IN TE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA, AD 2023

CORAM: CECILIA H. SOWAH, JA (PRESIDING)
ANTHONY OPPONG, JA
KWEKU T. ACKAAH BOAFO.JA

SUIT NO. H1/208/2018

DATE: 20TH APRIL 2023

KWABENA APPIAH. .... PLAINTIFF/RESPONDENT

VRS.

SARAH ODONKOR HESSE. .... DEFENDANT/APPELLANT

J U D G M E N T

ANTHONY OPPONG JA:

Plaintiff/Respondent to be referred to simply as Respondent claimed to have obtained a lease of land from one Madam Doreen Boatemah Bitihene by way of assignment dated 25th July 1995. Respondent claimed further that when he acquired the land he took immediate possession by erecting pillars and constructing concrete foundation for a house.

Respondent pleaded that defendant/appellant to be referred to simply as appellant trespassed unto his (respondent's) land and started constructing a house on the plot of land.

Consequently, respondent sued appellant at the court below and claimed declaration of the 0.44 acre land situate and being at Dome Village, Accra; recovery of possession of the said land; perpetual injunction and general damages for trespass.

The appellant denied the claim of respondent. She claimed to have acquired 0.24 acre land situate and being at North-Dome, Accra in 1990 from the Onamrokor Adain Family but was not issued with any document as she was informed of a litigation that existed between the Onamrokor Adain family and another family with the understanding that when the litigation was over, she would be given proprietary documents covering the land.

The appellant averred further that when the litigation was over, her grantors, Onamrokor Adain family, per the head thereof and the elders gave her documents over the land.

The appellant claiming to have been in possession of the land since 1990 when she started constructing her house counterclaimed for declaration of the 0.24 acre land situate and being at North-Dome, Accra; damages for trespass; recovery of possession and perpetual injunction

After the parties have joined issues and the court below heard and considered the evidence of the parties as well as the evidence of appellant's witnesses, respondent having called no witness, and not forgetting the evidence of court expert witness, the surveyor, the court below entered judgment in favour of the respondent. Interestingly, the court below rather inadvertently did not specifically dismiss the counterclaim of the appellant. This omission on the part of the trial judge will be addressed in due course.

Nevertheless, dissatisfied with the judgment of the court below, the appellant pursuant to leave of the court filed notice of appeal on the following grounds:

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

b. *That the trial judge failed to address the fact that the document relied on by the plaintiff is fraudulent*

c. *That the trial judge failed to address the fact that defendant is an innocent purchaser for value without notice*

d. *That the damages awarded is harsh and excessive*

The appellant filed an additional ground of appeal, namely: the court erred in allowing the plaintiff to prosecute his case and/or testify without revoking the power of attorney he gave to Kwaku Oppong Kyekyeku, his attorney.

The ground of appeal that the judgment of the court below is against the weight of the evidence opens the case for rehearing in accordance with Rule 8 of the Court of Appeal Rules, 1997 (C.I.19) whereby this court is required to consider the entire evidence, both oral and documentary so as to ascertain for itself whether the judgment is supportable having regard to the preponderance of the probabilities of the whole evidence on record.

See the cases **of Tuakwa v. Bosom (2001-2002) SCGLR 61 @ 65; Quacoopume v. Sanyo Electrical Trading Company Ltd (2009) 2 SCGLR 213 @219; Oppong v. Anarfo (2011) 2 SCGLR 556; Abbey & Ors. V. Antwi (2010) SCGLR 17; Ackah v. Pergah Transport Limited & Others (2010) SCGLR 728; Djin v. Musa Baako (2008-2008) 1 SCGLR 1; Akufo Addo v. Cathline (1992) 1 GLR 377 and Owusu Domena v. Amoah (2015-2016) 1 SCGLR 790**

It must also be pointed out that where an appeal is based on the ground that the judgment is against the weight of evidence, there is a presumption that the judgment of the Court below on the facts is correct. The appellant in such a case therefore assumed the burden of showing

from the evidence on record that the judgment is indeed against the weight of evidence. See **Ampomah v. V.R.A (1989-90) 2GLR 28**

It appears to this Court that the appellant, in purporting to acquire the disputed land, did not consider at all the all-important principle of caveat emptor. In **Brown v. Quashigah (2003-2004) 2 SCGLR 930**, the Supreme Court emphasized that the principle of caveat emptor is still a postulate of our law. This imposes a duty on prospective purchasers of land not only to conduct thorough and diligent searches on the land they intend to acquire but to also investigate thoroughly any information they come across or ought to have come across relating to the land. Prospective purchasers of land should not take anything for granted or should not sheepishly take whatever the prospective buyers would tell them in relation to the land but must satisfy themselves that they are acquiring litigation-free land by, for instance, visiting the land personally and taking note of the least sign of any prior possession or occupation of the land as well as any registered document on the land for serious and thorough investigation.

In the instant case, the respondent's evidence overwhelmingly portrayed that the original owner of the disputed land is Onamrokor Adain family. The then head of the said family, one Marye Adorkor Allotey, granted the land to respondent's grantor, Doreen Boatema Bitihene who in turn granted the land to respondent. Exhibits A, B and C are documentary evidence that heavily support this fact.

It is evident on record that before the appellant was granted this disputed land, a search was conducted and it was discovered that the land had been registered in the name of Doreen Boatema Bitihene, respondent's grantor. Notwithstanding this important discovery, appellant unwittingly threw caution to the dogs and allowed herself to be swindled to proceed to buy that same land.

At page 72A of the Record of Appeal (ROA) when appellant's attorney was being cross examined, the unfolded dialogue was as follows:

Q. *Did the defendant conduct any search regarding the ownership of the land before she bought it?*

A. Yes my lord

Q. What was the result of the search?

A. It stated the name of one Doreen Boatema Bitihene

Q. Are you telling the Court that the search you conducted indicated that the subject Matter of this suit belonged to Doreen Boatema Bitihene?

A. Yes, that is so.

In the face of this knowledge that put the appellant on sufficient notice of prior interest existing in the land, how could the appellant be considered as bona fide purchaser for value without notice? The contention of appellant that the Court below failed to address the fact that the appellant is an innocent purchaser for value without notice does not provide any succor to the wounds of the case of appellant. Any consideration of that contention will not be in favour of appellant because there is a fundamental fact of the appellant being put on notice. He did not take that notice seriously and that occasioned the materialization of the risk he took. The appellant therefore cannot be heard to say that he is an innocent purchaser for value without notice.

In **Apollo Cinemas Estate (Ghana) Ltd. v. The Chief Registrar of Lands (2003-2005) GLR 167**, it was held that:

"The plea of bona fide purchaser for value without notice was an absolute, unqualified and an unanswerable defence against the claims of any prior equitable owner. However, in order for the plea to be successfully invoked, the person relying on it had to prove that he had:

(a) acted in good faith

(b) paid consideration in money

(c) the legal estate properly vested in him and

(d) actual or constructive notice of other encumbrances on the property".

As observed earlier, in this case where the appellant had actual notice of the interest of the respondent's grantor, his invocation of the plea of bona fide purchaser is doomed to fail.

In any event, the appellant never pleaded that she was an innocent purchaser for value without notice and neither did she lead cogent evidence on that plea and so his accusation of the court below for not addressing the plea appears untenable. Even on the evidence, that plea cannot be successful as there is sufficient evidence that debunks the bona fides of the appellant.

The consideration and analysis of the entire record do not justify the appellant's contention that the judgment of the trial court is against the weight of the evidence. On the contrary, the judgment is quite supportable and indeed justifiable on the weight of the evidence as a whole, especially on the balance of the preponderance of the evidence on record.

The respondent established that as far back as 1979, Doreen Boatema Bitihene acquired the disputed land from Onamrokor Adain family and in 1995, Doreen Boatema Bitihene in turn granted the land to respondent. This fact finds support from Exhibits A and C as stated earlier. Indeed,

when the secretary of the Onamrokor family, DW2 was shown the documents respondent relied on, that is, Exhibits A and C, he never mentioned that the said documents were fraudulently obtained. What he said was that he had never seen them. Notwithstanding these facts, the appellant wanted this court to believe that the documents the respondent relied on were fraudulent. This court will reject that argument by the appellant as same is devoid of merit.

It is instructive to observe that Manye Adorkor Allotey was one time the head of Onamrokor Adain family, from 1968 to 1984. When DW2 was being cross examined at page 83A of the ROA, the following dialogue took place:

Q. *I am putting it to you the said Manye Adorkor Allotey granted the land to Madam Bitihene*

A. The indenture as I observed it confirms that Manye Adorkor Allotey granted the land to Madam Bitihene

At page 84 of the ROA the following dialogue also ensued:

Q. *That subject matter of dispute was granted by Manye Adorkor Allotey to Madam Bitihene who granted same to plaintiff and that the Onamrokor Adain family had no right to grant it out again*

A. We did not know that Manye Adorkor Allotey had granted the land to someone earlier.

By this answer, it can be inferred that the Onamrokor Adain family would not have granted the disputed land to appellant if they knew that the same piece of land had earlier on been granted to respondent. Commenting on this state of facts as gleaned from the record, the learned trial judge had this to say at page 130 of the ROA:

"The plaintiff traced his root of title to the said Doreen Bitihene through the Exhibits he tendered, namely A, B and C. Having divested of their interest in the land the defendant's grantor (Onamrokor Adain family) no longer had an interest (to purport to grant the land to defendant). She stated in evidence that a search conducted showed the plaintiff's grantor as the registered owner. This position is fortified by the cases of ***Brown.v. Quashigah (2003-2004) SCGLR 939, Sarkodie vrs. FKA Co.Ltd (2009) SCGLR 65 and Mousa Co. v. Saara (1999-2001) 1 GLR 538 CA.*** *I find that the principle of* ***nemo dat non quod habet*** *comes to play here. Consequently, the defendant took nothing from the Onamrokor Adain family"*

The finding and the conclusion of the trial court accord with the evidence. That is to say the judgment of the trial court cannot be said to be against the weight of evidence on the record. The judgment of the trial court deserves affirmation. However, for the fact observed from the record that the trial court failed to pronounce on the counterclaim of the appellant, we would employ the provision under Rule 32(1) of the Court of Appeal Rules and dismiss the counterclaim of the appellant.

The appellant argued that the court erred in allowing the respondent to adduce evidence in court himself when the power of attorney he had given to one Kweku Oppong kyekyeku had not been revoked. This argument has no legs to stand on in law. There is no known law and Counsel for appellant did not refer the court to any law that prohibits a donor of power of attorney from conducting his case himself if available for that purpose where the power of attorney subsists. A power of attorney merely mandates the donee to do what the donor would do in case for some reason the donor cannot do what he is mandating the donee to do at a particular point in time. In other words the right of the donor to testify or otherwise prosecute his case is never extinguished just

because the donor had mandated someone else to stand in for him by virtue of power of attorney.

The learned lawyer for respondent made the point that the essence of a power of attorney is to grant a person who for one reason or the other is unable to be present to do an act for himself to get another to do same in his stead. Thus when the donor of the power is able to do the said act, should he/she be prevented from doing so just because he has granted power to another? This submission finds favour with this court and our answer to the question posed by the lawyer for the respondent is emphatic no.

The argument by appellant that respondent lost the power to prosecute his case himself since the power of attorney he had donated to Kweku Oppong Kyekyeku had not been revoked is a clear case of misconception of the law.

One of the grounds of the instant appeal is that the damages awarded by the trial court against the appellant is harsh and excessive. This ground would be considered as having been abandoned by the appellant as there was no submission on it in the written submissions that the appellant relied on for purposes of this appeal.

For the reasons stated above, we find no merit in the appeal and same is dismissed. The judgment of the trial court dated 29th day of July 2016 is hereby affirmed. The counterclaim of the appellant is dismissed as devoid of merit.
Costs of GH¢15,000.00 in favour of Plaintiff/Respondent

SGD

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JUSTICE ANTHONY OPPONG

JUSTICE OF THE COURT OF APPEAL

SGD

I AGREE **……**

JUSTICE CECILIA H. SOWAH

JUSTICE OF THE COURT OF APPEAL

SGD

I ALSO AGREE **……**

JUSTICE KWEKU T. ACKAAH BOAFO

JUSTICE OF THE COURT OF APPEAL

COUNSEL:

EVA ANGELINA DANIELS KLU WITH ABIGAIL WILLIAMS FOR PLAINTIFF/RESPONDENT

KOFI SOMUAH WITH DAVID KOKO FOR DEFENDANT/RESPONDENT