IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA- A.D. 2021

CORAM: YEBOAH, CJ (PRESIDING)

MARFUL-SAU, JSC

AMEGATCHER, JSC

OWUSU, JSC

AMADU, JSC

CIVIL APPEAL

NO. J4/14/2021

31ST MARCH, 2021

MARY AKYAA BOAKYE (SUBSTITUTED BY YAW BOAKYE ADDEI) — **PLAINTIFF/APPELLANT /RESPONDENT**

VRS

1. **THE PRESIDING BISHOP OF THE METHODIST CHURCH**
2. **THE ANGLICAN BISHOP OF THE DIOCESE OF KUMASI**
3. **THE CATHOLIC BISHOP OF KONONGO MAMPONG, ASHANTI**
4. **EDWARD OSEI BOAKYE TRUST FUND**

— **DEFENDANTS/RESPONDENTS/ APPELLANTS**

JUDGMENT

MARFUL-SAU, JSC: -

This appeal is taken against the unanimous decision of the Court of Appeal dated the 26th of July 2018, which in part affirmed the decision of the trial High Court. The Court of Appeal, however, reversed the trial High Court's decision on the ownership of House No. 29 Volta Avenue, Kumasi which was devised in the Will of Edward Osei Boakye (deceased testator) to the original plaintiff in this action a sister of the said Edward Osei Boakye for life. In this appeal, we intend to give the parties the same designation as they had at the trial High Court, such that, the original plaintiff and the substitute, will be referred to as plaintiff. It is noted that the original plaintiff, Mary Akyaa Boakye died during the pendency of the action and was substituted by her son Yaw Boakye Addei.

The brief facts of the case are that by an amended writ of summons issued on the 13th January 2016, the plaintiff alleged that Edward Osei Boakye in his last will and testament dated 10th May 1997, included properties which did not belong to him. Among the properties was House No. 29 Volta Avenue, Kumasi, which the plaintiff contended was her own property. The High Court, at the end of the trial dismissed the plaintiff claims and entered judgment on the counterclaim for the defendants, who are the Executors of Edward Osei Boakye.

The plaintiff lodged an appeal against the decision of the trial High Court in the Court of Appeal, which affirmed the decision of the High Court, but reversed the decision concerning the ownership of House No. 29 Volta Avenue, Kumasi. The Court of Appeal in its judgment held that the said property was the self-acquired property of the plaintiff having acquired same in 1970. The Court of Appeal thus rejected the claim by the

defendants that the property was actually acquired by the late E. O. Boakye, but did so in the name of the sister for security reasons.

The defendants being aggrieved with the decision of the Court of Appeal mounted this appeal praying this Court to set aside the decision that House No. 29 Volta Avenue, Kumasi, was acquired by the plaintiff. This appeal therefore relates to the ownership of House No. 29 Volta Avenue, Kumasi. The Notice of Appeal filed on 3rd August 2018 by the defendants contained two grounds of appeal, namely:-

"1. The part of the judgment declaring the Plaintiff /Appellant/ Respondent as owner of House No. 29 Volta Avenue, Nhyiaeso Kumasi, is against the weight of evidence before the Court of Appeal.

2. That the Court of Appeal erred when it held that House No. 29, Volta Avenue, Nhyiaeso, Kumasi, was the property of the plaintiff/Appellant/ Respondent.

The defendants' case is that House No. 29 Volta Avenue Kumasi, the subject matter of this appeal, was acquired by E.O. Boakye and same devised to the plaintiff for her life in the last Will of the said E.O. Boakye. According to the defendants, E.O. Boakye acquired the property in the name of the plaintiff for security reasons. The defendants posited that plaintiff's actions and conduct for 9 years after the grant of probate makes it evident that she had no real ownership interest in the property. They tendered during the trial Exhibits 2,6,10,11,12,13 and 14 as evidence of admissions made by the plaintiff, all of which were adverse to the interest she sought to assert in court. The defendants argued that for a period of 9 years after the grant of probate, the plaintiff conducted herself in relation to the estate of E. O. Boakye in such a manner that she is estopped from claiming ownership to the property in dispute.

The plaintiff on the other hand asserted that the property was acquired by her in 1970, having acquired the land for the building from the Government of Ghana. The plaintiff

tendered at the trial Exhibits E series and N series to prove that the property was self-acquired by her. The fundamental issue to be determined in this appeal, therefore, is who owns House No. 29 Volta Avenue, Kumasi?

The main ground in the appeal, is that the judgment of the Court of Appeal on the ownership of the property is against the weight of evidence adduced at the trial. It is therefore pertinent for us, as the second appellate court, to review the record to determine whether on the totality of evidence, the Court of Appeal was right in reversing the decision of the High Court concerning the property in issue. It is also trite that an appeal is a re-hearing. What this means is that as the second appellant court, we have the mandate to review or re-examine the entire record of appeal and arrive at our own finding or conclusion, as to whether on the totality of evidence adduced at the trial, the first appellate court was right in reversing the decision of the trial High Court on the ownership of House No, 29, Volta Avenue, Kumasi.

In the case of **Continental Plastics Engineering Co. Ltd. V, IMC Industries- Technik GMBH (2009) SCGLR 298**, Georgina Wood CJ, delivering the judgment of the Court stated at pages 307 to 308 as follows:

> ***''An appeal being by way of re-hearing, the second appellate court is bound to choose the finding which is consistent with the evidence on the record. In effect, the court may affirm either of the two findings or make an altogether different finding based on the record.''***

In his statement of case for the defendants, learned counsel contended that the Court of Appeal erred in declaring the plaintiff owner of the building in dispute only because some documents on the building, particularly the ''exhibit E series'' were in the name of the plaintiff. According to counsel, the Court of Appeal failed to critically examine the conduct of plaintiff after the will of E.O. Boakye was admitted to probate, which conduct

was adverse to the very interest she sought to assert in the instant case. Counsel therefore submitted that the learned Justices of the Court of Appeal erred in their evaluation of the evidence on record.

What evidence was led by the plaintiff? The plaintiff in her pleadings stated that the building in dispute was her self-acquired property. In the pleadings and in the witness statement, the plaintiff failed to disclose how the property was acquired. It was only in "exhibit N6'' that she tried to explain how she acquired that property. From the record, during the PNDC era most properties of E. O. Boakye, the testator herein were confiscated to the State. The building in dispute was among the properties of E.O. Boakye which were confiscated. The plaintiff, therefore wrote the letter "exhibit N6'' on the 15th May 1986, petitioning the PNDC government to release the property to her as the owner. At this period, the record showed that the late E. O. Boakye was in self - imposed exile. The relevant part of ''exhibit N6'' which is found at page 342 of the record reads as follows:-

> ***''Sir, during the years abroad, I obtained plot of land in Kumasi and bought the Accra house for residential dwellings for the use and benefit of myself and two sons. Since I was away working most of the time I had to depend on someone to develop the Kumasi plot for me. I did not deem it improper to request my brother, the said E. O. Boakye to oversee the project for me. I remitted him as much money as was needed, most times such remittance was in kind in the sense that I paid his children's (two of them) educational expenses in United States whilst he reimbursed me by caring on my project.''***

We observed that the above fact was not pleaded and no effort was made by the plaintiff to prove same. For example, the names of the two children of the testator were not even disclosed during the trial and neither was the amount spent as educational expenses.

More importantly, no effort was made to prove the remittance which was allegedly made to the testator.

From the record of appeal, it seems plaintiff based her ownership claim on the fact that documents on the building, such as the allocation letter and building permit were in her name. However, the fact that some documents covering the building were in plaintiff's name, only raises a presumption under section 35 of the Evidence Act, 1975 (NRCD 323). That section provides as follows:-

> ***''The owner of the legal title to property is presumed to be the owner of the full beneficial title''***

Under section 30 of the Evidence Act, 1975, the above presumption is a rebuttable one and is therefore subject to section 20 of the Evidence Act, which provides thus:-

> ***''A rebuttable presumption imposes upon the party against whom it operates the burden of producing evidence and the burden of persuasion as to the non- existence of the presumed fact.''***

From the above provisions of the Evidence Act, evidence may be led in a trial to displace the presumption created under section 35 of the Act. And the burden for proving the non-existence of the presumption, in the instant case, was on the defendants against whom the presumption operated. Now, given the documentary evidence on record that plaintiff was the legal owner of the property, we need to determine whether the defendants, on the totality of evidence on record were able to rebut the presumption. In other words the defendants needed to adduce evidence that could displace the presumption that plaintiff was the owner of the building simply because the documents on the building are in her name.

The defendants from the record do not challenge the authenticity of the documents covering the building, but contended that the building was acquired by the testator in the

name of plaintiff for security reasons. The defendants further stated that plaintiff was holding the property in trust for the testator and for that matter the defendants. The defendants in a sense were relying on the doctrine of resulting trust which implies a situation where property is conveyed to one person but the purchase price is paid by another thus creating a resulting trust in favour of the person who paid the purchase price, unless a gift was intended by the person who paid for the property. This principle of law was stated in the case of **Dyer v. Dyer (1788) 2 Cox Eq. Cas. 92**, where Eyre CB said:

> ***''The clear result of all the cases, without a single exception is that the trust of a legal estate, whether taken in the names of the purchasers and others jointly or in the names of others without that of the purchaser, whether in one or several; whether jointly or successive - results to the man who advances the purchase money… It is the established doctrine of a court of equity that this resulting trust may be rebutted by circumstances in evidence.''***

This principle was applied with approval in the case of **In re Koranteng (Decd); Addo v Koranteng & Others(2005-2006) SCGLR 1039,** where this Court speaking through Date –Bah, JSC delivered thus at page 1054:

> ***"In essence, a resulting trust in this context, is a legal presumption made by the law to the effect that where a person has bought a property in the name of another, that other would be deemed to hold the property in trust for the true purchaser. It is a trust implied by equity in favour of the true purchaser or his estate, if he has died. The trust is regarded as arising from the unexpressed or implied intention of the true purchaser…. Thus, for a resulting trust to be established, there had to be proof that the purchase money for the property was advanced by the beneficiary of the resulting trust''.***

See Ussher & Others v Darko [1977] 1 GLR 476 C.A.

Now, from the above authorities it is clear that evidence by an alleged trustee showing his name on the title documents will be immaterial if the party claiming to have created the resulting trust is able to prove that he advanced the money for the purchase of the property and that he had no intention to gift the property. So, applying the decision in the above cases to the instant case, "Exhibit E series" which are documents covering the property in dispute, House No. 29 Volta Avenue, Kumasi, would have been immaterial if the defendants were able to prove that the testator, E. O. Boakye advanced the money for the property and that he had no intention to gift the property. Even before a determination is made on whether or not the testator in this case, advanced the money for the purchase of the property in the first place, the act of the testator, devising the property in his Will and giving a life interest in the property to plaintiff's mother, shows that he clearly had no intention whatsoever to gift the property absolutely to the plaintiff. From the record, therefore, the important question to be answered now is, did the testator advance the money for the purchase of the property? Again, the record of proceedings clearly shows that save averments in the pleadings and the testimony that the testator advanced the money for the property and the evidence that the testator exercised acts of possession over the property during his lifetime, the defendants did not provide any positive evidence to the effect that the testator advanced the money for the acquisition of the property.

The defendants, however, claimed after probate was granted to the Will of E. O. Boakye, that the plaintiff for almost 9 years exhibited several conducts which indicated that she did not own the building in dispute, as same was acquired by the testator. The defendants thus pleaded estoppel against plaintiff in view of her conduct in relation to the Will of E. O. Boakye. The defendants buttressed their claim of estoppel by tendering into evidence the following exhibits:-

"Exhibit 1" is the probate granted by the High Court Accra on the 20th of November 2006 with its Will attached. There is ample evidence on record showing that plaintiff was present when the Will was read, hence became aware of the devise to her of House No. 29 Volta Avenue, Kumasi.

"Exhibit 2" is a letter signed by plaintiff's mother for and on behalf of the head of family to the Executors complaining about the lawyer for the estate engaged by the Executors.

"Exhibit 6" is a letter signed by plaintiff describing herself as sister, beneficiary and customary successor and exerting pressure on the Executors to issue vesting assents to beneficiaries, she being one of the beneficiaries.

"Exhibit 7" is the Vesting Assent issued to plaintiff after her persistent demand that Vesting Assents be issued to beneficiaries as demanded in Exhibit 6.

"Exhibit 9" is a publication of notice to creditors and debtors in the Daily Graphic issued by the Lawyers of Executors of E. O .Boakye to which no such claim was received by plaintiff.

"Exhibit 14" is a writ of summons issued on the 7th of July 2008, by plaintiff against the Executors claiming an amount of US$470,000.00, which she allegedly advanced to the testator for the construction of a shopping mall and a cold store. Of importance is paragraph 3 of the statement of claim accompanying the writ of summons at page 248 of the record, where the plaintiff pleaded thus: ***"Plaintiff is the uterine sister of the late Edward Osei Boakye and also one of the beneficiaries of his last will."***

The above, point to different instances plaintiff acted in relation to the Will of the testator. Throughout the almost 9 year period, after probate was granted and before this action was instituted, there is no evidence that the plaintiff made any assertion or took any positive step publicly, to claim ownership of the property in dispute. The conduct of plaintiff therefore suggested that the property owned by the testator and the life interest

devised to plaintiff in the Will was proper. Indeed, it is important to note that plaintiff did not even challenge the process leading to the grant of probate. It was only after the 5th of April 2007 when vesting Assent was granted that plaintiff sought to challenge the validity of the Will.

From the evidence on record two issues of estoppel call for determination in this appeal. Plaintiff's earlier suit tendered in evidence as ''Exhibit 14'' raises an issue of whether or not she is estopped by res judicata? The second issue is whether or not the conduct of plaintiff failing to challenge the devise of the property in dispute to her, amounted to estoppel by conduct?

We shall at this point address first the issue of estoppel by conduct. This happens where a person puts up a behavior or makes a statement knowing very well that the other party will act upon it; or if a person is made to believe the existence of a factual situation by another person, then that person who so conducted himself, will be estopped from denying his behavior or statement or the consequences of his behavior. This principle has been codified by section 26 of the Evidence Act, 1975 (NRCD 323) as follows:

"except as otherwise provided by law, including a rule of equity, when a party has by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successor in interest.''

We are of the opinion that since section 26 of the Evidence Act, creates a conclusive presumption, where the basic facts which give rise to the presumption are established in an action, it cannot be controverted by an aggrieved party.

In this case, the defendants pleaded estoppel in paragraphs 10, 11, 12 and 14 of their statement of defence.

From the record the plaintiff whose conduct gave rise to the estoppel failed to adduce any credible evidence to explain the admissions, conduct and statements despite the notice given by the defendants in their pleading that they will rely on the doctrine of estoppel.

In the case of **In Re Asere Stool: Nikoi Olai Amontia IV (substituted by Tafo Amon II) v. Akotia Oworsika III (substituted by) Laryea Ayiku III (2005-2006 SCGLR 637, at page 651**, this Court speaking through Dr. Twum JSC held thus:

"In our view, this type of proof is a salutary rule of evidence based on common sense and expediency. Where the adversary of a party has admitted a fact advantageous to cause of that party, what better evidence does the party need to establish that fact than by relying on his own admission. This is really an example of estoppel by conduct. It is a rule whereby a party is precluded from denying the existence of some state of facts which he had formerly asserted."

Again, in the case of **Wood v. Tamakloe (2007-2008) SCGLR 852**, this Court applied the doctrine of estoppel by preventing a defendant who had previously acknowledged the plaintiff to be owner of a disputed property to reverse her position by claiming ownership. Sophia Akuffo JSC (as she then was) delivered as follows:

> ***"If the disputed property were in truth owned by the defendant, then having knowingly and without coercion made a declaration against her proprietary interest in the said house, she, the defendant could not be heard to be saying later on that the house was hers."***

Based on the principle enshrined in the above cases, we are of the considered opinion that the Court of Appeal erred in holding that the principle of estoppel was predicated

on fairness and justice and for that matter would not apply same to the instant case. The Court of Appeal in reversing the decision of the High Court on the ownership of the building in dispute, relied on the case of **Social Security Bank v. Agyarko (1991) 2GLR 192**, from which they quoted thus:-

> ***"The principle of estoppel by conduct was applicable only in those circumstances where it was just to invoke it, namely in those circumstances in which it will be unjust, inequitable or unconscionable to permit a party against whom a plea of estoppel by conduct was raised to go back on his word or conduct. Consequently, in invoking a plea of estoppel by conduct, one had to have regard to the circumstances surrounding the particular conduct which was the subject of the plea. Invariably, each case had to be decided on its own peculiar facts."***

We are of the opinion that the learned Justices of the Court of Appeal with respect misapplied the dicta above. Indeed, the dicta supports the case of the defendants in the sense that on the totality of the evidence on record, it will be unjust and inequitable, in view of the admissions and conduct demonstrated by the plaintiff, to allow her to retract her admissions. The conclusion reached by the Court of Appeal on House No. 29 Volta Avenue, Kumasi, therefore, was contrary to the plaintiff's own written declarations and her overall conduct as disclosed by the record of proceedings. For example, there is evidence on record, that plaintiff herself, asserted that she was a beneficiary under the will of E.O. Boakye. The learned Justices of the Court of Appeal erred on this issue as the court did not in any way demonstrate why the decision of the trial High Court was unjust.

On the issue of estoppel by conduct we think evidence on record supports the decision of the trial High Court and the learned trial Judge was right in dismissing plaintiff's claim to the building in dispute. Indeed, the trial Judge was right in the evaluation of the evidence when she made the finding below:

> ***''I am particularly fortified in this finding because the plaintiff was a very vociferous writer. If she was in anyway shortchanged by the provisions of the will, when it was read on 19th October 2006, as is borne out by Exhibit 5, she most definitely would not have waited until 8th June 2015 when this writ was issued, to take steps to recover her self-acquired property, whether by writ or letter.''***

As we have already stated on the 7th of July 2008 plaintiff caused a writ of summons to be issued against the defendants claiming an amount of US$ 470,000, being money she allegedly paid to E. O. Boakye for the construction of a shopping mall and a cold store. At this point the Will had been read and probate taken and Plaintiff was thus aware of the devise of House No. 29 Volta Avenue to her. This was the only property that was devised to her under the Will of E. O. Boakye.

The reasonable thing one would have expected plaintiff's mother to do was to challenge the building devised to her if indeed the building was her self-acquired property. The failure of plaintiff to include her ownership claim over the property in dispute is what leads us to the issue of res judicata.

In **In Re Sekyeredumasi Affairs: Nyame v. Kesse alias Konto (1998- 99) SCGLR 476**, this Court speaking through Acquah, JSC (as he then was) stated at page 478 to 479 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 accidents'' 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 In re Yendi Skin Affairs: Andani v. Abudulai (1981) GLR 866 CA. The rationale underlying this last estoppel is to encourage parties to bring forward their whole case so as to avoid a succession of related actions.''

Issue estoppel in the wider sense is also referred to as the doctrine of abuse of process commonly referred to as the rule in **Henderson v. Henderson (supra)** whose essence was set out in the case of Barrow v. Bankside Agency Ltd. (1996) 1WLR 257 at 260 as follows:

"The rule in Henderson v. Henderson (1843) Hare 100 is very well known. It requires parties, when a matter becomes a 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 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 forever and that a defendant should not be oppressed by successive suits when one will do. That is the abuse at which the rule is directed.''

On the above principle of law the case of **Greenhalgh v. Mallard (1947) 2 All ER 255**, is very instructive and throws more light on the estoppel issues raised in this case. At page 257 of the report the court observed that res judicata:

> ***''Is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in.''***

The courts in Ghana have applied the above principle of law in several cases, such as **Dahabieh v. SA Turqui & Bros (2001-2002) SCGLR 498**, where this Court stated at page 507 of the report that:

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

The effect of the above principle of law as espoused in the cases cited above is that when a party has the opportunity to litigate he must bring his full case before the court. Any attempt to do piecemeal litigation should not be condoned as doing so only amounts to an abuse of the court process.

On the above authorities therefore plaintiff was therefore estopped by res judicata to raise the issue relating to House No. 29 Volta Avenue, Kumasi again in another suit when she had the opportunity to do so when she sued the Executors to recover an amount of US$ 470,000.

In this appeal, we are faced with a situation where the trial court and the Court of Appeal made different determination concerning the ownership of the building in dispute. We are therefore bound to determine which of the two findings is consistent with the evidence on record. As we have ready indicated we find the decision of the trial High Court more consistent with the evidence adduced at the trial. We therefore hold that the decision of their Lordships of the Court of Appeal was against the weight of evidence and we shall therefore set aside that decision and affirm that of the High Court which declared E. O. Boakye owner of House No. 29 Volta Avenue Kumasi.

Accordingly we allow the appeal and the decision of the Court of Appeal on the ownership of House No. 29, Volta Avenue, Kumasi is hereby set aside.

S. K. MARFUL-SAU

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

N. A. AMEGATCHER

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