IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA-GHANA

CORAM: WOOD (MRS.) CJ, (PRESIDING)
ANSAH, JSC
YEBOAH, JSC
BONNIE, JSC
AKAMBA, JSC

CIVIL APPEAL
NO. J4/28/2013

12TH FEBRUARY, 2014

MRS. GRACE FYNN … PLAINTIFF/ APPELLANT/ APPELLANT

VRS

1. STEPHEN FYNN

2. CHRISTIANA OSEI … DEFENDANTS/ RESPONDENT/ RESPONDENT

JUDGMNET

WOOD (MRS) C.J

This court has clearly set out the legal principles governing appeals against the concurrent findings of fact and conclusions of two lower courts. The principle is that ordinarily, a second appellate court, such as this honourable court, would not interfere with the findings of fact made by a trial court and confirmed on appeal by a first appellate court. A second appellate court would overturn such findings and conclusions only in exceptional cases. The circumstance under which such an intervention may be legally permissible or justifiable is borne out in such cases as:

Achoro and Another v. Akanfela and Another [1996-97] SCGLR 209, at 214 we reasoned that the finding would be interfered with where;

"It was established with absolute clearness that some blunder or error resulting in a miscarriage of justice, was apparent in the way in which the lower tribunals had dealt with the facts. It must be established, e.g., that the lower courts had clearly erred in the face of a crucial documentary evidence, or that the principle of evidence had not been properly applied; or that the finding was so based on erroneous proposition of law that if that proposition be corrected, the finding will disappear … It must be demonstrated that the judgments of the courts below were clearly wrong."

Obrasiwa 11 and others v Otu and Another [1996-7] SCGLR 618, at 624 affirmed the above legal proposition.

In Kpakpo v Brown [2001-2002] SCGLR 876, we observed that where the findings and conclusions are supported by the record and no miscarriage of justice has resulted from the decisions; the second appellate court would have no choice but to confirm those findings and conclusions.

The following cases:

Musah v Musah [2011] SCGLR 819,

Fabrina Ltd v Shell Ghana Ltd [2011] SCGLR 429, at 449

Fosua and Adu –Poku v Dufie (Deceased) and Adu- Poku v Mensah [2009] SCGLR 310,

Gregory v Tandoh IV & Hanson [2010] SCGLR 971,

Obeng & Others v Assemblies of God Church, Ghana [2010] SCGLR 300 at 409 and

Mensah v Mensah [2012] 1SCGLR 300

bring out other circumstances under which a second appellate court's interference would be justified. On each occasion, this court speaking through our respected brother Dotse JSC carved out some of the exceptions to the general rule of non interference. Our learned brother expressed the position in Obeng v Assemblies of God Church (supra), thus:

"…where findings of fact have been made by a trial court and concurred in by the first appellate court, then the second appellate court like this court, must be slow in coming to different conclusions unless it was satisfied that there were strong pieces of evidence on record which made it manifestly clear that the findings by the trial court were perverse", or strong pieces of evidence, where the trial court failed to properly to evaluate the evidence or make proper use of seeing or hearing the witnesses at the trial.

We thus applied these principles to affirm findings and conclusions of the two lower courts in Ntiri v Essien [2001-2002] SCGLR 459; Sarkodie v F K A Co Ltd [2009] SCGLR 79; Jass Co Ltd v Appau [20009] SCGLR 266 and Awuku-Sao v Ghana Supply Co Ltd [2009] SCGLR 713.

Gregory v Tandoh IV [2010] SCGLR 971, (supra) however merited a different treatment. The court decided in the interest of justice to overturn the concurrent findings of fact, and therefore had to set out the limits of its jurisdiction in that particular instance. The court observed:

"It is therefore clear that, a second appellate court, like this Supreme Court, can and is entitled to depart from findings of fact made by the trial court and concurred in by the first appellate court under the following circumstances: First, where from the record of appeal, the findings of fact by the trial court are clearly not supported by evidence on record and the reasons in support of the findings are unsatisfactory; second, where the findings of fact by the trial court can be seen from the record of

appeal to be either perverse or inconsistent with the totality of evidence led by the witness and the surrounding circumstances of the entire evidence on record of appeal; third, where the findings of fact made by the trial court are consistently inconsistent with important documentary evidence on record; where the first appellate court had wrongly applied the principle of law (see *Achoro v Akanfela*) (supra) and other decided cases on the principle) the second appellate court must feel free to interfere with the said findings of fact in order to ensure that absolute justice is done in the case."

These represent only some of the grounds on which an appellate court may disturb the concurrent findings of two or more lower courts; they do not present a closed category. And so it happens that since this appeal principally turns on just one or two fundamental issues of fact, which issues both lower courts resolved in the respondent's favour, in this court, the appellant bears the rather onerous burden of dislodging the general legal proposition by situating her case within any of the known exceptions or providing some other compelling reason that would justify a departure from the general rule.

This inevitably leads to an examination of the main facts culminating in this instant appeal. The facts which led to the commencement of the action in the High Court are indeed very simple and not at all complex. The 1st defendant has been married to the appellant for some thirty years. The couple is blessed with six children. The 1st defendant sold a store No. 18 Railway Quarters, Kumasi, the subject property of this appeal, to the respondent, for valuable consideration of GHC40, 000. She went into possession after the vendor had transferred the property to her upon payment of the full purchase price and subsequently registered as a member of the Railway Traders Association. A couple of months thereafter the appellant, claiming to be a joint owner of store No 18, and yet whose consent and concurrence was never secured before the sale, sued to have the sale set aside and to repossess the property.

The 1st defendant admitted these facts, but the respondent challenged inter alia, the claim of joint ownership and asserted that due diligent searches she conducted prior to the purchase did not disclose that the property was jointly acquired by the couple. She contended that, to the contrary, these showed that store number 18 was the exclusive property of the vendor; hence her plea in defence that she was a bona

fide purchaser for value without notice. She therefore counterclaimed in that capacity for declaration of title and an order for perpetual injunction to restrain the couple from interfering with her quiet enjoyment of the subject property.

Both the trial and appellate courts in exercising their respective jurisdictions had very little difficulty in finding for the respondent both on the facts and the law. Dissatisfied, the appellant has appealed to us in this court; to set aside the findings and conclusions of the two lower courts, substitute these with those findings and conclusions that will ultimately secure judgment in her favour.

The grounds on which the appellant impugned the decision of the court of appeal include the oft used omnibus appeal ground- the judgment is against the weight of evidence. I find this ground rather superfluous given the other specific grounds filed. But we cannot begrudge the appellant, who is obviously desirous of ensuring that nothing is left to chance and that none of her complaints were left unaddressed in this appeal in which as already noted, essentially hinges, on a couple of rather narrow questions of fact. The other appeal grounds are:

i. "The Court of Appeal erred when it held that the subject property is owned solely by the 1st Defendant/Respondent/Respondent in the face of clear admissions by the 1st Defendant/Respondent/Respondent himself, to the contrary.

ii. The Court of Appeal was wrong in law when it held that the 1st Defendant/Respondent/Respondent did not hold the subject property as a trustee for and on behalf of himself and the Plaintiff/Appellant/Appellant.

iii. The Court of Appeal erred when it held that the learned trial court was right, when it declined to order the Plaintiff/Appellant/Appellant to refund the purchase price, with interest (at the prevailing bank rate) as well as other incidental expenses merely because the Plaintiff/Appellant/Appellant had not claimed these reliefs in the suit.

iv. The Court of Appeal was wrong in law in holding that the subject property belonged solely to the 1st Defendant/Respondent/Respondent in

the light of well settled judicial dicta, and as such same was given contrary to law."

The complaint I have against these other appeal grounds is that these could have conveniently been reduced into two main grounds. Grounds (ii) - (v) are repetitions. They all somehow convey similar thought; only that they are couched differently. Be that as this may, the appellant has invited us to overturn the judgment of the two lower courts and substitute them with an order setting aside the purported sale.

GROUNDS (ii- iv)

At both the trial and appeal hearings, the learned justices after reviewing the evidence on the record, decidedly concluded that the store No. 18 was solely acquired by the 1st defendant and not jointly as part of the couple's matrimonial property as contended by the appellant. Her principal complaint against this primary finding, as may be gathered from these three grounds of appeal, is that the court's finding on this critical issue was patently in error, given that as is borne out by the record, the 1st defendant as per his statement of defence, unequivocally admitted her (appellant's) assertion that this asset was acquired from the joint resources of the couple. Appellant counsel thus argued that the trial court and indeed the appellate court really had no option and on the authority of West African Enterprise Ltd. v Western Hardwood Ltd. [1995-6] 1 GLR 153, was bound to accept joint ownership as the proven fact and ought properly to have found for the appellant on this issue. The argument further went that, had the two courts adopted this approach, and been guided by the line of cases such as Mensah v Mensah [2012] SCGLR 391, and Quartson v Quartson [2012] 2SCGLR 1077, they (the two lower courts) would have come to the undoubted conclusion that the 1st defendant held the property in their joint names as part of their matrimonial assets, and thus nullified the sale, which the evidence clearly showed was effected without her consent and concurrence.

The respondent counsel had urged that we dismiss these arguments given that the appellant failed to discharge the evidential burden which rested on her on account of the state of the pleadings, more particularly, given that the 1st defendant's admissions were not binding on the respondent. Mensah v Mensah (supra) and

Quartson v Quartson (supra), which dealt with the acquisition of matrimonial property during marriage, he urged, were clearly distinguishable from this instant case.

Now, the appellant as plaintiff had pleaded per the paragraph 4 of her twenty paragraphed statement of claim as follows:

"The plaintiff states that she and 1st defendant pooled their resources together to acquire property including a house numbered plot 94, F-line at Buokrom Estate, Kumasi, where they reside and store No. 18, situated at the railway Quarters Shopping Mall, Kumasi."

It is not disputed that the 1st defendant had in a terse two paragraphed statement of defence admitted every single fact pleaded by the wife, the appellant.

Undoubtedly, the appellant's main argument is premised on the 1st defendant's admissions. It is noteworthy that the appellant for reasons best known to her sued the husband as 1st defendant. She could have called him as her witness, whereupon he could still have had opportunity to confess to his sins in disposing of their jointly acquired property without her consent. But she avoided that route as indeed was her constitutional right, choosing rather to make the love of her life her opponent; but perhaps for only that period they were to find themselves embroiled in this legal duel. That may well have been her fundamental right but then, she cannot escape the legal consequences flowing from that singular choice. The 1st defendant in his statement of defence as noted, admitted the appellant's assertion that the store was jointly owned by the two of them, leaving the appellant to argue that these plainly admitted facts inured to her benefit as they are sufficient to support a positive finding in her favour without more, and placing her under no legal obligation to provide further evidence in proof of ownership. True, in the case of In re Asere Stool; Nikoi Olai Amontia IV (substituted by Tafo Amon II) v Akotia Oworsika III (substituted by) Laryea Ayiku III [2005-2006] SCGLR, this court laid down the following salutary rule of law, namely that:

"Where an adversary has admitted a fact advantageous to the cause of a party, the party does not need any better evidence to establish that fact than by relying on such admission, which is an example of estoppel by conduct."

But will this general legal principle apply in this instant case? Can the 1st defendant properly, on the peculiar facts of this case, be described as appellant's adversary? We do think the rule will not apply in certain cases such as for example where fraud or collusion is alleged and or proved. The appellant's arguments invite this further question: what is the legal import and probative value of the 1st defendant's admission relative to the appellant's claim, given that the respondent, who was joined to the suit in her independent and separate capacity as 2nd defendant, disputed the assertion of joint ownership, joined issue with appellant on this crucial fact and put her to its strict proof?

Where two or more persons are sued not even jointly but severally only, that is in their separate capacities, as in this instant case, any admission by a defendant binds only that defendant making it. It does not bind another defendant who has challenged the assertion and called for its strict proof. Furthermore, since no issue is joined as between the plaintiff asserting the fact and the defendant admitting it, no duty will be cast on the former to lead evidence on the admitted fact.

But the same cannot be said of another defendant who denies the assertion. Under such circumstances, a court is under a duty to treat the case of each defendant separately viz a viz the plaintiff's case on the merits and as relates to the fact in issue. (See Kusi & Kusi v Bonsu [2010] SCGLR 65).

Another equally pertinent question is this; what is the duty of a court when faced with a situation where a defendant's admission conflicts with the evidence of the another defendant who joins issue with the plaintiff on the assertion, such as in this instant case where 1st defendant's admission is directly in conflict with the evidence supplied by the respondent at the trial? Which of the two conflicting versions must a court accept and consequently as being either clearly advantageous or disadvantageous to the plaintiff's case? Frankly, this is the difficulty the appellant finds herself in.

We think it is impossible to lay down any hard and fast rules, rules cast in stone in respect of matters of this nature. These are matters better left to a court's judgment on the merits of each given case. Of course in evaluating the respective weight to be given to the conflicting positions of the defendants, the court will be guided by

the law and the same considerations that courts employ in "attacking or supporting credibility" as provided under s 80 of the Evidence Act, 1975, NRCD 323.

Thus for example if one defendant admits facts, and the other defendant challenges the fact asserted and yet is unable to lead sufficient evidence in disproof of the fact, the admitted facts would weigh in plaintiff's favour.

As far as this appeal is concerned, we are of the opinion that the 1st defendant's admission does not aid the appellant's case in any material way. There is more to this case than the 1st Defendant's admissions. The appellant had a duty to make a solid case against the respondent, independently of the 1st defendant's admissions. If it were not so, why did the she not cut matters short by simply taking advantage of the admissions and move the court for judgment and altogether avoid a full scale trial?

Unfortunately, the appellant merely relied on this admission as concrete proof of joint ownership, whereas the respondent did not merely challenge the fact, but as rightly found by the court below proceeded to adduce evidence, which on the balance of probabilities, proved that the property was owned exclusively by the 1st defendant and further that in any event she was a bona fide or innocent purchaser for value without notice. The evidence proved that the appellant herself had previously owned one of those stores- registered in her sole name-, which she has in any event disposed of. Also, the evidence spelt out in great detail how the respondent came to purchase the property and the due diligence conducted thereto.

Evidence which came from a clearly disinterested witness, the DW4 the Vice-Chair of the Railway Quarters Association to which both the appellant and the 1st defendant belonged, proved that contrary to the appellant's assertion, the Association have instances where stores have been registered in the name of more than one person, thus completely discrediting the appellant's explanation as to why the property was not in their joint names but the sole name of the 1st defendant. All these credible pieces of evidence effectively neutralized the 1st defendant's bare admissions via the pleadings, and which the appellant is clutching at as proof of joint ownership.

Truthfully speaking, the appellant did not benefit, not even minimally, from the admission of the 1st defendant, the defendant who tactically failed to present

himself at the trial so that, he could if for nothing at all, seek leave to cross-examine the respondent and demonstrate the improbability of her claim to bona fides. Certainly, if he thought the best strategy was simply to admit the facts and disappear from the court's radar altogether, that rather was the appellant's undoing. She was caught in a rather anomalous and most awkward position; one from which she could extricate herself if only she additionally led sufficient evidence, to displace the respondent's case. Even if to start with, she could seek solace in the 1st defendant's admission, given the state of the respondent's defence and counterclaim, she bore an evidential burden which she failed to discharge. She cannot therefore simply rely on the bare admission of her husband to succeed.

The concurrent findings are not perverse; they are amply supported by the record, and clearly consistent with the totality of the evidence. No miscarriage of justice has been occasioned by these findings and conclusions and it would be most unjust on our part, to interfere with them.

GROUND (v)

The appellant counsel's argument in under this ground of appeal is untenable. We do not think this court's thinking on the status of property acquired during the existence of any marriage is shrouded in confusion. Indisputably, during the existence of the marriage union, it is most desirable that the couple pool their resources together to jointly acquire property for the full enjoyment of all members of the nuclear family in particular. But, the decided cases envisage situations where within the union parties may still acquire property in their individual capacities as indeed is their guaranteed fundamental right as clearly enshrined under article 18 of the 1992 Constitution, in which case they would also have the legal capacity to validly dispose of same by way of sale, for example, as happened in this instant case. No court in such clear cases would invalidate a sale transaction on the sole legal ground that the consent and concurrence of the other spouse was not obtained. We would however subject these views we have expressed to this sound caution. Since, the peace, tranquility, harmony, stability and indeed the health and general well being of any marriage union thrives best in the environment of mutual affection, trust and respect for each other as well as transparency; we think a spouse in such a case is under a moral obligation at any given time, (indeed it is most expedient and fair) to apprise the other spouse of the intention to acquire and

dispose of self acquired properties at all material times. This is clearly implicit from this court's view expressed in Quartson v Quartson (supra), namely that:

"The Supreme Court's previous decision in *Mensah v Mensah* …, is not to be taken as a blanket ruling that affords spouses unwarranted access to property when it is clear on the evidence that they are not so entitled. Its application and effect will continue to be shaped and defined to cater for the specifics of each case."

This instant case was fought on the basis that the appellant contributed to its acquisition, which we understood from the pleadings as some direct financial contribution. This basic fact we have found to be unproven. It was never fought on the basis and proven that the respondent even knew of the existence of the marriage union and further that she knew that the property was indeed jointly acquired during this period as family property. Consequently Mensah v Mensah (supra) and Quartson v Quartson (supra) has no bearing and is clearly inapplicable to the peculiar facts of this case. To hold otherwise would have amounted to substituting a case different from that which the appellant herself put up, conduct which is clearly deprecated by the principle enunciated in the case of Dam v Addo GLR [1962] 342 and cited with approval in a host of other cases. (See Bisi v Tabiri alias Asare [1987-88] 1 GLR SC and Kwame Serwah [1993-4]1 GLR 360 and Antie & Adjuwuah v Ogbo [2005-2006] SCGLR 494.

In the result the appeal fails and is hereby dismissed.

(SGD) **G. T. WOOD (MRS)**

CHIEF JUSTICE

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

(SGD) P. BAFFOE BONNIE

JUSTICE OF THE SUPREME COURT

(SGD) J. B. AKAMBA

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