IN THE SUPERIOR COURT OF JUDICATURE
IN THE COURT OF APPEAL - A C C R A

CORAM - ARYEETEY, JA [PRESIDING]
KANYOKE, JA
APALOO, JA

H1/84/2006
22ND NOVEMBER, 2007

MATHEW ALEXANDER KWAKYE] … PLAINTIFF/APPELLANT
SUBSTITUTED BY JANET KWAKYE]
AND DR. ADJEI MARFU

V E R S U S

(1) MICHAEL KWAME OFORI] … 1ST DEFENDANT
(2) BUGRI NAABU GROUP OF
COMPANIES] … 2ND DEFENDANT/RESPONDENT

KANYOKE, JA :- This appeal has emanated from the judgment of the High Court, Accra (Coram: Mr. Justice S.T. Farkye, Justice of Appeal (as he then was) sitting as an additional High Court Judge, wherein the Court dismissed the plaintiff/appellant's (hereinafter the plaintiff) action and entered judgment for the 2nd defendant/respondent (hereinafter called the 2nd defendant) upon its counterclaim; ineffect declaring title in House No. 171, Airport West Residential Area, Accra in the 2nd defendant. The said house (herein the disputed property) originally belonged to the 1st defendant. However in or about March 1985 the 1st defendant by a Deed of Assignment sold and or transferred all his interests in the disputed property to the 2nd defendant for a sum of ¢5,700,000.00. Subsequently in or about July or August 1985 the 1st defendant purported to sell the same disputed property to the plaintiff. This resulted in a ranging controversy between the plaintiff and the 2nd defendant over ownership of the disputed property.
This also resulted in the court action initiated by the plaintiff against both defendants in the High Court, Accra. In the course of the litigation the plaintiff himself died and was substituted by his executors, Mrs Janet Kwakye and Dr. Adjei Marfu.

By his amended statement of claim filed on 24th April 1993, the plaintiff averred that somewhere in 1985 the 1st defendant sold the disputed property to him for the sum of

¢5,250,000.00 payable by instalments. The 1st defendant did not however disclose to the plaintiff that he had already sold the disputed property to the 2nd defendant. The plaintiff only got to know this when he was about to pay the last instalment of ¢3,000,000.00 to the 1st defendant. According to the plaintiff when he confronted the 1st defendant the latter admitted selling the property to the 2nd defendant but explained that the 2nd defendant had expressed his disinterest in the disputed property and had requested a refund of the sum of ¢2,810,000.00 being the part-payment it made towards the purchase of the property. Based on this disclosure the plaintiff and the 1st defendant agreed to refund to the 2nd defendant the said amount of ¢2,810,000.00 out of the last instalment of ¢3,000,000.00 left to be paid by the plaintiff to the 1st defendant. According to the amended statement of claim on a certain appointed day the plaintiff and the 1st defendant went to the office of the 2nd defendant where a refund of ¢2,810,000.00 was made to the 2nd defendant through its Managing Director Mr. Bugri Naabu (DW1) who instructed Mr. Tony Kwakye 2nd defendant's Solicitor to issue a receipt in acknowledgement. Mr. Tony Kwakye (PW1) issued the receipt (exhibit A).

According to the plaintiff, Mr. Bugri Naabu also demanded and received from him an amount of ¢100,000.00 for the return to the plaintiff the Title Deeds of the disputed property. All this took place in 1985. The plaintiff alleged further that 2nd defendant did not keep to its part of this agreement but rather encouraged the plaintiff or sat by for the plaintiff to make substantial developments to the disputed property to his detriment hence the action.

The plaintiff testified and called two witnesses in support of his claims. The evidence of the plaintiff is not substantially different from the averments in the amended statement of claim.

The 1st defendant, who was represented throughout the proceedings by a counsel filed a statement of defence on 23rd May 1996 which was essentially an admission of the plaintiff's claims and created the impression that it was the plaintiff rather than the 2nd defendant who was the owner of the disputed property by virtue of purchase of same from him (the 1st defendant). The 1st defendant did not however turn up in court to testify despite several opportunities given to him including the court's indulgence to move to his house to take his evidence which was spurned by him.

The case of the 2nd defendant was also averred in an amended statement of defence and counter claim filed on 12th May 1998. In this amended statement the 2nd defendant emphatically denied the plaintiff's claim. The 2nd defendant insisted that it purchased the disputed property from the 1st defendant for the sum of ¢5,700,000.00 by instalments. The first payment of ¢3,000,000.00 was made by a banker's draft which was tendered during the trial as exhibit 2. The 2nd defendant averred that the sale transaction between it and the 1st defendant was duly confirmed by the execution of "Deed of Assignment registered at the Lands Commission as No. AC 2082/85. In respect of the alleged meeting in 2nd defendant's office for the refund of ¢2,810,000.00 the 2nd defendant categorically denied the allegation and put the plaintiff to strict proof of same. Also in refutal of the plaintiff's claim that 2nd defendant encouraged the plaintiff or sat by for the plaintiff to make some developments to the disputed property to his detriment, the 2nd defendant averred that it was rather in 1989, after its Managing Director (DW1) was released from political detention that the plaintiff approached him to purchase the disputed property which had then been mortgaged to the Social Security Bank Ltd. by 2nd defendant for a loan, which was refused by both word of mouth and by written letters. Despite this the plaintiff went ahead to develop the disputed property. The 2nd defendant called evidence in support of its case through its Managing Director (DW1) and two other witnesses. That also is the case of the 2nd defendant.

On the 23rd December 2004, the High Court entered judgment in favour of the 2nd defendant on its counter-claim and dismissed the plaintiff's claims.

The trial judge made a finding of fact that from 20th March 1985 the 1st defendant was not the owner of the disputed property. He also found that the 2nd defendant made a part-payment of ¢3,000,000.00 of the purchase price by the issue of a banker's draft (Exhibit E) that was paid through PW1, that in dates in July and August 1985 when he received payments from the plaintiff the 1st defendant could not have legally done so as he was not the legal owner of the disputed property then.

The trial judge also made these findings of fact.

(1) that the evidence of the plaintiff and his two witnesses concerning the alleged refund of ¢2,810,000.00 to the 2nd defendant through DW1 was discredited evidence, (2) that at all material times the 2nd defendant had secured a mortgage over the disputed property

and that there was no fraud in doing so, (3) that the conduct of PW1 in defending the 2nd defendant in connection with the disputed property in anearlier suit brought by the Social Security Bank Ltd. was consistent with the ownership of the property in the 2nd defendant and [4] that the failure of the 1st defendant to give evidence in the suit was collusive with the plaintiff to assist the plaintiff to claim ownership of the property. On the basis of these findings, the trial judge consequently dismissed the plaintiff's claims and awarded against him and in favour of the 2nd defendant general damages of ten million [¢10,000,000.00] Cedis for trespass with costs of ¢6 million against the 1st defendant and the plaintiff jointly and severally .

It is against this judgment that the plaintiff feeling dissatisfied originally filed one ground of appeal, namely that" The judgment is against the weight of the evidence".

Later, pursuant to leave granted by this court, the plaintiff filed the following additional grounds of appeal as per three notices filed on 29th December 2004; 10th February 2005 and 4th November 2005 respectively. The grounds of appeal are that;

"[i] The Court erred by upholding Exhibit 3 as evidence of the payment of Five Million Seven Hundred Thousand Cedis [¢5,700,000.00] to the 1st defendant by the 2nd defendant.

[ii] The Court further erred by making a definite finding on the fact that P.W.1, 2nd defendant's then solicitor sent a banker's draft of three million Cedis [¢300,000.00] to the 1st defendant for the purchase of the disputed property.

[iii] The Court also erred in law by his failure to apply the equitable principle of trust.

[iv] The Court also erred in holding that it accepts the defence of the 2nd defendant that no refund was made to 2nd defendant for the simple reason that P.W.1 was counsel who defended 2nd defendant in 1989 in an action between 2nd defendant and Social Security Bank in which the disputed property was used as Security Bank, in which the disputed property was used as Security for a loan.

[v] The learned trial judge erred by holding that the 1st defendant colluded with the plaintiff to get the disputed property for the plaintiff when there was no evidence to support it.

[vi] The learned judge erred in law by his failure to make definite findings to enable the plaintiff obtain full redress.

[vii] The judge erred in law by holding that the plaintiff is a trespasser.

[viii] The trial judge erred in law when he upheld the objection of 2nd defendant's Counsel to the tendering of Exhibit R1 and R2.

[ix] The trial judge erred when he rejected Exhibit R1 on the further ground that one of the receipts had no date.

[x] The trial judge erred when he failed to apply the equitable principle of laches and acquiescence to protect the interest of the plaintiff."

Learned Counsel for the plaintiff argued these grounds of appeal in his written submission filed on 24th November 2005 and learned counsel for the 2nd defendant also responded in his written submission filed on 5th March 2007 pursuant to leave granted by this court on 22nd February 2007.

In my view these grounds of appeal are mainly supplementary to the substantive issues for determination in this appeal. These substantive issues were the same relevant issues at the court below for determination and which were in fact fully considered and pronounced upon by the learned trial judge. I agree with learned counsel for the 2nd defendant that having regard to the state of the pleadings [and I will add, the evidence adduced at the trial] there appeared or ensued one cardinal and important issue for determination, namely [1] whether there was a valid sale of the leasehold interest in the disputed property by the 1st defendant to the plaintiff in July or August 1985, Secondly having regard to the admission by the plaintiff that he got to know that the disputed property had been sold by the 1st defendant to the 2nd defendant when he attempted to make the last instalment payment to the 1st defendant, who, as between the plaintiff and the 2nd defendant, bore the burden of proof that the 2nd defendant later divested its interest in the disputed property by selling same to the plaintiff by getting a refund of ¢2,810,000.00 from the 1st defendant through the plaintiff.

Thirdly it was also necessary for the trial court as it is equally necessary for this court to consider and decide whether by his alleged substantial development of the disputed property the trial court should have given the plaintiff any protection or whether this court should do so.

In his judgment the learned trial judge answered the first issue or question in the negative and I agree with him. The learned trial judge answered this question or issue

at page 232 of the record of proceedings as follows:

"The 1st defendant knew very well in July and August 1985 that he was not the legal owner [and I will add not even the equitable owner] of the property in dispute because on 20th March 1985 there had been a Deed of Assignment i.e. Exhibit 2.

The 1st defendant I must say without mincing words that if he actually took money from the plaintiff for the sale of the disputed property then he defrauded the plaintiff that was why he did not appear in court to give evidence."

It is significant to observe that Exhibit 2 was tendered without objection. Exhibit 2 is a registered document. No evidence was led by the plaintiff to show that Exhibit 2 was not executed by the 1st defendant. The 1st defendant did not also come to court to deny executing Exhibit 2. He did not also file an amended statement of defence to deny executing Exhibit 2 or challenge its authenticity, even though by the 2nd defendant's counterclaim both the plaintiff and the 1st defendant became defendants to that counterclaim. A counterclaim is a cross-action since therefore both the plaintiff and the 1st defendant failed to file defences to that counterclaim they are deemed to have admitted that counterclaim. See **Beddall vrs Mait-land (1881) 17 Ch. D. 174 at p. 181.**

The legal effect of Exhibit 2 is that as at 20th day of March 1985 the 1sr defendant had completely and effectively transferred or assigned all his leasehold interest in the disputed property to the 2nd defendant.

Consequently in July or August 1985 the 1st defendant had nothing or no interest at all, legal and or equitable in the disputed property to sell to the plaintiff. The principle of Nemo dat quod non habet applied to stop or prevent the 1st defendant from selling the disputed property to the plaintiff. Therefore as far as the disputed property is concerned, the plaintiff got nothing from the 1st defendant. Clearly therefore as the learned trial judge pointed out rightly in my view if the 1st defendant actually took any money from the plaintiff with the intention of selling or having sold the disputed property to him, then he dishonestly defrauded the plaintiff.

Next, on his own pleading and evidence did the plaintiff satisfactorily and convincingly demonstrate that the 2nd defendant had in fact made a part-payment of

¢2,810,000.00 and not ¢3,000,000.00 to the 1st defendant for the sale of the disputed property to it and secondly did the plaintiff succeed in proving satisfactorily that a meeting did take place in the office of the 2nd defendant where the refund of ¢2,810,000.00 was made to the 2nd defendant.

By Section 11(1) of the Evidence Decree, 1975 (NRCD 323) the plaintiff bore the obligation to prove these issues or questions in order to avoid a ruling against him on these issues. Section 11(1) of NRCD 323 provides:

> "11(1) For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue."

In the instant case it is the plaintiff who alleged that the 2nd defendant had subsequently after the sale of the disputed property to it, divested itself of its leasehold interest by getting a refund of ¢2,810,000.00which he initially paid to the 1st defendant as part-payment of the purchase price of the disputed property. That allegation has been denied by the 2nd defendant . The plaintiff must therefore prove it for he who alleges proves. In his judgment the learned trial judge made positive findings of fact that the initial part-payment 2nd defendant made towards the sale of the disputed property from the 1st defendant was ¢3,000,000.00 and that the mode of payment was by a banker's draft. This finding is copiously supported by the evidence on the record, both oral and documentary. See Exhibit E (page 255 of record).

Again in paragraph 3 (c) & (d) of 2nd defendant's amended statement of defence and counterclaim (page 52 of the record) is this averment:

"3(c) Pending the report of the Engineering Services Department of the Bank, the Bank on March 14th 1985 paid to the 1st defendant an amount of ¢3,000,000.00 (Three million Cedis) per a Banker's Draft Numbered BVHC 1005532 dated March 14th 1985.

(d) The 2nd defendant subsequently made further payments out of its own resources as additional payments for the said House No. 171 Airport West Residential Area to the 1st defendant, until the purchase price of ¢5,700,000.00 was totally paid to the 1st defendant."

As already noted the 1st defendant did not amend his statement of defence or file a defence as a plaintiff to the counter-claim to react to paragraph 3(c) and (d) of the 2nd

defendant's amended statement of defence and counterclaim. The plaintiff too did not file a defence or Reply to the amended statement of defence and counterclaim.
The plaintiff and the 1st defendant are therefore deemed to have admitted paragraph 3© and (d) of the 2nd defendant's amended statement of defence. The learned trial judge's finding that the initial part-payment the 2nd defendant made to the 1st defendant towards the purchase of the disputed property was ¢3,000,000.00 is supported by the evidence on the record. I will not therefore disturb that finding. It is significant to point out that the plaintiff and his two lawyer witnesses (PW1 and PW2) were emphatic in their respective evidence that the sum of money allegedly refunded to the 2nd defendant was ¢2,810,000.00. None of them explained why only ¢2,810,000.00 and not ¢3,000,000.00 was refunded to 2nd defendant. This discrepancy in figures therefore throws a serious doubt on the claim of the plaintiff that he indeed refunded ¢2,810,000.00 to the 2nd defendant. But that is not all, PW1 on the evidence, turned out to be the next discredited witness for the plaintiff. For instance whilst the plaintiff, PW1 in his evidence-in-chief and PW2 insisted that the ¢2,810,000.00was in raw cash and that it was carried in a beer carton to the office of the 2nd defendant, PW1 contradictorily gave this answer in cross-examination at page 88 of the record of proceedings:

"Q. Was the alleged amount of ¢2,810,000.00 paid in your presence to the 1st defendant?

A. Yes.

Q. How was it, in ¢5,000.00 notes or what?

A. I cannot tell but <u>I think it was paid by cheque</u>."

This contradicts PW1's own evidence-in-chief that the ¢2,810,000.00 was in raw cash which was carried in a brown paper box to the office of the 2nd defendant. Again whilst the plaintiff himself said in his evidence-in-chief that the money was ¢2,810,000.00, in cross-examination he said" "……I paid the 3 million cedis to the 1st defendant and the money was given to the 2nd defendant" (page 63 of the record).

Furthermore whilstPW1 said those who met in the Get Together restaurant at Accra New Town were himself, the plaintiff, the 1st defendant and Mr. S.N. Adjei (PW2) and that <u>they all</u> drove in a convoy to the office of 2nd defendant to pay the ¢2,810,000.00 to the 2nd defendant (See page 81 of the record) PW2 – Mr. S.N. Adjei said these who met at the Get Together Restaurant and eventually drove to 2nd defendant's office were

himself, the plaintiff, the 1st defendant and one Major Banson and that they went and met PW1 - Mr. Kwakye in 2nd defendant's office where the ¢2,810,000.00 was paid to DW1 who instructed PW1 to issue the receipt – Exhibit A. (See pages 97 – 99 of the record of proceedings).

It is clear therefore that by the several contradictions and conflicts exposed in the evidence of the plaintiff and his witnesses about all the circumstances of the alleged meeting in the offices of the 2nd defendant, the disparity in the sum of money that was allegedly refunded to the 2nd defendant and the suspicions surrounding the issue of exhibit A by PW1 – the discredited witness for the plaintiff it is doubtful and difficult to believe that any money was paid to 2nd defendant as a refund of the first part-payment it made to the 1st defendant towards the purchase of the disputed property. Contrary to the conflicting evidence of the plaintiff and his witnesses on that issue 2nd defendant adduced unblemished evidence to show that indeed it purchased the disputed property from the 1st defendant and that it never divested itself of that property. I think therefore that the learned trial judge was right and justified in preferring the case of 2nd defendant to that of the plaintiff. Clearly the plaintiff had on the evidence failed to discharge the burden or obligation on him to introduce sufficient, cogent and unblemished evidence to prove that 2nd defendant subsequently divested itself of its leasehold interest in the disputed property. The ruling against the plaintiff on that issue is therefore justified and must not therefore be disturbed by this court.

In the light of what I have said so far I find no merit in grounds (i), (ii), (iv), (vi) & (vii) which are in substance and essentially complaining that the judgment is against the weight of the evidence on record. The judgment is amply supported by the evidence on the record on the issues raised in these grounds of appeal.

I will now comment on ground (viii) & (ix) together.

The submission of learned counsel for the plaintiff on these grounds in substance as I understand it, is that the learned trial judge by rejecting Exhibits R^1 and R^2, had erred in excluding evidence which would have ennured to the benefit of the plaintiff. The response of learned counsel for he 2nd defendant is that no proper foundation was laid for tendering these documents. Secondly whatever evidence the admission of R^1 and R^2

would have been made available to the court was already in evidence so their admission or rejection added nothing or subtracted nothing to the case of the plaintiff. Consequently, contended learned counsel for the 2nd defendant the rejection of R^1 and R^2 did not occasion any substantial miscarriage of justice and therefore that complaint should be dismissed by this court.

I think I will agree with learned counsel for the 2nd defendant that the rejection of R^1 and R^2 did not occasion any substantial miscarriage of justice. I also agree that no proper foundation was laid for the tendering and admission of R^1 and R^2.
It is important to note that R^1 and R^2 were not only photocopies but that one of them was even undated. No evidence was led as to when R1 was issued and the circumstance of its issue. Secondly the attempt to tender R^1 and R^2 was done during the re-examination of the plaintiff.

Under Section 73(1) of the Evidence Decree, 1975 (NRCD 323) " Subject to the discretion of the court, re examination shall be directed to the explanation of matters referred to in cross-examination." The attempt to tender R^1 and R^2 during the re-examination of the plaintiff was certainly not directed to the explanation of matters referred to in the cross-examination. Secondly though I concede that a copy of a document may be admissible in evidence in certain circumstances under Sections 166, 167 and 175 (1) of NRCD 323 (the Evidence Decree) that is only permissible where it is shown for instance that the original of the document is in the custody of the opponent who has either refused or failed to produce same upon request or on the orders of the court. It may also be shown that the original could not be traced after due diligence and in any case the copy of the document sought to be tendered must have been certified by its custodian to be a corretreplica of the original or if the copy is testified to be a correct copy by witness who has compared it with the original. See Section 175(1)(b) of the Evidence Decree, 1975 (NRCD 323). None of these situations or circumstances was established by the plaintiff as a foundation for tendering of R1 and R^2. Besides I agree with learned counsel for the 2nd defendant that the attempt to tender R^1 and R^2 was an attempt to adduce further evidence-in-chief by the plaintiff during his re-examination. It is my considered opinion that the rejection of R1 and R2 by the learned trial judge was a

right decision and a proper exercise of his discretion. In any case as Section 5(3) of the Evidence Decree, 1975 (NRCD 323) provides:

"No finding, verdict, judgment or decision shall be set aside, altered or reversed on appeal or review because of the erroneous exclusion of evidence unless –

(a) the substance of the excluded evidence was made known to the court by the questions asked an offer of proof or by any other means; and

(b) the court which decides on the effect of the error also determines that the excluded evidence should have been admitted and that the erroneous exclusion of the evidence resulted in a substantial miscarriage of justice."

Having held that R1 and R2 were properly rejected by the learned trial judge and that even if the trial court erred in rejecting R^1 and R^2 from admission in evidence no substantial miscarriage of justice has been occasioned the appeal stands dismissed on grounds (viii) and (ix) of the grounds of appeal.

I do not also see any merit in ground (v) that there is no evidence of collusion between the plaintiff and the 1st defendant and therefore the trial judge erred in so finding. It could be true that there is no actual evidence of such collusion but I think that having regard to the events that occurred and or were perpetrated by the plaintiff and the 1st defendant after the plaintiff had got to know of the true state of affairs, a collusion between them could be reasonably inferred. For even though the plaintiff had got to know that the disputed property had already been sold to the 2nd defendant he encouraged the 1st defendant to prepare and execute a Deed of Assignment of the disputed property in his (plaintiff's) favour. Secondly even though 1st defendant was represented throughout the trial, he failed and or refused to come to court to testify and make himself available for cross-examination by the 2nd defendant. Even the court's preparedness to move to the 1st defendant's residence to take his evidence was spurned by him. He filed a statement of defence which was essentially an admission of the plaintiff's claims and was intended to show that it was rather the plaintiff and not the 2nd defendant who was the owner of the disputed property by purchase. The 1st defendant and the plaintiff even though defendants to 2nd defendant's counterclaim, failed and or refused to file a defence to that counterclaim. From all these facts it is a reasonable inference that the plaintiff and the 1st defendant had colluded between them with an intention to deprive the 2nd defendant of its

ownership of the disputed property. In my view therefore the trial judge's finding of collusion is based on a reasonable inference from the evidence laid before him. I find no merit in ground (v) of the ground of appeal. The appeal is equally dismissed on that ground.

Finally grounds (iii) and (x) of the grounds of appeal complain that the learned trial judge erred in law by his failure to apply the equitable principles of trust, laches and acquiescence to protect the plaintiff.

The submission of learned counsel for the plaintiff on these grounds is that the learned trial judge erred in failing to apply the equitable principles of laches, trust and acquiescence to protect the plaintiff's interest after receiving evidence that the plaintiff had spent ¢250 million on the property. By this argument I understand learned counsel for the plaintiff to be saying that after getting a refund of ¢2,810,000.00 and an additional ¢100,000.00 with a promise to return the title Deeds of the disputed property to the plaintiff, the 2nd defendant failed to keep to its said promise and rather encouraged the plaintiff or sat by for the plaintiff to make substantial development and renovations to the disputed property to his detriment. Therefore the 2nd defendant is estopped by conduct from disputing the plaintiff's ownership of the disputed property. Learned counsel for the 2nd defendant's response is that having regard to the most unconscionable conduct of the plaintiff at every stage of the proceedings as revealed by the evidence on the record, the equitable principles of laches trust and acquiescence does not apply here. Such unconscionable conduct of the plaintiff includes (1) the failure of the plaintiff to conduct a search; (2) he got to know as early as 1985 that the name of the 2nd defendant was registered in the Lands Registry as a purchaser of the disputed property (3) even though he claimed inconsistently to have refunded ¢2,810,000.00 he had got to know as early as 1985 that the 2nd defendant would not transfer the property to him. Therefore the plaintiff had notice both actual and written (i.e. 2nd defendant had warned him by letters – Exhibits 5 and 6) to desist from developing the disputed property) of the 2nd defendant's leasehold interest in the property and yet went ahead to develop the property. Learned counsel for the 2nd defendant therefore contends that in the circumstances the plaintiff could not or did not act with good conscious or in good faith and there is no evidence that the 2nd defendant encouraged him or sat by whilst the plaintiff developed the disputed property

to his detriment. I think that even on point of procedure the issues of laches, trust and acquiescence cannot avail the plaintiff. The rules of procedure require that a party must raise by his pleadings all matters which go to show that the action or counterclaim is not maintainable or that the transaction is either void or voidable in point of law. Such matters include estoppel by conduct or by res judicatam. See the cases of **Chellaram Vrs. G.B.O. (1944) 10 W.A.C. 77; Dedeke Vrs. Williams (1944) 10 W.A.C.A. 277** and **Oppong Vrs. Bawa Dagoma (1969) C.C. 102 C.A.**

The point taken by the learned counsel for the plaintiff that the 2nd defendant encouraged and or sat by whilst the plaintiff substantially developed the disputed property to his detriment, is an assertion in that the 2nd defendant is estopped by conduct from claiming ownership of the disputed property. In otherwords, raising the issues of laches, trust and acquiescence amounts to alleging estoppel by conduct against the 2nd defendant which was not specifically pleaded by the plaintiff either in his original statement of claim or in his subsequent amended statement of claim. If the plaintiff wanted to rely on such issues as a protective shield he ought to have specifically pleaded them, see order 19 rule 16 of L.N. 140A now order 11 rule 8 of C.I. 47. In his amended statement of claim all that the plaintiff averred in paragraph 12 is as follows:

"12. The plaintiff honestly believing that he had lawfully purchased the said property invested about ¢250,000,000.00 in the property in renovating and converting it into a hotel to the Knowledge of Bugri Naabu, the Managing Director of the 2nd defendant company."

Nowhere in his amended statement of claim has the plaintiff pleaded that the 2nd defendant encouraged or sat by whilst the plaintiff developed the property to his detriment. Nowhere in this said statement of claim has the plaintiff pleaded specifically the issues of estoppel by conduct trust or laches, and acquiescence . Therefore having not specifically pleaded these issues the plaintiff cannot now rely on them in this appeal. In the case of **Malm vrs. Lutterodt [1963] 1 G.L.R. 1** which involved a land litigation the trial judge gave judgment for the plaintiff, but based his decision on the further ground that the plaintiff's father had acquired adverse title against the defendant through his occupation of the land in dispute for considerable length of time [laches and

acquicsance] and that therefore the defendant had abandoned the land. On appeal to the then Supreme Court, the Court held inter alia, as appears in the headnote at page 2: "Raising the issue of abandonment amounted to alleging estoppel by conduct which was not pleaded by the plaintiff and about which he led no evidence whatsoever. The learned trial judge therefore erred in basing his judgment on a point which was not a triable issue on the pleadings."

The appeal was accordingly allowed. See also **Young Vrs. Star Ominibus Co. Ltd.]1902] 86 L.T. 41, Oloto Vrs. Williams [1944] 10 W.A.C.A. 23** and **Robinson Vrs. Singh [1879] 11 Ch. D. 798.**

For the reasons given herein I think the trial judge was right in not considering the issue of laches and acquiescence, and equitable trust since these were not pleaded and were therefore not triable issues. In any case the 2nd defendant made a categorical denial of paragraph 12 of the amended statement of claim in his amended statement of defence and counterclaim. The plaintiff was therefore put to strict proof of that averment. It is even instructive to note that the plaintiff did not seek any specific relief on the basis of paragraph 12 of the amended statement of claim.

Besides the overwhelming evidence on the record is that 2nd defendant neither encouraged or sat by whilst the plaintiff went ahead with the development of the disputed property. The evidence on the record shows that when the 2nd defendant through DW1 got to know that the plaintiff was developing the property, it did all that was reasonable in the circumstances by warning him both verbally and in written letters such as exhibits 5 and 6 to desist from his acts on the disputed property. For instance in Exhibit 5 dated 14th March 1989, the Managing Director of 2nd defendant (DW1) made it clear to the plaintiff that: "We have no intention to either sell or transfer the said building…. We therefore write formally to you that the transfer cannot be made to you."

And in Exhibit 6 dated 12th March 1990 DW1 referred to his letter No. BNCW/4/89 dated 14th March 1990 and continued as follows.

"We have noticed that you are making some changes on our uncompleted building without our knowledge and permission despite the fact that after our meeting at the Managing Director's residence at Dansoman we also wrote to you.

Your action in developing the plot despite our meeting and letter referred above

is therefore very unfortunate and we are warning you that if you do not stop work on the plot, we shall be compelled to take the necessary legal action against you since you are not the rightful owner of the property…."

Exhibits 5 and 6 were tendered in evidence without objection.

DW1 and his witnesses also testified that DW1 sent his workmen to the site to warn the plaintiff to stop work without success. Apart from this there is uncontradicted evidence on record that as at the date the plaintiff commenced the development of the property up to the date of its completion, the plaintiff had not got the title Deeds of the disputed property returned to him by the 2nd defendant. He had also not succeeded in getting the 2nd defendant to sign the Deed of Assignment given to him by 1st defendant. The plaintiff therefore had sufficient notice, actual and constructive that the 2nd defendant had not evinced an intension to transfer and did not therefore transfer its leasehold interest in the disputed property to him and yet went ahead with the development.

"Na who cause 'am.' He cannot now complain. I will further dismiss and I do dismiss the appeal on grounds (iii) and (x) of the grounds of appeal.

In conclusion the appeal is dismissed.

[SGD.] STEPHEN E. KANYOKE
JUSTICE OF APPEAL

I agree. **[SGD.] B. T. ARYEETEY**
JUSTICE OF APPEAL

I also agree. **[SGD.] R.K. APALOO**
WQ0

JUSTICE OF APPEAL

<u>COUNSEL</u> - MR. MINKA PREMO FOR APPELLANT.

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