IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2024

CORAM: PWAMANG JSC (PRESIDING)
OWUSU (MS.) JSC
LOVELACE-JOHNSON (MS.) JSC
PROF. MENSA-BONSU (MRS.) JSC
KOOMSON JSC

CIVIL APPEAL
NO. J4/40/2020

14TH FEBRUARY ,2024

1. **NUUMO ADJEI KWANKO II**
2. **FALCON CREST INVESTMENT LIMITED**

PLAINTIFFS/RESPONDENTS/ RESPONDENTS

VRS.

1. **JUDEVILLE HOMES GHANA LIMITED**
2. **THE REGISTRAR LAND TITLE DIVISION LANDS COMMISSION, ACCRA**

DEFENDANTS

1. **DALEX FINANCE & LEASING COMPANY ..... 1ST APPLICANT/APPELLANT/ APPELLANT**
2. **MARINA DISTRIBUTION COMPANY LTD ..... 2ND APPLICANT**

JUDGMENT

KOOMSON JSC:

INTRODUCTION & FACTS:

This is an appeal against the decision of the Court of Appeal dated 25th April 2018. The Court dismissed the Appeal by the 1st Applicant /Appellant/Appellant (hereinafter to be referred to as "The Appellant").

By a Writ of Summons and Statement of Claim dated the 5th day of November, 2015 the Plaintiffs/Respondents/Respondents (hereinafter referred to as Respondents) commenced an action against the 1st and 2nd Defendants claiming the following reliefs:

1. An order annulling the lease dated the 7th day of July, 2011 between 1st Plaintiff and the 1st Defendant for failure of consideration.

2. An order directing the 2nd defendant to cancel Land Title Certificate No. GA. 37952 Vol. 46 folio 210 in the name of 1st defendant (Judeville Homes Ltd.) and re-issue one in the name of 2nd Plaintiff (Falcon Crest Investment Ltd.)

3. Cost

The Respondents obtained judgment on 11th January 2016 against the 1st and 2nd Defendants at the High court and proceeded to execution.

Appellant herein, on 21st February 2017, that is almost a year after the 1st Respondent secured judgment, filed an application for an injunction and to set aside the judgment of the court delivered against the 1st and 2nd Defendants, which said application was opposed by the Respondents.

RULING OF THE HIGH COURT

The court after hearing the argument of both parties proceeded to dismiss the Application to set aside the default judgment. The learned trial judge opined:

> ***"It is true the proprietor of land with land certificate enjoys indefeasibility of title to the land as stated in section 43 of PNDCL 152 but that indefeasibility is not absolute. It is subject to certain overriding interest such as stated in section 46 of the law and even as could be envisaged in certain peculiar circumstances such as the one the 1st Applicant is saddled with herein***
>
> ***1st Defendant had no registrable interest in the land not having paid for it but would not disclose same to 1st Applicant and deceived 1st Applicant into accepting the certificate and 1st Applicant would also not enquire as to whether the land had been fully paid for before the certificate was applied for and obtained"***

The learned trial Judge proceeded to further deliver himself of the judgment as follows:

> ***"To the extent that the said mortgage entered into by 1st Defendant and 1st Applicant to secure the loan advanced to TLG is tainted with deceit and for that matter invalidity, 1st Applicant's so called interest in the mortgage property is rendered non-existing and this leads me to agree with learned lawyer for Plaintiffs /Respondent that 1st Applicant lacks locus or interest in this matter for it to claim that it has adversely or injuriously been affected by the judgment of the court"***

Dissatisfied with the ruling of the High Court the Appellant appealed to the Court of Appeal on the grounds that:

1. The Learned Judge erred when he held that the Land Title Certificate of 1st Defendant is not indefeasible and or conclusive evidence of title in that full payment has not been made for the mortgaged land.
2. The Learned Judge erred when he held that though the 2nd Defendant Registrar Land Title Registry is not a legal entity, its (court's) order directed at it for the cancellation of 2nd Defendant's land Title Certificate was nevertheless proper.
3. The learned Judge erred when he held that even though the mortgaged land had been attached by Appellant in an earlier judgment in so far as full payment had not been made for the land the attachment of the land in execution of the earlier Court judgment was of no effect.
4. The learned Judge erred when he refused to set aside the default judgment in that the default judgment concern land which is the subject of mortgage an act which is against the provisions of the Land Title Registration Law PNDC Law 152 and the rules of Court CI. 47.
5. The learned Judge erred when he refused to set aside the default judgment in that the Respondents are estopped from setting aside the land title certificate and defeating Appellant's rights obtained under the mortgage at a time no court action had been commenced to set aside 1st Defendant's land title certificate.
6. The ruling is against the weight of evidence.

JUDGMENT OF THE COURT OF APPEAL

The Court of Appeal speaking through B. Ackah- Yensu JA (as she then was) in dismissing the appeal of the Appellant held as follows:

> ***"The position of the law is that an encumbrance cannot be a fetter on the mortgagors right to transfer the property because it remains the owner even after the property has been transferred. A mortgage under Ghanaian law hence does not operate as to change the ownership, right of possession or other interest, whether present or future, in the property charged, except as otherwise provided by law…***

"Unlike the trial judge however we do not see that the Appellant adopted either of the two modes. Clearly the appellant did not sue in the name of the 1st Defendant. The Appellant filed the application in his own name, but simply as an applicant. The proper procedure would have been for them to file the application against both the Plaintiffs and the Defendant. In our view therefore even if the appellant had established the requisite interest to enable them obtain leave of the court to set aside the default judgment, by not using the proper procedure it had rendered the application incompetent because it did not have appropriate capacity"

The Appellant, dissatisfied with the decision of the Court of Appeal has invoked our appellate jurisdiction on the following grounds as appears in the amended notice of appeal:

1. The Learned Judges erred when they held that Applicant did not have capacity and or competence to bring the application to set aside the default judgment.
2. The Learned Judges erred when they did not hold that nonpayment of the mortgaged land by 1st Defendant is not a ground for setting aside a registered land under the Land Title Registry.
3. The Learned Judges erred when they did not hold that the 2nd Defendant, Registrar, Land Title Registry which is not a legal entity is incapable of cancelling 1st Defendant's Land Title Certificate.
4. The Learned Judges erred when they held that Appellant did not have the requisite interest to challenge the default judgment.
5. That the learned judges erred when they did not hold that due to the fact the mortgaged land had been attached by appellant in an earlier judgment, Respondent had no claim to same.
6. The learned judges erred when they refused to set aside the default judgment in respect of land which is the subject matter of a registered mortgage.

7. The learned judges erred when they did not hold that Respondents are estopped from setting aside the Land Title Certificate.
8. The learned judges of the Court of Appeal erred by giving effect to a judgment which had adversely affected Appellant without giving it a hearing.

APPEAL TO SUPREME COURT

It is established that appeals are by way of rehearing ie. the appellate court steps into the shoes of the court of first instance and evaluates the cases of the parties together with the evidence adduced. In the case of **Mensah (Dec'd); Mensah & Sey v. International Bank (Gh.) Ltd. [2010] S.C.G.L.R. 118 at 132-133**, this Court held as follows:

> ***"It is necessary to point out that an appeal is by way of rehearing and as explained by Osei Hwere J. (as he then was) in Nkrumah v. Ataa [1972] 2 G.L.R. at 18 whenever an appeal is said to be (by way of rehearing) it means no more than that the appellate court is in the same position as if the rehearing were the original hearing and hence may receive evidence in addition to that before the court below and it may review the whole case and not merely the point as to which the appeal is brought"***

Adinyira JSC in the case of **Nana Kow Mensah King vs. Opanin Kweku Kyikyibu Gyan (Civil Appeal No. J4/5/2015 delivered on 22nd July, 2015)** held as follows:

> ***"There is a host of jurisprudence on point that an appeal at whatever stage is by way of rehearing as every appellate court has a duty to examine the record of proceeding by scrutinizing pieces of evidence on record and ascertain whether the decision is supported by the evidence. In that respect the appellate court can draw its own inferences from the established facts and in arriving at its judgment, the appellate court can affirm the judgment for different reasons or vary it."***

RESOLUTION OF ISSUES

In our view, the totality of the grounds of appeal filed by the Appellant calls on this court to determine the competency of the application filed by the Appellant and whether the Appellant had sufficient interest in the disputed property so as to cloth it with capacity/*locus standi* to seek remedy before the Court.

COMPETENCY OF APPLICATION FILED BY THE APPELLANT BEFORE THE HIGH COURT

The 1st Respondent commenced suit No. LD/0057/2015 titled Numo Adjei Kwanko & Another vs. Judeville Homes Ghana Limited & The Registrar, Land Title Division and obtained a default judgment against the 1st Defendant on 11th January, 2016. The judgment in essence cancelled the Land Title Certificate (No. GA 37952) in favour of the 1st Defendant upon which the Appellant had registered a mortgage for a facility granted to TGL. Thus, a New Land Title Certificate (No.GA 50764) was issued by the 2nd Defendant in favour of the 2nd Respondent.

On 21st February, 2017, the Appellant, a stranger to the suit, filed an application for injunction to restrain the Respondents from alienating/transferring or any way dealing with the land and for leave of the court to set aside the default judgment of the Court dated 11th January, 2016. This application was served on both Plaintiffs and 1st Defendant as stated by the trial High Court Judge in his ruling at page 188 of the record where he stated as follows:

> **"For[sic] all intends and purpose, the Applicants adopted the procedure where they applied in their own names and served the applications on both parties in the suit"**

It is noted that a stranger to a judgment, the execution of which would adversely affect him is not left without a remedy. Case law has established two methods by which a stranger could take such step. The unclear arena is whether the opportunity to set aside the

judgment is limited to only default judgments or judgments that have been determined on the merits. Majority of case law has dealt with the default judgments and the instant appeal also touches on the setting aside of a default judgment.

In **Nai Otuo Tetteh vs. Opanyin Kwadwo Ababio (Deceased) (substituted by Naachie Awo Chocho Botwey IV) & Another [Civil Appeal No. J4/30/2017; delivered on 14th February, 2018], Pwamang JSC** held as follows:

> ***"The lower courts concerned themselves with the procedure whereby a stranger may apply to set aside a judgment discussed in Lamptey v Hammond [1987-88] 1 GLR 327, and that line of cases but that procedure is where a default judgment has been taken and a stranger to the proceedings who is affected seeks to set the default judgment aside and defend the action. Even in those cases the summons that is referred to in the decisions is application by summons as distinguished from application by motion and it is not a reference to writ of summons. Having regard to the fact that our current High Court rules have done away with applications by summons that procedure prescribed in Lamptey v Hammond would be satisfied if a stranger filed a motion and served both the plaintiff and the defendant praying for leave to set aside a default judgment that affected him. In this case the appellant had his application to set aside served on the plaintiff and the defendant. That appears to be the intendment of Order 19 Rules 1 and 2 of the High Court (Civil Procedure) Rules, 2004 (C.I. 47)."***

The Order 19 Rule 1(1) – (3) of the High Court Civil Procedure Rules, 2004 (CI 47) provides that:

> ***"Applications to be made by motion***
>
> ***(1) Every application in pending proceedings shall be made by motion.***
>
> ***(2) Proceedings by which an application is to be made to the Court or a Judge of the Court under any enactment shall be initiated by motion and***

where an enactment provides that an application shall be made by some other means, an application by motion shall be deemed to satisfy the provision of the enactment as to the making of the application.

(3) Except where these Rules otherwise provide, no motion shall be made without previous notice to the parties affected."

Gbadegbe JSC in the case of **Mrs. Jennifer Kankam Nantwi & Another vs. Joseph Amenya (Civil Appeal No. J4/22/2019 delivered on 23rd October, 2019)** reiterated the procedure as follows:

"...One significant matter emerging from the record of appeal before us is that both the trial court and the CA made a determination at pages 262 and 409 respectively of the record of appeal that the plaintiffs were not parties (or privies) to the previous action whose judgment they seek to annul. In view of this determination, their failure to obtain the consent of the defendant to the said proceeding before issuing the writ of summons herein deprived them of any cause of action flowing from the judgment. Consequently, as strangers to the previous action, the instant proceedings by which they seek among others an order annulling the previous judgment was improperly constituted...

In reaching the view that relief (1) contained in the writ of summons is improperly constituted, we were guided by the settled practice of courts where a person other than a party to an action seeks to intervene in an action as was decided in the case of Gbagbo v Owusu [1972] 2 GLR, 250. In his judgment in the said case, Abban J (as he then was) at page 253 thereof set out the applicable procedure and practice to be employed by third parties (strangers or interveners) who have been adversely affected by judgments as follows: "It is well established that there are only two methods whereby a stranger to a judgment who is adversely or injuriously affected can set it aside. That is, he can obtain the defendant's leave to use

the defendant's name and then apply in the defendant's said name to have the judgment set aside. Or where he cannot use the name of the defendant, he can take out a summons in his own name to be served on both the plaintiff and the defendant, asking to have the judgment set aside and for him to intervene..."

See also the cases of Wolley vs. Nsiah (2003 – 05) 1GLR 68 and Lamptey vs. Hammond (1987 – 88) 1GLR 327.

The Appellant in the instant case elected not to obtain leave of the Defendant to use the Defendant's name to have the judgment set aside. The Appellant in our opinion sought to bring itself under the second method which is that he could take out summons in his own name but then the summons should be served on both the Plaintiff and the Defendant, asking leave of the court to set aside the judgment and for him to intervene.

The Record shows that the Appellant served the Respondents and the 1st Defendant. We agree with the learned counsel for the Respondent on his submission that the 2nd Defendant is not a legal entity that exists for it to be sued. The 2nd Defendant is an administrative department within the Lands Commission and the appropriate entity to have been sued by the Respondents was the Lands Commission. The Lands Commission Act, 2007 (ACT 767) established the Lands Commission as a body corporate with perpetual succession capable of being sued and to sue: see section 1 and 40 of ACT 767.

Counsel for the Respondent argues that the Registrar of the Land Title Registry was sued and that there is nothing wrong in seeking a relief against a public official to compel him/her to carry out a court order. Learned Counsel ends on the note that the Respondent did not sue the Land Title Registry of the Lands Commission as argued by the appellants but rather the Registrar of the Land Title Registration Division of the Lands Commission who is a legal entity that can sue and be sued.

The argument of Respondents' Counsel is not sustainable and sins against ACT 767 which has established only one "Lands Commission". One cannot bring an action against the Survey Department or Land Registry as if they exist as legal entities. These departmental units have no capacity to be sued. ***See the case of Aquatic Biology Institute vs. Abokuma (1978) GLR @72***. Upon the coming into effect of Act 767, Land Title Certificate is issued by the Lands Commission and as such, an order seeking cancellation of a certificate can only be directed at the Lands Commission. Therefore, the non – service of the application on the 2nd Defendant is justified under the circumstances and is not fatal to the procedure adopted by the Appellant. The 2nd Defendant is a non – existent entity that can be served legally.

The learned trial judge rightfully found that the procedure adopted by the Appellant was competent when he held that:

> ***"The applicants to the extent that they were not parties to the suit no. LD/0057/2015 are strangers to it in the eyes of the law. Therefore, in my considered view, the competence of the applicants appears unimpeachable... For[sic] all intends and purposes, the applicant adopted the procedure where they applied in their own names and served the application on both parties in the suit ... It is in the view that I consider the instant applications instead of the summons being taken out as not only competent but also satisfactory of the requisite procedure"***.

The Court of Appeal on the contrary ruled as follows***:***

> ***"... Unlike the trial judge however, we do not see that the Appellant herein adopted either of the two modes. Clearly the Appellant filed the suit in the name of the 1st Defendant. The Appellant filed the application the in his own name, but simply as an applicant. The proper procedure would have been for them to file the application against both the Plaintiffs and the Defendants. In our view therefore, even if the Appellant had established***

the requisite interest to enable them obtain leave of the court to set aside the default judgment, by not using the proper procedure it had rendered the application incompetent because it did not have appropriate capacity".

It is our view that, by filing and serving the application on both the Respondents and the 1st Defendant, the Appellant complied with the procedure specified by law. It appears the learned justices of the Court of Appeal might have conflated the procedure to be adopted and capacity to sustain the application by holding that ***"by not using the proper procedure it had rendered the application incompetent because it did not have the appropriate capacity".***

The procedure to be adopted by a stranger to challenge a judgment is different from the capacity to sustain the application or relief sought. From the Record of Appeal, we are satisfied that the proper procedure was adopted by the Appellant. The Court of Appeal therefore erred when it held that the Appellant did not use the proper procedure to set aside the judgment obtained by the Respondent.

CAPACITY/INTEREST/LOCUS STANDI TO JUSTIFY APPLICATION

For a stranger to succeed in setting aside a judgment, he must not only demonstrate that he has used the proper procedure, he must further show that he has sufficient interest in the subject matter of judgment to enable the Court set aside same and give him an opportunity to intervene or defend his interest.

Prof. Mensa – Bonsu (Mrs) JSC in the case **of Kasseke Akoto Dugbartey Sappor & 2 Others vs. Very Rev. Solomon Dugbartey Sappor & 4 Others (Civil Appeal No. J4/46/2020 delivered on 13th January, 2021)** on capacity said:

"Capacity to bring and maintain the action remains a cardinal hurdle that must be jumped if either party is to remain in the case. It is for good reason that Order 2(4) of High Court (Civil Procedure) Rules 2004, (CI 47) as amended, insists on the capacity of the plaintiff being indorsed on the writ

before it becomes a competent writ. Rule 3 of the Court of Appeal Rules, 1997 as amended, grants the right of audience only to "A person who is a party to any cause or matter before the Court…" (emphasis supplied)

Therefore, just as there cannot be a "phantom plaintiff" so there cannot be a "phantom appellant". Black's Law Dictionary defines 'Capacity' or Standing as: "A party's right to make a legal claim or seek judicial enforcement of a duty or right capacity…" Thus, one's ability to appear in court to make a claim hinges on whether one is recognized in law as having sufficient interest in any matter to seek a hearing on any particular issue. This "sufficient interest" must remain throughout the life of the case, or one's legal ability to stay connected with a case making its way through the courts would be lost."

In the case of **Florini Luca & Another vs. Mr. Samir & 2 Others (Civil Appeal No. J4/49/2020, delivered on 21st April, 2021)** Pwamang JSC drew the distinction between capacity in its true sense and locus standi most often interchangeably used. He stated as follows:

"It is pertinent to recognize that though capacity and locus standi are closely related and in many instances arise together in cases in court they are separate legal concepts. Capacity properly so called relates to the juristic persona and competence to sue in a court of law and it becomes an issue where an individual sues not in her own personal right but states a certain capacity on account of which she is proceeding in court. But locus standing relates to the legal interest that a party claims in the subject matter of a suit in court. This may be dependent on the provisions of the statute that confers the right to sue, such as the Fatal Accidents Acts in Akrong v Bulley. Otherwise, generally locus standing depends on whether the party has a legal or equitable right that she seeks to enforce or protect by suing in court."

In this case, what is necessary to be resolved is the *locus standi* of the Appellant, ie, the interest that connects the Appellant to the judgment to enable him set aside the judgment. Arguments about a lack of capacity by the Respondent's Counsel, is with due respect to Counsel, misguided. The Appellant is a legal entity registered in accordance with the laws of Ghana and is maintaining the action in its own right and not in a representative capacity or some different capacity.

The Court of Appeal held that ***"We therefore would agree with the trial judge in its conclusion that the appellant did not have the requisite interest to challenge the default judgment. Indeed, as stated by the trial judge, we agree that no useful purpose would be served in setting aside the default judgment"***.

The crux of learned Counsel for the Appellant's argument is that the mortgage registered and recorded on Certificate No. GA37952 creates sufficient interest to cloth it with the *locus standi* to sustain the application to set aside the judgment. Counsel for the Respondent disputes this and submits that the Court of Appeal made a finding that there was no mortgage in respect of a loan of Five Million Ghana Cedis (GHc5,000,000.00) in the year 2013 based on which the Appellant is claiming interest in the subject matter of dispute. Further Exhibit DA2 was in respect of an amount of GHc960,127.000.

The Court of Appeal's finding on this is as follows:

> ***"In any case the mortgage in question (exhibit DA2 at pages 43 – 46 of the records of appeal) is dated the 28th day of March, 2012 in respect of an amount of GHc960,127.00 in paragraph 2 of the appellant's affidavit in support of the motion, they stated that they granted a loan of GHc5,000,000.00 to TLG Capital in the year 2013. It is difficult to understand how the mortgage could have been in respect of the said loan facility. We have also perused the records and cannot find any other mortgage document in respect of a loan contracted in the year 2013 for which the land in dispute was mortgaged to the appellant"***

From the record, it is undisputed that but for the cancellation of Land Title Certificate (No. GA 37952) by the High Court, there was an existing encumbrance in favour of the Appellant by way of the registered mortgage. From the reading of the Court of Appeal's decision, the learned justices did not dispute that there was a mortgage but similar to the High Court, the Justices of the Court of Appeal held that the Appellant had failed to justify the existence of the mortgage for the sum of GHc5,000,000.00.

Section 1 of the Mortgages Act, 1972 (NRCD 96) provides as follows:

> ***"(1) A mortgage for the purpose of this ACT is a contract charging immovable property as security for the due repayment of debt and any interest accruing thereon or for the performance of some other obligation for which it is given, in accordance with the terms of the contract.***
>
> ***(2) A mortgage shall be an encumbrance on the property charged, and shall not, except as provided by this ACT, operate so as to change the ownership, right to possession or other interest (whether present or future) in the property charged.***
>
> ***(3) A mortgage may be created in any interest in immovable property which is alienable".***

The section 4 of NRCD 96 provides:

> ***"(1) Every mortgage is effectual to create a charge upon all interests and rights which the mortgagor has in the property mortgaged, or which he enjoys as an incident of his interest in the mortgaged property.***
>
> ***(2) Subsection (1) shall apply only if and as far as a contrary intention does not appear expressly or by necessary implication and shall have effect subject to the provisions of the mortgage."***

It is trite knowledge that a mortgage does not operate to change ownership or transfer an interest in land but is a charge over an interest in land. It is our view that a mortgage creates a special kind of interest known as 'security interest': see section 3(1) of the new Borrowers and Lenders Act, 2020 (ACT 1052) which provides:

> ***"a security interest is created by a transaction that in substance secures payment or performance of an obligation, without due regard to the form of transaction, where a borrower or a third party who has title to the collateral willingly creates a security interest in favour of the lender."***

There is no doubt that this security interest is protected by law under appropriate circumstances. The applicable legislation at the time of the transaction, section 72 of the Land Title Registration Act, 1986 (PNDCL 152) provided that the mortgage would not have effect unless registered and when the mortgage is registered as an interest in land, the instrument by which the mortgage is created shall be filed in the Registry: see section 72 of PNDCL 152. The Appellant has produced Exhibit DA2 which shows the registration of the mortgage.

In the opinion of Respondents' Counsel and the Court of Appeal, Exhibit DA2 is undermined by the Respondent's inability to produce a facility letter matching the sum of GHc960,127.00. Thus to the extent that the judgment obtained by the Appellant was for the facility of GHc5,000,000.00 for which there is no corresponding recorded mortgage deed on Exhibit DA2, Exhibit DA2 cannot support the Appellant's claim that it was a security for the loan facility of GHC5,000,000.00.

We disagree with the line of reasoning of the trial High Court Judge and also that of the learned justices of Court of Appeal. A careful study of the rule permitting to a stranger to set aside a judgment shows that, the stranger/applicant must demonstrate a sufficient interest in the subject matter so that the Court could sets aside the judgment and permit him to defend his interest. Underlying the Rule in Lamptey v Hammond is that, the Stranger

when successful in setting aside the judgment must be given an opportunity to defend his claim in the substantive suit from which the judgment or order emanates.

It is our view that, the fact that there was a mortgage registered and recorded on the Land Title Certificate (GA 37952) which the High Court cancelled, it is prima facie evidence of the Appellant's sufficient interest or nexus to the property which cloths the Appellant the requisite *locus standi* to apply to set aside the judgment of the High Court.

It is further observed that a mortgage, when registered, can only be discharged or cancelled in accordance with law. See sections 77 and 78 of PNDCL 152. The Appellant obtained judgment in Suit No. BFS/151/2014 against the 1st Defendant which said judgment subsists. The 1st Defendant was served with the application to set aside the judgment and did not dispute the allegations of the Appellant.

Section 122 of PNDCL 152 confers powers on the Court to order a rectification of a Land Title Certificate under limited circumstances. The power to order rectification by the Court includes cancellation. The section provides:

> ***"(1) subject to subsection (2), the Court may order the rectification of the land register by directing that a registration where it is satisfied the cancellation or amendment of the registration has been obtained, made or committed by fraud or mistake"***
>
> ***(2) The register shall not be rectified so as to affect the title of a proprietor who has acquired a land or an interest in land for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought or had personally caused the omission, fraud or mistake or substantially contributed to it by an act, neglect or default"***

The section 122 re-enforces the view that the High Court cannot order a rectification of the register (ie cancellation of GA 37952) without the beneficiary or proprietor of the entry being notified. In the instant case the proprietors under the Land Title Certificate GA 37952 are the 1st Defendant and the Appellant. Thus, there was a fundamental statutory requirement for the Appellant to have been heard before a consequential order of cancellation of the land title certificate (GA 37952) can even be made by the Court.

In case of **In Re Kumi (Dec'd), Kumi v. Nartey [2007-2008] SCGLR 723** Sophia Adinyira JSC stated at page 632-633 as follows: ***"As said earlier, it is trite law that a person cannot be found guilty or liable on order or judgment unless he had been given fair notice of the trial or proceeding to enable him to appear and defend himself. This is the essence of justice. Failure by a court or tribunal to do so would be a breach of the rules of civil procedure and natural justice. A judgment or order procured under such circumstances is, in our view a nullity***."

It is noted that, it is a requirement of natural justice that, before a party or person is condemned or found liable, he must be given the opportunity to be heard in his defence. He can only do so if he is made aware of the proceedings, charges or allegations.
This principle was highlighted by this Court in the case of **Aboagye vs Ghana Commercial Bank [2001-2002] SCGLR797**. The Court held that:

> **"All courts and adjudicating authorities were required under article 19(3) of the Constitution, 1992 to give a fair hearing within reasonable time. That required notice of proceedings to be given to the person affected by any decision of the adjudicating authority and that he be given the opportunity to defend himself.**"

In **Republic vs State Fishing Corporation, Commission of Enquiry; Ex parte Bannerman [1967] GLR 536,** the need to give a person opportunity to be heard before condemnation was stated thus:

"It is well established that the essential requirements of natural justice at least include that before someone is condemned, he is to have an opportunity of defending himself, and in order that he may do so, he is to be made aware of the charges or allegations or suggestions which he has to meet."

In **Abbot vs. Sulivan [1952] IKB 159,** Lord Denning said of administrative bodies:

"These bodies, however, which exercise a monopoly in the important sphere of human activity with the power of depriving a man of his livelihood, must act in accordance with the elementary rules of justice. They must not condemn a man without giving him an opportunity to be heard in his own defence and any agreement or practices to the contrary would be invalid"

The above statement by Lord Denning applies to the Courts and the Courts have a basic duty to ensure that the laws of the land are upheld and orders/judgments are not given which operate inimically against the interest of parties without the affected party given a hearing. By section 122 of PNDLC 152, the High Court's cancellation of the Land Certificate GA 37952 is a nullity for non – compliance with the provisions of the statute ie. not giving the Appellant a hearing. Date Bah JSC captures this in the case of **Republic v High Court (Fast Track Division) Accra; Ex-parte National Lottery Authority [2009] SCGLR 390** @ page 402, where he observed as follows:

"No judge has authority to grant immunity to a party from consequences of breaching an Act of Parliament. But this was the effect of the order granted by the learned judge. The judicial oath enjoins judges to uphold the law rather than condoning breaches of Acts of Parliament by their orders."

The argument that the 1st Respondent's consent was not sought before the creation of the mortgage, assuming it is justified, does not give validity to the cancellation of the Land Title

Certificate GA 37952. The requirement is for the Appellant to have had prior knowledge of the issue before the court's decision to cancel the Land Title Certificate.

The sole focus by the Courts below on the loan facility of GHc5,000,000.00 is the expectation to see a corresponding amount in Exhibit DA2 before acceptance of the existence of the mortgage, is erroneous. Financial Institutions sometimes give further advances to Borrowers and relying on existing security to secure repayment of those advances. When done, the further advance in the absence of prior existing encumbrances or notice of other interest take their priority from the existing security interest created. This is known as the principle of tacking in mortgages. See the case of **Hopkinson v Rolt (1861) 11 ER 829.** Thus the argument of the Appellant that the loan facility of GHc5,000,000.00 was secured by Exhibit DA2 is justified under the principle of tacking and is legal.

Further, once the property had been attached prior to the commencement of the Respondents' action against the Defendants, the Court could not make an order rendering the attachment nugatory and also for the property to be sold to the 2nd Respondent. Order 45 Rule 6 of CI 7 states as follows:

> **"Unauthorised alienation during attachment void**
>
> *After an attachment has been made by actual seizure, or by written order duly delivered, served or posted in accordance with rule 5, any alienation without leave of the Court of the property attached, whether by sale, gift or otherwise, and any payment of the debt, dividends, or shares to the judgment debtor during the continuance of the attachment, shall be null and void, and the person making the alienation or payment shall be liable to committal for contempt of Court."*

The sale from the 1st Respondent to the 2nd Respondent and the use of the High Court to compel the issuance of Land Title Certificate No. GA50764 is therefore void.

OTHER MATTERS

In our respectful view, the other matters such as the alleged failure of consideration by the 1st Defendant being a basis to nullify the lease and title certificate, the lack of consent in the creation of the mortgage and other matters concerning the validity of the mortgage created must be resolved at trial.

We have refrained from making any pronouncement regarding these issues in order not to prejudice any hearing before the High Court.

CONCLUSION:

We accordingly, for the reasons stated above, allow the appeal. The decision of the trial High Court, dated 11th January, 2016 and that of the Court of Appeal, dated 25th April,2018 are hereby set aside.

The Land Title Certificate No. GA 37952 in the name of Judeville Homes Ltd. is hereby restored. The Land Title Cerficate No. GA 50764 in the name of the 2nd Plaintiff/Respondent is hereby set aside as cancelled.

The Appellant is hereby joined to the suit as 3rd Defendant to defend its interest in the property before the High Court. The Appellant is given 14 days within which to file its statement of defence. Thereafter, the case shall take its normal course.

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

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

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

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

PROF. H. J. A. N. MENSA-BONSU (MRS.)
(JUSTICE OF THE SUPREME COURT)

COUNSEL

SAMUEL M. CUDJOE ESQ. FOR THE 1ST APPLICANT/APPELLANT/ APPELLANT WITH HIM JESSICA ANSAH-ANTWI & YAHAYA BRAIMAH.

KWAME FOSU-GYEABOUR ESQ. FOR THE PLANTIFFS/RESPONDENTS/ RESPONDENTS.