IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2022

CORAM: DOTSE JSC (PRESIDING)

AMEGATCHER JSC

OWUSU (MS.) JSC

TORKORNOO (MRS.) JSC

PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL

NO. J4/27/2022

30TH NOVEMBER, 2022

1. CYRIL MAINOO

2. CYMAIN GHANA LIMITED

…… PLAINTIFFS/RESPONDENTS/ APPELLANTS

VRS

1. AMA ATAA
2. AMA POKUAA
3. EFIA SAA
4. NANA KUNADU
5. AMA SERWAA

……. DEFEENDANTS/APPELLANTS/RESPONDENTS

JUDGMENT

DOTSE JSC:- On the 30th day of November 2022, this court by a unanimous decision allowed the appeal by the Plaintiffs/Respondents/Appellants hereafter referred to as Plaintiffs, against the Court of Appeal judgment dated 30th July 2020 which was in favour of Defendants/Appellants/Respondents hereafter, Defendants.

In the circumstances, the Court of Appeal judgment of even date was set aside, and the judgment of the High Court dated 19th day of October, 2018 was restored.

We now proceed to give the reasons for our decision of the 30th November 2022.

Daniel Webster, a prolific American writer and commentator in his address to the Massachusetts Convention in 1820 stated as follows:-

> *"It would seem, then, to be part of political wisdom* ***to found government on property;*** *and* ***to establish such distribution of property, by the laws which regulate its transmission and alienation, as to interest the great majority of society in the protection of government.***" Emphasis

See *"The Quotable Founding Fathers" Edited by Buckner F. Melton Jr, page 286*.

We find the above quotation appropriate because, Opanin Kwame Poku, the original owner of House Number 24, North Labone Housing Estate, Accra, had the presence of mind to take advantage of the Laws to establish the distribution and alienation of the said property to his forty five (45) children. However, the lack of clarity and understanding which underpinned the said process led to the chaos, confusion and anarchy which engulfed the said House number 24, North Labone Estate which is the subject property germane to the appeal herein.

We are of the considered opinion that, if the principle of *"Understanding"* had underpinned the conduct of all the principal actors in this case, the matters would have been resolved without resort to the law courts.

WHAT THEN ARE THE FACTS OF THIS CASE

We proceed to set out the facts of the case, first as stated from the Plaintiffs perspective.

Plaintiff purchased the disputed house from some of the children of Opanin Kwame Poku who originally owned the house in 2003 after representatives of the children had agreed to sell same at a negotiated price of 1.15 billion old cedis. After the initial payment, *(receipt of which is in evidence as exhibit A),* they took immediate possession of the property and made a final payment in July of the same year. See exhibit B. Thereafter plaintiffs were provided with an Indenture which is in evidence as exhibit C. Plaintiffs averred that soon after taking possession, they did extensive renovation works on the property without any interference. The works included changing the roof and windows, demolishing the outhouse, rebuilding the septic tanks etc. The business of 2nd plaintiff was also relocated to the building, and operated therefrom for seven years without any interference. Plaintiffs averred that there was no pending suit between the children of Opanin Kwame Poku at the time of the sale and neither were they made aware of any pending suit between the children over the said property. Plaintiffs further contend that no injunctive order was served on them restraining them from using the disputed property and neither were they joined as parties to any suit over the property.

In 2010, 1st defendant and another sued plaintiffs herein, together with Opanyin Yaw Gyamfi and Yaa Asibuo in Suit No. BFA 74/2010 but the suit was dismissed by a ruling of the court dated 21st June 2010 as being caught by the principle of estoppel per rem judicatam in view of the judgment in Suit No. FA80/03.

On obtaining judgment on 24th September 2009, in respect of Suit No. FA/80/03, an order of possession dated 28th November 2011 was executed against plaintiffs without recourse to them even though to the knowledge of defendants, 2nd plaintiff herein had been in undisturbed possession of the property since 2003.

The instant action was triggered by the execution of the writ of possession on plaintiffs. It is the case of plaintiffs that the execution process led to the closure of the head office of 2nd plaintiff causing delays in delivery of contractual obligations to clients, huge financial losses and serious embarrassment to the company and its partners across the West Africa sub-region. On 7th September 2012, on an application by the plaintiffs the order was set aside.

We have verified the exhibits referred to herein as A, B and C and found them to be authentic.

For example, on 10th July 2003, there is a document which reads as follows:-

> *"I Opanyin Yaw Gyamfi of Kumawu-Woraso on behalf of all the 45 children of late Kwame Opoku, have received an amount of One billion, one hundred and fifty million cedis (¢1,150,000.00) from Cyril Mainoo of Cymain (GH) Ltd Accra, being final payment for the sale of House number 24, North Labone House Estate, Accra on 10th July 2003."*

The said document was signed by Opanyin Yaw Gyamfi and the 1st Plaintiff herein and also witnessed by one Sampson Agyenim-Boateng who subsequently testified as PW1 in the case.

We have also verified a Deed of Assignment in respect of the transfer of the said property by Opanyin Yaw Gyamfi acting for and on his own behalf and 43 other (siblings beneficiaries) on the one side and the 1st Plaintiff on the other side for and behalf of the 2nd Plaintiff as well.

Based on the above facts, the Plaintiffs caused a writ of summons in which they claimed the following reliefs to be issued against the defendants:

1. "Declaration of title to House Number 24, North Labone Housing Estate, Accra
2. Damages for wrongful execution
3. Damages for loss of earnings
4. Damages
5. Perpetual injunction restraining the Defendants, their assigns, privies, workmen or any person claiming through them from interfering with the Plaintiff's possession, occupation, use and enjoyment of House Number 24 North Labone Housing Estate, Accra
6. Costs
7. Any further order or orders as this Honourable Court may deem fit."

It is perhaps very instructive to give some background information about *Suit Nos FA/80/03* and *Suit No. BFA/74/2010* respectively. This is because the said Suits had been referred to in the rendition of the facts and judgment of the trial Court which has led to this appeal **Suit No. FA/80/2003.** This Suit was instituted by Madam Ama Afriyie and Madam Ama Atta against Yaw Gyamfi and Yaa Asubou who were described in the endorsement as representing the children of Opanyin Kwame Poku who want H/No 24, North-Labone Accra to be sold.

The 1st Plaintiff therein, was described as representing the matrilineal family of Opanyin Kwame Poku whilst the 2nd Plaintiff therein was described as representing three children of Opanyin Kwame Poku who do not want the property H/No 24, North-Labone, Accra to be sold.

The Plaintiffs therein filed several reliefs from relief A through to U.

It is of interest to note the following reliefs claimed by the Plaintiffs in this Suit No. FA/80/03.

(c) Declaration that once the late Opanin Kwame Poku in his life time refused to allow the children of his previous Uncles and brothers whose properties he inherited to succeed the properties of his deceased fathers, ***his own children cannot be allowed to inherit the properties he left behind*** to the exclusion of the children of his deceased uncles and brothers.

(h) declaration that, by the proposed Terms of Settlement in the Kumasi High Court, Suit No. CS.56/98 intitutled ***Madam Ama Afriyie v Opanin Kwasi Takyi*** the house No. 24 North-Labone is the family property of the matrilineal family of the late Opanyin Kwame Poku the brother of the 1st Plaintiff and the father of the 2nd Plianitff and 1st and 2nd Defendants herein.

(i) Declaration that the manifested intention of the 1st and 2nd Defendants herein to sell the said house No. 24, North-Labone, Accra constitutes a breach of the said proposed terms of settlement and therefore the said house continues to remain the bonafide family property of the late Opanyin Kwame Poku."

It is worthy to take note that, the 2nd Plaintiff in Suit No. FA 80/2003 who was reputed to be representing three of the childen who do not want the property of their late father Opanyin Kwame Poku to be sold was the 1st Defendant who was sued by the Plaintiffs herein in the instant suit.

On the 24th day of September 2009, the High Court in Accra, presided over by Abada J, delivered judgment in the said suit and made several orders. Without any intention of being repetitive, the learned trial Judge in the case before us in her rendition and analysis of the effect of this Suit No. FA/80/03 stated substantively as follows:-

"The thrust of the case of the Plaintiffs in Suit No. FA/80/03 was that the disputed property was family property and not the self acquired property of the deceased Opanyin Kwame Poku. This issue engaged the court in its findings and conclusions as evidenced in its judgment. Although two of the reliefs of Plaintiffs in the Suit was for an order cancelling the acts or actions of their siblings who wanted the house sold and also an order nullifying any alleged or purported sale of the house on grounds of trespass and illegality, none of the issues set down for trial sought to challenge the legality of the sale or the capacity of Yaw Gyamfi or the majority of the children to dispose of same. It is significant to note that the case of the defendants was dismissed and judgment was entered in favour (sic) plaintiffs' grantors.

Although an order for sale of the disputed property was not a relief sought by the Plaintiffs in Suit No. FA/80/03, having found that the property was the self-acquired property of the deceased, the court held ***that the children of the deceased Opanin Kwame Poku were tenants in common and proceeded to order the sale of the property. The court gave the first option of sale to the children who were against the sale of same, defendants herein."*** This refers to the defendants in this appeal.

Continuing, the learned trial Judge delivered herself thus:-

"Based on the judgment of the court, defendants obtained an order for execution and Writ of Possession on 28th of November 2011 which has since been set aside as per exhibit I".

The learned trial Judge then proceeded to make this important finding and analysis in her erudite decision.

"Applying the principle of issue of estoppel as earlier discussed in this judgment, I rule that to the extent that the issue before the court in Suit No. FA/80/03 had nothing to do with the issue this court has been called upon to determine, the issue of estoppel per rem judicatam does not apply.

The submission that the final judgment in Suit No. FA/80/03 extinguished the interest of Plaintiffs in the property on grounds of estoppel per rem judicatam is untenable." Emphasis

It is also worth taking note that, this case, Suit No. FA80/03 was pending in the High Court from 2003 until 24th September 2009 when Abada J, delivered his judgment.

It is also a fact that, the Writ of Possession that was granted and executed by the Court on 28th November 2011 was illegally obtained.

This is because, it is provided under Order 43 r.3 (2) of the High Court (Civil Procedure) Rules, C. I. 47 that a writ of possession shall not be issued without the leave of the court except in mortgage actions under Order 56. **This leave shall not be granted unless the court is satisfied that all persons in actual possession have received notice of the proceedings to enable a person to apply for any relief to which the person may be entitled.** See Order 43 r. 3 (3) of C. I. 47 Marful-Sau JSC, of blessed memory, explaining the above provisions in his invaluable Book *"A Practical Guide to Civil Procedure In Ghana"* writes at page 144 as follows:-

What this rules means is that people in the occupation of a property subject of the writ of possession must be notified of the execution proceedings whether they were parties to the action or not." Emphasis

We can confirm and verify that the Plaintiffs herein, even though were in possession of the disputed property and having also carried out extensive renovation works, were never notified, contrary to the provisions referred to supra. This is what made the

execution of the writ of possession a nullity which unfortunately the Court of Appeal failed to appreciate.

See also the consolidated case of ***Nene Narh Matti and Others v Osei Godwin Teye and Others, unreported decision of the Supreme Court, Suit No CAJ4/13/2017 dated 22nd November 2017***, where this position was dealt with in detail.

The said Writ of Possession was however set aside by order of the High Court dated 7th September 2012. What is puzzling to any ordinary but curious observer is that, Ama Atta, the 2nd Plaintiff in Suit No. FA/80/03 a daughter of the deceased Opanin Kwame Poku must have known that the Plaintiffs herein had on or by 2003, taken over occupation and possession of H/No. 24 North-Labone, Accra. The Plaintiffs presence in said house was pronounced to the extent that they performed various overt acts of ownership and possession which lay in their carrying out extensive renovations on the subject property without let or hindrance.

A court of equity will definitely take note of the acts of omission and of commission of the Defendants herein and their agents in evaluating the justice of the facts of the case as presented before us in this respect.

SUIT NO. BFA.74/2010

The parties in this Suit are as follows:-

1. Ama Ataa
2. Pokuwaa
3. Efia Saa - Plaintiffs
4. Nana Kunadu
5. Ama Serwaa

Vrs

1. Yaw Gyamfi
2. Yaa Asuboi
3. Kwabena Boateng - Defendants
4. Boating Samboat Enterpirse
5. Manu
6. The Occupant of the House
   No. C.249/98

What is of interest is that, the 1st Plaintiff in the above intitutled suit, Ama Ataa is one and the same person who has been litigating in respect of this H/No 24, North Labone Accra, albeit without any success whatsoever.

The 1st, 2nd and 5th and 6th Defendants have been either privy to Suit No. FA/80/03 or the instant Suit in the High Court and from which this appeal lies.

Learned Counsel for the Defendants/Applicants in this Suit No. BFA.74/2010, filed an application for the court to strike out pleadings and dismiss the action pursuant to the proceedings under Order 11 rule 18 (1) (b) and (d) of the High Court (Civil Procedure) Rules 2004, C. I. 47.

The Applicants therein deposed to a 16 paragraphed affidavit in support of the application. However, for purposes of emphasis, we will reproduce paragraphs 5, 8, 10, 11, 12 and 13 which provide as follows:-

5. That this action is an abuse of the processes of this Honourable Court as the issues raised in this action had been raised and finally determined on another action entitled ***Madam Ama Afriyie and Anr. v Yaw Gyamfi and Anor Suit No. FA80/2003.***

8. That on the 25th July 2003, the 1st Plaintiff herein issued a writ of summons and statement of claim against the 1st and 2nd Defendants herein claiming the reliefs endorsed thereon.

10. That the said suit was tried, evidence taken and judgment entered by the Honourable Court per his Lordship Anthony Abada.

11. That the Honourable Court in its judgment dealt conclusively and finally with all the reliefs claimed on the Writ of Summons which was from (a) to (j).

12. That the Plaintiffs have not appealed against the said judgment.

13. That the Plaintiffs are thus estopped from proceeding with this action and demanding the determination of the same issues raised and the reliefs determined by another High Court of competent jurisdiction.

On the 21st day of June 2010, the High Court, Accra presided over by Ofosu-Quartey J, held after considering the issues germane raised in the application as follows:-

> "For the foregoing reasons and with regard to all the circumstances of the case, I grant the application and strike out the pleadings in the statement of claim as being matters that have been brought up in the earlier case decided by Justice Abada in Suit No. FA/80/2003. **I dismiss Suit No. BFA.74/2010 as being caught by the principle of estoppeal per rem judicatam."**

The above rendition is necessary to give a clearer picture of the facts that enabled the learned trial Judge in the instant appeal to make the findings and conclusions upon which she based her decision which unfortunately was set aside and reversed by the Court of Appeal.

FACTS UPON WHICH THE DEFENDANTS CONTESTED THE SUIT AND FILED A COUNTER CLAIM

Defendants denied the allegations and per their further amended statements of defense and counterclaim, filed on 27th of June 2017 with leave of court, contended that plaintiffs have no cause of action against them because their alleged grantors had no power to sell the disputed property. Defendants also accused plaintiffs of meddling in the estate of their late father. They averred that since the death of their father, letters of administration or probate had not been granted by the court, and that Yaw Gyamfi did not have the legal capacity to sell properties of the estate of their deceased father therefore whatever he did was an illegality and void.

In further denial of the claim, defendants contended in paragraph 7 of the statement of defence and counterclaim that 1st defendant and many of the children of Opanin Kwame Poku, were not present at the meeting in Kumasi where the sale of the property was discussed. And that not all the children of the late Opanin Kwame Poku were in favour of selling the disputed house.

Defendants also denied receiving any share of the proceeds of the sale and averred that plaintiffs alleged grantor, Yaw Gyamfi, who was 1st defendant in suit No. FA80/03, failed to disclose the alleged sale to the court in that suit. Defendants further challenged the authenticity of the receipts and averred that being an illiterate, the absence of a jurat on the receipt which was thumb printed by Yaw Gyamfi was fatal.

It is also the case of defendants that at the commencement of suit No. FA80/03, no renovation works had commenced on the disputed property.

They further averred that plaintiffs had notice of an injunctive order which was posted on the disputed house and were cited for contempt of court on two occasions. Defendants further averred that in executing judgment obtained in suit No. FA80/03, they found that the property was occupied by plaintiffs herein who refused to allow valuers appointed by the court unto the premises to access the property.

Counterclaim of Defendants

1. "Declaration that in the judgment dated 21st October 2009, the High court Accra, has declared that the property in dispute the house number 24 North Labone, located at Cantonments, Accra is the self-acquired property of late Opanin Kwame Poku belong to all the 45 children including defendants herein.
2. Declaration that once the house in dispute became the property of all the children of the late Opanin Kwame Poku one son Yaw Gyamfi who is not properly mandated by the rest could not purport to sell that house to the plaintiff herein on their behalf.
3. Declaration that the said final judgment of the High Court, Accra dated 21st day of October 2009, cancels and nullifies the purported claims of plaintiffs and supersedes his claim.
4. Declaration that the absence of jurat in the receipts relied upon by plaintiff nullifies the alleged sale of the property in dispute to him.
5. Declaration that the property in dispute, house number 24 North Labone, located at cantonments, Accra as it is the property of a deceased person under the law, it is the personal representative of the deceased owner of the house who could sell and or give away the property and Yaw Gyamfi was not a personal representative of the deceased owner of the property in dispute.
6. Declaration that the plaintiff is to pay rent of US3,000.00 per mensein for all the time he claims to have purchased the house or to have occupied the property from the beginning to this removal from the house.
7. Declaration that not being a party to the High court, Accra suit No. FA80/03 dated 25th July 2003, the plaintiff had no right to resist and interfere with the lawful execution of a judgment of a court of competent jurisdiction of which he was not a party.
8. An order for perpetual injunction (prohibitory and mandatory) against the plaintiff, his assigns, privies, agents and workmen.

9. An order for ejectment and recovery of possession
10. An order nullifying and cancelling any purported deed of indenture, sale given to plaintiff
11. An order that aside the rent recoverable for the duration of time plaintiff had occupied the house, plaintiff should be made to rebuild the main building and the out-house to its original state in which it was, because they had demolished the outhouse and changed the main building, or failing, they should pay the present day cost of rebuilding the out-house for the defendant to re-build it.
12. An order for cancelling of any unauthorized changes made at the land commission in respect of registration of the house in dispute.
13. An order that the execution which had been completed and plaintiffs went by an ex parte application, reversed it, they should be made to return the keys and the property back to the judgment creditors.
14. Mesne profit
15. General damages for trespass and fraud.
16. Interest at the prevailing bank rate up to the date of payment."

DECISION BY THE HIGH COURT

After trial in which both parties testified and called witnesses, the learned trial Judge delivered herself in a judgment in which she found for the Plaintiffs.

In view of the very fundamental findings made by the learned trial Judge and her conclusions which are consistent with the findings and the applicable laws and principles, we deem it expedient to quote in extenso portions of the said judgment. We do so because of the lack of any deep appreciation of the said findings and conclusions reached by the intermediate appellate court that is the Court of Appeal. It is no wonder

that we have departed from the decision of the Court of Appeal and accordingly set it aside.

This is how the learned trial Judge analysed and concluded her judgment.

> *"The thrust of the case of plaintiffs in Suit No. FA80/03 was that the disputed property was family property and not the self-acquired property of the deceased Opanin Kwame Poku. This issue engaged the court in its findings and conclusions as evidence in its judgment. Although two of the reliefs of plaintiffs in that suit was for an order cancelling the acts or actions of their siblings who wanted the house sold and also an order nullifying any alleged or purported sale of the house on grounds of trespass and illegality, none of the issues set down for trial sought to challenge the legality of the sale or the capacity of Yaw Gyamfi or the majority of the children to dispose of same. It is significant to note that the case of the defendants was dismissed and judgment was entered in favour of plaintiffs' grantors.*
>
> *Although an order for sale of the disputed property was not a relief sought by the plaintiffs in Suit No. FA80/03, having found that the property was the self-acquired property of the deceased, the court held that the children of the deceased Opanin Kwame Poku were tenants in common and proceeded to order the sale of the property. The court gave the first option of sale to the children who were against the sale of same; defendants herein. Based on the judgments of the court, defendants obtained an order for execution and writ of possession on 28th November 2011 which has since been set aside as per exhibit i.*
>
> *Applying the principle of issue estoppel as earlier discussed in this judgment, I rule that to the extent that the issue before the court in suit No. FA80/03 had nothing to do with the issue this court has been called upon to determine, the issue of estoppel per rem judicatam does not apply. The submission that the final judgment in suit No. FA80/03 extinguished the interest of plaintiffs in the property on grounds of estoppel per rem judicatam is untenable.*
>
> *The position of the law is that a defendant who mounts a counterclaim carries the same burden of proof to establish the assertions made on a balance of probabilities. Section 11 (4) of the*

Evidence Act 1975 (Act 323) provides that "the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence."

*In **Re Krams (Decd) Yankyerah v Osei-Tutu & Anor [1989-90] 1 GLR 638**, the Supreme Court observed that having mounted a counterclaim on the same facts, the evidential burden of producing evidence was on defendant to substantiate his claim as a defendant and to prosecute his counterclaim or be ruled against.*

***The testimony of plaintiff stood uncontroverted throughout the cross examination while that of the defendants was inconsistent and 1st defendant's lawful attorney was repeatedly evasive**. I have no reason not to believe plaintiff's version. Having given careful considerations to defendant's claims and having read submissions by counsel, it is my respectful view that defendants have failed to demonstrate that they are entitled to their counterclaim: The counterclaim is accordingly dismissed.*

I enter judgment in favour of plaintiff for relief 1 and 5 endorsed on the writ of summons and I declare that house number 24 North Labone House Estate, Accra is the lawfully acquired property of plaintiffs.

It is hereby ordered that, defendants, either by themselves, their assigns or privies, or whatsoever claiming through them, are hereby restrained from interfering with plaintiffs' quiet enjoyment of the title property. No evidence was adduced before the court on loss of earnings or special damages that relief is accordingly dismissed.

Costs is assessed at GH¢50,000."

APPEAL BY DEFENDANTS AGAINST THE DECISION OF THE COURT OF APPEAL AND ITS JUDGMENT

Feeling aggrieved by the decision of the High Court, the Defendants appealed against same to the Court of Appeal, and on the 30th day of July 2022 the Court allowed the appeal, set aside the judgment of the High Court and instead found for the Defendants.

The Court of Appeal delivered itself thus in a unanimous decision as follows:-

> *"There is no evidence that Respondents adopted any of the prescribed means as strangers to suit No FA80/2003 to set aside the execution. The Appellants were legitimately entitled to pursue an execution of a valid judgment they had obtained and had which had not been set aside. They could, therefore, not have been liable for any wrongful execution or damages that occasioned the Respondents. From the totality of the evidence adduced at trial, we find ourselves justified to reverse the learned trial Judge by setting aside the grant of the reliefs 1 to 5 endorsed on the writ of Respondents. We further deem it fit to grant reliefs a, b, c, e, g, h, i, j, m and 1 of the counterclaims of the Appellants. We however do not find it proven or right to grant reliefs f, k, n, o and p of the counterclaim. Same are accordingly dismissed."*

It must however be noted straight away that, the learned trial Judge did not grant reliefs 1 to 5 as endorsed by the Plaintiffs. Instead, the learned trial Judge only granted Plaintiffs reliefs 1 and 5 as endorsed therein. The learned Judges of the Court of Appeal therefore erred in making that claim.

APPEAL BY THE PLAINTIFFS AGAINST THE DECISION OF THE COURT OF APPEAL TO THE SUPREME COURT

Feeling aggrieved by the decision of the Court of Appeal, the plaintiffs on the 6th day of August 2020 filed an appeal against the said judgment with the following as the grounds of appeal:-

The grounds of appeal are:-

a. "That the judgment is against the weight of evidence
b. Additional grounds of appeal shall be filed on receipt of the judgment of the Court of Appeal

The Reliefs sought from the Supreme Court are

a. **That the judgment of the Court of Appeal dated the 30th day of July 2020 be set aside and the judgment of the High court dated 19th October 2018 be restored."**

It is worth noting that, no further additional grounds of appeal have been filed. This appeal has therefore been argued on the sole ground of *"Judgment is against the weight of evidence."*

We have evaluated the statement of case filed by learned Counsel for the Plaintiffs, S. K. Boafo and also that by learned counsel for the Defendants, T. N. Ward-Brew.

ANALYSIS AND CONCLUSIONS

ARGUMENTS OF LEARNED COUNSEL FOR THE PLAINTIFF IN SUPPORT OF THE SOLE GROUND OF APPEAL

The arguments of learned counsel for the Plaintiffs S. K. Boafo in support of the sole ground of appeal stated supra can be summarized as follows:-

References were made to Sections 11 and 12 of the Evidence Act 1975 (NRCD 323) which sets out the burden of proof which lies on a party to lead evidence on an issue which is proof on the balance of probabilities. From an understanding of the basic principles on this proof on the balance of probabilities, it is trite learning that, this burden lies generally on the plaintiff whose responsibility is to lead sufficient evidence to establish that probability as an issue. However, where the Defendant, as happened in this case has also filed a counterclaim, then they also have to establish that degree of balance of probabilities to establish the burden of proof. In instances or, circumstances like this, the burden shifts to the Defendants when the plaintiff has been unable to establish the burden to the satisfaction of the court.

At this stage, it is necessary to set out in detail the provisions of sections 11 and 12 of the *Evidence Act, NRCD 323 1975*

11. Burden of producing evidence defined

(1) For the purposes of this Act, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against that party.

(2) In a criminal action, the burden of producing evidence, when it is on the prosecution as to a fact which is essential to guilt, requires the prosecution to produce sufficient evidence so that on the totality of the evidence a reasonable mind could find the existence of the fact beyond a reasonable doubt.

(3) In a criminal action, the burden of producing evidence, when it is on the accused as to a fact the converse of which is essential to guilt, requires the accused to produce sufficient evidence so that on the totality of the evidence a reasonable mind could have a reasonable doubt as to guilt.

(4) In other circumstances the burden of producing evidence requires a party to produce sufficient evidence which on the totality of the evidence, leads a reasonable mind to conclude that the existence of the fact was more probable than its non-existence.

12. Proof by a preponderance of the probabilities

(1) Except as otherwise provided by law, the burden of persuasion required proof by a preponderance of the probabilities.

(2) "***Preponderance of the probabilities***" **means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence**."

From the above, it is quite apparent that, a Defendant who has filed a counterclaim as in the instant case assumes the same burden as a plaintiff in the case if he is also to succeed.

The crux of the above principle is simple, it is based on the understanding that a counterclaim is a separate and distinct action which must also be treated as a substantive suit on its own with the same standard of proof as contained in Sections 11 and 14 of the *Evidence Act, (1975) NRCD 323.*

See ***Nortey (No.2) v African Institute of Journalism and Communications & Others (No.2) [2013-2014] 1 SCGLR 703.***

Learned counsel for the Plaintiff also referred extensively to the principles of law guiding the determination of the ground of appeal *"That the judgment is against the weight of evidence".*

In this respect, learned counsel for the Plaintiff referred to several cases including the following to establish the ground of appeal urged by them against the Court of Appeal judgment. See:-

- ***The Republic v Bank of Ghana, The Governor (Bank of Ghana) and 4 others Ex-parte Benjamin Duffour, Civil Appeal No. J4/34/2018, dated 6th June 2018.***
- ***Owusu-Domena v Amoah [2015-2016] 1 SCGLR 790 and***
- ***Solomon Tackie and Ago Bannerman, (suing as joint Heads of the Tackie and Bannerman Thompson Families- Plaintiffs/Appellants/Appellants v John Nettey (substituted by Fred Bibi Ayimey & Anr.-Defendnats/Respondents/Respondents (2021) DLSC 10172, (Civil Appeal No J4/44/2019 dated 24th March 2021***

This court, in an authoritative and unanimous decision after reviewing the principles of law decided in the locus classicus decisions on this issue of *"Judgment is against the weight of evidence"* laid down a road map that should guide courts when the said principle is being evaluated in an Appeal before the courts.

WHAT THE COURT SAID IN THE SOLOMON TACKIE AND AGO BANNERMAN V JOHN NETTEY CASE SUPRA

"In a concurring opinion in the case of ***Abbey & Others v Antwi V, [2010] SCGLR 17*** at pages 34-35 Dotse JSC, stated the following as the guiding principle where an appellant alleges that the judgment, like in ground one of the instant appeal was *"against the weight of evidence."*

> *"It is now trite learning that where an appellant alleges that the judgment of the trial court is against the weight of evidence,* ***the appellate court is under an obligation to go through the entire record of appeal to satisfy itself that a party's case was more probable than not."***

The locus classicus in this respect, appears to have been reiterated with greater clarity and emphasis by our distinguished Chief Justice (Rtd), Sophia Akuffo JSC *(as she then was)* in the case of ***Tuakwa v Bosom [2001-2002] SCGLR 61 at 65*** where she held as follows:-

> *An appeal is by way of rehearing, particularly where the appellant, …alleges in his notice of appeal that, the decision of the trial court is against the weight of the evidence. In such a case….* ***it is incumbent upon an appellate court, in a civil case to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on a balance of probabilities, the conclusions of the trial Judge are reasonably or amply supported by the evidence."*** Emphasis supplied

See also the following cases

- ***Ampomah v Volta River Authority [1989-90] 2 GLR 28***
- ***Djin v Musah Baako [2007-2008] 1 SCGLR 686***
- ***Ago Sai & Others v Kpobi Tetteh Tsuru III [2010] SCGLR 762, at 791 -792***
- ***Akufo-Addo v Cathline [1992] 1 GLR 377***

- *Mintah v Ampenyin [2015-2016] 2 SCGLR 1277 at 1282 and finally*
- *International Rom Ltd (No.1) v Vodafone Ghana Ltd & Fidelity Bank Ltd. (No. 1) [2015-2016] 2 SCGLR 1389 just to mention a few.*

ROAD MAP

What all these authoritative decisions require of an appellate court, such as this Court especially, when a ground of appeal like the instant, formulated on the basis that *"the judgment is against the weight of evidence"* have to do are the following:

i. **Consider the case as one of re-hearing. This means an evaluation of the entire record of appeal.**
ii. **Consider the reliefs claimed by the plaintiff and if there is a counterclaim by the Defendant, that must equally be considered.**
iii. **Consider and evaluate the evidence led by the parties and their witnesses in support of their respective cases especially the cross-examination as this is the evidence that is now elicited from the parties and their witnesses after the tendering of the witness statements.**
iv. **An evaluation of the documents tendered during the trial of the case and how they affect the case.**
v. **An evaluation of the application of the facts of the case vis-à-vis the laws applied by the trial court and the intermediate appeal court.**
vi. **A duty to evaluate whether the trial court and Court of Appeal correctly or wrongly applied the evidence adduced during the trial.**
vii. **The burden on the final appellate court, such as this court is generally to carefully comb the record of appeal and ensure that both in terms of substantive law and procedural rules, the judgment appealed against can**

stand the test of time. In other words, that the judgment can be supported having regard to the record of appeal.

The above criteria are by no means exhaustive, but only serve as a guide to appellate courts such as the task facing us in the instant appeal." Emphasis supplied

ARGUMENTS BY LEARNED COUNSEL FOR THE DEFENDANTS

Learned Counsel for the Defendants, Mr. T.N. Ward Brew resisted the appeal and argued that since all the children of the original owner of the property did not agree on the sale of the house to the Plaintiffs, the sale must fail as was decided by the Court of Appeal.

In this respect, learned Counsel for the Defendants referred to and relied on the following cases to support his arguments.

- ***Unreported judgment in Suit No. J4/38/2018 Korkor Mensah v Robert Tetteh Mensah & Ors***
- ***Koomla alias Aikins v Ekua alias Hayford & Anr [1997-98] 1 GLR 831***
- ***Sedorme v Dodor [1984-86] 2 GLR 79***

Learned counsel for the Defendants also relied on the Road map set out by this court in the ***Solomon Tackie and Ago Bannerman v John Nettey (substituted by Fred Bibi Ayimeh) and Anr*** supra, and rested his case on the following concluding statement thus:-

> "In direct response to the claim by Plaintiffs/Respondents/Appellants that the judgment of the Court of Appeal is against the weight of evidence, the Court of Appeal took into account the criteria stated supra so Defendants/Appellants/Respondents humbly expect the Honourable Supreme Court to do same and affirm the judgment of the Court of Appeal. The Court of

Appeal took into account substantive law and procedural rules and dealt with the judgment of the High Court."

It is worth noting that, learned counsel himself made heavy weather of the inconsistent evidence of DW1 Yaw Kyei, a grandson of late Kwame Poku when he stated in his statement of case thus:-

"One serious issue we were faced with in the High Court trial was that Ama Ataa, 1st Defendants/Respondents/Appellants, who was very close to her father the late Opanyin Kwame Poku and knew a lot about his properties had been struck with stroke and therefore could not testify therefore one Yaw Kyei, a grandson of the late Kwame Poku courageously stood in for her in defense of his grandfather's interest."

This we dare say is an open admission by learned Counsel for the Defendants that the evidence led by his clients in the trial court was wishy washy and not up to the required standard of proof. If that is the case, then it definitely meant that the case of the Defendants, and their counterclaim was weak, badly conducted at the trial court and can therefore not be improved upon in the intermediate appellate court without fresh evidence.

We now proceed to consider this ground of appeal that "judgment is against the weight of evidence" in the light of the guidelines set out in the Road map in the Solomon Tackie case supra.

APPLICATION OF THE ABOVE ROAD MAP IN THE INSTANT CASE

In the instant appeal, we have as a court evaluated the entire evidence led by the court, the exhibits tendered into evidence by the parties and the conduct of the parties, before the institution of the Suit in the High court and the evidence led by the parties

to support their rival stories. In this respect, we took into consideration the evidence of the 1st Plaintiff and that of *Sampson Agyenim Boateng, PW1 that of Oduro Kwateng, PW2* and of *Kwame Amoah PW3*. We have also evaluated the evidence of 2nd Defendant, *Ama Pokuaa* for and on behalf of the Defendants and the evidence of *Yaw Kyei D.W.1.* Indeed the evidence of this DW1, under cross examination testified as follows:-

"Q: So at that meeting, they took a decision to sell H/No.24 North Labone estate?

A: Yes please. At that meeting they took a decision to sell the property but that meeting was not called because she was not managing the funds that she was getting from the said property…"Emphasis

It is also very important to observe and note that, this D.W.1 admitted in answer to a question that the decision to sell the house was taken by the majority of the children of Opanyin Kwame Poku. See page 245 of Volume 2. As a matter of fact, the findings of fact made by the learned trial Judge was consistent with the evidence led before her. The decision by the Court of Appeal to depart from those findings is therefore not based upon any empirical evidence that had been led. The guideline stated in the first road map appears to have been met.

Before we consider the other ingredients set out in the road map in the ***Solomon Tackie case*** supra, we consider it worthwhile to discuss in extenso the findings of fact made by the learned trial Judge and whether it was legitimate for the Court of Appeal to depart from same.

We would also discuss the application of the principle of law in the ***Tsrifo v Dua III [1959] GLR 63 at 64*** in this appeal.

FINDINGS OF FACT MADE BY THE LEARNED TRIAL JUDGE

i. The testimony of Plaintiffs' witnesses that they had the consent of the majority of the children to sell the disputed house to plaintiffs is corroborated by the testimony of 1st and 2nd Defendnats.

It must be borne in mind that in Suit No. FA80/03 already referred to supra, 2nd Defendant testified that, Yaw Gyamfi and Yaa Asubour represented forty (40) of the children of Opanin Kwame Poku who wanted the property sold, and 1st Defendnat represented the faction which was against the sale.

ii. The learned trial Judge found as a fact that, 1st Defendants lawful Attorney during the trial, (Yaw Kyei) admitted during cross-examination that the children of the Deceased, Opanin Kwame Poku called a meeting where they decided to sell the disputed property.

iii. 2nd Defendant admitted during cross-examination that of the fifteen (15) children of his late father who were against the sale of the house, ten (10) left to join those who were for the sale, indicating that only five of them stood against the sale.

iv. Learned trial Judge verified exhibits A, B and C, and stated as follows:-
"I have also studied the Indenture and evidence of payment made by Plaintiffs for the property. I note that exhibit C, the Indenture was executed by Yaw Gyamfi on behalf of the forty-three (43) children and witnessed by Oduro Kwanteng PW2.

v. The learned trial Judge correctly found as a fact that there was abundant evidence supporting Plaintiff's assertion that defendants were aware of the presence of the Plaintiffs on the property.

From the facts, the Defendants contention that they only found out the presence of the Plaintiffs on the land when they went to execute Suit No.FA/80/03 is false. The learned trial Judge referred to the evidence of the lawful Attorney of the 1st Defendant that it was 1st Defendant who was responsible for the property after the death of Opanin Kwame Poku. That it was the said 1st Defendant who put a caretaker in charge and from the evidence it was from the caretaker that the Plaintiffs obtained the keys and performed the overt acts of ownership already referred to supra.

vi. The learned trial Judge found as a fact that, in Suit No.FA/80/03, contrary to the assertions of the plaintiffs therein, the disputed house was the self acquired property of the deceased Opanin Kwame Poku and not family property as contended by the Defendants herein, and Plaintiffs therein.

HOW DID THE COURT OF APPEAL DEPART FROM THESE FINDINGS OF FACT

We take note of the many instances and reasons given by the learned Justices of the Court of Appeal why they departed from the findings of fact by the learned trial Judge. We take note of the reasons advanced by the Court of Appeal for departing from the findings made by the learned trial Judge from pages 372 to 376 of volume 2 of the appeal record.

For example, the Court of Appeal even though admitted that the sale of the property in this case is not similar to sale of stool land which was dealt with in cases like unreported case of ***Richard Appiah-Nkyi v Nana Achina Nuamah, Suit No. J4/42/2017 dated 31/01/2018*** and ***Akwei & Others v Awuletey & Anor [1960] GLR 231 at 238***, nonetheless appeared to have relied on the principles stated therein in departing from the findings of the learned trial Judge.

Even though the Court of Appeal made the necessary distinctions therein and sought to rely on Section 14 (3) of the Conveyancing Act, NRCD 175 and its application in cases like ***Sedorme v Dodor supra, Koomla Alias Aikins v Ekua Alias Hayford & Anor supra,*** its

application of the principle of the indivisible nature of the interests of title held by each of the children therein is not borne out by the cases relied upon.

The decision of the Court of Appeal that the findings by the trial Judge on the validity of Exhibit C is suspect and unsupportable is with the greatest respect unacceptable and not supported by the logical and deductive reasoning that the learned trial Judge exhibited.

What must be noted is that, a Court of law is bound by the appeal record and is under no circumstances permitted to incorporate its own views and evidence into it. This is because, the defendants herein never denied in evidence that they did not benefit from the sale of the proceeds of the property.

Furthermore, the fact that the group that the Defendants represented had been discredited by the evidence of 2nd Defendant and DW.1 Yaw Kyei to such an extent that it is dangerous to act upon the evidence of such persons who only came to support the evidence of the Plaintiffs herein in substance.

Indeed, the learned trial Judge in a well analysed opinion and reasoning from pages 302-305, volume 2 of the appeal record clearly stated the compelling evidential and legal reasoning why the evidence of the Defendants herein had been so discredited by cross-examination that it should not be believed and acted upon. Portions of the said evidence in chief and cross-examination had already been referred to supra.

Besides the above, there are a host of respected judicial decisions on the principle that, *"where the evidence of one party on an issue was corroborated by a witness of his opponent, whilst that of the opponent on the same issue stood uncorroborated even by his own witness, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good reason (which must appear on the face of the judgment) the court found the corroborated version incredible or impossible".*

Ollennu J, as he then was, in the celebrated and ground breaking case of ***Tsrifo v Dua VIII*** supra, laid down the principle after stating the history of the case and findings of facts by the native trial court as follows:-

> "In their judgment the native trial court made the following findings of fact:
>
> "The witnesses in this case supported plaintiff in their evidence in respect of the case heard and determined in respect of the land in dispute. Except defence witness Kwami, all of them mentioned the "Have" stream as the recognized boundary mark between both parties land which came in conjunction with the arbitration."
>
> In otherwords, the native trial court found the plaintiff's claim (that the "Have" stream is the boundary between his land and that of the defendant) confirmed by all but one of the witnesses for the defendant.
>
> **Where the evidence of one party on an issue in a suit is corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated version in preference to the corroborated one, unless for some good reason (which must appear on the face of the judgment) the court finds the corroborated version incredible and impossible.**
>
> In this case, there is nothing in the judgment which justified the native trial court's rejection of the plaintiff's evidence, which on the record was corroborated both by his own witnesses and those of the defendant." Emphasis supplied

The above principle of law, had been followed in a long line of cases such as ***Osei Yaw v Domfeh [1965] GLR 418 at 423, Asante v Bogyabi [1966] GLR 232 at pages 240-241, S.C and In re Ohene (Decd); Adiyia v Kyere [1975] 2 GLR 89 at page 98 C.A***

In the case of ***Banahene v Adinkra and Others, [1976] 1 GLR 346***, Anin J.A, as he then was, spoke on behalf of the court, Coram Apaloo, Anin and Francois JJ.A, (as they were then) in such authoritative terms on pages 350 as follows:-

> *"The rule is that, where the evidence of one party on an issue in a suit is corroborated by witnesses of his opponent, whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good reason (which must appear on the face of the judgment the court found the corroborated version incredible or impossible."*

The same principle of law was re-stated and applied by the Supreme Court in the celebrated case of ***Achoro v Akanfela [1996-97] SCGLR 209***, at 214 where Acquah JSC, (as he then was) spoke with unanimity on behalf of the court whilst espousing the above principle as follows:-

> "Again, the tribunal's finding that the first Petitioner took part in the contest is supported by the photograph which was tendered, and also the evidence of the first Plaintiff witness, Atuguba-Bandam Amung. Whilst this witness was under cross-examination, he was asked:-
>
> Q. Do you know the persons who contested with the first defendant at Sandema for Kanjarga skin?
>
> A. I know the people who contested with the first defendant for the Kanjarga skin but I was not there when the contest took place.
>
> Q. Who were the contestants?
>
> A. They were Akanfela and Adam Achoro"
>
> Emphasis

Adam Achoro is, of course the first petitioner. How, in the face of such pieces of evidence from the petitioners and their witnesses supporting the defendant's version on material issues, the trial tribunal could not have found otherwise. For the law is settled that where the witness of a party supports the evidence of that party's opponent on material issues, such as in the instant case, the party who called the witness should lose the contest on that material issue." Emphasis

Finally, the Supreme Court, speaking with one voice through Twum JSC, 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*** re-stated the principles as follows:-

"Where the adversary of a party has admitted a fact advantageous to the 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." Emphasis

In our considered view, having relied on all the above cases, we would formulate the principle thus:-

"Where as in this case, the 2nd Defendnat, and 1st Defendants lawful Attorney, Yaw Kyei all testified under cross-examination which supported the position of the Plaintiff's grantors on the sale of the disputed property to the plaintiffs to the knowledge of the Defendants, who sat by and did nothing to the exercise of overt acts of ownership by the plaintiffs herein, the Defendants must be deemed to have directly supported the version of the plaintiffs case and deemed to have been caught by their conduct.

Furthermore, they should also be deemed to have directly given evidence which supports the case of the plaintiff's grantor. The principle of law decided in the Tsrifo v Dua and the other cases relied upon by the learned trial Judge must be deemed to be applicable.

DEPARTURE FROM FINDINGS OF FACT MADE BY A TRIAL COURT BY AN APPELLATE COURT

The Court of Appeal departed from the many findings of fact made by the trial court and substituted these with their own findings which they articulated in their judgment.

The principles upon which an appellate court such as the Court of Appeal can depart from the findings of fact have been stated in a long line of cases such as ***Achoro v Akanfela, supra, Fosua & Adu Poku v Dufie (Deceased) and Adu Poku Mensah [2009] SCGLR 310 at 313, Obeng v Assemblies of God Church, Ghana [2010] SCGLR 300 at 313, Gregory v Tandoh & Anr. [2010] SCGLR 971 at 985 – 990*** just to mention a few.

However, we are satisfied in our analysis of the above cases and the principles of law involved that, the decision of the Court of Appeal to depart from the said findings of fact was perverse, and inconsistent with the evidence and conduct of the parties on record.

We are therefore of the settled opinion and conclusion that, there were no compelling reasons to disturb the findings of fact so ably formed by the learned trial Judge. We therefore set aside the departure made by the Court of Appeal as not supported by the evidence and conduct of the Defendants. From the record, the learned trial Judge granted relief (1) and (5) and not all the reliefs (1-5) as the Court of Appeal erroneously interpreted the orders of the trial court.

See pages 309 and 377 for the positions of the trial court and the Court of Appeal.

2. In our evaluation of this Appeal, we have come to the conclusion that the learned trial Judge considered the claims of the parties before the court, evaluated same before she concluded the judgment in favour of the plaintiffs. Taking these into consideration, we are of the view and conclusion that the evidence led by the plaintiffs is weightier or simply put, superior to that of the Defendants. In such an instance, we can safely conclude that the plaintiffs case has been proved by a preponderance of probabilities within the meaning of the context of the burden of proof as provided in Section 12 (2) of the *Evidence Act, 1975 (NRCD 323)*. The evidence led by the Plaintiffs on the essential facts of this case, that the house in dispute belonged to their father, that upon his death, almost all or a majority of the children decided to sell it to the plaintiffs, who expended money in re-developing the property thereby performing overt acts of ownership to the knowledge of the children especially the Defendants who sat by and did nothing to their occupation of the said house amounts to their being estopped by conduct from denying the Plaintiffs claims. In this respect, it does not really matter that the Defendants were in court in respect of the property. This is so because, they knew of the Plaintiffs presence on the land but took no practical and concrete steps against them. See case of ***Sagoe & Others v SSNIT [2012] 2 SCGLR 1093.***
3. From the rendition above, it is quite apparent that the guidelines in numbers 2 and 3 supra of the Road map have all been adequately dealt with in the judgment of the learned trial judge to our admiration. We therefore have no basis to depart from those findings and conclusions. On the contrary, we are of the view that, the Court of Appeal did not adequately consider the essential issues germane in the case.
4. An assessment of the evidence led by the parties through documents tendered quite clearly establish that the plaintiffs have discharged the burden on them. They not only provided exhibits A, B and C, but also relied on these to establish the

necessary nexus with their title which was conveyed to them by representative group of the children of the deceased owner. We note and observe that, Exhibit A is the initial payment made by the Plaintiffs for the purchase of the house which the children of the deceased owner acknowledged. Exhibit B on the other hand is the final payment which was also receipted for and acknowledged and finally Exhibit C, the Deed of Assignment to the Plaintiffs.

We have also considered the merits of the cases in *Suit Nos. FA80/03, BFA* 74/2010 and conclude that these cases have not diluted the effect of the judgment of the learned trial Judge in this case. On the contrary, it does appear that the Defendants intentionally allowed the Plaintiffs to re-develop the property, and thereafter move to take over the house giving credence to the age old saying *"reaping where they have not sown"*.

5. On evaluation of the guidelines in the 5th, 6th and 7th road map as stated supra, we are of the opinion that, we prefer the trial court judgment to the Court of Appeal decision.

Bearing in mind the duty that is on this court as the final appellate court, and the fact that we have to consider not only the facts but the applicable laws based on the findings by the two lower courts, we are of the view that the decision of the High Court is more in tune with our understanding of the issues germane in this case than that of the Court of Appeal.

CONCLUSION

It was based on the above reasons that we unanimously allowed the appeal by the plaintiffs herein, set aside the Court of Appeal judgment and restored the decision of the High Court.

V. J. M. DOTSE

(JUSTICE OF THE SUPREME COURT)

N. A. AMEGATCHER

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

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