

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF  
JUSTICE ACCRA LAND COURT DIVISION '9' HELD ON MONDAY THE 20<sup>TH</sup>  
DAY OF NOVEMBER 2023 BEFORE HER LADYSHIP  
JUSTICE NABEELA NAEEMA WAHAB J. (MS.)

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SUIT NO. LD/0532/2020

1. AUGUSTINE ARHINFUL  
2. GIFTY DIAMOND ADDY  
3. JEWEL ADDY  
4. GENEVIEVE ADDY  
5. ESTHER DIAMOND ADDY

} - PLAINTIFFS

VRS

NII WILLIE WELBECK - DEFENDANT

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**J U D G M E N T**

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**BACKGROUND**

From the processes filed by the Parties, a background to the instant action is as follows:

By a Writ and Statement of Claim filed on 3<sup>rd</sup> August 2005 and amended on 20<sup>th</sup> March 2007, one Felicia Abrah Todzro and New Generation Senior Secondary School as 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively, instituted an action against Jacob Eddhley Addy and Augustine Arhinful as 1<sup>st</sup> and 2<sup>nd</sup> Defendants respectively. The Suit was numbered BL/700/2005 and is hereafter referred to as "Suit No. BL/700/2005". The 1<sup>st</sup> Defendant was stated to be a proprietor of a private school and the 2<sup>nd</sup> Defendant, a professional footballer.

It was the case of the 1<sup>st</sup> Plaintiff, Felicia Abrah Todzro, that she is the owner of a parcel of land measuring approximately 0.25 acres, situate as West Bubiashie in Accra, more particularly delineated on a site plan attached to her indenture. The 1<sup>st</sup> Plaintiff added that the land is registered in her name at the Land Title Registry in Accra with Land Certificate Number 62/15/901/1/1.

Felicia Abrah Todzro stated that she acquired the subject land from the Asere Stool, immediately went into possession and constructed a building on the land which was taken over by the 2<sup>nd</sup> Plaintiff school in January 2005.

It was the further case of Felicia Abrah Todzro that the Defendants have recently trespassed unto her land, destroyed a part of the structure of the New Generation Senior Secondary School and when confronted, the 1<sup>st</sup> Defendant Jacob Eddhley Addy claimed that he sold the parcel of land to the 2<sup>nd</sup> Defendant Augustine Arhinful.

By the action in Suit No. BL/700/2005, the Plaintiffs sought a declaration of title to the 0.22 acres of land at West Bubiashie, recovery of possession, perpetual injunction, damages for trespass and costs.

In their Defence filed on 20<sup>th</sup> October 2005, the 1<sup>st</sup> Defendant stated that he is the brother of the late Diamond Nii Addy who acquired a large tract of land from the Asere Stool. The Defendants stated that the land of Diamond Nii Addy devolved to his children upon his death, and the children assigned a portion of the land to the 2<sup>nd</sup> Defendant. The Defendants maintained that the land claimed by Felicia Abrah Todzro was different from their own lands.

Before the action could be heard and conclusively determined on its merits by the Court, the Defendants entered into Terms of Settlement with the Plaintiffs. The Terms

of Settlement was dated 17<sup>th</sup> February 2009, filed in Court on 10<sup>th</sup> March 2009 and adopted as Consent Judgment of the Court on 8<sup>th</sup> April 2009.

Upon the death of Felicia Abrah Todzro, she was substituted by Nii Willie Wilbeck.

The parties were engaged in processes to give effect to the judgment when the 2<sup>nd</sup> Plaintiff instituted the instant action.

### **THE INSTANT ACTION - PLAINTIFFS' CASE**

The instant action was commenced by a Writ and Statement of Claim filed on 24<sup>th</sup> February 2020 and amended on 9<sup>th</sup> October 2020.

The action has been instituted by the 2<sup>nd</sup> Defendant in Suit No. BL/700/2005, Augustine Arhinful, as 1<sup>st</sup> Plaintiff together with four other Plaintiffs nearly eleven (11) years after the Terms of Settlement was filed in Suit No. BL/700/2005.

The Defendant to the action is Nii Willie Welbeck who was substituted for Felicia Abrah Todzro, the 1<sup>st</sup> Plaintiff in Suit No. BL/700/2005.

It is the case of the 1<sup>st</sup> Plaintiff as stated in the Amended Statement of Claim that he is the owner of the land which is the subject of this action, measuring approximately 0.33 acres, situate at Bubiashie in Accra and assigned to him by the 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs, his grantors, for a term of 99 years starting from 20<sup>th</sup> March 1995.

The 1<sup>st</sup> Plaintiff stated that he was a party to Suit No. BL/700/2005. He added that a composite plan was prepared which formed the basis of Terms of Settlement signed by the Parties to that suit and adopted as Consent Judgment of the Court.

It is the case of the Plaintiffs that the Terms of Settlement filed in Suit No. BL/700/2005 and adopted as Consent Judgment of the Court was obtained by fraudulent misrepresentation. The Plaintiffs provided the particulars of the alleged fraud in paragraphs 7(a) - (g) of the Amended Statement of Claim.

By their action, the Plaintiffs seek an order of this Court to set aside the Consent Judgment entered on 8<sup>th</sup> April 2009 in Suit No. BL/700/2005, an order of perpetual injunction to restrain the Defendant from interfering with the subject land, costs and any other order (s) the Court may deem fit.

### **DEFENCE OF THE DEFENDANT**

In his Statement of Defence, the Defendant admitted the claim by the 1<sup>st</sup> Plaintiff that a composite plan was drawn up which formed the basis of the Terms of Settlement and Consent Judgment in Suit No. BL/700/2005. He however denied that the Consent Judgment was obtained by fraudulent misrepresentation.

In support of his case that the Consent Judgment in Suit No. BL/700/2005 was not obtained by fraudulent misrepresentation, the Defendant stated that following the adoption of the Terms of Settlement as Consent Judgment, the 1<sup>st</sup> Plaintiff represented by Counsel informed the Court as recently as January 2018 that he wanted to purchase the Defendant's land.

It is the case of the Defendant that having acknowledged the validity of the Consent Judgment and informed the Court of his interest in purchasing the subject land from the Defendant, it should not lie in the mouth of the 1<sup>st</sup> Plaintiff to say that he had been fraudulently misled into signing the Terms of Settlement or that the Consent Judgment was fraudulently obtained.

### **ISSUES SET DOWN BY THE COURT FOR DETERMINATION**

At the hearing of the application for directions on 18<sup>th</sup> January 2020, this Court differently constituted set down the following as the issues to be determined in the case:

1. *Whether or not the Consent Judgment filed on 8<sup>th</sup> April 2009 in Suit No. BL 700/2005 was obtained by fraudulent misrepresentation and same ought to be set aside;*
2. *Any other issues arising from the pleadings.*

### **SUMMARY OF WRITTEN ADDRESSES FILED BY BOTH COUNSEL**

In his written address, Counsel for the Plaintiffs submitted that the Defendant admitted some of the grounds and particulars of fraudulent misrepresentation pleaded by not specifically denying them in his Statement of Defence. Counsel for Plaintiffs also stated that the Defendant admitted other grounds of fraudulent misrepresentation during cross-examination and by refusing to cross-examine the 1<sup>st</sup> Plaintiff. Relying on Order 11 Rule 13 of C.I. 47 and the case of *Re Asere Stool; Nikoi Olai Amintia IV (substituted by Tafo Amon II) v. Akotia Oworsika III (substituted by Laryea Ayiku III) [2005-2006] SCGLR, 637*, Counsel for Plaintiffs submitted that although the Plaintiffs had proved their case to the required standard of proof, in view of the admissions by the Defendant the Plaintiffs were not under a duty to provide further proof of their case.

Counsel for the Defendant on the other hand submitted that the Plaintiff had waited too long to institute the present action and he should be taken to have confirmed the Terms of Settlement filed and adopted as Consent Judgment and abide by the transaction. Counsel for Defendant relied on the case of *Kessie v Namih and Others [1981] GLR 444 (HC)* in support of his submissions.

### **APPLICABLE LAW**

### **JURISDICTION TO SET ASIDE CONSENT JUDGMENT**

In the case of *Republic v. High Court (Commercial Division) Accra; Ex Parte The Trust Bank Ltd (Amponsah Photo Lab Ltd. & Three Others (Interested Parties) [2009] SCGLR 164*, the Supreme Court relied on the case of *Emeris v. Woodward [1889]46 Ch D 185* and held as reported in holding 1 of the report at page 165 thus:

*"Notwithstanding that a consent judgment had been given and completed, a trial High Court had ample jurisdiction to set it aside upon any grounds which would entitle it to set aside an agreement entered between the parties..."*

This jurisdiction of the High Court was affirmed in the more recent case of *SIC Insurance Co. Ltd v. Ivory Finance Company Ltd & 4 Ors [2018-2019] 1 GLR 563 at page 570*. In this case the Supreme Court referred to its previous decision in *Republic v High Court (Commercial Division) Accra; Ex Parte The Trust Bank Ltd (Amponsah Photo Lab Ltd. & Three Others (Interested Parties)* (supra) and held per Anin Yeboah JSC (as he then was) that:

*"It is a basic common law principle that a consent judgment obtained before a Court of competent jurisdiction could be set aside on grounds of fraud, mistake or on any other vitiating factor, regardless of its finality."*

From the above-cited authorities, this Court is certain that it has jurisdiction to consider the present action instituted by the Plaintiffs which seeks to *inter alia* set aside the Consent Judgment entered in the Suit No. BL/700/2005.

### **PROCEDURE TO CHALLENGE A CONSENT JUDGMENT**

In Halsbury's Laws of England, (3rd ed.) Vol. 22 it is stated that:

*"... Unless all the parties agree, a consent order, when entered, **can only be set aside by a fresh action.**" (Emphasis added)*

The Supreme Court has also held that the accepted procedure to challenge the validity of a Consent Judgment is to bring a fresh action to establish fraud, mistake, or other vitiating factor. In *SIC Insurance Co. Ltd vrs. Ivory Finance Company Ltd & 4 Ors*

(supra) the supreme Court held as reported in holding 1(a) at page 564 of the report that:

*“...given that an appeal would not ordinarily lie against a consent judgment, **bringing a fresh action to challenge the validity of a consent judgment was a standard and accepted procedure.** Thus, a fresh action to establish fraud, mistake, or other vitiating factor seemed a reasonable procedure for achieving justice in the circumstances.” (Emphasis added)*

In their recent decision in the case of *Republic v. The High Court Land Division (7) Accra Ex parte: The Registered Trustee of East Dadekotopon Development Trust & 3 Ors [Unreported; Civil Motion No J5/46/2020; 22 July 2020; SC]* the Supreme Court speaking through her Ladyship Torkonoo (Mrs.) JSC referred to Halsbury's Laws of England (4th Edition) Volume 26; referred to the dictum of Azu Crabbe JSC speaking for the Court of Appeal in *In re Arthur, Abakah v Attah-Hagan [1972] 1 GLR at page 442*, cited with approval the decision of the High Court delivered by Dordzie J. (as she then was), in *Lutterodt v Nyarko [1999–2000] 1 GLR 29* and similarly held thus:

*“The firm legal position is that consent judgments are binding as contracts, and not even appealable. In order to be free of them, fresh action must be taken by the parties to the consent judgment to vacate them for critical reasons that would invalidate a compromise not contained in the judgment or order.” (Emphasis added).*

The instant suit is a fresh action, instituted by the 1<sup>st</sup> Plaintiff who was 2<sup>nd</sup> Defendant in Suit No. BL/700/2005 together with four others for the purpose of challenging the Consent Judgment entered in that case. The Court therefore finds that the procedure adopted is the appropriate procedure per the decisions of the Supreme Court on the matter.

### **FRAUD/ FRAUDULENT MISREPRESENTATION**

As already stated, the first and fundamental issue set down by this Court differently constituted for determination in this case is whether or not the Consent Judgment filed on 8<sup>th</sup> April 2009 in Suit No. BL/700/2005 was obtained by fraudulent

misrepresentation and same ought to be set aside. To appreciate the issue raised, the Court considered the authorities on fraud and fraudulent misrepresentation.

Misrepresentation is defined in Osborn's Concise Law Dictionary, Eighth Edition, edited by Leslie Rutherford and Sheila Bone as:

*"A representation that is untrue, a statement or conduct which conveys a false or wrong impression. A false or fraudulent misrepresentation is one made with knowledge of its falsehood and intended to deceive. A negligent misrepresentation is one made with no reasonable grounds for believing it to be true. An innocent misrepresentation is one made with reasonable grounds for believing it to be true, as where an honest mistake is made. (Emphasis added)*

In the case of *Comfort Offibea Dodoo & Anor v. Nii Okai Lokko [Unreported; Appeal No HI/135/2014; 19 December 2019]*, the Court of Appeal in its judgment delivered by Tanko Amadu J.A. (as he then was), stated that in Black's Law Dictionary 7th Edition page 670, fraud is defined as: *"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment"*. **At page 1016 fraudulent misrepresentation is defined as: "A false statement that is known to be false or is made recklessly and that is intended to induce a party to detrimentally rely on it"**. **(Emphasis added)**

His Lordship added that the learned authors of *"Kerr on the Law of Fraud and Mistake"* Seventh Ed. McDonnell and Monroe under the rubric *"A treatise on the Law of Fraud and Mistake"* page 1, also defined Fraud in a number of ways, three of which are relevant in the context of the instant case. At page 1, Fraud is defined as follows:—

*".....(b) Fraud, in the contemplation of a Civil Court of Justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence justly reposed, and are injurious to another, or by which an undue or unconscientious advantage is taken of another (c) All surprise, trick, cunning, dissembling and other unfair way that is used to cheat any one is considered as fraud. (d) Fraud in all cases*



*implies a wilful act on the part of any one, whereby another is sought to be deprived, by illegal or unequitable means of what he is entitled to..."*

### **BURDEN OF PROOF**

It is the case of Counsel for Plaintiffs as stated in his written address that the burden of proof on the Plaintiffs is to prove their case on the balance of probabilities.

In civil cases, it is the general principle of law that the Plaintiff bears the burden to prove his case or what he alleges. This legal burden and the standard of proof required in civil cases is contained in sections 10, 11, 12 and 14 of the Evidence Act, 1975 (NRCD 323).

In explaining the requirement of the above-stated provisions of NRCD 323, in the case of *Gifty Oforiwa & Anor vs. Patrick Nutor [Unreported; Civil Appeal No H1/225/2018; 16 May 2022; CA]* the Court of Appeal referred to section 11(1) & (4), 12 and 14 of the Evidence Act, 1975 (NRCD 323) and the decision of the Supreme Court in *Adwubeng vs Domfeh [1996-97] SCGLR 660* and held per Honyenuga, JA (presiding) as follows:

*"The standard of proof in land suits and also in civil cases is proof by preponderance of probabilities."* (Emphasis added)

### **STANDARD OF PROOF IN CIVIL CASES (LAND CASES) IN WHICH FRAUD IS ALLEGED**

The instant action is a civil suit and Counsel for the Plaintiffs would have been correct in his assessment of what the standard of proof on the Plaintiffs is, except that the instant action is a civil suit in which fraudulent misrepresentation has been alleged.

Fraud is a crime and it has been held that fraud is criminal in nature even where it is clothed in civil garbs. In section 13 (1) of the Evidence Act, 1975 (NRCD 323) the degree or standard of proof of fraud in both civil and criminal matters is therefore stated as follows:

*“In a civil or criminal action, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond reasonable doubt.”*

Indeed, in the case of Nana Asumadu II (Deceased) & Anor vs. Agya Ameyaw [Unreported; Civil Appeal No J4/01/2018; 15 May 2019; SC], the Supreme Court held as follows:

*“In law, fraud is a deliberate deception to secure unfair or unlawful gain, or to deprive a victim of a legal right. It is both a civil wrong and a criminal wrong. **Fraud, be it civil or criminal, has one connotation.** It connotes the intentional misrepresentation or concealment of an important fact upon which the victim is meant to rely, and in fact, does rely to the harm of the victim. It is therefore criminal in nature even where it is clothed in civil garbs. **Having pleaded fraud, ...which connotes imputation of crime on the part of the Defendant in obtaining the judgment, the law required Plaintiffs to establish that allegation clearly and convincingly and beyond reasonable doubt.**” (Emphasis added)*

Therefore, contrary to the submissions by Counsel for Plaintiff contained in his written address, the burden of proof on the Plaintiffs in this case is not the same as the burden of proof in civil cases in which fraud has not been alleged.

### **PROOF OF FRAUD**

The fraudulent misrepresentation alleged which must be proved beyond reasonable doubt must also be distinctly alleged and distinctly proved for as held in the case of Davy v Garret (1877) 7 Ch D 473 at 489, CA:

*“In the Common Law Courts no rule was more clearly settled than that fraud must be **distinctly alleged and as distinctly proved**, and that it was not allowable to leave fraud to be inferred from the facts.” (Emphasis added).*

The case of Davy v Garret (supra) was cited with approval by the Supreme Court in the case of Republic vs High Court, Accra; Ex Parte Aryeetey [2003-2005] 1 GLR, 537 in which the Supreme Court held that “As a matter of practice and procedure...it is a

*requirement that a judgment can be impeached on grounds of fraud only by a fresh action where the necessary particulars of the fraud must be distinctly stated in the pleadings. The proponent must not only distinctly specify the alleged fraud, but also strictly prove same because it is not permissible to infer fraud from general situations or facts.*

**(Emphasis added)**

### **EFFECT OF PROOF OF FRAUD**

It is generally understood and accepted as law that where fraud is successfully proved, that fraud vitiates everything. A relevant statement on this as provided by the Supreme Court in *Okofoh Estates Ltd. vs. Modern Signs Ltd. [1996-1997] SCGLR 233 at 253* is that: *“An allegation of fraud goes to the root of every transaction. A judgment obtained by fraud passes no right under it and so does a forged document or a document obtained by fraud pass no right”*. **(Emphasis added)**

Thus, if the fraudulent misrepresentation distinctly alleged and specifically pleaded in paragraph 7 (a) – (g) of the Amended Statement of Claim is specifically proved beyond reasonable doubt, the effect of this proof would be that the Court would be able to declare that the Terms of Settlement and the Consent Judgment obtained by fraud is vitiated.

### **DUTY OF THE COURT IN AN ACTION TO SET ASIDE A JUDGMENT ON GROUNDS OF FRAUD**

In the case of *Nana Asumadu II (Deceased) & Anor vs. Agya Ameyaw* (supra) the Supreme Court referred to the decision of the Court of Appeal in *Brutuw v. Aferiba [1984-86] 1 GLR 25* and the English case of *Jonesco v. Beard [1930] AC 298* and stated that the reliefs claimed by the plaintiffs indicate that they mainly wanted the judgment in an earlier suit to be set aside on the grounds of fraud and misrepresentation. The Court thus stated that:

"...the learned trial judge should have determined the issue of fraud solely and not to have allowed the plaintiffs to re-open the whole case and to allow same parties to re-litigate the same subject-matter..."

The Supreme Court found and held that "The learned trial judge misdirected himself on the law as to what to do when plaintiffs evoked the court's jurisdiction to set aside a judgment allegedly obtained by fraud by not hearing the issue of fraud alone."

Similarly, in the case of SIC Insurance v Ivory Finance Co Ltd (supra) at page 570, the Supreme Court referred to its previous decision in Okwei Mensah (Decd) (acting by) Adumuah Okwei v Laryea (Decd) (acting by) Ashieteye Laryea & Another [2011] 1 SCGLR 317 and explained that:

"...when a court is called upon to set aside a judgment on grounds of fraud, **the case should be limited to only the allegation of fraud** and it should not re-open the matter as if it is a fresh trial of issues raised in the earlier case." **(Emphasis added)**

Relying on the above-cited authorities, this Court is clear that its duty in the present case is simply to consider the particulars of the alleged fraudulent misrepresentation provided by the Plaintiffs and determine on the basis of the evidence adduced whether or not the Plaintiffs have established their case beyond reasonable doubt. The Court would not re-open the matter as if it is a fresh trial of the issues raised in the earlier case.

### **EVALUATION OF EVIDENCE AND OPINION**

The Court has considered the particulars or grounds of the fraudulent misrepresentation alleged and stated by the Plaintiffs in paragraphs 7(a) - (g) of the Amended Statement of Claim and evaluated the evidence in support of same.

#### **Ground of fraudulent misrepresentation stated in paragraph 7(g):**

*The size of the Defendant's purported land which was to be recovered under the Terms of Settlement increased on the ground after the Consent Judgment and after the 1<sup>st</sup> Plaintiff had been made to believe on a visit to the land, that it affected only a small portion.*

The Court finds that the Plaintiffs did not provide evidence that the 1<sup>st</sup> Plaintiff was made to believe that only a small portion of his land will be affected or that after the Consent Judgment, the size of the Defendant's purported land increased on the ground.

In support of this claim or ground of fraudulent misrepresentation, Counsel for Plaintiff submitted in his written address that the 1<sup>st</sup> Plaintiff's land is not shown on the composite plan and it was therefore during a visit to the land that the 1<sup>st</sup> Plaintiff was made to believe that only a small portion of his land will be affected.

The Court finds that the 1<sup>st</sup> Plaintiff's land is indeed not shown on the legend on the composite plan– **Exhibit F** and the submissions by Counsel in this regard may be probable. The burden on the Plaintiffs however is to prove their case beyond reasonable doubt.

From the Statement of Claim filed in Suit No. BL/700/2005, a copy of which is attached to the Witness Statement of the 1<sup>st</sup> Plaintiff and marked **Exhibit B**, the Court however found that, whereas the Plaintiffs in Suit No. BL/700/2005 sought a declaration of title to **0.25 acres of land** at West Bubuashie, registered at the Land Title registry as **No. 62/15/901/1/1**, from the Terms of Settlement filed and adopted as Consent Judgment, a copy of which is attached to the Witness Statement of the 1<sup>st</sup> Plaintiff and marked **Exhibit C**, it is stated that the Parties agreed that the 1<sup>st</sup> Plaintiff, Felicia Abrah Todzro *“would recover possession of 0.266 acres of land, more or less, being Parcel No. 901/1 Block 15 Section 62 situate at Bubiashie and delineated on Registry Map 04/62/88 in the Land Title Registry, Victoriaborg, Accra.”* (**Emphasis added**)

The Court finds from **Exhibits B** and **C** that the size and description of the parcel of land stated in the Terms of Settlement are different and also larger than that stated in the Statement of Claim filed in Suit No. BL/700/2005.

Whilst this documentary evidence before the Court was not challenged, the Court finds that there is no evidence that this discrepancy in the size and identity of the

subject land as stated in the pleadings and in the Terms of Settlement was fraudulently misrepresented.

**Ground of fraudulent misrepresentation stated in paragraph 7(f):**

*The purported indenture granted by Nii Aryee Tagoe, an acting Asere Mantse is fraudulent as no such Asere Mantse ever had power and authority to alienate Mukose lands being part of the Niikoi Olai family lands.*

The Court finds that evidence provided by the Plaintiffs during the trial in support of this ground of fraudulent misrepresentation especially by PW 1, Joseph Emmanuel Neequaye was inconclusive.

This Court is however of the considered opinion that any investigation into this ground of fraudulent misrepresentation would amount to re-opening of Suit No. LD/700/2005 as it is related to the issue of which of the Parties has a better title to the subject land.

**Ground of fraudulent misrepresentation stated in paragraph 7(e):**

*The Defendant suppressed information by not including the original site plan attached to the purported conveyance granted by Nii Aryee Tagoe, a supposed acting Asere Mantse in 1954.*

In respect of this ground of fraudulent misrepresentation, the Court found from the Composite plan prepared by the Regional Surveyor and dated 10<sup>th</sup> November 2008, relied on by the Plaintiffs in support of their case and marked as **Exhibit F**, that, it is stated that the Composite plan was prepared after consideration of *inter alia* the land shown on the site plan of Felicia Abrah Todzro and another. The Plaintiffs did not provide any evidence to suggest that the site plan considered and referred to by the surveyor in **Exhibit F** in the preparation of the composite plan was different from that which the Plaintiffs claimed is the original site plan attached to the purported conveyance to Felicia Abrah Todzro.

In his Witness Statement filed on 17<sup>th</sup> September 2021 and admitted into evidence during the trial as his evidence in chief without objection, the Defendant stated that he is aware that the original Deed of Indenture together with the site plan attached to the conveyance granted by Nii Aryee Tagoe, the Acting Asere Mantse in 1954 was tendered in Court together with the Land Title Certificate. The Defendant tendered a copy of the Indenture, site plan and Land Title Certificate in evidence and same were marked as **Exhibit 5**.

The Court is therefore of the considered opinion that this ground of fraudulent misrepresentation was not made out.

**Ground of fraudulent misrepresentation stated in paragraph 7(d):**

*The identity of the Defendant's purported land, if he had any at all, was at all material times, different and distinct from the 1<sup>st</sup> Plaintiff's land granted to him by the 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs and this was known to the Defendant prior to the Terms of Settlement being executed.*

The Court finds that the description of the land in respect of which Felicia Abrah Todzro initiated Suit No. BL /700/2005, as described in paragraph 5 of the Statement of Claim filed in Suit No. BL /700/2005 – **Exhibit B**, and described in the Amended Writ and Statement of Claim filed in Suit No. BL/700/2005, relied on by the Defendant and marked as **Exhibit 1**, is different from the land described in the Terms of Settlement filed in the suit- **Exhibit C** executed by the Parties and adopted as Consent Judgment of the Court.

The Court also finds that by the survey instructions filed by the Defendants on 9<sup>th</sup> November 2007 in Suit No BL/700/2005 - **Exhibit 9**, the surveyor was instructed “*To superimpose the Site Plans of the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant as against the Site Plans of the Plaintiffs.*” However, from the Composite Plan prepared by the surveyor, **Exhibit F**, the Court finds that the land of the 2<sup>nd</sup> Defendant in Suit No. BL/700/2005, the 1<sup>st</sup> Plaintiff herein, is not shown on the legend as land shown to the surveyor and considered for the preparation of the composite plan. There is therefore no indication

on the Composite Plan that the 1<sup>st</sup> Plaintiff's land is the same as the land of Felicia Abrah Todzro. Yet, the Plaintiffs and the Defendant in the instant action agree that the Composite Plan, **Exhibit F**, which does not show the land of the 1<sup>st</sup> Plaintiff herein is what formed the basis of the Terms of Settlement- **Exhibit C**.

The Court further finds that the land described in the Writ, Statement of Claim in Suit No. BL/700/2005- **Exhibit B** and described in the Amended Writ and Statement of Claim in Suit No. BL/700/2005 -**Exhibit 1** is also different from the 1<sup>st</sup> Plaintiff's land described in the schedule of the 1<sup>st</sup> Plaintiff's Deed of Assignment or indenture attached to his Witness Statement filed in the present action, **Exhibit A**, which was admitted in evidence without objection.

The copy of the report of the search conducted by the Plaintiffs at the Land Commission and dated 18<sup>th</sup> September 2019 – **Exhibit E**, also indicates that there is no recorded transaction in the name of Felicia Abrah Todzro in respect of the 1<sup>st</sup> Plaintiff's land.

From the analysis of the above-stated exhibits, the Court finds that the Plaintiffs provided a number of documentary evidence in support of the claim that the land in respect of which Suit No. BL/700/2005 was instituted is different from that in respect of which the Parties to the action entered into Terms of Settlement and is also different from the 1<sup>st</sup> Plaintiff's land.

There is however no evidence before the Court to support of the claim by the Plaintiffs that these differences were known to the Defendant at the time the Terms of Settlement was executed.

The Court also considered that although **Exhibits A, B, C and F** were available to the 1<sup>st</sup> Plaintiff before the Terms of Settlement was executed, filed and entered as Consent Judgment of the Court, and although these exhibits or evidence supported the Plaintiffs claim that the identity of the Felicia Abrah Todzro's purported land, if any at all, was at all material times, different and distinct from the 1<sup>st</sup> Plaintiff's land, surprisingly, the 1<sup>st</sup> Plaintiff who is literate and was also represented by Counsel did not notice this even though from his own indenture – **Exhibit A** the Statement of Claim



filed in the suit – **Exhibit B** , and the Terms of Settlement which he executed – **Exhibit C**, this fact is apparent.

The Court therefore finds that whilst the 1<sup>st</sup> Plaintiff did not notice from all the above exhibits that his land is different from the land of Felicia Abrah Todzro, it may well be the case that the Defendant did not notice this too.

The Court therefore finds that the Plaintiffs were unable to establish beyond reasonable doubt that the differences in the description or the identity of the land was known to Felicia Abrah Todzro or the Defendant herein prior to the execution of the Terms of Settlement, and also that such information was suppressed by the Defendant to overreach the 1<sup>st</sup> Plaintiff at the time of the execution of the Terms of Settlement.

The Court is of the considered opinion that without more, the mere finding of a discrepancy in the description of the subject land in **Exhibits A, B and C** and the absence of the 1<sup>st</sup> Plaintiff land on the legend of **Exhibit F** is insufficient to arrive at a conclusion that there was fraudulent misrepresentation on the part of the Defendant.

**Ground of fraudulent misrepresentation stated in paragraphs 7(c):**

*The Defendant induced the 1<sup>st</sup> Plaintiff into believing that the portion of the Defendant's supposed land which was to be recovered from the 1<sup>st</sup> Plaintiff's land was just a small portion when in fact it was not.*

In respect of this ground of fraudulent misrepresentation the Court finds that there was no evidence in support of same.

**Ground of fraudulent misrepresentation stated in paragraph 7(b):**

*The person who was presented to the Court as Felicia Abrah Todzro (in Suit No BL 700/2005) was never named and called as such and same was an act of impersonation.*

The case of the Plaintiffs in this regard as presented in the Statement of Claim was stated more clearly in the written address filed by Counsel for Plaintiffs. It is the case of the Plaintiffs that during the conduct of Suit No. BL/700/2005, a woman attended

Court and was introduced or announced for the record as the 1<sup>st</sup> Plaintiff in the suit, Felicia Abrah Todzro.

After the said woman died, the Plaintiffs saw a photograph of her on a copy of the obituary poster, tendered by the 1<sup>st</sup> Plaintiff in evidence and marked as **Exhibit G**. The Plaintiffs pointed out that on the obituary, the name of the deceased is stated as Beatrice Afia Aku Mills.

Counsel for Plaintiffs submitted that although **Exhibit G** is a document which emanates from the Defendant, no-where on **Exhibit G** is it stated that the deceased Beatrice Afia Aku Mills was also known as Felicia Abrah Todzroh.

Counsel for the Plaintiffs also submitted in his written address that no-where in the Statement of Claim filed in Suit No. BL/ 700/ 2005 - **Exhibit B** was it stated that Felicia Abrah Todzro was also known as Beatrice Afia Aku Mills.

For the above stated reasons, it is the case of the Plaintiffs that the attendance, participation and representation of Beatrice Aku Mills as Felicia Abrah Todzro in Suit No. BL/700/2005 was fraudulent.

**Exhibit G** was admitted without objection by the Defendant and in cross-examination held on 19<sup>th</sup> July 2023, as recorded at page 3 of the proceedings, the Defendant admitted that his name is stated on **Exhibit G** as the head of family of the deceased. The Court therefore finds that **Exhibit G** is a document which emanated from the Defendant.

The Court also finds that the Defendant did not deny that the photograph of the woman shown on **Exhibit G** is a photograph of the woman who attended court during the conduct of Suit No. BL/700/2005 and was introduced as Felicia Abrah Todzro. It was essentially the Defendant's case as stated in cross examination held on 19<sup>th</sup> July 2023, that Madam Felicia Abrah Todzro was the same as Beatrice Aku Mills, and that she changed her name to Beatrice Afia Aku Mills when she was of age.

When the Defendant was asked on cross-examination whether he had any legal document to confirm this information concerning the change of name he stated that:

Answer: *I do not have any legal document to that effect. This incident took place a long time ago.*

As noted and submitted by Counsel for Plaintiffs, the Court agrees that it was strange that the Defendant was not able to provide evidence of the alleged change in name, no identity card or any document at all in proof of this claim, especially when on the Amended Writ and Statement of Claim filed in this case, the Plaintiffs had challenged the identity of the person presented during Suit No. BL/ 700/ 2005 as Felicia Abrah Todzro.

In his written address, Counsel for Plaintiff urged the Court not to prefer the oral evidence of the Defendant that Felicia Abrah Todzro was also known as Beatrice Afia Aku Mills to the documentary evidence which showed that the two persons were different.

Counsel for Plaintiffs submitted that there were two different persons, one named Felicia Abrah Todzro, the other named Beatrice Aku Mills. The latter had been presented in Court as the former and this was fraudulent misrepresentation and impersonation, which should be a basis for this Court to set aside the proceedings in Suit No. BL/700/2005 and the Consent Judgment entered in the case.

In the case of *Duah v Yorkwa [1993-94] 1 GLR 217*, the Court of Appeal held per Brobbey J.A. (as he then was) and reported in holding 5 of the report at page 220, that: *"Whenever there was a written document and oral evidence in respect of a transaction, the court would consider both the oral and the documentary evidence and often lean favourably towards the documentary evidence especially where the documentary evidence was found to be authentic and the oral evidence conflicting.*

In the case of *Fosua & Adu Poku v Dufie (Deceased) & Adu-Poku Mensah [2009] SCLGR 310* the Supreme court held unanimously as reported in holding 1 of the report at page 311 that:

*"It was settled law that documentary evidence should prevail over oral evidence."*

This Court finds from the documentary evidence – **Exhibit G** that the person who attended Court in Suit No. BL/700/2005 was Beatrice Aku Mills and not Felicia Abrah

Todzro and this prevails over the oral evidence of the Defendant that Beatrice Aku Mills was the same person as Felicia Abrah Todzro.

The Court also finds that on the totality of the evidence in respect of this matter the Plaintiffs proved their case beyond reasonable doubt.

**Ground of misrepresentation stated in paragraph 7(a):**

*The purported Power of Attorney the basis of which the Terms of Settlement was entered into was fraudulently procured as same was not duly authorized and signed by the therein named donor/ principal.*

With regard to this ground of misrepresentation, Counsel for Plaintiffs noted and submitted in his written address that in paragraphs 7 and 8 of the Statement of Defence, the Defendant denied the Plaintiffs claim that the Terms of Settlement was not duly authorized and signed by the therein named donor/ principal, Felicia Abrah Todzro or that same was fraudulently procured.

Counsel for the Plaintiffs added that despite this denial by the Defendant, in the face of the report of the forensic expert, PW3, admitted into evidence as **Exhibit U**, the Defendant admitted during cross-examination that the names of Felicia Abrah Todzro on the Terms of Settlement and Power of Attorney may have been written for her. Counsel for Plaintiffs submitted that the Plaintiffs proved their case and the Defendant admitted this.

The Court finds from the answers of the Defendant in the cross-examination held in respect of this issue and other answers provided by the Defendant during the trial that the Defendant was generally evasive and not truthful in his evidence until the untruths were pointed out to him in a manner that left him with no option than to admit that he had not been truthful.

In respect of this ground of fraudulent misrepresentation, the Court finds from the indenture of Felicia Abrah Todzro, dated 13<sup>th</sup> June 1955, admitted into evidence without objection as **Exhibit H** that Felicia Abrah Todzro made her mark on the signature page. There is also a jurat on **Exhibit H**, which states that before Felicia

Abrah Todzro made her mark, the indenture was read, interpreted and explained to her in the Ga language. The Court considers that in the absence of other legitimate and contrary evidence, the jurat and mark on **Exhibit H** lead to an inference that Felicia Abrah Todzro was illiterate or blind and could not write her name or sign a signature.

The Court however found that the Terms of Settlement, **Exhibit C** dated 17<sup>th</sup> February 2009, is signed by Felicia Abrah Todzro or bears her full name written by hand.

The Court further found that the Power of Attorney dated 5<sup>th</sup> September 2011, alleged to have been prepared by Felicia Abrah Todzro to authorize one Omani Kortei to act as the lawful Attorney of Felicia Abrah Todzro, tendered in evidence by the Plaintiffs and marked as **Exhibit I**, also bears the signature or handwriting of the said Felicia A. Todzro.

From the Witness Statement of Alhaji Bukari Yakubu – **PW 3**, who testified as a Chief Superintendent of Police (Rtd) of the Ghana Police Service and gazetted in 1981 as an expert in document examination (detection of forgeries) and from the report of the forensic examination – **Exhibit U**, the Court finds as contained in the report that the handwriting or signature stated to be that of Felicia Abrah Todzroe on the Terms of Settlement – **Exhibit C** and on the Power of Attorney – **Exhibit I** are not comparable and they could not have been produced by the same person.

In cross – examination held on 19<sup>th</sup> July 2009, the following ensued as recorded at page 4 of the proceedings of that day:

Question: *Who signed the Terms of Settlement filed on 17/02/2009 marked as Exhibit 2?*

Answer: *It was signed by Madam Felicia Abrah Todroh.*

At page 8 of the proceedings of the Court for that date the following ensued:

Question: *You have told this Court that Madam Felicia Abrah Todzroe was, in your own words your daughter. Between the handwriting on Exhibit 2, that is, the signature for the 1<sup>st</sup> Plaintiff and the handwriting on Exhibit H, which one represents your daughter's handwriting?*

Answer: As I stated earlier, Madam Felicia Abrah Todzroe had little education so **it might happen that someone might have written those names for her. (Emphasis added.)**

As defined in the Osborn's Concise Law Dictionary, Eighth Edition, a false or fraudulent misrepresentation is one made with knowledge of its falsehood and intended to deceive or as held in the case of *Comfort Offibea Dodoo & Anor v. Nii Okai Lokko* (supra), it is a false statement, known to be false and made with the intention to induce a party to detrimentally rely on it.

In the case of *The Republic vs. Daniel Mckorley, Exparte: Al-Hassan Iddisah [Unreported; Suit No. GJ/0057/2020, dated 27th day of February, 2023, CA]* the Court of Appeal explained in its judgment delivered by His Lordship, Kweku T. Ackaah-Boafo, JA that:

*"...when the law speaks of reasonable doubt it is not a fanciful doubt. To paraphrase the Supreme Court of Canada in *R. v. Villoroman, [2016] 1 SCR 1000, 2016 SCC 33 (CanLII) at p. 1023*, "A reasonable doubt is a doubt based on 'reason and common sense'; it is not 'imaginary or frivolous'; it 'does not involve proof to an absolute certainty'; and it is 'logically connected to the evidence or absence of evidence' (See also *R. v. Lifchus, [1997] 3 SCR 320, 1997 CanLII 319 (SCC)*). In other words, the reasonable doubt threshold does not require a fantastical suspension of disbelief. It is a doubt that logically arises from the evidence, or the lack of evidence based on common sense and reason."*

After careful consideration of the totality of the evidence adduced in respect of this matter, in particular, the evidence of the Plaintiff's Witness -PW3 and the admission of the Defendant thereafter that someone might have written the names on **Exhibit H** and on **Exhibit 2** for Felicia Abrah Todzro, this Court is of the opinion that the Plaintiffs proved their case beyond reasonable doubt that the Defendant knew that others had written the name of Felicia Abrah Todzro on the Terms of Settlement and other documents relied on in Suit No. BL/700/2005 and this was intended to deceive the Defendants in Suit No. BL/700/2005.

## **EFFECT OF THE FRAUDULENT MISREPRESENTATION ON THE PLAINTIFFS**

Counsel for the Defendant stated in his written address that the Plaintiffs did not show how the fraudulent misrepresentation had adversely affected them.

The Court is however satisfied that it was the Plaintiffs case as stated in the processes filed and as submitted by their Counsel, that the 1<sup>st</sup> Plaintiff would not have entered into the Terms of Settlement adopted as Consent Judgment in Suit No. BL/700/2005 if he had known that the signatures thereon were not that of Felicia Abrah Todzro or that Felicia Abrah Todzro had not authorized anyone to act on her behalf in the Power of Attorney relied on.

From all the processes filed by both Parties, especially the Witness Statement of the Defendant, it is apparent that by the Terms of Settlement entered as Consent Judgment in Suit No. BL/700/2005, the 1<sup>st</sup> Plaintiff herein agreed to cede the land marked on the composite plan to Felicia Abrah Todzro, who was substituted by the Defendant.

This adversely affects the 1<sup>st</sup> Plaintiff for the reason that the land of Felicia Abrah Todzro as described on the Writ and Statement of Claim as amended and filed in Suit No. BL/700/2005 is different from the land described in the Terms of Settlement. The Composite Plan which forms the basis of the Terms of Settlement does not indicate in the legend that the 1<sup>st</sup> Plaintiff's land was taken into consideration. Yet, it appears that on the ground, the Terms of Settlement have been interpreted to include the 1<sup>st</sup> Plaintiffs land and as stated by the Defendant in his Witness Statement and Defence, the 1<sup>st</sup> Plaintiff has indicated to the Court in proceedings held as recently as 2018, that for the purpose of giving effect to the Consent Judgment entered on the basis of the Terms of Settlement, he is prepared to buy back his land from Felicia Abrah Todzro or the Defendant herein and a valuation report has been prepared.

So long as the Terms of Settlement and the Consent Judgment entered on the basis of that agreement remain in force, the Plaintiffs herein are bound by same as claimed by the Defendant in all the processes filed in this case.

## **ACTION INSTITUTED WITHIN REASONABLE TIME?**

Whilst the Defendant admitted during the trial that the handwritings/ signatures of Felicia Abrah Todzro may have been written by others, Counsel for the Defendant submitted in his address relying on the case of *Kessie v Namih and others* (supra) that the instant action has not been instituted within reasonable time and the Plaintiff is deemed to have accepted the transaction.

The brief facts of the case of *Kessie v Namih and others* (supra) as reported at page 444 – 445 of the report are that, the Plaintiff a legal practitioner instituted an action in 1977 against the Defendant to have a deed of assignment executed in 1929 cancelled on the ground of fraud. The 1<sup>st</sup> Defendant did not enter appearance to the suit. The Plaintiff contended that the deed of assignment was a forgery but led no evidence on proof of that allegation. The Court found *inter alia* on the Plaintiff's own evidence that the Plaintiff got to know as far back as 1945 that the 1<sup>st</sup> Defendant had been assigned the whole interest in the subject land but did nothing about it until 1977 when he instituted the action. It was under these circumstances that the Court held per Roger Korsah J. that although an action may be instituted at any time to avoid a transaction on grounds of fraud, 27 years was too long a time to wait before commencing proceedings to vitiate the transaction between the Plaintiff and the Defendant on the ground of fraud.

In the present case, the Defendant admits in his Statement of Defence and in his Witness Statement that as recently as January 2018, the 1<sup>st</sup> Plaintiff herein had given indication to the Court that he was prepared to purchase the subject land from the Plaintiff. The Court finds that by this statement, the Defendant admits that as at 2018 the 1<sup>st</sup> Plaintiff did not know that the Terms of Settlement which was adopted in Suit No. BL/ 700/2005 had been obtained by fraudulent misrepresentation.

The Court also finds from the dates of the report of the search conducted by the Plaintiffs at the Lands Commission, 18<sup>th</sup> September 2019- **Exhibit E**, the date of the request for forensic examination, 19<sup>th</sup> January 2021 - **Exhibit T** and the report of the forensic expert, 21<sup>st</sup> May 2021 - **Exhibit U** that the key evidence relied on by the Plaintiffs in support of this case was obtained recently. The Court therefore finds that



the present action has not been instituted after an unreasonably long period of time as Counsel for the Defendant suggests in his address.

## CONCLUSION

After consideration of all the evidence adduced, the Court finds that Felicia Abrah Todzro, the 1<sup>st</sup> Plaintiff in Suit No. LD/700/2005 was impersonated during the conduct of the suit by one Beatrice Afia Aku Mills.

The Court also finds that the handwriting/signature of Felicia Abrah Todzro on the Terms of Settlement which was filed in Court and entered as Consent Judgment in Suit No. BL./700/2005 was not her deed and the Consent Judgment was obtained by fraudulent misrepresentation.

As stated by the Supreme Court in *Okofoh Estates Ltd. vs. Modern Signs Ltd.* (supra), *“An allegation of fraud goes to the root of every transaction. A judgment obtained by fraud passes no right under it and so does a forged document or a document obtained by fraud pass no right”*. **(Emphasis added)**

This Court therefore sets aside the Consent Judgment entered in Suit No. BL/700/2005 as null, void and of no effect.

The Court orders that the Defendant, his agents or assigns are perpetually restrained from interfering with the subject land, described in the schedule 1<sup>st</sup> Plaintiffs indenture, **Exhibit A**, as ALL THAT piece of land situate lying and being at Bubiashie – Accra and bounded on the North by proposed road measuring 175 feet more or less, on the East by the Assignors land measuring 65 feet more or less, on the South by Winneba to Accra Motorway measuring 80 feet and 40 feet and 20 feet respectively more or less and on the West by Assignors land measuring 125 feet more or less and containing an approximate area of 0.33 Acre more or less which said piece and parcel

of land is more particularly described and delineated on the plan attached to the indenture and edged pink.

Costs of Fifteen Thousand Ghana Cedis (GH¢ 15,000) is entered in favour of the Plaintiffs against the Defendant having regard to Order 74 of the High Court (Civil Procedure Rules) 2004 (C.I. 47) as amended.

SGD

NABEELA NAEEMA WAHAB (MS.) J.  
(JUSTICE OF THE HIGH COURT)

COUNSEL

1. IVAN MENSAH DADZIE FOR THE PLAINTIFF – PRESENT
  
2. G.H. QUIST WITH FLEISCHER-DJOLETO FOR – PRESENT  
THE DEFENDANT

CASES REFERRED TO:

1. *Kessie v Namih and Others* [1981] GLR 444 (HC)
2. *Republic v. High Court (Commercial Division) Accra; Ex Parte The Trust Bank Ltd (Amponsah Photo Lab Ltd. & Three Others (Interested Parties))* [2009] SCGLR 164
3. *Emeris v. Woodward* [1889]46 Ch D 185
4. *SIC Insurance Co. Ltd v. Ivory Finance Company Ltd & 4 Ors* [2018-2019] 1 GLR 563 at page 570.
5. *Republic v High Court (Commercial Division) Accra; Ex Parte The Trust Bank Ltd (Amponsah Photo Lab Ltd. & Three Others (Interested Parties)*

6. Republic v. The High Court Land Division (7) Accra Ex parte: The Registered Trustee of East Dadekotopon Development Trust & 3 Ors [Unreported; Civil Motion No J5/46/2020; 22 July 2020; SC]
7. In re Arthur, Abakah v Attah-Hagan [1972] 1 GLR at page 442
8. Lutterodt v Nyarko [1999–2000] 1 GLR 29
9. Comfort Offibea Dodoo & Anor v. Nii Okai Lokko [Unreported; Appeal No HI/135/2014; 19 December 2019]
10. Gifty Oforiwa & Anor vs. Patrick Nutor [Unreported; Civil Appeal No H1/225/2018; 16 May 2022; CA]
11. Adwubeng vs Domfeh [1996-97] SCGLR 660
12. Nana Asumadu II (Deceased) & Anor vs. Agya Ameyaw [Unreported; Civil Appeal No J4/01/2018; 15 May 2019; SC]
13. Davy v Garret (1877) 7 Ch D 473 at 489, CA
14. Republic vs High Court, Accra; Ex Parte Aryeetey [2003-2005] 1 GLR, 537
15. Okofoh Estates Ltd. vs. Modern Signs Ltd. [1996-1997] SCGLR 233 at 253
16. Brutuw v. Aferiba [1984-86] 1 GLR 25
17. Jonesco v. Beard [1930] AC 298
18. SIC Insurance v Ivory Finance Co Ltd (supra) at page 570
19. Okwei Mensah (Decd) (acting by) Adumuah Okwei v Laryea (Decd) (acting by) Ashietey Laryea & Another [2011] 1 SCGLR 317
20. Duah v Yorkwa [1993-94] 1 GLR 217
21. Fosua & Adu Poku v Dufie (Deceased) & Adu-Poku Mensah [2009] SCLGR 310
22. The Republic vs. Daniel Mckorley, Exparte: Al-Hassan Iddisah [Unreported; Suit No. GJ/0057/2020, dated 27th day of February, 2023, CA]
23. R. v. Villoroman, [2016] 1 SCR 1000, 2016 SCC 33 (CanLII) at p. 1023,
24. R. v. Lifchus, [1997] 3 SCR 320, 1997 CanLII 319 (SCC).