IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: YEBOAH CJ (PRESIDING)

PWAMANG JSC

OWUSU (MS.) JSC

AMADU JSC

PROF. MENSA-BONSU (MRS.) JSC

CIVIL APPEAL

NO. J4/47/2021

15TH FEBRUARY, 2023

1. **EDEM AFFRAM**
2. **NANA OBUOR NIMAKO**

PLAINTIFFS/RESPONDENTS/APPELLANTS

VRS

1. **BERNARD YAW OWUSU-TWUMASI**
2. **OAK HOUSE COMPANY LTD**
3. **OAK HOUSE GROUP LTD.**

DEFENDANTS/APPELLANTS/ RESPONDENTS

JUDGMENT

MAJORITY DECISION

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

This is an appeal from a case which began because two friends decided to go into commercial ventures together, relying merely on their friendship to order their affairs, with unhappy results. It proves again the truth of the adage:

The interests of Friendship are served but ill,

When pressed into competition with the Till.

In this judgment, the original designations of the parties are maintained to avoid confusion as their roles in the case changed in the course of its travel through the hierarchy of courts.

Facts and Background

The 1st plaintiff and 1st defendant were friends who, at some point in time, were both based in the United Kingdom. They decided to go into business together, and first established a company, Concord Security Ltd. in UK which they managed together till 1st Defendant returned to Ghana, whilst 1st Plaintiff remained in the UK.

While 1st plaintiff was in the UK and 1st defendant was in Ghana, they formed another Company, Oak House Company Ltd (the 2nd defendant in the instant case), sometime in 2004. They invited two other persons to join them in the business. The documentation leading to the incorporation were all signed with the consent of the 1st Plaintiff and on his behalf by the 1st defendant. The 1st Plaintiff held 43% of the shares; the 1st defendant had 25% shares; the 2nd plaintiff also had 25% shares; and another person who subsequently resigned, owned 7% shares. The 1st plaintiff says he paid for his share through various sums of money he transferred to 1st defendant to capitalize 2nd defendant Company, as well as funding the acquisition of equipment such as cars, needed for the running of the company. The parties operated on the basis of friendship,

and all their communication was informal. Sometime later, 1st plaintiff began to notice that 1st defendant seemed to be no longer available to talk about the affairs of the Company. Eventually, he returned to Ghana only to discover that 1st defendant had removed his name as a Director and shareholder of 2nd defendant Company and changed the structure of the shareholding.

1st plaintiff further contends that 1st defendant had incorporated 3rd defendant company and transferred all of 2nd defendant's shares to 3rd defendant.

The 1st plaintiff also claimed that he remitted money to 1st defendant to acquire land at East Legon for their joint benefit. 1st defendant bought ten (10) plots at East Legon and also other plots in the near-by community of Adjiringanor, but never gave him his share of five (5) plots of land as agreed.

On his part, 2nd Plaintiff said he was a subscriber of 25% of the shares for which he was fully paid up and that the 1st defendant used his position as Managing Director and under threats from him, caused him to resign by letter under his own hand, from the company. He also relinquished his 25% shares, and received payment therefor. His plaint was that he was pressured to take those steps and was thus literally muscled out of his status as director and shareholder.

By amended writ and statement of claim dated 5th April 2016, 1st plaintiff took out a writ against the 1st, 2nd and 3rd defendants with the following claims

> *a. A declaration that Plaintiff is a shareholder of 2nd Defendant Company.*
>
> *b. A declaration that Plaintiff holds forty-three (43) percent shares in 2nd Defendant company*

c. A declaration that any purported change in the shareholding structure of the defendant company is void and of no legal effect.

d. A declaration that 1st Defendant action of altering the shareholding structure of 2nd Defendant Company without following due process was fraudulent.

e. A further declaration that the transfer of the shares and assets of 2nd defendant company to Oak House Group Ltd. by 1st Defendant is void and of no effect.

f. An order of accounts into the books and finances of 2nd Defendant from incorporation until date of judgment.

g. An order directed at 1st Defendant to render accounts for the said lands acquired for their common use.

h. Cost including Solicitors fees

i. Any other reliefs that the court may deem fit.

The 2nd plaintiff applied to join the suit and was so joined by ruling of 26th July 2016. The two plaintiffs then jointly filed an amended statement of claim dated 15th December, 2016 and the following reliefs of 2nd plaintiffs as against 1st and 2nd defendants jointly were added to those filed earlier on behalf of 1st plaintiff:-

j. A declaration that 2nd Plaintiff is a shareholder in 2nd Defendant Company with shareholding of 25% shares.

k. An order for account of the affairs of 2nd Defendant

l. An order that 2nd Plaintiff should be paid for his services as a promoter and director of 2nd Defendant Company on quantum merit basis.

m. Cost including legal costs.

n. Any orders that this Honourable court deems fit

The High Court entered judgment in favour of plaintiffs on 21st January, 2019. The 1st defendant filed notice of appeal on 15th February 2019. His grounds were:-

i. The trial court erred in law when it granted the 1st Plaintiff the relief of the recovery of US$950,000 being the alleged value of five (5) plots of land at Adjiringanor Accra and which said relief had not been endorsed of 1st Plaintiff's writ of summons.

ii. The trial Court erred in law when it held that 2nd Plaintiff is still a shareholder of 2nd Defendant despite the voluntary transfer of shares and recovery of capital contribution subscription by the 2nd Plaintiff.

iii. The trial court erred in law and fact when it held that the 1st Plaintiff is still a shareholder of 2nd Defendant.

iv. The award of GH¢40,000 as costs in favour of the 1st plaintiff against the 1st Defendant is harsh and excessive in the circumstances.

v. The judgment is against the weight of evidence.

vi. Further grounds of appeal would be filed upon receipt of the record of proceedings.

No further grounds were filed. The Court of Appeal heard the case and reversed the decision of the trial High court on 29th April, 2021.

Following from this reversal in their fortunes, the plaintiffs have therefore brought this instant appeal to this honourable court by notice of appeal on 17th June, 2021, with eight grounds of appeal.

> *"(a) That the Court of Appeal erred in law when it held that the 1st Plaintiff was not a shareholder of 2nd Defendant Company because 1st Plaintiff did not personally sign the incorporation document, contrary to the position of law that a person can do an act through a lawfully authorized representative.*
>
> *(b) The Court of Appeal came to the wrong conclusion that 1st Plaintiff was not a shareholder of 2nd Defendant Company because he did not personally sign the incorporation document of the 2nd Defendant Company, contrary to the admission in evidence of 1st Defendant that he signed the incorporation document on behalf and upon authorization of 1st Plaintiff.*
>
> *(c) That the Court of Appeal erred in law when it held that since 1st Plaintiff failed to particularise the fraud alleged against 1st Defendant in his witness statement, when (i) the law on particulars apply to pleadings and not evidence and (ii) paragraph 13 of the further amended statement of claim provided particulars of fraud.*
>
> *(d) That the Court of Appeal erred in law when it held that the purported buy back of 2nd Plaintiff's shares as well as the consequential action were lawful when there was no evidence of*

meeting of conditions of buyback including the consent to the buy back by 2nd Defendant company as required by law.

(e) The Court of Appeal erred in law when it relied on the witness statement of Peter Nanfuri as corroborative evidence when the said Peter Nanfuri never appeared at trial to identity his witness statement for same to be adopted as is evidence in chief and thereafter subjected to cross-examination which is contrary to law.

(f) The Court of Appeal erred in holding that the valuation report commissioned by 1st Plaintff and produced by third party professional was wrongly tendered in evidence by 1st Plaintiff and wrongly admitted by the trial court, when it was more reasonable to accept the document on grounds of reliance and production from proper custody than to reject on the sole ground of authorship.

(g) The Court of Appeal erred in law when it held that 1st Plaintiff was not entitled to 5 out of the 10 plots of land 1st Defendant purchased because 1st Plaintiff had not specifically asked for a recovery of 5 plots of land when the 1st Plaintiff had asked the trial court to make other orders that the trial court deems fit.

(h) The judgment of the Court of Appeal is against the weight of evidence..

Case for the plaintiffs/respondents/appellants

The facts are sufficiently set down above in respect of the 1st plaintiff.

The 1st plaintiff as a Director and the majority shareholder with 43% of the shares, paid for his share through various sums of money he transferred to 1st defendant to capitalize 2nd defendant Company. On account of his immigration status, he could not return to Ghana, but relied completely on his friend the 1st defendant.

The documentation leading to the incorporation were all signed with his consent and on his behalf by the 1st defendant. The 1st defendant ran the affairs of the company by himself, but the 1st plaintiff, supplied all the equipment the company needed and provided funding. The parties communicated regularly on the affairs of the company, until 1st defendant cut him off completely. He was never paid any dividend. 1st plaintiff said after he regularized his immigration status, he returned to Ghana only to discover that 1st Defendant had caused a re-registration of the company, removed his name as a Director and shareholder of 2nd Defendant Company and changed the structure of the shareholding. He had never been informed of the re-registration, nor had he instructed 1st defendant to alter his shares. 1st plaintiff also found that though he neither resigned nor received any notice that he was being removed as a Director of 2nd defendant Company, he had been so removed.

The 1st Plaintiff also claimed that he took a loan of 10,000 from a UK bank and remitted the money to 1st defendant, for the purpose of purchasing plots of land for their joint benefit. The evidence also showed that 1st defendant did acquire land of 10.4 acres (tenplots) of land at East Legon but in his own name only, even though the funding was provided by 1st plaintiff. but 1st defendant never gave him his share of five (5) plots of land as agreed. He also acquired 3.0 acres (three-and-half plots) of land in Adjiringanor within the same geographical area, again in his own name only. Eventually, the three-and-half plots at Adjiringanor were lost to litigation The 1st defendant admitted to having purchased all the land in his name only, but that he held the land in trust for himself and the 1st plaintiff.

Having taken over 2nd defendant completely, and without recourse to his business partner, the 1st defendant incorporated a new company, Oak House Group Ltd, now 3rd defendant herein. He transferred all the shares he owned as well as all those he "acquired" from his partners, both 1st and 2nd plaintiffs, in 2nd defendant, thereby becoming 93% owner of those shares. The 1st plaintiff, therefore, claimed a part of the shares of 3rd defendant as he had been wrongfully divested of his shares in 2nd defendant.

2nd Plaintiff

On his part, 2nd Plaintiff said he was a subscriber of 25% of the shares and that he paid 20,000,000 old cedis cash representing 20% shares. He had first been allotted 20% of the shares but was later allotted a further 5% in consideration of the services he rendered in the pre-incorporation and immediate post-incorporation phases. 2nd Plaintiff averred that 1st Defendant was the alter ego and the controlling mind of the 2nd Defendant Company; and that he used his position as Managing Director and alter ego to push him out of 2nd Defendant Company as Director and shareholder.

Case for Defendant

The 1st defendant submits that from about the year 2000, he and 1st plaintiff had been friends and business partners. Their business relationship over this period was based on trust and in utmost good faith. It was on the basis of this trust that the 1st plaintiff and 1st defendant incorporated several companies such as Cedem Travel and Tour Services, Business Express Services, Concord Security Limited (UK) and the 2nd defendant Company.

The 1st defendant admits that by the original shareholding structure in 2nd defendant Company, the 1st plaintiff held 43%, 2nd plaintiff 25%; he 1st defendant held 25%: with the 7% going to a friend who later resigned and transferred his shares to him. He held

these shares on behalf of 1st plaintiff but he managed 2nd defendant's business all by himself, and was indeed its alter ego and directing mind. This was done with 1st plaintiff's approval and consent, and that "*This was the case right from incorporation up till the institution of the present proceedings*."

The 1st defendant claims in paragraph 11 of his statement of case that the parties agreed that 1st defendant would relinquish his shares in the Concord Security in UK to 1st plaintiff and 1st plaintiff would relinquish his shares in 2nd defendant to 1st defendant. 1st defendant claims that it was 1st plaintiff's decision to make his wife a shareholder in Concord Security in 2006 that led to the agreement that he would relinquish his interest in Concord Security and in return take over the shares of 1st plaintiff in 2nd defendant. He further claimed in paragraph 12 that to this end,

> *"A share transfer agreement was therefore executed between 1st Plaintiff and 1st Defendant by which 1st Plaintiff transferred his shares in 2nd Defendant to 1st Defendant. All of this was done in the same way the incorporation was done so 1st Defendant signed everything on behalf of 1st Plaintiff and transferred the shares to himself.*

The 1st defendant admits that by their arrangements he signed on behalf of the 1st plaintiff as he had been doing on every occasion, and so 1st plaintiff's shares in 2nd defendant Company were acquired by him, through him signing on behalf of 1st plaintiff as was their practice. The 1st defendant also submitted that although he signed the transfer agreement all by himself, he did so on behalf of 1st plaintiff and that this was not strange because he was the one who signed all the documents of incorporation on behalf of 1st plaintiff. Therefore, if his shares had been transferred to 1st defendant by virtue of an agreement reached between them, it was consistent with the practice they had adopted to run their business

In his own submissions in paragraph 14 1st defendant stated that though what transpired might appear curious and odd.

> "***the curiosity raised by the transaction is lessened and indeed completely whittled away when accounted (sic) is taken of the fact already established that the shares the subject matter of the transaction were acquired by 1st Plaintiff in the same way they were transferred to 1st Defendant***."(emphasis in original)

In respect of the plots of land, the 1st defendant admitted that some land was bought by them but that it was not from money remitted by 1st plaintiff, but rather money from one of their joint businesses – Cedem Travel Services. The 1st defendant admitted to having purchased the land in his name only, but that he held the land in trust for himself and the 1st plaintiff. He also claimed that the land was made up of 8 plots and not 10 plots as 1st defendant claimed and that as a result of litigation on the lands, some were lost to them. Of what was left, four plots were sold upon 1st plaintiff's instruction, it had been agreed between them that the proceeds were to be used by him to roof his (i.e. 1st defendant's) house. Another plot was also given to an employee of 1st plaintiff's to develop, and that the person was already developing the land.

In respect of 2nd plainitff's claims, 1st defendant said that 2nd plaintiff voluntarily signed away his directorship position; and relinquished the 25% shares in consideration of the sum of three thousand Ghana cedis, which was paid to him. He also executed a deed of transfer of shares and so ceased to be a shareholder. It was therefore surprising that he was now claiming that he was "*coerced into relinquishing the shares in 2nd Defendant.*"

1st defendant denies charges of fraud since what happened was the result of an agreement. In paragraph 9 on p.12 of his statement of case, 1st defendant describes his

signing the share transfer agreement by himself for himself and on behalf of 1st plaintiff as not being wrongful since he was "*reversing his own acts*". He submits rather petulantly,

> "*if 1st defendant did not act fraudulently when he signed 2nd defendant's regulation for and on 1st defendant behalf, why then is he reversing the process by which 1st defendant obtained those shares fraudulent? It cannot be*"

In respect of the plots of land, his explanation in Paragraph 13 and 14 was

> *"Plots of land were given to "Plaintiff's employee upon 1st plaintiff's instructions to 1st Defendant. Another 4 plots were sold with 1st Plaintiff's consent and proceeds used to roof 1st Defendant's residence.*

The said employee, however, was not named, nor was any proof given of the agreement for him to use the proceeds from the sale of their common property for his own use.

It is therefore the more surprising that in the submissions, 1st defendant pointed out in paragraph 6 of page 17

> *"Also worthy of noting is the fact that 1st Plaintiff provided no documents proof of any direct financial contribution by way of bank transfers or contributions given by 1st Plaintiff for purposes of 2nd Defendant."*

Was 1st defendant, who had no documentary proof himself of serious claims on account on the informal manner of their dealings now demanding documentary evidence from 1st plaintiff as proof of his claims?

1st defendant bases a case on whether the evidence of 1st plaintiff's claims was consistent with "*legally authorized manner for constituting a person as one's legally authorized*

*representative to do something on one's behal*f?", but also shows occasions when he acted on 1st plaintiff's instructions because their relationship was based on informal arrangements. For instance, if the 1st plaintiff asked him to give a plot of land to an unnamed employee of his and 1st defendant acted on it, and now relies on it as a defence, where is the documentary evidence of such instruction?

He then concludes his submissions by submitting that (paragraph 20 of page 41).

> "*1st Plaintiff however, does a volte face when it comes to following through the same story he corroborated when 1st Defendant says that 1st Plaintiff lost the shares through the same process by which 1st Plaintiff acquired the Plaintiff share*.
>
> *1st Plaintiff's answer in effect is that for the acquisition he endorses the acquisition but when it comes to losing the shares his answer is in the negative. You cannot speak from two ends of your mouth on one matter. It is this reason for which the court below rightly discounted the claim of fraud against 1st Defendant*.

The appeal

Some of the eight grounds of appeal filed by plaintiffs specifically, grounds '(b)', '(d)', '€' and '(f)', were too verbose and occasionally argumentative, violating Rule 6(4) of the Supreme Court Rules, 1996 (CI 16) as amended. Those grounds will therefore be taken together and addressed as one. In ***Smith & Others***. v ***Blankson (substituted by) Baffor & Another.*** (2007-2008) SCGLR 374. Sophia Akuffo JSC (as she then was) complaining about the many grounds of appeal filed stated

at p.381 and p. 385.

> *"The most cursory reading of the notice of appeal would show that, in fact, there are only three grounds of any impact to the resolution of this matter"… It is not by lengthy words and paragraphs that a bad case can be transmuted into a good one. The only ends served by such protracted pleadings it to waste the court's time and, at times, confuse the issues;… Counsel would be well advised to desist from such unnecessarily rambling and wordy pleadings and submissions in the future..."*

See also, dictum of Dr. Seth Twum JSC in ***West Laurel Co. Ltd & Others*** v ***Agricultural Development Bank*** [2007-2008] SCGLR 556 at 562 when he complained that one of appellant's grounds was "*both argumentative and full of narratives*" and proceeded to strike it down under Rule 6(5) of CI 16.

The plaintiffs have pleaded the omnibus clause: "The judgment of the Court of Appeal is against the weight of evidence.", under Ground '(**h**)' of the appeal. It will therefore be addressed first, as this is where the appellate court's powers of re-hearing are grounded.

Ground '(**h**)'

The appellant has pleaded in ground g that the judgment is against the weight of evidence. Having so pleaded, it is trite law that an appeal being in the nature of a re-hearing, that this puts an obligation on an appellate court to review the entire proceedings to make up its own mind about the evidence led, See the oft cited authorities of ***Tuakwa*** v ***Bosom*** [2001-2002] SCGLR 61, ***Agyeiwaa*** v ***P&T Corp*** [2007-2008] 2 SCGLR 985; ***Oppong*** v ***Anarfi*** [2011] 1 SCGLR 556; ***Djin*** v ***Musah Baako*** [2007-2008] SCGLR 686 ***In re Bonney (Decd) Bonney*** v. ***Bonney*** [1993-94] 1 GLR 610 per Aikins JSC at p. 617.

In ***Tuakwa*** v ***Bosom*** (supra) te Supreme Court held per Akuffo JSC (as she then was) at p. 65

"furthermore, an appeal is by way of a re-hearing … 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".

The point is also made in **Oppong v Anarfi** (supra), per Akoto-Bamfo JSC at p 167 that,

"There is a wealth of authorities on the burden allocated to an appellant who alleges in his notice of appeal that the decision is against the weight of evidence led. … it is incumbent upon an appellate court in such a case, to analyse the entire record, take into account the testimonies and all documentary evidence adduced at the trial before it arrives at its decision, so as to satisfy itself that, on the preponderance of probabilities, the conclusions of the trial judge are reasonable or amply supported by the evidence."

Djin v **Musah Baako** (supra), it was held per Aninakwah JSC held at p691

"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 were 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.

It is clear, the appellate court is obliged to give the evidence another look and to analyse the entire record; and it is in the many wordy grounds of appeal that the appellant has sought to point out what evidence should have been applied in his favour.

Ground (a) and (b) are on the same point and will be addressed together:

> *(a) That the Court of Appeal erred in law when it held that the 1st Plaintiff was not a shareholder of 2nd Defendant Company because 1st Plaintiff did not personally sign the incorporation document, contrary to the position of law that a person can do an act through a lawfully authorized representative.*
>
> *(b) The Court of Appeal came to the wrong conclusion that 1st Plaintiff was not a shareholder of 2nd Defendant Company because he did not personally sign the incorporation document of the 2nd Defendant Company, contrary to the admission in evidence of 1st Defendant that he signed the incorporation document on behalf and upon authorization of 1st Plaintiff.*

The discussion of these grounds of appeal raise the issue of when an appellate court must defer to the findings of fact made by a trial court and when it can differ in the course of exercising its duty of re-hearing. An appellate court also has the responsibility to evaluate evidence on record for the purpose of resolving facts in issue and matters relevant to the facts in issue. Such re-assessment of evidence necessarily involves an examination of whether the trial court gave proper consideration to all the evidence in contention. In the process of analyzing and resolving facts in contention, the trial court may have to decide which witness to

believe; which witness is credible; and which statements of a witness it ought to accept or receive with caution. It is generally true that the trial court has opportunity to observe witnesses etc that an appellate court does not have, hence the posture of deference to such findings that is recommended to appellate courts. Principles have evolved in the course of time that guide the court as it tries to make up its mind one way or the other on the evidence. There is a long line of authorities that have established the applicable principles, that an appellate court must treat findings of fact by a trial court with respect, and that though it may interfere when the situation calls for it there must be good reason to do so.

Where a trial court makes findings of fact that are influenced by contemporaneous circumstances such as the observable demeanor of witnesses, it would be unwise to reject such findings without giving consideration to the observable circumstances that gave birth to those findings. In ***Kyiafi*** v ***Wono*** [1976] GLR 463 at 466 Ollenu JA justified the principles thus:

> *"It must be observed that the question of impressiveness or convincingness are products of credibility and veracity, a court becomes convinced or unconvinced, impressed or unimpressed with oral evidence according to the opinion it forms of the veracity of the witness. That being so, the court of first instance is in a decidedly better position than the appellate court. .. the appellate court should not interfere with findings of fact made by trial court."*

The Supreme Court has affirmed the principles involved when an appellate court has to analyse the findings of fact made by a trial court, by way of re-hearing. In ***In Re Okine (Decd) & Anor*** v ***Okine & Ors*** [2003-2004] SCGLR 582 Prof Kludze JSC stated at p.607

"There is a long line of cases to the effect that, even if the appellate court would have come to a different conclusion, it should not disturb the conclusion reached by the trial court. This is because the trial court is presumed to have made the correct findings. Therefore, where the evidence is conflicting, the decision of the trial court as to which version of the facts to accept is to be preferred, and the appellate court may substitute its own view only in the most glaring of cases. This is primarily because the trial judge has the advantage of listening to the entire evidence and watching the reactions and the demeanour of the parties and their witnesses….. Therefore, unless it is apparent that this advantage of seeing the witnesses and evaluating their testimony for credibility has been woefully abused, the conclusion of the trial judge should be respected. In other words, where the evidence can reasonably support the conclusions of the trial judge, the appellate judges should not order a reversal just because their assessment and comparison, or their view of the probabilities, may be at variance with those of the trial judge. If the evidence can lead to two or more plausible conclusions, the conclusion of the trial judge should prevail, even though a different judge might come to a different conclusion".

Therefore, treating the observations and defensible conclusions of a lower court with respect by an appellate court is dictated as much by a responsible exercise of the power of re-hearing as for practical good sense. It certainly is the case that a person who is not present at a hearing to make direct observation, and under circumstances whose atmosphere no written record could adequately capture, should be slow to express disagreement with one who had the direct experience.

A clear instance was exemplified in the instant appeal when the trial judge in assessing the evidence, came to the conclusion that a major witness of the 1st defendant who had given testimony as to how come the 1st plaintiff lost his shares in the company, was not credible. Of the witness, Henry Myles Mills, Company Secretary and DW2, who claimed that 1st defendant had signed the share transfer agreement as both "a transferor and a transferee" the trial judge at p. 22 of the judgment observed thus

> *"DW2 who is a lawyer failed to impress the court in the box. His voice was shaking and his frame was jittery. He sounded incoherent and when he had been in the box far less thirty minutes he pleaded to be released on a spurious claim that he had to appear another High Court. He wanted an escape route when the questions were too hot for him and was fumbling because of the untruth, he was on the box to peddle.*

A trial judge who had formed such an impression of an important witness was making use of the opportunity offered by being the one who saw the witnesses, to determine whether what they told the court was credible and deserved any weight at all.

In doing such assessment of the witness, the trial judge was backed by statutory authority. The Evidence Act 1975 (NRCD 323) provides a list of attributes that a trial judge may use in assessing the credibility of a witness.

> *Section 80 (2) states as follows:*
>
> *"(2) Matters which may be relevant to the determination of the credibility of the witness include, but are not limited to*
>
> *(a) the demeanour of the witness;*

(b) the substance of the testimony

(c) the existence or non-existence of any fact testified to by the witness;

(d) the capacity and opportunity of the witness to perceive, recollect or relate any matter about which he testifies;

(e) the existence or non-existence of bias, interest or other motive

(f) the character of the witness as to traits of honesty or truthfulness or their opposites;

(g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;

(h) the statement of the witness admitting untruthfulness or asserting truthfulness.

An appellate court without the benefit of such ocular observation, would have little reason to dispute the conclusion, and give weight to the testimony, nevertheless.

Again, in respect of assessment of documentary evidence by a trial court, the Court of Appeal chose to disbelieve an account which was backed by documentary evidence, in favour of one that had only the say-so of the party whose account was being disputed. The 1st defendant had averred that there was verbal agreement between them that 1st plaintiff could keep the shares of the UK Company (Concord) while he kept the shares of 2nd defendant Company. An examination of documentary evidence filed by 1st defendant showed that, contrary to his assertion that he came into the shares of 1st plaintiff's shares in 2nd defendant

Company as a result of a verbal agreement based upon the fact that *" being part of the success story of Concorde Security had relinquished his claim in favour of Oakhouse Ltd"* The trial judge found as a fact that that story was not credible on more than one ground. First,

> *" Concorde Security was incorporated in October 2004 whilst Oak House was incorporated on 18th November, 2004 just one month separating them."*

The Judge then queries (p438)

> *"what kind of success could have been recorded by a company established by a foreigner in UK within one month of operation to have been so financially successful to have inspired the incorporation of 2nd Defendant Company.*
>
> *This claim made by 1st Defendant I find not to hold water unproved, not supported by any shred of evidence and with the greatest respect a classic cock and bull story."*

Second, the trial judge found as a fact that on the record, the 1st defendant did not own any shares in Concorde Security as he had led the court to believe. His explanation of why his name did not appear on the records did not hold water and so the trial judge could not give any credence to his claims. These facts notwithstanding, the Court of Appeal stated at p16 of its judgment

> *"It said the 1st defendant explained the situation in his evidence by saying that it was eventually agreed between them that 1st plaintiff will take the Concorde Security in the UK while he 1st defendant also assume ownership of 2nd defendant company in Ghana. This is the*

explanation provided by the 1st defendant as to how 1st plaintiff became divested of his shares in 2nd defendant."

This is a very strange way to approach findings of fact by a trial court. The trial judge made meticulous analysis of the evidence before him and wrote more than two pages on why the 1st defendant's story could not be true. The appellate court without any analysis of the evidence at all, merely repeated the 1st defendant's unsubstantiated claims to dislodge the specific findings made by the trial court.

Again, the transfer of shares was explained in the judgment of the trial court thus:-

The Government of Ghana desirous of updating its Register of Companies in 2011 required companies to update their records. The project was not intended to affect material particulars such as Directorships and shareholding but it transpired that this was what happened to 2nd Defendant's shares as shown by the difference between Exhibit A and Exhibit D.

Under Exhibit D, a share transfer agreement 1st Defendant became the owner of the 100,000 shares i.e. 100% of 2nd defendant, he maintained that 1st Plaintiff transferred his shares to him. It turned out that the transfer of shares agreement had not been prepared under instructions from 1st Plaintiff or with his knowledge. It had been signed solely by 1st Defendant who claimed under cross-examination "that has been the practice then between myself and Edem Afram" but the share transfer agreement was not tendered and it could not be located at the Registrar -General's Department.

However, at p. 64 of the judgment of the Court of Appeal, the court proceeded to differ with the findings of fact of the trial court thus:

> *"The evidence before this court is that there was a government directive that all companies must be re-registered for regularisation purposes.* ***The 1st Defendant explained that in the course of complying with that directive and knowing that they have both agreed to take over Concorde and 2nd Defendant respectively, he transferred all shares of 1st plaintiff into his name. About Kimathi's shares, 1st defendant did admit the secretary must have made some mistakes by not writing his name.*** *1st defendant told the court 1st plaintiff never gave him any instructions to do so but he did based on that belief that he was no longer a shareholder in 2nd defendant. He went further to explain that just as he signed 1st plaintiff's signature when he was registering 2nd defendant and also allotting him shares and 1st plaintiff never complained but blessed it, in the same manner, he did when he transferred the 43% back to himself, in that belief that the 1st defendant was fully in control of 2nd defendant*." (emphasis supplied)

The Court of appeal approached the issue as if it was bound to accept the explanation of the 1st defendant to matters in issue. It therefore discounted the findings of the trial court made on documentary evidence and testimony of witnesses in favour of the explanation of 1st defendant, that was unsupported by the evidence available, and without any legal basis whatsoever. The Court of Appeal, said of the 1st defendant's explanation in robust support,

> *"However good or bad, this explanation may sound, the question the court is interested in is whether it is reasonably probable. That is the defence expected of a party accused of committing a crime."*

With respect, how could a bad-sounding explanation be considered "reasonably probable?" This is not only strange reasoning but, indeed and a complete misstatement of law. It is unclear why the Court of Appeal without any legal basis for so differing, jettisoned the meticulous analysis the trial court did, in favour of explanations by the 1st defendant that flew in the face of legal principles, because. With respect, an act done with consent can never be in the same league as one done without consent.

Consent

> *Consent is a matter of exemption or justification that may go to negative the existence of an offence. When it is a matter of exemption, it affects the circumstances that render an act a prohibited one … Acts such as the taking of another's property; contact with another's person; sexual intercourse; entry onto land in the possession of another, etc may ordinarily be engaged in without criminal liability. They are, however, rendered criminal by the absence of consent. Therefore the circumstances occasioning the doing of the act are material to the existence of criminal liability. …*
>
> *Where the lawfulness of an act depends on the consent of the victim, it must be shown that the consent was obtained from one who was mature enough to appreciate the import of the consent, and who was not labouring under any mental defect that might affect his or her cognitive abilities. Such consent must also have been freely given, without any compulsion whatso-ever, and with a full appreciation of the significance of the event to which the consent is given."*

See H.J.A.N Mensa-Bonsu, '*The General Part of Criminal Law – A Ghanaian Casebook*' vol 2 Black Mask, Accra, 2001 chapter 10.

The 1st defendant has set the fact of his act being lawful as a defence to the charge of fraud. Even if it was by his own largesse that he gave an absent business partner almost double the shares he was keeping for himself, with his consent, once the property had been accepted and paid for, purporting to take back those shares without the person's knowledge and consent could never be regarded as a lawful act of merely "reversing" what the 1st defendant had done. It is also unclear how the Court of Appeal came to misdirect itself on the law pertaining to consent, and allowed itself to come to the conclusion that an explanation whether good or bad, merely had to sound "*reasonably probable*" to give a *"the defence expected of a party accused of committing a crime*," in order to remove the tag of criminality from the conduct.

It must be here stated clearly that the act of taking over those shares was an act of appropriation that was not done with the owner's consent, and consequently, a dishonest appropriation. The Criminal Offences Act, 1960 (Act 29) defines "dishonest appropriation" in section 120 (1) (b) as follows:

> *(1) An appropriation of a thing is dishonest*
>
> *(b) if it is made by a person without claim of right, and with a knowledge or belief that the appropriation is without the consent of a person for whom that person is trustee or who is owner of the thing or that the appropriation would, if known to the other person, be without the consent of the other person.*

The fact that 1st defendant admits that the "*reversal*" of the 1st plaintiff's signature was without his knowledge and consent while at the same time making the claim

that there was a verbal agreement between them sounds strange to the ear. In any case, how does one "reverse" one's signature when it is already affixed to a document?

The trial court, in fact, made specific findings thus:

> *"I have found …that 1st plaintiff never gave any instructions for 1st defendant to appropriate his shares in 2nd defendant. And 1st defendant having done so is dishonest appropriation, which is fraudulent."*

How could the Court of Appeal gloss over all of that? If indeed the parties had come to agreement that 1st plaintiff should keep the shares whose quantity remained undisclosed in Concorde Security while relinquishing the 43% of shares in 2nd defendant, why then did 1st defendant admit that when he acted to "reverse" his signature and take back the shares, it was without the 1st plaintiff's consent? The two explanations cannot co-exist in the same transaction, and are not even "reasonably probable".

The trial court also analysed the evidence led by the 1st defendant to explain how the 1st plaintiff came to be divested of his shares without his knowledge and consent. He also went further to examine the events that led to the 1st defendant ceasing to be a Director or shareholder. The supposed share transfer agreement was not tendered and it could not be located at the Registrar -General's Department. Should such a vital agreement, if it existed, not have been tendered by one on whom the burden lay to prove that the act of appropriation had been done with the consent of the 1st plaintiff? Relying on section 30(5) of Act 179, he held that there had been no valid transfer of shares from 1st plaintiff to 1st defendant as he had claimed.

The trial court had examined the record of incorporation applied section 36 of the Company's Act, 1979 and come to the conclusion that 1st plaintiff had paid for his shares. He applied the presumption of regularity under section 37 of NRCD 323 and held that there was sufficient evidence that the statutory requirement of payment in cash for the shares which were 43,000,000 had been paid for by 1st plaintiff . Relying also on the evidence of PW3 who used to own 7% of the shares, and was Secretary to 2nd defendant, trial judge found that money for funding the company had come from 1st plaintiff. He stated at p 12 of the judgment (ROA 431)

> "*I find as a fact that the overwhelming evidence on record shows that Edem Afram contributed immensely in both cash and kind towards the incorporation of 2nd Defendant company and was the colossus financier of 2nd defendant. I find that he legitimately acquired 43% of the shares and paid for same and that his acquisition of the shares in 2nd defendant was not an act of kindness or favour from 1st Defendant at all.*"

Despite all of this analysis of available evidence by the trial court, the Court of Appeal drew the following startling conclusion:

> *"We agree with counsel of the appellant [i.e. 1st defendant] that to accede to the logic and reasons of the trial court clearly leads to one inevitable conclusion that in the first place 1st Plaintiff was never a shareholder and it would be equally fraudulent for 1st Defendant to have signed the regulation at the time of incorporation of 2nd Defendant on behalf of the 1st Plaintiff. The point is that it is the subscriber who signs the regulations and 1st Plaintiff have failed to sign the regulation is legally and factually not a subscriber*."

The conclusion appeared like a thunderbolt out of the blue, when the Court of Appeal now declared that the 1st plaintiff did not even own any shares in 2nd defendant because he did not personally sign the regulations as was required by law.

Throughout the proceedings, there had never been any issue about the 1st plaintiff's directorship and membership of the company. Both parties understood that to be the case and worked with that understanding, to the point when a witness testified to the extent of the funding provided, and also acknowledged that 1st plaintiff was "the guy with the money". Upon what basis then could the Court of appeal now come to this conclusion when the trial court had found as a fact that the 1st defendant was the majority shareholder and also that he paid for the shares?

On this score, one may turn to the Evidence Act, 1975 (NRCD 323). Section 26 where it is provided that

> *"when a party has by his own statement, act or omission, intentionally and deliberately caused or permitted another to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party…"*

In ***Republic*** v. ***Adamah-Thompson and Others, Ex parte Ahinakwa II (substituted by) Ayikai (No. 2)*** (2013-2014) 2 SCGLR 1396; at p. 1423 Benin JSC stated in respect of the doctrine of estoppel by conduct

> *"It is normally founded on fraud …There are five elements to establish in order to succeed in a claim founded an estoppel by conduct. These are:*

(i) the party alleged to be in breach must have made a representation which was false or must deliberately have concealed material facts;

(ii) the party making the representation knew it was false or that he acted negligently or recklessly in not knowing the falsity of the representation

(iii) the other party must have been led to believe the representation was true

(iv) the person who make the representation intended same to be relied upon; and

(v) the other person actually acted upon the representation and has suffered prejudice or loss that cannot be remedied unless the claim in estoppel succeeds"

One does not need to look far in the instant appeal to find all the elements in the conduct of 1st defendant.

The 1st defendant had led the 1st plaintiff to believe they were business partners and that he was the majority shareholder in 2nd defendant. On the strength of that belief, he had received funds and equipment for the running of the company, as the evidence showed. He cannot now be heard to say that he was not any such shareholder and that what he did to make him the majority shareholder was done in jest.

Constructive Trust

From all the admissions by the 1st defendant, it can be construed that he held the shares in trust for the 1st plaintiff. When can a person be held to be a constructive

trustee of another's interest in property? In ***Hussey*** v ***Palmer*** [1972] 3All ER 70: 1 WLR 1286 Lord Denning explained 'constructive trust' as follows:

> *"It in a trust imposed by law whenever justice and good conscience require it. It is a literal process, founded upon … principle of equity, to be applied in case where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. It is an equitable remedy by which the court can enable an agreed party to obtain restitution"*

As pointed out by Millett L J in ***Paragon Finance Plc*** v ***Thakerar & Co*** [1999] 1 All ER 400 at 408

> *"the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is colored from the first by the trust and confidence by mean of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property."*

The Supreme Court of Ghana has also made a number of pronouncements on this form of implied trust. In ***Soonboon Seo*** v **Gateway Worship Centre** 2009 SCGLR 278, a Korean missionary raised money in Korea in the name of a church based at

Ashaiman, a township in the Greater Accra Region of Ghana. Upon his return to Ghana, the missionary announced in church that he had raised money in the name of the church, but did not disclose how much. Subsequently, he bought land with some of the money. The church brought action against him for inter alia, declaration of title to the land. The Court held, Per Akuffo JSC at p. 296 "The facts clearly support the creation of a constructive trust (an implied trust.) … relying on the dictum of Taylor JSC in ***Saaka*** v ***Dahali*** [1984-86] 2 GLR 774 at 784 that,

> *"A constructive trust arises when, although there is no express trust affecting specific property, equity considers that the legal owner should be treated as a trustee for another. This happens, for instance, when one who is already a trustee takes advantage of his position to obtain new legal interest in the property as where a trustee of leaseholds takes a new lease in his own name. The rule applies where a person although not an express trustee, is in a fiduciary position …"*

From all the authorities above, the stated that a Constructive Trust sounds in Equity and arises where the courts, by their discretion, decide that it would be unjust to allow someone to keep property solely for himself and not share with another. In the instant case, it would be unconscionable to hold otherwise, for at all material times, the 1st defendant knew he held the shares paid for by the 1st plaintiff, in trust for him and would be deemed to be a constructive trustee.

Again, it is an elementary rule of evidence that when an adversary makes an admission that is advantageous to the other party there would be no need by that party to prove that material fact. See **In Re-Asere Stool; Nikoi Olai Amontia (substituted by Tafo Amon II)** v. **Akotia Oworsika III (substituted by Laryea**

Ayiku III). [2005-2006] SCGLR 637, this honourable Court, speaking through Dr. Twum, JSC (as he then was) said at p.651,

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

After the many statements that 1st defendant had made in respect of the relationship with 1st plaintiff, the Court of Appeal had no basis to come to the conclusion it did.

Fraud

(c) *That the Court of Appeal erred in law when it held that since 1st Plaintiff failed to particularise the fraud alleged against 1st Defendant in his witness statement, when (i) the law on particulars apply to pleadings and not evidence and (ii) paragraph 13 of the further amended statement of claim provided particulars of fraud.*

The 1st plaintiff made allegations of fraud against the 1st defendant and pleaded the particulars as required by law and on the well-known authorities. The Court of Appeal disputed this, but the evidence belied this posture of doubt.

What is fraud?

Taylor JSC (sitting in the Court of Appeal) gives a comprehensive definition in ***SA Turqui & Bros*** v. ***Dahabieh*** [1987-88] 2 GLR 486 (CA), which bears quoting. At p. 502 he said:

In law, it involves a false representation whether exhibited by words or conduct or otherwise which, in the well-known words of Lord Herschell in ***Derry*** *vs.* ***Peek*** *(1889) 14 App. Cas 337 (H. L) stated at p. 374, is'…made (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false.'"*

He went on and said

"In my opinion, a charge of fraud in law can be taken to be properly made against a party who knowingly or recklessly whether they conduct or words uses unfair, wrongful or unlawful means to obtain a material advantage to the detriment of another party. It is an insidious form of corruption, and it is therefore a charge involving moral obloquy. Bluntly put without equivocation, it is a species of dishonest conduct.

In ***Okofoh Estates Ltd*** v. ***Modern Signs Ltd*** [1996-97] SCGLR 224, at p.254 the Supreme Court per Edward Wiredu JSC (as he then was) said,

"An allegation of fraud goes to the root of every transaction. A judgment obtained by fraud passes no right under it and so does a forged document or document obtained by fraud pass no right."

"*Fraud is a serious sin against the administration of justice and as is often said, fraud vitiates everything*", so intoned Kpegah JSC in ***Republic*** v. ***High Court; Accra ex parte Aryeetey*** [2003-2004] SCGLR 398 at p. 406.

On account of the seriousness of its consequences on any transaction when established, the Supreme Court has insisted that it must ordinarily be pleaded so that sufficient notice would be given as to what the other side was to prepare to

defend. In ***Apeah*** v. ***Asamoah*** [2003-2004] 1 SCGLR 226 at p.243 it was stated by Brobbey JSC

> *"Ordinarily, fraud should be pleaded. It was not pleaded in the instant case. Notwithstanding the rules on pleadings the law is that where there is clear evidence of fraud on the face of the record, the court cannot ignore it."*

See also dictum of Atuguba JSC in ***Amuzu*** v**. *Oklikah*** [198-99] SCGLR 141 at p.183.

In the instant appeal, the 1st plaintiff accused 1st defendant of fraud and set out the particulars of fraud in paragraph 13 of the amended statement of claim filed on 5th May 2016 to include the following:-

> *"a. Unknown to Plaintiff 1st Defendant without due process fraudulently removed Plaintiff as Director of 2nd Defendant Company.*
>
> *b. 1st Defendant has fraudulently altered the shareholding structure of the Company to remove Plaintiff as a shareholder without following due process.*
>
> *c. That according to the shareholding structure, Plaintiff is mysteriously no longer a Director or Shareholder.*
>
> *d. That 1st Defendant fraudulently transferred Plaintiff's shares to 1st Defendant without his consent and or due process."*

Consequently trial Judge held that the claim of fraud had been proved and that he would cancel the deed of transfer as having been based on fraud perpetrated by 1st defendant. At p. 23 of the judgment, the trial court stated that

"Simply because he wrote the name of 1st Plaintiff on Exhibit 'A'. 1st Defendant thought he could similarly appropriate the shares of 1st Plaintiff. 1st Defendant cannot transfer the shares of a shareholder to himself and sign on behalf of that shareholder and himself as transferor and transferee in the face of the strong claim by 1st Plaintiff that he never gave such instructions. It is for 1st Defendant to prove that 1st Plaintiff gave him such instructions."

Even 1st defendant cast doubt on his ownership of 100% shares as not being correct and impugn Exhibit "D" that gives him all the shares in 2nd defendant. 1st Defendant's explanation is that it was a paralegal that gave him all the 100% shares and he also signed without reading it making him effectively having appropriated the shares of Kimathi Kuenyehia as well. How could 1st Defendant now attribute appropriation of all the shares to the mistake of a paralegal?"

The trial judge therefore concluded at p.25 of the judgment

"I have found that whatever appropriation of the shares of 1st Plaintiff by 1st Defendant was an act of fraud that no court of justice will allow it to stand. For fraud vitiates agreement, contracts and unpack (sic) what has been wrapped…1st Defendant did not own 93% in 2nd Defendant and could not have transferred same … the act being fraudulent, nothing can be founded on it"

On this point, the Court of Appeal disagreed with the trial court's findings. The reason for so disagreeing was that Exhibit D which was the new share structure,

had been tendered by 1st plaintiff himself so no fraud had been proved. The Court of Appeal said

> *"Exhibit "D" was tendered by the 1st Plaintiff himself and this was admitted into evidence by the court. It was not controverted nor objected to as obtained fraudulently and therefore this court takes it as the true state of affairs then at the trial. This is an official document, a certified true copy coming from the Registrar General's Department and more so, tendered by the Plaintiff. The law is clear such documents are presumed to be the true state of affairs until proven otherwise. Until the contrary is proved, Exhibit D is deemed to be prima facie evidence that the procedures were duly complied with, approved as such by the Registrar General and entered into its official records. The justice to be dispensed by courts is justice within the law not one of sympathy…"*

With the greatest respect, the official document was tendered to show exactly what the 1st defendant had done by way of altering the share structure and that 1st plaintiff's plaint was not mere conjecture. It was not tendered to show how he had participated in the making of Exhibit D. The Court of Appeal should have found it interesting that 1st defendant himself admitted that Exhibit D which was an official document from Registrar-General's Department, recited an untruth that he owned all 100,000 shares[i.e 100% of the shares in 2nd defendant]. This he had blamed on the mistake of a paralegal and that he had signed the document without reading. When he was incorporating 3rd Defendant Company, it was recited that he had 93,000 shares in 2nd Defendant and so Exhibit D served its purpose in showing the extent of the perfidy of 1st defendant. Nothing more.

The Court of Appeal claims that the 1st plaintiff did not particularise his claim

> *"We are of the opinion that even though there was no particularization, the 1st Defendant's explanation is reasonably probable and creates a doubt in our minds and therefore disposes of that allegation of fraud against him."*

From this, the Court of Appeal makes a startling statement that "*The 1st plaintiffs pleadings did not disclose any cause of action based on fraud by 1st defendant*". It however, goes on to state.

> *"We believe there are doubts as to whether he had the intent to defraud the 1st Plaintiff. This court is not oblivious of the position of the law that even if fraud is not pleaded nor particularised but it is apparent on the face of the record, the court has power to hold so… (citing Joana Nyarko v Maxwell Tetteh J4/27/19, 11th December 2019 per Kotey JSC)"*

Having said that, the Court of Appeal in apparent contradiction to the holding of the case he cited, when the Supreme Court speaking through Kotey JSC stated the law thus:

> *"This Court has held in a number of cases [that] … though it is preferable to plead and particularise fraud, failure to do so is not fatal in all circumstances."*

then goes on and says

> "*In the instant appeal though the particulars were not there, which flouts the procedure, assuming it was established, this court could go ahead to hold that there was the intent to defraud. However, do not think the intent by 1st defendant to defraud 1st plaintiff was established nor was it apparent on the face of the record*."

For the Court of Appeal to cite authority to the effect that even if the alleged fraud is not particularized, the court can still make its findings, and in the same breath claim that the fraud was not particularized so that violated Order 11 r 12 of the High Court (Civil Procedure) Rules 2004 (CI 47) seems to mean the exact opposite of what the authority cited sought to convey.

This posture is incomprehensible, given the facts and the law as found by the trial court. The Court of Appeal does not state what caused the "reasonable doubt" to form in its mind, as there is no analysis of any facts that could have produced that result, in contradistinction to the trial court's evidence-based conclusions that fraud had been established. One wonders what evidence beyond what had been led before or how the 1st plaintiff came to be deprived of his interest in 2nd defendant, would have met the court's approval. The Court of Appeal's willingness to discount 1st plaintiff's account but to accept the 1st defendant's improbable explanations leaves a lot to be desired.

Ground (e)

> *(e) The Court of Appeal erred in law when it relied on the witness statement of Peter Nanfuri as corroborative evidence when the said Peter Nanfuri never appeared at trial to identify his witness statement for same to be adopted as is evidence in chief and thereafter subjected to cross-examination which is contrary to law.*

The witness Peter Nanfuri submitted a Witness Statement but did not show up in court to be cross-examined on it. In the recent case of ***John Dramani Mahama and Electoral Commission, Nana Addo Dankwa Akufo-Addo 7th December, 2020*** Writ No. J1/05/2021 16th day of February, 2021(Unreported) The Supreme Court explained the status of a Witness statement

"The rules permit a party to call or not to call a witness, who has filed a witness statement to testify, as the mere filing of a witness statement does not constitute an election to testify …"

For all practical purposes therefore, if the one who provides a witness statement does not attend court to identify the statement and be sworn, and even cross-examined, then the evidence is not before the court. It was thus for legally valid reasons that Nanfuri's evidence as provided by a Witness Statement was expunged from the trial records by the trial judge. Surprisingly, the Court of Appeal resurrected it and applied it as corroborative evidence. This ground of appeal is also allowed.

Ground '**f'**

(f) The Court of Appeal erred in holding that the valuation report commissioned by 1st plaintiff and produced by third party professional was wrongly tendered in evidence by 1st Plaintiff and wrongly admitted by the trial court, when it was more reasonable to accept the document on grounds of reliance and production from proper custody than to reject on the sole ground of authorship.

The evidence showed that the 1st plaintiff caused an expert to produce a Valuation report for him. Based upon the values ascribed to landed property in the area where the lands in contention used to be, the trial court accepted the values in the report and ordered 1st defendant to pay for five of those plots of land based upon that report.

The Valuation Report was produced at the behest of, and for the purposes of 1st plaintiff. This report thus qualified to be described as self-serving evidence. Evidence is deemed to be self-serving when the documents are prepared by one

party solely for the purposes of a trial. In ***Yehans International Limited*** v ***Martey Tsuru Family & Anor*** [2019-2020] 1 SCLRG 838, the Supreme Court held that documents prepared either during the trial or solely for the purpose of the trial are deemed to be self-serving and deserve no weight. In that case, Sophia Adinyira JSC at pp. 848 to 849, said of such evidence

> *"… The document, exhibit 17, which was prepared by the first Appellant without any input from the respondents … can rightly be described as self-serving and worthless as held by the Court of Appeal. Their lordships were justified in not attaching any weight to this survey plan."*

See also See also ***Ago Sai & Others*** v ***Kpobi Tettey Tsuru II*** [2010] SCGLR 762. Ansah JSC stated at p. 786

> *"… copying an old map of an area in dispute on the instructions of a plaintiff in a suit, are [sic] self-serving and the law was that it did not permit a party to prove his case by previous acts in his favour…"*

See also ***Ahadzi & Another*** v ***Sowah & Others*** [2019-2020] 1 SCLRG 79, per Pwamang JSC in respect of the self-serving nature of Statutory Declaration.

The evidence was clear that the valuation report had been prepared at the instance of the plaintiff for purposes of this litigation, with the 1st defendant making no input in the process of its production. It was therefore a self-serving document and the trial court should not have relied on it. The trial court should have based its conclusions on a document ordered by the court itself, or produced at the instance of both parties. The appeal on this ground is allowed.

Ground 'g'

(g) The Court of Appeal erred in law when it held that 1st Plaintiff was not entitled to 5 out of the 10 plots of land 1st Defendant purchased because 1st Plaintiff had not specifically asked for a recovery of 5 plots of land when the 1st Plaintiff had asked the trial court to make other orders that the trial court deems fit.

Throughout the trial, there was evidence that the two parties acquired land at East Legon and other areas in the vicinity. The dispute was as to how many they were. Whilst 1st plaintiff said there were about 10 plots, 1st defendant said there were eight of them. The trial court made findings of fact based on documentary and other evidence, that there was more than one set of lands – one was 10.4 acres and the other was 3.5 acres. The 1st plaintiff maintained that he funded the purchase of the plots of land with a ten thousand-pound sterling (£10,000) loan from the UK, whilst the 1st defendant insisted the lands were bought with proceeds from one of the companies – Cedem Services – which they both owned. This admission, at a minimum, entitled them prima facie, to a half share each, or 5 plots of land apiece, for "equality is equity."

1st defendant also maintained that he held the land for himself and in trust for 1st plaintiff. The trial judge came to the conclusion that there was no evidence that the Cedem company's finances could fund the land purchase etc. and of the 1st defendant's claim, stated that *"it remained a wild allegation with no substance to back it and dismiss it as totally untrue*." Whatever the situation was, the 10 plots (or 8 as the case may be), were proved to have been purchased and owned by both parties so the court ordered that 1st plaintiff was entitled to five (5) of those plots.

To these claims, the Court of Appeal's response was that 1st plaintiff had not proved the claim that he sent money from UK and that the burden of proof shifted to him to prove that he transferred money to 1st defendant for the purchase and

that he failed to establish his case or lead any evidence to confirm the transfer. With respect, this is an argument that carries no weight. The 1st defendant himself admitted that 1st plaintiff had some plots of land purchased by him and that he held them in trust for 1st plaintiff. As to why he no longer had the land he had a number of explanations, as to some litigation in respect of double sale of lands by their landowner. He also stated that 1st plaintiff instructed him to sell four of those plots and use the proceeds to roof his own house. He also instructed that one of those plots be given to an employee of his in the UK and that the person was developing it.

With such an admission the burden of proof shifted to him to prove these instructions by 1st plaintiff. Having failed to do so, the allegation that he had appropriated five plots of land belonging to 1st plaintiff still stood unchallenged. In any case, since the 1st defendant's admission was against his own interest, how important was it for the 1st plaintiff to prove that he financed the purchase of the plots, and for his claim to founder because the Court of Appeal did not believe he was the source of the funding? If 1st defendant had not recognized his claim on those plots would he have provided that explanation of how the lands came to be sold even though he bought them in his own name?

The Court of Appeal did not comment on the fact that the burden to prove the permission granted by 1st plaintiff to him to sell land they both owned and to apply the proceeds to his own use as 1st defendant had already admitted. In the same way, the evidence on the 5th plot which had been given to a third party, supposedly on the instruction of 1st plaintiff, could easily have been established by testimony or documentary evidence. As things stood, the Court of Appeal was disputing the existence of plots of land that 1st defendant had admitted to having purchased and held for his own benefit and in trust for 1st plaintiff which he had appropriated to

his own exclusive use. Whilst the trial court did meticulous analysis of the exhibits of receipts and came to the conclusion that the lands lost to litigation were different from those appropriated, the Court of Appeal was content to hold in the teeth of documentary evidence, that all the lands had been lost through litigation. It said

> *"The defendant tendered exhibits 14-18 to establish that he indeed bought the lands though from different source of funding and the problems encountered after purchase. He tendered receipts from the vendor, Margaret Abbey, the documents on the issues in court, and the judgments he obtained. 1st Defendant even testified that one of such plots he bought the 1st Plaintiff himself gave one out to one of his Concorde, UK, employees who is developing same as at the time of the trial.*
>
> *I guess this satisfies the claim to render accounts of those lands.*

With respect, this conclusion flies in the face of the evidence led, and the findings of the trial Judge. After examining Exhibits 14, 15 and 16, the trial Judge stated at page 32 of the judgment (ROA 451)

> *"By Exhibit '16' I will find that the litigation over the land that 1st Defendnat engaged in was not in respect of the ten and half plots but over three and half plots for which 1st Defendant sought a court order to recover that money. Having admitted brazenly of selling four of the plots to roof his house and finding that 1st Defendant had no just cause expecting any money from Concorde Security…I will order 1st Plaintiff to recover from 1st Defendant the value of five plots of land from 1st Defendant as per the valuation report."*

The Court of Appeal states (page 752 ROA) *"There was even no finding by the trial court that the Plaintiff is entitled to five (5) plots of the said lands*". This conclusion with due respect, is not supported by the evidence on record. At page 32 of the trial court's judgment, a specific finding was made, after he had analysed the evidence. This led the court to conclude that the land litigated over, was different from the ten and half plots claimed According to the trial judge at page 31 of the judgment,

> *"I have taken a critical look at Exhibit '14' and '15' being exhibit of an entry of judgment filed against Ms. Margaret Abbey for recovery of ¢16,000 together with interest.*
>
> *This amount paid for which 1st Defendant went to court to procure judgment was in respect of three plots of land paid at Adjiringanor and different from the 10 and half plots paid.*

How could Court of Appeal over look this assessment of evidence by the trial court and conclude that 1st Defendant owed no accounting to 1st plaintiff? Even if the Court of Appeal found itself unable to accept the valuation report in Exhibit J, the response was not to discount the purchase of the lands and 1st plaintiff's interest therein.

In any case the Court of Appeal said

> *"That 1st Plaintiff only asked for accounts and not his shares so the court had given what he did not ask for; and that parties are bound by their pleadings."*

If the Court of Appeal felt that it was "*not fair to accept the 1st Plaintiff's valuation reports tendered hook, line and sinker*," it was not fair either to use that to hold that the Plaintiff's demand for accounts had been satisfied only because the 1st defendant had offered excuses that did not stand up to scrutiny.

On ground 4 of the Court of Appeal, the less said about it the better. The information about the 1st plaintiff's wife's passport had nothing to do with the claims of directorship and shares and plots of land. It was a red-herring that did not deserve the attention of the appellate court.

The order to return the passport was not germane to the reliefs. A passport belongs to the issuing State and no one has a right to take hold of another's passport without authority from the State. The order to return it was appropriate.

Ground '**d**'

> *(d) That the Court of Appeal erred in law when it held that the purported buy back of 2nd Plaintiff's shares as well as the consequential action were lawful when there was no evidence of meeting of conditions of buyback including the consent to the buy back by 2nd Defendant company as required by law.*

In respect of the buy back of the shares of 2nd plaintiff, the Court of Appeal spent much of its effort addressing 2nd plaintiff's plaint. The Court concluded that the purchase of shares held by 2nd plaintiff did not violate Section 56 of Companies Act 179 since he surrendered it voluntarily. The trial court had made a finding that 2nd plaintiff had been paid by cheque from 2nd defendant's account after he surrendered the shares. He also found that 2nd defendant's shares had not been sold to anyone and yet it had paid for them from its own accounts. Trial Judge held that this was wrongful and ordered the sale to be reversed. He also ordered that since 1st defendant had not been issued with a share certificate, his purchase of those shares had not been perfected and that they ought to be returned to 2nd

plaintiff. In consequence, the 2nd plaintiff was to refund to 2nd defendant, the money paid to him for the 25% shares he used to hold, with interest.

The Court of Appeal disagreed with this analysis and spent many pages establishing the fact that not having been given a share certificate was of no consequence in his acquisition of the shares that 1st defendant had acquired. inexplicably concluded that the fact that a share certificate was not issued to 1st Defendant *"is not material to his legal status as a member and shareholder."*

In respect of the claims of 2nd plaintiff's it is difficult to agree with the trial judge. The 2nd plaintiff surrendered the shares himself and took money for them. Whatever the reason for surrendering them, the deed was done by letter under his hand and even if he has now thought better of the step he took, he has only himself to blame. What is done is done, and we should let sleeping dogs lie.

The more serious question was who was entitled to the benefit of those shares once they had been surrendered by 2nd defendant, however reluctantly. This is because having exercised the buyback option the 1st defendant then appropriated those shares. Was the consent of 1st plaintiff sought as to what to do with those shares?

The 1st defendant then incorporated 3rd defendant and transferred all the shares he had "acquired" to that company. Since the 1st plaintiff retained his interest in the company, it followed that he had an interest beyond his unlawfully divested 43% in 2nd defendant in the new company. This should have been assessed and findings made as appropriate.

Conclusion

On account of the foregone discussion, notwithstanding that after the unlawful transfer of the 1st plaintiff's shares, all the shares in the 2nd defendant stood in the records in the name of the 1st defendant, he would be deemed to have held 43% of the shares on a constructive trust with the 1st plaintiff as the beneficial owner of those shares. By operation of the equitable principle of tracing, this beneficial interest of the 1st plaintiff attaches to 43% of shares in 3rd defendant to which the shares in 2nd defendant were transferred. It is from this position of the rights of the 1st plaintiff in the shares of the 2nd and the 3rd defendants that the reliefs he prayed for ought to be considered. Reliefs (a) and (b) would be granted in line with the law as stated. However, by his reliefs (c), (d) and (e), the 1st plaintiff prays for declarations that the transfer of shares in the 2nd and 3rd defendants are void and of no legal effect, but such declarations may affect third parties dealings with the 2nd and 3rd defendants over the period of the changes and are hereby refused. The reliefs sought do not in any way advance the economic interest of the 1st plaintiff which he seeks to protect by this action and which are sufficiently catered for by reliefs (a) and (b). It must be remembered that the remedy of declaration is discretionary and would not be granted by a court where it is likely to unsettle third party accrued rights. See **Ibenewura v Egbuna [1964] 1 WRL 219. PC.** It is hereby declared that the 1st appellant has been the beneficial owner of 43% of the company shareholding of the 2nd and 3rd defendants/appellants/respondents companies (the 2nd and 3rd respondents) right from the respective dates of their incorporation. Consequently the 1st respondent is hereby ordered to execute deeds of transfer covering 43% of the company shareholding of the 2nd and 3rd respondents that are currently registered in his name in favour of the 1st appellant. Upon the execution of the deeds of transfer of shares by the 1st respondent, the 2nd and 3rd respondents shall cause the name of the 1st appellant to be registered in their respective registers of members as the holder of 43% shares.

Relief (f) by which the 1st plaintiff prays for an order of accounts shall be granted. The 2nd and 3rd respondents are ordered to render accounts of their operations to the 1st appellant in the form of Annual Finanacial Statements in accordance with section 157 and the Eigth Schedule of the Companies Act, 2019 (Act 992) covering the years 2015 to 2022. This shall be done no later than six months from today 15th February, 2023.

In respect of relief (g), we have upheld the entitlement of the 1st plaintiff to plots of land at Adjirigano, Accra but rejected the self-serving valuation report tendered in evidence. The Greater Accra Regional Head of the Land Valuation Division of the Lands Commission, Greater Accra Region is hereby ordered to undertake a valuation of the land at Adjirigano, Accra referred to in Exhibit "J" tendered at the trial in the High Court in order to offer expert opinion on the value of one plot of land as at 28th May, 2015 when this case was commenced. The 1st appellant and the 1st respondent shall accompany the Head of the Land Valuation Division and point out the land to the Head and they shall furnish the Head with any documents on the land. The valuation report shall be presented to this honourable Court to be dealt with in accordance with law. This court shall determine the value of two plots of the land for that amount to be paid to the 1st appellant.

In sum, the appeal by the 1st plaintiff/respondent/appellant (the 1st plaintiff) against the judgment of the Court of Appeal dated 29th April 2021 succeeds in part and is allowed on the terms of the detailed orders made above.

The appeal by the 2nd plaintiff/respondent/appellant (the 2nd plaintiff) however fails and same is dismissed as being without merit. The 1st plaintiff in his evidence-in-chief said that the shares that were given to the 2nd plaintiff were originally allocated to the 1st defendant so we shall not disturb the record as it relates to those shares which shall remain in the name of the 1st defendant.

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

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

CONCURRING OPINION

AMADU JSC:-

(1) I have had the privilege of reading in draft the opinion of my learned and respected sister Professor Mensa-Bonsu (Mrs.) JSC, and I am in agreement that, this appeal must be allowed in part for the reasons hereinafter set out.

(2) The saying goes that, broken trust is like melted chocolate, no matter how hard you try to freeze it, it will never turn to its original state. The formidable personal and business relationship that existed between the 1st Plaintiff and the 1st Defendant herein saw the birthing of various businesses including the 2nd Defendant. Unfortunately, that exciting relationship which hitherto existed between the said principal parties, has lost its badinage and now, wallow in

sordidness because the mutual trust, which held them together is completely broken.

(3) The Plaintiffs in this action have proceeded against the 1st Defendant for marring their interest in 2nd Defendant, an incorporated body established under the laws of Ghana. While 1st Plaintiff's plaint is that the 1st Defendant unlawfully changed his (1st Plaintiff's) status as shareholder and director in the 2nd Defendant's Company, the 2nd Plaintiff contends that, the 1st Defendant coerced him and took over his shares. Expectedly, the 1st Defendant denied any wrongdoing, contending that, at all times, he acted upon the voluntariness of the Plaintiffs as defined by their informal business arrangements.

(4) This suit commenced at the Commercial Division of the High Court Accra, which delivered judgment in favour of the Plaintiffs. On appeal, against the said judgment, the Court of Appeal reversed the judgment of the Trial High Court Dissatisfied with the decision of the Court of Appeal, the Plaintiffs have appealed from the judgment seeking a reversal of the judgment of the Court of Appeal.

BACKGROUND AND FACTS.

(5) Sometime past, the 1st Plaintiff and the 1st Defendant were the best of friends. They lived in the United Kingdom and pursued several business interests. While in the United Kingdom, they established business entities called, Concord Security Limited Cedem Travel and Tour as well as Business Express Services.

(6) Subsequently, 1st Defendant relocated to Ghana. Upon his return, the parties decided to form another Company, Oak House Company Ltd; the 2nd Defendant. The 1st Plaintiff held 43% of the shares in 2nd Defendant; while 2nd Plaintiff held 25% of the shares, and Kwaku Dziedzorn Kuenyehia had 7% of the shares at incorporation. At the time of incorporation, all documentations requiring the

signature of the 1st Plaintiff was signed on his behalf by the 1st Defendant. This was the case because, the 1st Plaintiff was not physically in the jurisdiction at the time of the incorporation of the 2nd Defendant. The affairs of the 2nd Defendant, at all times were managed principally by the 1st Defendant in a manner that, he is at best, its *alter ego.* The parties however, adopted a friendly and an informal approach to the running of the business.

(7) According to the 1st Plaintiff, sometime after the incorporation of 2nd Defendant, he observed that, the 1st Defendant had stopped communicating with him regarding the affairs of the company. Suspicious of the new trend, he travelled to Ghana and discovered that, the 1st Defendant had removed him as a Director and shareholder of the 2nd Defendant Company without his sanction nor consent. Further, the 1st Plaintiff claims that, the 1st Defendant incorporated the 3rd Defendant and unlawfully caused the transfer of about 93% shares in 2nd Defendant to 3rd Defendant. 1st Plaintiff further contends, that while outside the jurisdiction, he remitted monies to 1st Defendant to acquire ten plots of land at East Legon and other plots at Adjiringanor for their joint benefit, yet, he was never given his share of those plots.

(8) Pursuant to an application by the 2nd Plaintiff on the 26th of July 2016, he was made a party to the suit. According to him, he held 25% shares in the 2nd Defendant company. According to him, the 1st Defendant used his position as Managing Director to coerce and force him to give up his shares and directorship of which, he received no consideration for same. He therefore wants the court to reverse that unlawful act.

(9) The reliefs sought by the 1st Plaintiff against the Defendants per his writ of summons filed on the 5th day of April 2016 were :

"a. A declaration that Plaintiff is a shareholder of 2nd Defendant Company.

b. A declaration that Plaintiff holds forty-three (43) percent shares in 2nd Defendant company.

c. A declaration that any purported change in the shareholding structure of the defendant company is void and of no legal effect.

d. A declaration that 1st Defendant action of altering the shareholding structure of 2nd Defendant Company without following due process was fraudulent.

e. A further declaration that the transfer of the shares and assets of 2nd Defendant company to Oak House Group Ltd. By 1st Defendant is void and of no effect.

f. An order of accounts into the books and finances of 2nd Defendant from incorporation until date of judgment.

g. An order directed at 1st Defendant to render accounts for the said lands acquired for their common use.

h. Cost including Solicitors fees

i. Any other reliefs that the court may deem fit".

(10) Following his joinder to the suit, the 2nd Plaintiff also prayed for the following reliefs per an amended writ of summons and a statement of claim dated the 15th day of December, 2016 :

"a. A declaration that 2nd Plaintiff is a shareholder in 2nd Defendant Company with shareholding of 25% shares.

b. An order for account of the affairs of 2nd Defendant.

c. An order that 2nd Plaintiff should be paid for his services as a promoter and director of 2nd Defendant Company on quantum meriut basis.

d. Cost including legal costs.

e. *Any other orders that this honourable court deems fit."*

(11) The 1st Defendant on his part confirmed the 1st Plaintiff's case that, their business relationship has been one based on mutual trust and very informal. According to him, it was based on this trust and informalities that he established the various businesses with the 1st Plaintiff. According to the 1st Defendant, he single-handedly saw the incorporation of the 2nd Defendant. At the time of the incorporation, he signed the incorporation forms on behalf of the 1st Plaintiff. Subsequently, the parties reached an agreement allowing 1st Plaintiff's shares in 2nd Defendant to be transferred to 1st Defendant through the same means as the acquisition of those shares initially. According to him, the parties at the time agreed that the 1st Plaintiff takes control of the business in the United Kingdom while the 1st Defendant also takes over the 2nd Defendant company.

(12) With respect to the landed properties, the 1st Defendant asserted that, they were acquired from funds from Cedem Travel and Tours but some of them were lost through litigation. According to him, four of the plots were sold with the consent of the 1st Plaintiff, and the proceeds therefrom was, with the consent of the Plaintiff, used to roof 1st Defendant's residence. 1st Defendant denied ever coercing 2nd Plaintiff to resign as director of 2nd Defendant nor relinquish his interest in 2nd Defendant.

(13) **DECISION OF THE TRIAL HIGH COURT**

The High Court entered judgment in favour of the Plaintiffs and made the following orders:

a. *The deed of transfer transferring 1st Defendant's shares in 2nd Defendant to 3rd Defendant be cancelled.*

b. *1st Plaintiff's shares be transferred to him.*

c. *An account be taken of 2nd Defendant as well as 3rd Defendant for all their financial dealings since incorporation.*

d. *1st Plaintiff recover from 1st Defendant the value of five plots of land as per the valuation report.*

e. *2nd Plaintiff pays an amount he received together with interest to the 2nd Defendant after account has been taken of 2nd Defendant.*

f. *1st Defendant returns the passport of 1st Plaintiff's wife in the 1st Defendant's custody.*

(14) In its delivery, the following findings of facts were made by the High Court:

(i) *That the 1st Plaintiff was a fully -paid up subscriber of 2nd Defendant's shares as evident from his signature appearing in the regulations of the company hence applying the* ***maxim, omnia*** *praesumuntur rule, 1st Plaintiff must be presumed to have properly acquired those shares.*

(ii) *That the transfer of the 1st Plaintiff's shares in 2nd Defendant by 1st Defendant to himself was fraudulent and therefore, the said transfer had no effect.*

(iii) *The 1st Defendant did not follow due process in removing the 1st Plaintiff as a director of 2nd Defendant Company.*

(iv) *That the re-acquisition of 2nd Plaintiff by 2nd Defendant was void for failing compliance with Section 56 of Act 179 as well as the absence of any share certificate issued as demanded by Section 53 of Act 179.*

(v) *Regarding the lands, it was only 3.5 plots which were the subject of litigation leaving 10.5 plots. It was wrong for the 1st Defendant to use proceeds of four of the plots to roof his house.*

DECISION OF THE COURT OF APPEAL

(15) Dissatisfied with the decision of the Trial Court, the Defendants appealed to the Court of Appeal. On the 29th of April 2021, the Court of Appeal reversed the decision of the High Court and dismissed the case of the Plaintiffs. The Court of Appeal also made the following findings:

(a) *2nd Plaintiff voluntarily resigned as director in 2nd Defendant and also, voluntarily relinquished his shares in 2nd Defendant as per his own letters, Exhibits '8' and '4'. Following the voluntary relinquishment, 2nd Defendant received a cheque sum of GHs3000.00 (Exhibit '5'). 2nd Plaintiff failed to lead adequate and credible evidence that he was coerced or threatened to resign as director and or relinquish his shares in 2nd Defendant.*

(b) *The mere absence of a share certificate did not vitiate the transfer of shares from 2nd Defendant to 1st Defendant.*

(c) *On the acquisition of the lands, the court found, that the 1st Plaintiff failed to prove any remittances towards the acquisition of those lands.*

(d) *It was wrong for the trial court to have ordered for recovery of moneys in respect of the lands when the specific relief being sought by the 1st Plaintiff was an order of account which said relief, he even failed to properly justify its grant.*

(e) *The valuation report (Exhibit 'J') was self-serving and same was admitted unfairly against the 1st Defendant.*

(f) *There was no evidence showing that the 1st Defendant was in possession of 1st Plaintiff's wife passport.*

(g) *The 1st Plaintiff failed to particularise fraud and in event, the 1st Plaintiff failed to prove the said allegation of fraud against the 1st Defendant.*

APPEAL TO THE SUPREME COURT

(16) It is against this decision of the Court of Appeal that, the Plaintiffs brought the instant appeal per the notice of appeal filed on the 17th of June 2021. The grounds of appeal set out in the notice of appeal are as follows:

"a. That the Court of Appeal erred in law when it held that the 1st Plaintiff was not a shareholder of 2nd Defendant Company because 1st Plaintiff did not personally sign the incorporation document, contrary to the position of law that a person can do an act through a lawfully authorised representative.

b. The Court of Appeal came to the wrong conclusion that 1st Plaintiff was not a shareholder of 2nd Defendant Company because he did not personally sign the incorporation document of the 2nd Defendant Company, contrary to the admission in evidence of 1st Defendant that he signed the incorporation document on behalf and upon authorization of 1st Plaintiff.

c. That the Court of Appeal erred in law when it held that since 1st Plaintiff failed to particularise the fraud alleged against 1st Defendant in his witness statement, when (i) the law on particulars apply to pleadings and not evidence and (ii) paragraph 13 of the further amended statement of claim provided particulars of fraud.

d. That the Court of Appeal erred in law when it held that the purported buy back of 2nd Plaintiff's shares as well as the consequential action were lawful when there was no evidence of meeting of conditions of buyback including the consent to the buy back by 2nd Defendant company as required by law.

e. The Court of Appeal erred in law when it relied on the witness statement of Peter Nanfuri never appeared at trial to identify his witness statement for same to be

adopted as his evidence in chief and thereafter subjected to cross-examination which is contrary to law.

f. The Court of Appeal erred in holding that the valuation report commissioned by 1st Plaintiff and produced by third party professional was wrongly tendered in evidence by 1st Plaintiff and wrongly admitted by the Trial Court, when it was more reasonable to accept the document on rounds of reliance and production from proper custody than to reject on the sole ground of authorship.

g. The Court of Appeal erred in law when it held that 1st Plaintiff was not entitled to 5 out of the 10 plots of land 1st Defendant purchased because 1st Plaintiff had not specifically asked for a recovery of 5 plots of land when the 1st Plaintiff had asked the trial court to make other orders that the Trial Court deems fit.

h. The judgment of the Court of Appeal is against the weight of evidence".

(17) I notice that most of the grounds of appeal are argumentative and unnecessarily repetitive. Further, where errors of law have been alleged, the necessary particulars have not been set out. The rules of this court frown upon grounds of appeal which are vague, argumentative; narrative and which, if allege an error of law or misdirection fail the particulars of the said errors. The case law on this issue is well settled. Considering some of the pertinent issues raised in this appeal and in order to do substantial justice to the parties to the appeal, especially the Appellants, I shall, nonetheless consider the grounds, by merging those which can be evaluated and determined compositely under the omnibus ground of appeal. This approach was applied by this court in the case of **INTERNATIONAL ROM**

LTD. VS. VODAFONE GHANA LTD. Civil Appeal No.J4/2/2016 dated 6th June 2016.

(18) **APPEAL BY WAY OF RE-HEARING**

An appeal, as the authorities and statute stated have is by way of rehearing. As the final appellate court, this court is enjoined to place itself in the position of the Trial Court and embark on a reevaluation the entirety of the record of appeal especially as the Plaintiffs have alleged that the judgment of the Court of Appeal is against the weight of evidence. This is an invitation to this court to right any wrong by the first appellate court with respect to the evaluation of the evidence on record and the application of the law to the facts and evidence. In their prosecution of the omnibus ground the Plaintiffs carry the burden of pointing out the pieces of evidence and or analysis by the court below which fell short of a proper evaluation of the evidence. Further that, there are relevant pieces of evidence not evaluated at all which in either case, if properly done, the decision of the Court of Appeal would have been in their favour.

(19) In **DJIN VS. MUSAH BAAKO [2007-2008] SCGLR 686** this court pronounced per Aninakwah JSC at page 691 that: ***It has been held in several decided cases that where an appellant complains that a judgment is against the weight of evidence, he is implying that there were 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.*** See also **OPPONG VS. ANARFI [2011] 1 SCGLR 665; TUAKWA VS. BOSOM [2001-2002] SCGLR 61.**

ANALYSIS OF THE GROUNDS OF APPEAL

(20) I shall first, evaluate grounds "a" and "b" together. The two grounds question whether the Court of Appeal was right in holding that, 1st Plaintiff was not a shareholder of the 2nd Plaintiff. The grounds have been formulated as follows:-

a. *The Court of Appeal erred in law when it held that the 1st Plaintiff was not a shareholder of 2nd Defendant Company because 1st Plaintiff did not personally sign the incorporation document, contrary to the position of law that a person can do an act through a lawfully authorised representative.*

b. *The Court of Appeal came to the wrong conclusion that 1st Plaintiff was not a shareholder of 2nd Defendant Company because he did not personally sign the incorporation document of the 2nd Defendant Company, contrary to the admission in evidence of 1st Defendant that he signed the incorporation document on behalf and upon authorization of 1st Plaintiff.*

(21) In the judgment of the Court of Appeal, the basis of the judgment of the Court below in respect of the above grounds was that, after holding that the transfer of 1st Plaintiff's shares to 1st Defendant was not fraudulent, the court pronounced that: ***"We agree with counsel of the Appellant that to accede to the logic and reasoning of the Trial Court clearly leads to one inevitable conclusion that in the first lace, 1st Plaintiff was never a shareholder and it would be equally fraudulent for 1st Defendant to have signed the regulation at the time of incorporating of 2nd Defendant on behalf of the 1st Plaintiff. The point is that it is the subscriber who signs the regulations and 1st Plaintiff having failed to sign the regulation is legally and factually not a subscriber."***

(22) It is important to point out that, the key holding of the Court below, was that, no fraud had been committed in the transfer of 1st Plaintiff's shares to the 1st Defendant. The court sought to point out that, to accede to the argument of the 1st Plaintiff will also operate to render his shares in 2nd Defendant fraudulent, as he did not personally subscribe to those shares. This observation is very critical, having regard to the fact that, there was no controversy regarding whether 1st Plaintiff was a shareholder of 2nd Defendant Company. On the contrary, the issue centered on whether 1st Plaintiff remained a shareholder of 2nd Defendant Company.

(23) Be that as it may, if the Plaintiffs plaint is to isolate and fault the Court of Appeal's pronouncement that ***"it is the subscriber who signs the regulations and 1st Plaintiff having failed to sign the regulation is legally and factually not a subscriber",*** then, I cannot but agree that the said pronouncement, to the extent of seeking to deprive 1st Plaintiff's shares in 2nd Defendant at the incorporation stage is in error.

(24) It is instructive to observe that, the 1st Defendant himself admits that, at the incorporation stages, all documents required to be signed by the 1st Plaintiff were duly signed by 1st Plaintiff albeit on his behalf by 1st Defendant. In fact, there is no dispute at all regarding the shareholding structure at the incorporation stage of the 2nd Defendant. 1st Defendant actually corroborates 1st Plaintiff's case, that 1st Plaintiff was the majority shareholder of the 2nd Defendant.

(25) Undoubtedly, that aspect of the Court of Appeal's decision is in pursuance of a strict enforcement of the relevant sections of the Companies Act, 1973 (Act 179). In terms of Act 179, it is upon the registration of the regulations of a company that the company is deemed to have been duly incorporated and a certificate of

incorporation issued. Section 18 of Act 179 governs subscription to the Regulations of the Company. It provides in Subsections (1) and (2) as follows:

"(1) The Regulations of a company registered after the commencement of this Act shall be signed by one or more subscribers in the presence of, and shall be attested by, at least one witness.

(2) In the case of Regulations of a company with shares the subscribes, or each subscriber if more than one, shall write opposite to the subscriber's name the number of shares the subscriber takes and the cash price payable for the shares and shall take at least one share."

(26) From the above two provisions, it is mandated that, at least one subscriber **signs** the regulations of the Company. Then, where there is more than one subscriber, each subscriber shall ***write opposite to the subscriber's name the number of shares the subscriber takes and the cash price payable for the shares and shall take at least one share.***

(27) The compelling investigation thus focuses on section 18(2) of Act 179 and queries, whether, by writing the name of the 1st Plaintiff on his behalf and specifying the number of shares he holds, the 1st Plaintiff cannot be deemed a shareholder of the 2nd Defendant company? Stated differently, does section 18(2) of Act 179 contemplate, and or allow situations where the requirement therein can be satisfied on behalf of another? That is, will an agency arrangement be permissible under Section 18(2) of Act 179. A further inquiry of pivotal introspection is, what is the effect of a subscriber whose subscription to the shares was not signed by him personally but on his behalf? Does he cease to be a member of the company?

(28) Both principal parties in this suit admit that the 1st Plaintiff is a subscriber to the shares since its incorporation. 1st Defendant also recognises the 1st Plaintiff as a

subscriber to 2nd Defendant's shares. I do not think that, the mere fact that, the parties in their usual informal arrangement by allowing 1st Defendant to sign the regulations on behalf of the 1st Plaintiff invalidates 1st Plaintiff's subscription. That, with respect, will be most unjust and will not be a functional application of the law in the real world and within the peculiar factual circumstances of the principal protagonists in this unfortunate dispute.

(29) This position should never be understood as a judicial blessing to the violation of statutes. As servants of statutes, that must not define the courts' duty simpleter. Rather, as aforesaid, from the peculiar facts of the present action, the 1st Defendant admits that the 1st Plaintiff is owner of the 43% shares upon incorporation. There was no instance, where any proceedings was ever commenced by either the 1st or 2nd Defendant to contest the 1st Plaintiff as a shareholder in 2nd Defendant. At all times, 1st Plaintiff has also, acted in utmost belief that, he is the 43% shareholder of the 2nd Defendant based on numerous representations made to him. In such situation, it will be grossly inequitable, to now decide that, because the shares were subscribed to on behalf of the 1st Plaintiff, the 1st Plaintiff, legally speaking is not a shareholder. It is important that, principles of estoppels should not normally be permitted to operate to obviate honouring statutory compliance. However, the statutory non-compliance in this respect, in my view is *de minimis* and merely directional, and cannot operate to void the shares of 1st Plaintiff who, as the evidence shows, contributed significantly to the formation of the company. It is not surprising that, the parties, at the commencement allowed him the majority holding.

(30) From the record, Exhibit 'B' tendered in evidence was an email correspondence between Kimathi Kuenyehia *(a shareholder and former director of 2nd Defendant)*, 1st

Plaintiff and the 1st Defendant. At paragraph 3 of Exhibit 'B', Kimathi Kuenyehia wrote: ***I also wish to thank you for all the support (even though you are out of the jurisdiction of Ghana) on matters concerning and touching OAK House -financial, as the biggest shareholder; ideas; as the MBA educated man and many other areas that time and space may not permit me to elucidate.***

(31) While under examination-in-chief by PW3 further testified as follows :

Q: Can you tell this honourable court, the contributions that Mr. Edem Afram [1st Plaintiff] made towards the incorporation of Oak House Company Ltd. (2nd Defendant Company)?

A: My Lords, At the time, we were in a very unique position. I was a student, and I did not have any money to contribute to the business. Edem had been running a very successful company in the UK; he was the guy with the money.

Q: So as far as you are concerned, these monies were sent to who?

A: They were sent to 1st Defendant.

Q: And what was the purpose of these remittances?

A: It was to fund the business

Q: What business?

A: Oak House, the 2nd Defendant.

It is worthy of mention that, the Defendants did not cross-examine PW3 on the above testimony.

(32) In fact, the doctrinaire approach forced on the strict construction and application of the statute within the special context of this suit will simply result in an improper use of a statute to remunerate unjust enrichment in favour of a person who has acknowledged the interest of his adversary. I will therefore borrow the exception recognised by Atuguba JSC regarding consequences of violating statutory dictates in the case of **NETWORK COMPUTERS LIMITED VS. INTELSAT GLOBAL SALES [2012] 1 SCGLR 218 at page 231** as follows: ***Unless a substantive Act can be regarded as directory and not mandatory or its infraction is so minimal that it can be observed that it can be covered by the maxim de minimis non curat lex or such that the complaint about it is mere fastidious stiffness in its construction or the breach relates to part of it which in relation to others, can be regarded as subsidiary and therefore should not be allowed to prejudice the operation of the dominant part or purpose thereof, or the strict enforcement of the statute would amount to a fraudulent or inequitable use or some other compelling reason, I do not see how a court can gloss over the breach of a statute.***"

In this context, I will therefore hold that, the 1st Plaintiff is a subscriber to 1st Defendant's Regulations. Grounds "a" and "b" of the ground of appeal set out are accordingly upheld.

(33) The next grounds to be considered are grounds "c" and "d" which are formulated as follows:-

c. That the Court of Appeal erred in law when it held that since 1st Plaintiff failed to particularise the fraud alleged against 1st Defendant in his witness statement, when (i)

the law on particulars apply to pleadings and not evidence and (ii) paragraph 13 of the further amended statement of claim provided particulars of fraud.

d. *That the Court of Appeal erred in law when it held that the purported buy back of 2nd Plaintiff's shares as well as the consequential action were lawful when there was no evidence of meeting of conditions of buyback including the consent to the buy back by 2nd Defendant company as required by law.*

Because ***"fraud"*** is a serious offence, which requires a higher standard of proof, the law demands, that a general plea that one has been fraudulent is insufficient. The law mandates pleadings of fraud to set out the necessary particulars of the allegation of fraud. Thus, Order 11 Rule 12 of the High Court Civil Procedure Rules, 2004 (C.I.47) headed *particulars of pleading* enacts that:

"(1) Subject to subrule (2), every pleading shall contain

particulars of any claim, defence or other matter pleaded including, but without prejudice to the generality of the foregoing words:

(a) particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; ..

(b) ……..."

(34) Therefore, setting out the particulars of an item of pleading is not to use the same item in description. Fraud simply amounts to dishonesty. In giving particulars of fraud, it will be redundant and circular to still use the word ***"fraud" or fraudulent"*** without pointing out what constitutes the said ***"fraud"*** or ***"fraudulent"*** else, the supposed particulars of pleading will require further particularization. In their paragraph 13 of the amended statement of claim, the Plaintiffs' particulars of fraud were settled as follows:-

"a. That unknown to Plaintiff, 1st Defendant without following due process fraudulently removed Plaintiff as director of 2nd Defendant company.

b. 1st Defendant has fraudulently altered the shareholding structure of the company to remove Plaintiff as shareholder without due process.

c. That according to the new shareholding structure, Plaintiff is mysteriously no longer a director or shareholder of 2nd Defendant Company.

d. That 1st Defendant fraudulently transferred Plaintiff's shares to 1st Defendant without his consent and or due process".

(35) The above, with much deference falls short of what passes as particulars of fraud. As observed by Gbadegbe JSC in the case of **NANA ASUMADU II (DECEASED) SUBSTITUTED BY: NANA DARKU AMPEM AND ANOR. VS. AGYA AMEYAW [2019-2020] 1 SCLRG 681,** ate pages 698-699 cited by Counsel for Defendants . . .***Without going into what constitutes a good plea of fraud at law, I say without any hesitation that a party who pleads fraud as the foundation of his case cannot be permitted to aver in his pleading for that purpose the very technical term which he is required to particularise … the Plaintiff was required to provide the following particulars of the fraud that was alleged against the defendant : (i) that the Defendant on a date in the course of testifying the action made a false statement (representation) of a material fact in the action; (ii) that the Defendant in making the statement knew that it was false (iii) that the Defendant intended to induce the court to act upon the false statement; and (iv) that the court in its judgment acted upon the said false statement resulting in judgment being tendered against the Plaintiff to his detriment or prejudice. … It is important that the particulars show with specificity that in making the false***

statement to the court, the defendant intended to deceive the court-the element of dishonesty".

(36) While holding that, the Plaintiff did not provide the necessary particulars of fraud, I have not lost cognizance of the principle that, in an action where fraud is not even pleaded and or particularised, the court is not estopped from making a finding of fraud if there is sufficient evidence in support thereof. Thus, granted arguendo that, the 1st Plaintiff failed in his pleading fraud, the court is not prohibited from investigating that allegation if the evidence before indisputably supports same. As this court observed in the case of **APPEAH VS. ASAMOAH (2003-2004) SCGLR 266 at243,** *ordinarily fraud should be pleaded. It was not pleaded in the instant case. Notwithstanding the rules on pleadings, the law is that where there is clear evidence of fraud on the face of the record the court cannot ignore it. That was the decision of this court in* ***AMUZU VS. OKLIKAH (1998-99) SCGLR 141.*** *In that case fraud was not pleaded but when it was raised it was upheld by the trial court and in the Supreme Court. In the same way, failure to plead the issue of fraud at the trial court did not prevent the trial court and this court from endorsing it when it was raised. Indeed, fraud vitiates everything."*

(37) Indeed, the Court below, recognising this approach, delved into an investigation of the allegations of fraud. Suffice to say, that it held otherwise. The court observed *inter alia* that: *"We are of the opinion that eventhough there was no particularization, the 1st Defendant's explanation is reasonably probable and creates a doubt in our minds and therefore dispose of that allegation of fraud against him. The 1st Plaintiff's pleadings did not disclose any cause of action based on fraud by the 1st Defendant, nor has he established fraud by law. We believe there are doubts as to whether he had the intent to defraud the 1st Plaintiff. This court is not oblivious of the position of the law that even if fraud is not pleaded nor particularized but it is apparent on the face of the record, the court has power to hold so -* ***JOANA NYARKO VS. MAXWELL TETTEH, J4/27/19 dated 11th***

December 2019 (unreported) SC per Kotey JSC. *In the instant appeal though the particulars were not there, which flouts the procedure, assuming it was established, this court could go ahead to hold there was no intent to defraud. However, we do not think the intent by 1st Defendant to defraud 1st Plaintiff was established nor was it apparent on the face of the record.-**AMUZU VS. OKLIKAH [1988-9] SCGLR 141".***

What evidence was led by 1st Plaintiff in proof of his allegation of fraud *(albeit without the necessary particulars)* against the 1st Defendant? At paragraph 35 of the 1st Plaintiff's witness statement, he testified that: ***"The 1st Defendant has displayed greed by fraudulently manipulating everything right from the registration process to eventually assuming control over 2nd Defendant. 1st Defendant is seeking to reap from shares he does not own. Investing in shares can only be demonstrated in terms of how many shares one owns. To that extent, 1st Defendant decided to sow just few seeds and later wanted to harvest more fruits through unlawful deceitful means."***

(38) It is important to emphasise that, the 1st Defendant consistently maintained his denials of these allegations of fraud against him. His defence has been that, 1st Plaintiff lost the shares through the same process he acquired those shares and thus, the parties had an understanding, that those shares should be transferred back to the 1st Defendant for the latter to take absolute control of the 2nd Defendant company while Plaintiff takes charge of the companies in the United Kingdom. During the testimony of PW3, Kimathi Kuenyehia, he told the court of a discussion between himself and 1st Defendant to the effect of a shareholder's agreement whereby 1st Plaintiff would take over Concord Securities in the United Kingdom while 1st Defendant takes over 2nd Defendant exclusivey. Specifically, this is what was elicited during the testimony of PW3

"Q: So based on what you will recall, these discussions about an

agreement was about what?

A: Actually it was Bernard (1st Defendant) who informed me that he had reached. Some agreement with Edem that Edem would take the UK part of the business and Bernard would take the Ghana part of the business.

Q: But you never had any discussion with Edem about this?

A: No I did not."

(39) Assuming, for purposes of arguments, the evidence does not support the defence of the 1st Defendant, can it be concluded that 1st Defendant in changing the shares acted fraudulently? I am in agreement with the Court below that, the 1st Defendant raised a reasonable doubt, which whittled the evidence of the fraud alleged against the 1st Defendant. By this finding, I am not suggesting that the transfer of the 1st Plaintiff's shares was lawful. What I am saying, is that, not every wrongful act is fraudulent. Therefore, there was insufficient evidence, from the 1st Plaintiff in proof of this allegation of fraud. In the same way, there was insufficient evidence from the 1st Defendant to prove on a balance of probabilities that, the 1st Plaintiff sanctioned a transfer of his shares. The want of insufficient evidence will not necessarily render a conduct fraudulent. I therefore affirm the finding of the Court of Appeal on this issue, subject to the qualifications made.

(40) The above reasoning will also operate in relation to the change in the directorship of the 2nd Defendant. It is beyond doubt that, the statutory procedures for removing a director was never complied with. Further, the evidence did not establish that 1st Plaintiff resigned as a director of the 2nd Defendant. I therefore, hold, that 1st Plaintiff, remains a director and shareholder in 2nd Defendant's company.

(41) The Plaintiffs' fourth ground of appeal alleges error of law against the judgment of the Court of Appeal in that, its holding that the purported buy back of 2nd

Plaintiff's shares as well as the consequential action were lawful when there was no evidence of meeting the conditions of buyback including consent to the buy back by the 2nd Defendant company as required by law.

(42) According to Plaintiffs, 2nd Plaintiff was coerced to relinquish his shares in 2nd Defendant. The evidence on record reveals that, the 2nd Plaintiff wrote a letter dated the 28th of September 2007 (Exhibit '5') addressed to the Board Chairman of the 2nd Defendant to be reimbursed back his capital contribution to the company. Another documentary evidence, is Exhibit '4' a letter of 2nd Plaintiff resigning from 1st Plaintiff's company. A cheque in the sum of GHs3,000.00 was issued by 2nd Defendant to 2nd Plaintiff which he duly obtained. The drift of the discourse clearly shows that, the 2nd Plaintiff voluntarily decided to relinquish his shares and resign from the company.

(43) The evidence on record did not demonstrate any form of coercion or threats. I will therefore uphold the reasoning the of the Court of Appeal that: ***"It was incumbent on 2nd Plaintiff to provide credible evidence to buttress his allegations of coercion which he woefully failed to do, and thus failed to establish his assertions. 2nd Plaintiff alleged her reported the alleged duress to a fellow director Mr. Owusu Nsiah who he said advised him on it but he failed to call Owusu Nsiah to corroborate this assertion. This is tantamount to failure to call a material witness and therefore fatal to the success of his case. The law is settled that a material witness whose evidence would have assisted the court immeasurably if not called clearly dealt a big blow to the parties' alleging the case".***

(44) Infact during cross-examination of 2nd Plaintiff, he affirmed his willingness to leave the 2nd Defendant's company per the following testimony :

Q: I will draw your attention to some documents. Mr. Obour

Nimako, take a look at Exhibit8. It is a letter headed "Resignation from the Board of Directors of Oaks Company Limited". At the bottom of the said letter, is your name and signature. Is that correct?

A: Yes, My Lord.

Q: This signature was not forged; is that not correct?

A: It is correct

Q: This signature was signed by yourself willingly; is that not correct?

A: Yes, my Lord

Q: Shortly after Mr. Obour Nimako you again on 28th of September 2007 after your resignation, wrote to the chairman of the company, Mr. Peter Nanfuri demanding from the company, the contribution you made, which thereby made you a member of the company.

A: Yes, it is correct.

Q: Please take a look at Exhibit 4 attached to the witness statement of 1st Defendant, Mr. Obour-Nimako, this Exhibit '4' is indeed the letter you signed, requesting for your capital contribution of 20 million Cedis at the time, today GHs2000?

A: Yes, My Lord.

Q: Please take a look at Exhibit 5. It is a Unibank cheque bearing your name; is that not correct?

A: It is correct

Q: Please take a look at Exhibit '6'. If you draw your mind to the last but three transactions on that statement of account, you will see a debit of the sum of GHs3000.00 reflecting the same cheque numbering your name?

A: It is correct.

Consequently, this ground of appeal is without merit and same is accordingly dismissed.

(45) The next ground is ground "e" which is formulated thus: ***The Court of Appeal erred in law when it relied on the witness statement of Petter Nanfuri as corroborative evidence when the said Peter Nanfuri never appeared at the trial to identify his witness statement for same to be adopted as his evidence -in-chief and thereafter subjected to cross examination which is contrary to law.***

(46) I am in agreement with the Plaintiffs on this ground that to the extent that the said witness statement of Peter Nanfuri was never tendered in evidence by the said person, the Court below erred in relying on it in arriving at its findings. This conclusion however, does not detract from the fact that, the 2nd Plaintiff voluntarily relinquished his shares. Consequently, the said witness statement was evidentially unnecessary. It proves nothing.

(47) The next ground of appeal is that:

"The Court of Appeal erred in holding that a validation report commissioned by 1st Plaintiff and produced by a third -party professional, was wrongly tendered in evidence by 1st Plaintiff and wrongly admitted by the Trial Court, when it was more reasonable to accept the document on grounds of relevance and production from proper custody than to reject on the sole ground of authorship". What has informed this ground is the following pronouncement by the Learned Justices of the Court of Appeal as follows: *"This court is at a loss as to how exhibit 'J' got in as an exhibit since it was not listed in the notice of discovery of documents nor the pre-trial check list. Be that as it may it is tendered into*

evidence and marked as Exhibit 'J'. With the greatest respect to the learned Trial Judge, this report was generated and tendered by one party and therefore self-serving. The court should have ordered both parties to present their various reports or ask both parties to appoint one valuer or the court could appoint a valuer suo motu. The court failed to do any of these but decided to rely on the valuation presented by one party. The court failed to have a second opinion but fully accepted in ditto the figures presented by the report as the true cost of lands at Adjrigano. We are not obvious of the fact that the court is not bound by expert opinions but that it was not fair to accept the 1st Plaintiff's valuation report tendered hook, line and sinker. The court could have ordered the Land Valuation Division or the Lands Commission or some other land related institution to do an independent job for it for a fair assessment, assuming it was even needed." The said valuation report, per the evidence was sanctioned by the 1st Plaintiff and not the trial court. Same was clearly self-serving and being self-serving, notwithstanding the absence of any opposition to same, the Trial Court ought not to have used it to define the values of the lands. The courts have adopted the practice of relying on such reports for purposes of resolving disputes from recognised state institutions such as the Lands Commission. I therefore hold that, the Court of Appeal was not in error in placing little or no weight at all on the said report.

(48) The Plaintiffs' Ground '9' is formulated as follows: ***"The Court of Appeal erred when it held that 1st Plaintiff was not entitled to 5 out of the 10 plots of land 1st Defendant purchased because 1st Plaintiff had not specifically asked for recovery of the 5 plots of land when 1st Plaintiff had asked the trial court to make any other orders that the Trial Court deems fit".***

It has become fashionable these days, for litigants and their counsel to abuse the exceptional principles espoused in cases such as **HANNA ASSI (NO.2) VS. GIHOC REFERIGERATION AND HOUEHOLD PRODUCTS (NO. 2) [2007-**

2008] SCGLR 16 to the effect that a court is not proscribed from granting a party that which was not expressly sought for but clearly established by the evidence adduced. The **DAM VS. ADDO** principle remains salutary in civil litigations. The principle, espoused in the case of **DAM VS. J.K. ADDO AND BROTHERS [1962] 2 GLR 200** posits that: *"A court must not substitute a case proprio motu, nor accept a case contrary to, or inconsistent with, that which the party himself puts forward, whether he be the Plaintiff or Defendant."* It is only when there is absolutely no dispute and the evidence leads to one and only one conclusion warranting the grant of a relief that has not been expressly prayed for, that, a court of law must be inclined to so indulge an otherwise deserving party.

(49) The evidence of before the court in respect of the parcels of land was not straight forward and not without controversy. While there is uncontroverted evidence that, the principal parties jointly owned those lands acquired, *(the means of acquisition notwithstanding),* some of the parcels had been subjects of litigation and had been lost. The 1st Defendant claimed to have with the consent of the 1st Plaintiff sold some parcels to roof the 1st Plaintiff's building, which claim was denied. The 1st Defendant also claimed that the one plot of land had with the consent of Plaintiff been transferred to 1st Plaintiff's employee, a claim which was also denied. Save the about three parcels which the court finds on a balance of probabilities, per the evidence on record, to have been lost in litigation, there remains other parcels of land unaccounted for.

(50) It is therefore appropriate to make an order which will adequately compensate the 1st Plaintiff in respect of those parcels of land. It must be placed on record that, the 1st Defendant was in a trusteeship position as regards the parcels of land he jointly owned with the 1st Plaintiff. As a trustee, he was expected to act diligently as a

fiducial and pursue the best interest of the 1st Plaintiff. A breach of 1st Defendant's fiduciary duties, will necessitate in the circumstances, an order to recompense the 1st Plaintiff with respect to his beneficial interest therein.

(51) It has been settled by this court in a rich line of decisions that, in the evaluation of evidence, the jurisprudence is that, an appellate court ought not, except in exceptional circumstances, disturb the consideration of the evidence by the Trial Judge who saw and heard the witnesses give evidence. The ascription of probative value to evidence which is exclusively a matter for the Trial Court which perceived and received the evidence comes at a later stage of the whole process. Nevertheless, the exercise is one in which the appellate courts are equally qualified and competent in some situations to reverse findings and conclusions which are not based on the drift of the evidence on record.

(52) In the process of adjudication, a Trial Court, or in the instant case, the first appellate court could draw mistaken conclusions from indisputable primary facts and may wrongly apprehend the facts on which the foundations of the case will rest. In that situation, it will be invidious to suggest that the second appellate court should not intervene and do what the justice of the dispute requires. Thus, in the exercise of its appellate powers in the instant case, with all due respect to the Learned Justices of the Court of Appeal, they were in error in their reevaluation of the evidence on record and the findings they arrived at against the 1st Plaintiff which resulted in their entirely reversing the judgment of the Trial High Court. With respect to the 2nd Plaintiff he failed woefully to prove that he was coerced to relinquish his shares and directorship in the 2nd Defendant. The plea of *non est factum* does not operate in his favour. His appeal fails and I dismiss it.

(53) In the result, for all the reasons hereinbefore set out, and the fuller reasons in the lead judgment of my learned and respected sister, I will also allow the 1st Plaintiff's appeal in part, and abide the orders contained in the lead judgment.

I. O. TANKO AMADU

(JUSTICE OF THE SUPREME COURT)

DISSENTING OPINION

PWAMANG JSC:-

My Lords, when two friends fight, there is a human tendency for a bystander to intuitively sympathise with the narration of events by one of them as against the other. However, the law works differently. My legal analysis of the evidence in this case leads me to a conclusion different from my sisters and brothers on this bench. That is why I dissent and I proceed to explain myself.

This is an appeal from the judgment of the Court of Appeal dated 29th April 2021, by which the Court of Appeal reversed the decision of the High Court that was given in favour of the plaintiffs/respondents/appellants (the plaintiffs). The case concerns mainly ownership of company shares in Oak House Ltd, the 2nd defendant company, but the 1st plaintiff also claims against the 1st defendant/appellant/respondent (the 1st defendant) for accounts in respect of some lands at Adjirigano, Accra. The aspect of the case that relates to the 3rd defendant company is dependent on whether or not at the time of its incorporation the 1st defendant was the actual owner of the shares in the 2nd defendant and had authority to transfer same to the 3rd defendant company.

It is settled law, that an appeal is by way of re-hearing. This has been explained by the authorities to entail the appellate court reviewing all the evidence that was led at the trial and examining how the lower court applied the relevant principles of law to the evidence and to answer the question; whether the judgment appealed from was right or wrong. See **Tuakwa v Bosom [2001-2002] SCGLR 61** and **Owusu-Domena v Amoah [2015-2016] SCGLR 790.** Grounds of appeal and the arguments of counsel based on them serve the useful purpose of pointing out to the appellate court where it is suggested that the lower court erred in coming to its judgment. When properly drawn up, grounds of appeal ought to address the key issues arising on the face of the judgment appealed against, the resolution of which would decide the appeal one way or the other. Thus, where an appellate court finds from the grounds of appeal and arguments of counsel that some matters they address are peripheral only and not fundamental or germane to a resolution of the real controversy among the parties, the appellate court is not bound to resolve those fringe matters. In deciding an appeal, an appellate court is entitled to limit itself to the fundamental issues arising from the evidence and the law in the case and that is what I intend to do in this case.

Although a few provisions of the **Companies Act, 1963 (Act 179),** under which the 2nd defendant was incorporated, are relevant for the determination of this case, it is the agreements entered into among the parties at incorporation and in the course of the life of the company that are decisive in settling who the current actual owners of the 2nd and 3rd defendants ought to be. From the evidence, the agreements between the 1st plaintiff and 1st defendant, who were the original founders of the 2nd defendant, concerning ownership and operation of the 2nd defendant company were all verbal and the controversy is; what it is that was orally agreed by the two of them. So far in the case, there has been talk about failure to comply with provisions of Act 179 on transfer of shares and appointments of directors, but it ought to be pointed out from the outset, that

unless either the 1st plaintiff or the 2nd plaintiff or both of them are held to still be shareholders and members/directors of the 2nd defendant at the time its shares were transferred, they would have no locus to complain about how the documentation of the transfers were done. If, on the other hand, it is held that they were directors of the company at the time, then they would bear equal responsibility for any failure to comply with provisions of Act 179 so such failure ought not to adversely affect the case of any party in particular. For example, the oath pursuant to section 28 of Act 179 at page 202 of the Record of Appeal purported to have been sworn to by Edem Afram, the 1st plaintiff, at Accra on 18th November, 2004 before a certain Commissioner for Oaths called Seglah Raymond is plainly a forgery. The 1st plaintiff was not in Accra on that date and never appeared before any Commissioner for Oaths. This evidence, if the focus is on compliance with Act 179, can have the effect of undoing the whole incorporation of the 2nd defendant and rendering moot the question of ownership of any company shares. But, in this case, the Registrar of Companies has not invoked her powers of sanctions against the directors and officers of the company or against the company itself, so, the court ought to exercise a narrow jurisdiction and determine the main controversies the parties placed before it.

It also bears stating, that the 1st defendant's evidence with regard to the 1st plaintiff's apparent conspiracies with third parties including his wife to undermine immigration laws of the United Kingdom for monetary gain, apart from the effect that may have on the character of the 1st plaintiff in relation to his disposition to speak the truth, that ought not to be the determinative factor to sway this case one way or the other. The jurisdiction of the High Court that was invoked per the endorsements on the writ of summons was for the determination of the true owners of the company shares standing in the name of the 1st defendant and for an account of the lands at Adjiringano and that ought to be the remit of the court in this case.

My Lords, the legal ownership of company shares is generally speaking a matter of record and in this case there is no dispute about the state of the records. However, in Equity, the legal owner of shares may be held to hold same in trust for a beneficial owner and Act 179, by section 7, saves the application of the principles of Equity and the Common Law as they relate to companies. The provision is as follows;

7. Saving of equity and common law

The rules of equity and of the common law applicable to companies shall continue in force except so far as they are inconsistent with a provision of this Act.

There is specific recognition of beneficial ownership of company shares by **section 100(1) of Act 179** which is as follows;

100. Protection of beneficiaries

(1) A person claiming to be interested in any shares or debentures or the dividends or interest on those shares or debentures may protect the interest of that person by serving on the company concerned copies of a notice and affidavit in accordance with the Rules of the High Court.

The records show that at incorporation on 19th November, 2004 the shares of 2nd defendant were as follows; 1st plaintiff-43%, 2nd plaintiff-25%, 1st defendant-25%, Kweku Dziedzorm Kuenyehia (Kimathi Kuenyehia)-7%. The 1st plaintiff was not personally present in Ghana for the incorporation and it was the 1st defendant who, with his consent, initialed the registration documents on behalf of the 1st plaintiff that made him a shareholder and director. There is general agreement that this record also reflected the beneficial ownership of the shares at incorporation. At the time of filing the case, the records of the shareholding had changed and was as follows; 1st defendant-100%, but he admits that Kimathi Kuenyehia is the beneficial owner of 7% shares out of his 100%. There is no longer mention of 1st and 2nd plaintiffs. The dispute before the court in this case is

about how the shares of the plaintiffs in the 2nd defendant were transferred to the 1st defendant.

When the 1st plaintiff filed this suit he pleaded that the transfer of his shares to the 1st defendant was done fraudulently but the 1st defendant denied that and contends that the transfer was done with the knowledge and consent of the 1st plaintiff. The 2nd plaintiff joined the case only after the 1st plaintiff had sued and his case is that he was coerced and forced to surrender his shares which the 1st defendant rejects. He says that 2nd plaintiff acted freely and voluntarily and that he received payment for the shares he surrendered. So, shorn of all the accusations and counter accusations in the pleadings and witness statements of greed and ungratefulness, the issues for decision in this case are quite narrow and it is a matter of proof of oral agreements that were made by the parties, especially at the stage where the shares of the plaintiffs in the 2nd defendant were transferred to the 1st defendant.

I shall first tackle the reclaim for shares of the 2nd defendant by the 1st plaintiff after which I shall deal with that of the 2nd plaintiff. It is common course between the 1st plaintiff and the 1st defendant that they started off as great friends before becoming trusting business partners between 2002 and 2007. They did joint businesses without any recordings of their agreements and understandings. When they were not discussing business directly in person they communicated about their joint affairs using telephones and there are no letters or emails about their companies exchanged between them that were tendered at the trial. By pleading fraud, the 1st plaintiff placed on himself a burden of proof that is onerous to discharge. From the evidence, he was neither personally involved in the paper work for incorporation of the company nor its management so he could have made out his case without trumpeting fraud the way it was done. I find the thrust of his case to be at paragraphs 15 and 18 of his Further Amended Statement of Claim filed on 15/12/2016 wherein he pleaded that the purported transfer of his shares to

the 1st defendant was void and of no legal effect and that he still remained a shareholder in 2nd defendant company. Accordingly, if the 1st plaintiff proved by evidence that he did not consent to the transfer of his shares, that purported transfer would be unlawful and void and, in Equity, the shares would still to be his and the 1st defendant would be held to hold them on a constructive trust with him as the beneficial owner. The court could then, among other reliefs, make an order for the rectification of the company's records to reflect the true beneficial ownership of the shares.

In my considered opinion, the case between 1st plaintiff and 1st defendant is substantially about the contention of the 1st defendant that 1st plaintiff verbally agreed with him for him to take full ownership of 2nd defendant while 1st plaintiff took full ownership of Concorde Security Ltd in the UK. The matters relating to the resource support the 1st plaintiff is supposed to have sent to assist 2nd defendant in its formative stages, as well as the obvious tremendous work that the 1st defendant did between 2007 to 2015 without the involvement of the 1st plaintiff to bring the 2nd defendant to the height it attained, are good to discuss but, those matters do not directly decide the central issue for determination that arises on the pleadings. The evidential value of those matters if proven or admitted would be to influence the court's assessment of the credibility of the testimonies of the parties themselves, who were the protagonists, in respect of whether or not there was an oral agreement for take over of 2nd defendant and Concorde Security, UK.

Since the parties had previously cooperated on all their joint businesses verbally, the case of the 1st defendant that it was based on an oral agreement that he transferred the shares of 1st plaintiff to himself ought not to be dismissed lightly and described as a fairy tale, as the trial judge stated, without a proper analysis of the evidence in that respect. After all, the 1st plaintiff's case of being a significant financier of 2nd defendant at incorporation was not proved by any direct evidence either. An instance is, when 1st plaintiff

mentioned that he sent a Mercedes Benz car for the operations of the 2nd defendant, the dates on the documents of the car that were tendered were shown through cross examination to be inconsistent with his testimony. Then he mentioned a loan he contracted from a bank in UK amounting to £10,000.00 for joint undertakings with the 1st defendant in Ghana but the 1st plaintiff could not produce even a single document on the bank loan. Furthermore, the testimony of Kimathi Kuenyehia, as well as his email, to the effect that it was 1st plaintiff who had money at the incorporation and he supported the operations of the company from the UK did not mention particulars of the assistance 1st plaintiff gave for setting up 2nd defendant. The point I am making here is, that this case calls for a balanced and dispassionate analysis of the totality of the evidence led by the parties using settled principles of the Law of Evidence in order to decide who, on a balance of probabilities, proved his case and is therefore entitled to judgment. The case ought not to be decided on the emotive hunch of the judge.

As the 1st plaintiff correctly stated in his statement of case in this final appeal, this is a quintessential case of oath against oath; the 1st defendant stated on oath that it was the 1st plaintiff who requested him to take full ownership of the shares of 2nd defendant in place of Concorde Security UK, but 1st plaintiff also testified under oath that he did not consent and that the 1st defendant had no interest whatsoever in Concorde Security Ltd, UK. This discussion was supposed to have taken place between the two of them and there is no record of an agreement they came to. At the close of the trial, the High Court, after examining the evidence opted for the version of the 1st plaintiff that the transfer of shares was done without his consent and did not believe the version of the 1st defendant. The Court of Appeal on the other hand came to the conclusion that the version of the 1st defendant was probable, especially when weighed against the evidence the 1st plaintiff led and the legal standard for proof of fraud, upon which the 1st plaintiff based his case. Being a second appellate court faced with conflicting findings of facts, we are enjoined to

analyse the totality of the evidence ourselves and to make up our own mind as to which of the two stories was proved by a preponderance of probabilities, whether the claim by the 1st defendant or the denial by the 1st plaintiff.

An appellate court may set aside a finding of fact by a lower court if there was no evidence in support of the finding or where the preponderance of evidence weighed heavily against the finding or where inferences drawn from the evidence led were wrong. See **In re Yendi Skin Affairs; Yakubu vrs Abdulai (No.2) [1984-86] 2 GLR 239. SC.** In deciding whose story is preferable in a situation of oath against oath as in this case, a court ought to consider a number of matters from the trial including those stated under **section 80** of the **Evidence Act, 1975 (Act 323)**. It provides that;

80. Attacking or supporting credibility

(1) Except as otherwise provided by this Act, the Court or jury may, in determining the credibility of a witness, consider a matter which is relevant to prove or disapprove the truthfulness of the testimony of the witness at the trial.

(2) Matters which may be relevant to the determination of the credibility of the witness include, but are not limited to

(a) the demeanour of the witness;

(b) the substance of the testimony;

(c) the existence or non-existence of a fact testified to by the witness;

(d) the capacity and opportunity of the witness to perceive recollect or relate a matter about which the witness testifies;

(e) the existence or non-existence of bias, interest or any other motive;

(f) the character of the witness as to traits of honesty or truthfulness or their opposites;

(g) a statement or conduct which is consistent or inconsistent with the testimony of the witness at the trial;

(h) the statement of the witness admitting untruthfulness or asserting truthfulness.

In the circumstances of this case, although the 1st defendant said that at the time they discussed the issue, the parties involved Kimathi Kuenyehia, who was then a law student in the UK and their common friend, for him to draft a shareholders agreement between them on the shares of Concorde Security UK, when Kimathi Kuenyehia testified and was examined on it, he said he could not recollect the details but admitted a discussion about for him to draft an agreement on the shares of a company between the 1st plaintiff and the 1st defendant. The evidence of Kimathi Kuenyehia therefore did not positively settle the controversy. I shall therefore review the evidence and examine the reasons assigned in the judgments of the lower courts for their findings, especially that of the High Court since the Court of Appeal did not fully explain their findings on the evidence, and form an opinion about the credibility of the parties and decide which of them is entitled to judgment.

In order to form an opinion on credibility of testimony, section 80(2)(a) of NRCD 323 states demeanour of witnesses, but in this case the trial judge who saw the parties and watched them in the witness box did not record any observations about demeanour of either of them and he did not draw any inference based on demeanour. The note he made on demeanour was of DW2 who testified that he was a witness to the shares transfer deed by which the 1st plaintiff's shares were moved to the 1st defendant. The critical fact in dispute in this case is not the signing and witnessing of that shares transfer deed but it is, whether the 1st plaintiff orally agreed with the 1st defendant for the 1st defendant to take full ownership of 2nd defendant, and on that issue, the trial judge's comment on demeanour of DW2 is irrelevant. Section 80(2)(d)(e)&(f) talks of capacity to perceive and recollect the events, bias and character traits of the witness for deciding on credibility of

her testimony, but from the record before us, there is hardly any facts justifying any preference between the parties herein with regard capacity to recollect the events, the presence or absence of bias and character traits of honesty or dishonesty. I shall score them equal marks on those factors. Of the factors mentioned under the section, it is subsection (2)(c)&(g) on the existence or non-existence of facts testified to and statements or conduct that is consistent or inconsistent with their respective testimonies, that ought, in my view, to be applied in determining credibility and arriving at the right inferences in this case.

Therefore, to begin with, we need to critically examine the 1st plaintiff's own admitted conduct in relation to affairs of 2nd defendant from 2007 to 2015, eight years, during which he allowed 1st defendant to exclusively own 2nd defendant, to see if it is consistent with his testimony or the testimony of the 1st defendant. For that period, he stopped making enquiries about the affairs of 2nd defendant and what was happening in there. From his own evidence, he also stopped sending resources to support its running. This distancing of the 1st plaintiff from the company has the appearance of alignment with the case of the 1st defendant that 1st plaintiff ceded the company to him and no longer considered himself as having any interest in it. From his own case, the 1st plaintiff was not aware of the involvement in the company of the high profile directors in the persons of a former Managing Director of Ghana Commercial Bank, former Head of Banking Supervision at Bank of Ghana and a former Inspector General of Police, all of them brought into the company by the 1st defendant in 2006. The 2nd defendant was conceived of as a specialised investigation company that was to service the banking industry in Ghana so it definitely needed the participation of persons of high repute, standing and experience in the security and banking sectors of the country if it was to succeed. It must have taken a lot to get the former Minister of Finance, Dr Kwabena Duffour interested in

the success of the company and these heavy weights onto the board but the 1st plaintiff did not know anything about their participation in the company until after eight years!

However, the 1st plaintiff explained his detachment from the company after 2007. He explained that the 1st defendant changed his attitude towards him and became confrontational anytime he made enquiries about the company, so he decided to stay away. Secondly, 1st plaintiff stated that he had immigration issues in the United Kingdom so he could not travel to Ghana to check for himself what was happening in the company. But, his evidence is that from incorporation, apart from 1st defendant, he dealt with the company through his friends and was not personally involved. So what changed after 2007 in relation to dependable friends if 1st defendant became a changed person? There was Kimathi Kuenyehia, the first secretary of the company about whom 1st plaintiff was asked during cross examination and whose email dated 26th July 2005 1st plaintiff tendered, who could have been contacted for information within the eight years of the 1st plaintiff's departure from the company. After the 2005 email about the company, the 1st plaintiff did not communicate again concerning the 2nd defendant. He could also have engaged a lawyer in Ghana to conduct searches and demand information on his behalf on account of his status as a shareholder and Director. The answers the 1st plaintiff provided under cross examination for not getting involved with 2nd defendant for such a long period were not satisfactory to me. This is someone who, from the record, within this same period completed building a house at Trassaco Valley in Accra. The 1st defendant testified that the 1st plaintiff got over his immigration challenges and visited Ghana after 2010 but never bothered to stop by at the offices of 2nd defendant. His conduct proven by the evidence shows a consistency with the testimony of the 1st defendant that he ceded his interest in 2nd defendant to the 1st defendant. One can only speculate about what defence the 1st plaintiff would have put up if, before this case, 2nd

defendant became insolvent and the 1st plaintiff was taken on for its debts incurred after 2006.

The case of the 1st plaintiff is that the 1st defendant had nothing at all to do with Concorde Security Ltd of UK so it could not have been the case that he traded off any interest in it. But the 1st defendant in his pleadings and evidence talked at length about how Concorde Security was formed jointly by him and 1st plaintiff during his stay in London and how he co-managed it with 1st plaintiff even when he moved to Ghana. He said it was in 2006 that differences arose about Concorde Security because the 1st plaintiff requested that the shares in that company that the two of them had equal beneficial interests should be transferred into the name of 1st plaintiff's wife and he flatly refused. 1st defendant finally said he would only agree for the shares to be put in the name of the wife of 1st plaintiff only on the condition that a shareholders trust deed was signed by the two of them. The 1st defendant said they discussed with Kimathi Kuenyehia for him to prepare the shareholders agreement but somehow they never got round to have it prepared and signed. To prove that the two of them discussed about a shareholders trust deed on Concorde Security UK, the 1st defendant tendered Exhibit '18' through Kimathi Kuenyehia who testified upon a subpoena filed by the 1st plaintiff. Exhibit '18' is the handwritten notes Kimathi Kuenyehia took at a meeting where the 1st plaintiff and 1st defendant discussed about a shareholders agreement. Now, Kimathi Kuenyehia in his testimony stated that Exhibit '18' was about a joint company of the 1st plaintiff and the 1st defendant though he could not confirm if that was Concorde Security UK. He was however definite that the discussion was not about the 2nd defendant company.

It appears to me that the trial judge did not quite appreciate the import of the evidence the 1st defendant led through Exhibit '18' and therefore did not draw the right inference from that evidence. The 1st defendant sought to prove that he and 1st plaintiff discussed about signing an agreement on the shares of Concorde Security UK and that Kimathi

Kuenyehia was the witness. Exhibit '18' and part of the testimony of Kimathi Kuenyehia confirms that indeed the parties held such a discussion but Kimathi Kuenyehia fell short of saying that the discussion was about shares in Concorde Security UK. From that point, it is for the judge to have decided whether to believe the 1st defendant that the discussion was about their joint interest in Concorde Security or to disbelieve him and to state his reasons. The question of fact for decision on this aspect of the case was not whether a shareholders agreement was entered into but whether there was a discussion as contended by the 1st defendant but flatly denied by the 1st plaintiff. If there was such a discussion, then it means the 1st plaintiff had interest in the beneficial ownership of the shares of Concorde Security. That would defeat the story of the 1st plaintiff that 1st defendant had no interest in Concorde Security that could have been traded off for full ownership of 2nd defendant company.

Now, for me, the testimony of Kimathi Kuenyehia on this issue of a discussion about a shareholders agreement between the parties concerning their joint company which was not 2nd defendant, backed by Exhibit '18', confirmed the existence of matters testified to by the 1st defendant. That supports the credibility of his testimony and convinces me that the 1st defendant's story of his beneficial interest in Concorde Security is more probable than the 1st plaintiff's complete denial and his testimony that 1st defendant had nothing at all to do with Concorde Security. It is not always that proof of a fact in court is possible to achieve with mathematical exactitude since the memory of witnesses may fade with the passage of time. Kimathi Kuenyehia saying that he does not remember the company whose shares they discussed about while admitting such a discussion is sufficient corroboration of the testimony of the 1st defendant so the question ought to be why the straight denial by the 1st plaintiff? The trial judge rather inferred that 1st defendant had no interest in Concorde Security because the share holding trust agreement was not

executed, which was the wrong inference to draw from the evidence on Exhibit '18'. The 1 st defendant never built his case on any rights arising from Exhibit "18".

Still on Concorde Security UK, the 1st defendant testified that at incorporation, he and the 1st plaintiff made Ruby Amoh to hold the shares in that company on their joint behalf but the 1st plaintiff in his pleadings denied this. In his Amended Reply filed on 24/4/2017, the 1st plaintiff stated that at some stage in the life of Concorde Security UK, the shares in the company were transferred to Ruby Amoh to hold in trust for him because he was facing "uncertain residential status" in the UK. Under cross examination of the 1st plaintiff this is what transpired;

Q. It is the 1st defendant's position that at the time Concord Security was established, indeed the said Ruby Amoh was a shareholder of Concord Security Company?

A. It may well have been, it may well not have been; it has been a long time. At various stages in the life of Concord Security, Ruby Amoh was at a point a shareholder, and at some point, she was not. My Lord, Ruby Amoh is my maternal aunty. Everything pertaining to Concord Security was my personal business. Mr Owusu-Twumasi had nothing to do with Concord Security.

Q. Mr Afram, I am talking specifically about your averment in your reply, that at the time of incorporation of Concord Security Company, Ruby Amoh did not hold any shares in same; you did say so?

A. If that is what my reply says, then I will say so. I have provided the answer that at some stages in the life of the company Ruby Amoh was a shareholder and at some stages, she was not a shareholder.

Exhibit '11' being the record from the Companies Registry of UK did not exactly correspond with what either party said about the changing ownership of the shares of Concorde Security as it was not the record of the company at incorporation in 2004.

Nonetheless, for the reason that there is a narration in Exhibit '11' that 1st plaintiff was a former shareholder, the trial judge jumped to the conclusion that it meant that 1st plaintiff was the sole beneficial owner of the shares of Concorde Security throughout and that 2nd defendant never had any beneficial interest in the shares. The trial judge also held that the immigration status of the 1st plaintiff could not legally affect his ownership of company shares in the UK. That holding is inconsistent with the pleadings of the 1st plaintiff himself that he made Ruby Amoh to hold his shares in Concorde Security to avoid his residential status challenges. Those certainly were immigration related challenges. The inference that at incorporation all the shares in Concorde Security were in the name of the 1st plaintiff cannot be justified on the basis of Exhibit '11' alone, because the document did not state that. Secondly, 1st plaintiff himself testified that the records on Concorde Security did not reflect the beneficial ownership of the shares and that even when at some stages the shares were stated in the records as belonging to Ruby Amoh, it was he who was the actual beneficial owner.

What the trial judge failed to consider from the admissions by the 1st plaintiff concerning Ruby Amoh's holding of Concorde Security shares in trust and Exhibit '11' is, whether those pieces of evidence in anyway support the testimony of the 1st defendant on the holding of Concorde Security shares in trust with himself as part beneficial owner or they supported the total denials by the 1st plaintiff. Remember, that it is not in dispute that the joint business undertakings by the parties were not based on documents so the documents involved here can only serve to make the oral testimony of one party more credible than the other and not to prove the contents of the documents.

The testimony of the 1st defendant is that in 2006 he and 1st plaintiff agreed on the future controls of Concorde Security UK and 2nd defendant. The witnesses in the case stated in unison that it was in 2006 that the 1st defendant informed them that he and 1st plaintiff had reached an agreement for he 1st defendant to take full ownership of 2nd defendant.

Though Mr Peter Nanfuri and Mr Pamford Bray did not appear to testify at the trial, the contents of their witness statements that were struck out by the trial judge do not differ from the evidence led by Mr Joseph Boye Clottey, a Director of 2nd defendant who joined the company with 34 years experience at the Bank of Ghana, rising to become Head of Banking Supervision Department and Advisor to the Governor. He testified that when in 2006 the 1st defendant informed the board about the departure of the 1st plaintiff from the company, he said so with regret. It was around this same time that the 1st defendant told Kimathi Kuenyehia the same thing and he testified to this. It must be noted, that contrary to what the 1st plaintiff stated that the 1st defendant took advantage of the re-registration of companies undertaken in 2014 to take over his shares, it appears that the changes were first formally done on 5th June, 2008 as disclosed on Exhibit 'E' tendered by the 1st plaintiff. The records show a clear re-organisation of 2nd defendant by the 1st defendant from 2006/2007 when he injected high caliber specialised expertise into its management. This timing, with the rest of the evidence, is consonant with the case of the 1st defendant that in 2006 he was given full charge of 2nd defendant. The consistency of the proven statements and conduct of all persons involved in the case, including even the 1st plaintiff himself, with the story of the 1st defendant weighs heavily in favour of the credibility of his testimony.

On account of the above analysis of the evidence in accordance with the rules of evidence on credibility of testimonies, my considered opinion about the effect of the whole of the evidence led at the trial is, that on a balance of probabilities, there was an agreement between the 1st plaintiff and the 1st defendant in 2006 for the 1st defendant to take full ownership of 2nd defendant company. Since it was the 1st defendant who initialed for the 1st plaintiff's original subscription to the 43% shares, his act of transferring those shares by him initialing again for the 1st plaintiff was done with his consent and

accordingly lawful. I fail to see proof by the 1st plaintiff that the transfer of the 43% shares originally allocated to him was done fraudulently.

I now turn to the transfer of the shares of the 2nd plaintiff. The transfer of the 2nd plaintiff's shares were covered by documents executed by him so the simple question for determination is; was he able to prove that he, a retired Commissioner of Police, was threatened, coerced and induced against his will to sign documents surrendering his shares in 2nd defendant? The trial judge dismissed the story of threats and coercion stated by the 2nd plaintiff and held that he acted voluntarily and freely surrendered his 25% shares in 2nd defendant and he received payment for the shares. In this appeal, the 2nd plaintiff has not contested the finding that he acted voluntarily and he received payment for his shares that were surrendered. What the 2nd plaintiff is chasing in this appeal is for restoration of the order the trial judge made to the effect that the statutory conditions required to exist before a company can acquire back its own shares were not proven to exist at the time the company acquired the shares of the 2nd plaintiff. For that reason, the High Court ordered that 2nd defendant's shares should be returned to him while he refunded the payment he received. The Court of Appeal set aside that order upon a purposive interpretation of section 56 of Act 179 as a whole. But, a simple answer to the 2nd plaintiff is, that after he received payment and voluntarily surrendered his share in 2nd defendant, he ceased to be a member of that company so he has no locus to complain about non-compliance with provisions of Act 179. Since the trial judge came to the conclusion that 2nd plaintiff voluntarily exited the company, that was the end of the matter since there was no competent claimant before the court. The 2nd plaintiff cannot be allowed by a court of Equity to reprobate and aprobate at the same time. In his evidence-in-chief, the 1st plaintiff stated that the 25% shares given to the 2nd plaintiff were originally allocated to the 1st defendant so, there ought not to be a dispute if the shares ended up with the 1st defendant.

The final issue in this appeal is the order the trial judge made for the 1st defendant to pay to the 1st plaintiff the value of five plots of land at Adjiringano, Accra as stated in a valuation report tendered by the 1st plaintiff. Meanwhile, the 1st plaintiff did not endorse his writ of summons or statement of claim with a relief of recovery of the value of any number of plots. The relief endorsed was for accounts of the lands he pleaded had been acquired by him and the 1st defendant for their joint benefit and he led evidence about the lands. The 1st defendant's defence was that when it was agreed that the 1st plaintiff should take full ownership of Concorde Security in UK, he was to take over all their joint undertakings in Ghana and that included the land at Adjiringano. The trial judge gave as basis for his order the following reason;

"Having admitted brazenly of selling four of the plots to roof his house and finding that 1st defendant had no just cause of expecting any money from Concorde Security and guided by the valuation report being Exhibit 'J' of the value of an average land at Adjirigano, I will order 1st plaintiff to recover from 1st defendant the value of five plots of land from 1st Defendant as per the valuation report."

From my analysis of the evidence above, I disagree with the trial judge's holding that the 1st defendant had no just cause to expect any money from Concorde Security. Therefore, for the reasons I explained in that respect I cannot support the basis on which the trial judge made the order for the recovery of money from the 1st defendant.

In sum, I am of the considered opinion that the plaintiffs failed to prove their pleaded cases and their claims ought to have been dismissed. Accordingly, the Court of Appeal came to the right decision in this case and the appeal against their judgment fails and is dismissed.

G. PWAMANG

(JUSTICE OF THE SUPREME COURT)

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