IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - AD 2024

CORAM: SACKEY TORKORNOO (MRS) CJ (PRESIDING)
PWAMANG JSC
OWUSU (MS.) JSC
LOVELACE-JOHNSON (MS.) JSC
KULENDI JSC
ASIEDU JSC
KOOMSON JSC

CIVIL MOTION
NO. J7/21/2022

17TH JANUARY, 2024

1. **MICHAEL ODAI LOMOTEY** } **PLAINTIFFS/APPELLANTS/**
2. **EBENEZER OTU MAKPOI** } **RESPONDENTS/APPLICANTS**

VRS.

1. **KWOW RICHARDSON** } **DEFENDANTS/RESPONDENTS/**
2. **AKWASI PREMPEH** } **APPELLANTS/RESPONDENTS**
3. **LANDS COMMISSION** ..... **DEFENDANT**
4. **FREDERICK SHAMO KWEI** ..... **CO-DEFENDANT/RESPONDENT**

RULING

MAJORITY OPINION

KULENDI JSC:

INTRODUCTION:

1. We have before us an application, invoking our review jurisdiction pursuant to Article 133 of the Constitution and Rule 54(a) of the Supreme Court Rules, 1996 (C.I. 16). The Applicants are praying this Court to review the judgment delivered by the Ordinary Bench of this Court on the 15th of June 2022, and affirm the Court of Appeal's decision which had settled the issues in contention in favor of the Applicants.

2. Every so often, applications of this nature are brought before this Court, and as we have always maintained, a favorable seizure of this jurisdiction, being the zenith of the judicial process, lends itself only to instances where parties are able to meet the threshold as set by the Constitution, the Rules of this Court and established case law. **Article 133** of the 1992 Constitution of Ghana states,

   '*The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court. (2) The Supreme Court, when reviewing its decisions under this article, shall be constituted by not less than seven Justices of the Supreme Court*.'

3. A close examination of this article reveals that it is one of the very few instances in the Constitution where the exercise of a Constitutional prerogative is made subject to ***'such conditions as may be prescribed by the rules of Court.'*** It therefore suggests to us that in the exercise of this Constitutional authority to 'review our decisions', premium must be placed on the conditions prescribed by the relevant rules of Court.

4. Therefore, to act outside the ambit of these rules in the exercise of our review jurisdiction, no matter how well intentioned, or in pursuit of individual notions of justice, would be unconstitutional and in error.

   In this wise, we are guided by the immortal words of Taylor J. (as he then was) in the case of **Bonsu v Bonsu [1971] 2 GLR 242 at 260** where he shared the following admonishment,

   "There is always a real danger when vague ideas of justice undefined by statute or case law are propounded and brandished like a cure-all magic wand- without appreciating the actual position, namely, that the true legal notions of justice are circumscribed by the demands of the law and that in this court we administer justice according to three and only only three yardsticks: statute, case law or our well-defined practice."

5. Inspired by this erudite restatement of an age old principle, mutatis mutandis, we say that in the exercise of our review jurisdiction, our notions of substantial justice must be bridled by our constitutionally imposed fidelity to the conditions set by

the Rules of Court, specifically by Rule 54 of the Supreme Court Rules 1996, (C.I. 16).

The said **Rule 54(a) of C.I. 16** provides that:

'The *Court may review any decision made or given by it on any of the following grounds-*

(a) Exceptional circumstances which have resulted in a miscarriage of justice.

(b) Discovery of new and important matters or evidence which after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given*.'*

6. On the backdrop of the constitutional injunction that our review jurisdiction be exercised pursuant to the conditions prescribed by the Rules of Court, it becomes immediately clear that a review is markedly different from an appeal.

As was pointed out by Taylor JSC in **Nasali v. Addy [1987-1988] 2 GLR 286** at 288:

". . . all persons who have lost a case are likely to complain of a miscarriage of justice, but . . . in the absence of exceptional circumstances such complaints are a poor foundation for the exercise of the review power for it is only in exceptional circumstances that the interest rei publicae ut sit finis litium principle yields to the greater interest of justice."

7. Whereas in an appeal the Court, in exercising its rehearing jurisdiction, is obligated to scrutinize the entire record of the case culminating in the appeal, in exercising its review jurisdiction, the inquest is limited to '**whether the applicant has established the existence of exceptional circumstances'** which has occasioned a miscarriage of justice.

8. In the case of **Republic v. Numapau And Others; Ex Parte Ameyaw II [1999-2000] 2 GLR 629,** in relation to the grounds on which a review application may be mounted, this Court had this to say:

" *It has been held time and again that the review process* ***must never be viewed or used as a devise for a re-hearing of the applicant's case****. Therefore, the case of the applicant, in support of an application for review must clearly establish factors that would justify the application under either of the stipulated grounds. It is clear that the application herein was made under the first ground and therefore, to succeed, the applicant must demonstrate to us the existence of exceptional factors which show that the decision of the majority has manifestly resulted in a miscarriage of justice. What constitutes exceptional circumstances cannot be comprehensively defined. In previous decisions, it has been described as "some fundamental or basic error, which the court inadvertently committed in the course of considering its judgment*"

9. Evidently, the threshold for invoking a favorable exercise of this Court's review jurisdiction is higher than that required in an appeal.
   An exemplification of this position is gleaned in the fact that the mere existence of 'defects' in the judgment would not *ipso facto* render the application for review successful, the applicant must prove that those defects rose to the level of exceptional circumstances, and that the judgment occasioned a miscarriage of justice. This requirement is conjunctive and not disjunctive. Therefore, even where an applicant could establish exceptional circumstances, he/she was still required to establish that a miscarriage of justice had been occasioned or would be occasioned, if this Court did not intervene to rectify the misstep.

10. Therefore, no matter how glaring the error alleged, where it is evident that the Court's decision could validly be rested on other grounds in the case, or that the conclusion reached by the Court was in fact validated by other grounds which the Court duly considered, then the second threshold, of the miscarriage of justice, would not have been met, and hence a recourse to our review jurisdiction would not be justifiable.

11. Consequently, in the case of **Mechanical Lloyd Assembly Plant Ltd v. Nartey [1987-88] 2 GLR 598**, this court re-echoed these view thus:

'*The review jurisdiction is a special jurisdiction to be exercised in exceptional circumstances. It is not an appellate jurisdiction. It is a kind of jurisdiction held in reserve, to be prayed in aid in the exceptional situation where a fundamental and basic error* ***must have occasioned a gross miscarriage of justice.***' (emphasis ours)

Similarly, in **Ababio and Others vs. Mensah [1989-1990] 1 GLR 560** Taylor JSC laid down some of the instances that may constitute exceptional circumstances:

"*(a) all cases of void orders come under the Mosi v. Bagyina principle and applicants affected by such orders are entitled ex debito justitiae to have the orders set aside. Lapse of time does not affect the right and indeed the court itself is entitled suo motu to set aside such orders when it has the opportunity to do so;*

(b) all decisions of the Supreme Court given per incuriam by inadvertently overlooking a statute or a binding decided case which would have indicated a contrary decision in circumstances where the ratio decidendi does not support the decision and where there is no material which can be legally used as a ratio to support the said decision, are candidates for the exercise of the review power if they have occasioned a miscarriage of justice; and

(c) any other Supreme Court decision having exceptional circumstances which demonstrably indicates [as in the instant case] that the said decision is not legally right and has actually occasioned a miscarriage of justice, is liable to be reviewed on the Fosuhene principle."

12. The revised **4th edition of Black's Law Dictionary** defines miscarriage of justice to mean, "*prejudice to the substantial rights of a party.*"

13. In ascertaining what could constitute a miscarriage of justice the **Mechanical Lloyd case** supra remains useful. Here, this Court conceptualized the following as constituting a miscarriage of justice;

'*In sum, therefore, in this application, it was incumbent on the applicant to show that* ***his substantial rights in the matter that came before this court***

have been prejudiced by some fundamental or basic error made by the majority.'

14. The requirement of this conjoined threshold was aptly summarized by this Court in the case of **Agyekum v. Asakum Engineering Construction Ltd [1992] 2 GLR 635 at 637** at holding (2) therein as follows:
"*The acid test remained always the existence of exceptional circumstances and the likelihood of a miscarriage of justice that should provoke the conscience to look at the matter again.*"

15. Consequently, the net effect of whatever grounds an Applicant relies on must be such that the exercise of our power of review becomes necessary if a miscarraige of justice to the Applicant, is to be averted. A mere re-arguing of his original case will not suffice. The case of Fosuhene v. Pomaa [1987-88] 2 GLR 105 is also equally instructive.

16. Eventually, in the case **of Arthur (No.2) v. Arthur (No.2) [2013-2014] 1 SCGLR 569**, at 579-580 this Court, speaking through the venerable **Dotse JSC,** was particular to provide additional clarity by prescribing a roadmap to guide litigants seeking to invoke our review jurisdiction in the following terms:
'*We are therefore constrained to send a note of caution to all those who apply for the review jurisdiction of this court under rule 54(a) of the Supreme Court Rules 1996 (C.I. 16), to be mindful of the following which we set out as a road map.*

It is neither an exhaustive list nor one that is cast in iron such that it cannot be varied depending upon the circumstances of each case:

(i)in the first place, it must be established that the review application was filed within the time limits specified in rule 55 of Cl 16, i.e. it shall be filed at the Registry of the Supreme Court not later than one month from the date of the decision sought to be reviewed.

(ii)That there exist exceptional circumstances to warrant a consideration of the application;

(iii)That these exceptional circumstances have led to some fundamental or basic error in the judgment of the ordinary bench;

(iv)That these have resulted into miscarriage of justice (it could be gross miscarriage or miscarriage of justice simpliciter);

(v)The review process should not be turned into another avenue as a further appeal against the decision of the ordinary bench; and

(vi) The review process should not be used as a forum for unsuccessful litigants to re-argue their case'

17. In addition to this erudite reasoning, we are of the considered opinion that, our review jurisdiction does not confer on this Court the power to formulate and introduce grounds in justification of an applicant's case which were never contended by the Applicant at any stage in the previous proceedings and/or in the Application before this Court in aid of some notion of substantial justice. Indeed, such an approach would not be justified even in an adjudication by the ordinary bench of this Court, let alone by a review panel.

18. Having exhaustively set out the hurdles that lie ahead of the Applicants in the instant suit, we shall summarize the antecedent contentions that have culminated in this application.

19. The Applicants are the children and administrators of the estate of their father John Bortey Makpoi, alias Lomotey Makpoi. They allege that their father acquired a parcel of land at New Nugua Extension from the Nungua Stool evidenced by an indenture under the hand of Nii Odai Ayiku IV, Nungua Mantse, with the consent of the principal elders, which is dated 7th February, 1962 and registered at the Lands Registry as No. AC.7629/73; 244/99.

20. The Applicants assert that the size of this land was initially 22.96 acres. However, a portion of the land was compulsorily acquired by the Government for the construction of the Accra-Tema Motorway and that compensation was duly paid to their father. As a consequence of this, the size of the land was reduced to 14.49 acres.

21. The Applicants also aver that after the said compulsory acquisition of part of the land, another portion of the land was zoned for a woodlot. Consequently, they applied to the Lands Commission for the new developments to be indicated on their registered documents covering the land. The Applicants state that while this process was ongoing, the Respondents came onto the land and started to develop portions of same, despite their spirited protestations. The Applicants therefore initiated an action at the High Court against the Respondents herein to protect their interest in the land.

22. The Applicants state that in the course of the proceedings, one Frederick Shamo Kwei, the Co-Defendant/Respondent herein, who claimed to be a principal member of the Numo Kofi Anum Family **and caretaker** of the families lands at Tesa, applied to be joined to the suit on the grounds that his said family are the grantors of the 1st and 2nd Respondents, in the case. The application for joinder was not contested, and the Court proceeded to join the Co-Defendant as a necessary party to the action.

23. Like the ordinary bench did before us, it is particularly relevant that we set out, in extenso, the affidavit filed by the Co-Defendant in support of his said application for joinder before the trial High Court:

"*1. That I am a Deponent herein.*

*2. T**hat I am a Principal Member and Caretaker of Numo Kofi Anum Family Lands at Tesa and have the authority and consent of the said Family to depose to these facts.** (emphasis mine)*

3. That Numo Kofi Anum (Deceased) during his lifetime acquired a vast piece of Land at Tesa bounded on the North by Otinshie/Bedzin, on the North-West by Otele/Bawaleshie and on the South-West by Martey Tsuru and on the South by Agbelesa, on the East by Adjiringanor.

4. The Family land is divided into Northern and Southern Sectors by the Accra Tema-Motor Road.

5. That sometime in 2001, my family granted a piece or parcel of the family lands comprising about 26 Acres more or less to the 1st and 2nd Defendants.

6. That the Defendants have shown the Writ of Summons and the Statement of Claim to me.

7. That the Plaintiffs herein claim to derive their Title from Nii Odai Ayiku IV. Nungua Mantse by a grant dated 17 February 1962.

8. That the land claimed by the Plaintiffs forms a part or portion of our ancestral family lands of which we have enjoyed quiet and undisturbed possession for years.

9. That in 1990, as a result of grants made by Nii Odai Ayiku IV, Nungua Mantse to certain persons of portions of our land my Family applied for their Nungua Stool to be joined to a Suit we have commenced in this Honourable Court titled: Suit No. 383/89

Nii Mate Tesa & Others

Versus:

1. Numo Nortey Adjeifio

2. Empire Builders Limited

3. Nii Oda Ayiku IV, Nungua Mantse, substituted by Nii Osabu Adjin II (Deceased) substituted by Nii Afotey Odai IV. Dzasetse and Acting Nungua Mantse.

4. Nii Adjei Akpor II Shikitele. Teshie

5. Numo Adjei Kwanko II, Osabu & Ayiku Wulomo

10. That the Suit is still pending; I am 6th Plaintiff and Counsel for the Nungua Stool, T.A. Tagoe Esquire, is currently cross-examining Witness of the 1st Defendant.

11. That the Suit has been adjourned to 26th March 2004

12. That I am advised and verily believe the same to be true that since I am Plaintiff in Suit No. 383/89, I must apply as allodial owner to protect the interests of the Defendants and also the integrity of our lands.

13. That I am advised and verily believe the same to be true that my presence will assist in determining all the issues/differences in the matter and I pray to be joined as a Co-Defendant.'

24. Upon being joined to the suit, the Co-Defendant filed his statement of defence and counterclaim for declaration of title to the land. After trial, the High Court gave judgment in favor of the Co-Defendant/Respondent but no judgment was given to the original defendants, who are described by the Applicant herein as being, 'spectators who promised the Teshie families that they could use force and connection to collect the land from the Nungua Stool so that they will sell it and share the money with them'.

25. The Applicants appealed against the judgment of the High Court to the Court of Appeal, which reversed the decision of the High Court, finding in favour of the Applicants.

26. The Court of Appeal took the view that the Co-Defendant/Respondent did not have capacity to sue as he was not a member of the Numo Kofi Anum family as he had held himself out. Therefore, the Court of Appeal reversed the decision of the High Court primarily on the legal ground of capacity. The Court of Appeal concluded that the Co-Defendant did not have capacity to represent the Numo Kofi Anum family. It also rejected the evidence of the 1st Respondent on grounds that the 1st Respondent was testifying under a 'dead power of attorney' and that the Memorandum of Understanding between the Defendants and the Co-Defendant was unstamped.

27. According to the Applicants, the Co-Defendant upon receipt of the Court of Appeal judgment, cut his losses and admitted defeat.
    The original defendants (the Respondents herein) then filed notice of appeal and brought the matter before this apex Court to settle the issues once and for all. The Supreme Court reversed the decision of the Court of Appeal, and affirmed the decision of the trial High Court by a 4-1 majority, with our respected brother His Lordship Pwamang JSC dissenting.

28. The Applicants subsequently took issue with the judgment of the Ordinary Bench of this Court and lodged this application for review. In substantiation of their arguments for a review, the Applicants argue that though the Supreme Court made copious reference to the judgments in **Suit No.: 383/89,** it misapplied

the findings that the Court came to in that case because, in the former case (hereafter referred to as the Tessa Case), the Applicant alleges that the Co-Defendant was struck off as a party because the Supreme Court held that he was not a member of the Numo Kofi Anum family and therefore could not represent them.

29. The Applicant additionally argues that whilst the Supreme Court in Suit No: 383/89 granted possessory interests to the grantees of the Nungua stool in the judgment in Suit No. 383/89, same privileges were not afforded them. The Applicants therfore claim that the Supreme Court has departed from its previous decisions thus, must be set aside.

30. Having exhaustively set out the principles of law and the threshold applicable in an application invoking the review jurisdiction of this Court, we shall now interrogate the arguments of the Applicants to ascertain whether or not they meet the standard required under Rule 54 of the Supreme Court Rules.

CAPACITY

31. The first, and arguably the most forceful leg of the Applicants argument is that the Supreme Court misapplied its earlier decision in the Tesa case, which was ordinarily binding on it.

    In paragraph 15 of his application, the Applicants specifically assert as follows;

    '*That whereas the Supreme Court in Suit No. 383/89 held that Frederick Shamo Kwei was not a member of Numo Kofi Anum family and cannot represent the family, so they struck him off as a party, the majority mistakenly said he has capacity. Even though Frederick Shamo Kwei himself did not appeal against the ruling on his capacity, and the Defendants who appealed did not argue that he had capacity, the majority mistakenly added him to the case.'*

32. It was rather curious to note that after the Applicants had made extensive reference to the Supreme Court decision in the Tesa case, they omitted to attach the said judgment for our perusal. That notwithstanding, the judgment of the Court of Appeal, which was affirmed by the Supreme Court, was attached.

33. Admittedly, the Court of Appeal in the Tesa case found that the Co-Defendant, Frederick Shamo Kwei, the 6th Defendant therein, lacked capacity to prosecute the action on the ground that he was not a member of the Numo Kofi Anum Family of Tesa. In the judgment of the Court of Appeal in the Tesa case, the Court found as follows:

'*The evidence on the record shows that the 1st, 2nd, 3rd, 4th and* ***6th Respondents*** *trace their relationship to their ancestor Numo Kofi Anum through their maternal relationship. The 3rd Respondent made this admission under cross examination stating that his mother was Numo Kofi Anum's daughter … The* ***6th Respondent under cross examination by counsel for the 3rd Defendant made similar admissions…****There is no evidence from the 1st, 2nd, 3rd, 4th, and 6th respondents to prove that they had been duly authorized to take the present action, more so when they trace their lineage through their matrilineal line. There is nothing also on record to show that they initiated their action under any exceptional or special circumstances as stated in In Re: Ashalley Botwe Lands; Adjetey Agbosu & ors u Kotey & Ors (2003- 2004) SCGLR 420 at 423. The 1st to 4th and 6th respondents could not in their own right claim to be principal members of the patrilineal family since they trace their lineage along their matrilineal line. There is also no evidence that there are no surviving family members from the patrilineal line to take up the mantle nor that they had failed to act for which reason they were compelled to step in. In any case there is nothing exceptional evident from the facts in issue to clothe the Ist to 4th and 6th respondents with any requisite capacity. In the result, the 1st, 2nd, 3rd, 4th and 6th respondents who trace their lineage from the matrilineal line in a patrilineal succession community as Teshie community is and having failed to show any special circumstances, do not have the requisite capacity to initiate this action.'*

34. It is the Applicants' argument that this finding was misapplied by the Supreme Court when it held that the Co-Defendant was clothed with the requisite capacity to commence the action.

35. It must be pointed out that at page 20 of the judgment of the Ordinary bench, this Court duly acknowledged the position taken by the Court, differently constituted, in the Tesa case. Indeed, at page 20 of the judgment, this Court, speaking through the venerable **DORDZIE JSC.** opined thus:

    '*The Court of Appeal took the view that the Numo Kofi (Anum) Family is patrilineal, the 1st to 4th and 6th (plaintiffs) are matrilineal descendants of the family, as such they are not members of the family therefore, cannot sue on behalf of the family. Their names were struck out of the suit as wrongly joined to the suit.'*

36. In spite of the earlier position adopted by this Court in the Tesa case however, the Ordinary Bench, in the instant case, opted to chart a different path. The Ordinary Bench categorically stated at page 22 as follows:

    '*The trial court's analysis of the law on the circumstances where the co-defendant would be clothed with capacity to join the action I find to be sound and is in line with decisions of this court that are more liberal in the application of the customary law exceptions laid down in Kwan v, Nyieni supra…'*

37. It is therefore clear that the Ordinary Bench did not at any point in its reasoning, attempt to adopt this Court's earlier position in the Tesa case wherein it found that the Co-Defendant lacked capacity to participate in the suit. The finding of the Ordinary Bench that the Co-Defendant was clothed with the requisite capacity to defend the suit and prosecute his counterclaim was therefore a departure from its earlier decision in the Tesa case.

38. It bears reiterating that the Supreme Court is not fiendishly bound by its earlier decisions.

    Article 129(3) of the 1992 Constitution of our Republic provides that,

    '*The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so …'*

39. Having clearly articulated the earlier view espoused in the Tesa case, and still choosing to adopt a contrary view for stated reasons, the Ordinary Bench quite

clearly chose to depart from its previous decision, as is its prerogative under Article 129(3) of the Constitution.

40. Furthermore, the earlier position adopted by this Court in the Tesa case, with much deference to the panel, is a rather hard pill to swallow. The Court, affirming the Court of Appeal found that the 1st to 4th and 6th Respondent's therein could not have properly occupied the the role of Head of families of their respective gates, because they traced their lineage from maternal members of the Numo Kofi Anum Family of Tesa.

41. This position, with respect to my brothers and sisters in the Tesa case, is at variance with the settled legal principle that a family has the autonomy to elect any person as family head.

    In a judgment of this Court dated 14th of April 2021 in Civil Appeal No.: **J4/19/2021** entitled **Adams Addy & Anor. v. Solomon Mintah Ackaah**, which I had the privilege of authoring, this Court, in articulating the current position on the appointment or election of head of families posited as follows:

    '*In any event, we are of the view that family headship is by appointment and therefore has to do with the factual circumstances of the appointment of a person as against historic predecessorship … The succession to family headship being by appointment or election, much emphasis ought to be given to the factual circumstances of the appointment or election of a person such as the nature of the appointment or election and the recognition of the appointment or election by the family itself…* ***It is to be noted that the appointment of a person as head of a family is neither automatic nor does it devolve on any person as a matter of right. The Appointment is made by the elders of the family either formally and expressly or by necessary implication, such as where a family accepts and supports acts of headship performed by a member who is not expressly elected as head of the family***.'

42. In our respectful view, therefore, the matrilineal roots of the Co-defendant to the Numo Kofi Anum Family of Tesa, was not reason enough to disjoin him. The

Co-defendant, who was the 6th Respondent in the Tesa case commenced the action, together with the other Respondents as **joint customary heads of the principal gates of the Numo Kofi Anum families of Tesa.** Having commenced the action in this capacity therefore, the only basis on which his capacity could be impugned, was for the Appellants therein to demonstrate that he was never so appointed, or for some other sufficient reason, that his appointment was irregular, illegal or invalid.

43. Assuming without admitting that the issue of capacity, as argued by the Applicant, ought to have been settled against the Co-Defendant, we are of the opinion that this misstep by the Ordinary Bench would still not have occasioned a miscarriage of justice.

44. It is significant to note that even in the Tesa case, which the Applicant has urged as binding on us, this Court held that the seeming defect in the C'o-Defendants capacity (therein the 6th Defendant), did not affect the validity of his evidence, or the probative weight to be placed on same. This Court, in that case, simply held that a lack of capacity to sue did not automatically translate into an ineligibility to give evidence in the suit.

45. The jurisprudence underlying this position is glaringly obvious, the general rule under **sections 58 and 59** of the **Evidence Act, 1975 (NRCD 323)** is that any person is competent to give evidence unless the person is incapable of coherent expression or incapable of understanding the duty of a witness to tell the truth.

46. We need not belabor the fact that in the earlier Tesa case, it was the testimony and evidence of the Co-Defendant and not his status as a party to the action, that led the Court to settle the matter in the way it did. Therefore, capacity notwithstanding, the Ordinary Bench properly found that the Court of Appeal had erred in expunging the Co-Defendant's testimony on the record.

47. It is therefore irrefutably clear that whether or not the Co-Defendant was maintained as a party to the suit, title would ultimately have been declared in favor of the Numo Kofi Anum family of Tesa, who are the grantors of the Respondents. Consequently, the Applicant has failed to meet the standard of proving the existence of exceptional circumstances which **have resulted or are likely to result in a miscarriage of justice.**

POSSESSORY INTEREST:

48. The Applicants have argued that the decision of the Ordinary Bench ought to be reviewed because the Supreme Court failed to grant the Applicants possessory interests in their land even though they were grantees of the Nungua Stool. They argue that whereas in the Tesa case, the Court had granted possessory interests to the various grantees of the Nungua Stool, the Ordinary Bench refused to offer the same opportunity to them.

    At page 54 of the judgment of the Trial High Court, coram: Dotse JSC sitting as an additional High Court Judge, the learned jurist delivered himself as follows:

    '*As against the 3rd Defendant, I am certain the 3rd Defendant (Nii Afotey Odai IV) is a reputable land owner in that area and must have in the course of dealing with their own land trespassed onto the Plaintiffs' land.*

    Besides, the Plaintiffs have not led any cogent evidence to satisfy the court that the names of the persons on Exhibit 1, tendered by the 3rd Defendant are persons whose lands are on the disputed land, the extent of such land, and that those persons dealt with the land with the full knowledge of the defects in the title of the 3rd Defendant. Under the circumstances, I will hold that the persons on Exhibit I, tendered by the 3rd Defendants, purporting to be persons who have had title of parcels of land conveyed to them by the 3rd Defendants, if indeed they are on Plaintiffs' land were bona fide purchasers of title to land without notice.'

49. Having regard to first principles, it must be emphasized that throughout the Applicants' prosecution of their case, they did not at any instance plead the defense of being bonafide purchasers for value without notice of any defect in the title of their grantor. Therefore, having exhaustively argued their case before

the Courts below and the Ordinary bench, the Applicants cannot at this belated stage seek to introduce new claims.

50. No litigant has an automatic, vested and unimpeachable right to any equitable relief. It is the circumstances of each case that may or may not warrant the exercise of the Court's discretion.

51. Needless to say, the grant of a possessory interest over property, being by its very nature an equitable relief, may be asserted even by a person has been held not to be the legal owner of land and may be granted where the Court deems it fair, just, conscionable and equitable so to do.

52. The Applicants, by their own evidence have shown that the land was undeveloped up until the time the Respondents entered upon it, pursuant to a Memorandum of Understanding by the Co-Defendants family and have since developed the land. To our mind, resort may be made to the grant of possessory interests, where a person has expended considerable resources in developing the land under dispute and though title is declared in favor of another, it would be unfair, unjust, unconscionable and inequitable to dispossess such a person without an option to attorn tenant to an adjudged owner of the land.
In our considered view, the circumstances of this case does not lend itself to these considerations.

CONCLUSION

53. We therefore find that this application fails to meet the threshold of exceptional or special circumstances that would warrant a proper exercise of our review jurisdiction.

54. In coming to this conclusion, we have carefully considered the reasons urged on us by our venerable brothers Asiedu and Koomson JJSC, as basis on which they are inclined to reach a different conclusion.

Principal amongst these reasons, at least from the opinion rendered by our respected brother Aseidu JSC is the view that the Co-Defendant had perpetrated fraud on the High Court, when he filed his joinder application and made the representation that he is a member of the Numo Kofi Anum Family, which he knew, as per the judgment of the Court in the earlier Tesa case, to be untrue.

55. Firstly, and with due deference, we are of the considered opinion that, as with the issues of limitation, adverse possession and estoppel, this view is an entirely novel one which was not raised by the Applicants throughout the trial or in the subsequent appeals or even in this application. Therefore, it ought not be raised for the first time by this Court, suo moto, in the consideration of a review application. To do such, would amount to this Court, this late in the proceedings, putting up a case for the Applicants, and moreso a case which the Applicants have not submitted for consideration at any stage in the litigation. Needless to say, such an introduction by the Court will be a departure from acceptable practice and procedure and for that matter an unjustifiable overreaching of the Respondent who has no opportunity whatsoever of answering such a view.

56. In any event, we find, at least, from our evaluation of the entire record that this allegation of fraud is not supported by the record. This is simply because, at the time that the Co-Defendant deposed in his affidavit in support of an application for Joinder wherein he represented that he was a principal elder and caretaker of the Numo Kofi Anum Family, the concurrent suit No. 383/89 which eventually resulted in the famous Tesa judgment had not even been concluded by the High Court, let alone result in a judgment of the Court of Appeal. Therefore, it was impossible for the Co-Defendant to be aware of the content of a judgment that was not in existence. The judgment that found that he was not a member of the Numo Kofi Anum Family was delivered long after the affidavit in which the minority contends that the Co-Defendant committed a fraud.

57. Specifically, at the time the affidavit was filed in support of the application for Joinder, the concurrent suit no. 383/89 had been adjourned by the High Court,

differently constituted, to 26th March 2004. See paragraphs 9-12 of the uncontroverted Affidavit of the Co-Defendant which is reproduced in extenso in this judgment.

58. Therefore, where is the perjury and fraudulent deceit of the trial court that is being alleged. Even the High Court, as the court of first instance, had not reached a judgement in suit no. 383/89, let alone the Court of Appeal and which judgment the Co-Defendant was supposed to be aware of at the time he deposed to his affidavit contending that he was a principal member of the Numo Kofi Anum Family.

59. In fact, the record shows that the High Court delivered its judgment in Suit No. 383/8 (the Tesa Case) on or about **21st December 2009** and the Court of Appeal in turn delivered its judgment on or about **19th April 2012**. This therefore begs the question, 'How could the Co-Defendent have committed perjury, deceit and fraud in an affidavit filed sometime before **26th March 2004** in relation to a judgment that came into being between five (5) and eight (8) years later?'

60. While we acknowledge that the arguments made by my learned and respected brothers Aseidu and Koomson were, no doubt, actuated by their bid to achieve what they perceive to be the justice in the case, we remain unconvinced by these arguments and hold the view that the position adopted by the majority, best advances the overall cause of justice in a manner that does not undermine our fidelity to the established rules and principles guiding the exercise of this Court's review jurisdiction.

61. We are of the very considered and humble opinion that there is no judgment that cannot be criticized. However, the kind and gravity of error that will justify a review of a decision of this Court has long been settled and we should be careful not to depart from these settled principles and plethora of precedents.

62. Even where an Applicant has demonstrated exceptional circumstances, these must have the effect of occasioning a miscarriage of justice in order to warrant the exercise of this Court's review jurisdiction.

63. It is for these reasons that by majority of 4 to 3, Pwamang, Assiedu and Koomson JJSC dissenting, we determined this application for review as having failed with cost of GH¢ 15,000 in favour of the Respondent and reserved these reasons to be filed on or before the 31st of January 2024.

E. YONNY KULENDI
(JUSTICE OF THE SUPREME COURT)

G. SACKEY TORKORNOO (MRS.)
(CHIEF JUSTICE)

M. OWUSU (MS.)
(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)
(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

ASIEDU, JSC:

INTRODUCTION:

[1]. Article 133(1) of the Constitution 1992, gives power to the Supreme Court to review any decision given by it on such grounds and subject to conditions imposed by rules of court. Subsequently, rule 54 of the Supreme Court Rules, 1996, C.I. 16 identifies two main grounds for the review of decisions of this court. These are: (a) exceptional circumstances which have resulted in miscarriage of justice, and, (b) discovery, after judgment had been given, of new and important matter or evidence, which could not have been obtained after the exercise of due diligence during the hearing of the case before the trial court.

The judgment in respect of which the instant application has been brought was delivered on the 15th June 2022 whiles the application was filed on the 13th July 2022. The application, therefore, satisfies the requirement of rule 55 of the Rules of the Supreme Court.

[2]. It is clear from the affidavit in support of the application, particularly, paragraphs 19 and 20 thereof that the instant application is anchored on rule 54(a) of CI. 16; that is to say that, the applicants pray for review on the ground that the judgment of the majority of the ordinary bench had created exceptional circumstances which have resulted in miscarriage of justice. In **QUARTEY VS CENTRAL SERVICES CO. LTD. [1996-1997] SCGLR 398**, this court came clear on the parameters for review of its decisions. The court held that:

> "A review of a judgment is a special jurisdiction and not an appellate jurisdiction, conferred on the court; and the court would exercise that special jurisdiction in favour of an applicant only in exceptional circumstances. This implies that such an applicant should satisfy the court that there has been some fundamental or basic error which the court inadvertently committed in the course of considering its judgment; and which fundamental error has thereby resulted in a gross miscarriage of justice. These principles have been stated over and over again by this court. Consequently, a losing party is not entitled to use the review process to re-argue his appeal which had been dismissed or

use the process to prevail upon the court to have another or second look at his case."

This court has made it clear in many of its decisions that the review jurisdiction is not another opportunity opened to a losing party to re-argue his appeal and take a second bite at the cherry. See for example the decision of this court in **MECHANICAL LLOYD ASSEMBLY PLANT LTD. VS NARTEY [1987-88] 2 GLR 598 @ 664**.

[3]. Nonetheless, to the extent that a party can honestly show that there exists in the judgment of the ordinary bench, an error which had led to a miscarriage of justice, it is the duty of this court to correct that error in order to pave the way for substantial justice to be done. It is, in my view, within the equitable jurisdiction of this court not to suffer a wrong to be without a remedy. Indeed, the error which had led to the miscarriage of justice could be an error of law or an error of fact or a mix-error of law and fact. Either way, this court is bound to correct any of such errors in order to ensure that justice is done. In **ARTHUR (NO.2) VS. ARTHUR (NO.2) [2013-2014] 1 SCGLR 569 @ 580**, this court stated that:

For a review application to succeed the following conditions must be satisfied:

"1. It must be established that the review application was filed within the time limits specified in rule 55 of CI.16, i.e. it shall be filed at the Registry of the Supreme Court not later than one month from the date of the decision sought to be reviewed;

2. That there exist exceptional circumstances to warrant a consideration of the application;

3. That these exceptional circumstances have led to some fundamental or basic error in the judgment of the ordinary bench;

4. That these have resulted into miscarriage of justice (it could be gross miscarriage or miscarriage of justice simpliciter);

5. The review process should not be turned into another avenue as a further appeal against the decision of the ordinary bench; and

6. The review process should not be used as a forum for unsuccessful litigants to re-argue their case."

Thus, whenever it can be reasonably argued that justice has been denied or that justice is absent in a particular judgment, there exist exceptional circumstances for which the review jurisdiction of this court may be triggered by the filing of an application for that purpose. See **Republic vs. High Court, (General Jurisdiction), Accra Ex parte Attorney General (Exton Cubic Group Limited - Applicant) [2019-2020] 2 SCLRG 617 @ 642.**

CAPACITY OF CO-DEFENDANT TO SUE:

The applicants, who were the Plaintiffs in the trial court, have deposed that whiles this suit was pending against the 1st, 2nd and 3rd defendants, one Frederick Shamo Kwei, the 4th defendant otherwise described as the co-defendant, filed an application to join the suit in his capacity as a principal member of the Numo Kofi Anum family of Tesa. That application was granted by the trial court despite the challenge by the applicants herein. However, the Court of Appeal reversed the ruling and held that the said 4th defendant had no capacity to act on behalf of the Numo Kofi Anum family. On appeal to this court, the majority reasoned on this issue that:

> "the plaintiffs raised the issue of the capacity of the co-defendant not being the head of the Numo Kofi Anum family to be joined to contest the suit on behalf of the family. The trial court aptly stated the law in the case of **Kwan vs. Nyieni & Others [1959] GLR 67**. The learned trial judge in my view further correctly interpreted Order 4 rule 9(2) of CI.47 and held that the co-defendant being a party on behalf of the Numo Kofi Anum family is in line with the law". The Court of Appeal in Kwan vs. Nyieni laid down basic guidelines which will enable an ordinary member of the family sue to protect family land. The court held that:
>
> > "as a general rule the head of a family, as representative of the family, is the proper person to institute a suit for recovery of family land; to this general rule there are exceptions in certain special circumstances, such as:
> >
> > (i) where family property is in danger of being lost to the family, and it is shown that the head, either out of personal interest or otherwise, will not make a move to save or preserve it; or

(ii) where, owing to a division in the family, the head and some of the principal members will not take any steps; or

(iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole.

In any such special circumstances the Courts will entertain an action by any member of the family, either upon proof that he has been authorised by other members of the family to sue, or upon proof of necessity, provided that the Court is satisfied that the action is instituted in order to preserve the family character of the property"

Kwan vs. Nyieni was decided on the 26TH FEBRUARY, 1959. Since that date, the law on who qualifies to sue or be sued in respect of family property has been codified. Hence, it is the law as codified that governs a suit in respect of family property and not the decision in Kwan vs. Nyieni. Some of the conditions in the codified law may reflect the decision in Kwan vs. Nyieni but that in itself does not mean that the present state of the law is that which was set out in Kwan vs. Nyieni.

Order 4 rule 9 sub-rules 2 to 7 of the High Court (Civil Procedure) Rules, 2004, CI.47 represents the present state of the law on this subject. Unlike the principle set out in Kwan vs Nyieni, where it becomes necessary for a member of family to sue, apparently, to protect family property, such family member is required under rule 9(4) of Order 4 to serve a copy of the writ on the head of family in order that the head of family may take advantage of the provisions in rule 9(5) to either apply to the court to object to the writ or be substituted as the Plaintiff or be joined to the Plaintiff. This is not what happened in the instant suit.

[4]. The Court of Appeal held that the 4th defendant lacked the capacity to join the action and that he failed to endorse the capacity upon which he filed his counterclaim. The evidence given by the 4th defendant was excluded by the Court of Appeal on grounds of lack of capacity to sue. The majority of the ordinary bench did not agree with the Court of Appeal. The majority quoted a portion of the cross examination of the 4th defendant on this issue in their judgment which can be found at page 10 of exhibit BMB herein. In his answers to questions under cross examination as found at page 10 of exhibit BMB, the 4th defendant insisted that he was, since 1st January 2008,

the head of family of the Numo Kofi Anum family of Tesa sometimes referred to as Numo Tesa family. One of the grounds of appeal before the ordinary bench was that "the court of appeal erred in not following the binding decision of the Supreme Court in the case of Nii Mate Tesa (substituted by Daniel Markwei Marmah) & 5 others vs. Numo Nortey Adjeifio (substituted by Adjei Sankuma) & 6 others; Suit No. J4/44/2013 of 15th May 2014."

FRAUD BY THE CO-DEFENDANT:

In the Mate Tesa case, the defendants had challenged the capacity of Frederick Shamo Kwei, then the 6th plaintiff in that case and the 4th defendant/co-defendant in the present case together with other plaintiffs, to institute the action in the Mate Tesa case. The High Court judge had ruled that the 6th Plaintiff therein (who is the 4th defendant/co-defendant in this matter) had capacity to sue in the Mate Tesa case. That holding was reversed by the Court of Appeal as shown in exhibit BMA attached to the instant application. See pages 7 to 11 of exhibit BMA. This position of the Court of Appeal that the 6th plaintiff therein (who is also the 4th defendant/co-defendant in this matter) lacked capacity to initiate that action because he was not a member of the family of Numo Kofi Anum family, was upheld by this court in its judgment delivered on the 15th May 2014 and reported as **Adjei Fio (substituted by) Adjei Sankuma & Adjei Kwanko II vs. Mate Tesa (substituted by) Marmah & Others [2013-2014] 2 SCGLR 1537 @ 1544. (hereinafter referred to as the Mate Tesa case).** The implication of the judgment in the Mate Tesa case is that at the time the 4th defendant/co-defendant in this matter, Frederick Shamo Kwei swore to his affidavit for joinder, he knew that he had, as far back as 15th May 2014, been declared as not being a member of the Numo Kofi Anum family of Tesa. Having therefore sworn to the contrary, the 4th defendant/co-defendant Frederick Shamo Kwei committed perjury and acted fraudulently by deceiving the trial court into believing that he was a principal member of the Numo Kofi Anum family and thus joining him as such to the instant suit. His joinder was therefore obtained by fraud. Such a person should not be entertained by this court.

[5]. The learned editors of Halsbury's Laws of England (5th ed.) Volume 47 state at page 16 paragraph 13 that:

"The court has never ventured to lay down, as a general proposition, what constitutes fraud. Actual fraud arises from acts and circumstances of imposition. It usually takes either the form of a statement of what is false or suppression of what is true."

At page 17 the learned editors write:

"A person is guilty of fraud if: (1) he dishonestly makes a false representation, and intends, by making the representation, to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss; (2) he dishonestly fails to disclose to another person information which he is under a legal duty to disclose and intends, by failing to disclose the information, to make a gain for himself or another or to cause loss to another or to expose another to a risk of loss; or (3) he occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, dishonestly abuses that position, and intends, by means of the abuse of that position, to make a gain for himself or another, or to cause loss to another or expose another to a risk of loss"

In **Nana Asumadu II (Substituted by Nana Darku AMPEM) & Another vs. Agya Ameyaw [2019-2020] 1 SCLRG 681**, this court at page 695 held that:

"In law, fraud is a deliberate deception to secure unfair or unlawful gain, or to deprive a victim of a legal right. It is both a civil wrong and a crime. Fraud, be it civil or criminal, has one connotation. It connotes the intentional misrepresentation or concealment of an important fact upon which the victim is meant to rely, and in fact, does rely to the harm of the victim. It is therefore criminal in nature even where it is clothed in civil garbs. Having pleaded fraud, the particulars of which the plaintiff provided under paragraph 6 of their statement of claim … which connotes the imputation of crime on the part of the defendant in obtaining the judgment, the law requires the plaintiffs to establish that allegation clearly and convincingly and beyond reasonable doubt …. The facts on record did not permit the trial court to re-open the dispute over title to Diaso lands, as the parties and the reliefs claimed in this suit were the same as those in Suit No. LS. 45/2000. The trial court should have identified the allegation of fraud as the main issue in the matter before it and addressed

that issue only, but it did not do so. It did not even make any findings of fact on the issue of fraud, which makes the trial court's judgment incurably bad".

In the words of Acquah, JSC (as he then was) in **Frimpong and Another vs. Nyarko [1999-2000] 1 GLR 429**, at page 437:

> "Fraud, as is well-known, vitiates everything, and when a court of law in the course of its proceedings, has cause to believe that fraud had been committed, the court is duty-bound to quash whatever had been done on the strength of that fraud. As Osei-Hwere JA (as he then was) said in In re West Coast Dyeing Industry Ltd, Adams v Tandoh [1984-86] 2 GLR 561 at 605, CA:
>
> "Fraud like cancer, calls for a swift remedy. It must be uprooted. Therefore, [when] fraud is brought to the court's notice and there is credible evidence to support it the court is obliged to deal with it swiftly and decidedly."
>
> The House of Lords in Jonesco v Beard [1930] AC 298 at 301-302, HL puts it this way: "Fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the Court, it spreads to and infests the whole body of the judgment."

Whereas the Court of Appeal saw through the 4th defendant in this matter and therefore ruled that he had no capacity to join the suit at all, the ordinary bench, unfortunately, held that the 4th Defendant/co-defendant, Frederick Shamo Kwei had capacity to join the suit as he did. In my humble opinion and with all due respect, the majority of the ordinary bench committed an error which occasioned a grave miscarriage of justice leading to the plaintiffs being deprived of their land.

[6]. RELIANCE ON EVIDENCE OF CO-DEFENDANT

It was argued that even if the 4th defendant had been struck out as not being a proper party to the suit, the evidence adduced by him could still be considered by the court. Even if this is the position of the law, my humble and respectful view is that, the same should not hold for a person who wriggled his way into the suit by committing perjury and fraud upon the court. For, a party who has committed fraud should on no occasion be permitted to benefit from his fraudulent action and behaviour by the court tolerating his testimony which came in as a result of the fraudulent act. I do not think

the rules of evidence permit this court to entertain testimony founded on fraud to come to its judgment. The joinder of the 4th defendant/co-defendant, is without doubt void since he had no capacity; in view of the fact that he was not a member of the Numo Kofi Anum family at the time he falsely swore to that effect. In this wise, the principle enunciated in the famous **MOSI v. BAGYINA [1963] 1 GLR 337** by this court comes into play that:

> "Where a judgment or an order is void either because it is given or made without jurisdiction or because it is not warranted by any law or rule or procedure, the party affected is entitled ex debito justitiae to have it set aside, and the court or a judge is under a legal obligation to set it aside, either suo motu or on the application of the party affected. No judicial discretion arises here. The power of the court or a judge to set aside any such judgment or order is derived from the inherent jurisdiction of the court to set aside its own void orders and it is irrespective of any expressed power of review vested in the court or a judge; and the constitution of the court is for this purpose immaterial. Further, there is no time limit in which the party affected by a void order or judgment may apply to have it set aside."

Even then, this court held in **HUSEINI VS MORU [2013-2014] 1 SCGLR 363** as stated in holding 1 of the report that:

> "Since the plaintiff instituted the suit through an attorney under a power of attorney that is defective because it was not witnessed in accordance with section 1(2) of the Power of Attorney Act, 1998 (Act 549), **the writ and pleadings and all evidence based upon it is void for want of capacity**" (emphasis supplied)

In effect, where a party is struck out of a writ for want of capacity to sue every evidence and any steps taken by the party cannot be saved by reliance on the rules of evidence. This is so because where a party's name is struck out for want of capacity it is as if the person never initiated the action and so reliance cannot be placed on the evidence given by that person who had been declared an improper party for want of capacity as a result of which his name has been struck out from the writ. It is almost a non-sequitur to talk of striking out the name of a person for want of capacity whiles at the same time entertaining and relying on the testimony founded on the want of

capacity of that person. If reliance could lawfully be placed on the testimony of a person whose name had been struck out of the writ for want of capacity, then there is no point in striking out the name in the first place. Here again, and with due respect, the majority in the ordinary bench fell into a grave error by relying on the evidence of Frederick Shamo Kwei when from all intents and purposes he was not a member of the Numo Kofi Anum family and could therefore not give evidence on behalf of the family in his fraudulently acclaimed capacity as a principal member of the family. Even the Kwan vs. Nyieni case relied upon by the majority speaks of a member of family suing on behalf of the family. It has never been part of our law that a non-member of a family could be joined to a suit or be allowed to sue to protect the properties of a family which he does not belong to. That position is, certainly, contrary to the provision of Order 4 rule 9 sub-rules 2 to 7 of the Rules of the High Court. This court has a duty to uphold, apply and enforce the laws of the land. See **REPUBLIC v. HIGH COURT, KUMASI; EX PARTE KHOURY [1991] 2 GLR 393 @ 399.**

[7]. CO-DEFENDANT'S ACTION STATUTE BARRED:

The evidence of the applicant show that their father acquired the land from the Nungua stool as far back as 1962. The indenture covering this parcel of land had been registered vide Land Registry Nos. AC.7629/73 AND 2447/99. Relying on the judgment in the Mate Tesa case, the ordinary bench held that the land claimed by the applicants herein was owned by the Numo Kofi Anum family of Tesa. The evidence show that the land claimed by the applicants was originally given to their father in 1962 by the Nungua stool and that they have been in occupation ever since. The majority of the ordinary bench found as a fact that the land claimed by the applicants herein fell in the land claimed by the Numo Kofi Anum family in the Mate Tesa case. The Numo Kofi Anum family are not on record as having contested this case even from the trial High Court. The size of the land claimed by the applicants is stated to be 14.46 acres. The majority stated that the evidence of the surveyor appointed by the ordinary bench show that about 98% of the land claimed by the applicants fell within the area shown by the defendants and covered by the plan of Numo Kofi Anum family. The size of the land claimed and granted in the Mate Tesa case was 918.24 acres.

There was no serious dispute by the respondents in this matter that the applicants had their land from the Nungua stool in 1962. The majority in the ordinary bench referred to an averment by the 4th defendant/co-defendant acknowledging that the Nungua stool sometime in the early 1960s made grants of portions of land claimed by the Numo Kofi Anum family of Tesa. The Mate Tesa case was filed by the plaintiffs therein to challenge claims made by "certain other quarters of Teshie". The Nungua stool was joined to the suit as it progressed. It is not in dispute that the 4th defendant/co-defendant acknowledged that the land claimed by the applicants had been in the possession of the applicants at least since the 'early 1960s'. See page 4 and 5 of exhibit BMB where the majority of the ordinary bench acknowledged an averment by the co-defendant that ***"It is further averred by the co-defendant that sometime in the early 1960s, Nii Odai Ayiku IV, then Nungua Mantse, without legal authority started making grants of portions of co-defendant's said land to certain persons including the father of the plaintiffs"***. The Mate Tesa case was instituted in 1989 and as stated above, the co-defendant says that the applicants' father was granted the land claimed by the applicants herein in the early 1960s. The applicants say specifically that their father had his grant in 1962. So where did the rules on limitation go that the applicants' possession of the land they claim was not protected by the ordinary bench? At least, having occupied their land since 1962 to the knowledge of the Numo Kofi Anum family of Tesa, as admitted by the 4th defendant/co-defendant, any interest of Numo Kofi Anum family in the said land occupied by the applicants stood extinguished. This is because the applicants, prior to the institution of even the Mate Tesa case in 1989, had been in possession of their land close to thirty (30) years. Section 10(1)(2)(4) of the Limitation Act, 1972, NRCD 54 is very important and bears relevance to the instant discussion. It provides that:

> "10. Recovery of land
>
> (1) A person shall not bring an action to recover a land after the expiration of twelve years from the date on which the right of action accrued to the person bringing it or, if it first accrued to a person through whom the first mentioned claims to that person.
>
> (2) A right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run.

(4) For the purposes of this Act, a person is in possession of a land by reason only of having made a formal entry in the land."

The majority of the ordinary bench, with respect, was therefore enjoined, as a matter of justice, to protect the legal and possessory rights of the applicants herein and their failure to do so amounts to grave injustice against the applicants herein since the failure has led to the applicants being deprived of their land unlawfully. The fact that the Numo Kofi Anum family suddenly woke up from its slumber in 1989 and sought to protect its lands is no ground to deprive the applicants of their legal and possessory right to the land which they have occupied for thirty years short of one year. This position of the law was asserted by this court in **REPUBLIC v COURT OF APPEAL; EX PARTE LANDS COMMISSION (VANDERPUYE ORGLE ESTATES LTD, INTERESTED PARTY) [1999-2000] 1 GLR 75**, when the court held that:

"The law was that a purchaser of land would not lose his land by virtue of a judgment in a litigation commenced after the sale. Similarly, even if a valid deed was subsequently invalidated by a judgment of a court, the doctrine of bona fide purchaser for value would apply to protect the title of the purchaser."

LACHES AND ACQUIESCENCE:

This court is not only a court of law but also of equity, at least, since 24th July 1874 and, therefore, the applicable equitable principles must be brought to bear on its decisions. I am, respectfully, of the opinion that the failure of the Numo Kofi Anum family to take steps at all to recover the land since becoming aware of the presence of the applicants on the land in dispute since the early 1960s makes them guilty of equitable laches and acquiescence. In their book The Law of Trusts and Equitable Obligations (4th ed.), Oxford University Press, the learned authors: Robert Pearce and John Stevens state at page 766 that:

"If a plaintiff delays bringing his action, the court may consider it inequitable for him to succeed, and the defendant will be protected from any liability".

In the old Privy Council case of Lindsay Petroleum Co. vs Hurd (1874) LR 5 PC 221 at 239- 240, their Lordships explained the doctrine of laches when they stated that:

"…the doctrine of laches in courts of equity is not an arbitrary or technical doctrine. Where it will be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards be asserted, in either of these cases, lapse of time and delay are most material".

The failure of the majority to invoke the doctrines of laches and acquiescence in the face of the evidence of possession of the land in dispute by the applicants herein constitutes a grave error resulting in a miscarriage of justice on the applicant by which they lost, by virtue of the majority decision, the land in dispute which they have possessed for almost thirty years prior to the institution of the action by the respondents herein in the Mate Tesa case.

THE REVIEW JURISDICTION:

In **Taylor and Another vs. Lawrence and Another [2002] 2 All ER 353; [2002] EWCA Civ. 90; [2003] Q.B. 528**, the English Court of Appeal considered the circumstances under which an application to re-open an appeal which had, otherwise been determined by the Court. The Court held that:

"The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined ***in order to avoid real injustice in exceptional circumstances***. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely ***to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents***. ***A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes.*** The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was a tension between a court having such a residual jurisdiction and the need to have finality in litigation, so that it

was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established, and that might justify the Court of Appeal in taking the exceptional course of reopening proceedings which it had already heard and determined. ***It should, however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy***. The effect of reopening the appeal on others and the extent to which the complaining party was the author of his own misfortune would also be relevant considerations. Where the alternative remedy would be an appeal to the House of Lords, the Court of Appeal would only give permission to reopen an appeal which it had already determined if it were satisfied that the House of Lords would not give permission to appeal. (emphasis supplied).

It must be stated that the UK Supreme Court had, in **R vs Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte [2000] 1 AC 119**, a decision which predates the Taylor vs. Lawrence case supra, asserted an inherent jurisdiction to re-open an appeal which had otherwise been concluded.

The co-defendant is also said to have pleaded that "the payment of compensation to the plaintiffs was based on misrepresentation by the plaintiffs and does not make the plaintiffs undisputed owners of the land". See page 5 of exhibit BMB. This assertion is very amazing and fantastic! The judgment of the majority shows at page 6 of exhibit BMB that exhibit D was tendered by the applicants to show that the compensation was paid to the plaintiffs/applicants herein in 1976. If it is true that the land occupied by the applicants was owned by the Numo Kofi Anum family who had been aware of the presence of the applicants on the land since the early 1960s and had collected compensation in respect of the land in 1976, it is not unreasonable to expect them to take immediate steps to recover possession of their land. They will not wait till 1989 before suing some other persons on some lands and join the Nungua stool later. The receipt of the compensation as a result of the Government's acquisition of the land is a weighty and relevant evidence of their ownership of the land and, in my humble and respectful opinion, the majority of the bench should have taken this fact into

consideration to preserve the possessory right of the applicants. The failure of the majority of the ordinary bench to take the collection of compensation in 1976 by the applicants for their possession of the land into consideration worked a great deal of injustice to the applicants which has resulted in a miscarriage of justice and this court has an avowed duty to correct and remedy. The injustice and miscarriage of justice here is the unwarranted deprivation of the land which applicants have possessed since 1962.

[8]. The power of this court to review its decisions is granted by the Constitution 1992 in article 133(1) which provides that:

> "The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by Rules of Court."

So, our Supreme Court need not invoke an inherent jurisdiction to review its decisions although long before the coming into force of the 1992 Constitution, this Court had asserted the jurisdiction to review its judgments. See cases like Mechanical Lloyd Assembly Plant Ltd vs Nartey [1987-1988] 2 GLR 598; Fosuhene vs Pomaa [1987-1988] 2 GLR 105 among others.

[9]. The decision in Taylor vs. Lawrence (supra), was subsequently codified in the English Civil Procedure Rules. Three basic conditions which ought to be satisfied before a concluded appeal could be re-opened, were identified by the learned authors of Civil Appeals (2nd ed.), Sweet & Maxwell by James Leabeater et al at page 244 as follows:

1. It is necessary to do so in order to avoid real injustice;
2. The circumstances are exceptional and make it appropriate to re-open the appeal
3. There is no alternative effective remedy.

Commenting on these conditions, the learned authors stated at page 245, paragraph 8.004 that:

> "It must be clearly established that the integrity of the first instance decision and/or the appeal itself has been critically undermined, with the result that a 'significant injustice' has probably been perpetrated and 'the process itself has

been corrupted'. In addition, a causal connection must be demonstrated: it must also be established that there is a strong possibility that such injustice or corruption affected the result of the case. Further, it is necessary to prove that, had the court known the true position at the original hearing (at first instance or on appeal), it is highly likely that it would have reached a different conclusion; and that there is a powerful probability that (by reason of the injustice or corruption) an erroneous result was arrived at in those earlier proceedings. Permission to re-open an appeal will not be granted on the grounds of an argument that was open to the applicant at the time of the original hearing or evidence that could with reasonable diligence have been brought forward at the original hearing"

At page 247, the authors continued by stating that:

"If it could be shown that the judge had completely failed to understand a clearly articulated point, it is possible that his decision might be susceptible to being re-opened (particularly if the facts were as extreme in their nature as a judge failing to read the right papers for the case and never realizing it). However, a decision cannot be re-opened to enable an unsuccessful applicant to put one of his arguments better than he had done at the original trial. If a party fails to advance a point, or argues a point ineptly, that would not, at least without more, justify re-opening a court decision.

In assessing whether the re-opening of an appeal is necessary to avoid real injustice, the appeal court must have regard to the principle of finality of judgments,' a cardinal principle of justice'. To that end the appeal court will take into account the effect that the re-opening of the appeal would have on others and the extent to which the applicant has been the author of his own misfortune."

It was pointed out in Re Uddin [2005] 1 WLR 2398 that it is the 'corruption of justice' which demands the exceptional recourse to the re-opening of the appeal which 'relegates the high importance of finality in litigation to second place'. It was also determined in **Couwenbergh [2004] EWCA Civ. 674** that:

"If ever there is a reason for the court of appeal to reconsider the correctness of a decision of the court below, then it is when a deceit has been practiced on that court"

[10]. Although the decisions quoted above are of persuasive authority, they portend much learning from which this court may draw upon. In **Ababio and Others vs. Mensah [1989-1990] 1 GLR 560** Taylor JSC laid down some of the instances that may constitute exceptional circumstances:

"(a) all cases of void orders come under the Mosi v. Bagyina principle and applicants affected by such orders are entitled ex debito justitiae to have the orders set aside. Lapse of time does not affect the right and indeed the court itself is entitled suo motu to set aside such orders when it has the opportunity to do so;

(b) all decisions of the Supreme Court given per incuriam by inadvertently overlooking a statute or a binding decided case which would have indicated a contrary decision in circumstances where the ratio decidendi does not support the decision and where there is no material which can be legally used as a ratio to support the said decision, are candidates for the exercise of the review power if they have occasioned a miscarriage of justice; and

(c) any other Supreme Court decision having exceptional circumstances which demonstrably indicates [as in the instant case] that the said decision is not legally right and has actually occasioned a miscarriage of justice, is liable to be reviewed on the Fosuhene principle."

See also the decision of this court in **MECHANICAL LLOYD ASSEMBLY PLANT LTD v. NARTEY** (supra) where it was held that:

"it is essential that a party seeking to overturn a judgment demonstrates that he or she does so only upon footing of matters discovered since judgment was entered". I would qualify this by saying that the said matter must be relevant and exceptional and be capable of tending to show that if they had been timeously discovered their effect would have altered the decision.

Another circumstance is the one falling within the principle [i.e. where a judgment or an order is void] so ably enunciated by that pillar of legality, Akufo-Addo C.J. in Mosi v. Bagyina [1963] 1 G.L.R. 337, S.C.

A third circumstance comes within the class of cases which can legitimately be said to be decisions given per incuriam for failure to consider a statute or case law or fundamental principle of procedure and practice relevant to the decision and which would have resulted in a different decision.

A fourth class of cases must fall within the constitutional mandate granted us in article 116 (3) of the Constitution, 1979 by which we were enjoined to depart from our previous decisions when it appears right so to do. This must be a sort of omnibus criterion covering all other cases not falling within the three classes I have itemized, for in the numerous conditions governing human relationship it is impossible to formulate a priori propositions that will cover all cases without exception".

In **AFRANIE II v. QUARCOO AND ANOTHER [1992] 2 GLR 561**, this court again held that:

"Under the law the only ground for the review of a decision of the Supreme Court was that the circumstances were exceptional and that in the interest of justice there should be a review. Although what exactly constituted exceptional circumstances had not been spelt out, on the authorities the court had found exceptional circumstances where:

(a) the circumstances were of a nature as to convince the court that the judgment should be reversed in the interest of justice and indicated clearly that there had been a miscarriage of justice; or

(b) the demands of justice made the exercise extremely necessary to avoid irremediable harm to the applicant; or

(c) a fundamental and basic error might have inadvertently been committed by the court resulting in a grave miscarriage of justice; or

(d) a decision had been given per incuriam for failure to consider a statute or a binding case law or a fundamental principle of practice and procedure

relevant to the decision and which would have resulted in a different decision; or

(e) the applicant had sought for a specific relief which materially affected the appeal and had argued grounds in support but the appellate court had failed or neglected to make a decision on it. The misconstruction of the words of a statute upon which the decision of a case depended was such an error of law that it would deprive the court of jurisdiction to decide the matter."

[11]. In the instant matter as already pointed out, Frederick Shamo Kwei who joined the suit on his false claim to be a member of the Numo Kofi Anum family, had at the time of his application and to his knowledge, been declared by this same court as lacking capacity to act on behalf of the said family on grounds of him not being a member of the Numo Kofi Anum family of Tesa, yet, the majority of the ordinary bench endorsed his capacity as a member of the family contrary to the judgment of this court in the Mate Tesa case. Once, it was determined that the said Frederick Shamo Kwei was not a member of the Numo Kofi Anum family, it concludes the issue that he had no capacity to act on behalf of the family in a false capacity as a principal member of the family. As pointed out in the **Standard Bank Offshore Trust Co. Ltd vs. National Investment Bank and 2 Others [2017-2018] 1 SCLGR 707** that:

"A person's capacity to sue, whether under a statute or rule of practice, must be present and valid before the issuance of the writ of summons, else the writ is a nullity. The capacity to sue must be present before the writ is issued out and must be stated in the endorsement and/or statement of claim accompanying the writ."

[12]. MISCARRIAGE OF JUSTICE:

The most important question to answer in this application is whether the joinder of Frederick Shamo Kwei to the suit and hence, his participation in the proceedings had occasioned any miscarriage of justice on the applicants herein. For, if no miscarriage of justice had been occasioned the applicants consequent upon the joinder and the participation of Frederick Shamo Kwei referred to in the judgment under consideration, as the co-defendant, then the application for review is pointless and unnecessary.

The majority of the ordinary bench, at page 3 of the judgment, exhibit BMB herein, acknowledged the joinder of Frederick Shamo Kwei to the instant action by the trial court on the strength of the affidavit filed by him. Indeed, he was joined to the suit as the co-defendant. The majority of the ordinary bench referred to the averments in the pleadings filed by the co-defendant and his averment that the land, subject matter of the suit, was owned by the Numo Kofi Anum family. The co-defendant also alleged that the payment of compensation by the Government of Ghana to the father of the applicants in respect of ownership and possessory right over the land in dispute was obtained by misrepresentation. The majority referred to the averment by the co-defendant in respect of the grant of the land in dispute to the applicants' father by the Nungua stool. At page 6 of exhibit BMB, the majority of the ordinary bench stated that the co-defendant filed a counterclaim for a declaration of title to the land claimed by the applicants herein. From pages 9 to 10 of the judgment, the majority of the ordinary bench made reference to the evidence adduced by the co-defendant. Reference was also made by the majority of the ordinary bench to the judgment of the trial court wherein the trial court held among others that:

> "On the evidence I am satisfied that the co-defendant's family have been in possession of their land including the one in dispute for a very long time exercising overt acts of ownership over it…. On the preponderance of the evidence, I am satisfied that the co-defendant has been able to establish his family's title to the land in dispute. Accordingly, I dismiss plaintiffs' claim and enter judgment for the co-defendant against the plaintiffs on his counterclaim. Any order of injunction placed on the parties is hereby discharged".

Finally, the majority of the ordinary bench delivered itself at page 25 of exhibit BMB that:

> "In the circumstances of this case, the co-defendant found it necessary to join the suit when the plaintiffs sued their grantees. In his application for joinder he deposed to facts of he being authorised by the family, he further deposed that he was the caretaker of the Numo Kofi Anum family lands and he represents the family in court matters. He confirmed this in paragraph 12 of his pleadings and in his evidence at the trial by citing the title of the case pending at the High Court at that time involving the Numo Kofi Anum lands, which turns out to be

the Tesa case, which I have severally referred to in this judgment. For the reasons I have stated I endorse the trial court's reasoning and conclusion on the issue of the capacity of the co-defendant to join the suit. The decision of the trial court is sound, there is no justifiable reason why the Court of Appeal interfered with findings made by the trial court…. The appeal against the judgment of the Court of Appeal dated 3rd April 2019 succeeds in its entirety. The said judgment of the Court of Appeal is hereby set aside. The decision of the trial court is affirmed and we accordingly restore same"

From the above reference to the co-defendant, his joinder to the action which had been shown to be unlawful, illegal and fraudulently procured and consequently his wrongful and illegal participation in the proceedings by adducing evidence which was relied upon by the trial High Court and the ordinary bench of this court, it cannot be overstated that great injustice had been meted out to the applicants by the reliance on the impugned joinder and participation in the proceedings. Herein lies the miscarriage of justice which this court has a duty to correct by the review jurisdiction and power given to this court. The judgment given in favour of the co-defendant and by extension the defendants or respondents herein was based on a lack of capacity of the co-defendant; it was based on a fraudulent application by the co-defendant to join the suit; it was premised on a fundamental and basic error inadvertently committed by the ordinary bench resulting in a grave miscarriage of justice; it was also given per incuriam for failure to consider the binding decision and law in the Standard Bank Offshore Trust Co. Ltd vs. National Investment Bank and 2 Others (supra) or a fundamental principle of practice and procedure to the effect that the capacity of the co-defendant was non-existent at the time he was joined to this case. The judgment of the ordinary bench also ignored the possession of the land by the applicants herein for close to thirty years. The judgment of the majority of the ordinary bench entails grave injustice against the applicants in this matter.

[13] CONCLUSION:

I will conclude by re-echoing the words of Francois JSC in **Ribeiro vs Ribeiro (No.2) [1989-1990] 2 GLR 10** @ 143 to the effect that:

"Our attempts to halt the abuse of the review jurisdiction of this court by frowning upon attempts to turn the exercise into another avenue for appeal,

must be matched by an equally genuine willingness for introspection. And where a fundamental error has occurred, to be prepared to admit and correct it. Otherwise the exercise of review would only amount to a confirmation of a previous stand and the mere endorsement of a majority view".

I will therefore vote to grant the instant application.

S. K. A. ASIEDU
(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

KOOMSON JSC:

The instant application emanates from the decision of the ordinary bench (4:1 majority) given on 15th June, 2022. In this judgment the parties will maintain their initial description before the trial court.

The Plaintiffs filed this application arguing that there are exceptional circumstances warranting the intervention of this Court to review the decision of the ordinary bench.

FACTS OF THIS CASE

The facts of this case is adequately captured in the decision of the ordinary bench. The Plaintiffs assert that their Late Father John Bortei Makpoi owned about 14.46 acres of land situate at Nungua Adjiringanor near the Accra-Tema Motorway. Their Late father obtained a grant from the Nungua Stool represented by Nii Odai Ayiku IV in 1962. Documentation concerting the grant was registered with the Lands Commission and their Late Father had possession of the land since acquisition and similarly, the family has also possession of the land. The claim of the Plaintiffs is that the 1st and 2nd Defendants have trespassed on portions of the land.

For the 1st and 2nd Defendants, the entire area where the Land is situate belongs to the Numo Kofi Anum Family and Ashong Mlitse Family of Teshie. It is their case that the 1st Defendant obtained its grant from the families above-mentioned. As at the time of acquisition searches were conducted at the Lands Commission and there was nothing to show that the Plaintiff's Late Father had an interest in the Land. Further the 1st Defendant had spent considerable sum in building and developing the infrastructure on the land.

The 4th Defendant claiming to be a principal member of the Numo Kofi Anum Family and caretaker of the Family's Lands, applied and was joined to the suit. The 4th Defendant confirmed that the 1st and 2nd Defendants are grantees of the Numo Kofi Anum Family of Tesa. It is the case of the 4th Defendant that the land does not belong to the Nungua Stool. At all times, the Family had been in possession until the Plaintiffs recently forcibly trespassed onto the land. The 4th Defendant recognizes that in the early 1960s, the then Nungua Mantse made grants of portions of the Family's land to certain persons including the father of the Plaintiffs.

GROUNDS FOR THE APPLICATION BY THE APPLICANTS

The review jurisdiction is not a further appellate jurisdiction for aggrieved parties to continue to litigate matters. It is specifically provided for under the 1992 Constitution to give room for this Honourable Court to under very limited exceptional circumstances, where there has been a miscarriage of justice due to some fundamental error in its judgment to review such judgment/decision.

Article 133(1) of the 1992 Constitution provides as follows: *"**The Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court"**.* Rule 54 of the Supreme Court Rules, 1996 (C.I. 16) provides the grounds and conditions under which the review jurisdiction of the Supreme Court may be invoked as follows:

> *"The court may review any decision made or given by it on any of the following grounds:*
>
> ***a. Exceptional circumstances which have resulted in a miscarriage of justice;***

b. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given".

In the case of **Quartey v Central Services Co. Ltd. [1996-97] SCGLR 398**; this court restated the remit of the review jurisdiction as follows:

> *"a review jurisdiction is a special jurisdiction, conferred on the court, and the court would exercise that special jurisdiction in favour of an applicant only in exceptional circumstances. This implies that such an application should satisfy the court that there has been some fundamental or basic error which the court inadvertently committed in the course of considering its judgment and which fundamental error has resulted in gross miscarriage of justice".*

Similarly, in the case of ***Penkro v Kumnipah II [1987-88] SCGLR 398,*** the Supreme Court stated that, *"the review jurisdiction is a special jurisdiction to be exercised in the exceptional circumstances. It is a kind of jurisdiction held in the reserve, to be prayed in aid in the exceptional situations where there is a fundamental and basic error".*

The roadmap for the exercise of the review jurisdiction was similarly provided for in the case of ***Arthur (No. 2) v Arthur (No. 2) [2013-2014] 1 SCGLR 569 at 579-580***, this Honourable Court laid down the parameters for the review jurisdiction as follows:

> ***"We are therefore constrained to send a note of caution to all those who apply for the review jurisdiction of this court in respect of rule 54(a) of C.I. 16 to be mindful of the following which we set out as a road map. It is neither an exhaustive list nor one that is cast in iron such that it cannot be varied depending upon the circumstances of each case.***
>
> ***a. In the first place, it must be established that the review application was filed within the time lines specified in rule 55 of C.I. 16.***

b. That there exist exceptional circumstances to warrant a consideration of the application.

c. That these exceptional circumstances have led to some fundamental or basic error in the judgment of the ordinary bench.

d. That these have resulted into miscarriage of justice (it could be gross miscarriage or miscarriage of justice simpliciter).

e. The review process should not be turned into another avenue as a further appeal against the decision of the ordinary bench.

f. The review process should not be used as a forum for unsuccessful litigants to re-argue their case.

It is only when the above conditions have been met to the satisfaction of the Court that the review panel should seriously consider the merits of the application".

Thus, the jurisdiction is restricted to the review of decisions "made or given by the Supreme Court and not the decisions of any prior trial or appellate court or tribunal before whom the case had previously been determined.

Grounds for review application

From my perusal of the application and the statement of case filed by Learned Counsel for the Plaintiffs, the ground for this application are as follows:

a. The decision of the ordinary bench to suo motu join Frederick Shamo Kwei to the appeal was given per incuriam.

b. The ordinary bench erroneously applied the judgment in Suit No. 383/89/ the ordinary bench did not apply the whole judgment in Suit No. 383/89.

The majority's decision was given by my sister, Dordzie JSC and from my reading of the judgment, she made reference to the case of **Adjeifio & Adjei Kwanko II & Others vs. Mate Tesa substituted by Marmah (2013-2014) SCGLR 1537** ("Tesa Case"). The majority indeed agreed that the Mate Tesa case was relevant to the instant case and was binding on the Court.

At pages 17-18 of the judgment, Dordzie JSC states as follows:

> ***"One would have thought that the decision of the Supreme Court in the Adjei Fio (substituted by Adjei Sankuma & Adjei Kwanko II) vs. Mate Tesa (substituted by Marmah) and Others (I will refer to this case from now as the Mate Tesa case, reported in (2013-2014) 2 SCGLR 1537 would have put an end to litigation over the particular parcel of land in issue in this case.***
>
> ***.... However, it appears the 'sacred principle' of stare decisis, which is enshrined in the 1992 Constitution and re-enacted in the Courts Act in 1993, had been thrown overboard in the hierarchy of our court system.***
>
> ***.... By operation of these statutory provisions, the courts abide by former precedents on the same point of law decided in previous suits. In this suit, it appears the Court of Appeal overlooked this principle, and failed to abide by its own decision in the Tesa case and the decision of the Supreme Court ..."***

The Plaintiffs recognize that the ordinary bench referenced the Tesa case in its judgment but it is the application of the case that the Applicants find problematic. According to learned Counsel for the Plaintiffs, the ordinary bench recognized that in the Tesa case, the Court of Appeal had found that Frederick Shamo Kwei (4th Defendant) was not a member of the Numo Kofi Anum Family and this was also confirmed by the Supreme Court. For the Applicants, the decision of the ordinary bench to suddenly cloth the 4th Defendant with capacity in the face of the decision in the Tesa case was given per incuriam.

As expected, the Defendants are opposed to the application for review. It is their case that the Plaintiffs seek to use this avenue to reargue the appeal. The Supreme Court having correctly assessed the evidence and made these findings, it amounted to an attempt on the part of the Plaintiffs to re-argue the appeal.

Article 129(3) of the 1992 Constitution provides that ***"The Supreme Court may while treating its own previous decisions as normally binding, depart from***

a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law". The same provision is repeated in section 2(3) of the Courts Act, 1993 (ACT 459).

This Court in **Okudzeto Ablakwa (No. 3) & Another [2013-2014] 1 SCGLR 16** commented on article 129(3) as follows: *"**Accordingly, the Supreme Court may depart from its own previous decision in terms of article 129(3) of the Constitution. However, until it has decided to do so, it would, in our view be incorrect to argue that the Supreme Court is in error when it is following its own previous and unchallenged decision. In this review application, therefore, the applicants face a difficulty in persuading this court that there was a fundamental error in the judgment of 22 May 2012, when the alleged error is based on the court following its own previous decision. The place for inviting the court to depart from its decision in Nii Kpobi Tettey Tsuru III (No. 2) v Attorney General (No. 2) should have been before the bench of nine justices and not before the review bench".***

From my reading of the judgment of the majority of the ordinary bench, the majority did not indicate that it was departing from the judgment in the Tesa case. In the Tesa case, Gbadegbe JSC endorsing the findings of the Court of Appeal about the lack of capacity about some of the Plaintiffs therein including the 4th Defendant herein (6th Plaintiff therein) said as follows:

> ***"Having disposed of the factual grounds, we next turn to the ground which concerns the capacity of the plaintiffs who sued as joint heads. In his judgment, the learned trial judge relying on article 17 of the 1992 Constitution after finding that save the 5th plaintiff the others lacked the capacity endorsed on the writ came to the ….. that although they were not descended from the patrilineal line as the endorsement asserted having been begotten by female members of the family, they were competent to be joined to the suit in that 5 capacity. This finding was contested on appeal to the Court of Appeal and rightly resolved in our opinion by the learned justices of the Court***

of Appeal when they held that they were incompetent to sue and proceeded to strike them out. It does appear to us that the decision of the learned justices on the said point which has been appealed to us was right and was one that looked at the case from a purely substantive perspective as indeed is required of us by Order 1 rule 2 of the High Court (Civil Procedure Rules), C.I. 47 of 2004. Indeed, there is ample power in the court under order 4 rule 5(2) to make such an order. In our view, having struck out the other five plaintiffs their joinder to the action was a mere instance of misjoinder that from the rules cannot by itself operate to defeat any action and therefore the submissions argued on us by the defendants based only on the said misjoinder looks to us as being without substance. See Order 4 rules 5(1) and (2) of the High Court (Civil Procedure) Rules, C.I. 47". .... Then there is the cross appeal by which the 1st – 4th and 6th plaintiffs invite us to reverse the decision of the Court of Appeal relating to the holding by the learned justices of the Court of Appeal that they lacked capacity to be joined to the instant action. We have read the record of appeal and the written briefs in relation to the said ground of appeal and have come to the conclusion that the learned justices of the court below were right for the reasons provided in the judgment, the subject matter of this appeal. The plaintiffs themselves asserted a specific capacity which was not supported by the evidence and accordingly, the order striking them out was right. The cross-appeal is therefore dismissed".

The decision of the Court in the Tesa case was emphatic that the Court endorsed the findings of the Court of Appeal to the effect that save for the 5th Plaintiff therein, the rest of the Plaintiffs therein (including the 4th Defendant herein) lacked capacity on the evidence adduced to be joined to the action and litigate the issues concerning the Land.

The majority of the bench using the Tesa case to arrive at a conclusion that the land in dispute belonged to the Numo Kofi Anum Family further held that:

"The trial court's analysis of the law on the circumstances where the co-defendant would be clothed with capacity to join the action I find to be sound and is in line with decisions of this court that are more liberal in the application of the customary law exceptions laid down in Kwan vs. Nyieni supra .... An appeal having the nature of rehearing, this court can exercise the same powers as the High Court to cure the defect ... I entirely agree with the analysis and conclusion drawn by this court in the said case on this procedural issue. This court would therefore order that the title of this suit be amended, and the name of the co-defendant to read "Frederick Shamo Kwei suing on behalf of himself and other members of the Numo Kofi Anum Family".

In the light of the previous decision of this Court in the Tesa case that the 4th Defendant lacked capacity to initiate an action for the Numo Kofi Family, I am of the opinion that the decision of the majority of the ordinary bench conferring capacity on the 4th Defendant was given without due consideration to the entirety of the judgment in the Tesa Case. The decision on the Tesa case to the extent that it confirmed that the 4th Defendant lacked capacity to commence an action on behalf of the Numo Kofi Anum Family meant that the majority was bound to follow same.

No justification was given by the majority for the deviation from the holding in the Tesa case that the 4th Defendant lacked capacity which goes to the root of the sustenance of any claim before a court. Prof. Mensa Bonsu JSC in the case of **Kesseke Akoto Dugbartey Sappor & 2 Others vs. Very Rev. Solomon Dugbatey Sappor & 4 Others (Substituted by Ebenezer Tekpetey) (Civil Appeal No. J4/46/2020 delivered on 13th January, 2021)** on capacity held that:

"Capacity to bring and maintain the action remains a cardinal hurdle that must be jumped if either party is to remain in the case. It is for good reason that Order 2(4) of High Court (Civil Procedure) Rules 2004, (C.I. 47) as amended, insists on the capacity of the plaintiff being indorsed on the writ before it becomes a competent writ. Rule 3 of the Court of Appeal Rules, 1997 as amended, grants the right of audience only to "A person who is ***a party to any cause or matter before the Court ...****" (emphasis supplied). Therefore,*

just as there cannot be a "phantom plaintiff" so there cannot be a "phantom appellant".

Black's Law Dictionary defines 'Capacity' or Standing as: "A party's right to make a legal claim or seek judicial enforcement of a duty or right capacity …". Thus, one's ability to appear in court to make a claim hinges on whether one is recognized in law as having sufficient interest in any matter to seek a hearing on any particular issue. This "sufficient interest" must remain throughout the life of the case, or one's legal ability to stay connected with a case making its way through the courts would be lost.

…. This means that the fact that an appellate Court re-hears a case means that it must consider the entire dossier and not only aspects deemed relevant by the parties; and that the parties must remain competent throughout the proceedings …. Therefore, the effect of any primary barriers, such as want of capacity in the Plaintiff, or Appellant by the time it is due to re-hear the case remains relevant throughout the case. To hold otherwise would mean to gloss over an important issue as the capacity of the parties to maintain the action".

The decision of the majority with great respect was given per incuriam to the extent that it clothed the 4th Defendant with capacity. No reason was provided as to the circumstances/justification leading to a finding inconsistent with a decision of the same Court in the Tesa case. Dotse JSC in the case of **Hon. P. C. Appiah-Ofori vs. The Attorney General (delivered on 2/06/2010 WRIT NO. J1/4/2007)** giving the road map for a departure from a previous decision of the Court stated as follows:

"It should also be noted that, since all courts are bound to follow the decisions of the Supreme Court on questions of law, there must be certainty and consistency in its decisions, reference article 129 (3) of the Constitution.

As the constitutional and final appellate court of the State, the Supreme Court must only depart from its previous decisions when cogent, and very good reasons are given to justify the need that there appears to be the need to so depart. In so doing, it will be worthwhile for the court to make reference to its previous decisions and state

clearly and boldly that it is departing from it. It is only when such clear statements are made, indicating a change in the decision of the Supreme Court that courts below it will be given guidance and directions".

In my view, since the majority did not depart from the decision in the Tesa case, including the finding of capacity of the 4th Defendant in the case, then the majority of the bench were bound to follow the decision in the Tesa case to the effect that the 4th Defendant did not have capacity.

Further, once the majority of the bench was satisfied that the Plaintiffs' land fell within the area covered by the decision in the Tesa case in favour of the Numo Kofi Anum Family, the Court held that the Plaintiffs" grantor (Nungua Stool) could not have made any grant to the Plaintiffs of what it does not have. Thus, the grant from the Numo Kofi Anum Family to the 1st Defendant was valid and cannot be questioned by the Plaintiffs.

With this finding, the majority inadvertently did not recognize that the Plaintiffs could have a different interest to protect at law separate from that of the Nungua Stool. In the Tesa case, the Court found that, the fact that the land in dispute belonged to the Numo Kofi Anum Family did not automatically mean that all grantees of the Nungua Stool automatically had no interest to be protected at law or defences available.

The case of **Attram v Aryee (1965)** is emphatic on this as follows:

"A prior purchaser of land cannot be estopped as being privy in estate by a judgment against the Vendor commenced after the purchase …"

Also, in the case of **Republic vs. Court of Appeal Ex-parte Lands Commission (Vanderpuye Orgle Estates Ltd. Interested Party [1999-2000] 1 GLR 75** where the court per Bamford-Addo JSC held at page 84-86 that:

"…. The law then is that a purchaser of land would not lose his land by virtue of a judgment in a litigation commenced after the sale.

Similarly, even if a valid deed is legally invalidated for the proper legal reasons, i.e. by a subsequent legally proper judgment, which is not so in this case, the doctrine of bona fide purchaser for value would apply to protect the title of such a purchaser".

In my opinion, the majority of the ordinary bench did not avert their mind to this binding principle and as such determined the interest of the Plaintiffs as synonymous with that of Nungua Stool in the Tesa case. The consideration of the interest of the Plaintiffs as one and the same as that of the Nungua Stool erroneously operated on the minds of the majority to rely on the Tesa case to drive the Plaintiffs away from the seat of judgment simpliciter.

The grant by the Nungua Stool to the Plaintiffs' father as far back as 1962 was acknowledged by the Defendants. The evidence on record also showed control by the Plaintiffs' father in respect of the area acquired and the payment of compensation by the Government of Ghana for the compulsory acquisition of part of the land for the construction of the Tema Accra Motorway is further testimony to this possession.

The decision in the Tesa case by Dotse JSC (sitting as Additional High Court Judge) emphatically exempted grantees of the Nungua Stool which was tendered in evidence. The Plaintiffs' Father had been in long possession to merit a conclusion similar to the finding of DOTSE JSC or in the alternative that the Plaintiffs had adversely possessed the Land prior to the Defendant's interference. It is therefore my considered opinion that the decision of the ordinary bench has occasioned a substantial miscarriage of justice to the Plaintiffs/Appellants/Respondents/Applicants.

In my opinion, there are exceptional circumstances for the decision of the ordinary bench to be reviewed. Accordingly, the ordinary bench's decision is reviewed.

G. K. KOOMSON
(JUSTICE OF THE SUPREME COURT)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

COUNSEL

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