IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA A.D. 2023

CORAM:

JUSTICE HENRY KWOFIE (MR.) J.A (PRESIDING)

JUSTICE ANTHONY OPPONG (MR.) J.A.

JUSTICE SOPHIA ROSETTA BERNASKO ESSAH (MRS.) J.A.

CIVIL APPEAL NO.: H1/184/2021

DATE: 23RD MARCH, 2023

OSEI OWUSU ANSAH - PLAINTIFF/APPELLANT

VRS

1. HFC BANK (GHANA) LTD - DEFENDANTS/RESPONDENTS

2. O'SULLIVAN ESTATE LTD ACCRA

J U D G M E N T

SOPHIA R. BERNASKO ESSAH (MRS) JA:

This is an appeal by the Plaintiff/Appellant against a judgment of the High Court dated 19th February, 2020 in which the trial Court dismissed the claims of the Plaintiff and

entered judgment for the Defendant/Respondent. The grounds of appeal filed on 24th February, 2020 were as follows:

i. *That the judgment is against the weight of evidence.*

ii. *The cost awarded by the learned judge against the Plaintiff is excessive.*

iii. *Additional grounds of appeal to be filed upon receipt of the copy of the judgment.*

On the 23rd of July 2020, reference page 132 of ROA, the following additional grounds of appeal were filed:

i. *That the learned trial judge erred when he found that the Plaintiff/Appellant was given vacant and peaceful possession of the land.*

ii. *That the learned trial judge erred when he found that the Plaintiff/Appellant failed to protect his interest in the land.*

iii. *The learned trial judge erred when he found that the 1st Defendant/Appellant is not liable to the Plaintiff /Respondent.*

In this delivery, the Plaintiff/Appellant will be referred to as Plaintiff, and the Defendant/ Respondent, Defendant.

The facts of this case do not lend themselves to much controversy.

Plaintiff, is a chartered Auditor by profession and resident in Kumasi. The 1st Defendant is a bank, while the 2nd Defendant is a company engaged in real estate. By a Deed of Assignment dated 4th December, 2002, 2nd Defendant assigned all of its unexpired interest in a piece of land described as Plot No. 15, Baatsona, and measuring about 0.2 acres to Plaintiff. Prior to the signing of the Deed of Assignment with 2nd Defendant, Plaintiff dealt with the 1st Defendant and its subsidiaries with regards to discussions for the Sale and payment of the land. Having paid the total purchase price of $10,880, and

upon execution of the Deed of Assignment with 2nd Defendant, he was granted a Land Title Certificate. He then commenced building of a 4 bedroom structure on the land and by June, 2009, the building had been constructed up to lintel level. He thereafter travelled out of the Jurisdiction. Upon his return on or about April, 2010, he discovered that his building had been pulled down and a wall built around the land. He reported the matter to the police. He also notified the 1st Defendant who informed him of the pendency of a Court case between the 2nd Defendant and another family over the land and advised him to take necessary steps to protect his interest in the land.

He has since been denied possession of the land which has been redeveloped into a residential facility and occupied by unknown persons.

Plaintiff caused his lawyers to write to the 1st Defendant requesting a refund of all monies paid by him in respect of the land but same was neither complied with nor any steps taken to indemnify him against the losses. He contends that his inability to retain possession of the land was due to a defect in the Defendant's title which constitutes a breach of the covenants in the Deed of Assignment. He therefore commenced action against the Defendants and sought the following reliefs:

i. *A declaration that the Defendants have breached the covenants of undisturbed possession in the Deed of Assignment dated 4th December, 2002.*

ii. *Damages for breach of Covenant.*

iii. *An order for the refund of all the $10,880 paid by the Plaintiff to the 1st Defendant.*

iv. *An order for the payment of interest on the said amount at the commercial bank lending rate from the 1st of January, 2003 until the date of final payment.*

In a joint statement of defence, 1st Defendant said that they are registered to engage in banking and its related affairs, and not in real estate and to that extent they have not

engaged in any transaction with the Plaintiff. According to them the HFC Investment service, a subsidiary of 1st Defendant initially acted as managers for the 2nd Defendant's "project", which was the Development of O'Sullivan Estates at Community 18. In 2006, HFC Realty Company limited took over the management of the O'Sullivan Estates Project as project managers for the 2nd Defendant. That they had no legal dealings with the Plaintiff nor did they convey or vest any legal rights and authority in him.

2nd Defendant also averred that some time in 2002, they assigned the subject matter property to the Plaintiff who was put in possession, whereupon the Plaintiff was able to enjoy quiet and peaceful possession which enabled him to develop the land. That they also transferred valid legal title in respect of the subject matter to the Plaintiff from their Land Title Certificate No. TD 0107 Volume 019 folio 39 dated 17th December, 1998, which covers the subject matter property.

The Plaintiff subsequently was issued with title certificate No. TD 1497 in respect of the land. That as purchaser for value and in possession of the land, the Plaintiff was obliged under law to defend and protect his interest in the land. Having left the land and returned to see it encroached upon, the Plaintiff woefully failed to protect and defend his interest in the land, and rather took an easy option to demand the refund of the price of the land from the 2nd Defendant which they dispute.

In its judgment, the Court below acknowledged that the 1st Defendant and or its subsidiaries acted within some roles as lawful representative of the 2nd Defendant. In that it received monies on behalf of 2nd Defendant and in respect of HFC Realty Ltd, acted as manager for the 2nd Defendant's housing project. That 1st Defendant in receiving and issuing receipts in respect thereof, was operating in accordance with its functions as a bank and not as co-owner of the land in dispute. That 2nd Defendant admitted the receipt of the money paid to it through the 1st Defendant and proceeded to

perform or provide the consideration for taking the money. That the 1st Defendant was not party to the Deed of Assignment dated 4th December, 2002, neither was HFC Realty a party, but rather Plaintiff and the 2nd Defendant. Letters were nonetheless written by the 1st Defendant on behalf of the 2nd Defendant. The Court further held that the legal position or role of an agent per se is not an offence or actionable unless it is in furtherance of an illegal act, which is not the case in the instant suit. The Court below therefore held that the 1st Defendant is not liable to the Plaintiff in any form.

It also found that the Plaintiff was put into possession of the land by the 2nd Defendant per the Deed of Assignment. That having been able to enter the land and build a house on it to lentil level, then it indicated that he enjoyed peaceful vacant possession because he was not resisted or driven away by anybody. That it was only when Plaintiff had travelled out of the jurisdiction that 3rd parties had the opportunity to encroach on his land.

Regarding whether or not there was a defect in the Defendant's title, the Court below held that the Plaintiff did not give evidence to show that the 2nd Defendant's title to the land had either been cancelled or was defective or set aside. That the Plaintiff never conducted any search at the Land title registry to show that the 2nd Defendant had a defective title to the land. That although there was a default judgment, same was set aside and the 2nd Defendant's title restored.

The Court below was therefore of the view that the 2nd Defendant's title to the land has never been defective in any form, and that it was on the back of the 2nd Defendant's title that the Plaintiff also obtained a valid title to his land.

The Court below further held that the plaintiff was given peaceful and vacant possession of the land by the 2nd Defendant and it was for this reason that the Plaintiff was able to build his 4 bedroom house up to lentil level. It found as fact that the Plaintiff upon entry onto the land assigned to him by the 2nd Defendant failed, neglected or refused to protect or defend his property as enshrined in the 1992 constitution. It was also of the opinion that if the Plaintiff chose to initiate the instant action against the Defendant, the encroachers on the land should have been joined as necessary parties.

The Court below concluded that the Plaintiff had failed to discharge the burden of proof required by law on him in respect of his claims.

This is the judgement the Plaintiff impugns and prays this Court to set aside.

In his written submissions to this Court, counsel for Plaintiff argued his appeal in this order:

i. *That the learned trial judge erred when he found that the Plaintiff/Appellant was given vacant and peaceful possession of the land.*

ii. *That the learned trial judge erred when he found that the Plaintiff/Appellant failed to protect his interest in the land.*

iii. *The learned trial judge erred when he found that the 1st Defendant/Appellant is not liable to the Plaintiff /Respondent.*

iv. *That the judgment is against the weight of evidence.*

v. *The cost awarded by the learned judge against the Plaintiff is excessive.*

In addressing Grounds (i) & (ii) counsel for Plaintiff premised his submissions on the implied covenants by a covenantor in a conveyance for valuable consideration, as set out in Section 22 (1) of NRCD 173 the Conveyancing Act, being; the right to convey, quiet enjoyment, freedom from encumbrances and further assurances. He contended that not having been in possession of the land at the date of commencement of the suit, a fact which Defendant's witness had admitted during Cross examination, then Defendant had breached the Covenants implied in a Conveyance for valuable consideration and therefore he was entitled to his reliefs.

To buttress his point about his entitlement to his reliefs He relied on the case of **Unilever Ghana Ltd. vs Kama Health Services (2013-2014) 2 SCGLR 861,** the facts of which he said were similar to Plaintiffs case. Specifically, he relied on the portion of the judgement wherein the Supreme Court held that the Plaintiff/Respondent therein, who was the purchaser of the property could not be compelled to hold on to the property when he encountered challenges in attempting to register his interest in the property at Lands Commission.

The Supreme Court also held that the acts of possession that the Plaintiff exercised over the property were done in the belief that title had passed to it until they were met with challenges. Therefore an abrogation of the sales agreement in the circumstances albeit unilateral would be justified. In explaining the obligations of a Vendor, the Supreme Court held that an incidence of every sale of land for valuable consideration is that the purchaser be granted quiet enjoyment. A challenge to a purchaser's title would not be considered as possession in the eyes of the law and was anything but quiet enjoyment. That a vendor has an obligation to sell property free from all encumbrance except those that were known to the purchaser.

Counsel for Plaintiff, contended that the ratio in the above case is also applicable in Plaintiff's case, because, the Defendants breached their obligation to ensure that the Plaintiff was in undisturbed, vacant and peaceful possession of the land as provided for in Section 22 of NRCD 173 for the following reasons:

Firstly, Plaintiff's continuous possession of the land was interrupted by persons who are claiming a title different from what the Defendants transferred to the Plaintiffs.
Secondly, on the strength of the Unilever case, the fact that the Plaintiff was in possession at one time and even has a Land Title Certificate does not mean that the Plaintiff was in legal possession since that possession had challenges.

Thirdly, the conduct of the Defendant in failing to inform Plaintiff of a challenge to its title in Court, when same became known to Defendant, disabled Plaintiff from taking the necessary steps to join the action and defend his interest. Thus the Defendant in choosing to defend the action in its name as if they are still owners of the land, despite having transferred title in the land to the Plaintiff cannot be heard claiming that the Plaintiff should have defended its interest in the land. The Defendant is thereby approbating and reprobating.
He contended that the Plaintiff exercised acts of possession on the land, but because of the defective title given to him by the Respondent, his property was destroyed by 3rd parties. Therefore the destruction of the Plaintiff's building and the challenge to his title cannot be concluded as he failing to protect his interest.

He submitted that on the strength of the Unilever case the Plaintiff is entitled to unilaterally abrogate the contract of sale with the Defendant and demand recovery of monies paid.

In fierce rebuttal to the submissions of Counsel for Plaintiff on the 1st and 2nd Grounds of appeal, Counsel for Defendant said that the Plaintiff was in delusion as to the rights and benefits conferred and vested in him by virtue of the Land Title Certificate that he possessed. That he had a valid title certificate yet went to sleep and expected Defendant to come to his service.

He contended that the Plaintiff is confusing the responsibility of the vendor that is the 2nd Defendant to put him into possession of land, with Plaintiff's obligation and duty to protect and defend the lawful possession he enjoys in the land against all unlawful acts of trespass and encroachment of third parties.

That Plaintiff's possession was assured until he left his uncompleted building unprotected and traveled out of the jurisdiction for an unknown length of time. In the circumstances, Plaintiff cannot say he was not put into possession only because he returned from abroad to find a third party had taken over his possession by means of unlawful acts of trespass.

Counsel for Defendants relied on the case of **Kweku and others vs Quansah and others (1977) 2 GLR 403** wherein it was held that a person who unlawfully entered land and ejected the one legally and physically in possession did not obtain possession, so as to enable him maintain action for trespass, except when the person ejected had submitted to the ejection by delaying to re-expel the intruder.

That again the law on possession of land granted by a grantor speaks to the fact that an unlawful trespass or act does not derogate from the fact of possession granted, unless the person who dispossessed the Plaintiff did so lawfully.

He contended that contrary to the submission of the Plaintiff, to amount to a breach of quiet and peaceful possession and enjoyment of the land, such a challenge must be lawful. The unlawful takeover of possession of Plaintiff's land based on a default judgment against the defendant, which judgement was later set aside, and the 2nd

Defendant restored, by implication meant, the Plaintiff's title to the land holds sway and is valid.

In respect of ground (iii) of the Grounds of appeal, Counsel for Plaintiff submitted that Plaintiff dealt with the predecessor of the 1st Defendant and some of its subsidiaries at all times. That the 2nd Defendant was not involved in any of the discussions leading to the execution of the Deed of Assignment. The 2nd Defendant's name only appeared on the Deed of Assignment as assignor at a time they had made full payment.

That the 1st and 2nd Defendants acted and continued to act as one and the same company throughout the case, although the defendants contend that they are two different companies. Therefore the 1st Defendant having conducted its affairs as if it is the same entity as the 2nd Defendant it cannot now be heard denying the liability arising out of the breaches of the Defendants in the transaction.

He contended further that if even the 1st Defendant could be deemed to be an agent, the 1st Defendant did not disclose the identity of its principal at all material times prior to the execution of the contract, but only after the sale. Therefore at best the 2nd Defendant was an undisclosed principal. In such circumstances the position of the law is that a third party has the option of suing either the agent or the

principal. But the misjoinder or non-joinder of any party does not by the tenets of Order 4 rule 5(1) of CI 47, defeat proceedings.

He contended that the Court erred by not taking consideration of the answers of DW1 and the exhibits tendered through him which showed that the 1st and 2nd Defendants conducted their affairs in a manner that a third party bystander will be entitled to believe that they are the same company concerning the "project".

He argued that the 1st Defendant must therefore be held liable for breach of the covenant by the 2nd Defendant to ensure that the Plaintiff is granted and remains in vacant possession of the land, for the reason that the 2nd Defendant was an undisclosed principal at all times prior to the execution of the contract. He urged the court to set aside the judgment of the court below and enter judgment in Plaintiff's favour.

The argument canvassed by the Counsel for Defendant in response to Counsel for Plaintiff's submissions on this Ground (iii) was that it could not be the case that the Plaintiff after 7 years of executing a Deed of Assignment with the 2nd Defendant and having been put in possession by the 2nd Defendant, could now say he never knew of the existence of the 2nd Defendant as principal of the 1st Defendant in the land transaction. That the Deed of Assignment was not executed under duress but must have been given to Plaintiff to study before the execution. Therefore Plaintiff knew of the 2nd Defendant before he executed the document to consummate the sale agreement between the Plaintiff and 2nd Defendant. It was also the 2nd Defendant who put the Plaintiff in physical possession of the land. Therefore the claim by the Plaintiff that he was never aware of the 2nd Defendant is false. That in any case the Plaintiff had not been able to make any case against the 2nd Defendant as a principal of the 1st Defendant and therefore its agent, to make the failure of the 1st Defendant who failed to disclose the presence of the principal liable.

Counsel for Defendant made no submissions in respect of ground 4 and 5 of the Grounds of appeal, having said that they were deemed abandoned by the Counsel for Plaintiff, no submissions having been made thereon. He urged the Court to dismiss the appeal as misplaced and without merit.

In this appeal we take cognizance of our function as a rehearing Court as provided in Rule 8(1) of the Court of Appeal Rules CI19. An appellate Court has a duty to conduct its

own independent examination of the Record of Proceedings to determine whether indeed, the appeal should succeed, taking into account the totality of the evidence. The following cases referenced: **Akufo-Addo Vrs. Catheline (1992) 1 GLR 377; Abbey Vrs. Antwi V. (2010) SCGLR 17, 20; Aryeh & Akakpo Vrs. Ayaa Iddrisu (2010) SCGLR 891.**

In so doing, we are mindful not to interfere with the findings of fact of the trial Court unless it is established with absolute clearness that some blunder or error resulting in a miscarriage of justice, is apparent in the way in which the lower Court dealt with the facts: See **Achoro vrs: Ankefena (1996-97) SCGLR 209.**

Instances where findings may be interfered with may arise in the following circumstances:

i. *The said findings of the trial Court are clearly unsupported by evidence on record; or where the reasons in support of the findings are unsatisfactory: See* ***Kyiafi vrs. Wono (1967) GLR 463-467.***

ii. *Improper application of principle of evidence: See* ***Shakur Harihar Buksh vrs. Shakur Union Parshad (1886) LR 141 A7;*** *or where the trial Court has failed to draw an irresistible conclusion from the evidence: See* ***Fofie vrs. Zanyo (1992) 2 GLR 475 at 490.***

iii. *Where the findings are based on wrong proposition of law:* ***See Robins vrs. National Trust Co. (1927) AC 515*** *wherein it was held that where the finding is so based on erroneous proposition of law, that if that proposition be corrected, the findings disappears.*

iv. *Where the finding is inconsistent with crucial documentary evidence on record.*

Guided by these principles we will now launch into a determination of this appeal.

To begin with we are clear that the Plaintiff was granted access to the land by the 2nd Defendant. A Deed of Assignment was executed between him and the 2nd Defendant

dated 4th December, 2002 and marked as Exhibit 'A'. Reference page 28 of ROA. He also obtained a Land title certificate No. TD1497, Volume 018, Folio 649 dated 27th January 2006, extracted from the land title certificate of the 2nd Defendant. Reference page 31 of ROA. The Plaintiff entered upon the land and put up a 4 bedroom house up to lintel level as at June, 2009. (Reference, Page 56 of ROA). That notwithstanding, Plaintiff, says there was a breach of the implied Covenants of a Conveyor of land set out in Section 22 (1) of the Conveyancing Act, (1973) NRCD 175 by the Defendants, because upon his return to Ghana on the 24th April 2010, having left the country in early April, 2010, he returned to find his structure had been pulled down, and a wall built enclosing the land.

Section 22 (1) of the Conveyancing Act 1973 NRCD 175, provides as follows:

(1) *In a conveyance for valuable consideration there shall be implied the covenants for right to convey, quiet enjoyment, freedom from encumbrances and further assurance, in the terms set out in Part I of the Second Schedule.*

A covenant, strictly speaking, is a contract made by deed. A covenant is either express or implied. An express covenant is one which is spelt out in the lease. An implied covenant, on the other hand, is one which is implied by virtue of the creation of the conveyance, by statute, or by virtue of what the Courts consider to be the intention of the parties.

The implied covenants by a transferor are elaborated and explained in Part 1 of the Second Schedule as follows:

Covenants Implied in any Conveyance for Valuable Consideration

***Right to Convey**:*

That notwithstanding anything done, omitted or knowingly suffered by the covenantor or any one through whom he derives title otherwise than by purchase for value, the covenantor has, with the concurrence of every other person (if any) conveying by his direction, full power to convey the subject-matter expressed to be conveyed, in the manner in which it is expressed to be conveyed.

***Quiet Enjoyment**:*

That notwithstanding anything done, omitted or knowingly suffered by the covenantor or any one through whom he derives title otherwise than by purchase for value, the subject-matter expressed to be conveyed shall remain to and be quietly entered upon, received, held, occupied and enjoyed by the covenantee and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without interruption or disturbance by the covenantor or any person through whom the covenantor derives title otherwise than by purchase for value, or any person rightfully claiming (not being a person claiming in respect of an interest to which the conveyance is expressly made subject) by, through, under or in trust for any of the foregoing persons.

***Freedom from Encumbrances**:*

That the subject-matter expressed to be conveyed is freed and discharged from or otherwise sufficiently indemnified by the covenantor against all such interests, encumbrances, claims and demands (other than those to which the conveyance is expressly made subject) as have been or shall at any time be made, caused or suffered by the covenantor or any person conveying by his direction, or any person through whom the covenantor derives title (otherwise than by purchase or value) or any person rightfully claiming by, through, under or in trust for any of the foregoing persons.

In order to succeed the Plaintiff is required to prove that there was a contract for conveyance between himself and the 1st and 2nd Defendants, that the Conveyance was for valuable consideration, that the implied covenants inherent in the Agreement have been breached by the Vendor/ covenantor or any person through whom the covenantor derives title otherwise than by purchase for value, or any person rightfully claiming (not being a person claiming in respect of an interest to which the conveyance is expressly made subject) by, through, under or in trust for any of the foregoing persons.

Clearly, in respect of the 1st Defendant, there was no Contract of Conveyance with the Plaintiff. From the finding of the Court below, with which we agree, the 1st Defendant

played a role for the 2nd Defendant in the Plaintiff's purchase of the 2nd Defendant's land, as a bank. In that capacity it received payments on behalf of the 2nd Defendant and issued receipts in respect of the transaction between Plaintiff and 2nd Defendant, Reference page 126 of ROA. The 1st Defendant was not party to the Deed of Assignment Exhibit 'A'. In finding that the 1st Defendant is not liable to the Plaintiff in any form, the Court likened the position of the 1st Defendant to that of an agent and said on page 122 of the ROA *"As a matter of law the position or role of an agent per se is not an offence or actionable unless it is in furtherance of an illegal act which is not the case in the instant suit."*

We agree with the trial Court, that the 1st Defendant's position was akin to that of an agent of the 2nd Defendant. Consequently, the general rule relating to the agency ought to apply. This rule as set out by White J in the case of ***Montgomerie v. U.K. Mutual S.S.Assn Ltd(1891) 1 Q.B. 370 at 371*** is as follows:

"There is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal, the contract is the contract of the principal and not that of the agent; and prima facie at common law the only person who may sue is the principal and the only person who can be sued is the principal"

This basic principle is often expressed in the maxim that the agent "drops out" of the transaction see ***Am. J. Comp L. (1963) 272 at 278by Muller-Freienfels.***

We are satisfied that the court was right in finding that the 1st Defendant was not liable to the Plaintiff. And as counsel for Plaintiff correctly submitted in his written submissions, once the 1st Defendant disclosed who their principal was, they fell out and 1st Defendant could not sue both but one. (Reference page 20 of Written Submissions of the Plaintiff/ Appellant). The Deed of assignment having been signed by the 2nd Defendant, they were the appropriate persons to be sued and liable to the Plaintiff if so found and not the 1st Defendant.

That settled, did the 2nd Defendant breach the Covenant to Convey? The implied covenant that a conveyor of property for valuable consideration has the right to convey, means that the vendor has full power and the right to convey the property and the interest he is transferring. Reference **Eastwood vs Ashton (1915) C 900.** He is in effect saying the title he conveys is effectual to pass to a purchaser such continuous and apparent easements as are necessary to the enjoyment of the land conveyed without special mention, and indeed, everything actually or reputedly appertaining to the land. The covenant assures the purchaser that the vendor, has good and right title to convey and that this right is not affected by anything which he or anyone from whom he derives title has done.

This means also that the vendor must necessarily be bound to furnish the purchaser with the means of asserting his title and defending his possession. The purchaser's cause of Action only arises against the vendor, if there is a defect in the title of the transferor which makes it impossible for the transferor to convey the title he has contracted to convey to the purchaser.

Although counsel for Plaintiff, contended that the 2nd Defendant conveyed a defective title to him the facts and record prove otherwise as found by the trial Court. From the undisputed facts of this matter, the 2nd Defendant, had title document to the land. The title Certificate is a final and conclusive evidence of title. The weight and worth of the document is apparent as per Section 18 of the **LAND TITLE REGISTRATION LAW, 1986 (PNDCL 152),** which provides: *"(1) The land register shall be conclusive evidence of title of the proprietor of any land or interest in land appearing on the register." The register is thus the only authoritative proof of title.*

During Cross Examination the Plaintiff admitted that he was aware that the 2nd Defendant had registered title to the subject matter.

On page 76 of the ROA the following transpired

Q: You are aware that the 2nd Defendant had registered title document in respect of the subject matter property.

A: Yes.

In their statement of Defence, the 2nd Defendant averred in paragraph 8 (found on page 20 of the ROA,) that it holds *Land Title Certificate No. TD 0107 Volume 019 Folio 39 dated 17th December, 1998 which covers the subject matter property."*

Plaintiff did not produce any evidence to show that the right or title of the 2nd Defendant had been affected by anything the 2nd Defendant did or anyone from whom he derives title otherwise than by purchase for value, had done. Plaintiff did not also produce any evidence to show that the 2nd Defendant's title had since the conveyance to him, been adjudged in any suit to be defective. The entire evidence before the court, does not show or suggest, and the Plaintiff is not so asserting, that there has been any judgement based on the merit of the case against the 2nd Defendant in respect of their title to the subject matter property or that a Court has held that some other person is the real owner.

There is no evidence produced that the Land Title Certificate of the 2nd Defendant has been cancelled. The fact that some persons had sued the 2nd Defendant, for reliefs which are not evident on the ROA and obtained judgment in default of defence, which has been set aside, does not suggest a defect in the title of the 2nd Defendant.

That being the case, then clearly the 2nd Defendant had the right to convey the land at the time it did.

Likewise the Plaintiff has not asserted that his Land Title Certificate which he holds has been adjudged to be defective or been cancelled pursuant to any judgment or however.

The Plaintiff admitted during cross examination that the title he applied for was still subsisting. *The following transpired during cross examination:*

Q: and by virtue of the deed of assignment and the title certificate of your assignor that is the 2nd Defendant, you also applied for land title certificate in respect of the land assigned to you.

A: yes.

Q: and you were granted full title to the land assigned to you.

A: yes.

Q: that title that you applied for is still subsisting.

A: yes.

We are unequivocal and trenchant in our minds that the 2nd Defendant had the right to Convey title in the land to Plaintiff and did not breach that implied covenant to convey as required under Section 22 (1) of the Conveyancing Act 1973 NRCD175. The trial court therefore rightly ruled accordingly.

Did the 2nd Defendant breach the covenant of Quiet enjoyment as alleged by the Plaintiff? It is an incidence of every sale of land for valuable consideration that the purchaser be granted quiet enjoyment.

Covenant of Quiet Enjoyment means that the covenantee and those claiming through him will not be disturbed in their possession, occupation or enjoyment of the property by anything done, omitted or suffered by the covenantor or by anyone through whom the covenantor derives title other than by purchase for value or by any person rightfully claiming by, through or in trust for the covenantor, unless such a person is claiming in respect of an interest to which the covenance is expressly made subject. Thus any exercise of adverse rights over the property by the transferor or by some person for whom he is responsible, or those lawfully claiming under him will amount to a breach of the covenant.

The covenant is based on the principle that a grantor may not derogate from his grant, that is, he cannot give something with his right hand and take it with his left hand. Thus the covenant is prospective in its operation. The obligation undertaken by the grantor/ covenantor is not to do anything after the date of the grant which will derogate from the grant or substantially interfere with the grantee's enjoyment of the subject matter of the grant.

It is an important aspect of the implied covenant for quiet enjoyment that it is not an absolute covenant protecting a covenantee against interference by anybody, but is a qualified covenant protecting the covenantee against interference with his quiet and peaceful possession and enjoyment of the property by the covenantor or persons claiming through or under the covenantor. The basis of it is that the covenantor, by conveying the property, confers on the covenantee the right of possession during the term and impliedly promises not to interfere with the covenantee's exercise and use of the right of possession. The covenant for quiet enjoyment is broken if the vendor or covenantor or someone claiming under him does anything which substantially interferes with the Purchaser's or covenantee's title to, or possession of the property or with his ordinary and lawful enjoyment of same.

In the instant case, the Plaintiff failed to prove that the demolition of his 4 bedroom house at lintel level, was done by the 2nd Defendant. He also failed to show that his disturbance of enjoyment of the property, was perpetuated by a person or people through whom the Defendant derives title or by any person rightfully claiming by, through or in trust for the 2nd Defendant. The Plaintiff failed to prove that the 2nd Defendant breached his covenant to ensure he quietly enjoyed the possession of the land. Accordingly, we cannot fault the learned trial judge's finding that the covenant was not breached by the 2nd Defendant.

Counsel for Plaintiff has relied on the Unilever case (Supra) and the judgment thereon to buttress his case of breach of Conveyance and the reliefs he seeks.

But in our view, the facts of the Unilever case are not similar to the instant case, and the judgment inapplicable. In that case, the Appellant sold property numbered 1-3 & 10-12 situate at Kumasi, popularly called SNR 1 SAT Building, which forms part of Kumasi Part 1 lands, to the Respondent at a fee of US$500,000.00, payable in three instalments over a given period of time. Having received part payment in terms of the agreement, the Appellant gave the documents on the property to the Respondent. The Respondent was given possession and it started collecting rents from the sitting tenants. The Respondent began the process of registering the property at the Land Title Registry; publications were made in the newspapers about the intended registration, as required by law. A number of objections were raised, prominent among which were those raised on behalf of the Golden Stool of Ashanti whose occupant is the Asantehene. As a result of these objections the registration could not go through principally because of the Asantehene's claim that his consent was not sought before the sale. Consequently, the Respondent treated the sale transaction as having failed and therefore refunded the rents to the Appellant but the latter returned same to the Respondent. The Appellant's position was that as far as it was concerned the Respondent was the new owner since it had been given all the necessary documents to the property, including the consent of the Lands Commission, and had been placed in possession. Eventually, the Respondent refunded the rents to the tenants. The sale contract was subsequently cancelled by the act of both parties, but upon the Respondent's initiative. Following the termination of the contract, the Appellant refunded the cedi equivalent of US$500,000.00 to the Respondent; but it failed or refused to pay any other sum that was demanded by the Respondent. The trial Court gave judgment in favour of the Respondent to recover interest and other charges found to have been proven on the evidence. Costs were also awarded in favour of the Respondent. The

Appellant was dissatisfied so it lodged an appeal to the Court of Appeal. The Court of Appeal virtually upheld the trial Court's decisions in respect of the interest, special damages and costs in a reasoned decision The Appellant was not satisfied hence the appeal to the Supreme Court and the judgment thereon, as relied on by the Appellant as aforesaid.

The fundamental distinction between the instant case and that of the UNILEVER case, is that whereas the vendor in the UNILEVER case merely gave the purchaser the documents on the land, consent of the Lands Commission and possession, but did not transfer title, the Plaintiff herein was granted document which enabled him obtain title to the land in addition to possession. The 2nd Defendant in the instant case, having passed legal title to the Plaintiff was thus legally vested with the purchase price and they do not have to return the money to the Plaintiff as was the case in the UNILEVER case. The Judgement of the court in the UNILEVER case was obviously predicated on the nature of the title conveyed to the purchaser in that case. The Unilever case is thus distinguishable from the instant case and does not assist the Plaintiff.

In our view, once 2nd Defendant had furnished the Plaintiff with the means of asserting his title and defending his possession against all others including the 2nd Defendant, with the Land Title Certificate he held, and additionally had possession of the land to enable him build up to lentil level, then we will not hesitate to agree with the trial judge that 2nd Defendant had performed his obligation under the conveyance and the Plaintiff failed to protect his interest in the land.

Plaintiff wielded the Land Title Certificate to the land in his hand, but he failed to challenge the third party who had entered his land, and who had not satisfied him that he held a higher or better legal title than him, but allowed him to take over the land from him.

There is no evidence on record that Plaintiff heeded the advice of the 1st Defendant when they told him to protect his interest in the land.

Their additional information to Plaintiff that their Motion on Notice for stay of execution and to set aside the writ of possession, had been granted as at 29th October, 2009, and that one of the Defendants, Joseph Sese Bortier, ordered by the Court below to stop the demolition exercise, (Reference page 40 to 41 of ROA) did not weigh on the Plaintiff's mind, to accordingly protect his interest. This information was made known to Plaintiff on 10th May 2010, Reference page 40 of ROA. At the time Plaintiff had returned from London on 24th April 2010, and notwithstanding that his property had been pulled down, all that the 3rd party had done was to build a wall around the land. Plaintiff had sufficient time to challenge the said person, by all legal means at his disposal, but chose to stand by and watch him redevelop the land into a residence and put certain persons in occupation. Reference Paragraph 14 of Statement of Claim page 4 of ROA.

Accordingly, counsel for Plaintiff's submissions seeking to justify Plaintiff's inaction, on the grounds that Defendant failed to tell him when they got to know of the challenge to their title, that is, if it was at the time of the sale or after the sale, and also that Defendants did not join him to the suit do not hold any sway with us.

From the ROA there is no evidence that the Plaintiff himself paid heed to the police when they adviced him to report the matter to the Property Fraud Office of the Police Headquarters upon his complaint to them about the conduct of the 3rd party. Reference page 37 of ROA.

It bears saying that though the Plaintiff was made aware by one Eric in early 2010, that some persons were claiming that they had obtained judgment in a case against his grantors, as per the complaint to the police found on page 38 of the ROA, yet he says he left for London during the first week of April, 2010, without any protection to his property. Thus when he returned on 24th April, 2010, his structure had been razed down.

Reference page 39 of ROA. The vendor cannot be expected to police the title for the purchaser in perpetuity.

In any case, the Plaintiff during cross examination accepted that since he held a valid title certificate in respect of the subject matter it was his responsibility to protect his land from third party encroachers. He testified as follows:

Q: As a holder of a valid Land Title Certificate in respect of the subject matter property, it is your responsibility to protect your land from any third party encroachment.

A: I accept that statement.

From the foregoing, we find no merit in the Plaintiff's ground of appeal against the decision of the trial Court that he failed to protect his interest in the land.

Generally, where an Appellant alleges that the judgment is against the weight of evidence before the Court, then the Appellate Court is required to analyse the Record of Appeal entirely, so as to satisfy itself that on the balance of probabilities the conclusions of the trial judge are reasonable or amply supported by the evidence. But the Appellant also has a duty to point out the pieces of evidence which if the trial Court had taken into consideration would have resulted in a finding in his favour. The Supreme Court case of ***Tuakwa vs Bosom (2001-2002) SCGLR 61*** refers**.**

We have carefully evaluated the evidence on record, and the proceedings that eventuated in the determination of the decision in favour of the Defendant and conclude that the Plaintiff has failed to satisfy us that the judgment is against the evidence adduced at trial.

We think that the Plaintiff failed to persuade us that the Court below erred in its decision on any of the grounds he raised. It is our opinion that, the contract was perfected, legal title had passed and the purchase price legally vested in the 2nd Defendant. This Court endorses the conclusion of the trial Court without any reservation whatsoever as the

conclusion is amply supported by explicit documentary evidence on record. This appeal has no merit and we dismiss same.

Cost of GH¢20,000.00 awarded in favour of the Defendants.

SGD

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JUSTICE SOPHIA ROSETTA BERNASKO ESSAH (MRS)

(JUSTICE OF THE COURT OF APPEAL)

I AGREE **SGD**

……

JUSTICE HENRY KWOFIE

(JUSTICE OF THE COURT OF APPEAL)

I ALSO AGREE **SGD**

……

JUSTICE ANTHONY OPPONG

(JUSTICE OF THE COURT OF APPEAL)

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BOBBY BANSON FOR THE PLAINTIFF/APPELLANT