IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL (CIVIL DIVISION)

ACCRA – GHANA

CORAM: MARGARET WELBOURNE JA PRESIDING

P. BRIGHT MENSAH JA

BARTELS-KODWO JA

SUIT NO. H1/31/2020

5TH APRIL 2023

BETWEEN:

LUMOR BORTEY BORQUAYE … PLAINTIFF/APPELLANT

vs

ALHAJI ABDUL AZIZ … 1ST DEFENDANT/RESPONDENT

KWAME AYEW … 2ND DEFENDANT/RESPONDENT

JUDGMENT

BRIGHT MENSAH JA:

The plaintiff/appellant herein has launched the instant appeal against the decision of High Court, [Land Division] Accra, delivered 13/02/2019 in favour of the defendants/ respondents. Per a notice of appeal filed with this court on 21/03/2019, the plaintiff/ appellant complains that:

1. The judgment is against the weight of evidence.
2. The entire judgment was ambiguous and failed to provide reasons for the conclusions arrived at.
3. The trial judge erred by not following the decisions of the superior courts which are binding on her.
4. The trial judge disregarded and did not determine at all the plaintiff/ appellant's issues 8 and 9 raised on the pleadings and argued in the submission but rather held erroneously and contrary to the evidence on record that the plaintiff/appellant did not raise any issues on the pleadings.
5. The learned trial judge ignored the call for superimposition of plans raised in the plaintiff's issues for determination and paid no attention to all the documentary evidence placed before her for the determination of the identity, location and

ownership of the disputed land, resulting in miscarriage of justice to the plaintiff/ appellant by her holding that the "evidence led establishes that the land in dispute does not belong to the Nungua Stool".

6. The trial judge was wrong in holding that the plaintiff/appellant's action was statute barred from 2001 to 2019 when the evidence on the record clearly shows that there was a legal action challenging the defendants/ respondents occupation of the disputed land from 2003-2011.

7. The trial judge acted under misapprehension of facts in holding that the plaintiff/ appellant's action was caught by estoppel res judicata when that judgment based on Teshie Stool Odartei Tse We family grant cannot be used to lay claim to the disputed Adjirigannor lands declared by the courts to be Nungua Stool land, against the same Odartei Tse We family.

8. The trial judge erred by holding that the plaintiff/appellant's action is statute barred while at the same time holding that the plaintiff/appellant is estopped per res judicata by a litigation that lasted from 2003-2011.

9. The trial judge misapplied the facts and the law when she held in one breadth that Adjiriganor lands belonged to the Nungua Stool alright but

in another breadth held contrary that the evidence adduced did not establish that the land in dispute belonged to the Nungua Stool and or

the plaintiff/appellant.

10. The trial judge holding without explanation that the way some of the issues were framed and the evidence adduced did not establish them in favour of the plaintiff clearly left those issues undetermined and glossed over.

11. The trial judge erred when she held that some issues were not established even though the plethora of documentary evidence on record ie Exh A,B,C,E,F,E1 that supports the said issues were all placed before her and were sufficiently addressed on.

12. The trial judge acted under misapprehension of facts when she differently stated 2003 and 2008 as the commencement date of suit No.TRD40/10 ENTITLED NISSA DEVELOPERS vs KWAME AYEW and yet held against the plaintiff/ appellant that his action is statute barred.

13. The learned trial judge misapplied the law on registration of instruments affecting land leading to grave miscarriage of justice on the plaintiff/appellant.

14. The learned trial judge failed to make any definite finding supported by any evidence on the records as to the conflicting claims of the Nungua stool as against the Teshie stool Odartei Tse We family ownership, identity and physical location of the disputed land.

15. The learned trial judge's conclusion that the plaintiff/appellant is estopped by the High Court decision in Nissa Developers v Kwame Ayew is unsupported by the law on estoppel and was against the evidence on record.

16. The trial judge erred by not following the decisions of the superior courts which are binding on her.

17. Further grounds of appeal will be filed upon receipt of the records of appeal. See: ***pp 186 – 189 of Vol.3 of the record of appeal [roa]***

In launching the present appeal, the plaintiff/appellant prays this court to set aside the entire judgment of the lower court and to enter judgment in his favour. As we proceed along, we shall address the plaintiff/appellant simply as the appellant and the defendants/respondents as 1st and 2nd respondents respectively.

BACKGROUND:

It is appropriate at this stage to chronicle the facts and events leading to the initiation of the case, the trial and the instant appeal. The appellant took out a writ of summons against the respondents for the following judicial reliefs:

1. Declaration of title to all that piece or parcel of land cited in paragraph 5 of the statement of claim.

2. Perpetual injunction restraining the defendants, their principals, agents assign privies and anybody claiming through or under them and or anybody at ll from further entry unto or doing anything in connection with or in respect of the subject matter land.

3. Recovery of possession.

4. Damages for trespass.

5. Cost including legal cost.

The appellant pleaded that he is the eldest surviving son and customary successor to his late father, Konor Borketey Borquaye and brought the action for himself and on behalf of Konor Borketey Borquayes. The said Konor Borketey Borquaye, according to the appellant, had in the year, 1998 took a customary grant of a piece or parcel of land described in paragraph 5 of his statement of claim. The said land is situate and lying at Adjirigannor/New Nungua. His decased father took grant of the land from the Nungua stool for a term of 99 years, according to the appellant.

It is his case that upon his deceased father's acquisition of the land a wall was built around it and some caretakers were put in charge of same. The respondents trespassed unto it; broke portion of the fenced wall and began changing the character and nature of the disputed land. The appellant claimed that the disputed land is part of Adjirigannor lands that is covered by several judgments of superior courts that have decreed Adjirigannor lands in the Nungua stool as belonging to, and owners of the said land. The disputed land does not belong to the Teshie Ashong Mlitse Odartei Tsewe of Teshie and does not also fall within Ottanor, appellant asserted further.

To the appellant, any purported grant to the respondents and/or purported registration they relying on Teshie Ashong Mlitse Odartei Tsewe and Akwaboye Doku families, Empie Builders, Jeezreel Real Estates and Habitat Ltd as their root of title to cover the Nungua stool Adrignanor lands which they do not own, cannot confer valid title to the respondents.

The 2nd respondent, on the other hand, claims that he was granted an assignment of 15 acres of the disputed land situate and lying at North Adjiringannor (Ottanor) by the Jeezreel Real Estate Ltd. According to the 2nd respondent, Jezreel Real Estate Ltd had earlier in time taken its grant from the Ashong Mlitse family of Odartei Tsewe family of Teshie in 2002 and was plotted at the Lands Commission as AR/691/2002 and numbered 267/2005 before assigning its interest to him.

According to the 2nd respondent, the land in question was initially granted to Habitat Gh Ltd by Jezreel Real Estate but was reassigned by the former to the latter who also subsequently leased 15 acres thereof to the 2nd respondent who registered it with number AR/6912, AR/6566/99 and issued with land title certificate No. TD 5459. Furthermore, he claims he subsequently purchased 5 acres of the disputed land direct

from the Ashong Mlitse family of the Odartei Tsewe family of Teshie in the year, 2010. Therefore, in total he had 20 acres for which he caused same to be walled.

2nd respondent pleaded further that he was sued in respect of the land by the Nissa Developers Ltd in suit No. TRD 40/10 titled Nissa Developers Ltd v Kwame Ayew. The Nungua Stool was joined in the suit but he obtained judgment that was delivered somewhere in the year, 2011.

It is also the case of the 2nd respondent that in the year, 2016 another family, Akwraboye Doku family of Teshie also confronted him on the land, the latter family claiming they have a judgment they recovered in suit No. L1997/92 titled Nmai Mensah (substituted by Simon Adjei Adjetey) v Seth Laryea & ors. He averred further that that judgment went against his former grantors ie Ashnong Mlitse family of Odartei Tsewe fa,ily of Teshie. In consequence, he had to renegotiate with the said Akwraboye Doku family of Teshie and was issued with a fresh conveyance in 2016. It is part of the land that he had sold to the 1st respondent in 2015, he averred further.

Issues for trial:

Given the nature of the case, the following issues were set down by the appellant for the consideration of the trial court:

1. Whether or not the boundary of New Nungua – Adjirigannor lands have

   been conclusively determined and declared as properties exclusively

   belonging to plaintiff's grantors, the Nungua stool by virtue of the judgments cited in paragraph 7 of the statement of claim.

2. Whether or not the Teshie stool Otanor land claimed in the case of Nii

   Nmai Mensah (subst'd by Simon Adjei Adjetey) v Seth Laryea & 3 ors

   on superimposition of plans of the disputed land is within and falls inside the boundaries of Adjiringanor-New Nungua stool lands in accordance with the subsisting judgments cited at paragraph 7 of the statement of claim.

3. Whether or not the parties in the Nii Nmai Mensah (subt'd by Simon

   Adjei Adjetey) v Seth Laryea suit No. L 1977/92 are clothed with

   capacity to litigate and or claim title to any portion of the described

   Otanor land that physically falls within the boundaries of Nungua Stool Adjiringanor lands.

4. Whether or not per the judgments cited in paragraph 7 of the statement of claim it is the Nungua stool or the Teshie stool/Odateitse We family/

   Akwroboye Doku family which can lawfully and validly alienate, control and or grant the disputed land falling inside New Nungua Adjiringanor.

5. Whether or not the case of Nii Mensah (subt'd by Simon Adjetey) v

   Seth Laryea (subt'd by Emmanuel Affotey Tetteh) & 3 ors in respect

Of Otanor Teshie stool land if it affects "any inch, acre, hector or thousands" of New Nungua-Adjiringanor land was given and obtained *per incuriam* the judgments cited in paragraph 7 of the statement of claim.

6. Whether or not the judgment in suit no. 1997/92 dated 27/7/2015 plotted in favour of the Akwaboye Doku family at the Lands Commission affecting Adjiringannor lands was obtained *per incuriam* the judgments cited at paragraph 7 of the statement of claim and plotted, *per incuriam,* in error or mistake of rightful ownership.

7. Whether or not any plotting of the judgments in suit No. TRLD40/10, Land Title Certificate No. TD 5459 and documents numbered AR/6912/2002, AR/6506/99 in the record of the Lands Commission were done in error, mistake or *per incuriam* the declarations in judgments cited in paragraph 7 of the statement of claim and must be cancelled, revoked, expunged and or set aside.

8. Whether or not the plaintiff is entitled to his claim.

9. Any other issue(s) arising out of pleadings and/or on the face of the record and/ or in the course of the proceedings. See: ***pp 158-160 Vol. 1 [roa]***

Additional issues:

It is on record that the respondents did also file for determination, the under- listed additional issues:

a. Whether or not the land granted to and occupied by the 2nd defendant forms part of the land allegedly granted to the plaintiff.

b. Whether or not plaintiff has any valid title to the disputed land.

c. Whether or not the plaintiff has any structure on the land granted to and occupied by the defendants.

d. Whether or not the defendants' land falls within the Akwraboye Doku family land.

e. Whether or not the Akwraboye Doku family land has anything to do with the Nungua stool land.

f. Whether or not the plaintiff's claim is statute barred. See ***pp 223-224 Vol. 1 [roa].***

At the end of the trial, the learned trial judge having considered the issues raised at the pre-trial in terms of the evidence adduced at the trial, held that some of the issues were improperly framed. The lower court for eg., held:

"It must be stated that the way these issues were framed

and the evidence adduced did not establish them in favour

of the plaintiff."

See: ***pp 173-174 Vol.3 [roa]*** *[pp 6-7 of the manuscript judgment].*

Apparently explaining why those issues in particular were not properly framed, the lower court stated:

"The issue of whether or not the parties in the Nii Nmai Mensah (substituted by Simon Adjei Adjetey) v Seth Laryea suit No.1977/92 are clothed with capacity to litigate and or claim title to any portion of the described Otanor land that physically falls within the boundaries of Nungua Stool Adjiriganor lands and the issue of whether or not per the judgments cited in paragraph 7 of the Statement of claim it is the Nungua Stool or the Teshie Stool/Odatei Tse We family/Akwraboye Doku family which can lawfully and validly alienate, control and or grant the disputed land falling inside New Nungua – Adjiringanor lands were dealt with together by Counsel for the plaintiff.

Learned Counsel for the plaintiff cited Banga & ors v Dzanie & anr (1989-1990) GLR 510 and submitted that all transactions by the Odartei Tse We family involving Habitat Ltd., Jezreel Estates Ltd, Empire Builders and the 2nd herein, Kwame Ayew and other were

registered affecting Adjiriganor lands and Nungua stool interest and title have long ago been declared per incuriam by courts of competent jurisdiction thus conferring no further right, interest or title over Adjiriganor lands in the said Odartei Tse We family. He stressed that by the judicial pronouncements the Odartei Tse We Family had no title left in any portion of Adjiringanor lands for the 2nd defendant to hold on to litigate the judgment in Exhibit 7 purportedly against the Nungua Stool and or its grantees and to continue to use same to claim and remain on the disputed Adjiriganor land that do not belong to his grantors……..……..”

It is important to observe that on yet another critical issue as to which of the parties in the Nii Nmai Mensah (subt'd by Simon Adjei Adjetey) v Seth Laryea suit No. L 1977/92 are clothed with capacity to litigate and or claim title to any portion of the described Otanor land and whether Otanor land physically falls within the boundaries of Nungua Stool Adjiringanor lands, the lower court ruled:

"…… the way this issue was stated and the evidence led did not assist the court to determine this [sic] ***issues."***

It is not surprising, therefore, that learned Counsel for the appellant has severely criticized the lower court for not properly evaluating the evidence led on record and in the result, denying itself the opportunity of resolving those fundamental issues in the case.

Admittedly, there were as many as fifteen issues including additional issues that the parties raised at the pre-trial for the consideration of, and for determination by the trial court. However, the settled law is that what issues are germane and central to the determination of controversy between parties lies with the trial judge to decide. The courts are therefore not tied down to only the issues agreed upon by the parties at the pre-trial but all issues emerging from the entire spectrum of the case provided that evidence was led on them, even if those issues were not specifically set down for hearing. On the authorities, therefore, the trial court is not bound to consider only the issues set out in an application for directions [hitherto, summons for directions]. Thus, the court is mandated also to consider and determine all issues arising across the entire spectrum of the pleadings provided evidence was led on it. See: ***Kariyavouolas v Osei [1982-83] GLR 658.***

In ***Fidelity v Investment Advisors v Aboagye-Atta [2003-2005] 2 GLR 118*** this court stated the law that what issues were relevant and essential to a case was a matter of law for the trial judge to decide.

The Supreme Court has now put the matter beyond *per adventure* when the apex court speaking through Wood CJ held:

> *"…….. indeed it is sound basic learning that courts are not tied down to only the issues agreed upon by the parties at pre-trial. Thus, if in the course of the hearing an issue is found to be irrelevant, moot or even not germane to the action under trial, there is no duty on the court to receive evidence and adjudicate on it. The converse is equally true. If a crucial issue is left out but emanates at trial from either the pleadings or the evidence, the court cannot refuse to address it on the grounds that it is not included in the agreed issues".* **[emphasis added]**

See: ***Fatal v Wolley [2013-2014] 2 SCGLR 1070 @ 1076.***

Guided by the above sound legal principles, we are of the considered opinion that the lower court abdicated its judicial mandate to sufficiently and or properly evaluate the evidence led on record and to determine the penultimate issues the case raised, capable of disposing of the case one way or the other.

On principle, going by the pleadings the parties filed in this case and from the available evidence led on record both oral and documentary, it cannot be overemphasized that those issues that the lower court claimed were not properly framed, were the very foundational issues that were to determine the case one way or the other. Going by the pleadings the parties filed, some of the central issues that ought to have gained the attention of, and weighed on the mind of the lower court were:

1. Whether the land the 2nd respondent claims is factually situate and lying at Ottanor, the north of Adjiriganor or that it rather forms part of the Adjiringanor lands.

2. Whether title to Adjiriganor lands has indeed been decreed in the Nungua stool by reason of some judgments of superior courts the appellate pleaded in paragraph 7 of the statement of claim.

3. If the land forms part of the Adjiriganor lands, whether the judgments the 2nd respondent relied on in the trial of this appeal were given *per incuriam.*

We take notice that the appellant has repeated 3rd ground of appeal in the 16th ground of appeal. Obviously this is a human error. We shall therefore treat the 3rd and the 16th

grounds of appeal as one ground of appeal. Per the ground of appeal, the appellant complains the trial judge erred by not following the decisions of the superior courts which were binding on her.

The appeal:

We now proceed to evaluate the evidence the parties led on record and analyze the arguments of Counsel.

By a stream of decided cases, the law is certain that an appeal is by way of re-hearing the case. The Court of Appeal Rules, **C.I 19 rule 8(1)** provides that any appeal to the court shall be by way of re-hearing. The phrase, ***"an appeal is by way of re-hearing"*** has received several judicial interpretation in a legion of cases. In ***Nkrumah v Ataa [1972] 2 GLR 13 Holding 4***, for eg., the court emphasized:

> *"Whenever an appeal is said to be 'by way of re-hearing' it means no more than that the appellate court is in the same position as if the rehearing were the original hearing, and the appellate court may receive evidence in addition to that before the court below and may review the whole case and not merely the points as to which the appeal is brought, but evidence that was not given before the court below is not generally received."*

Re-echoing the principle, the Supreme Court in ***Akufo-Addo v Catheline [1992] 1 GLR 377 @ 392*** stated the law as follows:

> *"It must be pointed out that the phrase does not mean that the parties address the court in the same order as in the court below, or that the witnesses are heard afresh. What it does however indicate is that the appeal is not limited to a consideration whether the misdirection, mis-reception of evidence, or other alleged defect in the trial has taken place,*

so that a new trial should be ordered. It does also mean, as pointed out by Jessel M.R in Purnell v Great Western Rail Co. [1876] 1 QBD 636 @ 640, C/A that the Court of Appeal is not to be confined only to the points mentioned in the notice of appeal but will consider (so far as may be relevant) the whole of the evidence given in the trial court, and also the whole course of the trial." **[emphasis ours]**

The settled rule, therefore, is that the appellate court is enjoined by law to scrutinize the evidence led on record and make its own assessment of the case and the evidence led on record just like a trial court. Where the court below comes to the right conclusion based on the evidence and the law, its judgment is not disturbed. The opposite is equally true and the judgment is upset on appeal where it is unsupportable by the facts and or the evidence.

Traditionally, it is key duty of a trial court to resolve primary issues of fact. The Supreme Court in ***Quaye v Mariamu [1961] 1 GLR 93 @ 95*** in stating that general rule that it is the duty of the trial court to resolve the primary facts, ruled that once the facts are found, an appellate court is in as good a position as a trial court to draw inferences or conclusions from those facts.

The law is also that where the appellate court was obliged to set aside a judgment of a lower court, it must clearly show it in its judgment where the lower court went wrong. We need to reiterate that it is not every error committed by the lower court that attracts the sanctions of the appellate court. For the appellate court to interfere in the judgment of the lower court to set it aside, the error must be so fundamental that goes to the root of the case capable of overturning the judgment. In other words, ordinary error(s) which are at the periphery do not attract sanctions of the appellate court.

In summary, therefore, where the appellate court is invited to rehear a case, it exercises the same power as the trial court to review the case as a whole. In exercising that power it has the jurisdiction as the trial court to make its inferences and to come to its own conclusions. See: **rules 31 & 32 of the Court of Appeal Rules, 1997 [C.I 19].**

In arguing out present appeal, learned Counsel for the appellant combined grounds 1, 5, 9, 11, 14 of the appeal together. We propose to discuss the omnibus ground ie 1st ground of appeal before proceeding to consider the other grounds.

1st ground of appeal: THE JUDGMENT IS AGAINST THE WEIGHT OF EVIDENCE

Learned for the appellant has severely criticized the learned trial judge, submitting that the entire judgment of the lower court is ambiguous and the learned trial judge having failed to provide reasons for the conclusions she arrived at**.**

Now, to say that **a judgment is against the weight of evidence** implies that there are on the face of the judgment, some errors or facts or both. In either case, the presumption is that the trial court applied wrong principles of law to the case under consideration. It could also be implied that the findings of the court could not be supported having regard to the evidence led on record. We note, however, that making primary findings of fact is the prerogative of the trial court and where on the evidence the findings are supportable the findings shall not be disturbed on appeal. The converse is equally true where the findings cannot be supported.

Traditionally, where a party has complained that the judgment cannot be supported having regard to the evidence led at the trial, it was incumbent on the party to so demonstrate it. There are legion of authorities that have consistently held that when an

appeal hinges on that **omnibus ground** that the judgment is against the weight of evidence, duty is cast on the appellant to demonstrate the lapses in the impugned judgment complained of. See: ***Djin v Musah Baako [2007-2008] 1 SCGLR 686.***

The principle was re-echoed the rule in ***R v Central Regional House of Chiefs & ors; Exparte Gyan IX (Andoh – Interested Party) (Civ. App. No, J4/11/2013 of 19/07/2013 (unreported)*** wherein the Supreme Court is credited with that statement of law that an appellant has a duty to clearly show where the court below went wrong or where it failed to take into consideration all the circumstances of the case and the evidence led on record or that it had drawn wrong inferences without any evidence in support.

It is quite important to stress that having regard to the evidence led on record in this case, both oral and documentary, we do roundly agree that the lower court totally failed to properly evaluate and address all the salient issues in controversy.

Foremost, the appellant had pleaded in paragraph 7 of his statement of claim that some superior courts of judicature by their pronouncements have decreed title to Adjiringanor lands in the Nungua Stool. For purpose of clarity, we reproduce here below that assertion averred contained in paragraph 7 of the statement of claim that runs as follows:

> *"7. Plaintiff says there have been several judicial decisions*
>
> *including cases of Empire Builders Ltd v Nii Bortrabi Obroni*
>
> *& 4 ors in suit No. H1/137/2005; Theophilus Teiko Tagoe in*
>
> *Suit No. IRL 73/10 which have all declared the Nungua stool*
>
> *as the lawful owners of the Adjiriganor lands as against the*

Teshie stool. So by the subsisting judgments the Teshie Stool

has no land in the vicinity to lawfully grant to anybody at all."

In proof of the above averment, the appellant tendered in evidence without objection, those judgments herein referred to:

i) Judgment of the Court of Appeal marked **Exhibit D** in suit No. H1/137/2005 dated 18/12/2014 entitled: Empire Builders Ltd v Top Kings Ltd & 3 ors appears on the record at ***pp 176-193 Vol. 2 [roa].***

ii) Judgment of the High Court in a suit No. IRL 73/10 entitled: 1. Theophilus Teiko Tagoe 2. The Nungua Stool v Dr Prempeh 2. Daniel Markwei Marmah delivered 31/07/2015 was marked **Exhibit E** and that appears on ***pp 194-223 Vol. 2 [roa].***

iii) Judgment of the Supreme Court in Suit No. Civil Motion No. J5/15/2015 entitled: The Republic v The High Court (Land Division) Accra; Exparte: The Lands Commission – (Nungua Stool & 7 ors – Interested Parties) appears at ***pp 224-246 Vol. 2 [roa].***

Additionally, the appellant tendered in evidence some documents including an indenture, **Exhibit A** which described the land as all that piece of or parcel of land situate, lying and being at Adjiriganor and gave the size as 23.20 acres. His site plan attached to the indenture **Exhibit 1D** in support of his claim the disputed land appearing at ***p. 1F, Vol. 2 [roa]*** confirms the identity and size of the land as described

supra. Furthermore, the appellant tendered in evidence, a Lands Commission Survey map, **Exhibit F** appearing on ***p. 247 Vol. 2 [roa].***

We have critically studied all the judgments the appellants tendered referred to supra in support of his claim and are left in no doubt that the pronouncements squarely affirm that the Adjiriganor lands belong to the Nungua Stool. Significantly, the lower court itself made a finding of fact that from the available evidence, **it was clear Adjiringanor lands belong to the Nungua Stool.** See: ***p. 173 Vol. 3 [roa]***

The respondents, on the other hand, tendered in evidence indenture from the Odartei Tsei We family of Teshie, the basis of the 2nd respondent's claim and this appears on ***p. 170F Vol.2 [roa].*** The respondents also put in evidence, site plan found on ***p. 170G Vol.2 [roa]*** indicating that the locality of their land is at North Adjiraganor. In evidence in support of their claim were also **Exhibits 1, 2, 3 and 4** as well as **Exhibit 6.**

i) Exhibit 1 is found at ***p. 40-44 Vol.1 [roa];***

ii) Exhibit 2 at ***pp 45-46 Vol.1 [roa];***

iii) Exhibit 3 at ***pp 47 – 52 Vol. 1 [roa];***

iv) Exhibit 4 at ***p. 53-56 Vol. 1 [roa];*** and

v) Exhibit 6, a judgment of the High Court differently constituted appears at ***p. 71-79 Vol. 1 [roa].***

The respondents tendered further in support of their case, another judgment of the High Court in a suit No. 1997/92 entitled: Nii Nmai Mensah (substituted by Simon Adjei Adjetey v Seth Laryea Mensah & 2 ors with Samuel Adjei Mensah as the Co-defendant. That was received in evidence as **Exhibit 8** and that appears on ***pp 80-130 Vol.1 [roa].***

It is noted that the judgment referred to in the preceding paragraph ie Exhibit 8 deals with a declaration of title to all that tract of land at Otanor on Teshie stool land bounded on one side by Adjiringanor land, one side by Otinshe land, another side by CSIR land and the other side by Adjiringano land. **Exhibit 6** likewise deals with title to land and recovery of possession of all that piece or parcel of land situate at New Nungua (East Legon) measuring approximately 44.92 acres.

But is New Nungua land the same as Otanor land that is situate at North Adjiriganor and shares a common boundary with the Adjiriganor lands? This issue, among other salient issues, called for determination by the lower court.

A court of competent jurisdiction is mandated by law to give a decision that reflects the totality of the evidence on record. In exercising that judicial mandate it is the duty of the court to make findings on primary facts and apply the law to the facts. Anything short of that is an abdication of the time-honoured mandate. See: ***Frederick Yaw Agyarkwa & ors v Nii Odamatey & anr [2020] DCLA 8846***.

See also: ***Alex Aboagye, Moses Essien & 257 ors v Attorney General & anr [2016] DLSC 2873*** and ***Domfeh v Adu [1984-86] 1 GLR 653***.

We have had serious regard to the evidence led on record and we do roundly agree with the submissions of learned Counsel for the appellant that the lower court failed to resolve the primary facts in this case and did not give any acceptable conclusions. As pointed out elsewhere in this judgment, one of the primary issues in the case that needed to be resolved was whether the disputed land is either situate at Adjiraganor or Otanor. It cannot be lost on this court that both parties agree that Otanor land shares boundary with Adjiraganor and is situate at the north of Adjiriganor.

From the available evidence, it is plainly obvious the story of the appellant has been consistent with his pleadings, in that the disputed land forms part of the land the Nungua Stool granted to his deceased father in the 1990s which he inherited upon the demise of his father. The appellant maintained throughout the trial that the land, the subject matter of the dispute is situate at Adjiriganor. The respondents, on the other hand, in one breadth says the disputed land is situate at Otanor but in another breadth says it is at New Nungua. But according to the appellant, New Nungua is the same as Adjiringanor.

One of the judgments the 2nd respondent relied on describes the land as Otanor whilst the other describes it as New Nungua. It is obvious therefore those judgments of the High Court, **Exhibits 8 & 6** on which respondents rely, run in conflict with each other. The respondents have not explained with any degree of certainty which of the two judgments support their claim as to whether the disputed land is at Otanor or New Nungua.

Insofar as there are apparent conflicts in the story of the respondent whereas that of the appellant is consistent with his pleadings and evidence, we prefer the story of the appellant to the respondents and hold that the disputed land is situate at Adjiringanor on the Nungua stool lands. For, the settled position of the law is that where there was a departure from pleadings at a trial by one party whereas the other's evidence accorded with his pleadings, the latter's story was as a rule, preferable. See: ***Appiah v Takyi [1982-83] GLR 1***, the decision of this court.

The appellant put in evidence without any objection, a survey map of Accra indicating the location of Adjiringanor and Otanor lands. Per this survey map, **Exhibit F** appearing on ***p. 247 of Vol. 2 [roa],*** Otanor lands lie north of Adjiriganor. Significantly,

although it is the case of the respondents that their land is situate at Otanor, North Adjiringanor per **Exhibit F**, the respondents' land falls squarely within the same grid lines of the survey map on latitudinal grid lines of 355000 and longitudinal grid lines of 1220000 with a scale of 1:2500. The appellant has all along maintained both in his pleadings and evidence both oral and documentary that his land [the disputed land] is situate and lying at Adjiriganor. There is enough evidence particularly as per **Exhibit F** to find and we do hold that the land in dispute is situate and lying at Adjiriganor and not at Otanor which is also described as North Adjiringanor.

Flowing from the finding that the disputed land is situate and lying at Adjiriganor it goes without saying it forms part of the Nungua Stool lands. In the circumstances, it is the Nungua Stool that has the power to alienate any portion of the Adjiringanor lands and no other family, stool or entity without recourse to the Nungua stool. In the case of: 1.Theophilus Teiko Tagoe 2. The Nungua Stool v Dr Prempeh 2. Daniel Markwei Marmah case [supra] the court made these remarkable observations when dealing with the identity of the land in dispute:

> *"By far the most critical issue is as to the identity or location of the subject land. Its location is decisive of the case. If the land is situate at Adjiringanor, then it is the 2nd plaintiff which had the right to alienate it since it is part of its Nungua Stool land ……"*

See: ***p. 202 Vol. 1 [roa]***

In the final analysis, the court held it was incontestable that the Adjiringanor lands belong to the Nungua Stool.

As a matter of emphasis, also appearing on ***pp 181-182 Vol.1 [roa]*** is the finding of the Court of Appeal in the case of ***Empire Builders Ltd v Top Kings Ent. Ltd & ors [supra]*** that runs as follows:

> *"…… There was abundant evidence on record to support the trial judge's finding that the disputed land belonged to the Nungua Stool and not the Teshie Stool. There was the evidence that before the statutory declaration of ownership by the Ashnong Mlitse Family of Teshie the Nungua per its chief, Nii Odai Ayiku had been granting leases of the land to its subjects which were registered by the Lands Commission. There was also the evidence that the Government of the Gold Coast acquired a large portion of the disputed land from the Nungua Stool in the 1940s. There was also the undisputed evidence that it was the Nungua Stool which granted part of their land to the Teshie people to settle on but the Teshie people went beyond the area granted to them……"* See: ***pp 181-182 Vol. 1 [roa].***

In summary, therefore, by these authoritative pronouncements coming from these courts of competent jurisdiction, Adjiringanor lands are owned by the Nungua Stool.

Guided by the principles stated supra and coupled with the pieces of evidence herein referred to, and other evidence led on record, it is not difficult to find that the judgment of the lower court in the instant appeal was against the weight of evidence.

That leads us to discussing the issue whether the decision of the lower court in our present appeal was given *per incuriam.*

3rd ground of appeal: THE JUDGMENT OF THE LOWER COURT WAS GIVEN PER INCURIAM

In this ground of appeal which is repeated as 16th ground of appeal, the appellant complains that the trial judge erred by not following the decisions of the superior courts which are binding on her.

To start with, by reason of ***Article 129(3) of the 1992 Constitution of Ghana*** this court as well as other courts below are bound by all decisions of the Supreme Court on questions of law. Similarly, this court is bound by its previous decisions whilst all other courts lower than the Court of Appeal shall follow the decisions of the court on questions of law. See: ***Article 136(5) of the Constitution.***

In order to do any meaningful discussion and analysis of the issue, it is not only desirable but appropriate to resort to the assertion of the 2nd respondent as to how he acquired the disputed land and the judgment he recovered in suit No. TRLD 40/10 entitled: **Nissa Developers Ltd v Kwame Ayew** on which he heavily relied in the course of the trial and the other judgment of the High Court he tendered in evidence.

Going by his pleadings, the 2nd respondent claims that he was initially granted an assignment of 15 acres by the Jeezreel Real Estate Ltd. who had earlier on in 2002 taken its grant from the Ashong Mlitse family of Odartei Tsewe family of Teshie. He subsequently in the year, 2010 purchased 5 acres more direct from the Ashong Mlitse

family of the Odartei Tsewe family of Teshie all in total, 20 acres. He then caused same to be walled.

It was 2nd respondent's case again that he was sued in respect of the land by the Nissa Developers Ltd in suit No. TRD 40/10 titled Nissa Developers Ltd v Kwame Ayew. The Nungua Stool was joined in the suit but he recovered judgment. That was in the year, 2011. However, in the year, 2016 another family by name Akwraboye Doku family of Teshie also confronted him on the land. According to the 2nd respondent, that family claimed they have a judgment they recovered in suit No. L1997/92 titled Nmai Mensah (substituted by Simon Adjei Adjetey) v Seth Laryea & ors against his former grantors ie Ashong Mlitse family of Odartei Tsewe family of Teshie. In order not to lose the land, the 2nd respondent claims he had to renegotiate with the said Akwraboye Doku family of Teshie. Consequently, he was issued with a fresh conveyance in 2016 and it is part of the 20-acre piece of land he acquired that he sold a portion thereof to the 1st respondent in 2015.

It bears stressing that one of the fundamental issues that was raised for consideration of the lower court and for determination and worth repeating here, was whether per those judgments the appellants pleaded in paragraph 7 of the statement of claim it was the Nungua stool or the Teshie stool/Odateitse We family/Akwroboye Doku family which can lawfully and validly alienate, control and or grant the disputed land falling inside New Nungua Adjiringanor.

Sadly, instead of the lower court making a definite pronouncement on that key issue rather observed in its judgment as appearing at ***p. 175 Vol. 2 [roa]***

as follows:

> *"With regard to the issue of whether or not the case of Nmai*

Mensah (substituted by Simon Adjei Adjetey) v Seth Laryea & Ors in respect of Otanor Teshie Stool land affects 'any inch, acre, hectare or thousands' of New Nungua-Adjiringanor lands was given and obtained per incuriam the judgments cited in paragraph 7 of the statement of claim, the way this issue was stated and the evidence did not assist the court to determine this issue," **[emphasis added]**

Now, a careful reading of the judgment of the lower court leaves us in no doubt whatsoever that the learned trial judge was heavily persuaded by the judgment the 2nd respondent purportedly recovered in the case of Nissa Developers Ltd in suit No. TRD 40/10 titled Nissa Developers Ltd v Kwame Ayew. That judgment, it cannot be over-emphasized, is fraught with a lot of errors, both on the law and the facts. This is because although the Nungua Stool applied to join as a party in the case, there is nothing on record to show that the plaintiff took the necessary procedural steps to draw up the order of joinder and to properly make the Nungua Stool as a necessary party as required by **Order 4 r 5(5) of the High Court [Civil Procedure] Rules, 2004 [C.I 47]**. That rule stipulates:

"(5) When an order is made under subrule (2), the writ shall within fourteen days after the making of the order or such other period as may be specified in the order, be amended accordingly and indorsed with a reference to the order in

pursuance of which the amendment is made and with the

date on which the order for the amendment is made."

The rule further provides that where a person is ordered to be made a defendant, the person on whose application the order is made shall procure it to be noted in the cause book by the Registrar and after it is so noted. See: **Order 4 r 5(6) of C.I 47.**

As pointed out supra, there is nothing on record to show that after the joinder of the Nungua Stool in that case as the 2nd defendant, the writ was so amended to reflect the joinder and or the plaintiff complied with **Order 4 r 5(6) of C.I 47.** In absence of any evidence to the contrary, we hold that the Nungua Stool was not properly made a party in that case and therefore, the judgment the 2nd respondent herein recovered in that case was not binding on the Stool and by extension, the appellant in this case, a grantee of the Nungua Stool. So, that trial court having not ensured that the plaintiff did the needful to make the Stool a necessary party to the suit and in consequence ended up not giving hearing Nungua Stool in the case, flew in the face of the settled principles of law.

First, the lower court having made order for joinder in the case which effect was to enable all matters in controversy to be completely and effectually determined once and for all, but not giving hearing to the Nungua Stool amounted to a breach of the rule of natural justice for which reason the decision of the lower court was liable to be set aside. A court generally has no jurisdiction to proceed against a party who has not been served or notified of a hearing date. To hold otherwise would be a clear violation of the *audi alteram partem rule.* See: ***Nana Ampofo Kyei Baffour (suing per his lawful attorney Nana Antwi Fosuhene) v Justmoh Construction & ors J4/51/2016*** per Adinyira JSC.

See also: ***R v Court of Appeal & Thomford; Exparte Ghana Chartered Institute of Bankers [2011] 2 SCGLR 941*.**

Second, in an action for a declaration for title to land and or for recovery of possession, the rule is that even where a party defaulted in entering appearance the plaintiff must proceed as though the defaulting party had appeared. That was another way of saying that the case ought to take its normal cause. See: ***Conca Engineering v Moses [1984-86] 2 GLR 319 C/A.***

A case taking its normal cause simply means that the plaintiff, shall as a matter of law, serve all processes filed in court as well as hearing notices on the defaulting party. The effect of this rule is that the defaulting party would not turn round to complain that he was not properly notified and or was not given a hearing. See: ***Bortey Alabi v B5 Plus Co. Ltd & anr [2013-15] 2 GLR 222*** the court adopting and applying the cases, ***In re West Coast Dyeing Industry Ltd; Adams v Tandoh [1984-86] 2 GLR 561 CA*** and ***Barclays Bank v Ghana Cable Co. Ltd [1998-1999] SCGLR 1.***

Having regard to these breaches of rules of procedure and the *audi alteram partem rule*, the judgment in suit No. TRD 40/10 titled Nissa Developers Ltd v Kwame Ayew was in the eyes of the law, legally bankrupt. In consequence, the lower court in the instant appeal should not have considered it at all, let alone heavily relying on it to hold that the judgment raised an issue of estoppel. We shall revisit that issue.

We return to the issue whether the judgment of the lower court was given *per incuriam.*

Needless to emphasize, we have critically studied the whole record of appeal; analytically read the judgment of the lower court in the instant appeal and considered the arguments of Counsel on the point and we are left in no doubt whatsoever that the judgment runs in conflict with the judgments of both the Court of Appeal and the Supreme Court the appellant tendered in support of his case, particularly the Court of Appeal which authoritatively held that Adjiringanor lands belong to the Nungua Stool

and not the families of Teshie. As a matter of emphasis, we reiterate our position that the available evidence in this case established that the land the families from Teshie mentioned supra which the respondents lay claim to, does not form part of Adjiringanor lands. Those pieces or parcels of land the Teshie families lay claim to, form part of Otanor lands which both parties in the instant appeal agree lies north of Adjiringanor.

To the extent that the lower court failed or refused to follow both judgments of Court of Appeal and the Supreme Court on questions of law in accordance with ***Articles 129(3) & 136(5) of the 1992 Constitution*** we hold that the judgment of the lower court delivered in our present appeal was given *per incuriam.*

Another point worth noticing is that although the lower court had earlier made a finding of fact that Adjiringanor lands belong to the Nungua stool it nevertheless went ahead to hold at ***pp 176-177 Vol. 3 [roa]*** that the evidence adduced did not establish that the land granted to and occupied by 2nd respondent forms part of the land granted to the plaintiff. Having so held, the learned trial judge then proceeded to dismiss the claim of the appellant. We have critically evaluated the whole evidence and are of the view that the decision flies in the face of copious evidence the appellant put before the court. **Exhibit F,** the survey map of Accra, for e.g., clearly established that the land in dispute falls within Adjiringanor lands whereas the land the respondents lay claim to, equally falls within Adjiringanor lands.

First, as noted elsewhere in this judgment, the judgments **Exhibits 6 and 8** the respondents relied on to press their claim, obviously run in conflict with each other. Admittedly, the 2nd respondent never made a counterclaim in the case. However, once he relied on those 2 judgments to support his claim it can be safely held he carried the

burden to establish with clarity, the identity of the land he claims. See: the oft-quoted case, ***Anane v Donkor [1965) GLR 188 SC***.

Next, it was established that the site plan attached to the appellant's indenture tendered in evidence conforms in size with what is marked and edged red on the survey map, ***Exhibit F.*** It is instructive that the site plan respondents tendered as appearing at ***p. 170G Vol. 2 [roa]*** indicates that the land he lays claim to, is situate and lies at North Adjiringanor also known as Otanor. However, evidence abounds that the land the respondents lay claim to physically falls within the same grid lines of the appellant's land on latitudinal grid lines of 355000 and longtitudinal grid lines of 1220000 with a scale of 12500. See*: **Exhibit F at p. 247 Vol. 2 [roa].*** It follows, therefore, that if the respondents claim that they took their land from the Odartei Tse We and Akwraboye Doku Teshie families then they cannot use that grant to dislodge the appellant whose evidence has persistently established that the disputed land lies at Adjiringanor and not Otanor.

At this stage we want to combine the **7th, 8th, 12th and 15th grounds of appeal.** The combined effect of these grounds of appeal is that the lower court erred in law when it held that plaintiff/appellant's action was caught by estoppel res judicata and also that the case was statute barred.

In its judgment, the lower court held that from the evidence the 2nd respondent has been in possession of the disputed land since 2001. That, according to the learned trial judge, was more than 12 years hence by law, the appellant's case was statute barred. ***See: p. 178 Vol. 3 [roa].***

We have read and re-read the statement of defence the 2nd respondent filed in the lower court on 22/03/2018 as appearing at ***pp 27-31 Vol.1 [roa]*** and it is clear on the face of the

record that the statement of defence never raised any issues of the appellant's case being caught by estoppel res judicata and also that the case was statute barred. Put differently, the respondents never specifically pleaded in their statement of defence that the appellant's case was caught by the issue of res judicata or that it was statute barred.

It is trite learning that the issue of a case being statute barred or caught by the statute of limitation is a special defence that shall be pleaded and proved. To prove existence of estoppel a party has to put in evidence the writ and proceedings of the previous suit as well as the judgment and the reasons of the judgment. See: ***Apeah & anr v Asamoah [2003-04] 1 SCGLR 226.***

There is that complaint also that the lower court *suo motu* raised the issue that the judgment the 2nd respondent recovered in suit No. TRLD 40/10 entitled: Nissa Developers Ltd v Kwame Ayew operated as an estoppel res judicata against the appellant. The lower court held at ***p. 180 Vol. 3 [roa]*** that the evidence led made it clear that the appellant was estopped per rem judicata by reason of the judgment in favour of the 2nd respondent in Suit No. TRLD 40/10 entitled: Nissa Developers Ltd v Kwame Ayew [supra] until the said judgment was set aside or quashed.

It has been submitted on behalf of the respondents the claim in that case mentioned supra was for a declaration of title in relation to the disputed land, the same claim appellant herein instituted the action at the lower court. Learned Counsel for the respondents has canvassed the point that once the appellant claimed to be a grantee of the Nungua Stool, the judgment in the case which is still subsisting because it has not been set aside, is binding on the appellant and operates as estoppel res judicata. In support, Counsel relied on the statement of law the Supreme Court established in ***Dzidzienyo v Tsaku & ors [2007-2008] SCGLR 531***.

In re-echoing the principle in ***Dzidzienyo v Tsaku & ors [supra]*** the apex court stated:

> *"It is well settled under the rule of estoppel that if a court of competent jurisdiction has tried and disposed of a case, the parties themselves and their privies cannot, thereafter, bring an action on the same claim or issue. The rule covers matters actually dealt with in the previous litigation as well as those matters which properly belong to that litigation and could have been brought up for determination but were not raised."*

For a case to operate as estoppel per rem judicata or res judicata the following elements shall be present:

1. There must be an earlier decision on the issue;
2. The decision was a final judgment on merits of the case;
3. The parties involved in the case were/are the same parties or parties in privies with the original parties.

See: ***Nana Brafo Dadzie II v John K Arthur [2017] 108 GMJ.***

See also: ***Foli & ors v Agya-Atta & ors (Consolidated) [1976] GLR 194 @ 197 C/A.***

Undoubtedly, the principle stated in the cases referred to supra is good law. However, it is inapplicable in our instant appeal for obvious reasons. First, what we find in this case is that the respondents per their statement of defence never raised or pleaded the special defence of the appellant's case caught by estoppel per rem judicata.

Equally important is also the finding of this court that the appellant's grantor, the Nungua Stool was, technically speaking, not properly made a necessary party to the case and in violation of **Order 4 r 5(5)&(6) of C.I 47.** In consequence, estoppel res judicata never applied to our present the case. Thus, the lower court erred when it raised the issue *suo motu* and held that the rule of estoppel res judicata applied.

As regards the question of the case of the appellant being statute barred, as stated elsewhere in this judgment, the settled position of the law is that it is special defence that ought to have been specifically pleaded and proved by evidence. See: ***Sasu v Amua-Sekyi [2003-2004] SCGLR 742.***

The Supreme Court in ***Dolphyne v Speedline Stevedoring Co. Ltd [1996-97] SCGLR 514*** held expressly that the statute of limitation that is to say, NRCD 54 was essentially a special plea which must be pleaded as required by the rules. And that if it was not pleaded, it cannot be adverted to in Counsel's submissions to the court, and the court would not on its own motion, take notice that an action was out of time.

In absence of the special defence of statute barred pleaded in the respondent's statement of defence, we find and hold that the lower court erred in law for raising it *suo motu* thus occasioning a gross miscarriage of justice to the appellant. What the lower court did amounted to setting up a case different from the respondents'. A court lacks the jurisdiction to substitute a case *proprio motu*, nor accept a case contrary to, or inconsistent with, that which the party himself puts forward. See: ***Dam v Addo [1962] 2 GLR 200.***

On the authorities, it is only issues like want of jurisdiction of the court to adjudicate a matter or the capacity of a party to mount an action that the court is clothed with jurisdiction to *proprio motu* raise it and invite the parties to address the court on it

because it goes to the root of the very foundation of the case. On the issue of jurisdiction for eg., the Supreme Court speaking with unanimity through Acquah JSC (as he then was) enunciated the principle to the effect that the issue can be raised at any time and regardless whether the parties raise it or not the court is duty bound to consider it. And where the issue is not raised the court is to raise it suo motu and call the parties to address that issue. See: ***AG (No. 2) v Tsatsu Tsikata (No.2) [2001-2002] SCGLR 620 @ 646***. See also: ***Frimpong v Nyarku [1998-99] SCGLR 734.***

In ***Bimpong-Buta v General Legal Council [2003-2004] 1200*** the Supreme Court re-echoed the avowed position of the law that jurisdiction is a fundamental issue in every matter to the extent that even if it was not questioned by any of the parties, it was crucial for a court to advert its mind to it to assure a valid outcome.

On the question of lack of capacity of a party to mount an action, the settled law is that if a party brings an action in a capacity he does not have the writ is a nullity and so are the proceedings and the judgment founded on it. Thus, if none of the parties raised it, the court may *sou motu* raise it and invite arguments or evidence to determine the issue before proceeding to try the case on its merit, if necessary. See: ***R v High Court; Exparte: Aryeetey [2003-2004] SCGLR 398.***

It is trite learning that capacity may be raised at any time, even on second or third appeal. In ***Standard Bank Offshore Trust Co. Ltd (subt'd) by Dominion Corporate Trustees Ltd v National Investment Bank Ltd & 2 ors [2018]*** the Supreme Court speaking through Benin JSC stated the law as follows:

> *"A writ that does not meet the requirement of capacity is null*
>
> *and void. Nullity may be raised at any time in the course of*

the proceedings even on a second or third appeal……"

Undoubtedly, we have sufficiently addressed all the salient issues the case raises, capable of disposing of the appeal. We do not therefore intend to discuss any further grounds of appeal.

Conclusion:

Overall, the appeal succeeds in its entirety. The appeal is allowed. The judgment of the lower court is hereby set aside and we enter judgment for the appellant on all the reliefs endorsed on his writ of summons. The appellant in the court below had sought for a declaration of title; recovery of possession; damages for trespass and perpetual injunction. All are granted under the power of this court stipulated in **rule 32 of the Court of Appeal Rules, 1997 [C.I 19].** We make an award of Ghc20,000.00 damages in favour of the appellant.

Costs to the appellant awarded against the respondents in favour of the appellant assessed at Ghc15,000.00.

SGD

P. BRIGHT MENSAH

(JUSTICE OF APPEAL)

SGD

MARGARET WELBOURNE

(JUSTICE OF APPEAL)

SGD

JANAPARE A. BARTEL-KODWO (MRS)

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