from the instant suit in that first, the respondent admitted, and as the trial court also found, the respondent was unable to prove fraud against the appellant's grantor. We have also held that failure by the respondent to call a material witness to the deed of gift was fatal to the case of the party that must call that material witness. Indeed, the lower erred when it dismissed the claim of the appellant on account that it failed to call its grantor to come and prove his title when respondent challenged the gift. The respondent alleged fraud so they carried the burden to prove it in terms of **Ss 13 & 15 of NRCD 323** particularly when the appellant denied that allegation.

It is noted for the record that the appellant's grantor, Christian Ahiabor has been dealing with the land since he acquired in 1988. As appearing on ***p. 201AM [roa]*** after acquisition, he granted portions of the land to the entities like Afro Tropic Company, Eurofood (Gh) Ltd besides the appellant. There has never been challenge from either the appellant's grantors or any group of persons. If Charway's children [respondent's grantors] now claim the land Ahiabor acquired was through fraud what steps did they take to set it aside or annul it when they became aware of it? Having taken no steps to assert their right they are fixed with inordinate delay in raising the red flag now.

Now given that the respondent or their grantors were unable to prove fraud against the appellant the deed of gift stood valid and that the appellant could rely on it in proof of its title to the land. In ***Egyir v Hayfron [1984-86] 1 GLR 510*** the facts showed that the defendant was in addition to relying on an ancient document, deed of gift, she had exercised acts of possession and ownership of the land, the subject matter of the dispute.

At the end of the trial, the Sekondi High Court relied on the traditional evidence offered by the plaintiff and therefore gave judgment in his favour as against the defendant who had relied on an ancient deed of gift. The learned trial judge ruled that where a party derived his title to land from someone else, either by way of gift or purchase or other form of alienation of land, it was incumbent upon that party whose title was derivative to prove the title of his grantor or vendor as the case may be. The court stated the principle that a grantor had a duty to sue or defend jointly with his purchaser in any dispute relating to the land sold and the purchaser had a corresponding duty to bring his vendor into the suit in his own interest. That principle was transferable to all forms of alienation of land by one person or body of persons to another, the court held further.

The defendant being dissatisfied with the decision of the Sekondi High Court appealed for the reversal of that judgment. The Court of Appeal in a unanimous decision allowing the appeal, severely criticized the approach the trial court adopted in rejecting the deed of gift and preferring the oral traditional evidence to the defendant's evidence in which an ancient document of deed of gift was tendered. See: ***Hayfron v Egyir [1984-86] 1 GLR 682***.

The Court of Appeal observed at ***p. 692 of the Law Report*** that the deed of gift provided a permanent record of the transaction. In the words of Apaloo CJ: *"that document was a reliable and trustworthy record as shown by the fact that the deed was preserved and produced by the Lands Department"*.

In the instant case, just as it happened in the ***Hayfron v Egyir [supra]***, the deed of gift to Christian Ahiabor was also registered with the Lands Registry Division of the Lands Commission under Act 122. By parity of reasoning, therefore, the document [deed of gift] the appellant relied on in the instant suit was presumed reliable and trustworthy record of that transaction. The only ground on which the respondent feebly tried to impeach it was that those who were deemed witnesses to the deed had flatly denied being privy to

the deed. But as we have repeatedly held, the respondent were unable to rebut that presumption of the valid gift. In the circumstances, we are of the respective view that the appellant proved better title to the disputed land whereas the respondent did not.

Significantly, the respondents also trace their root of title to the children of the late Joseph Abli Charway who tendered Letters of Administrators to show that they are the administrators of the estate of their father, Joseph Abli Charway, now deceased. It is arguable that once the grantors of the respondent are the children of Joseph Charway and the beneficial owners of the land upon demise of their father, they have better title than Christian Ahiabor, the appellant's grantor. However, as held elsewhere in this judgment, the deed of gift is valid to all intents and purposes. The Charway Family at the time it purported to dispose of the disputed land to the respondent had already divested itself of its interest. Therefore, the Charway Family has no land again to sell to the respondent under the ***nemo dat quod non habet*** rule when the family has not taken any lawful steps to set aside the gift. The ***nemo dat quod non habet*** rule applies whenever an owner of land who had previously divested himself of title in the land previously owned by him to another person, attempts by a subsequent transaction to convey title to the new person in respect of the same parcel of land cannot be valid. See: ***Hayford v Tetteh (subt'd by) Larbi & Decker [2012] 1 SCGCLR 471***. See also: ***Seidu Mohammed v Saanbaye Kangberee [2012] 2 SCGLR 1182***.

That leads us to discussing and determining whether the respondent acquired the disputed land in good faith. In other words, having regard to the established fact that it was the appellant that was first in time to have acquired the disputed land and registered it, whether it could be said that the respondent was a bona fide purchaser for value without notice.

From the available evidence, we think that the respondent could not be said to a *bona fide* purchaser for valuable consideration without notice. The evidence shows that the

respondent were very much aware that the disputed land was encumbered by reason of the appellant's earlier application to register the land under PNDC Law 152 and had been issued with a yellow card pending the issuance of a final certificate. Additionally, the respondent's representative admitted that they visited the disputed land and became aware that Afro Tropic Company abuts the disputed land but did not consider it necessary or were not interested to inquiring from the neighbours of the land as regards the owners of the disputed land they were proceeding to purchase. See: ***pp 271-272 [roa].***

The learned trial judge in her judgment **[see p. 388 roa]** though acknowledged that the Lands Commission had duty to ensure that there was no double registration, she nevertheless held that the subsequent registration by the respondent cannot be said to be done fraudulently. The lower court explained that fraud could not be held against the respondent principally because the appellant never attached a site plan to the letter it caused its lawyer to write caveating the registration for the respondent. According to the lower court, the site plan attached to the letter was rather in the name of 'Marichel Ltd' which is different from the appellant's. Therefore, the appellant could not prove fraud.

It has however been submitted on behalf of the appellant that even if the appellant never caveated to the registration of the respondent's interest in the land, the Lands Commission itself owed it a duty to have made that discovery from its records. The Commission was therefore fixed with actual notice of the earlier registration. To the learned Counsel for the appellant, the later registration was therefore procured by fraud. In support, he relied on the principle the Supreme Court stated in ***Brown v Quashigah [2003-2004] SCGLR 657 @ 957*** that runs as follows:

> *"Procuring a lease and subsequent land certificate when the plaintiff knew or ought to have known that the land has been previously granted to a prior encumbrance is tantamount to*

fraud."

We roundly agree with submissions of Counsel for the appellant that even if the appellant was unable to strictly prove fraud against the respondent, the Lands Commission itself by its own rules and regulations owed it a duty to the general public to ensure that there was no double registration of the same piece or parcel of land. Having regard to the fact that subsequent events showed that it was the same piece which was earlier on registered for the appellant it was reckless for the same Lands Commission to have re-registered for the respondent.

We also think the lower court's observation that the name on the site plan ie 'Marichel Ltd' the appellant attached to the letter caveating the purported registration of the same land by the Lands Commission to the respondent was different from Wrangler Ltd, the appellant herein and therefore did not give adequate notice to the respondent, is immaterial for the following reasons:

First, the site plan though had the name on it as 'Marichel Ltd' it nevertheless described the same piece of land. It is reiterated that the site plan the appellant included in its survey instructions and submitted on the directives of the lower court to the court appointed Surveyor for the purpose of surveying the land, the subject matter of dispute, is the same as the one contained in the lease executed in favour of the appellant [Wrangler Gh Ltd] when it first acquired the disputed land. In other words, the site in the appellant's lease, **Exhibit A** that stands in the name of Wrangler Gh Ltd is the same as the one included in the survey instructions.

It is equally worth observing that the site plan the appellant used both its conduct of search conducted at the Lands Commission and in the survey instructions and it is the same as the respondent's. In other words, the same site plan the appellant used gives the same dimension and size of land as the respondent also offered in evidence. It goes

without saying, therefore, that the parties were *ad idem* as to the disputed land. On general principle, where parties are *ad idem* on their pleadings the effect in law is that the subject matter is common to all the parties and the plaintiffs were not bound to lead evidence on the identity to such land. See: ***Western Hardwood Ent. v West Africa Ent. Ltd [1998-99] SCGLR 105***. See also: ***Attah v Amoasi [1976] 2 GLR 201 C/A*** and ***Adwubeng v Domfeh [1006-97] SCGLR 660 @ 677*.**

We think that the respondent did not do any due diligence before setting out to purchase the disputed land. Under Common Law, an intending purchaser of property was put on his enquiry to make such investigations as to title, as would enable him to rely on the plea of bona fide purchaser for value without notice. Our courts have therefore held in a number of cases that if the purchaser failed to make such inquiries, he acted at his own peril if subsequently events disclosed the existence of a valid challenge to the title he acquired. See: ***Osumanu v Osamanu [1995-96] 1 GLR 672 C/A*.**

The general principle of equity is that a purchaser is deemed to have notice of all that a reasonably prudent purchaser would have discovered. Thus, where the purchaser, like the respondent in this case, had actual notice that the property was some way encumbered it will be held to have constructive notice of all that she would have discovered if it had investigated the encumbrance. See: ***Boateng v Dwinfour [1979] GLR 360 @ 366 C/A***.

In the instant appeal the available evidence shows that the respondent knew of the appellant's grantors had registered the disputed land prior to the respondent's acquisition of same. The respondent's representative admitted under cross-examination that before they proceeded to acquire the land in disputed they were privy to that information that the land was encumbered. See: ***p. 269 [roa].***

Where a person is put on notice that property he seeks to buy does not belong to his vendor but goes ahead to buy he is clearly acting negligently or recklessly and his entry upon the property clearly trespassory. See: ***Comfort Abla Agbosu v Capatain Boafo – Suit No. 90/92 Unreported judgment of 29/04/1999.*** [Coram: Foster, Benin and Afreh JJA]

The Court of Appeal held in ***Comfort Abla Agbosu v Capatain Boafo [supra]*** that so long as plaintiff was able to prove title to the land, she was effectively in possession.

It cannot be overemphasized that the circumstances under which the disputed land was re-registered in favour of the respondent in the teeth of the caveat or protest by the appellant was, to say the least, very bizarre. Indeed, the respondent cannot be held to be a bona fide purchaser for value without notice in the circumstances of this case. Being a bona fide purchaser for value without notice implies that the purchase might have been made in good faith. The Supreme Court per Apaloo JSC [as he then was] in discussing and considering "good faith" under the Land Development [Protection of Purchasers] Act, 1960 [Act 2] which expression has not been defined under the Act, observed in ***Dove v Wuta-Ofei [1966] GLR 299:***

> *"…… only natural that the Act should require that the purchaser to avail himself of the statutory protection, should have acted honestly and reasonably at the date of the original acquisition of the land, and having so acted should have believed in the validity of his title."*

Re-echoing the principle in ***Hydrafoam Estates [Gh] Ltd v Owusu [2013-2014] SCGLR 1117 @ 1130,*** the Supreme Court per Anin Yeboah JSC [as he then was] delivered himself as follows:

> *"……..Even though the facts of each particular case may determine how prudent a purchaser of land must act under such*

circumstances, we think that at least, official searches at the Lands Commission in this case would have clearly established that the land was not designated as the property of the plaintiff's vendor. An official search at the Lands Commission to make inquiries as to the official records covering the land would have alerted the plaintiffs about the ownership of the disputed property. The fact that they were not professionals but were laymen in our view, did not take away the necessity to be prudent under the circumstances."

It is instructive, the lower court held in the instant case that Joseph Abli Charway as the head of the Charway family was a trustee for the family when the Nungua Stool gifted the whole land per a deed of gift. Granted that it was the case. We nevertheless think that even if Joseph Abli Charway standing as a trustee of the land did not properly deal with the land, there is that lack of evidence from the respondent's grantors to show that the family took any steps to set aside any grant he allegedly made without recourse to the principal members of the family. The search report, **Exhibit G** shows that Joseph Abli Charway at various times dealt with the land including the disputed land, unhindered. Therefore, if Joseph Abli Charway as a trustee never consulted the other principal members of the family in making grants of the land or that the principal members did not give consent to such grants, the grants were not void but voidable. Being voidable, each transaction he undertook as depicted on **Exhibit G** was good until the proper persons with capacity took steps to set aside those transactions including Christian Ahiabor's. See: ***Amaning alias Angu v Angu II [1984-86] 1 GLR 309***.

Given the circumstances, it is only reasonable and fair to say that the respondent's grantors or the Charway family did not act timeously in challenging those grants Joseph

Obli Charway made not excluding that to Christian Ahiabor. Indeed, the Letters of Administration the administrators of the estate of Joseph Abli Charway tendered in evidence reveals it was issued by the Accra High Court in 1998. Yet they did nothing to stop the sale of the land by Christian Ahiabor to the appellant in 2012 until they purportedly sold it to the respondent in 2014. The said Ahiabor, according to the evidence, was dealing with the land even when Joseph Charway was still alive till his demise in about 1997.

It is equally important to stress that the said Joseph Abli Charway is now deceased and it is trite learning that evidence involving a deceased person is always received and treated with extreme circumspection and suspicion. The policy rationale is that the deceased, unlike the biblical Lazarus, cannot come out of his grave to tell his story about his role in gifting the land to Ahiabor, or to assert any claim or disprove one against Ahiabor. Proof is therefore strict and must be utterly convincing. See: ***Moses v Anane [1989-90] 2 GLR 694 C/A*** as adopted and applied by Brobbey JSC in ***Apea v Asamoah [2003-2004] SCGLR 226 @ 241***.

Respondent's grantors claiming to be beneficiaries of the land:

Significantly, the respondent through their lawful attorney, Dennis Aryee Charway (DW1) tendered in evidence **Exhibit 7,** joint Letters of Administration granted to 1. Beatrice Komley Charway; 2. Lilian Komley Charway; 3. Comfort Komiokor Nuetetey; and 4. Beatrice Komiorkor Charway to administer the estate of Joseph Obli Charway. The administrators herein are described in **Exhibit 7** as the children of the deceased, Joseph Obli Charway. The said Dennis Aryee Charway (DW1) in testifying for the administrators of the estate of Joseph Obli Charway tendered in evidence, a power of attorney **Exhibit 6.**

The respondent pleaded in the statement of defence and same repeated in paragraphs 2 and 5 of DW1's witness statement that the administrators as the children of Joseph Obli Charway inherited the whole land that the original allodial owners, Nii Odai Ayiku IV and the Nungua Stool gifted to Joseph Obli Charway and the family.

Ironically, the respondent's grantors as beneficiaries of the estate of their deceased father never tendered in evidence, a **vesting assent** clothing them with the legal capacity or authority to deal with the land they claim they inherited from their father upon his demise. There is lack of evidence of that fact and requirement of the law. On the authorities, we think the children as beneficiaries lacked the legal capacity to alienate the disputed property to the respondent. The settled position of law is that until an administrator or beneficiary vested an inherited property in himself and registered it in accordance with **S. 24 of the Lands Registry Act, 1962 (Act 122),** he lacked the legal capacity to alienate it. See also: ***Conney v Bentum-Williams [1984-86] 2 GLR 301 C/A*.**

The Supreme Court in ***Okyere (decd) (subst'd) Peprah v Appenteng & Adomaa [2012] 1 SCGLR 65*** stated the rule that a sale by beneficiary without a vesting assent is void. The court therefore held in that case that until a vesting assent was executed in their favour, any purported sale of the real estate by the beneficiaries or the devisees were of no legal consequence and furthermore, the purchaser could not have a valid title. See also: ***Nkuah v Konadu & Boateng [2009] SCGLR 124*.**

It is arguable that issue of vesting assent and or the capacity of the children of Joseph Obli Charway (deceased) to legally alienate the disputed land to the respondent was not raised before the trial court and therefore may be said to be a new case raised. On general principle, a party is not permitted to make a new case on appeal which case he did not place before the lower court for consideration. However, if it is a challenge to jurisdiction or on points of law, that is permissible once evidence was led on it and was on record.

See: ***Attorney-General v Farore Atlantic [2005-2006] SCGLR 271; Abadwum Stool, Edubiase Stool and Benkum & Adonten Stools v Akrokerri Stool [2017] DLSC 2558***.

In adopting and applying the principle in ***Attorney-General v Farore Atlantic (supra)*** in a more recent case of ***Boateng v Serwah & ors (J4 8 of 2020) [2021] GHASC 19 (14 April 2021)*** in which case the issue of illegality of marriage between the parties on grounds of public policy was only raised for the first time on appeal in the Supreme Court, Pwamang JSC stated the law as follows:

> *"……..Ordinarily, this type of defence ought to be pleaded in accordance with Order 11 Rule 8 of the High Court (Civil Procedure) Rules, 2004 (C.I.47). Such pleading would provide particulars of the illegality relied on and the claim it is proposed to defeat. In this case probably because it was not pleaded by the defendants but raised in their submissions they did not argue it elaborately in their statement of case and the plaintiff too failed to argue in response though it was brought to her attention by service of the defendants statement of case on her. Nonetheless, since it is a matter of law that has been raised on the basis of evidence already on the record, the court has to consider it."*

Aside that the respondent's grantors lacked the legal capacity to have alienated the disputed land to the respondent, we have held elsewhere in this judgment that on the

nemo dat non habet principle, the respondent's grantors had no land to grant and or transfer to the respondent.

Ground (b) - The learned trial judge erred in law by admitting Exhibit 9 [witness statement in suit No. EL/107/2014] in evidence and relying on same which occasioned a substantial miscarriage of justice to the plaintiff.

The evidence showed that the impugned witness statement was filed in suit No. EL/107/2014 pending at the Tema High Court but it was an unsworn statement because the deponent has not mounted the witness box and sworn on oath to adopt it as his evidence-in-chief. That being the case, the witness statement **[Exhibit 9]** the lower court heavily relied on in the course of its judgment was inadmissible per by reason of the fact that it was not a sworn statement used in a public hearing and its deponent not subjected to cross-examination. See: **Order 38 r 3G(c) of CI 87**.

Being inadmissible *per se*, this court reserves the power to strike it down as improperly received in evidence in violation of **S. 76 of the Evidence Act, 1975 [NRCD 323].** There is that lack of evidence that Exhibit 9 being unsworn statement and the deponent not testified on it, it was tendered and used in the instant case as a hearsay evidence. On the authorities, it was the duty of the trial judge to reject inadmissible evidence that had been received, with or without objection, during the trial when she came to consider her judgment in the instant suit. See: ***Amoah v Arthur [1987-88] 2 GLR 87 C/A***. See also: ***Tormekpey v Ahiable [1975] 2 GLR 432 @ 434***.

It is the law itself that makes that piece of evidence inadmissible per se. See: ***West African Ent. v Western Hardwood Ent [1995-96] 1 GLR 155 C/A***.

Re-echoing the principle, the Supreme Court in ***Asante-Appea v Amponsah [2009] SCGLR 90*** held in that case that insofar the power of attorney tendered was not signed

by any witness, it was invalid. Consequently, the trial court erred in admitting it in evidence, the apex court stated further. In stating the law, Brobbey JSC postulated that under the **Evidence Act, 1975 [NRCD 323], S.8**, the appellate court was entitled to reject evidence which ought to have been rejected at the trial court even if there was no objection to such evidence when it was first tendered. Guided by the principle canvassed supra, we strike down as improper, the admission of, and use of Exhibit 9 by the lower court on ground that it was inadmissible *per se*.

In conclusion, we think that having regard to the evidence led at the trial, the evidence preponderate heavily in favour of the appellant but regrettably the trial court failed to draw an irresistible conclusion from the evidence. It is obvious that the lower court failed to draw inferences from the established facts. Most of the findings of facts were unsupportable. The learned trial judge also, in some instances, misapplied the law to the evidence, thus occasioning a miscarried of justice to the appellant. The judgment of the trial court is subject to be set aside on appeal and it is hereby set aside. Consequently, we resolve all the issues the trial court adopted for trial as contained in the application for directions, in favour of the appellant. We hold the appellant to be the lawful lessee of the disputed land and is, therefore, entitled to his claims.

In the result, we allow the appeal in its entirety and enter judgment for the appellant on all the reliefs he claims as endorsed on his writ. We order forthwith, the cancellation and or expunging of the respondent's Land Title Certificate No. TD 1305 from the records of the Land Title Division of the Lands Commission for reasons we have canvassed elsewhere in this judgment. The appellant is therefore entitled to general damages, for which we make an award of Ghc25,000.00 in its favour.

Appellant's costs assessed at Ghc15,000.

SGD

P. BRIGHT MENSAH

(JUSTICE OF THE APPEAL)

SGD

I agree MARGARET WELBOURNE

(JUSTICE OF THE APPEAL)

SGD

I also agree RICHARD ADJEI FRIMPONG

(JUSTICE OF THE APPEAL)

COUNSEL

CHARLES TETTEH WITH DAVID AGYEKUM FOR PLAINTIFF/APPELLANT

NII APATU-PLANGE FOR DEFENDANT/RESPONDENT