IN THE SUPERIOR COURT OF JUDICATURE

IN THE COURT OF APPEAL

ACCRA – GHANA AD - 2023

Coram: - *M. Welbourne (Mrs), J.A. (Presiding)*

Bright Mensah, J.A.

Bartels Kodwo (Mrs.), J.A.

Suit No. H1/117/2022

Date: 23rd March, 2023

Mrs. Agnes Ahadzi & anor ==== Plaintiffs/Appellants

Vrs

Nii Adjei Kwanko ==== 3rd Defendant/Respondent

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JUDGMENT

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WELBOURNE, J.A

This appeal is against the ruling of the High Court dated 30th July 2021. The Plaintiff will be described as the Appellant while the 3rd Defendant will be described as the Respondent.

BRIEF FACTS:

The Plaintiffs initially sued the 1st and 2nd Defendants herein for the following reliefs:

1. General damages for trespass onto the Plaintiff's land situate at Okpoi Gonno measuring 11.8 acres more particularly described in the Statement of Claim. Defendants have refused to pay heed despite demands from Plaintiffs;
2. Perpetual Injunction retraining Defendants from further acts of trespass;
3. Costs.

The 1st and 2nd Defendants in their Amended Statements of Defence Counterclaimed against the Plaintiffs as follows:

a. Declaration that Land Certificate No. GA 9043 dated 16th March, 1994 in the name of the Bortei Alabi family is null and void;
b. Declaration that subsequent documents based on the Land Certificate NO. GA 9043 in the name of 1st and 2nd Plaintiffs are also null and void;
c. Declaration that all that piece or parcel of land in extent 4.613 hectors (11.389 acres) situate at Okpoi Gonno in the Greater Accra Region of the Republic of Ghana described in the Land Title Certificate No. 9043 is part of the Defendant's family Tsier We land.

The original 3rd Defendant who became aware of the suit applied and was joined as such whereupon he filed his Statement of Defence and Counterclaimed as follows:

a. Declaration over all that piece of land situate and lying at Teshie bounded on the North by Teshie Stool Land and on the South by Teshie-Ada Road and on the East by Krobo Quarter Land and on the West by Agbawe Quarter registered as No. 1332/65;
b. Recovery of Possession;
c. Damages for fraud and trespass;
d. Perpetual Injunction restraining the Plaintiffs, 1st and 2nd Defendants, their assigns, servants or agents.

The Plaintiffs sued the Defendants when it immediately came to their notice that the Defendants were alienating portions of the land in dispute to their parties. They subsequently applied for Interlocutory Injunction and same was granted. It is captured at page 9 of the trial court's Judgment which is at page 16 of Volume 1 of the Record of Appeal as follows:

> "Having acquired the land, they were going to start development when they noticed that the parties who had been allocated portions of the land by the 1st Defendant were digging foundations for building on the land. He sought Police assistance and also applied for Interlocutory Injunction orders. The Defendants did not deny their intrusion on the land by their agents and grantees."

In the course of the trial, the 1st and 2nd Defendants died and whereas 1st Defendant was duly substituted, the 2nd Defendant was not thereby ending his legal contest before the court.

In his judgment which can be found at pages 8 to 20 of the Record of Appeal (Volume 1), the learned trial judge dismissed the respective Counterclaims of the Defendants. 3rd Defendant in particular was non- suited for want of capacity to initiate and maintain the action. The learned judge however granted the reliefs of the Plaintiffs.
Dissatisfied, only the 1st Defendant appealed to this Court and his appeal was upheld thereby setting aside the judgment of the trial court.

The Plaintiffs however appealed to the Supreme Court and were successful. The apex court set aside this court's judgment in favour of the 1st Defendant and restored the judgment of the High Court. The Supreme Court further enhanced the damages awarded to Plaintiffs by the High Court due to effluxion of time.

To enforce their judgment, Plaintiffs went to the High Court, entered the judgment and subsequently filed a Motion on Notice for Writ of Possession to issue. In accordance with the High Court (Civil Procedure) Rules, the 4th to 26th Respondents are grantees of the Defendants and as persons in actual physical possession of portion of the land adjudged in favour of Plaintiffs were served. The Motion could be found at page 1 to 20 of the Record of Appeal (Volume 1).

The Plaintiffs/Appellants (hereinafter referred to as the Appellants) was granted leave to issue Writ of Possession on the 17th day of June 2020 over the land in dispute. The Appellants subsequently issued Writ of possession on the 23rd day of June, 2020 and attempted to go into execution.

The 3rd Defendant/Respondent (hereinafter referred to as Respondent) on the 6th day of July, 2021 filed a Motion for Stay of Execution and to set aside the order for Writ of Possession and the Writ of Possession filed by the Appellants because Appellants' did not seek relief of recovery of possession and no court decreed any order for recovery of possession in favour of the Appellants' in the substantive case at the High Court and at the Supreme Court. See pages 1 to 106 of volume 2 of the Record of Appeal.

The Appellants filed an affidavit in opposition to Respondent's motion on the 16th day of July, 2021. See pages 107 to 110 of volume 2 of the Record of Appeal. The trial High Court on the 30th day of July, 2021 heard the Respondent's application and set aside the Writ of Possession on the ground that the Appellants in their relief did not claim recovery of possession. See pages 111 to 114 of volume 2 of the Record of Appeal.

The Appellants dissatisfied with the decision of the High Court, appealed against same on the 20th day of August, 2021. See pages 115 to 117 of volume 2 of the Record of Appeal.

Grounds of Appeal

1. The Learned Trial judge erred and misdirected herself in law, when she heard the application to set aside the writ of possession filed by the 3rd Defendant/applicant for himself and on behalf of 29 others when the said 3rd Defendant had no locus standing in the case because he was non suited by the High Court, which decision was affirmed by the Supreme Court culminating in the Supreme Court refusing to entertain 3rd Defendant's Statement of case holding that he is not a party to the suit, which Supreme Court decision was brought to the attention of the Learned Trial Judge which she ignored.
2. The substitution of the original deceased 3rd Defendant who was non suited by the High Court and affirmed and declared not a party by the supreme Court did not vest the substituted person with capacity yet the Learned Trial Judge erred in law when she failed to address the issue of lack of capacity on the part of the substituted 3rd Defendant.
3. The Learned Trial Judge erred in law when she failed to appreciate that though the Plaintiffs/Appellants did not include recovery possession as a relief in the endorsement to their Writ, the order of the Trial Judge which gave judgment in favour of the Plaintiffs/Appellants directed the Defendants not to remain on the land which order in effect amounted to an order to recover possession from the Defendant/judgment/debtors and for which reason the Plaintiffs/Appellants properly applied for the Writ of Possession which she granted on 23rd June, 2020 and renewed on 2nd July, 2021.

4. The learned trial judge erred in law and misdirected herself when she set aside a writ of possession she granted on 23rd June, 2020 in spite of arguments to the contrary by the 3rd Defendant which writ she renewed on 2nd July, 2021, yet without appealing against the said orders, the 3rd Defendant claiming to have been substituted applied again to have the writ of possession set aside and the learned trial judge granted same.

Grounds 1 and 2 are argumentative and therefore I would have struck them out in accordance with the Rules particularly Rule (4) of C.I.19; however, I realise that the Appellants themselves have listed the 3rd Defendant as one of the persons to be affected by the appeal (see page 117) of the Record of Appeal. I shall therefore deal with the essence of the ground.

The law is settled that an appeal is by way of re-hearing. Rule 8(1) of the Rules of this court provided that an appeal to this court shall be by way of rehearing and shall be brought by notice of appeal. We are therefore obliged to peruse the entire record of appeal and ascertain whether or not there are pieces of evidence which if applied ought to inure to the benefit of the Appellant or whether there are such other evidence which were wrongly applied thereby occasioning a miscarriage of justice to the Appellant.

Counsel for the Appellant submitted inter alia that:

The 3rd Defendant's Counterclaim was dismissed because he did not have the capacity to represent the Tsier We family and he did not appeal against same. 1st & 2nd Defendant's also had their Counterclaim dismissed whereas Plaintiff's Reliefs were granted by the trial Judge in the manner aforementioned. Dissatisfied, the 1st Defendant appealed to this Court and got the Judgment of the High Court set aside whilst granting his Reliefs. Plaintiffs dissatisfied also appealed to the Supreme Court whereupon the Judgment of the Court of Appeal was unanimously set aside, and the Judgment of the High Court restored with an enhanced damages.

It must be emphasized that because the Supreme Court affirmed the High Court ruling on the lack of capacity of the 3rd Defendant, though the 3rd Defendant filed his Statement of Case before the Supreme Court, same was disregarded and this is what the Apex Court said in its Judgment a copy of which could be found from **pages 31 to 46** of the Volume 1 of the Record of Appeal:

*"**In his judgment, the High Court held that 3rd Defendant had no capacity to represent Tsie We family and dismissed his case, but 3rd Defendant did not appeal.***

The appeal which went before the Court of Appeal was filed by 1st Defendant against the judgment of the High Court granting Plaintiffs their reliefs. That notwithstanding, the 3rd Defendant has filed a statement of case in this second and final appeal. ***Clearly, he cannot be heard as the appeal is against the decision of the Court of Appeal to which he was not a party. See Ansong Sowah v Adams [2009] SCGLR 111****. We noticed that the Plaintiffs misled the 3rd Defendant by stating in their Notice of Appeal that he stood to be affected by the appeal and included his name for service, but the Court of Appeal did not make any order either in favour of or against the 3rd Defendant which may be varied in this appeal****. Furthermore, since he did not challenge the High Court decision that he had no capacity in the case it means he was not a proper party to the case to begin with and is not entitled to be heard. In the circumstances we shall disregard his statement of case.****"*** (see pages 32 and 33)

Emanating from the above, it is not surprising that the 3rd Defendant was never considered a party to the suit and therefore had no locus to make submissions. Indeed, the High Court non-suited him which decision the final appellate Court affirmed. He failed to seek any review meaning that, that issue became one of **issue estoppel**. Counsel cited the case of **In Re Sakyedumase Stool Nyame vrs Kesse Alias Konto [1998-99] 476 per Acquah JSC** at pages 478-479.

Counsel for the Appellant submitted that the learned Judge therefore erred when in the light of a binding decision that the 3rd Defendant was not a party to the suit to have permitted Counsel to move a motion to substitute a non-existent party and proceed to set aside a valid order earlier made by her. For want of capacity counsel urged.

He prayed the Court to set aside the Order made in favour of the substituted non-existent party since one cannot put something on nothing and expect it to stay there (see **Mosi vrs Bagyina [1963] 1GLR 337-348; MacFoy vrs United Africa Co., Ltd. [1961] 3 All E. R. 1169, P.C).**

The 1st Defendant in the original suit appealed against the above Judgment and won. Being dissatisfied with that decision the Plaintiffs filed a further appeal to the Supreme Court.

The Supreme Court subsequently unanimously setting aside the Court of Appeal Judgment and restoring the Judgment of the High Court adjudged as follows:

> *"In the result, we find merit in the appeal and accordingly allow same. We set aside the judgment of the Court of Appeal dated 4th July, 2011 with slight modification. The trial Judge awarded the Plaintiffs general damages of GH¢50,000 at the time taking into consideration the length of time they had been prevented from developing their land together with their foreign partners. Today is about eight years on since the High Court gave its Judgment and taking that into account we award the Plaintiffs general damages of GH¢80,000."*

(See page 44 of the Volume 1 of the Record of Appeal). The Supreme Court Judgment could be found at pages 31 to 45 of the Record of Appeal Volume 1.

Thus, by the above, the Supreme Court affirmed the Judgment of the High Court. With the judgment restored, the Plaintiffs were therefore entitled to execute the said

Judgment. Counsel submitted that though there was no order for recovery of possession, by the nature of the Perpetual Injunction granted, injuncting Defendants from remaining on the land, it amounted to permitting the Plaintiffs to recover possession from those in possession since they are not expected to remain on the land. It was against that background that Plaintiffs filed their Entry of Judgment After Trial and subsequently a Motion on Notice for Writ of Possession. Both processes were served on the Defendants as well as their grantees, agents and assigns who are in actual possession of their respective portions of the land as required by the Procedure Rules. The Motion for Writ of Possession can be found at pages 1 to 9 of the Record of Appeal (Vol 1). Although the said Motion was opposed, the Learned Judge granted same and dismissed 3rd Defendant's Affidavit in Opposition. The Learned Judge subsequently renewed the said Order on June 28, 2021.

Counsel for the 3rd Defendant immediately after the grant of the initial Order by the Learned Judge for Plaintiffs to recover possession of the land in dispute applied to substitute the original 3rd Defendant with the present 3rd Defendant by reason of death. Having failed to appeal against the decision of the Learned Judge, 3rd Defendant through his Counsel however, by his Motion entitled "**Motion on Notice to Stay Execution of the Judgment in this Case and to Set Aside the Order for Writ of Possession granted on the 17th day of June and the Writ of Possession filed on the 23rd day of June 2020 under the Inherent Jurisdiction of the Court**" dated July 06, 2021, sought to set aside the execution process embarked upon by Plaintiffs. Although the said Motion was vehemently opposed, in a bizarre twist, the Learned Judge granted 3rd Defendant's Motion and ruled as follows:

"The court will grant the application, for the reason that the Plaintiffs ought to have included as a relief in their Writ of Summons, a claim for the recovery of possession."

It was further submitted that the 3rd Defendant ought to have appealed against the earlier Ruling of the Court granting leave for Plaintiffs to recover possession and not to have applied to set aside the valid Order of the Learned Judge.

Counsel for the Appellant further submitted that the Courts since time immemorial have also sought to do substantial justice to prevent needless suits which come at a great expense to a litigant where the facts, pleadings and evidence in a case so permits them to make some orders and or grant reliefs not even prayed for as the justice of a case may demand. (See cases such as **Chahin vrs Boateng [1963] 2 GLR 174, SC; Yeboah vrs Bofour [1971] 2 GLR 199, CA).**

Counsel for the Respondent in response to the Appellant's submissions stated that if indeed the Respondent was non-suited, the Appellants would not have made the Respondent as one of the parties in his motion on notice for writ of possession filed on the 17th day of February, 2020. **See page 1 of vol. 1 of the records of appeal**.
The Appellants in their motion for writ of possession unilaterally added twenty-six (26) Defendants to the application who were not parties to the suit from the High Court to the Supreme Court without the leave of the Court.

The Respondents also referred to a search report dated the 31st day of January, 2020 attached to Appellants' motion on notice of writ of possession as **exhibit "A",** that

named the Respondent as a party whom judgment after trial had been served on the 20th day of June, 2019**. See page 5 of volume 1 of the Record of Appeal.**

It therefore lies ill in the mouth of the Appellants that the Respondent was non-suited in the case and has no capacity to have applied to set aside the writ of possession wrongfully issued.

Even, a non-party who is injuriously affected by an order of the court can file an application to challenge or set same aside. See the Supreme Court decision in Civil Appeal No. J4/5/2014 entitled**: John Kwadwo Bobie vrs 21st Century Construction Company Limited & 7 Ors.** (Unreported) judgment delivered on the 9th day of March, 2016 at page 22.

The Respondent further contended that most of the other parties added to the suit by the Appellants were his grantees, hence, his motion to set aside the writ of possession on his behalf and that of his grantees whom the writ of possession has been issued against.

The main issue for determination under these grounds of appeal were whether or not the 3rd Defendant had locus after having been non suited at the trial court.

I will dismiss these grounds on the basis that the Appellants cannot approbate and reprobate. Having named the 3rd Defendant as one to be affected by the appeal, they cannot turn round and ask that he should be ignored.

GROUNDS (3) AND (4)

The learned trial judge erred in law when she failed to appreciate that though the Plaintiffs/ Appellants did not include recovery of possession as a relief in the endorsement to their writ, the order of the trial judge which gave judgment in favour of the Plaintiffs/ Appellants directed the Defendants not to remain on the land which order in effect amounted to an order to recover possession from the Defendant/ judgment/ debtors and for which reason the Plaintiffs/ Appellants properly applied for the writ of possession which she granted on 23rd June, 2020 and renewed on 2nd July, 2020.

The learned trial judge erred in law and misdirected herself when she set aside a writ of possession she granted on 23rd June, 2020 in spite or arguments to the contrary by the 3rd Defendant which writ she renewed on 2nd July, 2021, yet without appealing against the said orders, the 3rd Defendant claiming to have been substituted applied again to have the writ of possession set aside and the learned trial judge granted same.

It is settled law that the court would not grant order for writ of possession to be issued unless same was expressly sought for as a relief and or granted by the court in the substantive case. See the case of **Dzotepe vrs Hahormene II & Ors** (1984-86) 1 GLR 289 at 292

See also the Supreme Court Ruling in Civil Motion No. J5/ 1/2016 entitled: **Republic vrs High Court, Accra; Ex parte: Finali Ltd & Ors,** (unreported judgment dated the 30th day of November, 2016).

See also the Supreme Court decision in Civil Appeal No. J4/10/ 2019 entitled: **Empire Builders Limited vrs Top Kings J Enterprises Ltd. & 4 Ors** (Unreported Judgment dated the 16th day of December, 2020) at paragraph 8 (e) where Tanko Amadu JSC held as follows:

"Since the Appellant failed to amend its reliefs by the inclusion of a relief for possession after it had obtained leave to do so, the leave granted thus became void ipso facto and there was therefore no claim for possession to enable the Trial Judge make any order for possession. The order for possession is therefore null and void and thereby nullified".

It was Counsel for the Respondent's case that the trial court was bound by the decision cited above and did no wrong in setting aside the writ of possession on the ground that no relief for recovery of possession was sought by the Appellants in the substantive case.

The Appellants contend that the court could grant relief not asked for in doing substantial justice to include recovery of possession or amend relief to include recovery of possession.

In the instant case, nowhere in the judgments of the trial High Court and the Supreme Court was the Appellants' writ amended to include recovery of possession or was recovery of possession decreed for Appellants even though not asked for in their reliefs.

Thus, the instant case is distinct from the cases cited by the Appellants in support of their case as in those cases, the court amended the relief to include recovery of possession or ordered recovery of possession in their final judgment in the substantive case.

Thus, the authorities being relied on by the Appellants are not applicable to the instant suit.

In the case of **Hanna Assi (No. 2) vrs Gihoc Refrigeration [2007-2008] SCGLR 31** per Prof Ocran JSC; he stated as follows:

"In my opinion it was a mistake on the part of the Court of appeal not to have granted the applicant a declaration of title simply because he did not specifically include that relief in

his pleadings. It was a mistake that was regrettably repeated in the majority opinion when we sat as a regular Supreme Court bench in this case to consider the cross appeal; and we should seize the opportunity on this review to rectify this error, because it would cause a substantial miscarriage of justice for the applicant."

"There has been a major disagreement between some of us on this case at various stages of our deliberations. It is clear that this disagreement reflects differences in our respective judicial philosophies, quite apart from differences in our interpretation of the rules of procedure. My Lords, permit me to restate parts of my opinion on this cross-appeal when the case came before us as an ordinary panel. I wrote at the time (as stated in Gihoc Refrigeration & Household Products Ltd. vrs Hanna Assi [2005-2006] SCGLR 458 at 488-489 that:

"The position taken on the cross-appeal in the lead opinion delivered by my learned brother Dr. Date-Bah JSC, not only reduces substantive holdings into a Pyrrhic victory for the Defendant but it may also mean that the latter might have to return to court in a fresh suit to seek a formal declaration of title for self-protection in the future as regards third parties. Such a position does not bode well for judicial economy and the need to defuse unnecessary court litigation. It is the sort of judicial stiffness that we, as the final court of the land charged with the administration of justice, should be hesitant to embrace."

"I cited and adopted the rule in Chahin vrs Boateng [1963]2 GLR 174, SC. In that case, there was no counterclaim; and yet the Supreme Court, relying on rules 31 and 3 of the Supreme Court Rules, 1962 (LI 218), made it clear that it had power to make any order necessary for determining the real question in controversy in the appeal; and to give any judgment and make any order that ought to have been made."

The judicial philosophy as touted above by the esteemed departed jurist, is in sharp contrast to that espoused in the recent case **of Empire Builders Limited vrs Top Kings J Enterprises Ltd. & 4 Ors** (Unreported Judgment **dated the 16th December, 2020)** at paragraph 8 (e), Tanko Amadu JSC held as follows:

> *"Since the Appellant failed to amend its reliefs by the inclusion of a relief for possession after it had obtained leave to do so, the leave granted thus became void ipso facto and there was therefore no claim for possession to enable the Trial Judge make any order for possession. The order for possession is therefore null and void and thereby nullified".*

One may opine that the trending judicial philosophy can be taken from the good Book, in Matthew chapter 7:7 ***"Ask and it will be given to you; seek and you will find; knock and the door will be opened to you".*** There have been instances where parties are given the Declaration of title to the land but not recovery of possession by reason of the accrual of the Defendant's equitable rights or the laches and acquiescence of the Plaintiff while Defendant was in possession.

In the Hanna Assi case, Justice Professor Modibo Ocran explained the rationale behind the thinking of the Supreme Court. His term Judicial Economy is one that seeks to save parties from the expense of repetitive litigation and save the courts from deciding the same issues.

However, when the issue is about possession and it is not specifically claimed, the court ought to be circumspect in granting possession upon application. Apart from allowing a situation where the action would be fully determined in a piecemeal manner, it creates an unfair situation where a party in possession against whom there was no relief of repossession at the time he conducted his defence, is now confronted with having to defend his possession summarily by application. Issues of possession and repossession

are issues to be specifically, pleaded, settled and determined. Therefore the resort to judicial economy must be made in peculiar factual circumstances only.

In the adversarial system of adjudication the core role of the judge is to see to it that the combatants play the game of litigation by the known rules. The cardinal role of the judge could be fatally compromised to the annoyance of all if the judge were to ask for a relief on behalf of a party to the suit and then grant same.

Granting a relief is like a referee in football match confirming that a goal has been scored. The judge does not aid one side to score a goal and therefore I cannot aid one side to score. It is trite scientific learning that nature abhors vacuum. However, an infallible exception to that rule is to expect a judge to fill in the gaps for a party by granting reliefs which were not asked for. To do so will be a subtle way of descending into the arena of conflict. This court will decline an invitation into the arena of conflict whichever way the invitation is brought.

Where a party omits to ask for a particular relief the obvious impression created is that he does not consider that relief crucial or indispensable. If by way of afterthought the party concerned thinks that the omitted relief is after all very important, he should pay the price himself to remedy the situation, the price being to amend while it's still day or go back to court and make a case to be considered for its grant.

Finally, a queue must be taken must be taken from what happened at the tomb of Lazarus. When Jesus went to the tomb of Lazarus, He wept. (John 11:35); but the weeping did not bring Lazarus out of the tomb. He had to ask him to come out in a loud voice. (John 11:43) therefore one needs to literally shout for a relief to be granted.

In the instant case, the Appellant clearly has been declared the owner of the land in dispute. However due to the failure of the solicitor to ask for a substantial relief of

Recovery of Possession in addition to the Declaration of title, and injunction, the Appellant cannot have the recovery of possession unless he takes further steps to have this done. The appropriate approach is to commence an action to seek repossession only since the issue of ownership or title falls within the realm of resjudicata.

This court therefore agrees with the Trial judge when it set aside the writ of possession it had earlier granted. The appeal from the foregoing is accordingly dismissed in its entirety.

Cost of Five Thousand Ghana Cedis (GH¢5,000.00) in favour of 3rd Defendant/Respondent.

(SGD)

MARGARET WELBOURNE (MRS.)

(JUSTICE OF APPEAL)

(SGD)

I ALSO AGREE

JANAPARE A. BARTELS-KODWO (MRS.)

(JUSTICE OF APPEAL)

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CONCURRENT JUDGMENT

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Bright Mensah, J.A

I have had the opportunity to read the judgment of my esteemed sister, the Presiding Judge and am in total agreement with the analysis and the conclusion reached. However, to enrich the discussion I have decided to add a few words of mine.

Background:

The facts and events leading to the order complained of in the instant appeal are that the appellants [the plaintiffs] had initially sued the 1st and 2nd defendants claiming the following reliefs:

1. General damages for trespass onto the plaintiff's land situate at Okpoi Gonno measuring 11.8 acres more particularly described in the statement of claim. Defendants have refused to pay heed despite demands from plaintiff.

2. Perpetual injunction restraining defendants from further acts of trespass.

3. Costs.

The 1st and 2nd defendants having entered appearance and filed their statement of defence subsequently amended the defence and counterclaimed against the plaintiffs as follows:

a. declaration that land certificate No. GA 9043 dated 16th March 1994 in the name of the Bortei Alabi family is null and void.

b. Declaration that subsequent documents based on the land

certificate No. GA 9043 in the name of 1st and 2nd plaintiffs are null and void;

c. Declaration that all that piece or parcel of land in extent 4.613 hectors (11.389 acres) situate at Okpoi Gonno in the Greater Accra Region of the Republic of Ghana described in the land Title certificate No. 9043 is part of the defendants family Tsier We land.

The respondent [3rd defendant] in this appeal subsequently successfully applied for, and was joined in the suit as the 3rd defendant. Pursuant to the order for joinder, the respondent filed a defence and additionally counterclaimed against the appellants in the following terms:

i) Declaration over all that piece or parcel of land situate and lying at Teshie bounded on the North by Teshie Stool land and on the South by Teshie-Ada Road and the East by Krobo Quarter l;and and on the West by Agbawe Quarter registered as No. 1332/65;

ii) Recovery of possession;

iii) Damages for fraud and trespass; and

iv) Perpetual injunction restraining the plaintiffs, 1st & 2nd defendants, their assigns, servants or agents.

Issues were joined and the case went into full gamut of trial. At the end of the trial, the court found in for the plaintiffs [appellants in the instant appeal]. Being dissatisfied with the judgment of the lower court, the 1st defendant filed an appeal against the decision to the Court of Appeal. This court upheld the appeal and overturned the judgment of the High Court. However, the judgment of the Court of Appeal was also upset by the Supreme Court upon a further appeal to the apex court by the plaintiffs [appellants in the instant appeal]. The Supreme Court by its unanimous decision delivered in the case, allowed the appeal thus affirming the judgment of the High Court.

Significantly, the appellants herein after the Supreme Court judgment applied for and were granted leave by the lower court to issue writ of possession. Per an order of the lower court made 17/06/2020, the appellants were to proceed to execution against all the defendants as well as the other respondents cited herein, numbering twenty-six (26).

It is on record that the respondent in this appeal soon after the order of the lower court granting leave to issue a writ of possession, filed an application for stay of execution and for an order to set aside both the order for writ of possession to issue and the writ of possession itself. The application was hotly contested by the appellants and was so dismissed. The lower court having listened to the arguments of lawyers on each side, which arguments appear on ***pp 111-113 of the record of appeal [roa],*** delivered itself a ruling as follows:

> ***"Ruling:*** *The court will grant the application for the reason that the plaintiffs ought to have included as a relief in their writ of summons, a claim for the recovery of possession."*

See: ***p. 114 [roa].***

It is against this ruling of the lower court that the instant appeal has been launched.

Primary issue raised in the appeal:

Undoubtedly, the most crucial issue that the instant appeal raises and capable of disposing the matter is:

> ***"Whether the court could grant an application for writ of possession when a party and in our present case, the appellant did not claim by way of a judicial relief for recovery of possession."***

It has been argued quite strongly on behalf of the appellants that the effect of the judgment of the Supreme Court affirming the judgment of the lower court [High Court], was that the appellants were entitled to execute the said judgment. In the arguments of Counsel, the appellants had claimed perpetual injunction against the 1st and 2nd defendants as well as the respondent who was subsequently joined to the suit as the 3rd defendant. Having entered appearance, the respondent in this appeal filed a counterclaim against the appellants.

It is the case of the appellants that having been granted an order of perpetual injunction *howbeit* there was no claim for recovery of possession, the order for perpetual injunction nevertheless amounted to permitting the appellant to recover possession from all those persons in possession, the subject matter in dispute. In support of this legal proposition, learned Counsel referred us to ***Hanna Assi (No. 2) v GIHOC (No. 2) [2007-08] 1 SCGLR 16*** and equally relied on this court's ruling in ***George Lamptey v Mcklloyds Co. Ltd & anr; Civ. App. No. H1/163/2017 dated 19/12/2019***. Counsel also drew the court's attention for our consideration, to the following cases: ***Yeboah v Bofour [1971] 2 GLR 199 C/A; Chahin v Boateng [1963] GLR 174 SC.***

It has been profoundly urged upon us to do substantial justice in the matter and to avoid multiplicity of suits, by following the precedent set by the Supreme Court and to *suo motu* amend the reliefs of the appellants to include recovery of possession and to also restore the orders the lower court granted to issue writ of possession.

Arguing in opposition to the appeal, learned Counsel for the respondent has also with quite an amount of force propounded that the court would not grant order for writ of possession to issue unless same was expressly sought for as a relief and or granted by the court in the substantive suit. In support, Counsel referred the court to this court's decision in ***Dzotepe vrs Hahormene II & ors [1984-86] 1 GLR 289 @ 292*** and the ruling of the Supreme Court delivered in ***Republic vrs High Court, Accra; Exparte Finali Ltd & ors (Civ. Motion No. J5/1/2016 dated 30/11/2016 SC.***

Learned Counsel finally referred us to a recent decision of the Supreme Court in ***Empire Builders Ltd vrs Top Kings Ent. & 4 ors (Civil Appeal. No. J4/10/2019 dated 16/12/2020.***

Arguing further Counsel insisted that neither the High Court nor the Supreme Court amended the writ of summons in the instant case to include recovery of possession. Thus, cases Counsel for the appellant has referred us to, are distinguishable and inapplicable to our present case.

My opinion:

To start with, by reason of ***Article 129(3) of the 1992 Republican 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.***

I have critically read the cases both Counsel cited to press home their point. Reading those cases it is plainly obvious that some decisions of the Supreme Court conflict with each other. The case, ***Empire Builders Ltd vrs Top Kings Ent. & 4 ors [supra]***, for e.g., runs in conflict with ***Hanna Assi (No. 2) vrs GIHOC (No. 2) [supra]***. Whereas Empire Builders Ltd case reiterates the principle that there can be no order for recovery of possession when there was no claim for it in the substantive suit, Hanna Assi (No.2) proffers the contrary.

In ***Dzotepe v Hahormene [supra],*** the Court of Appeal echoed the rule that there cannot be an order for recovery for possession when no claim for it has been endorsed as a judicial relief on the writ of summons. That is in contrast with the case of ***George Lamptey vrs Mcklloyds Co. Ltd & anr [supra]*** where the learned judges sought to amend the writ of summons to include the relief for recovery of possession.

Now, having regard to these seemingly conflicting decisions which by reason of **Articles 136(5)** and **129(3) of the Constitution** are still binding on this court, we have the jurisdiction and or discretion to elect to follow one or the other of the conflicting decisions or depart from any of the decisions altogether given circumstances and exigencies of the matter on hand and in the interest of justice. For, the law is that where a lower court was faced with two conflicting decisions of a superior court both of which were binding on it, the lower court, in such a case, might in its discretion elect to follow one or the other of the conflicting decisions or it might take a different line. See: ***Armstrong vrs Strain [1951] 1 T.L.R 856*** and ***Akpawey vrs The State [1965] GLR 661.***

Needless to emphasize, the principle stated supra received judicial endorsement in the case of ***Republic vrs Bright [1974] 1 GLR 12.***

Guided by the principle stated herein, I roundly endorse the rule stated in ***Dzotepe vrs Hahormene[supra]*** and ***Empire Builders Ltd vrs Top Kings Ent. & 4 ors [supra]*** and

prefer same to those cases referred to supra on the principle that it is not the duty of the court to set up a case for a party when the party has not specifically asked for it. This is because any court that embarks upon such a path is doing so contrary to, and flies in the face of the avowed principle in ***Dan v Addo [1962] 2 GLR 216.***

The principle of law enunciated in ***Dan vrs Addo,*** needless to say, is a well- established proposition of law which is to the effect that a court of law must not substitute a case contrary to, and inconsistent with the one put forward by a party. The rule is rooted in the biblical principle in ***Matthew 7:7*** which is to the effect that ask and ye shall be given; knock and ye shall be opened; seek and ye shall find it.

I am of the respectful opinion that the appellant lost the golden opportunity to have applied for an amendment to the writ of summons to include an order for recovery at the Supreme Court where the judgment of the High Court was affirmed. In the alternative, the appellants could have applied subsequently to include the relief for recovery of possession. Once the appellants have taken no step to amend the writ of summons it is my candid opinion this court on the strength of the "*Dan v Addo principle*" lacks the jurisdiction to *suo motu* amend the writ. As a matter of emphasis, I think that any application for amendment to the writ to include an order for recovery of possession shall be made on notice to the other side. It is unacceptable if it was only contained in the written submissions of Counsel.

It is important to bring clarity to bear on the confusion and spin that most lawyers put on ***Hanna Assi (No. 2) vrs GIHOC (No. 2) [2007-08] 1 SCGLR 16*** and other such cases quoted in support. The correct and current position of the law is that before a court can or may embark on granting an order for recovery of possession when a party did not claim it as a relief on his writ of summons from the beginning, the following three (3) preconditions must be present:

i) there must be evidence led on record to prove that the party was entitled to a declaration of title to the disputed land;

ii) there must be evidence that the party after judgment decreeing title in him, had applied for an amendment to the reliefs endorsed on the writ of summons to include an order for recovery of possession;

iii) That after the grant of leave to amend, the successful party took the proper procedural steps to so amend the writ of summons.

Undoubtedly, these conditions are *sine qua non* for a court of law to order a writ of possession to issue even though a relief for recovery for possession was not initially endorsed on the writ of summons. It was for this legal reasoning that the Supreme Court speaking with unanimity through Anin Yeboah JSC (as he then was) in ***Nana Yaw Owusu & 2 ors vrs Hydrafoam Estates Ltd (Civ. App. No. J4/62/2013 dated 26/03/2014 (unreported)*** held that the Court of Appeal was in error when it proceeded to grant the relief of possession which was not supported by the evidence on record and when there had not been any formal amendment of the only relief endorsed on the writ.

Significantly, in ***Empire Builders Ltd vrs Top Kings J Enterprise Ltd & 4 ors [supra]*** the records show that the appellant in that case had applied for leave to amend its writ of summons after judgment to include the relief for recovery of possession. However, for unexplained reasons the appellant never took the procedural steps to amend the writ. The Supreme Court unanimously speaking through Tanko Amadu JSC ruled as follows:

> *"…….Since the appellant failed to amend its reliefs by the inclusion of a relief for possession after it had obtained leave to do so, the leave granted thus became void ipso facto and there was therefore no claim for possession to enable the trial judge make any order for possession. The order for possession*

is therefore null and void and thereby nullified."

In conclusion, I hold the respectful view that the learned trial judge properly exercised her judicial discretion in setting aside the order for recovery of possession since the appellants had not asked for same, neither had they made any attempt to amend the writ of summons after the Supreme Court judgment to include that judicial relief though perpetual injunction has earlier been granted.

The appeal therefore fails in its entirety and it is hereby dismissed.

(SGD)

PHILIP BRIGHT MENSAH

(JUSTICE OF APPEAL)

- **KWABENA ANKAMAH OSEI BADU FOR PLAINTIFFS/APPELLANTS**
- **KWAME FOSU GYEABOUR FOR 3RD DEFENDANT/RESPONDENT**