IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA-AD 2020

CORAM: DOTSE, JSC (PRESIDING)

APPAU, JSC

PWAMANG, JSC

DORDZIE (MRS), JSC

OWUSU (MS), JSC

CIVIL APPEAL

NO. J4/09/2019

20TH MAY, 2020

BOARD OF GOVERNORS,

ACHIMOTA SCHOOL ……. PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. NII AKO NORTEI II …….. 1ST DEFENDANT/APPELLANT/RESPONDENT

SUED AS "MANKRALO OR ACTING

CHIEF OF OSU OF DIVISION OF GA STATE"

2. PLATINUM EQUITIES LIMITED ……. 2ND DEFENDANT

3. LANDS COMMISSION ……. 3RD DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

PROLOGUE

DOTSE, JSC:-

We wish to commence this delivery by the following quotation which we think sums up the conduct of all major stakeholders in this case.

Quotation attributed to Thomas a Kempis. See Jack Fairweather's Book ***"The Volunteer the true story of the resistance hero who infiltrated Auschwitz"*** unnumbered page before the contents.

> ***"Whoever loves much, does much.***
>
> ***Whoever does a thing well does much***
>
> ***And he does well who serves the common community before his own interest."*** ***Emphasis***

This is an appeal by the Plaintiffs/ 1st Respondents/Appellants, hereafter, Plaintiffs against the judgment of the Court of Appeal dated 2nd November 2017.

The Court of Appeal judgment referred to supra actually reversed the Ruling of *(Judge No. 4)* sitting at the High Court Accra, dated 20th July 2016 wherein she dismissed an application filed by the 1st Defendant/Appellant/1st Respondent, hereafter 1st Defendant, which sought to

dismiss the suit filed therein by the Plaintiffs against the 1st Defendant and 2 others, therein namely, **Platinum Equities Ltd, 2nd Defendants therein and Lands Commission, 3rd Defendants/2nd Respondents/2nd Respondents, hereafter 3rd Defendants.**

RELIEFS CLAIMED BY THE PLAINTIFFS IN THE HIGH COURT SUIT NO. LD/0352/2016 FILED ON 26TH JANUARY 2016 WHICH 1ST DEFENDANT SOUGHT TO DISMISS AND FAILED IN THE TRIAL HIGH COURT BEFORE JUDGE NO. 4

a. An order declaring the Plaintiff's title to the entire Achimota School land, including the 172.68 acres claimed by the 1st and 2nd Defendants pursuant to the judgment entered in ***Suit No. SOL 21/10***.
b. An order setting aside the judgment, and all consequential orders, entered in Suit No. SOL 21/10 on the grounds that the said judgment and orders **were obtained by fraud perpetrated on the Plaintiff by the 1st Defendant, OR, in the alternative, a declaration that the judgment and all orders entered in Suit No. SOL 21/10, are not enforceable against the Plaintiff's title and interest in the Achimota School land.**

c. An order for the recovery of possession of parts of the Achimota School land encroached by the 1st and 2nd Defendants, their agents and/ or assigns.
d. An order of perpetual injunction restraining the 1st and 2nd Defendants and/or their assigns and agents from interfering with the Plaintiff's title, possession, occupation and use of the land encroached upon and/or any part of the Achimota School land.

e. An order for the recovery, jointly and severally from the 1st and 2nd Defendants, of the assessed restoration costs of the destroyed parts of the conserved greenery areas.
f. Damages for the 1st and 2nd Defendants' trespass to the Achimota School land.
g. An order for the 3rd Defendant to rectify the lands register by expunging any "plotting" and /or registration made in respect of any interest to any part of the Achimota School land pursuant to the judgment or any order made in Suit No. SOL/21/10.
h. Costs

BRIEF FACTS

The facts in this case are rather chequered. Due to this phenomenon, we will set out the facts in sequence and in some detail.

Writ No. SOL/21/10

On or about the 16th day of March, 2010, the 1st Defendant herein, therein Plaintiff instituted and filed Suit No. SOL/21/10 in the High Court, Accra against the 3rd Defendants herein, therein Defendant claiming the following reliefs:-

a. **"A declaration that the property in dispute has not been used for the public purpose or public interest alleged.**
b. **A declaration that the constitutional rights of the Plaintiff to own property either alone or in association with others has been violated.**
c. **An order for the recovery of the said land.**
d. Mesne profits for the use and occupation of the said land.
e. An order of perpetual injunction restraining the Defendants, their agents, hirelings, successors, personal representatives, workmen, servants, assigns,

whomsoever and howsoever described, from dealing with the said land in anyway whatsoever.

f. Costs and
g. Any further reliefs arising from the pleading." Emphasis

In a thirteen paragraphed statement of claim, the 1st Defendants herein pleaded material facts upon which they relied to claim the above writ of summons against only the 3rd Defendants.

SUMMARY OF MATERIAL FACTS AND PLEADINGS IN SUIT NO. SOL/21/10.

The 1st Defendants made the following key allegations in support of the above-listed claims:-

a. The 1st Defendant herein, plaintiff in Suit No. SOL/21/10 described himself therein as the Mankralo or Acting Chief of the Osu Division of the Ga State and brings (Suit No. SOL/21/10) for and on behalf of the Osu Stool and all its quarters, traditional families, elders, functionaries, citizens and stool-subjects who are the allodial owners."
b. A parcel of land measuring 338.61 acres lying at "Achimota in the City of Accra" formed part of the parcel of land acquired by the colonial government in 1922", under Certificate of Title LS No. 43/27.
c. The land was acquired "in 1922" for use as "extension of college site."
d. The government of "Gold Coast and of Ghana have failed or neglected to utilize the land for the purpose stated.
e. The Lands Commission (defendant therein, and 3rd Defendants herein) is the state institution charged with the management and control of public lands.
f. The "expropriation violates their rights under Article 18 (1) of the Constitution to own property either alone or in association with others."

g. The Lands Commission has "either by grant or neglect permitted others to occupy portions of the land for their own private purposes which act show that the Lands Commission has no intention to utilize the land for the declared "public purpose and
h. On the other hand the Lands Commission have either granted or permitted a number of third parties to occupy and utilize parts of the land for their own private purpose thus creating possibilities of adverse possession to the detriment of the plaintiffs."

3RD DEFENDANTS DEFENCE TO SUIT NO. SOL/21/10 FILED ON 3RD JUNE 2010 (THEREIN AS DEFENDANTS)

Our candid opinion with the Defence and conduct of the case by the Solicitors of the 3rd Defendants at the time is nothing but a collusion with the interests of the 1st Defendants herein.

The Solicitors of the 3rd Defendants as will be disclosed in these narratives, clearly abdicated their watchdog roles as constitutionally required of them.

What is the basis for such an accusation?

From the Defence filed, 3rd Defendants admitted paragraphs 1, 2, 3 and 4 of the statement of claim.

Paragraph 1 of the Statement of Claim reads as follows:-

"(1) The Plaintiff is the Mankralo or Acting Chief of the Osu Division of the Ga State and brings this action for and on behalf of the Osu Stool and all its quarters, traditional

families, elders functionaries, citizens and stool-subjects who are the allodial owners of the tract of land more precisely described in the schedule below."

How can the Defence Counsel honestly admit these material particulars in the pleadings as stated supra? Is he an advocate of the Osu Stool? The pleadings in the Defence become more puzzling when it was pleaded thus in paragraph 3 *"That according to Osu customary law practice and usage, the Mankralo shall act as a Mantse in the absence of a substantive Osu Mantse more especially at the time the writ was filed."*

In paragraph 4, the pleading in the Defence takes an unprecedented turn as follows:-

"That although currently Osu has a substantive Mantse, once his name has not been gazetted in the National Registrar of Chiefs the Mankralo has the requisite capacity to institute the instant action."

Even though the Solicitor who settled the pleadings for the 3rd Defendants then denied some factual averments in paragraphs 8, 10, 11, 12 and 13 of the Statement of Claim, he nonetheless virtually threw in the towel as in a boxing match when he pleaded in paragraph 7 of the Defence as follows:-

"The defendant in the circumstances pleads that since the facts are not in dispute, the case should be set down for legal arguments *". Emphasis*

By the above averments, the conduct of the case by the Defendants therein, now 3rd Defendants appeared to us to have been seriously compromised.

For example, the averments in paragraph 5 of the Defence that the Defendants are not in a position to admit the crucial averments in paragraphs 5, 6 and 7 of the Statement of Claim to us is an abdication of their constitutional mandate as managers of all public and vested lands.

Perhaps that explains why the users and occupiers of the Land, Achimota School and the constitutionally mandated institution to defend all suits against the Government, Attorney-General were all not served but rather marginalized.

How else can one interprete the Defence not being in a position to deny the following averments in the Statement of Claim bearing their constitutional position and knowledge of all public lands including the instant one. See for example the following paragraphs of the Statement of Claim:-

1. "The Plaintiff states that all the governments of the erstwhile Gold Coast and of Ghana **have failed and or neglected to utilize the land for the purpose stated."**
2. **No compensation whatsoever has been paid to the Plaintiffs for the said acquisition.**
3. The Plaintiffs say that expropriation without compensation violates their rights under Article 18 (1) of the Constitution to own property either alone or in association with others". Emphasis

Furthermore, if you juxtapose the averment in paragraph 12 of the Defence in which they absolutely denied granting any portion of the acquired land or permitting others to occupy same without their permission with their not denying those crucial averments, then it begs the question. **They asseverated further that, even though the land is occupied by several artisans, mechanics and squatters, none of these is a grant from them or with their consent. How did they come to plead those facts when they did not inform the plaintiff herein?**

If this was their position in the pleadings in the suit, then it is really incomprehensible that they should have pleaded that the case be resolved by legal arguments and not by evidence.

Be as it was, the suit eventually proceeded to conclusion on this legal arguments trajectory and on the **28th day of July 2011**, *(Judge No. 1)* (as he then was) presiding over the High Court, Accra delivered judgment in favour of the 1st Defendants herein, therein, Plaintiffs as follows:-

> **"The factual basis upon which Plaintiff instituted the action was not traversed. Indeed, in paragraph 7 of the statement of defence, defendant conceded that the facts are not disputed and so defendant advocated for determination of the dispute by legal arguments.** Therefore, by agreement of both lawyers for the parties the court directed both learned lawyers to file their respective legal submission which they did.
>
> Plaintiff made a case that since 1922, their subjects, families, elders, functionaries have not only been in possession of this land but have been doing acts adverse to the title the government acquired, nonetheless the government failed to take action. Plaintiff stressed that they have been in adverse possession by farming and putting up permanent settlement mansions on the land. This averment was not traversed. All defendants said was that there are mechanics, artisans and squatters who are presently occupying the land. **But what must be observed is that no such mechanic or artisan or squatter has sued the defendant**. It is the Osu Stool that claims that the court must intervene to **safeguard their possessory interest in the disputed land."**

The learned trial Judge then continued his delivery in the following terms:-

> **"The Plaintiff in their supplementary legal submissions filed on 21st April 2011 attached a site plan of land of approximately 172.68 acres as land they**

have been in adverse possession of. This was served on defendant. Nevertheless, there was no reaction.

I therefore take it that defendant concedes that Plaintiff and its subjects have been in adverse possession of the land contained therein.

I therefore conclude that Plaintiff succeeds in the action in part. However, since the law has been established in the case of ***Wordie and Others v. Awudu Bukari (1976) 2 GLR 317, CA*** **that where the plea of acquiescence and laches succeed the pleader becomes entitled to remain in possession but title cannot be declared in him, I declare plaintiff as entitled to remain in possession.**

Accordingly**, I enter judgment for Plaintiff and declare that they are entitled to remain in possession of all that piece of land which is approximately 172.68 acres as attached to the supplementary legal submissions filed on 21st April 2011. I hereby by an order of this court restrain the defendant, their agents, hirelings, workmen, servants, assigns whomsoever and howsoever described from dealing with the said land in any way inconsistent with the possessory right of Plaintiff." Emphasis**

PARTIES TO THE SUIT THEREIN

It must be noted that, the Suit in SOL/21/10 was conducted throughout between the 1st Defendants herein and 3rd Defendants.

This was irrespective of the fact that, the 1st Defendants themselves pleaded in paragraph 3 of their Statement of Claim as follows:-

"The Plaintiff says that the land described in the Schedule was acquired on 17th March 1922 by the Colonial government for ***"extension of college site"*** under Certificate of Title LS NO 43/27."

Finally in the schedule to the Statement of Claim, **in the description of the land, Achimota is mentioned.**

This meant that, at all material times, it was not lost on the 1st Defendants that this land has been acquired since 1922 by the Gold Coast Government for the Achimota College. Why then was the school not notified about the pendency of the Suit or let alone made a party?

It should be noted that, Achimota is a national asset, Is that the way to treat a national asset?

ACHIMOTA SCHOOL

Achimota School, formerly Prince of Wales College and School, later Achimota College, now Achimota Senior High School is a co-educational boarding school located at Achimota in Accra, Ghana and nicknamed MOTOWN.

The school was founded in 1924 by Sir Frederick Gordon Guggisberg, Dr. James Emman Kwegyir Aggrey and Rev. Alec Garden Fraser.

It was formally opened in 1927 by Sir Frederick Guggisberg, then Governor of the British Gold Coast Colony. Achimota, modelled on the British Public school system, was the first mixed-gender school to be established in the Gold Coast.

The school has educated many African leaders, including **Kwame Nkrumah, Edward Akufo-Addo, Jerry John Rawlings and John Evans Atta Mills, all of whom are former Heads of State of Ghana, and Sir Dawda Jawara, first head of state of The Gambia.**

Achimota School occupies over two square miles (525 hectares) of prime real estate in the middle of the Achimota Forest Reserve, in the Accra Metropolitan Area. It is a great co-educational boarding school where boys and girls receive complete and total education. It used to be a secondary school, teacher training college and University all rolled into one. But now only the secondary school exists at this site. **It possesses a swimming pool, extensive playing fields, a nature reserve, a demonstration farm, and a model village for the school's employees. It also has its own hospital, museum, library and printing press.**

Close to the school's central campus are the Golf Club, the Achimota School Police Station, a staff village for non-teaching staff called Anumle, a forest reserve, a large farm and a 45 bed Achimota Hospital.

From the above description, it is an undeniable fact that Achimota School is one of Ghana's most foremost educational institutions. They have served at various times as a Training College, a Secondary School which it still is, and the cradle of the University of Ghana.

NOTICE OF PENDENCY OF JUDGMENT IN SUIT NO SOL/21/10 TO ACHIMOTA

From the above narrative, it bears emphasis that our search through the entire appeal record has revealed that, the 3rd Defendants herein, therein 1st Defendants, **refused, failed and or neglected** to file any process against the judgment dated 28th July 2011 in respect of Suit No. SOL/21/10.

However, on the 4th of March 2013, almost one year, seven months from the date of judgment, one Veronica Owusu-Konamah, described therein as an Assistant Legal

Officer of the Lands Commission was kind enough to author the following letter to the Headmistress of Achimota School as follows:-

"Dear Madam,

IN THE MATTER OF NII AKO NORTEI V LANDS COMMISSION

This is to inform you that pursuant to our meeting on the ***19th of February 2013 we have contacted Mr. Stanley Amarteifio, Solicitor for Achimota Senior High School on the above subject matter as you directed.***

We have explained to him that the judgment obtained against the Lands Commission in Suit No. SOL/21/10 entitled Nii Ako Nortei v Lands Commission ***adversely affects Achimota School lands and there is therefore the urgent need for the school to take steps to set aside the judgment.***

Mr. Stanley Amarteifio has requested that we dispatch a copy of the writ and the judgment to you for onwards dispatch to him for action.

Accordingly, we have attached a copy of the writ and judgment of the High Court.

We wish to reiterate that the Land in respect of which judgment has been taken forms part of the Achimota school lands, which was acquired under a Certificate (sic) Title dated 1927. The Plaintiff judgment creditor is currently taking rapid steps to enforce the judgment hereto attached. Most critical of the steps is a pending application for mandamus to compel the Lands Commission to plot the subject matter lands in Plaintiff name.

We would humbly advise that you act expeditiously to halt the execution and to set the judgment aside.

Yours faithfully" Emphasis

For Solicitor Secretary

Veronica Owusu-Konamah

(Assistant Legal Officer)"

DESPERATE BUT FAILED STEPS TO VACATE THE JUDGMENT IN SUIT NO SOL/21/10 DATED 28TH JULY 2011

The plaintiffs herein, 3rd Defendants, and Attorney-General took various failed attempts at nullifying and or vacating the said judgment of 28/7/2011 until the institution of the instant suit which has culminated in this appeal. Some of the failed processes are:-

1. The first failed process embarked upon by the Plaintiff herein after they became aware of the judgment was to file a Notice of claim in the following terms filed on 17th June 2014. It was titled as follows:-

"BETWEEN

NII AKO NORTEY (MANKRALO OF OSU) - *PLAINTIFF*

SUING FOR AND ON BEHALF OF THE OSU

STOOL

165 WEST LAAKOO

LA-ACCRA

VRS

LANDS COMMISSION - *DEFENDANTS*

CANTONMENTS ACCRA

AND

THE BOARD OF GOVERNORS - CLAIMANTS

ACHIMOTA SCHOOL

ACHIMOTA, ACCRA

NOTICE OF CLAIM ORDER 44 RULE 12

TAKE NOTICE THAT THE BOARD OF GOVERNORS OF ACHIMOTA SCHOOL, hereby make a claim to the property as described below intended to be taken in execution by the Plaintiff pursuant to a judgment of the High Court Accra (Lands Division) dated the 28 day of July 2011.

The said property consists of:-

> *"All that piece or parcel of land containing an approximate area of 172.680 acres or 69.883 hectares more or less lying, situate and being at Achimota in the city of Accra in the Greater Accra Region of the Republic of Ghana and bounded on the North East by GIMPA (Campus) measuring a total distance of 5,144.4 feet more or less on the South East by Lessor's land, measuring 1600.2 feet more or less on the South West by Lessor's land measuring a total distance of 4,388.1 feet more or less and on the West by Lessor's land measuring 1,422.5 feet more or less on the North West by existing road measuring a total distance of 1,271.1 feet more or less."*

The address for service of Achimota School is

1. The Board of Governors
   Achimota School
   Achimota
   Accra

And

2. C/o Sylvia Cudjoe (Mrs)
   Amarteifio, Cudjoe and Associates
   2nd Floor, Total House
   25, Liberia Road
   Accra

Dated at Accra this 17th day of June 2014

The Registrar
High Court
(Lands Division)
Accra " *Emphasis*

Pursuant to the filing of the process wherein the Plaintiffs were described therein as Claimants, an application for Interlocutory injunction was applied for by them against the 1st Defendants herein, their servants, agents, workmen etc. from continuing with their acts of trespass on the land pending the final determination of their claim.
On the 30th July 2014, (Judge No. 2) presiding over an Accra High Court, dismissed the said application.

INVITATION TO PLAINTIFFS HEREIN TO SETTLE

Following the Ruling which was delivered on the 30th July 2014 by the High Court, Accra and referred to supra, the next events of consequence were ***"WITHOUT PREJUDICE"*** invitation letters from Dr. Philip Anderson to the Plaintiffs herein, inviting them for an out of court settlement, dated 7th August 2014 and 25th August 2014, respectively.

It is perhaps of interest to set out portions of the letter of 25th August 2014 which speaks for itself as follows:-

> **"Following the outcome of our meeting in your office on 21st August 2014, I have the instructions of my clients to respectfully respond to your concerns as follows:-**
>
> 1. **My clients confirm that they have sought the consent of your litigation rivals, the Osu Stool to attempt settlement out of Court in this matter and that the Osu Stool shall respect the outcome thereof.**
> 2. **The Summary of my clients' proposal package for settlement is**
>
> (i) **To establish a Public Private Partnership (PPP) with Platinum Equities to build classroom blocks, geography or science block and to build apartment units for teachers. My clients shall commit the total sum of GH¢1,750,000.00 towards the aforesaid project.**
>
> (ii) **To assist in the renovation of the Achimota School football field.**
>
> (iii) **To commit the sum of GH¢75,000.00 to fence your property in order to abate encroachment.**
>
> (iv) **The total value of my clients' partnership contribution shall therefore be GH¢1,825,000.00".**

What is worthy of note is that, the Platinum Equities mentioned therein in the letter, were the 2nd Defendants, the Plaintiffs herein issued Suit No. LD/ O352/16 against in the High Court, Accra which is the suit that has led to the instant appeal.

Secondly, it is important to observe that Dr. Philip Anderson wrote those letters principally "for and on behalf of interested parties with the consent and

concurrence of some principal members of the Osu Stool on the above subject matter and on their instructions to do so."

We are however aware of the legal implications in respect of these "without prejudice" communications. They are published just to indicate the engagements the plaintiffs had with 1st and 2nd Defendants.

From the appeal record, there seems to be nothing of value that emanated from these settlement attempts.

THE FILING OF THE ATTORNEY GENERAL'S SUIT NO: SOL/53/15

On 24th March 2015, the Attorney-General, in his capacity as the Principal Legal adviser to the Government of Ghana issued a writ of summons against Nii Ako Nortei as 1st Defendant and Lands Commission as 2nd Defendants. See pages 45-56 of the record of appeal.

In order to appreciate the full force and effect of the Ruling subsequently delivered by (Judge No. 3) on 6th July 2015, it is important to set out in full the reliefs claimed by the Attorney-General against the Defendants in that suit.

"**THE ATTORNEY GENERAL**

ATTORNEY GENERAL'S DEPARTMENT

MINISTRIES-ACCRA

VRS

1. **NII AKO NORTEI**
   (MANKRALO OF OSU
   ON BEHALF OF THE OSU STOOL
   165 WEST LAKOO
   LA-ACCRA
2. **LANDS COMMISSION**
   HEAD OFFICE
   CANTONMENTS
   ACCRA

The Plaintiff's claim is for

a. A declaration that the judgment of the High Court which was delivered by His Lordship Anthony Oppong, on 28th July 2011 sitting as the presiding Judge at the High Court (Lands Division) Accra in the case titled ***Nii Ako Nortei vrs Land Commission with case number SOL 21/10*** in favour of the 1st Defendant herein who was the plaintiff therein and declared that the 1st Defendant herein is entitled to remain in possession of all that piece of land which is approximately 172.68 acres as **attached to the supplementary legal submissions filed on 21st April 2011 and gave an order restraining the 2nd Defendant herein, their agents, hirelings, workmen, servants, assigns** whomever and howsoever described from dealing with the said land in any way inconsistent with the possessory rights of the 1st defendant herein is not binding on the Plaintiff.
b. An order of perpetual injunction restraining defendants from acting on the said judgment.
c. An order to set aside the judgment determined on 28th July 2011, by His Lordship Justice Anthony Oppong, sitting as the presiding Judge at the High Court (Lands Division) Accra in the case ***titled Nii Ako Nortei v Lands Commission with case***

number SOL 21/10 in favour of the plaintiff/respondent herein who was the plaintiff therein and declared that **the plaintiff/respondent herein is entitled to remain in possession of all that piece of land which is approximately 172.68 acres as attached to the supplementary legal submission filed on 21st April 2011 and gave an order** restraining the defendant/respondent therein, their agents, hirelings, workmen, servants, assigns whomsoever and howsoever described from dealing with the said land in any way inconsistent with the possessory rights of the plaintiff/respondent herein and further awarded cost of GH¢ 5,000.00 against the 2nd defendant/respondent.

d. An order to set aside and or expunge any registration of 1st and 2nd defendants as owner of the land in the Land Registry.
e. Declaration that the judgment of the High Court by His Lordship Justice Anthony Oppong, sitting as the presiding judge at the High Court (Lands Division) Accra in the case titled ***Nii Ako Nortei v Lands Commission with case number SOL 21/10*** in favour of the 1st defendant herein is null and void and of no effect." Emphasis

Following the service on the Defendants therein of the writ referred to supra, the 1st Defendant herein filed an application praying that the action against them be dismissed.

Accordingly, (Judge No. 3) on the 6th of July 2015 in a Ruling, granted the application. Judge No. 3 delivered himself and reasoned thus:-

"The Defendant, (Lands Commission), having lost the right to appeal with the effluxion of time within the statutory period within which he could have filed an Appeal against the judgment in Suit No. SOL/21/2010, ***now has joined hands with the Plaintiff to bring a fresh writ against the 1st Defendant/Applicant and the 2nd Defendant***

under the pretext that the 2nd Defendant did not bring to the attention of the Plaintiff the then Suit No. SOL 21/2010.

This is preposterous and I term it disingenuous on the part of both the 2nd Defendant and the Plaintiff herein named. Indeed there must be an end to litigation among some parties over the same subject matter.

I think it is an affront to the rule of law, equity, justice and good conscience for the Plaintiff, Attorney General (AG) to plead in its Statement of Claim and at paragraph 12 that in spite of the judgment of His Lordship Justice Anthony Oppong *given on 28th July 2011 (which the Plaintiff seeks to set it aside), the Plaintiff still contends that the property was litigated upon and for which the Court gave judgment in favour of the 1st Defendant/Applicant is still the property of the Government of Ghana. I ask, how is it so?* ***Does it mean that the Plaintiff or the Lands Commission does not respect the judgment given by a Court of competent jurisdiction such as the High Court (Lands Division), Accra? I say so far, on the 30th May 2013, the High Court (Land Division) presided over by His Lordship Justice Ocran, had an opportunity to rule over an application for mandamus by way of Judicial Review brought by Nii Arko Nortei to compel the Respondent, the Lands Commission to plot and Register the judgment in Suit No. SOL. 21/2010 and to grant the request and consent concurrence.*** *The Court, presided over by Ocran J granted the application with regard to the plotting of the 172.68 acres of land as contained in the judgment dated 28th July 2011.*

I only will have to ask the 2nd Defendant to respect the orders of the Court and also ask the Plaintiff to endeavour to help the parties to bring the dispute over the land to a close.

From the above analyses of the 1st Defendant's application vis-à-vis the Plaintiff's opposition to same, I find that the plaintiff's present suit, ***qualifies to be so described***

as an abuse of the court process which must not be entertained as the matters in controversy here have been determined by a court of competent jurisdiction between the same parties and basically on same subject matter and it will therefore amount to abuse of the process of the court to allow the 2nd defendant hiding behind the cloth of the Plaintiff to have an open-ended opportunity to be litigating and re-litigating over and over again in respect of the same issue which has over the period and in previous decisions been decided against him.

I accordingly grant the 1st Defendant/Applicant's application and hereby dismiss the suit as an abuse of the court's process. "Emphasis

It was when all these attempts to circumvent the effect of the judgment delivered by the High Court in Suit No. SOL/21/10 dated 28th July 2011 failed that the Plaintiffs herein resorted to the filing of Suit **No. LD/0352/2016 on 26th January 2016, already referred to in extenso supra.**

SUIT NO. LD/0352/2016

The 1st Defendants again prayed the High Court, to dismiss Suit No.LD/0352/2016 against them on the following grounds:-

a. That the filing of the suit amounted to abuse of process
b. Frivolous and vexatious
c. Discloses no cause of action

In a well considered Ruling, dated 20th day of July, 2016, (Judge No. 4) delivered herself thus:-

"The arguments of the 1st Defendant/Applicant therein was focused on 3 pillars" which are the same as stated supra.

The learned Judge continued thus:-

"The relevant portions of the affidavit in support are as follows:-

3. That the Plaintiff lack the capacity to bring this action
4. That the suit is also frivolous, vexatious and an abuse of process
5. That on 16/3/2010 per Counsel (for 1st defendant herein) I sued …Writ of Summons and Statement of Claim in Suit No. SOL 21/10 entitled ***Nii Ako Nortei v Lands Commission (3rd Defendant herein)*** for the following reliefs:

The basis of the Plaintiff/Respondent's opposition can be found in its fourteen paragraph affidavit in opposition. The essentials are as follows:-

6. That the Plaintiff's statutory right to the land **was neither asserted nor determined in Suit No. SOL 21/10 and in Suit No. SOL 53/15.**
7. **The Plaintiff was also not a party to Suit Number SOL 21/10 or Suit No. SOL 53/15.**
8. That although plaintiff filed a "Notice of Claim" in Suit No. SOL 21/10, it abandoned same after **it received advice that the proper procedure to assert its title to the land in dispute and the serious allegations of fraud against the first defendant is by commencing the instant action.**
9. That the land in dispute is neither owned by the 3rd defendant herein, who was the defendant in Suit No. SOL 21/10 nor the Government of Ghana, who was represented by the Attorney General as Plaintiff in Suit No. SOL 53/15.
10. That the plaintiff is incorporated by statute as a body corporate with perpetual succession, and is neither a privy of the 3rd defendant's herein nor of the Attorney General.

11. **The 1st defendant has always known that the land, which was acquired from his stool family in the 1920s, was duly paid for and subsequently vested by statute in the plaintiff who has remained in continuous occupation and uses same for its educational purposes since 1930.**
12. That the 1st defendant's action in Suit No. SOL. 21/10 against the 3rd defendant herein and its application in Suit No. SOL.53/15, **form part of fraudulent scheme to dispossess the plaintiff of its title to the land in dispute.**
13. **That the pleadings in the plaintiff's statement of claim herein set out clearly the fraud perpetuated by the 1st defendant in Suit No. SOL 21/10 with the unwitting aid and facilitation of the 3rd defendant herein.**

On the issue of whether the action amount to abuse of process of court and whether is vexatious and frivolous, the **Court noticed that per Exhibit NAN 1(which is the Writ of Summons, Statement of Claim) and Exhibit NAN 3 (which is the judgment of my brother Justice Anthony Oppong) the Plaintiff/Respondent herein was not a party to the suits. The Plaintiff respondent is the occupier of the land acquired by the government and administered by the 3rd defendant herein but vested in the plaintiff/respondent. The applicant should have joined the occupier of the land to the suit, but chose to refer to the plaintiff as strangers. Indeed, the presence of the plaintiff on the land is so obvious to escape notice. This court will refuse to find or presume that the plaintiff's action, which is an effort to protect the land on which the school is situate, amounts to an abuse of the judicial process or that it is frivolous and vexatious." Emphasis**

APPEAL BY 1ST DEFENDANTS TO THE COURT OF APPEAL

Feeling aggrieved with the decision of (Judge No. 4), the 1st Defendants/Respondents herein, appealed the decision to the Court of Appeal.

On the 2nd November 2017, the Court of Appeal delivered themselves by setting aside the decision of the High Court, and stated thus:-

On the issue of capacity, the Court of Appeal stated thus:-

> "It is the case of the appellant that the Education Act 1961, Act 87 repealed Cap 114 in section 34 when it provides that the following enactments as subsequently amended are hereby repealed; The Achimota School Ordinance (CAP 114), The Education (Southern Ghana and Ashanti) Ordinance CAP 121, The Education (Northern and Upper Regions Ordinance (CAP 122).
>
> CAP 114 since its repeal in 1961 had ceased to be law in order to confer any authority on the Board of Governors that was created under the law. Moreover, another law, Education Law of 2008, Act 778 has since also repealed Act 87. Indeed at the time of the repeal of Act 87, CAP 114 has since long ceased to exist. **Since the Board of Governors was not one of the Officers saved upon the repeal of CAP 114, it cannot now resurrect to mount a successful action as is being done in this case.**
>
> The learned trial Judge was under an obligation to determine the issue of capacity before proceeding to hear the matter on its merits. **The case of the plaintiff that it was not a party in the earlier suits does not help them. The Lands Commission duly informed them of the outcome of the suit and the Attorney General unsuccessfully took action in respect of the same land**. The Achimota School would have enjoyed the fruits of the litigation if they had been successful. **On the other hand, if the school felt that they had been given a raw deal they had to obtain the leave of the defendant in the suit to use his name and then apply to the court in the said defendant's name to have the judgment set aside.**

Alternatively, in case for some reason he cannot use the name of the defendant he can take out a summons in his own name, but in that case, the summons should be served on both the plaintiff and the defendant asking of the court to set aside the judgment and be allowed to defend the action on such terms of indemnifying the defendant as the Judge may consider just. See the case of ***Lamptey v Hammond [1987-88] 1 GLR 322 and the case In the Nungua Chieftaincy Affairs; Odai Ayiku v AG (Borketey Laweh XIV Applicant) [2010] SCGLR.*** This is not the procedure adopted by the Achimota School which is currently under the Ministry of Education under Act 778 of 2008 which has in Section 3 (1) repealed the Education Act, of 1961 (Act 87).

In our view the objection raised by the defendant regarding the capacity of the plaintiff to bring this action is valid and ought to have been decided before considering the merits of the case. It will be an exercise in futility to allow the trial to proceed when the plaintiff/respondent lacks the requisite capacity to sue. Any such trial in the light of *Bulley vrs Akrong* shall be declared a nullity.

As it is, there have been various suits in respect of this same land in which various courts of competent jurisdiction have decided against the plaintiff/respondent. These judgments and court rulings still stand tall against the plaintiff, the Lands Commission, and the Attorney-General who did not appeal against the decision. They are bound by these judgments. **The Writ of Summons can therefore rightly be described as an abuse of the court process and should not be entertained by the court." Emphasis**

APPEAL TO THE SUPREME COURT

Feeling aggrieved by the Court of Appeal decision, the Plaintiffs on 14th November 2017 appealed to this court with the following as the grounds of appeal:-

Grounds of Appeal

a. "That the Court of Appeal committed a jurisdictional error when it determined that the Appellant has no capacity to maintain this suit in an application made under Order 11 Rule 18 (1) (a) of the High Court (Civil Procedure) Rules, 2004 (C.I. 47). Or in the alternatives,

That the Court of Appeal's finding that the Appellant has no capacity to maintain this suit is neither supported by the evidence on record nor the law on the effect of a repealed legislation on completed and closed matters.

b. That the Court of Appeal's finding that the Appellant was aware of Suit No. SOL. 21/10 but neither filed an "appeal" nor took "any step" to have the judgment set aside**" is perverse as same is contradicted by the evidence on record and the instant action.**

c. **That the Court of Appeal fell into grave error in holding that the Appellant is a privy of the Lands Commission and the Attorney General and is thus bound by the judgment and orders in *Suit No. SOL. 21/10 (titled: Nii Ako Nortei II v Lands Commission) and Suit No. SOL 53/15 (titled: Attorney-General v Nii Arko Nortei and Lands Commission).***

d. **That the Court of Appeal erred in holding that the rule in *Lamptey v Hammond [1987-88] 1 GLR 327,*** relating to the remedy for a non-party affected by a judgment ***(and applied in In Re Nungua Chieftaincy Affairs; Odai Ayiku IV v Attorney-General (Borketey Laweh XIV Applicant) [2010] SCGLR 413)***, precludes the Appellant from issuing the Writ of Summons and Statement of Claim herein to challenge the judgment and orders procured by fraud.

Reliefs sought from the Court of Appeal

a. To set aside the Court of Appeal's decision nullifying the Applicant's action at the trial court, and
b. **Restore the trial Court's ruling dated 20th July 2016, which dismissed the 1st Defendant/Appellant/Respondent's motion to strike out writ of summons and statement of claim and to dismiss suit filed on 30th June 2016."**

PRELIMINARY POINT OF LAW ON THE APPEAL

In their Statement of case filed on 1st April 2019, learned counsel for the 1st Defendants herein, Bright Okyere-Adjekum raised a preliminary legal objection in the following terms:-

> "My Lords, our contention is that, the Appeal is fundamentally flawed. The Ruling which has snowballed into this Appeal was an interlocutory decision. My Lord by Section 4 (2) of the Courts Act, 1993, Act 459, this Appeal could not have been filed as of right. The Appellant ought to have obtained the special leave of this court. That decision we contend, was not a judgment within the meaning of Section 4 (1) (a) for same to have proceeded to this court as of right. My Lords, we rely on the analysis of this Court in ***Kwasi Owusu and Anr. v Joshua Nmai Addo and Anr. Civil Appeal No. J4/50/2014 dated 30th July 2015.***"

The above case is now reported as ***Owusu and Others v Addo and Anr. [2015-2016] 2 SCGLR 1479***.

Expatiating further on the above preliminary objection, learned counsel for the 1st Defendants submitted that *" the fatality in not obtaining the special leave of this court, the present Appeal is left with no legs to stand and ought to be dismissed, ex debito justitiae as the invocation of the Appeal processes is flawed at birth".*

Counsel then relied on the locus classicus case of ***Mosi v Bagyina [1963] 337*** to articulate his submissions further.

RESPONSE BY THE PLAINTIFFS

Learned counsel for the Plaintiffs Ace-Anan Ankomah in his Reply filed on behalf of the Plaintiffs on 8th May 2019 argued that the Plaintiff did not require special leave of this court to file the instant appeal to the court. The crux of the legal arguments of learned counsel can be summed up thus:

> *"Since the Supreme Court derives its jurisdiction from the constitution, article 131 thereof, there is no such requirement for special leave to be obtained before an appeal can be filed in situations such as this one, where the matter originates from the High Court."*

Learned Counsel for the Plaintiffs then sought to distinguish the Owusu v Addo case referred to supra in the following terms:-

> *"My Lords, we humbly submit that Kwasi Owusu can be distinguished from the present appeal as the jurisdiction of this Honourable Court is not being invoked in an appeal against the dismissal of a repeat application for stay of execution as was the case in Kwasi Owusu. This appeal is based on an appeal of a decision of one High Court in the exercise of its original jurisdiction and therefore the Appellant was not required to seek this Honourable Court's leave before it could file the appeal."*

In order to ascertain whether the contention by learned counsel for the Plaintiff that the ***Owusu v Addo*** case is distinguishable, it is important to set out the essential facts of this ***Owusu v Addo*** case in some detail.

FACTS IN OWUSU V ADDO

On 5th September 2012, the High Court , Accra delivered judgment in respect of a parcel of land situate at Achiaman near Pokuase and declared Addo as the victorious party; whilst restraining Owusu and his people from having anything to do with the land.

Being dissatisfied with the decision, Owusu lodged an appeal to the Court of Appeal.

They applied for stay of execution of the said judgment to the High Court which dismissed same, and a subsequent repeat application to the Court of Appeal was similarly dismissed. Owusu then appealed the Court of Appeal Ruling and questioned the correctness of the said Ruling to the Supreme Court.

In dismissing this application to the Supreme Court, the Court speaking with unanimity through Wood C. J. held as follows:-

> *"The right to appeal to this court in respect of an order of the Court of Appeal,* ***dismissing a repeat application for stay of execution, is not an automatic right but one carefully circumscribed by article 131 (2) of the 1992 Constitution and Section 4 (2) of the Courts Act, 1993 (Act 459).*** *Thus an appellant would have no direct access to the Supreme Court without first satisfying the leave requirement.* ***Djokoto & Amissah v BBB Industrials Co. (Ghana) Ltd and City Express Bus Services [2011] 2 SCGLR 825*** *criticised. Emphasis*

Having apprized ourselves of the relevant facts and the decision in the case of Owusu v Addo, supra, we are of the firm view that the said case is indeed distinguishable from the instant appeal.

In the first place, the appeal herein was lodged against the substantive decision of the Court of Appeal, not in an interlocutory matter. This point alone is enough to deliver a lethal blow to this preliminary legal objection.

Secondly, whilst the instant case is a substantive appeal flowing from the Court of Appeal's decision in respect of which an appeal as of right had accrued to the Plaintiffs herein, it was not so in the ***Owusu v Addo*** case as the facts show.

Our view of the matter is that, from the antecedents of the facts of this case which had been detailed above, it is clear that the facts herein are no where similar to the facts of the ***Owusu v Addo*** case. We will therefore dismiss the said objection and hold that the appeal is proper and proceed to deal with the substantive grounds of appeal on their merits.

CAPACITY

Once the capacity of the Plaintiffs herein has been challenged, it is crucial that the said issue be dealt with first.

HAVE THE PLAINTIFFS CAPACITY IN THIS CASE?

There is no doubt that the Plaintiffs averred in paragraph 1 of the Statement of Claim as follows:-

> "*The Plaintiff is a body incorporated pursuant to Section 5 of the Achimota School Ordinance No 7 of 1948 (CAP 114) as the governing body of Achimota School, which school was established pursuant to section 3 of CAP 114.*

The Court of Appeal as has already been referred to, did not accept the said averments referred to supra. Instead, the Court of Appeal held inter alia as follows:-

> *"CAP 114, since it's repeal in 1961 had ceased to be law in order to confer any authority on the Board of Governors that was created under the law. Moreover, another Law, Education Law of 2008, Act 778 has since also repealed Act 87, CAP 114 has since long ceased to exist. Since the Board of Governors was not one of the officers saved upon the*

repeal of CAP 114, it cannot now resurrect to mount a successful action as is being done in this case."

What this court has to decide in this suit herein is very simple and straightforward. The plaintiffs have averred thus "That Section 3 of CAP 114 now repealed, which concerns matters affecting Achimota School provided as follows:-

> "The Secondary Department of the Prince of Wales College and School shall be established as an independent and autonomous institutions and shall be styled "Achimota School".

They further contended that, Section 4 therein of the said repealed CAP 114 which established a Council as an entity named "Achimota School Council,

> "Which shall have control of and superintendence over, the general policy and property of the School ***and in all cases provided for by this ordinance may act in such manner as it deems best to promote the best interests of the school.***"

The Plaintiffs also in support of the above, detailed extensive historical antecedents of the Governing body of Achimota School as provided therein under sections 2, 7 and 29 of the said CAP 114.

The plaintiffs then contended rightly in our view that under those legislations, Achimota School lands were vested in the Board of Governors of the school which had capacity to be sued and to sue on behalf of the school over all the school's properties including the school's land.

Continuing with their further analysis of the historical antecedents of the Plaintiffs, they contended that, CAP 114 was subsequently repealed by the Education Act, 1961 (Act 87). This Act, did not continue in existence the boards established under the repealed CAP 114 but contained provisions in Sections 15 and 16 therein which empowered the

Minister of Education to establish and dissolve boards of governors for recognised institutions. By the provisions contained in the said Sections 15 and 16 of Act 87, it should be noted that Boards of Governors of second cycle institutions including the Plaintiffs have not been dissolved and where their terms have lapsed, new Boards have always been put in place under Act 87. Under these circumstances, can it be legally sustained that, the capacity of the Plaintiffs who are the Board of Governors, acquired under CAP 114 was completely lost and obliterated by the repeal of same by subsequent legislations? What about the rights and proprietary interests that had accrued to them under CAP 114?

Could these matters not have been dealt with appropriately in Suit No. LD/0352/2016 if it had been heard on the merits?

This phenomenon has become so general and pronounced that it is our view that judicial notice ought to be taken of this practice

WHAT IS JUDICIAL NOTICE

"This is a court's acceptance, for purposes of convenience and without requiring a party's proof of a well known and indisputable fact, and the court's power to accept such a fact." *Reference Blacks Law Dictionary, Ninth Edition, page 923.*

Judicial notice can therefore be taken of the management of all public second cycle schools in Ghana by Boards of Governors for the past 50 years or so, period.

We ask ourselves, does the plaintiff school have a body known as Board of Governors by which the institution known as Achimota School is governed and managed?

The answer is a big yes, and we dare say that, as the final appellate court of this country, *"we must think outside our box"* and render decisions that make sense and

capable of resonating with the ordinary and common people. We must also render decisions based on what is generally practiced in the country.

It is in this light that we will proceed to discuss the effect of the repeal of CAP 114 and Act 87 which had also been further repealed by the Education Act, 2008 (Act 778).

Learned Counsel for the Plaintiffs, Ace Ankomah in his detailed and incisive statement of case, referred this court to Article 106 (2) of the Constitution which stipulates that all Bills other than those excepted therein, must have ***"explanatory memorandum.*** This article 106 (2) of the Constitution provides as follows:-

> "No Bill, other than such a Bill as is referred to in paragraph (a) of article 108 of this Constitution, shall be introduced in Parliament unless
>
> ***(a) it is accompanied by an explanatory memorandum setting out in detail the policy and principles of the Bill, the defects of the existing law, the remedies proposed to deal with those defects and the necessity for its introduction." Emphasis***

We have verified the exceptions created therein and can confirm that, the Bill therein introduced, which repealed Act 87, that is Act 778 is not one of those exceptions and therefore must by necessity have an explanatory memorandum.

What is contained in this Explanatory Memorandum to Act 778 when it was introduced in Parliament as a Bill?

It states in part as follows:-

> *"The Education Act 1961 (Act 87) marked a turning point in the educational system of the country.* ***It has remained unchanged since its passage even though education has undergone many changes- changes which are not covered by its provisions.*** *It*

has served its due purpose. ***This Bill thus seeks to incorporate the lessons learned from the over fifty years of state control and management of educational reforms." Emphasis***

The memorandum further states thus:-

> *"The Bill thus seeks to embody the aspirations of the people of Ghana for a national system of education which provides knowledge, skills and social values required to build a united country capable of competing globally in a world increasingly driven by, and dependent on, science and technology for the generation of knowledge and skills." Emphasis*

The final quote from this memorandum of relevance states as follows:-

> ***"Thus schools owned by the community would through their boards of governors be given as much autonomy as possible to raise additional resources in cash and kind to supplement the state provisions."*** *Emphasis*

Learned Counsel for the Plaintiffs made reference to Section 10 (2) of the Interpretation Act, 2009 (Act 782) and its effect on the use of an aid to construction of statutes such as the Explanatory memorandum" referred to supra.

In order to put matters in proper perspective, let us quote in extenso this section 10 (2) of Act 792 as follows:-

> ***"A court may, where it considers the language of an enactment to be ambiguous or obscure, take cognizance of***
>
> ***a. the legislative antecedents of the enactment;***
> ***b. the explanatory memorandum as required by article 106 of the Constitution and the arrangement of sections which accompanied the Bill;***

c. ***pre-parliamentary materials relating to the enactments***
d. ***a text-book, or any other work of reference, a report or a memorandum published by authority in reference*** *to the enactment, and the papers laid before Parliament in references to the enactment;*
e. ***the parliamentary debates prior to the passing of the Bill in Parliament" emphasis***

Based on the above provisions in the Interpretation Act, Act 792 learned counsel for the Plaintiff invited this court to seriously consider the **"explanatory memorandum" as an aid to the construction of the said Act 778.**

The problem which this issue of capacity of the Plaintiffs has raised is this:-

What then is the effect of a repeal of legislation such as Act 778 repealing Act 87?

SUBMISSIONS BY 1ST DEFENDANTS ON ISSUE OF CAPACITY

Learned Counsel for the 1st Defendants, Bright Okyere-Adjekum anchors his objection to the Plaintiffs capacity on the plaintiffs own averments in paragraph 1 of their statement of claim filed on 26th January 2016 in which the plaintiffs described themselves as a body incorporated pursuant to section 5 of the Achimota School ordinance No. 7 of 1948 (CAP 114) as the governing body of the school. This has already been referred to in extenso elsewhere in this delivery.

Based on the above averments and the fact that CAP 114 had been repealed by Act 87 which had also been repealed by Act 778, learned Counsel for the 1st Defendants, submitted that, once there has been no saving clause or provision in either of the two Acts referred to above, it must be deemed that the law in CAP 114, which provided the plaintiffs with the capacity they purport to carry themselves with has been obliterated

from the statute books completely as if it has never been enacted, save for past transactions which should be deemed as having been closed.

In this respect, learned counsel referred to the oft quoted reference to Dr. S. Y. Bimpong-Buta's classical work on *"The Law of Interpretation in Ghana (Exposition and Critique)"* page 171 where the learned author stated as follows:-

> ***"The general common law rule is: where an Act is repealed or expires, lapses or otherwise ceases to have effect, it is regarded, in the absence of a contrary provision, as having never existed except as to past and closed matters or transactions." Emphasis***

Counsel then referred to the following decided cases ***Punjab v Mohar Singh, AIR 1955 SC 84, Attorney-General v Lamplough, L.R 8 EX. D223 and Kowus Motors v Check Point Ghana Ltd and Others [2009] SCGLR 230*** to buttress his contentions.

Based on the above, learned counsel submitted that, once Act 87 came into force and by operation of law CAP 114 ceased to exist, the Minister for Education could not have resurrected the Plaintiff Board under a repealed legislation.

According to learned counsel, the plaintiff school Board had become extinct by operation of law and contended that it would have been a fruitless venture to attempt to do so **"venture fructu efficitur".**

Learned counsel for the 1st Defendants then referred extensively to Section 32 of Act 87 and its definition of key words like *"assisted institutions," "board of governors", "public" and "public higher institut*ion" and juxtaposed same with the fact that the entire Act 87 had been repealed by Act 778 which has done away entirely with the concept of Board of Governors.

From the above references, learned Counsel concluded that the Plaintiff school is a public institution and that the term, Board of Governors of the school is a creation that is unknown to the laws of Ghana. He concluded thus that, the said body lacks capacity to have mounted the suit herein. Counsel therefore contended that the land in dispute is a public land which has by operation of the Constitution 1992 been vested in the President for which the Lands Commission is mandated to protect, reference article 257 to 258 of the Constitution.

After extensively referring to the relevant constitutional provisions therein, learned counsel made the following submissions.

That the institution of Suit No. SOL.2/2010 by the 1st Defendants herein against 3rd Defendants was proper.

We will deal appropriately with this issue whether under the circumstances, the 3rd Defendants, (Lands Commission) under broad daylight, and bearing in mind all the constitutional provisions therein contained, can be deemed to have protected public lands entrusted to them under the Constitution.

The actual intention of the above submissions was revealed when learned counsel expectedly submitted thus:-

> *"My Lords, the Appellant argues that the memorandum to the Education Act, 2008 (Act 778) makes its (sic) clear* ***that Act 778 intended the continuation in existence of existing Board of Governors. My Lords that cannot be the intent of the drafters of the Act as they would have expressly stated so particularly when as in this case the Act which preceded Act 778, the Education Act, 1961 (Act 87) had also over fifty-eight years ago repealed the body referred to as Board of Governors."***

Learned Counsel then referred to the following cases and concluded that the capacity of the plaintiffs is non existent and this issue must be decided against them and the appeal herein dismissed.

See ***Edusei v Diners Club Suisse S.A [1982-83] GLR 809 CA, at 814-815 per Francois J.A (as he then was), Asante-Appiah v Amponsah [2009] SCGLR 90 at 95 and Republic v High Court, Accra Ex-parte Aryeetey (Ankra- Interested Party) [2003-2004] SCGLR 398.*** The nature and facts of the instant appeal actually render the above decided cases irrelevant.

In a concurring opinion delivered by Dotse JSC in unreported Suit No. CMJ5/20/2020 dated 29th April 2020 intitutled ***The Republic v High Court, Accra (Commercial Division)- Respondents; Ex-parte Enviro Solutions and 3 Others – Applicants, Dannex Limited and 5 Others – Interested Parties***, where a similar situation arose in respect of a repealed statute with a savings provision, Dotse JSC, after reviewing relevant legislation in the Interpretation Act, 2009 (Act 792), the Companies Act 2019, Act 992, cases like ***Nii Kpobi Tettey Tsuru v Attorney-General [2010] SCGLR 904, Spokesman Publications Ltd. v Attorney-General [1974] 1 GLR 88 at 89***, Dr. S. Y. Bimpong-Buta's classical work "*The Law of Interpretation in Ghana*", page 171 and the Invaluable Book of VCRAC Crabbe, ***"Understanding Statutes"*** pages 140-141, concluded and held in his concurring opinion in the case referred to supra as follows:-

> *"It must also be emphasized clearly that, from the principles of interpretation of statutes dealt with supra in respected legal texts, statutes as well as case law, it is apparent that, a repealed statute does not lose all of its effect and operating provisions simply because a new statute had been enacted.* ***General principles of interpretation as well as the effects of relevant provisions in the Interpretation Act must all be considered and read together to give a wholistic application and meaning to the situation.***

When this is done, it becomes evident that the High Court had jurisdiction to hear the application for the confirmation albeit under a repealed enactment." Emphasis

IS THERE A CASUS OMISSUS?

We have referred to the Explanatory Memorandum to Act 778 when the Bill for the passage of the Act was introduced into Parliament. We have also made reference to article 106 (2) of the Constitution which stipulates that such memorandum can be used as an aid to the construction of statutes. This has since been incorporated in the Interpretation Act, 2009, Act 792, Section 10 (2) thereof supra.

VCRAC Crabbe, in his invaluable book *"Understanding Statutes"* pages 59-60 wrote concerning how statutes are to be constructed by reference to Sir Roundell Palmer's debate in Parliament contained in 2009, Hansard Parl. Deb (3rd Series) 685.

> ***"Nothing is better settled than that a statute is to be expounded, not according to the letter, but according to the meaning and spirit of it. What is within the true meaning and sprit of the statute is as much law as what is within the very letter of it,*** *and that which is not within the meaning and spirit,* ***though it seems to be within the letter, is not the law, and is not the statute. That effect should be given to the object, spirit, and meaning of a statute*** *is a rule of legal construction, but the object, spirit and meaning must be collected from the words used in the statute. It must be such an intention as the legislature has used fit words to express." Emphasis*

In this instance, considering the "explanatory memorandum" it does bear sufficient emphasis that the clear intentions exhibited therein had not been captured adequately by the words used in Act 778.

As can be seen from this explanatory memorandum, Boards of Governors were to be established for community schools. How come that, no provision had been made for the public schools like the Plaintiff school to have Boards of Governors, contrary to existing practice?

In this country, judicial notice can again be taken of the fact that, all second cycle public institutions such as Achimota School, Mfantsipim School, Wesley Girls, Adisadel, Mawuli School, Ola Girls, Ho just to mention a few, have for all these several years, been managed by their Boards of Governors. These Boards are composed of persons of repute, intellect and experience who manage these schools for and on behalf of the Minister for Education. General and practical knowledge can be taken into consideration for this court to take judicial notice of this phenomenon of Board of Governors managing public second cycle institutions in Ghana.

IS THERE AN OMISSION IN ACT 778?

Dealing with this subject of "casus omissus", Crabbe JSC in his book *Understanding Statutes* wrote at page 61 as follows:-

> *"An Act of Parliament maybe badly drafted. That may result in an omission of certain matters in the Act, or even of a word or words. It may be the fault of the Parliamentary counsel who drafted the Bill for the Act, or the result of an amendment in Parliament,* ***but whatever the source of the omission, effect must be given to the Act.*** *In those circumstances, the intention of the legislature, however obvious it may be, must, no doubt, in the construction of statutes, be defeated where the language it has chosen compels to that result****, but only where it compels to it." See the case of London and India Docks Co. v Thames Steam Tug and Lighterage Co. Ltd [1909] AC at p. 23. The rationale for such an occurrence is that, in cases where a material and***

relevant particular is not provided for in express terms there is a "casus omissus".

Expatiating further on this principle of "casus omissus", the learned author at page 61 writes thus:-

> "*The courts will refuse to apply the statute where the words do not compel the courts to supply the omission. This is in consonance with the basic principle that the function of the court is to interprete the law and not to legislate: "Emphasis*

This basically is the attitude of the English courts. What then are the functions of the Court? There are varying views, and different approaches are used by English Judges and American Judges.

In England, the rule is that, *"Judges do not make the law, they only interprete it"*. However, it is greatly acknowledged that, Oliver Wendell Holmes, that great American Judge in a dissenting opinion recognised without hesitation that ***"Judges do and must legislate, but they do so interstitially, they are confined from molar to molecular motions." See Southern Pacific Co. v Jensen (1917) 244 US 205 at p. 221.***

Lord Denning stoked great controversy in the debate between him and Lord Simmonds in the case of ***Seaford Court Estates Ltd. v Asher [1949] 2 KB 481 at p. 499*** where Denning L.J, stated as follows:-

> *"Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold set of faults which may arise, and even if it were, it is not possible to provide for them in terms free from all ambiguity …A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity.* ***It would certainly save the Judges trouble if Acts***

of Parliament were drafted with divine prescience and perfect clarity. *In the absence of it, when a defect appears a Judge cannot simply fold his hands and blame the draftsman.* ***He must set to work on the constructive task of finding the intention of Parliament,*** *and he must do this not only from the language of the statute,* ***but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature.***

That was clearly laid down by the resolution of the Judges in ***Heydon's case****, and it is the safest guide today… Put into homely metaphor it is this:* ***A Judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have strengthened it out?*** *He must then do as they would have done.* ***A Judge must not alter the material of which it is woven, but he can and should iron out the crease*****s****."Emphasis*

Lord Denning was condemned by the majority in the House of Lords even though the decision in the Seafood case was upheld. When he next had the opportunity in the case of ***Magor and St. Mellon's Rural District Council v Newport Corporation [1950] 2 ALL E.R. 1226 at p. 1236*** he reiterated his views once again as follows:-

We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing which lawyers are often prone. ***We sit here to find out the intention of Parliament and Ministers and carry it out, and we do this by filling in the gaps and making sense of the enactment than opening it up to destructive analysis****." Emphasis*

This approach was roundly condemned by the House of Lords. However, the Renton Report (1975) Cmnd 6053, para 19.2, commenting on the opinion of Lord Denning reported and recommended as follows:-

> *"We see no reason why the courts should not respond in the way indicated by Lord Denning.* ***The courts should approach legislation determined, above all to give effect to the intention of Parliament.*** *We see promising signs that the consideration is uppermost in the minds of the members of the highest tribunal in the Country." Emphasis*

See page 51 of Understanding Statutes.

What is the relevance of the above quotations to the instant case?

We have to put the antecedents of the instant appeal into perspective. Beginning from where it all started, *Suit No. SOL.21/2010* where the Plaintiffs herein were not made a party, nor served and brought into the picture until the judgment was entered against the Defendants therein in respect of land upon which their school which they manage has been taken over. Thus, when we consider the social conditions under which Act 778 was passed, the prevailing notorious material facts that, in Ghana at all material times, it is Boards of Governors who manage second cycle schools such as Achimota School, **the only reasonable, logical and justifiable conclusion is to fill the casus omissus therein in the statute by holding that the reference therein to the Board of Governors must be construed to mean a body corporate that stands in between the schools and the Minister.**

We cannot expect the draftsman to provide Boards of Governors for community schools and leave out public schools like the plaintiffs.

In this respect, we have no hesitation whatsoever to hold and rule that, the Plaintiffs have the requisite capacity to mount this action to defend Achimota School Lands. The judicial process must not be allowed to enable the hands of the managers of the Plaintiffs lands be taken over by persons who have no title to them whatsoever. As

indicated much earlier in this delivery, the rights acquired by the Plaintiffs in CAP 114 cannot be taken away retrospectively as is contended by the 1st Defendants.

See Section 34 (1) (c) of the Interpretation Act, 2009, Act 792 which provides that,

> *"Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided,*
>
> *(b) affect a right, a privilege, an obligation or a liability acquired, accrued or incurred under the enactment that is repealed or revoked." Emphasis*

FILL IN THE GAP

It is in respect of the above principle that we will fill in the gap which has been created, and the statute construed accordingly.

That is to say boldly that, the Board of Governors of Achimota School that is the plaintiffs herein, exist and have been put in place to protect the property of the school. The Plaintiffs thus have capacity to have mounted the instant action. The Court of Appeal decision on this ground of appeal is thus reversed and set aside.

We will next argue grounds (b) and (d) of the appeal together.

WHETHER THE PLAINTIFF IS A STRANGER TO THE SUIT NO. SOL/21/2010 AND THE SCOPE OF THE RULE IN LAMPTEY V HAMMOND [1987-88] 1 GLR 327

What is on record as the date when the plaintiffs herein were duly notified about the proceedings in Suit No. SOL.21/2010?

There is no indication in the entire appeal record that Judge No. I who handled Suit No. SOL.21/2010 ever used the procedural powers at his disposal to order the joinder of the plaintiffs to the suit therein.

There is similarly no indication that the 1st Defendant, and the 3rd Defendant herein, therein Plaintiff and Defendants in Suit No. SOL.21/2010 also conceived of the idea of joinder of the plaintiffs herein to the said Suit No. SOL.21/2010. This is irrespective of the fact that all the pleadings in the said suit, referred to elsewhere in this judgment supra, had given clear irrevocable indications **that the Plaintiffs herein were in possession and would thus be adversely affected by any decision arrived at in the said suit.**

In our opinion, any of the parties could have applied to have made the plaintiff herein a Defendant to that suit i.e. Suit No. SOL.21/2010 bearing in mind the state of the pleadings.

The court could also have suo motu ordered the Plaintiff herein to be joined to the Suit No. SOL.21/2010 bearing in mind the state of the pleadings therein contained and also in satisfaction of the rule in Denning M.R's decision in ***Gurtner v Circuit and Another [1968] 2 QB 587 at 595*** where he stated thus:

> *"When two parties are in dispute in an action at law and the determination of the dispute will directly* ***affect a third person in his legal rights*** *or in his pocket, in that he will be bound to foot the bill,* ***then the court in its discretion may allow him to be added as a party on such terms as it thinks fit.*** *By so doing, the court achieves the object of the rule.* ***It enables all matters in dispute to be effectually and completely determined and adjudicated upon between all those directly concerned in the outcome." Emphasis***

See Order 4 r. 3 (3) of the High Court (Civil Procedure) Rules 2004, C. I. 47.

The above principle has been applied by our courts in several cases such as ***Sai v Tsuru III [2010] SCGLR 762*** where the Supreme Court endorsed the test whether the joinder will ensure that all matters in dispute are completely determined. The courts generally have jurisdiction to join a person whose presence is necessary for the determination of the issues in the dispute. See ***Sam v Attorney-General [2000] SCGLR 102.***

Considering the state of the pleadings from both the plaintiff and defendant in Suit No. SOL/21/2010, the court should have exercised its discretion to join the plaintiffs herein if the parties therein were not interested in applying for a joinder. This would have made all issues in dispute to be determined once and for all.

It is an undeniable fact that, judgment was delivered by Judge No. I in Suit No. SOL.21/2010 on 28th July 2011.

The Defendant therein did not file any appeal. However, as stated supra, the defendants therein, through an **Assistant Legal Officer on the 4th of March 2013 officially notified the Plaintiffs herein about the judgment that had been obtained against them. Thus, it was not until after one year, seven months, that the Plaintiffs herein were officially notified.**

The reason behind this is not far to understand. This is because, at that time, the appeal process is no longer statutorily available to the Defendant therein or to the Plaintiffs herein who could have instigated the Defendants therein to file an appeal.

Secondly, the plaintiffs herein also engaged Solicitor who took faulty steps like the filing of the Notice of Claim which ended in a disaster. Thereafter the plaintiffs herein waited till the 26th day of January 2016 to file the instant suit which has culminated in the instant appeal.

What was the Plaintiff doing all this time, one would ask?

In between the first judgment, dated 28th July 2011 and the filing of the writ on 26th January 2016, there were these failed steps already referred to supra:-

1. Letter dated 4th March 2013 informing plaintiffs of the judgment dated 28th July 2011.
2. Notice of claim filed by Plaintiffs on 17th June 2014.
3. 30th July 2014, Ruling by Judge No. 2 on an application for Interlocutory injunction pursuant to the Notice of Claim which was dismissed.
4. Letters dated 7th August 2014 and 25th August 2014 respectively from Lawyer Dr. Philip Anderson purporting to be acting for 2nd Defendants herein Platinum Equities Ltd and with the consent of the 1st Defendants, herein inviting the Plaintiffs to an out of court settlement.
5. On 24th March 2015 the 3rd Defendants herein filed Writ No. SOL/53/15 already referred to supra against the 1st Defendants and 3rd Defendants herein.
6. On 6th July 2015 Judge No. 3 delivered a Ruling pursuant to an application at the behest of the 1st Defendants herein in Suit No. SOL.53/15, which dismissed the said Writ in its entirety.
7. **It was after the above failed attempts that, the plaintiffs herein re-strategised and filed Writ No. LD/0352/2016 on 26th January 2016 which has led to the present appeal.**

In his erudite statement of case, learned counsel for the plaintiffs Ace-Ankomah submitted in part as follows:-

> *"The investigations also showed that,* ***after procuring the judgment through falsehood, the 1st Respondents" (that is 1st Defendant)" later perpetrated fraud on that court to obtain an order for repossession to enter the school's land. The***

investigations showed that the 1st Respondent succeeded in his false and fraudulent claims in Suit No. SOL/21/2010 because of the role played, knowingly or otherwise, by the 3rd defendant/respondent." *Emphasis*

The particulars of this fraud have been provided in paragraph 20, 19.1 – 19.3 of the Statement of Claim filed by the plaintiffs as follows:-

"Particulars of Fraud

19.1 The 1st Defendant knew, or ought to have known, that the Achimota school land, including the 172.68 acres claimed was vested in the plaintiff by statute in 1948 for its intended use as a school, ***and yet pleaded in Suit No. 21/10 that the land acquired by the colonial government had not been used for its intended purpose.***

19.2 The 1st Defendant knew that the 172.68 acres it purportedly claimed and purportedly granted to the 2nd Defendant ***formed part of the conserved greenery areas of the Achimota School land and not occupied by any of its subjects and yet pleaded in Suit No. SOL/21/2010 that its subjects have been in adverse possession of same for over eighty (80) years.***

19.3 That the 1st Defendant knew, or ought to have known, that the 172.68 acres was part of the land vested in and owned by the plaintiff ***and have been in the undisturbed possession, occupation and use by the Achimota School, and yet issued his writ of summons and statement of claim in Suit No. SOL/21/2010 against the 3rd defendants and without notice to the plaintiff."*** *Emphasis*

These particulars of fraud raise very fundamental legal issues such as whether having acquired the lands in dispute specifically for the Plaintiff school under the Public Lands Ordinance 1876, CAP 134, the Lands Commission as administrators of public lands have any interest in the said lands. The plaintiffs as the beneficial users and owners

were those to be held responsible. These were issues which could have been raised in Suit No. LD/0352/2016 but was truncated.

Another issue worth noting is that, this time round, the 3rd defendants herein, therein Defendants, filed a Defence and Counterclaim in Suit No. LD/0352/2016 in the following terms:-

1. In further reply to the said paragraphs, 3rd Defendant states that the subject parcel of land forms an integral part of two larger tracts of **land acquired and paid for by the State under the Public Lands Ordinance, 1876 (CAP 134) as amended and in respect of which two Certificates of Title issued to the State have been registered at the Deed Registry as 869/1921 and No. 220/1927.**

10. In further reply to paragraph 13, 3rd Defendant states that the only reference by the 1st Defendant to the said 172.68 acres was made **on 21stApril 2011 when 1st Defendant filed a supplementary Legal Argument together with an attached site plan indicating a land size of 172.68 acres.**

Counterclaim Against the 1st Defendant

3rd Defendant repeats the paragraphs above and counterclaim as follows:

14. The 3rd Defendant says that the 1st Defendant knows that the **Osu Stool is not the pre-acquisition owner of the 172.68 acres and its Stool subjects were not in possession of the 172.68 acres yet made a fraudulent claim that the Stool and Stool subjects had long since been in adverse possession of the land.**

15. The 3rd Defendant says that the 1st Defendant knowing that it (1st Defendant) **had been denied the relief of recovery of possession in the judgment of 28th July 2011, fraudulently procured a writ of possession to recover possession of the 172. 68 acres it claimed to have been in adverse possession of.**

Particulars of Fraud

14A. The 1st Defendant knew that compensation for the Achimota School lands was paid to the Oku We Family and Owoo Family and not the Osu Stool; and that the 172.68 acres was virgin land (conserved greenery area) **yet it deliberately misrepresented to the court that the Stool and Stool subjects had cultivated the land and put up permanent settlement and residence there.**

15A. The 1st Defendant knew that it had been denied the order for recovery of possession of the 172.68 acres and **yet subsequently filed an application in the name of the suit without notice to 3rd Defendant, for an order for recovery of possession of the entire 172.68 acres against an alleged trespasser who 1st Defendant claimed had encroached on only a portion of the 172.68 acres.**

Wherefore the 3rd Defendant counterclaims against the 1st Defendant as follows:-

a. An order setting aside the judgment, and all consequential orders, entered in Suit No. SOL 21/2010 **on the ground that the said judgment and orders were obtained by fraud perpetrated on the Court by the 1st Defendant, or in the alternative, an order setting aside the Writ of Possession granted to the 1st Defendant on 24th April, 2014 and any steps taken on the strength of the said Writ of Possession.**

From all the above issues stated supra, can it lawfully be justified that the Plaintiff is a stranger to Suit No. SOL/21/2010? We think that in all fairness, the Plaintiff herein is a stranger for these variety of reasoning and legal deductions.

Learned Counsel for the 1st Defendant herein, Bright Okyere Adjekum in his response to these grounds of appeal anchored his submissions on the case of ***Lamptey v Hammond [1987-88] 1 GLR 327*** which was the shield the Court of Appeal used to render their

decision without examining the genesis of the suit in general and the contents of the reliefs claimed by the Plaintiffs herein and the state of the pleadings generally in this Suit No. LD/0352/2016.

Even though ***Lamptey v Hammond*** supra, might be said to be some authority by which a stranger who is adversely affected by a judgment of a court may have it set aside by certain procedures, its application to the facts of this case is in doubt and clearly inapplicable.

Learned counsel for the parties also reiterated the two leg principle of the rule in ***Lamptey v Hammond*** supra which permits a stranger to have judgment which injuriously or adversely affects him to move to set it aside.

What are these principles?

1. That the party needed to obtain the leave of the defendant in the suit to use his name and then apply to the court in that defendant's name to have the judgment set aside.
2. If the party is unable to use the name of the Defendant, then he can take out a summons in his own name but the summons should be served on both the Plaintiff and the defendant asking leave of the court to set aside the judgment and to be allowed to defend the action on such terms as indemnifying the defendant as the judge might consider fit.

The facts in this case are completely different from the position envisaged in the ***Lamptey v Hammond*** supra.

In the first place, it had already been set out elsewhere in this rendition that, the 3rd Defendants had colluded with the 1st Defendant in the conduct of Suit No. SOL.21/2010.

This found expression in the wishy washy Defence filed by the 3rd Defendants herein in the suit therein.

Their position in the general conduct of the suit, in failing to appeal against the said judgment and refusing to notify the plaintiffs herein timeously to afford them a chance or an opportunity to nullify the said proceedings speaks volumes.

Secondly, from the pleadings i.e. Defence filed by 3rd defendants herein as well as the counterclaim referred to supra, it makes the collusion story more plausible and probable. How then can the plaintiff be required to obtain the leave of the Defendant to use their name to correct the mess they had deliberately committed?

Thirdly, it ought to have dawned on our Junior brothers in the Court of Appeal that, judging from the reliefs endorsed by the Plaintiffs herein in the instant suit, which contains a relief of fraud with the particulars thereof given, there is absolutely no need for the plaintiffs to have saddled themselves with the rule in ***Lamptey v Hammond*** supra.

An allegation of fraud if proven will vitiate everything and it is the acts of the parties therein in Suit No. SOL.21/2010 that has given rise to this fraud.

See case like ***Dzotepe v Hahormene [1987-88] 2 GLR 681*** which reiterated the principle of law that fraud vitiates everything.

Basing ourselves on this courts decision in the case of ***In Re Poku (Decd); Appiah Poku and Others v Nsafoa Poku and Others [2011] 1 SCGLR 162*** where the court unanimously stated the principle thus:-

> *"The well established principle of law was that* ***fraud would unveil everything and that a judgment obtained by fraud could be impeached by fresh action****. However, that general rule was not a right conferred by the common law free from all*

encumbrances or obligations. One such encumbrance, which was relevant to the facts of the instant case, was the necessity to exercise diligence at the first instance. Thus it was clearly established that if a party ***was actually or constructively cognizant of fraudulent matters in the first action but failed to avail himself of them at that time, he could not thereafter seek to impeach the judgment of the court on those grounds." Emphasis***

It bears emphasis that, the plaintiff herein was absolutely not aware of the pendency of Suit No. SOL.21/2010 in court, much more about the proceedings and the subsequent delivery of judgment. Indeed the time lapse that expired before they were notified justifies their subsequent institution of the Suit No. *LD/0352/2016* in which fraud had for the first time been raised against the perpetrators of that fraud.

Under these circumstances we have no hesitation in allowing grounds (b) and (d) thereof of the grounds of appeal**. As a corollary, we hold and rule that the plaintiff herein was a stranger to Suit No. SOL.21/2010 and that a carefully designed scheme was put in place to prevent them from being aware of the pendency and delivery of judgment timeously.** This was done to prevent them from taking any steps to nullify the said judgment.

Secondly, the reliance of the Court of Appeal on the rule in ***Lamptey v Hammond*** supra and its subsequent application in ***In Re Nungua Chieftaincy Affairs; Odai Ayiku IV v Attorney-General (Borketey Laweh XIV –Applicant) 2010 SCGLR 413*** does not apply under the special circumstances of this case as set out in this delivery especially when fraud is alleged and could have been proven.

GROUND C

WHETHER OR NOT THE PLAINTIFF HEREIN IS A PRIVY OF THE LANDS COMMISSION AND ATTORNEY-GENERAL AND SHOULD BE BOUND BY THE JUDGMENTS AND ORDERS IN SUIT NO. SOL.21/2010

This brings us to the last ground of appeal. We have already quoted in extenso the relevant portions of the Court of Appeal judgment touching the various grounds of appeal

In respect of this ground, it is necessary to put in context for the purposes of emphasis and clarity how the Court of Appeal concluded this matter of the Plaintiffs being privy to the previous impugned decisions of the High Courts referred to supra in Suit No. SOL.21/10 and its related cases and also of the instant suit as an abuse of process.

This is what the appellate court Judges summed it up all:-

> *"We also find that the subject matter of this appeal has been litigated upon in various courts and decisions delivered are still effective and operate as res judicata against the plaintiff. We also find that the entire suit* ***is an abuse of the court process and should be brought to an end." Emphasis***

It appears to us that the appellate court did not consider the circumstances under which the judgment in Suit No. SOL.21/2020 in particular was obtained.

Learned counsel for the plaintiffs, Ace Ankomah referred to the unreported case of ***K.O. Keteku v Nick Adi-Dako, Suit No. BDC/10/07 dated 20/10/2015*** where the court defined abuse of process as follows:-

"According to Osborne's Law Dictionary, ***abuse of process is defined as " a frivolous or vexatious action as example setting up a case which already had been decided on by a competent court."***

Black's Law dictionary also defines abuse of process as follows:-

"There is said to be an ***abuse of process when an adversary through the malicious and unfounded use of some regular legal proceedings obtains some advantage over his opponent".*** *Emphasis*

Learned counsel then referred to this courts decisions ***in Naos Holding Inc v Ghana Commercial Bank Ltd.[2011] 1 SCGLR 492, and Sasu v Amua Sekyi and Another [2003-2004] 742*** in which the locus classicus on this principle of abuse of process was relied upon and this is the case of ***Henderson v Henderson (1843) 3 Hare 100.***

Learned counsel also referred to the statement of the principle and that of res judicata in the following cases, ***Nyame v Kese a.k.a Konto [1999-2000] 1 GLR 236-254*** where Edward Wiredu JSC at page 240 of the report stated thus:-

*"The principle of res judicata is now a well established and acceptable principle in judicial proceedings****. Its objective is to prevent an abuse of the court's process by estopping a party to a litigation against whom a court of competent jurisdiction has already determined the issue now being raised by reopening the same subject matter for further litigation. The principle can also be raised against privies of the original parties. Emphasis***

See also ***Boni and Another v The Republic [1971] 1 GLR 454,*** where the court stated the conditions that must exist for the plea of res judicata to succeed as the following:-

"The civil law doctrine of res judicata can be relied upon when the following conditions exist. ***(1) there must be the same parties, (2) suing in the same capacity, and (3)***

the issue before the court must be the same as that alleged to have been the subject matter of adjudication in previous proceedings*." Emphasis*

Based on the above submissions, learned counsel submitted that the Plaintiff herein is not a privy of the 3rd defendant or of the Attorney-General.

ARGUMENTS BY LEARNED COUNSEL FOR THE 1ST DEFENDANT

Learned counsel for the 1st defendant, Bright Okyere-Adjekum anchored his submissions on this ground of appeal by reiterating the fact that, **the plaintiff, 3rd defendant and the Attorney-General formed a wonderful tag team in this running litigation.**

Based on the above observations, learned counsel concluded that, the Suit was rightly dismissed by the Court of Appeal because it was not only frivolous and abuse of process but a classical case of abuse of process and frivolity.

Learned counsel referred to cases like the following to buttress his point.

1. ***Naos Holding Inc v Ghana Commercial Bank Ltd. supra***
2. ***Sasu v Amua Sekyi and Another [2003-2004] 742 supra***
3. ***Henderson v Henderson, Supra***
4. ***Borrow v Bankside Agency Ltd, [1996] 1 WLR 257 at 260*** where the rule was re-stated for purposes of clarity as follows:-

"The rule in ***Henderson v Henderson****… requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction,* ***to bring their whole case before the court so that all aspects of it may be finally decided (subject of course, to any appeal)*** *once and for all. In the absence of special circumstances, the parties*

cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise.

The rule is not based on the doctrine of res judicata in a narrow sense, or even on any strict doctrine of issue or case of action estoppel. ***It is a rule of public policy based on*** *the desirability, in the general as well as that of the parties themselves* ***that litigation should not drag on forever and that a defendant should not be oppressed by successive suits when one would do." The above statement of the principle of abuse of process clearly then underscores the essence of preventing those who want to make the litigation arena, i.e. the law courts, a career from embarking upon such a process as it is contrary to public policy and leads to loss of valuable time and resources." Emphasis***

Learned counsel then referred to the following cases where the application of the above principle was made manifest in those decisions. These are ***Osei-Ansong & Passion International v Ghana Airport Company [2013-2014] 1 SCGLR 25, Ashmore v British Coal Corporation [1990] 2 QB 338, [1990] 2 ALL E.R. 981, Castro v Murray (1875) 10 EX 213, Stephenson v Garret [1898] 1 Q.B. 677, Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd. [1975] AC 581.***

Based on the above decisions, learned counsel urged the court to dismiss the appeal since it is nothing but a classical abuse of process and frivolity, and that this court should not allow the Plaintiff to make the court an arena for it to pursue its career of unbridled litigation.

ANALYSIS BY THIS COURT

It beats our imagination that the findings of fact, so eloquently made by the learned trial Judge No. 4 in her Ruling in Suit No. LD/0352/2016 has not been given any serious

attention by the appellate court, despite the fact that it contains serious factual findings which are germane to the issues raised herein in this appeal. This is what she found:-

> *"On the issue of whether the action amounts to abuse of process of court and whether is vexatious and frivolous, the court noticed that per Exhibit NAN 1 (which is the Writ of Summons, Statement of claim) and Exhibit NAN3 (Which is the judgment of my brother Justice Anthony Oppong)* ***the Plaintiff/Respondent is the occupier of the land acquired by the government and administered by the 3rd defendant herein but vested in the Plaintiff/Respondent. The applicant should have joined the occupier of the land in the suit, but chose to refer to the plaintiff as strangers.*** *Indeed, the presence of the plaintiff on the land is so obvious to escape notice. This court will refuse to find or presume that the plaintiff's action,* ***which is an effort to protect the land on which the school is situate amounts to an abuse of the judicial process or that it is frivolous and vexatious" Emphasis***

We have already stated elsewhere in this delivery that, the 1st and 3rd Defendants through acts of inadvertence or collusion, failed, refused and or neglected to bring Suit No. SOL.21/2020 to the notice of the Plaintiffs. To make matters worse they refused to bring to their attention the judgment of 28th July 2011 until after the expiration of the appeal period.

From our analysis flowing from the above, it is quite apparent that the parties in Suit No. SOL.21/10 and Suit No. SOL/53/15 which were against the 3rd Defendants in the former case, and at the instance of the Attorney-General in the latter suit respectively cannot under the circumstances of this case be said to operate as res judicata and or abuse of the courts process by the plaintiffs herein.

REASONS

In the first place, the parties in Suit No.SOL.21/2010 were the 1st and the 3rd Defendants herein, (therein Plaintiff and Defendant), we have already set out already in extenso the antecedents of the said suit where the 3rd Defendants herein conducted the case without any reference to the Plaintiffs herein.

Secondly, it flows naturally from the above that not being the same parties, the Plaintiffs could not have sued therein in the same capacity, because they were not parties in any of those two previous suits.

Thirdly, since the plaintiffs were neither parties nor privies, to any of the above suits, the issue of same subject matter having already been decided in those suits cannot hold against them.

It stands to reason therefore that, in ascertaining whether the plaintiffs herein have been caught by the operation of these twin principles of abuse of process and res judicata as propounded in the cases referred to supra by the 1st Defendants herein, these principles cannot operate against the Plaintiffs because they were systematically and skillfully kept out of coverage area during the proceedings in those cases and beyond.

It must therefore be clearly noted that, for these principles to operate against a party, it must be established without any shadow of doubt that the party against whom the principle is invoked must have actively engaged in the previous suits or used persons who fronted for them, the subject matter must be the same and the capacity in which they were sued or sued be the same.

In the instant case however, the 1st Defendants themselves chose their own Defendants who as matters turned out contested the suit against them with kid gloves. Not having

satisfied the key ingredients necessary for the establishment of the principle of res judicata and abuse of process, we have an easy task, in upholding ground C of the grounds of appeal and hold and rule emphatically that the Plaintiffs herein are not privy of the 3rd defendants and the Attorney-General and are therefore not bound by the judgment and Orders/Rulings in Suit No. SOL.21/2010 of 28th July 2011 and Suit No. SOL/53/15 dated 6th July 2015 respectively.

CLOSING STATEMENTS

Our examination of the appeal record herein has revealed two key procedural irregularities that we feel constrained to comment on and sound a note of caution to trial Judges not to fall prey to such invitations during the trial of cases before them.

AMENDMENT OF PLEADINGS WITHOUT LEAVE

The learned trial Judge No. 1, who delivered judgment in Suit No. SOL.21/2010 on 28th July 2011 stated in part as follows:-

> ***"The Plaintiff in their supplementary legal submissions filed on 21st April 2011 attached a site plan of land approximately 172.68 acres as land they have been in adverse possession of****. This was served on defendant. Nevertheless, there was no reaction. I therefore take it that, defendants concedes that plaintiff and its subjects have been in adverse possession of the land contained therein." Emphasis*

What this means is that, after legal arguments in the case, *(because that was the modus operandi proposed by learned Counsel for the Defendants)* and whilst the parties were awaiting the delivery of judgment, the Plaintiffs introduced new evidence by their

supplementary submissions. It is quite disingenuous to describe the said process as a supplementary legal submissions.

The said process is nothing more than an amendment of the plaintiffs endorsement and or statement of claim.

In the first place, it must be noted that, the 1st defendants did not describe any land in respect of which they wanted an order for the recovery of land which they claimed in their endorsement in Suit No. SOL.21/2010.

However, it was in paragraph 13, of the Statement of Claim that the 1st Defendants herein, after recounting their reliefs endorsed on the Writ of Summons, attached a schedule of land with descriptions therein, containing an approximate area of 338.61 acres or 137.03 hectares of land situate and being at Achimota.

Thus it was the introduction of the site plan, covering land approximately 172.68 acres during the supplementary legal submissions that plaintiffs effectively amended their writ of summons by describing the land which later formed the basis of the judgment.

Order 16 r. 5 (1) of the High Court (Civil Procedure) Rules 2004, (CI 47) provides thus:-

> *"Subject to order 4 rules 5 and 6 and to the following provisions of this rule, the* ***court may at any stage of the proceedings upon an application by the plaintiff or any other party grant leave to***
>
> *(a)* ***the plaintiff to amend the plaintiff's writ, or***
> *(b)* ***any party to amend the party's pleading on such terms as to costs or otherwise as may be just and in such manner as it may direct." Emphasis***

Order 16 r 11 of the same C. I. 47 provides that, an application for leave to amend a writ or pleading shall be made on ***NOTICE*** to all the other parties in the action, and the application shall specify precisely the nature of the amendment intended.

We notice however that, the 1st defendants herein did not comply with this time tested provisions but nevertheless, the court proceeded and went ahead to grant the judgment based on a process which was illegally introduced into the case.

Writing in the authoritative book on *"Civil Procedure, A Practical Approach"," the Black Book,"* S. Kwami Tetteh, on page 445 delivered himself thus:-

> *"Beyond the permitted amendments,* ***amendment of a pleading or writ of summons may be made only upon an application that may be made at any stage of the proceeding, such application maybe granted upon terms as to costs or otherwise as may be just.*** *The court has ample discretion to grant leave in the following circumstances even after the expiry of the relevant limitation period if it is just to do so, to correct the name of a party in order to rectify a genuine* ***mistake over the identity of the intended plaintiff or defendant, to change the plaintiff's capacity to a new capacity that the plaintiffs may have possessed or acquired since the commencement of the action, to introduce fresh cause of action even after the limitation period provided that the new cause of action arises substantially from facts upon which a relief was originally claimed in the writ.*** *An action initiated in the name of an infant maybe amended to introduce the next friend." Emphasis*

See ***Gregson v Channel Four Television Corporation [2000] All ER (D) 956, CA, Lartey v Bannerman [1976] 2 GLR 461 CA and Yeboa v Bofour [1971] 2 GLR, 199 C.A.***

From the above, it bears emphasis that, the 1st Defendants could have succeeded in their application for amendment if they had properly applied to amend their pleadings as it is indeed required under the rules of procedure referred to supra. Not having done that, the procedure adopted therein is thus flawed as being grossly procedurally irregular and thus amounts to a nullity and could have rendered the said judgment void.

GRANT OF WRIT OF POSSESSION WITHOUT NOTICE

Secondly, the same Judge No. 1, on the 5th of December 2012 after judgment had been delivered in Suit No. SOL.21/10 on 28th July 2011, granted an application for writ of possession without serving the Plaintiffs herein who were in actual possession of the land contrary to Rules of Court. See Order 43 rules 3 (1) (2) and (3) and also (13) of CI 47.

The combined effect of these rules of court is that, **leave of the court for the writ of possession shall not be granted unless the court is satisfied that all persons in actual possession have received the notice of the proceedings to enable them apply for any relief to which the person may be entitled. See Order 43 r. 3 (3)** which provides thus:-

> *"The leave shall not be granted* ***unless it is shown that every person in actual possession of the whole or any part of the immovable property has received such notice of the proceedings as appears to the court sufficient to enable the person apply to the court for any relief to which the person may be entitled." Emphasis***

The rationale behind the said rule is not far to understand. This is because, as happened in this case, where the plaintiffs who occupy the land in dispute and operate a second cycle institution which no doubt is a national asset were neither parties nor joined to the case, were nonetheless unaware of the proceedings and could only have been informed about the pendency if this rule had been complied with.

S. Kwami Tetteh, writing on page 995 of his authoritative book on Civil Procedure already referred to supra on this subject, states as follows:-

> *"A judgment order for possession of immovable property may be enforced by a writ of possession, with the leave of court except in a mortgage action."*

Continuing further the learned author writes:-

> ***"However, leave would not be granted unless it is established that any person in possession of the property has been notified of the proceedings in order to apply for relief."*** *Emphasis*

We have verified from the appeal record and the court docket that indeed the Plaintiffs herein who were at all material times visibly in possession have contrary to the dictates of Order 43 r. 3 (3) not been notified.

What this also means is that the procedure adopted therein is irregular, procedurally flawed, void and is thus a nullity. Thus if Suit No. LD/0352/2016 had been allowed to run its full course, the execution of the impugned decision in Suit No. SOL.21/10 and its other variables, will not stand the test of time, as the execution of the Writ of possession therein amounts to a nullity and subject to be declared as such.

CONCLUSION

With the analysis made supra, the appeal by the plaintiffs against the judgment of the Court of Appeal, dated 2nd November 2017 succeeds. The said Court of Appeal judgment is hereby set aside and or reversed.

We accordingly direct that the case be remitted to the High Court, Accra for the Suit No.LD/0352/2016 to proceed pursuant to the Ruling of Judge No. 4, dated, 20th July 2016.

EPILOGUE

We commend (Judge No.4) for the indepth analysis and erudite ruling she delivered in this case at the trial High Court. In this respect, we reiterate our quote at the commencement of the judgment that, *"he does well who serves the common community before his own interest."* She has indeed done service to her community.

Similarly, we re-emphasise the fact that, *"whoever does a thing well, does much"* but the same cannot be said of those who do otherwise.

Whilst thus commending the Plaintiffs for their tenacity of purpose, dogged determination and perseverance, inspite of the many setbacks and frustrations suffered along the litigation path, we condemn in no uncertain terms the Solicitor who settled the pleadings of the 1st defendants and signed same on page 33 of the appeal record in Suit No. SOL.21/2010 without indication of his name.

In this respect, we are of the view that the plaintiffs must be encouraged to petition first the Lands Commission to investigate the circumstances surrounding the conduct of the case in Suit No. SOL.21/2010.

This is with a view to ensure that such an occurrence does not happen again. Secondly, depending upon the outcome of such an enquiry, the Plaintiffs may petition for appropriate disciplinary sanctions.

We have found the suppression of vital evidence by officials of the 3rd Defendants herein not only in this case but also in unreported case, Suit No. CM.J8/131/2019 dated 28th April, 2020, entitled ***Ogyeadom Obranu Kwesi Atta VI v Ghana Telecommunications Co. Ltd. & Anor.***, where we had to deal with issues of suppression

of vital and material evidence by officials of the 3rd Defendants which if available would have put the evidence before the court for adjudication.

In the instant case for instance, if one compares the defence filed by the 3rd Defendants herein in Suit No. SOL.21/2020 reference pages 32 to 33 of the appeal record, and the Defence that was filed by the same entity with the same set of facts in Suit No. LD/0352/2016 reference pages 213-215 of the appeal record, the point being made here becomes manifest.

This therefore calls for the commendation of Carlis Appiah Brako, Lawyer who settled the pleadings in Suit No. LD/0352/2016 for and on behalf of the 3rd Defendants and stated the facts correctly.

Let us end with this food for thought.

"Falling down is an accident,

Staying down is a choice

Arise and never stay down"

LEGEND

1. Judge No. 1 - His Lordship Anthony Oppong
2. Judge No. 2 - His Lordship Herbert Ocran
3. Judge No. 3 - His Lordship Ato Mills Graves
4. Judge No. 4 - Her Ladyship Elizabeth Ankumah

5. Court of Appeal (coram) - Gyaesayor Presiding JA
Dzamefe JA
Welbourne (Mrs) JA

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

Y. APPAU

(JUSTICE OF THE SUPREME COURT)

A. M. A. DORDZIE (MRS)

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS)

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

PWAMANG, JSC:-

A lot has been said about the greatness of the plaintiff in the majority opinion delivered by my most honourable and highly respected brother, Dotse, JSC. I had the opportunity to read it in draft and I must say it is well written and comprehensive but on this occasion I am unable to agree with some of the views expressed in the judgment. I will preface my dissenting statement with a quotation from the speech of Justice Holmes, when he delivered the opinion of the 5-4 minority in the United States Supreme Court case of **Northern Securities Co. v United States 193 US 177 (1904).** He said as follows at page 400 of the report;

"Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."

The plaintiff pleads in its statement of claim that in February, 2013 it was informed by the 3rd defendant that judgment had been recovered in the High Court, Accra on 28th July, 2011 by the 1st defendant in respect of land that formed part of the reserved land of Achimota School. The proceedings culminating in the judgment were not brought to the notice of the plaintiff herein whereas that ought to have been done by either the plaintiff therein (1st defendant herein), or the 3rd defendant or even the court. According to the plaintiff, as the judgment injuriously affected its interest it took several steps to have the judgment set aside but was unsuccessful hence this suit which was filed on 21st January, 2016. The plaintiff has impeached the judgment of 28th July, 2011 on several grounds and it is averred that if the judgment is executed land that was reserved for future development of the school and presently serves as an environmental buffer will be lost to private developers. I must state at the outset that the averments upon which the judgment is impeached and the handling of subsequent proceedings that sought to annul the judgment present a picture of deliberate dereliction by some personnel of the public institutions that have been involved in this case. But the plaintiff has been met

with a defence that is pitched on fundamental principles of law the consideration of which can easily be influenced by the pressure on the court induced by the circumstances of the case.

When the 1st defendant was served with the writ of summons herein, he filed a motion for a summary dismissal of the case on the grounds that the matters plaintiff was seeking to litigate had already been canvassed in the earlier attempts to set aside the judgment of 28th July, 2011 and pronounced upon by courts of competent jurisdiction so it is abuse of process to seek to relitigate them. He also challenged the capacity of the plaintiff which he said is not a juristic person. The trial court dismissed the motion but on an appeal the Court of Appeal upheld the arguments of law canvassed by of the 1st defendant and summarily dismissed that suit. The plaintiff has appealed against the judgment of the Court of Appeal and has contended that their Lordships of Appeal erred in their judgment. The appeal raises for our consideration three principal legal principles, namely; the locus standing of a non-party to bring an action to set aside a judgment that affects her, the application of the doctrine of res judicata, and the capacity to embark on proceedings in court.

There are no contentious facts in this appeal and the background of the case has been set out *in extenso* in the judgment for the majority so I will only relate in brief the facts relevant for an understanding of my statement. In 1948 the colonial government by the **Achimota School Ordinance, 1948 (CAP 114)** established Achimota School, as an independent educational institution. The ordinance provided for a governing council to control the affairs of the school and gave it authority to sue and be sued in matters concerning the school. The ordinance vested certain public lands that had been compulsorily acquired in the governing council of Achimota School. These lands can be classified into two categories; the land the school effectively occupies and had structures built on it including staff and workers accommodation, a hospital and a club

house, and then the land acquired for future expansion of the school. In 1961 CAP 114 was repelled by the **Education Act, Act 87 .** Act 87 has since been replaced by the **Education Act, 2008, Act 778.** That is the subsisting legislation on education in Ghana and governs matters relating to public basic and second cycle schools of which Achimota School is one.

This case is about the reserved land which provides a green cover in the environs of the school. In 2010 the 1st defendant/appellant/respondent (1st defendant) brought an action in the Land Division of the High Court, Accra against the Lands Commission claiming that he represented the original owners from whom the land was acquired by the colonial government. He contended that the land had not been used for the purpose for which it was acquired and that the original owners had taken adverse possession of the land for several years back without any challenge by the Lands Commission. He therefore prayed the court to grant a perpetual injunction against the Lands Commission and their privies and to order that he recovers possession of the land. In their statement of defence the Lands Commission admitted some of the averments of the plaintiff but effectively denied others. That notwithstanding, the lawyer of Lands Commission stated in his defence that the case could be determined by legal argument and this is the mode of trial that was adopted by the judge. Upon hearing the arguments the High Court presided over by Anthony Oppong J (as he then was), held that since the 1st defendant was in adverse possession for about eighty years, he was entitled to his reliefs. In the judgment (to be referred to as the Anthony Oppong J's judgment) the judge granted the perpetual injunction and an order for possession.

On becoming aware of the judgment the school did not act immediately until 1st defendant attempted to execute a writ of possession then the plaintiff filed a notice of claim on 17th June, 2014 pursuant to Or 44 R12 of the **High Court (Civil Procedure) Rules, 2004 (C.I.47)**. The plaintiff followed it up with a motion for interlocutory

injunction against the 1st defendant pending the determination of their claim. This application was heard and dismissed by S. H. Ocran J on 30th July, 2014. After the dismissal of the application for interlocutory injunction the plaintiff made no effort to ensure that the steps required under Or 44 R 12 for the prosecution of the claim were taken. In its affidavit in opposition to the motion to dismiss this case in the High Court deposed to by Ruth Essilfie-Ntreh (Mrs) of Bentsi-Enchill, Letsa & Ankomah, it is stated as follows at paragraph 8;

"That though the plaintiff filed a "NOTICE OF CLAIM" in Suit No. SOL/21/10, it abandoned same after it received advice that the proper procedure to assert its title to the land in dispute and the serious allegations of fraud against the 1st defendant is by commencing the instant action."

Before commencing the instant action one and half years later, the Attorney-General issued a writ of summons against the 1st defendant and the lands Commission praying for declaration that the first judgment was not binding on her, a declaration that the said judgment is null, void and of no effect and an order setting aside the judgment as having been obtained by fraud. In her statement of claim the Attorney-General contended that the land in dispute is the property of the Government of Ghana that was given to Achimota School. She stated that by Article 88 of the Constitution, 1992, the first case ought to have been brought against her and not the Lands Commission. The 1st defendant after entering appearance moved the High Court pursuant to Or 11 R 18(1)(d) of C.I.47 to dismiss the case. The 1st defendant deposed that the Lands Commission by the provisions of the Constitution and the Lands Commission Act is a proper party to be sued in relation to government lands and Attorney-General is not the only person that may be sued. He said the matters that were raised by the Attorney-General ought to have been raised in the first case and since the Lands Commission has lawyers, those matters cannot be raised at this late time. The Attorney-General in an

affidavit in opposition maintained that she alone could be sued and that if the Lands Commission is considered an agent of the Attorney-General then where a principal is disclosed, you do not sue the agent.

In his ruling dated 6th April, 2015 George Atto Mills-Graves, J held that the Lands Commission was a competent defendant to the action and the Attorney-General is bound by the first judgment. He then held that the suit was an abuse of the process of the court as the Attorney-General was seeking to relitigate a matter that has previously been determined on the merits by a court of competent jurisdiction. He relied on the case of **NAOS Holding Inc v Ghana Commercial Bank [2011] 1 SCGLR 489.** The Attorney-General did not appeal against this ruling.

Thereafter, on 2nd November, 2015 the Lands Commission filed a motion in the original suit praying the judge who delivered that judgment to set aside the judgment under his inherent jurisdiction arguing that the judgment is null and void. The judge on 10th June, 2016 dismissed the application on the ground that the defendant did not raise any matter that denied the court jurisdiction as would have rendered the judgment void.

It was after all these efforts failed that the plaintiff caused to be issued the writ of summons herein against the defendants praying for a declaration of title to the land covered by the Anthony Oppong J judgment, an order setting aside the said judgment on the ground that it was obtained by fraud. It also claimed for recovery of possession and injunction. The main contention of the plaintiff is that the land in respect of which the first judgment was given is vested in the plaintiff by virtue of section 29 of **CAP 114** so the judgment recovered against the Lands Commission is not binding on it. As to particulars of fraud in obtaining the judgment the plaintiff has pleaded that 1st defendant ought to have known that the land was acquired for Achimota School yet he claimed in the suit that the land had not been used for the purpose of its acquisition. It

also averred that the 1st defendant was not in possession of the land at the time he claimed so in his statement of claim.

I intend to consider all the grounds of the appeal under the three main legal grounds I set out supra but I will defer discussion of the question of the capacity of the plaintiff and tackle the other two grounds. But before that let me quickly dismiss the preliminary objection by the 1st defendant in which he claims that this appeal ought to have brought upon leave. The decision appealed against dismissed the whole action so the appeal is as of right.

In their judgment the Court of Appeal stated that as the plaintiff is a stranger to the first case, it could only seek to set aside that judgment if it adopted one of the two modes stated in the Court of Appeal case of **Lamptey v Hammond [1987-88] 1 GLR 327**. They held that the plaintiff did not comply with either mode so it was not entitled to a hearing on the merits. This has led the plaintiff to state as follows in ground IV of its grounds of appeal;

"That the Court of Appeal erred in holding that the rule in Lamptey v Hammond [1987-88] 1 GLR 327, relating to the remedy for a non-party affected by a judgment…precludes the appellant(sic) issuing the writ of summons and statement of claim herein to challenge the judgment and orders procured by fraud."

In its statement of case the plaintiff submits that it has complied with the second mode stated in Lamptey v Hammond but the 1st defendant maintains that it has not. Though it is now common place in our jurisprudence to cite the procedure as the rule in Lamptey v Hammond, the procedure in question was first applied in our jurisdiction in the case of **Gbago v. Owusu [1972] 2 G.L.R. 252**. It is a High Court decision by Abban J (as he then was) who incidentally authored the opinion in Lamptey v Hammond at the time

he was on the Court of Appeal bench. It is therefore appropriate to begin the discussion of this ground with the first decision.

The facts of the case are as follows. The applicant was an Ivorian national resident in Ghana and was sued by the plaintiff over a piece of land. He caused his lawyer to enter appearance for him but before he could take any further step in the case he was compelled to leave the country on account of the Aliens Compliance Order of 1969. Subsequently, the plaintiff got to know that before leaving, the applicant sold the land to the defendant so she got him substituted for the original defendant. Processes in the case were served on the new defendant by substituted service but he did not enter appearance so plaintiff applied and was granted judgment in default of appearance for title, damages and possession. When the applicant was informed of the judgment he returned to the country and filed a motion to have the default judgment set aside. Upon service of the motion on the plaintiff his Counsel raised a preliminary objection to the application on the ground that he was a stranger in the case.

At page 253 of his short ruling, Abban J said as follows;

"The applicant's main ground is that it was he who sold the land in dispute to the defendant, and that as a vendor he was bound to defend the title of the defendant; and the judgment, if allowed to stand, would eventually affect him adversely. Counsel for the plaintiff has raised a preliminary objection to the application. The basis of his said objection is that the applicant was not a party to the judgment and cannot therefore apply to have it set aside.

I think the applicant cannot be said to be a party to the judgment in question. Admittedly, he was the original defendant. But the defendant was regularly and properly substituted in his place, after it had become clear that the applicant had sold his interest in the land and left the country for good. The applicant admits that he completely disposed of whatever interest he (the

applicant) had in the land to the defendant before leaving Ghana in pursuance of the said Aliens Compliance Order.

To my mind, at the time judgment was entered, the applicant had no interest whatsoever in the land in dispute, and I do not see how his interest is adversely affected. He is a stranger to the judgment and he has not and cannot acquire a locus standi in this matter.

It is well established that there are only two methods whereby a stranger to a judgment who is adversely or injuriously affected can set it aside. That is, he can obtain the defendant's leave to use the defendant's name and then apply in the defendant's said name to have the judgment set aside. Or where he cannot use the name of the defendant, he can take out a summons in his own name to be served on both the plaintiff and the defendant, asking to have the judgment set aside and for him to intervene. See ***Jacques v. Harrison (1883) 12 Q.B.D. 136****."*

It is important to note that the application was to set aside judgment in default of appearance which the rules of court permitted. Therefore, the question that confronted the court was not the jurisdiction to set aside the default judgment, but it was whether a non-party has locus standing to make the application. This distinction is important because in some of the cases that this procedure has come up the two issues are mixed together. Further, the court took into account the fact that the applicant had divested his interest in the land and therefore had no interest to protect in the case. This fact weakened the locus standing of the applicant.

In **Lamptey v Hammond** the court dealt with an application to set aside a judgment obtained by default of the defendant to attend the trial. Pleadings in the case closed, summons for direction was taken and hearing notice served on the defendant. The court proceeded with the trial in the absence of the defendant pursuant to Order 36 R 16 of the High Court (Civil Procedure) Rules, 1954 (LN 140A). The case concerned a family house that had been sold to defray the personal debt of an administratrix of the estate of

the original owner. The plaintiff as head of the family sued the purchaser to recover the house and judgment was given in his favour after the defendant failed to attend the trial. The defendant died after the judgment. Two years later, the applicant who claimed to have bought the house from the defendant while the case was pending obtained the consent of the successor of the defendant to apply to set aside the default judgment and to defend the case. At the hearing of the application the plaintiff's lawyer challenged the procedure by which the applicant, a stranger, sought to have the judgment set aside relying on **Jacques v Harrison (supra)**. The High Court held that the applicant by obtaining the consent of the successor of the defendant made an effort to bring himself within the first mode in Jacques v Harrison so in order to avoid a failure of justice he would mould the order so as to grant standing to the applicant. He then proceeded to set aside the default judgment. As authority he quoted the English Court of Appeal case of **Minet v. Johnson (1890) 63 L.T. 507.** The plaintiff appealed to the Court of Appeal.

Abban JA, (with Wuaku and Ampiah JJA concurring), repeated what he said in Gbago V Owusu concerning the two alternative modes by which a stranger who is injuriously or adversely affected by a judgment may acquire standing to apply to set it aside.

At page 508 of the report Abban JA after refering Or 38 R 18 (dealing with setting aside judgment in default of defendant at the trial) said as follows;

"It seems to me that the person who can apply to set aside the judgment under Order 36, r. 18 of L.N. 140A is the defendant or any other third person who is adversely or injuriously affected by the judgment, provided he adopts one of the two modes outlined earlier on in this judgment, so as to acquire locus standi. Only those who have or can acquire locus standi can bring the application; and the provisions do not give a locus standi to a person who has none."

The Court of Appeal distinguished **Jacques v Harrison** and **Minet v Johnson** by saying that in those cases, there was a defendant in existence from whom the applicant could

obtain permission or who could be served with the application of the stranger but in the case at bar the defendant had died and there had been no substitution. They accordingly held that the applicant did not properly acquire locus standing to apply to set aside the default judgment. But the Court of Appeal allowed the appeal on the main ground that the applicant did not have any defence on the merits as the sale of family property to satisfy the personal debt of an administratrix was void and conferred no title in the purchaser. The court said no useful purpose would be served by setting the judgment aside.

My Lords, here too it is important to observe that Lamptey V Hammond was also a case of an application to set aside a default judgment permitted by the rules of court and the issue was the locus standing of a non-party to so apply. That notwithstanding, Abban JA, as he did in Gbago v Owusu, in stating the rule did not qualify it as applying only in applications to set aside default judgment. It is therefore necessary to trace the rule to its origins in English law from where it was adopted to ascertain whether it applies to final judgments as well or it is only applicable to default judgments. The case that Justice Abban relied on is **Jacques v Harrison** and, in fact, it is that case that first laid down the rule for the English courts too.

I will set out at length the facts as contained in the law report. The action was brought by the plaintiff against the defendant for the recovery of land for forfeiture by breach of covenants in a building lease which had been granted to the defendant. The lease had been deposited by the defendant with a housing society, who advanced a large sum of money on the security of the lease. At the time the defendant was sued he had no interest in the matter so he allowed judgment to go against him by default. A writ of possession was issue under which the plaintiff took possession. The society, who were the equitable mortgagees of the lease, went into liquidation before the plaintiff's action was brought, and the official liquidator got know of the case when the plaintiff took

possession. The liquidator caused proceedings to be taken in the Chancery Division to set aside the forfeiture, on the ground that no proper notice under the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 14, had been given by the plaintiff before the action was brought. Bacon, V-C., before whom the matter came, considered that the judgment ought to be set aside, as the want of notice as required by the Conveyancing Act was a defence to the action. However, under the Judicature Act, the case was not cognizable in the Chancery Division so he directed that the application for that purpose should be made to the Queen's Bench Division.

An application by summons was accordingly made to Field, J., at chambers, for an order to set aside the judgment; but such summons was taken out by the official liquidator in his own name without making the defendant a party to it, and therefore Field, J., dismissed the application as it was made by a stranger to the action. The Queen's Bench Division reversed this decision, and set aside the judgment on the ground that they had power to do so under Order 27, rule 15(1), as that rule gave the official liquidator a *locus standi*. The plaintiff appealed.

Order 27 r 15(1) provided as follows;

"Any judgment by default, whether under this order or under any other of these rules, may be set aside by the Court or a judge upon such terms as to costs or otherwise as such Court or judge may think fit."

Bowen LJ who delivered the opinion of the court said as follows at pages 167-168;

"There are, so far as we can see, only two modes open by which a stranger to an action, who is injuriously affected through any ***judgment suffered by a defendant by default,*** *can set that*

judgment aside; (emphasis supplied) and these two modes are amply sufficient to protect any such stranger in all cases in all his rights. He may, in the first place, obtain the defendant's leave to use the defendant's name, if the defendant has not already bound himself to allow such use of his name to be made; and he may thereupon, in the defendant's name, apply to have the judgment set aside on such terms as the judge may think reasonable or just. Or he may, if he is not entitled without further proceedings to use the defendant's name, take out a summons in his own name at chambers to be served on both the defendant and plaintiff, asking leave to have the judgment set aside, and to be at liberty either to defend the action for the defendant on such terms of indemnifying the defendant as the judge may consider right, or, at all events, to be at liberty to intervene in the action in the manner pointed out by the Judicature Act, 1873, s. 24, subs. 5."

As to whether Order 27 rule 15(1) gave standing to a stranger to the case he said as follows at page 169-170;

"The Divisional Court decided in his favour, reversing the judgment of Field, J., on the ground that Order XXVII., r. 15, gave the respondent a locus standi. Strictly speaking we should have been disposed to think that this decision was incorrect as a matter of practice and a misconception of the effect of the rule, which was not designed to give a locus standi to persons who had none, ***but to enable judgments by default to be set aside on terms*** *by those who had or who could acquire a locus standi."*

So, the English Court of Appeal was explicit in stating that the procedure it laid down by which a stranger could acquire standing applied only specifically for setting aside judgment suffered by the defendant's default.

Locus standing or simply standing, is one of the core principles on which the common law operates. The jurisdiction of the court at common law is only to be invoked by persons who have interest in the subject matter in respect of which they seek relief. This

is so because the courts do not try hypothetical cases but only actual controversies or disputes. The policy consideration is to make maximum use of the resources of the court by dealing only with life issues. See **Ware v Regent's Canal Co (1858) 3 De G & J 212**. The requirement of standing goes for the plaintiff as well as the defendant. A defendant must be shown to be an actual and true antagonist to a claim hence the power of a court to discharge a person who has been made a defendant who would not be directly affected by the outcome of the case. See **Morkor v Kuma [1998-99] SCGLR 620**. Locus standing is hardly an issue in private law cases since the interest of a party is usually evident from a right to property or personal legal status that is in contention. Consequently, it is my view that we tend to give too much importance to the issue of standing in cases like the one at bar where the claim of ownership to the land in issue is clear from the pleadings. In some jurisdictions such as the United States of America it is a big issue in public law cases but in Ghana we have virtually done away with requirement for locus standing in constitutional and judicial review cases. See **Article 2(1) of the Constitution, 1992 and In Re Appenteng (Decd); Republic v High Court, Accra, Ex parte Appenteng [2005-2006] SCGLR 18.**

At times locus standing is confused with capacity but they are of different juridical backgrounds though the underlying policy reasons are the same. Capacity relates to the legal personality of a party to proceedings and becomes an issue when a party is proceeding not for her personal benefit but under a stated legal or representative capacity. In such situations the law insists that the person must prove that capacity.

The omission by Justice Abban in the two judgments to state that the rule is only applicable to default judgments has led to attempts to invoke it in cases where a stranger seeks to set aside a final judgments given on the merits after a trial such as we are confronted with in this case. But it does not appear to me that Justice Abban ever understood himself as laying down for our jurisdiction a general rule applicable in

cases of final judgment. My opinion is informed by the fact that in both cases the Judge made it a point to add the other part of the original statement of the rule which states that the purpose of setting aside the judgment was to enable the applicant to defend the action, either in the name of the defendant on terms of indemnifying the defendant, or in her own name. If it was contemplated that the rule was to cover final judgment obtained after a trial on the merits, what defence would the original defendant be entitled to assert after a trial on the merits as in the instant case? In **Ansah-Addo & Ors v. Addo & Anor AND Ansah-Addo & Ors v Asante (Consolidated) [1972] 2 GLR 400** at page 406 Apaloo, JA said as follows;

"With great respect to the learned judge, I think he disposed of the serious issue of estoppel per rem judicatam in too cavalier a manner. The judgment of 1959, was a judgment inter parties and the elementary rule which governs the applicability of that plea, is that it estops the parties to the proceeding in which it is given and their privies."

Secondly, because the cases on the rule say the stranger may take out a summons in the stranger's own name and serve the plaintiff as well as the defendant, this has been considered to be referring to a writ of summons. The plaintiff in its statement of case submits that it took out a summons, referring to the writ of summons, and served the plaintiff and the defendant. But the summons mentioned in the authorities is application by summons as opposed to application by motion. In the judgment, especially in Lamptey v Hammond, Justice Abban made mention of "application" more than once and that cannot mean application by writ of summons. For example, at page 334 Abban JA adopted the following passage from Bowen L J's judgment in Jacques v Harrison;

'Bower L.J. at 168 of the report said:

"But it is of the essence of the intervention of the third person, if he adopts the latter course, that ***the defendant should be made a party to the application****. This is not a mere form, but an essential requirement of justice . . .* ***Until the applicant has made the defendant a party to the application by service upon him*** *of the summons, the applicant remains a mere stranger to the action." (emphasis supplied).*

No practice or procedure for an application to be made by writ of summons ever existed in England when the rule was laid down in Jacques v Harrison or in Ghana when Gbago v Owusu and Lamptey v Hammond were decided. The procedure that existed was that applications were to be made either by motion or by summons as was provided for in the High Court (Civil Procedure) Rules, 1954 (LN 140A).

From the law report the case of Jacques v Harrison went before Field J on application by summons and that procedure was approved by the Court of Appeal with the only addition that the application ought to have been served on the defendant. In England the procedure has been applied only in cases of default judgments. See **Minet v Johnson, Brighton and Shoreham Building Society v Hollindale & Ano [1965] 1 WLR 376 and Mohamed v Abdelmamoud [2018] EWCA Civ. 879.**There is no wonder that in all the cases in our jurisdiction I have come across that an attempt was made to apply the rule in proceedings commenced by writ of summons seeking to set aside final judgments obtained on the merits, the courts concluded that the rule had not been complied with. The basic reason is that the rule was never for application in cases of final judgment in the first place.

In sum, in my understanding, the rule in **Lamptey v Hammond** applies only in an application whereby a stranger who is adversely affected by a default judgment seeks to have it set aside. It does not apply where a final judgment has been recovered on the merits. The English Civil Procedure Rules, 1998 now contain a statutory provision that

accords locus standing to a non-party to apply to set aside a judgment so a stranger no longer has to appeal to **Jacques v Harrison** (same as Lamptey v Hammond) to gain standing. Order 40.9 is as follows;

"A person who is not a party but who is directly affected by a judgment may apply to have it set aside or varied."

This rule was applied in the recent case of **Mohamed v Abdelmamoud (supra)** where a non-party sought to set aside a default judgment. Meanwhile, twenty-two years on we are still relying on a decisions deriving their authority from 19th Century England. The substance of the doctrine of locus standing is to accord hearing to only those who are directly affected by the subject matter of a dispute so at the next occasion our rules should make a provision for it.

See the case of **Nai Out Tetteh v Opanyin Kwadwo Ababio [2019] GTLR 78. SC.**

In any proceedings by a stranger to set aside a final judgment, as we have in this case, before addressing the locus standing of the applicant, the court ought to ask itself under what jurisdiction it is called upon to set aside the final judgment. Jurisdiction to set aside a final judgment is clearly provided for by statute and long standing principles of the common law. Final judgment of a court may be set aside by way of an appeal, certiorari, or fresh action alleging voidness, fraud or collusion. See **Punjabi Brothers v Namih [1962] 2GLR 48**, **Arnold v National Westminster Bank plc [1991] 2 AC 93 and Osei-Ampong v Ghana Airports Co. Ltd. [2013-2014] 1 SCGLR 25** In this case the plaintiff by its relief (b) is seeking to set aside the first judgment on grounds of fraud and it is entitled to have that claim investigated on the standard for proving fraud. The decided cases are to the effect that a final judgment obtained by fraud may be set aside through a fresh action. It therefore appears to me that plaintiff cannot be faulted on the

procedure it adopted in this case. For the above reasons, I allow the appeal on Ground IV.

I will next consider the question of res judicata covered under ground III of the grounds of appeal which is;

"The Court of Appeal fell into grave error in holding that the appellant is a privy of the Lands Commission and the Attorney-General and is bound by the judgment and orders in Suit No SOL 21/10 (titled; Nii Ako Nortey II v Lands Commission) and Suit No. SOL 53/15 (titled; Attorney-General v Nii Arko Nortei and Lands Commission)."

This ground impeaches the following holding of the Court of Appeal at page 12 of their judgment; **"We also find that the subject matter of this appeal has been litigated upon in various courts and decisions delivered are still effective and operate as res judicata against the plaintiff. We also find that the entire suit is an abuse of the court process and should be brought to an end."**

The doctrine of estoppel per res judicata is a generic term that covers different juridical situations and has a narrow and wide meaning. In the narrow sense it entails two concepts, cause of action estoppel and issue estoppel. In the wider sense the doctrine is referred to as the rule in **Henderson v Henderson**. Various common law jurisdictions have their peculiar formulations of the estoppels that are comprised in the doctrine of res judicata but they are all in agreement on the twin policy rationale for the doctrine; it is in the public interest that there must be an end to litigation and a party to proceedings should not be twice vexed where one action would do.

In **Nyame v Kese Alias Konto [1999-2000] 1 GLR 236** at page 241 Acquaah JSC (as he then was) said as follows;

"The plea of res judicata really encompasses three types of estoppel: cause of action estoppel, issue estoppel in the strict sense, and issue estoppel in the wider sense. In summary, cause of action estoppel should properly be confined to cases where the cause of action and the parties (or their privies) are the same in both current and previous proceedings. In contrast, issue estoppel arises where such a defence is not available because the causes of action are not the same in both proceedings. Instead, it operates where issues, whether factual or legal, have either already been determined in previous proceedings between the parties (issue estoppel in the strict sense) or where issues should have been litigated in previous proceedings but, owing to "negligence, inadvertence, or even accident", they were not brought before the court (issue estoppel in the wider sense) otherwise known as the principle in Henderson v Henderson (1843) 3 Hare 100. See also Andani v Abudulai [1981] GLR 866, CA."

A reformulation of the doctrine of res judicata in English law is found in the case of **Virgin Atlantic Airways Limited (Respondent) v Zodiac Seats UK Limited [2013] UKSC 46** where Lord Sumption at paragraph 17 of the judgment of the House of Lords explained as follows;

"Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right

upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B)…… Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197-198. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."

The distinction among the different forms of res judicata is critical to a deeper understanding of the operation of the doctrine and the exceptions to the general principles. Cause of action and issue estoppels cover what was actually decided upon in the previous proceedings and do not prevent a party in subsequent proceedings between the same parties or their privies from raising a cause of action or an issue that was not decided. So though two parties may have in previous proceedings litigated on a subject matter which is involved in subsequent litigation between them, the cause of action in the subsequent litigation may be different. That would mean that the new cause of action was not decided upon because it did not come up at all. This may also be the case in respect of an issue relevant to the earlier proceedings but it was not decided in those proceedings because it was not raised. Going by the strict tenets of

cause of action and issue estoppels, the cause of action or issue which was not decided in the earlier proceedings can be litigated upon in the subsequent proceedings.

The case of **Peter Farrar v Leongreen Ltd [2017] EWCA Civ. 2211** illustrates the point very well. The appellant was a tenant who overstayed the length of his tenancy but continued to stay on the rented premises as a trespasser. The landlord brought proceedings against him but only for recovery of possession. He got judgment and it took sometime before he was finally able to evict the appellant. After the eviction the landlord filed a new case against the appellant and claimed for mesne profits for the period he overstayed on the premises as a trespasser. The appellant in his defence contended that the first judgment acted as res judicata against the landlord to prevent him from suing him for mesne profits and that he ought to have claimed the mesne profits in the first action. He lost in the court of first instance and was given leave to appeal to the Court of Appeal but only in respect of his grounds of appeal based on cause of action and issue estoppels. Sales L.J who delivered the judgment of the Court of Appeal said as follows at paragraph 15;

"In the first action, the respondent's claim was limited to a claim for possession, which only involved the respondent in having to show that it had a good cause of action as at the date of the order for possession made in its favour by HHJ Dight. It did not maintain any claim in relation to any cause of action regarding the previous period of trespass by the appellant. It is clear, in relation to the first principle, or cause of action estoppel, that it can only arise where the cause of action in the later proceedings is identical to that in the earlier proceedings: see Arnold v National Westminster Bank plc [1991] 2 AC 93, 105D per Lord Keith of Kinkel, cited by Lord Sumption in Virgin Atlantic at [20]. Therefore, the appellant could not say that the determination of the first action gave rise to any cause of action estoppel in this narrow sense."

In both **Arnold's** and **Virgin Atlantic cases**, the House of Lords allowed issues that had been determined in previous proceedings to be relitigated as exceptions to the principle of issue estoppel.

A second important distinction is that cause of action estoppel is jurisdictional and when it is held to be applicable the effect is to deny the second court jurisdiction to enquire into the claim. In **Basil v Honger 919540 4 WACA 569 at 572** Coussey JA said as follows; *"the plea of res judicata prohibits the court from enquiring into the matter already adjudicated upon. It outs the jurisdiction of the court".* That is true only of cause of action estoppel and, to some extent, issue estoppel. Res judicata in the wider sense used in **Henderson v Henderson** is completely different in its effect. Unfortunately, at times we generalize the legal incidence of a plea of res judicata without paying attention to these very significant differences.

In order to appreciate the legal incidence of a plea of the rule in **Henderson v Henderson** it will be helpful for us to take a close look at the case itself. The facts of the case were that the defendant sued the plaintiff in Newfoundland (Canada) for accounts in respect of a family partnership business which was operating both in that colony and in England. After service of the action the plaintiff left Newfoundland to England and a lawyer entered appearance for her and represented her in their absence. The plaintiff claimed that the lawyer did not have instructions to represent her. The defendant submitted his version of the accounts to the Newfoundland court but no accounts were submitted on behalf of the plaintiff and the court gave judgment and ordered the plaintiff to pay certain sums to the defendant. The defendant came to England and commenced proceedings to recover the monies ordered to be paid by plaintiff. The plaintiff then brought a fresh action against the defendant in England for accounts to be taken in respect of the partnership business and pleaded her version of the accounts between them. She stated that the service of the Newfoundland court processes on them

was irregular and that an amendment to defendant's accounts was not filed properly. The defendant moved the court to dismiss the plaintiff' action as the matter had been finally determined by the court in Newfoundland. Vice-Chancellor, Sir James Wigram at page 114 said as follows;

"In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of Litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. ….It is plain that litigation would be interminable if such a rule did not prevail. Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and prima facie, therefore, the whole is settled. The question then is whether the special circumstances appearing upon the face of this bill are sufficient to take the ease out of the operation of the general rule. Now, what are those circumstances?"

The Vice-Chancellor then considered the grounds the plaintiff urged on the court that should take the case out of the general rule. He formed the view that the errors of law the plaintiff pointed out from the judgment of the Newfoundland court properly are grounds for an appeal to the Privy Council which had appellate jurisdiction in respect of decisions from the colonies and noted that the plaintiff stated that she intended appealing to the Privy Council. He therefore dismissed the plaintiff's action.

This speech of V-C Wigram has since it was pronounced been quoted in several judgments in common law countries and, in most instances, it is presented as if it is an absolute rule of law admitting of no exceptions. Meanwhile, V-C Wigram was very clear that the wider sense in which the doctrine of estoppel per res judicata applies is not an absolute rule even where the subsequent proceedings involves the same parties and the same issues as the previous litigation. He excepted special circumstances and dismissed the action before him partly on the ground that the plaintiff had an alternative relief in an appeal.

The 1st defendant in his statement of case has placed considerable reliance on the case of **Naos Holding Inc v Ghana Commercial Bank Ltd [2011] 1 SCGLR 492** in which reference was made to the following statement of Dateh-Bah JSC in **Sasu v Amua-Sakyi & Anor [2003-2004] SCGLR 742,** at page…..;

"In addition to the cause of action and issue estoppels….there is the related doctrine of abuse of process, commonly referred to as the rule in Henderson v Henderson….whose essence was set out by the English Court of Appeal in Barrow v Bankside Agency Ltd [1996] 1 WLR 257 at 260 as follows;

"The rule in Henderson v. Henderson (1843) 3 Hare 100 is very well known. It requires the parties, when a matter becomes the subject of litigation between them in a court of competent jurisdiction, to bring their whole case before the court so that all aspects of it may be finally decided (subject, of course, to any appeal) once and for all. In the absence of special circumstances, the parties cannot return to the court to advance arguments, claims or defences which they could have put forward for decision on the first occasion but failed to raise. The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the

general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do."

The above statement of the principle of abuse of process clearly then underscores the essence of preventing those who want to make the litigation arena i.e. the law courts a career from embarking upon such a process as it is contrary to public policy and leads to loss of valuable time and resources"

But as was said of the rule in Henderson v Henderson in the case of **Manson v. Vooght and others [1999] BPIR 376** by May L.J. at page 387:

"In my view, the use in this context of the phrase 'res judicata' is perhaps unhelpful, and this not only because it is Latin. We are not concerned with cases where a court has decided the matter; but rather cases where the court has not decided the matter, but where in a (usually late) succeeding action someone wants to bring a claim which should have been brought, if at all, in earlier concluded proceedings. If in all the circumstances the bringing of the claim in the succeeding action is an abuse, the court will strike it out unless there are special circumstances. To find that there are special circumstances may, for practical purposes, be the same thing as deciding that there is no abuse, as Sir Thomas Bingham M.R. came close to holding on the facts in Barrow. The bringing of a claim which could have been brought in earlier proceedings may not be an abuse. It may in particular cases be sensible to advance cases separately. It depends on all the circumstances of each case. Once the court's consideration is directed clearly towards the question of abuse, it will be seen that the passage from Sir James Wigram V.-C.'s judgment in Henderson is a full modern statement of the law so long as it is not picked over semantically as if it were a tax statute." Unfortunately, we have in this country tended to treat the statement of Wigram as the text of a statute."

What Dateh-Bah, JSC must be understood to imply by his statement quoted above is that where the subsequent proceedings cannot be said to be oppressive, then it is not in

the public interest to dismiss them. Where as in this case, it is clear in respect of the first case that it was the 1st defendant who failed to join the plaintiff as a defendant, then he cannot complain of oppressive proceedings. Whilst in cause of action and issue estoppel, res judicata operates with all its force, the same is not the case with the rule in Henderson v Henderson. In **Bradford & Bingley Building Society v. Seddon [1999] 1 WLR 1482, Auld L.J. said at page 1490:**

"In my judgment, it is important to distinguish clearly between res judicata and abuse of process not qualifying as res judicata, a distinction delayed by the blurring of the two in the courts' subsequent application of the above dictum [of Sir James Wigram V.-C. in Henderson v. Henderson]. The former, in its cause of action estoppel form, is an absolute bar to relitigation, and in its issue estoppel form also, save in 'special cases' or 'special circumstances': see Thoday v. Thoday [1964] P. 181, 197-198 per Diplock L.J. and Arnold v. National Westminster Bank Plc [1991] 2 A.C. 93. The latter, which may arise where there is no cause of action or issue estoppel, is not subject to the same test, the task of the court being to draw the balance between the competing claims of one party to put his case before the court and of the other not to be unjustly hounded given the earlier history of the matter . . ."

In the House of Lords case of Johnson v Gore Wood & Co [2002] 2 AC 1, the appeal arose out of an application to strike out proceedings on the ground that the plaintiff's claim should have been made in an earlier action on the same subject-matter brought by a company under his control. It was argued by the defendant that the plaintiff should have brought his personal action at the time his company sued relying on **Henderson v Henderson.**

Millet L.J in his opinion cautioned about the application of the rule as follows;

"Particular care, however, needs to be taken where the plaintiff in the second action is not the same as the plaintiff in the first, but his privy. Such situations are many and various, and it

would be unwise to lay down any general rule. The principle is, no doubt, capable in theory of applying to a privy; but it is likely in practice to be easier for him to rebut the charge that his proceedings are oppressive or constitute an abuse of process than it would be for the original plaintiff to do so."

Therefore, where a defendant prays a court to summarily dismiss a plaintiff's action on ground of res judicata and abuse of process by reference to Henderson v Henderson, the court has to enquire whether the issue the plaintiff is seeking to litigate was specifically decided in the earlier proceedings involving the same parties or their privies. If it was specifically decided, then the court may not allow the plaintiff to re-open it, except in special circumstances. But if the question that arises in the second proceedings was not specifically decided and the defendant relies on abuse of process, then the burden is on the defendant to prove that the second proceedings are oppressive. If the plaintiff in that situation was not party to the earlier litigation but is only a privy, then evidence that shows that the question raised in the second proceedings relates to the said privy but was not raised by the party in the earlier proceedings, then it will be a denial of the right to hearing before a court for such a plaintiff to driven away from the judgment seat. The court ought not to consider only the subject matter of the two cases as most are wont to do. It may be the same piece of land but if a matter that would have been a legal defence available to the plaintiff if she had been a party in the earlier litigation, then though the subject matter would be the same, the issue or cause of action being raised in the second proceedings deserves to be investigated, unless it amounts to clear abuse of the process of the court on some other grounds.

In the affidavit in support of the 1st defendant's motion praying for the dismissal of plaintiff's action as being an abuse of process he deposed as follows at paragraph 19;

"That I am advised and I verily belief same to be true that all the matters being canvassed by the plaintiff have been repeatedly raised and decided upon."

The Court of Appeal too said as follows in their judgment at page 12 thereof;

"As it is there have been various suits in respect of this same land in which various courts of competent jurisdiction have decided against the plaintiff, the Lands Commission, and the Attorney-General who did not appeal against the decision. They are bound by these judgments. The writ of summons can therefore rightly be described as an abuse of the court process and should not have been entertained by the court…..We also find that the subject matter of this appeal has been litigated upon in various courts and decisions delivered are still effective and operate as res judicata against the plaintiff. We also find that the entire suit is an abuse of the court process and should be brought to an end."

When we closely analyse the deposition in the 1st defendant's and quoted passage from the judgment of the Court of Appeal against the backdrop of the extensive explanation and distinction of the different incidents of res judicata above, we find that they were alluding to issue estoppel as between 1st defendant and the plaintiff in respect of the first case. They allege the issue estoppel on the basis that the plaintiff is a privy of the Lands Commission who was defendant in the first case. Then cause of action estoppel may arise in respect of the suit by the Attorney-General against 1st defendant in the sense that the cause of action being raised for trial in the present case is the same as that sued upon by the Attorney-General who it is claimed is a privy of the plaintiff herein. Furthermore, the Court of Appeal talks of abuse of process generally without referring specifically to the rule in **Henderson v Henderson** but in this appeal it has been relied upon directly by the 1st defendant.

If for the purpose of our discussion we assume that the plaintiff is a privy of the Lands Commission then in order to determine if a case of issue estoppel would hold against the plaintiff on account of the first case, we have to find out what issues were enquired into and decided in that first case. The issue that was inquired into was the claim of adverse possession by the 1st defendant and it was decided that 1st defendant had been in adverse possession of the land as against the Lands Commission who did not take any steps to assert its title so the 1st defendant was entitled to remain in possession. So an injunction was granted against Lands Commission. Next we shall consider what claim has the plaintiff made in this present case? The main case of the plaintiff can be found in paragraph 19.3 of its statement of claim to the effect that the land in dispute is vested in Achimota School and that Achimota School as at 2011 was in effective possession of the land. Clearly, these issues were not enquired into and decided upon in the earlier case. So if we apply the definition of issue estoppel to these facts, there is clearly no issue estoppel against the plaintiff.

If we take the allegation of cause of action estoppel on account of the case by the Attorney-General, the basic point there is that that case was not decided on the merits so the cause of action cannot be said to be merged in the ruling of Ato Mills Greaves J.

Since issue estoppel and cause of action estoppel are not applicable against the plaintiff we next consider the rule in Henderson v Henderson to see if plaintiff's action amounts to abuse of process or estoppel in the wider sense. The authorities say the burden is on the 1st defendant to show that the action is abuse of process and what are the proven circumstances of this case? The grounds of claim raised by the plaintiff in this third case were not brought up by the Lands Commission in the first case for reasons that the plaintiff cannot be blamed. The 1st defendant on the other hand shares some blame for the late raising of these matters for at the time he sued in 2011 he was well aware that Achimota School has interest in the land but he failed to join them to the suit. If he had

joined them at that time all these issues would have been decided upon in one action so he cannot now complain that he being subjected to oppressive proceedings by plaintiff as far as the first case is concerned. The record confirms that it was more than a year after the first judgment that the plaintiff was made aware of it and they tried to set it aside. The plaintiff too committed some procedural blunders in its attempts to avoid the judgment such as failing to prosecute its notice of claim. A notice of claim is in the nature of interpleader proceedings and it automatically stays execution of the judgment so the application for interlocutory injunction that the plaintiff filed pursuant to its notice of claim was totally unnecessary.

Whether the case of the plaintiff that the land in dispute is vested in Achimota School and not the state can be sustained or not is a different matter but in my opinion, it certainly is not caught by res judicata or abuse of process on account of the first judgment. The plaintiff's claim never came up and was not extensively investigated and enquired into in the first case for a decision to be given on it. I will not express any views on the Attorney-General's suit as she has not appealed against the ruling of Mills-Graves, J.

I wish to emphasise the point that res judicata and abuse of process are not absolute concepts because it is common these days in our country, particularly in relation to land in the big cities, for a plaintiff to sue an allodial owner of land alone without joining her grantees and lessees who are in conspicuous occupation of the land. She would recover judgment against the allodial owner, who in some instances would deliberately put up a feeble fight if any at all, and with such judgment the plaintiff seek to bind the grantees and lessees trumpeting the fact that they are technically privies of the allodial owner so are estoppel per res judicata. If the grantee in possession seeks to assert her interest in the portion of the land in her possession she is met with a motion to dismiss on ground of abuse of process. It would be unfortunate for a court, without considering the

exceptions to the plea of res judicata explained above, to uphold such contention whereas defences based on adverse possession such as limitation and acquiescence that may avail the grantee or lessee were not raised, enquired into and decided upon in the earlier proceedings. Even if in the first suit the title of the plaintiff therein was properly proved, the person in possession is still entitled to a hearing of her possessory interest in the portion of the land under her occupation. In such cases, it is the party who deliberately failed to join the person in open occupation who is guilty of abuse of process and not the victim of injustice who is knocking on the door of the court to be accorded a hearing.

The above case did not involve the same parties and there was no cause of action estoppel or issue estoppel. In this case, as far as the first case is concerned, the 1st defendant cannot seriously contend that he is being oppressed by the plaintiff's suit. For the above reasons I uphold Ground III of the appeal.

I now turn to a consideration of the challenge to the capacity of the plaintiff. I start the discussion of this issue by quoting further from the speech of Justice Holmes that I commenced my opinion with. We left off where he bemoaned how immediate interests and demands of a case can distort analysis by judges. At page 401 of the report Holmes, J continued;

"These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view

of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with -- to read English intelligently -- and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt."

The capacity that the plaintiff asserts in this case is based on statute so our function is a simple one of reading and interpreting the statute to ascertain if the legislature intended to confer on the plaintiff the capacity to sue and be sued. Simple as this exercise is the consequences are considerable because the law is well-settled that without capacity a person or entity cannot have access to a court of law. I have, like Holms, J did, approached this issue as I would have done if the plaintiff were a regular public school which has asserted capacity under the statutes in question here. In the case of **Standard Bank Offshore Trust Co Ltd v National Investment Bank Limited & 2 Ors [2017-2018] 1 SCLRG (Adaare) 707** the defendant challenged the capacity of the plaintiff for the first time in a final appeal in the Supreme Court and argued that from the evidence on the record the plaintiff at the time it filed the writ of summons had no capacity to bring the action so the whole proceedings were void. The defendant therefore prayed the Supreme Court to nullify the all the proceedings in the High Court and the Court of Appeal. By unanimous decision the court acceded to the prayer of the defendant. Benin, JSC who authored the opinion of the court stated the law as follows at page 726 of the Report;

"A person's capacity to sue, whether under a statute or rule of practice, must be found to be present and valid before the issuance of the writ of summons, else the writ will be declared a nullity. In the case of a company, it's authority to bring a lawsuit is one of capacity and not standing. Capacity to sue is a very critical component of any civil litigation without which the plaintiff cannot maintain any claim. The issue of capacity to sue has been the subject of several writings, commentaries and court decisions, such that every practitioner of the law should

consider it before preparing a case for court. In an article titled 'IN LOCUS STANDI-A COMMENTARY ON THE LAW OF STANDING IN CANADA (TORONTO: CARSWELL, 1986)', Prof. Thomas Cromwell, who later became a judge of the Supreme Court of Canada, wrote at page 3 that: "Capacity has been defined as the power to acquire and exercise legal rights. In the context of the capacity of parties to sue and be sued, to say that a party lacks such capacity is to acknowledge the existence of some procedural bar to that party's participation in the proceedings-one that is personal to a party…..and imposed by law for one or more of various reasons of policy usually quite divorced from the substantive merits……It concerns the right to initiate or defend legal proceedings generally." (Emphasis supplied) This passage was quoted with approval in the Canadian case of PROVINCE OF NEW BRUNSWICK v. MORGENTALER, 2009, NBCA 26 at 43. That the legal authority to act is that which gives a party capacity was also affirmed in the case of DALLAS FORT WORTH INTERNATIONAL AIRPORT v. COX, 261 SW 3d 378 (Court of Appeals of Texas at Dallas, 2008), per Justice Ritchter who said "…..a party has capacity when it has legal authority to act, regardless of whether it has a justiciable interest in the controversy." It must be emphasized that the capacity to sue must be present before the writ is issued; such authority must appear in the endorsement and/or statement of claim accompanying the writ; it cannot be acquired whilst the case is pending; and an amendment cannot be sought to introduce it for the first time. A writ that does not meet the requirement of capacity is null and void. Nullity may be raised at any time in the course of the proceedings, even on a second or third appeal. The charge of tardiness that was raised by the respondent against the appellant is thus a red herring and does not hold water."

The 1st defendant contends that the plaintiff has no statutory foundation as the subsisting legislation on education, Act 778, has no provision for the establishment of boards of governors in public second cycle educational institutions of which Achimota School is one.

The plaintiff concedes this but submits as follows in paragraph 37 of its statement of case;

"37. Although Act 788 does not contain any provision on established boards or boards yet to be established by recognized institutions, the Memorandum dated 30th October, 2008 that introduced the Education Bill in 2008 makes it clear that Act 788 intended the continuation of existing Boards of Governors. The Memorandum recounts the progress in school management from the days of the local councils to the era of the District Assemblies, and also notes the role of religious bodies in the establish[ing] religious educational units which […] grew into parallel system of educational management of basix schools

38. The Memorandum further acknowledges that the principles which underpin the Bill derive from fifty years, […] of State control, management and administration of all schools […] and notes that "schools owned by the community would, through their boards of governors be given as much autonomy as possible[…]".

The plaintiff is unable to point to any statement in the Memorandum that accompanied the Education Bill, 2008 signed by then Minister, Prof Dominic Fobih dated 30th October, 2008, that mentioned boards of governors for existing public second cycle schools such as Achimota. The community schools mentioned are provided for under section 29 of Act 877 as follows;

29. Regulations

The Minister may, by legislative instrument, in consultation with the appropriate body, make Regulations in respect of

(a) the role, composition and any other functions of the inspectorate set up under section 7;

(b) development and assessment of the curriculum for educational institutions;

(c) the role of parent-teacher organisations in the education system;

(d) the ownership of schools by a community;…….(emphasis supplied).

It is such community schools that the Memorandum to Act 877 says regulations may be made for them to gradually become autonomous with boards of governors taking charge of their management. We are not told whether those regulations have been made or not but what is clear here is that the plaintiff is not making its case as a community school and relying on such regulations. Therefore, the reference has nothing to do with boards of governors in public second cycles schools. In its desperate need to find a statutory basis for its claim to juristic personality the plaintiff went to the extent of quoting a passage from a Memorandum to a bill on education that it claims was drafted in 2015 but which has not been passed into law. The quotation is not even from the intended bill but from a Memorandum and it submits that whenever that bill shall be passed into law the Memorandum will state that boards of governors may be established by the Regional Co-Ordinating Councils. I must confess that I find it difficult to accept this as a legal argument. Capacity to sue by law is required to exist at the commencement of the suit and cannot be gained along the line in the progress of the case. See the case of **Akrong and Anor v. Bulley [1965] GLR 469.**

Not withstanding the absence of any provision in Act 877, the plaintiff springs from the Memorandums to argue that in the interpretation of Act 877, the court should have recourse to the Memorandum in order to discover the intention of the legislature in Act 877 as far as boards of governors of public schools is concerned. The question I ask is which Memorandum? The 2008 one which makes no mention at all of boards of governors of second cycle public schools or the 2015 one which has no existence and is

of no effect whatsoever? The plaintiff has referred us to Section 10 of the Interpretation Act, 2009 (Act 792). It is as follows;

Aids to interpretation or construction

10. (2) A Court may, where it considers the language of an enactment to be ambiguous or obscure, take cognisance of

(a) the legislative antecedents of the enactment;

(b) the explanatory memorandum as required by article 106 of the Constitution and the arrangement of sections which accompanied the Bill;

(c) pre-parliamentary materials relating to the enactment;

(d) a text-book, or any other work of reference, a report or a memorandum published by authority in reference to the enactment, and the papers laid before Parliament in refer-ence to the enactment;

(e) the parliamentary debates prior to the passing of the Bill in Parliament.

The section says that **'where a court considers the language of an enactment to be ambiguous or obscure'**, then it may take cognizance of the Memorandum. Clearly, the section can only be called in aid where a specific provision of an enactment is being construed and its language is ambiguous or unclear. The plaintiff has not pointed to any provision in Act 778 on the establishment of board of governors that needs to be interpreted and that is ambiguous or obscure. There is talk of a situation of *casus omisus,* otherwise referred to a*s casus improvisus*, occurring here but in the interpretation of statutes and deeds such a situation is said to arise only where the words used in an enactment appear incomplete thereby rendering the provision meaningless or if the words are given their natural meaning an absurdity will be the result. It is then said that

a gap was left in the wording by a drafter's mistake such that it is only by filing that gap that the provision will have meaning and purpose or the absurdity will be avoided. See **Jones v Wrotham Park Settled Estates [1980] A.C 74.**

In Professor Cross' book; **Statutory Interpretation**, 3rd ed., at page 103 he states as follows;

"In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply ***making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."(emphasis supplied).***

In this case there is no statutory text that is to be read and a gap filed so to talk of *casus omissus* is to travel outside the limits of the judicial role and legislate. Act 877 as it presently exists is meaningful and clear without a provision for juristic status to boards of governors.

It is apparent that in Act 877 parliament adopted a particular approach to educational policy which though it incorporated some elements of the policy of Act 87, effected changes in some areas. Even if a look is taken of the Memorandum to Act 877, it is clear that there is a shift in policy away from having boards of governors as the structure to control second cycle schools in the country in preference for the District Assemblies to be in charge. For it is stated in that Memorandum as follows;

"The education service will be a decentralized Service. Provision is made for the establishment of regional and district education directorates; clauses 21 and 22. At the district level, the District Assembly will be responsible for its area of authority…throughout the basic, second cycle and functional literacy education levels including non-formal education is available to meet the needs of the

population of its area. For this purpose, the District Assembly will appoint a district education oversight committee but it will remain the responsibility of the District Assembly to;

(a) Build, equip and maintain public basic schools in the district;

(b) Establish the public schools required for the district, leaving the oversight committee among other functions to oversee;

(i) The conditions of school buildings and the infrastructure requirements of the schools, and the environmental cleanliness of the schools, lands and any other facilities of the schools…."

The Memorandum states that; "Clause 23 provides that a private educational institution should be incorporated as a legal entity and would among other things……"

What this means is simply that any boards of governors that have been set up in any school will be an administrative structures for assisting the school management without any statutory foundation. An administrative structure to assist in the administration of a school cannot claim juristic status under an Act of Parliament that makes no reference to them not to talk of according them rights to sue and be sued. It therefore seems to me that the policy choice in Act 877 was to have the District Assembly manage the basic and second cycle educational institutions in its district hence the elaborate provisions on boards of governors in Act 87 were left out. Whether the choice is a better policy or not is not for the court to decide. In the case of **Republic v Fast Track High Court, Accra; Ex parte Daniels [2003-2004] SCGLR 364 at 370** Kludze JSC said as follows;

".. Even in the area of statutory interpretation, we cannot amend a piece of legislation because we dislike its terms or because we suppose that the lawgiver was mistaken or unwise.

Our responsibility is greater when we interpret the Constitution. We cannot and must not substitute our wisdom for the collective wisdom of the framers of the Constitution."

Where the intention of the legislature has been made plain through the words used in the enactment it is contrary to the principles of interpretation to seek to amend it to fit the exigencies of a particular party no matter how majestic that party may be. When Lord Denning talked of gap filing in the case of **Seaford Court Estates Ltd. v Asher [1949] 2 KB 481 at p. 499** he qualified his statement by adding that; ***"A Judge must not alter the material of which it is woven, but he can and should iron out the creases."*** In this case the plaintiff is asking us to alter the material of the statute and that a court has no authority to do. As Judges are servants of statute so it is presumptuous for a court where a statute is clear to go ahead of parliament and say that they were wrong and should have provided for a particular thing in the Act. Even Lord Denning, the paragon of substantial justice, observed those limits. In the case of **London Transport Executive v Betts [1958] 2 All ER 636** he sat in the House of Lords in a case where the **Ratings and Valuations (Appointment) Act, 1928** had to be interpreted to determined whether the appellant in the case was entitled to an exemption of tax under the statute. Denning, L.J was the sole dissenter and he stated as follows at 655;

"Just take the steps in the reasoning. It goes like this: The word 'maintenance' included painting in the shop. That shows that it goes beyond the ordinary maintenance (as I have described it) and includes repairs. Hence it is wide enough to include overhauling and reconditioning-and even reassembling into different vehicles. But when it is pointed out that, if that meaning is adopted, it will lead to an absurdity in the statute-that leaves a gap which parliament cannot have intended-then it is said you must fill in the gap by writing into the statute words which are not there and by altering other words. At that point in the argument you come face to face, not with a particular precedent on this act, but with a fundamental principle on all acts, which is-the judges have no right to fill in gaps which they suppose to exist in an act of parliament, but must

leave it to parliament itself to do so. See Magor & St Mellons Rural District Council v Newport Corpn [1951] 2 All ER 839). No court is entitled to substitute its words for the words of the act. See Goodrich v Paisner [1956] 2 All ER 176."

This is a case where neither Act 877 nor its Memorandum give the slightest hint of an omission. The bigger question is; how is the dreamed up gap to be filled? It is the prerogative of the legislature to determine the rights, duties and limitations of legal entities its creates. Some the legislature accords them rights to sue and be sued, some it only accords the status of corporate entity and perpetual succession without adding a right to sue and be sued. Which of these are we expected by the plaintiff to decree for it on the basis of Act 877, not forgetting that the Act applies to all public educational institutions throughout the country? In the case of **Western Bank Ltd v Schindler [1977] Ch 1** it was held that where the insertion would be too long, then the court is exceeding the boundary of construction into the realm of doing the work of the legislature.

When the legislature decided to accord Achimota School the status of a juristic person it did so in plain words. **CAP 114** provided as follows;

4(1) There shall be established a Council to be styled "The Achimota School Council" which shall have entire control of and superintendence over the general policy and property of the School and in all cases unprovided for by this Ordinance may act in such manner as it deems best to promote the best interest of the School.

5*(1) The Council shall be a body corperate having perpetual succession and a common seal.*

(2) The Council may sue and be sued and may acquire, purchase, and hold any moveable and immoveable property…"

But the boards authorized to be established under Act 87 were not accorded the status of being able to sue and be sued. It provided as follows;

15 Establishment of Boards of Governors

(1) Subject to the provisions of subsection (4) of this section the Minister shall for every assisted institution by notice in the Gazzette establish a board of governors to act in accordance with a constitution and rules approved by him.

(2) A board of governors so established for an assisted institution shall be a body corporate with perpetual succession and a common seal and shall have power to hold and manage land for the purposes for which it is established…..

The status of Achimota School has changed since the passage of Act 87. Section 3 of **CAP 114** stated that;

The Secondary Department of the Prince of Wales College and School shall be established as *an independent and autonomous* institution and shall be styled "Achimota School".

It was this independent and autonomous status that constituted the foundation for the other provisions in the Ordinance whereby land could be vested in the school. By Act 87 the legislature dissolved this special status of the school and added it to the public school system and that was the legal effect of the repeal of CAP 114. From that point on Achimota School ceased to be an independent and autonomous institution and its Council lost its juristic capacity. Notwithstanding the repeal the plaintiff submits that it still in law has the status of being capable of suing and being sued. **Section 34 of Act 792** states that;

Effect of repeal

"34. (1) Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided,

(a) revive an enactment or a thing not in force or existing at the time at which the repeal or revocation takes effect;"

This provision was given effect to by this court in the case of **Kowus Motors v Check Point Ghana Ltd & Ors [2009] SCGLR 230.** The court held that the repeal of the first repealing enactment did not resurrect the juristic status of the plaintiff.

The plaintiff's argument under section 34(1)(b) of Act 792, that the Board of Governors of Achimota School still has its status under CAP 114 is a strange proposition of law that runs contrary to the plain language of the provision and the decision of this court in the **Kowus Case** and cannot be countenanced**.**

Section 34(1)(b) says; Where an enactment repeals or revokes an enactment, the repeal or revocation shall not, except as in this section otherwise provided,

(b) affect the *previous operation* of the enactment that is repealed or revoked, or anything duly done or suffered under the enactment;

The saving in section 34(b) relates to past actions that were taken by the Achimota Council (not even the Board of Governors) when CAP 114 was in force and does not confer authority for future purposes following the repeal. If that were so then the repeal of a statute will have no legal consequences whatsoever.

It is therefore abundantly clear that the claim of plaintiff to a special status for Achimota School board of governors has no legal basis. I have all the sympathy for the noble goals that the plaintiff seeks to pursue through these proceedings but the law is very clear on the point that it has no capacity. Let those who have the legal competence such as the Lands Commission and the Attorney-General act as the law has many rooms full of

remedies that can still avail those that the law recognizes. Some of us of the Christian faith believe that at the gate to heaven you must be recognized by Simon Peter before you can gain entrance. The rule there applies with the same rigor to the Mighty, such as Roman Emperor Nero and the humble, such as the Martyrs of Uganda. Capacity is a fundamental principle of our system of law that cannot be whittled down under the circumstances of this case.

For the above reasons, I hold that the plaintiff had no capacity to institute this action so the whole proceedings are a nullity. The effect of my decision on the capacity of the plaintiff on the whole appeal is that it fails for want of capacity and is hereby dismissed.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

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