IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: PWAMANG JSC (PRESIDING)

LOVELACE-JOHNSON (MS.) JSC

AMADU JSC

PROF. MENSA-BONSU (MRS.) JSC

ASIEDU JSC

CIVIL APPEAL

NO. J4/76/2022

10TH MAY, 2023

WEST AFRICA COMMODITIES LTD. …..

PLAINTIFF/APPELLANT/RESPONDENT

VRS

1. HAIKINS OFFEI FIANKO

……

DEFENDANTS/RESPONDENTS/APPELLANTS

2. DIANA FRIMPONG

JUDGMENT

PROF. MENSA-BONSU (MRS.) JSC:-

This is an appeal from the judgment of Court of Appeal dated 10th December, 2022 based on a series of contracts entered into between the parties.

FACTS AND BACKGROUND

The defendants were a couple, Mr Haikins Offei and Ms Diana Frimpong and the plaintiff was the West African Commodities Ltd represented by its Managing Director and its beneficial owner, Mr. George Baah Sackey. However, the plaintiff's name was substituted for that of the Managing Director's (and beneficial owner's) in the course of the trial.

The facts of the case have been made complex by the conflation of three contracts into one, as well as the conflation of the legal personality of plaintiff company with the personality of the beneficial owner of plaintiff company.

The two parties entered into transactions that are now set out as three distinct contracts:-

1. The sale and purchase of two plots of land set down in a written contract between plaintiff company as seller and defendants as buyers.
2. The sale and purchase of a block of flats by verbal contract for $160,000 between the defendants as sellers and the plaintiff/beneficial owner of plaintiff as buyer (s).
3. The verbal agreement to provide as consideration for the 2nd contract, in the form of cash of $50,000 and a plot of land to make up the outstanding $110,000 in order to realise the contract sum of $160,000.

In respect of the first contract, the parties entered into a written contract Agreement titled "sale of 2 plots of land."; dated 25th March 2015. The agreement covered 2 plots of land

measuring 70 x 200 ft at Ghc 330,000 i.e. one plot being GH¢165, 000. The plaintiff/appellant/respondent (hereinafter referred to as 'plaintiff') who was the seller, agreed that there should be GH¢100,000 down payment by the couple, the two defendants/respondents /appellants (hereinafter referred to as 'defendants') and "the balance spread over one year with effect from 25th March 2015." The contract had a clause titled: "*Special condition"* to the effect that if at the end of the one year, *"the balance is not paid, price will be reviewed."* Exhibit 1(ROA 59). The next day, i.e 26th March, 2015, they entered into another agreement in respect of the same two plots titled: " Sale and Purchase agreement". This was dated 26th March 2015, and also carried the clause "Special condition". This time, however, it read "*At the end of 18 months if the balance is not paid, price will be reviewed."* In paragraph 5 of the 'Sale and Purchase Agreement' there was a clause titled Integrated Agreement.

"*These agreement [sic] signed by the parties constitute the entire agreement between them. Any disagreement arising out [sic] the contract shall be solved amicably."*

It was clearly an effort to put the two agreements together as one, particularly in view of the difference in the 'Special condition' clause. Consequently, the 18-month clause was the governing period.

The defendants began making payments on the two plots in installments. Official Receipts issued, however, were on West Africa Commodities Ltd Letterhead as follows:

No. 0097 dated 16/06/2015

Fifty thousand Ghana cedis only for 2 plots of land purchased at Tse Addo cheque No. 000021

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Receipt No. 00967 dated 2/4/2015

One hundred thousand Ghana cedis for 2 plots of land at Tse Addo

Cheque No. 000012 and others."

Page 65 of ROA

Official Receipt No. 00987 dated 26/2/2016

Received from Fianko Haiking Offei & Diana Frempang the sum of Twenty five thousand Ghana cedis only (GH¢25,000) part payment for land at Tse Addo

Cheque No. 000008

The defendants requested access to the plots to begin construction even though the plaintiff had not given them the requisite documentation. The plaintiff allowed them access to only one plot and they began their development.

The defendants claimed that Mr. George Baah Sackey, the beneficial owner and Managing Director of the plaintiff company, after receiving the 3rd installment of payment on 26th February 2016, indicated that he was no longer interested in selling the 2nd plot of land, and that he wished to give it to his son. Clearly, Mr. George Baah Sackey had conflated and confused his legal personality with that of the plaintiff's, for a company cannot beget a son. By this time, the defendants had paid sums totaling Ghc 175, 000, ie more than half the consideration for the two plots of land. That variation of the contract meant that the defendants had completed payment for the first plot, with an outstanding extra payment of 15,000. The therefore began pressing the plaintiff's Managing Director for documentation as agreed upon. Upon making the demand for the documents, the plaintiff asked the 1st and 2nd defendants to pay GH¢5000 to his lawyers for the lawyers to prepare the indenture. They did so, but the plaintiff still failed to deliver the documents to them.

On a separate occasion, sometime in August 2016, the beneficial owner of plaintiff company, found that the 1st and 2nd defendants had built two blocks of flats on the one plot of land. They resided in one of the blocks and planned to sell or rent the other one. The plaintiff expressed interest in purchasing the block of flats the defendants wanted to commercialise. This time, roles were reversed: the defendants were the sellers while the plaintiff's beneficial owner was the buyer. The second agreement which appears to have been an oral agreement, was for the agreed price was $160,000. The plaintiff offered to pay $50,000 with a parcel of land in a different location valued at $110,000 to make up the $160,000. The parties agreed to the mode of payment in cash and kind.

The plaintiff began to pay some money in installments. In all what he paid amounted to a little over $40,000. He gave the defendants an indenture on a new plot of land, at a different location which he claimed was valued at $110,000. This was where the 3rd contract on the consideration became relevant. e defendants found out from their own enquiries that the going price for land in that area was $70,000. They confronted plaintiff with their findings, but obviously being aware that the $110,000 was an inflated price, he allegedly explained to them that he was going to "service" the plots and that when he had done so, the price would appreciate to the $110,000 he had quoted. The plaintiff appeared to treat all 3 contracts as one and the same thing, and believed that they had agreed to vary some of the terms of the written contract, and the second contract was largely verbal. To pay the cash component of the second contract, the plaintiff issued 3 posted dated cheques for the following sums

1. GH¢50,000 cleared on 13th July 2016
2. GH¢50,000 cleared on 5th August 2016
3. GH¢60,000 cleared on 3rd October 2016

The plaintiff claimed that these payments amounted to$45,000 at the foreign exchange rate they had agreed upon, and that he hoped to receive the keys to the flat from the couple but they kept making excuses. The defendants claimed it amounted to only $40,000. In respect of the first contract, the plaintiff claimed the defendants had only paid Ghc 150,000 and not Ghc 175,000 as they contended. A receipt showing the payment of Ghc25,000 after the payment of Ghc150,000 was explained by the Managing Director as not having come to him but to the newly-adjudged land

Owners who were threatening to demolish properties on the land. He did not, however bring this to the attention of the defendants, and the money was received as "part-payment" for the plot of land.

On 26th July 2017 the defendants served a Demand Notice on managing Director of plaintiff asking him to convey the two plots of land to them properly, with the necessary documentation.

The defendants also disagreed with the plaintiff's attempt to sell land to them at a "future price" and so sought to rescind the second contract. The defendants refused to continue with the contract, and they tried to get the plaintiff to take back his money and the document on the land for in-kind payment, but he refused, contending that they had to pay interest on the money he had paid to them. On these facts, the plaintiff issued a Writ on 8th December 2017 claiming

> *"(a) A declaration by the Court that the reluctance by the 1st and 2nd Defendants to release the keys to the block of flats fully paid for by Plaintiff is frustrating the contract validly executed between the Plaintiff and the 1st and 2nd Defendants.*
>
> *(b) An order directed at the 1st and 2nd Defendants to immediately release the keys to the said house/flat fully paid for by*

the Plaintiff immediately without delay to enable Plaintiff have access and vacant possession of the flats.

(c) Or in the alternative a declaration that the contract is terminated and 1st and 2nd Defendants ordered to release and return the Indenture document for the land exchanged and a refund of the cash amount of $50,000 plus interest at current commercial rates.

(d) Defendants be made to bear full legal costs incurred by plaintiffs.

The Defendants also counterclaimed as follows:-

"(a) An order for specific performance directed at the Plaintiff to convey and transfer title to two (2) plots of land situate and being at East La, behind the Trade Fair site to the Defendants and to grant access to same forthwith.

(b) General damages for loss caused to Defendants by Plaintiff's breach of the Sale and Purchase Agreement entered into by the parties in March 2015.

(c) Any further order (s) this honourable court may deem appropriate.

(d) Cost of the action."

The High Court judgment of 20th February 2019, dismissed the case of plaintiff, but granted the counterclaim of the defendants. The plaintiff appealed to the Court of Appeal, and the appeal was allowed in part. The Court of Appeal, however, decreed specific performance in favour of the defendants, but only in respect of the one plot of

land. The court refused to decree it in respect of the 2nd plot. Instead it awarded damages, and a refund of the excess amount paid based on the view that the second plot of land had already been transferred to another person (3rd party rights) by the Plaintiff.

GROUNDS OF APPEAL

a. *The Court below erred in ordering specific performance in respect of the first contract only in part.*
b. *The Court below erred in holding that the Defendants breached the contract for the sale of the flats.*
c. *The judgment is against the weight of the evidence led at the trial*
d. *Further grounds to be filed upon receipt of the full record of appeal.*

Although the defendants intended to file further grounds in ground (d), they did not do so, leaving only the three grounds of appeal. Therefore, only those grounds filed will form the substance of this appeal. We begin with the omnibus ground of appeal as it sets the legal parameters for the jurisdiction of the appellate court.

Ground(c)

Having pleaded the omnibus ground in ground (c) the burden is cast on the appellate court to review the entire record and form its own conclusions based on the available evidence. Therefore that ground will precede the discussion of the other substantive grounds (a) and (b).

The law on the duty of an appellate court when the omnibus ground has been pleaded has been so often discussed as to come jaded. In a long line of cases the Supreme Court has laid down the responsibility of the appellate court when the omnibus ground has been pleaded. See ***Akufo-Addo*** v ***Catheline*** [1992] 1 GLR 377; ***Tuakwa*** v ***Bosom*** [2001-2002] SCGLR 61; ***Djin*** v ***Musah Baako*** [2007-2008] 1 SCGLR 686; and ***Asamoah & Another***

v. ***Offei*** [2018-2019] 1 GLR 655. In ***Tuakwa*** v ***Bosom*** supra, at p.65, Akuffo JSC (as she then was) stated that

> *"furthermore, an appeal is by way of a re-hearing particularly where the appellant, is the plaintiff in the trial in the instant case, alleges in his notice of appeal that, the decision of the trial court is against the weight of evidence. In such a case, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testaments and all the documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that on a preponderance of the probabilities the conclusions of the trial judge are reasonably or amply supported by the evidence".*

This was expatiated on in ***Djin*** v ***Musah Baako***, supra, per Aninakwah JSC at p 691

> *"It has been held in several decided cases that where an (as in the instant case) appellant complains that a judgment is against the weight of evidence, he is implying that there are certain pieces of evidence on the record which, if applied in his favour, could have changed the decision in his favour, or certain pieces of evidence have been wrongly applied against him. The onus is on such an appellant to clearly and properly demonstrate to the appellate court the lapses in the judgment being appealed against".*

More recently in ***Asamoah & Another*** v. ***Offei,*** supra, Appau, JSC, speaking for the Court, stated the law at p.660 thus:

> *The authorities are legion that an appeal is by way of rehearing, particularly where the appellant alleges in his notice of appeal that the decision of the trial court was against the weight of evidence. In such a case, it is the duty of the appellate court to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that, on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence on record. And it is immaterial whether the appeal is a second one from the Court of Appeal to the Supreme Court.*

This court is thus well-placed to review the entire record of proceedings and relevant evidence.

Ground(a)

a. *The Court below erred in ordering specific performance in respect of the first contract only in part*.

The appellants complained that the 2nd plot of land had not been transferred to any 3rd party as evidence in trial court showed, and that being still available, the court should have decreed specific performance on both plots under the agreement.

Defendants claim that Plaintiff has reneged on the agreement and failed to deliver two plots of land under the Sale and Purchase Agreement or has failed to give them GH¢10,000.00 they had paid towards the 2nd plot, having made payments in excess of ¢165,000 which was the price of one plot.

In response to the argument that they were in breach because they had not completed payment for the two plots, the defendants explained that they made variations to the

original contract and that it was the plaintiff who refused to sell the second plot, contrary to the contract agreement on the land covered by the Sale and Purchase agreement of 26th March, 2015, leaving them with only one plot valued at Ghc 165,000. Having paid Ghc 175,000, they had completed the payments, and therefore the agreement to provide the documentation once they finished paying, had become due. Indeed, when making the demand in February 2016 for documents, it was in respect of the one plot. On the evidence, it was the plaintiff that breached the original agreement of 26th March 2015 by reducing the amount of land he had agreed to sell to the defendants. On his part, the plaintiff claimed he held 4 plots of land and agreed to sell two to Defendants at 165,000 each. Contract of sale fixed one year as the time limit. However, the plaintiff's case as presented is inaccurate. In the agreement the two plots were composite one plot because the measurement was 200x70. It could not be that the plots were separate and each had a price attached. Otherwise the measurement would have been presented as for each plot and not a composite of two plots measuring 200x70. Again, under cross-examination, the plaintiff's Managing Director admitted that the "Special condition" Clause in the agreement was varied by mutual consent. Therefore, the insistence on "one year" as being the time-frame for payment was inaccurate.

It is true the couple sought permission to build on the land and plaintiff's Managing-Director agreed "in the spirit of the friendship that had developed between us". The Managing-Director in paragraph 8 of the Statement of case submits that "*After granting them the permission and an unimpeded access to the land to commence building, I indicated to them that it is only upon making full payment of the two plots of land that I will prepare and release the indenture for that piece of land*." *They had not completed payment for the land which they commenced to build on the land and so I did not prepare the indenture for them until full payments is made*."

The plaintiff further contends that the Defendants had only paid GH¢150,000 which is less than the price of one plot of land, and have not paid for the full two plots which was GH¢330,000. This argument is somewhat disingenuous for it was the plaintiff who withdrew the one plot from the agreement. When the trial court pointed out to him that the receipts produced totaled Ghc 175,000, there having been an extra Ghc25,000 paid, the Managing Director's explanation was that the newly-adjudged landlords were pressing for payment or they would demolish the structures built on the land since the court had declared them owners, and so the Ghc25,000 went to the land owners. However, the defendants were not told about this, and the receipt read "part-payment" for the plot of land. Consequently, the court found that the couple had paid the Ghc175,000 as the receipts indicated. This reasoning cannot be faulted. One who is selling a piece of land enters into covenants including a covenant of assurance of title. Therefore, if there was need to perfect the title by negotiating with the newly-adjudged owners, it was improper for the plaintiff to push that cost on to the defendants without discussion, for, at all material times, they believed, and were right to so believe, that the plaintiff had perfect title to pass on to them.

On the question of whether or not the pledge to provide documentation upon completion of payment was due, the evidence is clear. The defendants insist that since they had been sold one plot only and not the two as agreed, and they had paid a little more than the cost of one plot, the obligation to provide the documentation upon completion of payment fell due after the 3rd installment of February 2016. The plaintiff maintains that they did not complete payment of Ghc330,000 as agreed. This is where plaintiff's posture is curious. The plaintiff did withdraw one plot from the agreement of sale, and, indeed, admits to having done so, considering the explanation he offered as to why he applied GHC 25,000 to payment of new landowners, and not towards the price of the land as

stated on the official receipt. If he took GHc25,000 from the defendants account, because his total bill to the new landowners in respect of the four plots he claimed to own was Ghc 100,000, then clearly he billed only one plot to the account of the defendants. Having determined unilaterally that the defendants were obliged to pay Ghc25,000 because they owned only one of those four plots, he cannot now be heard to say that the defendants still retained the two plots as under the written agreement, which, by apparently common consent, had been varied by verbal agreement.

In the same vein, the defendants' claim to the second plot, in view of the evidence of verbal variation of the contract and their own subsequent conduct, is difficult to appreciate. Having built a case of entitlement to performance of that aspect of the contract on the fact that they had paid what was required to unlock the provision of the documentation, it does not lie in their mouths to complain about the award the courts made. The Court of Appeal was, therefore, right in decreeing specific performance in respect of that one plot which the parties acknowledge had been paid for. The Court of Appeal was also right in awarding damages for breach of contract in respect of the 2nd plot rather than specific performance the defendants claimed since they had agreed to vary the contract and relied on the variation to make claims for documentation, because the defendants did not get round to paying for it. Even if it was only because plaintiff had, wrongfully, withdrawn it from the sale agreement, that was the act that constituted a breach of contract, and which was remediable by the award of damages. Had the plaintiffs paid for the 2nd plot in full, they might have been entitled, all things being equal, to specific performance in respect of that 2nd plot as well, but not otherwise.

Ground (b)

b. *The Court below erred in holding that the Defendants breached the contract for the sale of the flats*

The defendants further submit that Court of Appeal erroneously concluded that it was they, the defendants, who were in breach of the contract regarding the sale of the flats, even though the evidence on record showed that it was rather the plaintiff who was in breach. The evidence showed that in August 2016, the plaintiff prepared an indenture on the land he was offering as part-payment for the block of flats, yet the land under the sale and purchase agreement for which defendants had paid the lawyer remained without documentation. The Managing –Director of plaintiff company then requested the defendants to prepare a Sale and Purchase Agreement for the Block of flats and deliver the keys to him. The 2nd defendant avers that they refused because "*he had not been truthful with us in terms of the plot of land he was offering as part payment for the block of flats and also he had refused to give us the land documents for the land we purchased from him."* They stated in paragraph 1.3 of Statement of Case that "*the Court below failed to observe and appreciate that the plaintiff in flagrant breach of the terms of the contract did not meet the cash consideration of $50,000 as agreed*."

It is at this point that, in seeking to determine who was in breach of the agreement, the notion of a third contract between the parties comes into play. Here is why: The defendants and the plaintiff had entered the second contract for the block of flats for $160,000. At that point the contract was firm, as all the elements of a valid contract were present, and either party could have legally maintained an action for its breach. Therefore, the events that occurred later were pursuant to a third contract as to how the consideration for the second contract already concluded was to be paid. This called for fresh negotiations as the Managing-Director of plaintiff company claimed he did not have enough "liquid cash" and needed to come up with an arrangement with the defendants that would meet the price they were demanding for the block of flats, to entitle him to be given access to the property. The plaintiff therefore made a fresh proposal to the defendants: he would give them $50,000 and another piece of land valued at $110,000 at

another location. The defendants accepted the offer and so the plaintiff began to make installment payments. This was, thus, a separate contract to which the parties agreed. As it turned out, it was the plaintiff who could not deliver on what he negotiated.

To begin with, he did not pay $50,000 as he contracted to do, but only a little over $40,000, as per the applicable dollar-cedi exchange rate they had agreed upon. He was therefore unable to fulfill that cash part of the bargain. Next, the land he produced with the supporting indenture was in a completely different area from where the parties were. Second, he placed a value on it which was exactly equal to what was outstanding on the price of the block of flats upon payment of $50,000 cash. He claimed the land had been valued by a chartered surveyor. The defendants took the documents and made their own enquiries as to values of land in that area. Having come up with a figure of about $70,000, they confronted the Managing –Director of plaintiff company with what they had found concerning the price of the land, and alleged that he had overpriced the land in a fraudulent move to make up the $110,000 with land that was worth only a little over half the amount. The Managing-Director of plaintiff company did not deny the exorbitant price, but explained that the price of land in that area would appreciate in future because he intended to "*service the land, which would increase its value to the asking price of $110.000*." This was a posture that, at best, flew in the face of commercial sense and at worst, was simply fraudulent. The strange aspect of the bargain offered by the plaintiff was that whilst he wanted immediate access to and enjoyment of, the block of flats he had purported to purchase, he expected the defendants to wait till a future date when the contractual purchase price might be fully made up when land in that area might appreciate in value as a result of some proposed improvements the plaintiff intended to make on the land.

Another complication to this case was that the Managing-Director having conflated his personal capacity with that of the plaintiff's corporate personality, sought to use land in

the name of the Company West African Commodities to pay the personal debt of Gh¢110,000. Ordinarily, that could be done as Section 5 of the Contracts Act 1960 (Act 25) (1) provides as follows:

> *"Any provision in a contract made after the commencement of this Act which purports to confer a benefit on a person who is not a party to the contract, whether as a designated person or as a member of a class of persons, may, subject to the provisions of this Part, be enforced or relied upon by that person as though he were a party to the contract."*

However, there was no evidence of authorization of the transaction by the Board of plaintiff company. Therefore, by the nature of the consideration offered for the third contract, the defendants were right to reject it as fraudulent. They gave him the option of paying the outstanding sum of $120,000 or else they were unwilling to continue with the contract and would refund the $40,000.00 cash that he had paid them. In other words, the defendants were seeking a right of rescission based upon the plaintiff's breach of that agreement.

Indeed, the conflation of the personal capacity and corporate personality of the plaintiff led, in the course of the trial, to a challenge by counsel for the defendants that in that case, he could not maintain an action in his personal capacity, and the records were duly amended. The confusion was not merely procedural but substantive as well: The plaintiff complained in his submissions that for close to two years after he paid the cash and given them the indenture for the second piece of payment as in-kind payment and yet the defendants had refused to give him the keys to the block of flats. Again he contended that the defendants had paid only $150,000 of the contract sum in the first contract (as varied) and so they must pay the difference of Ghc 15,000 on the one plot they have built on. The plaintiff claimed to have paid $45,000, but the defendants insisted it was only a little

above $40,000. Under cross-examination on 5th December 2018, the Managing-Director admitted that the amount he paid at the then exchange rate amounted to $41,237.00 and not $45,000 as he stated. It transpired that the reason for the plaintiff's posture was that he had added the Ghc 15,000 he claimed to be owed to him under the first contract, on to what he had paid under the third contract, and arrived by his own calculation to $45,000. This was, however, still short of the agreed cash sum of $50,000, yet he was demanding performance when he had failed to supply sufficient consideration. There were too many loose ends in such an important contract.

Who was therefore in breach? In the Court of Appeal judgment, the facts as recounted were not entirely accurate as agreeing to accept land valued at $110,000 is not the same as accepting land that is supposed to be valued at $110,000. In recounting the facts the Court of Appeal left out a few important steps.

1. The parties agreed that the price of the block of flats would be $160,000. Thus far, the contract was made. The question then was how plaintiff was going to pay the amount. Being low on "liquid cash" (his own words in the witness statement) he offered to pay $50,000 in cash and then to give them a piece of land valued at $110,000.
2. The land the Plaintiff brought to them for $110,000 was, in their opinion, over-valued. The evidence the defendants led and which was not dislodged by the plaintiff was that his explanation for over-valuing the land was that he intended to "service" the plot. Concluding that this meant they were being asked to pay for future value of the land and not the current value, they rejected the land.

Thus far then, the plaintiff's consideration had failed. They also did not pay $50,000 as argued, but some $41,000 by the agreed rates. Therefore, when the Court of Appeal's summary appeared to be more favourable to the case the plaintiff made than was supported by the evidence, it influenced its decision to reverse the High Court.

On page 9 of the Court of Appeal judgment (ROA 225) the court stated

> *"we have reviewed the evidence on record as regards the sale of the block of flats and we have no difficulty finding that it was the Respondents who breached the contract for the sale of the flats.… having agreed to the value of $110,000 as the value of the land for the exchange of the flat it was inappropriate to unilaterally pick a new low value and by that resile from the agreement for the sale of the flat. They were clearly in breach of the agreement."*

The Court of Appeal appeared to blame the defendants for "unilaterally" picking "a new low value" and by that resiling from the agreement for the sale of the flat". Should the value of land, the subject of negotiation to pay a debt, be "unilaterally" provided by the plaintiff, even if relying on the work of a chartered surveyor? Was the chartered surveyor's professional skill not cast into serious doubt by the "future speculative value", that was placed on the land if, indeed, it was made by him? Why could the parties not be jointly involved in assessing the fair price of the land, and why should the defendants be held to a self-serving determination of value as offered by the plaintiff? The Court of Appeal's summary appeared to be much too favourable to the case the plaintiff made, than was supported by the evidence, and this influenced its decision to reverse the High Court.

In respect of the defendant's claim of specific performance of entitlement to the second plot, the Court of Appeal was right. The defendants challenge the court's position that the second plot having been given out to a third party was available for the remedy of specific performance. From the discussion herein, the defendants were not entitled to specific performance of the second plot, having agreed to a variation of the written agreement and relied on same to claim that their entitlement to the documents had

matured at the time they made their claim. The defendants were entitled to damages, and this the Court of Appeal correctly held.

Again these facts have thrown up the issue of who really was the party in the third agreement with whom the defendants were negotiating. The defendants believed they were dealing with the Managing-Director of the company in his person. In their Statement of Case, they submit that upon the Managing-Director seeing the block of flats they had built on the one plot of land, he decided to buy it for his son and expressed interest in making the purchase. Since a company cannot beget a son, they must have intended all along to deal with the Managing-Director and beneficial owner. On his part, the Managing-Director states that when the couple agreed he gave them the indenture for the $110,000 land and a cash amount. Page 29 of ROA. However, it transpired that the land he gave them was in the corporate name of the plaintiff and not his own, yet he sued in his personal capacity, and so the case began as "George Baah Sackey v Haikens Offei Fianko and Diana Frimpong". The realization that he did not have capacity to maintain the suit in his personal name led to an application to change the title of the instant suit in the course of the trial. Despite the change, the confusion continued as if the plaintiff and Mr. George Baah Sackey were one and the same person. Though it was open to the Managing Director to use property in the name of another as in-kind payment for a personal debt by section 5 of the Contracts Act, there should have been better evidence of proper authorization of the plaintiff's Board? From what transpired in the court, however, it was not clear who were the parties to the verbal contract? On the facts, there is no doubt about the defendants, but there is uncertainty as to who was contracting with them to buy the block of flats. Was it the Managing–Director of the plaintiff company or Mr. George Baah Sackey?

As things stood, the moment the plaintiff applied for the title of the case to be amended to give him capacity to maintain the action, it should have occurred to him that there

would be far reaching consequences. It meant that what he promised to deliver in payment was not really his to give, unless he could prove the necessary authorization from the Board of the plaintiff-company. It is trite contract law that if there was a mistake as to the identity of the contracting party the resulting contract would be deemed to be void, for "*nemo dat, quod non habet*".

Again, under section 2 of the Conveyancing Act 1973 (NRCD 175), it is provided that:

> *"No contract for the transfer of an interest in land shall be enforceable unless—*
>
> *(a) it is evidenced in a writing signed by the person against whom the contract is to be proved or by a person who was authorised to sign on behalf of such person;"*

Such verbal agreement as existed between the parties was insufficient for purposes enforcing a contract for an interest in land.

On these facts, were the defendants entitled to rescind the 3rd contract? It is clear that the Managing-Director had not shown proper authority as to land he was purporting to use to pay a personal debt. Nor was the agreement enforceable as it was only verbal and could be repudiated by the plaintiff at any time.

RESCISSION

Rescission is an equitable remedy which means the setting aside of a contract. \In ***SG – SSB*** **v** ***Hajaara Farms Ltd*** [2012] 1 SCGLR 1at p.23, Date-Bah SC quoting from Cheshire Fifoot and Furmston on the effect of discharge by breach stated

> *"A party who treats a contract as discharged is often said to rescind the contract. To describe the legal position in such a manner,*

however, must inevitably mislead and confuse the unwary. In its primary and more correct sense, as we have already seen, rescission means the retrospective cancellation of a contract ab initio, as for instance where one of the parties has been guilty of fraudulent misrepresentation. In such a case the contract is destroyed as if it had never existed, but its discharge by breach never impinges upon rights and obligations that have already matured. It would be better therefore in this context to talk of termination or discharge rather than of rescission."

It is clear that in the event of a mistake as to identity of contracting parties, or a misrepresentation, such as goes to the root of the contract as in the instant case, rescission is allowed. In that case, there must be restitution in integrum. The defendants held themselves ready to refund the cash the Managing Director had paid and the indenture to the land. It was the Managing Director who refused to take the money or indenture, insisting that the defendants ought to pay interest on the money at commercial rate. Considering that it was the Managing-Director who had no land he was legally entitled to give away to pay a personal debt, he is the one who failed to perform his side of the bargain and consequently, he is owed no interest on the money paid.

The Court of Appeal made orders in respect of the first contract, and ordered Specific performance of the first contract. The plaintiff was to give the title deeds on the paid up plot to the defendants. He was also ordered to pay back the sum of Ghc 15,000.00 which was the extra amount paid by the defendants towards the second plot in the first contract, with simple interest at the prevailing Commercial Bank rate from 26th October, 2016 till final date of payment. We are in full agreement. We however, disagree with the Court of Appeal that it was the defendants who breached the second and its related third agreement. The Managing-Director had entered into a contract in his own name but the

consideration was in the name of a company of which he was beneficial owner, without any evidence of proper authority to use the property of the company to pay a personal debt. Therefore, he it was who failed to provide the consideration he had negotiated with the defendants, and so they were right to rescind the contract.

The appeal is allowed in part. The Ghc 35,000 awarded by the Court of Appeal is hereby set aside. The defendants should return the Ghc160,000 paid by the Managing Director with simple interest as ordered by the Court of Appeal, as well as the Indenture he supplied under the rescinded contract. No order as to costs.

PROF. H. J. A. N. MENSA-BONSU (MRS.)

(JUSTICE OF THE SUPREME COURT)

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)

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