

the instant suit. The suit got struck out on some occasions which was relisted and also suffered series of adjournments including sine die adjournments.

In the Amended Writ of Summons filed on 21st March, 2019 pursuant to an order of this Court, the Plaintiff claims against the Defendants jointly and severally for the following reliefs:

- a. Declaration of title to one (1) house numbered 83, Community 8 situated and being at a place commonly known and called co-operative, Community 8, Tema.
- b. Ejectment and recovery of possession of the said property.

On 2nd April, 2019 the 1st Defendant filed her Amended Statement of Defence pursuant to an order for joinder and denied the claims of the Plaintiff and further stated that the Plaintiff is not entitled to his claim. The 2nd Defendant on same date also filed his Statement of Defence and counterclaimed against the Plaintiff as follows:

1. A Declaration that House No. 83 Cooperative Community 8 Tema is the property of the 2nd Defendant.
2. An order setting aside the auction sale of House No. 83 Cooperative Community 8 Tema.

The Plaintiff on 8th August 2019 filed a Reply and Defence to the 2nd Defendant's counterclaim.

THE CASE OF THE PLAINTIFF

The Plaintiff in his Amended Statement of Claim averred that he is the legitimate landlord of the property no. 83, Community 8, Cooperative Tema. That he purchased the said property under Writ of Summons no. A2/543/08 dated 19/04/10. According to the Plaintiff, he purchased the said property under public auction conducted by Mr. Aduse-Poku, a licensed auctioneer on the 22nd September, 2010 as the result of him being declared as the highest bidder for the amount of GH¢10,000.00. That the auction sale was advertised in Ghanaian Times on three editions the last being on the 20th day of September, 2010. The Plaintiff further stated that he was issued with a receipt by the said auctioneer for the cost of the property. He continued that he is the rightful owner of the property in question. He therefore claimed as per the reliefs endorsed on his Amended Writ of Summons.

In his Witness Statement filed on 26th July 2019, which he relied on as his evidence in chief, the Plaintiff told the Court that he lives at Klagon. That he is a Minister of the Gospel and a businessman. He repeated the averments in his pleading to the effect that he purchased the subject matter property under a *Writ of Fieri Facias* No. A2/543/08 dated the 19th day of April 2010. That the purchase followed the judgment given in this honourable Court in the case of Hagar Fokuoh vrs Abena Mother (Suit No. A2/543/08) given on the 4th day of March 2009. He continued that all attempts by his counsel to be furnished with a copy of that judgment failed. He tendered a copy of the application for a certified true copy as exhibit 'A'. The Plaintiff also tendered a copy of the auction sales account and a copy of the official receipt dated 22nd September, 2010 as exhibits 'B' and 'C' respectively. He further told the Court in his evidence that he was subsequently issued with a certificate of purchase of this Court on 12th November, 2010. He tendered a copy of the said certificate as exhibit 'D'.

According to the Plaintiff, there was a capital valuation report on the residential property at Community 8, Cooperative, Tema prepared by Property Lane Limited. He tendered a copy of the said report as exhibit 'E' and added that the surveyor who did the valuation and signed is now deceased. The Plaintiff further told the Court that the auction sale was advertised in the Ghanaian Times on two editions on 13th September and 20th September 2010 respectively. He tendered exhibits 'F1' and 'F2' being the said publications. The Plaintiff concluded that the purchase of the said property was not fraught with any fraudulent practice and the processes leading to same was done in tandem and accordance with law; and that he is the rightful legal owner of the subject matter property. He prayed the Court to grant him all his reliefs endorsed on his Writ of Summons.

The Plaintiff called one witness as PW1 who gave his name as Kingsford Kwame Kumi and told the Court that he is the secretary of the Royal Mart Enterprise, the licensed auctioneering company based in Accra that worked on the auction processes of the property in dispute (H/No. 83, Community 8, Co-operative, Tema). He continued that their company was given a letter of appointment which he tendered a copy as exhibit 'G'. That they did a publication in two editions of the Ghanaian Times being the 13th September 2010 and 20th September 2010 respectively. That the Plaintiff herein became the highest bidder; he tendered exhibit 'H' which is a certificate of purchase, to that effect. That the Plaintiff eventually purchased the property in dispute for GH¢10,000.00 and an official receipt was issued by the company acknowledging payment of same; exhibit 'J' being receipt of the said payment was tendered in evidence. PW1 continued that they did a statement of account into Court and their company's commission of 7% which was GH¢775.00 was given to them by the Court. He tendered exhibits 'K' and 'L' being auction sales account and request for

valuation-professional fees. He concluded that the Plaintiff being the highest bidder of the said property and legally paying for same became the legitimate owner of the said property H/No. 83, Community 8, Co-operative, Tema.

The Plaintiff thereafter closed his case.

THE CASE OF THE DEFENDANTS

Both the 1st and 2nd Defendants in their Amended Statement of Defence and Statement of Defence respectively, denied the claims of the Plaintiff. They further pleaded fraud that the sale of the property in dispute was done fraudulently and not in accordance with the law. They particularized their plea of fraud as follows:

- a. Failing to determine a reserve price.
- b. Failing to serve the judgment debtor the notice of reserve price.
- c. Failing to post the appropriate notices and for the statutory period in accordance with the law.
- d. Attaching and selling H/No. 83 Cooperative Homes, when same was not the property of the judgment debtor.

In her defence, the 1st Defendant testified relying on her Witness Statement filed on 11th July 2019 that she is a trader and lives at house number Cooperative 83 Community 8, Tema. According to the 1st Defendant, the Defendant named in the case Hagar Fokuoh vrs. Abena Mother (Suit No. A2/543/08) is her sister, who is now deceased. That she knows the lawful owner of the house in question and that he is the Rt. Reverend Abraham Tagoe Rtd; who lives at New Gbawe, Accra. She continued that her mother is Elizabeth Quarshie who is deceased. She tendered copies of death certificates of her sister and mother as exhibits '1' and '2'. The 1st Defendant continued that her mother entered into an agreement with

the Rt. Reverend Abraham Tagoe to build a house on the Cooperative platform No. 83 and later to have the house sold to her. That the Rt. Reverend Abraham Tagoe later decided not to sell the house but rather her mother and family should occupy the house and use the money spent on constructing the building as rent. She tendered in evidence copies of rent agreements for the year 2000, 2003 and 2004 as exhibit 3A – 3C. According to the 1st Defendant she, her mother and sister have stayed in House No. 83 Cooperative as tenants of the Rt. Reverend Abraham Tagoe Rtd. That the house does not belong to her sister or any of the occupants of the said house. That they pay their rents to their landlord and the owner of the said house for which receipts were issued by the Rt. Reverend Abraham Tagoe Rtd. She tendered in evidence copies of receipts for rents paid for the years 2009, 2011 and 2013 as exhibit 4A – 4C. The 1st Defendant further told the Court that the Plaintiff's claim is not true as the judgment debtor came to live with her mother in the said house as a tenant and had no interest whatsoever in the property to warrant an attachment of the property for sale to defray any judgment debt. She continued that the failure to confirm ownership of the property was all part of the fraudulent activities of the Plaintiff and his abettors to sell the house. That her sister Abena Mother died on 6th June 2010 and so as a judgment debtor could not have been served with notice of the reserve price by the Court that gave judgment in the said suit. The 1st Defendant concluded that purchase of the said property was done fraudulently as none of the occupants at the time was informed or made aware of any selling price of the property Cooperative house no. 83. She prayed the Court to declare that the Plaintiff is not the lawful owner of the Cooperative house no. 83 and not the landlord so cannot eject them from the house neither can he recover possession as the auction sale was done fraudulently and was not done in accordance with law.

The 2nd Defendant in his evidence in chief told the Court that he is a retired clergyman and lives at New Gbawe, Accra. That he is the rightful owner of house no. 83. That he is a member of the Tema Co-operative Housing Society; and attends meetings. According to the 2nd Defendant, he was allocated house no. 83 by the Tema Community 8 Cooperative housing society limited registered number 4121 as the lawful owner on 20th March 1995 after full payment. He continued that he knows Afua Agyeiwaa (1st Defendant). That she and her mother now deceased have been tenants of his property house no. 83 Cooperative Community 8 Tema since 1995. That he has always received rental payments from them. That he entered into a tenancy agreement with the late Elizabeth Quarshie when the house was at lintel level for a period of six years which was further extended to two years; and all expenses she spent on the building were to be used as her rent. That he asked them to quit at the end of the period but they pleaded with him to stay and the period was extended. That they have been staying in his house Cooperative no. 83 and he is the owner of the said property. That as the lawful owner he settles all rates and taxes. The 2nd Defendant concluded that he does not know Mahama Zango (Plaintiff herein) and that the Plaintiff does not own the property in dispute. That the occupants are his tenants and he is the lawful owner and is unwilling to sell his property. He prayed the Court to declare that the sale of the said property was done fraudulently and to set it aside.

Thereafter the Defendants closed their defence.

As at the time of reading this judgment, Counsel for the Plaintiff had not filed any written address. On the other hand, Counsel for Defendants filed a written

address on behalf of the Defendants on 10th July 2023; and the Court has duly taken notice of same.

The legal issues to be determined by this Court are:

- i. Whether or not the auction sale conducted on the subject matter property was regular or irregular.*
- ii. Whether or not this Court ordered the auction sale of the property in dispute.*
- iii. Whether or not the auction sale of the property in dispute was done fraudulently and illegally.*
- iv. Whether or not the 2nd Defendant is the owner of the property in dispute.*
- v. Whether or not the Plaintiff is entitled to the reliefs endorsed on the Amended Writ of Summons.*
- vi. Whether or not the 2nd Defendant is entitled to the reliefs in his Counterclaim.*

In civil cases, the general rule is that the party who in his pleadings raises an issue essential to the success of his case assumes the onus of proof. See **Sections 10, 11(1) and (4) and 12(1) and (2) of the Evidence Act, 1975 (NRCD 323)**.

Section 12(1) of the Evidence Act, 1975 (NRCD 323), provides that:

“except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities.”

Gbadegbe JSC in the case of **Sagoe v. SSNIT (2011) 30 GMJ 133; (2012) 52 GMJ 47** held that:

“The party who asserts the affirmative of an issue has the incidence of the legal burden ...”

Section 11(4) of the Evidence Act explains the burden of proof in civil cases as follows:

“In other circumstances, the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence, a reasonable mind could conclude that the existence of the fact was more probable than its non-existence”.

In the case of **Ackah v. Pergah Transport Ltd &Ors[2010] SCGLR 728** the Supreme Court held *inter alia* as follows:

“It is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documentary and things (often described as real evidence), without which the party might not succeed to establish the requisite degree of credibility concerning a fact in the mind of the Court or tribunal of fact such as a jury...”

In the case of **Memuna Amoudi v. Kofi Antwi, Part 3, [2006] MLRG, 183 at 195,** the Supreme Court per Wood, JSC (as she then was) stated:

“A cardinal principle of law on proof ... is that a person who makes an averment or assertion ... has the burden to establish that his averment or assertion is true. He does not discharge his burden unless he leads admissible and credible evidence from which the fact or facts he asserts can be properly and safely inferred.”

The law is that an auction sale may be regular, irregular or illegal. Where it is regular, title passes to the purchaser and cannot be impeached. Where it is

irregular, the sale is voidable until it is set aside or else it becomes absolute. The affected party or judgment debtor may apply within twenty-one days to set an irregular sale aside on stated grounds. Where the sale is illegal, there is no time limit to set it aside because it is *void ab initio* and no title passes to the purchaser. In an execution process, where a writ of *fieri facias* (*fi.fa*) is the method of execution, after the property is attached, a valuation exercise is carried out on the property and the judgment creditor applies to the Court on notice to the judgment debtor for a reserved price order to have the property sold at an auction sale. After the reserve price order is given by the Court, notices are made according to the rules and laws governing notices of sale. It is at least seven days' notice if it is movable property and at least twenty-one days' notice if it is immovable property unless the judgment debtor consents otherwise in writing. The period of the notice runs from when same is made or published prior to the auction sale.

See: Order 23 rules 9 (1), 10 and 11 of the District Court Rules, 2009 (C.I. 59)

Sections 12, 15 and 16 of the Auction Sales Act 1989, PNDCL 230.

I shall now examine and evaluate the evidence adduced by the parties in support of their respective cases within the context of their corresponding burdens and the prescribed standard of proof as provided under *the Evidence Act, 1975 (NRCD 323)* to resolve the above issues.

- i. Whether or not the auction sale conducted on the subject matter property was regular or irregular.*

From the evidence before this Court, PW1 whose company auctioned the property in dispute testified that they did a publication in two editions of the Ghanaian Times being the 13th September 2010 and 20th September 2010 respectively. The Plaintiff in his evidence told the Court that the auction sale was advertised in the Ghanaian Times on two editions on 13th September and 20th September 2010 respectively. Exhibit 'F1' indicates that on Monday, September 13, 2010, there was an advertisement in the Ghanaian Times at page 32 about an auction sale of the property in dispute being the property of the Defendant therein to be held on 21st September 2010 at 10am. Exhibit 'F2' also indicates that same advertisement was placed in the Ghanaian Times on Monday, September 20, 2010 (which was exactly a week after the date of the initial advertisement) but this time the auction sale was to take place on 22nd September 2010 at 10am. These were said to be ordered by the Deputy Sheriff of this Court.

The Plaintiff in his Amended Statement of Claim stated that the auction sale was advertised in the Ghanaian Times on three editions the last being on the 20th day of September, 2010 but in his evidence told the Court that the auction sale was advertised on two editions. The Plaintiff was inconsistent as to the number of editions the auction sale was advertised in the Ghanaian Times as he contradicted himself in his pleadings and evidence before the Court.

Below is the relevant parts of the cross examination of the Plaintiff by Defendants' counsel on the issue of adequate notice of the auction sale of the disputed property.

"Q: I put it to you further that the process leading to the said auction were all fraudulent.

- A: *It was not fraudulent as I stated in my statement that the Court published it in the media for 21 days and it was auctioned.*
- Q: *You have told this Court earlier today and at the last sitting that there was 21 days' notice before the auction sale. Now between the date of the notice 13/09/2010 and the date of the auction do we have 21 days?*
- A: *To the date he is referring to, you will not get 21 days but if you go to the previous publicity to the time of the auction, the 21 days was up to. I did not add only one publicity, it was more than one so if he can refer to the other one.*
- Q: *The 2nd publicity is exhibit 'F2', now the date of that notice is Monday 20/09/2010.*
- A: *That is correct.*
- Q: *And the auction was to take place on 22/09/2010.*
- A: *Yes I have seen it there.*
- Q: *And you will agree with me that between the date of the notice 20/09/2010 and the date of the auction 22/09/2010, we don't have 21 days.*
- A: *It does not come to 21 days but what I know is that they have published the thing and I went and bought it.*
- Q: *You will also agree with me that the date published in exhibit 'F1' is different from the date published in exhibit 'F2' on the same property.*
- A: *I agree.*
- Q: *I am putting it to you that the two notices in exhibits 'F1' and 'F2' were the only notices published for the auction in respect of the house you have allegedly purchased.*
- A: *I have no answer to that because it was an auction so if I am passing by and there is an auction I don't need to check the publicity. My strength is*

that I bought it from this august house and not the publicity was my strength."

There is no evidence before this Court to support the Plaintiff's assertion that the Court published the auction sale for 21 days before same was carried out. The evidence in relation to the advertisement of the auction sale is exhibits 'F1' and 'F2'. Neither exhibit 'F1' nor exhibit 'F2' suggests that the advertisement in the Ghanaian Times was done 21 days prior to the said public auction.

PW1 also testified under cross examination that after the valuation, the bailiff showed him the house and he posted notice on it and he did advert in the Ghanaian Times. He confirmed under cross examination that exhibits 'F1' and 'F2' were the two adverts. He further testified under cross examination that if it is an immovable property, it must be up to 21 days from the date of the order and if it is movable it is 7 days from the date of the order.

Clearly PW1 as a secretary of an auctioneering company who does the advertisement and paper work in Court, as he testified under cross examination, did not even know the rules on notices before an auction sale is conducted.

Paragraph (b) of subrule (1) of rule 9 of order 23 of the District Court Rules, 2009 (C.I. 59) provides as follows:

"9. (1) Subject to subrule (2) a sale shall not be made until

(b) in the case of immovable property, at least twenty-one days' notice, has been given to the public, unless the judgment debtor in writing consents otherwise."

Subrule (2) provides that:

“Despite any notices which are published elsewhere, a notice shall be published in the town or place where the property to be sold is situated, and if the sale is to take place in any other town or place the notice shall also be published, in the town or at the place of sale.”

The 1st Defendant maintained under cross examination that no notice was pasted on the subject matter property before the said auction sale was carried out because none of the occupants saw such notice. From the evidence on record, the advertisement of the auction sale of the property in dispute in the Ghanaian Times did not satisfy the above rule under the District Court Rules as stated above as well as a similar provision under *section 15 of the Auction Sales Act 1989, PNDCL 230*. The date of the notices prior to the said auction sale of the property in dispute was less than the minimum statutory twenty-one days’ notice under the relevant rules and laws. There is also no cogent evidence before this Court that notice of the sale of the disputed property was posted on the property in dispute or served on the judgment debtor.

Therefore from the evidence of the Plaintiff and PW1, the above rules and laws on the periods of notice of sale were not complied with before the said auction sale was conducted. Accordingly, I find from the evidence before this Court that the said auction sale conducted on the subject matter property was irregular.

ii. Whether or not this Court ordered the auction sale of the property in dispute.

From the evidence adduced before this Court in the instant action, the Plaintiff testified that he purchased the property in dispute under a public auction conducted by Mr. Adusei-Poku, a licensed auctioneer of the Royal Mart Enterprise on 22nd September 2010 following a judgment given in this Court in the case of Hagar Fokuoh vrs Abena Mother (Suit No. A2/543/08) on 4th March

2009; but all attempts to obtain a copy of that judgment failed. He also told the Court that he was issued a certificate of purchase on 12th November 2010 which is in evidence as exhibit 'D'.

PW1 who testified that he is the secretary of the Royal Mart Enterprise, the licensed auctioneering company that worked on the auction processes of the subject matter property, further told the Court that their company was given a letter of appointment. He also told the Court that they did a publication in two editions of the Ghanaian Times on 13th September 2010 and 20th September 2010. From the evidence of PW1, they conducted a public auction on the orders of the Court and rendered the sales account to the Court after the Plaintiff herein purchased the property in dispute for GH¢10,000.00.

Exhibit 'G' is an unsigned letter purported to have emanated from this Court dated 2nd June 2010 where the Deputy Sheriff appointed a valuer at Property Lane, Accra to value a property of the Defendant in the case of Hagar Fokuo vrs. Abena Mother (A2/543/08) and the property was described as the building at Community 8 Tema. Even if Exhibit 'G' had any probative value in the instant case, it did not authorise the company of PW1 (Royal Mart Enterprise) to auction the property in dispute.

Exhibits 'D' and 'H' which is the Certificate of Purchase indicates that the property in dispute was sold in execution of a Decree in the above suit (Fokuo vrs. Abena Mother) by Order of this Court dated the 25th day of April 2009. However the evidence on record in the instant action does not include the said Order of this Court under which the property in dispute was sold. If indeed the Court gave an order for the said property to be auctioned which is likely to be an

order for a reserved price, such order should have been part of the evidence before this Court in the instant action but there is no such evidence on record.

Section 16(2) of the Auction Sales Act 1989, PNDCL 230 provides as follows:

*“Where the auction sale is as a result of a judgment debt, the sale **shall be subject to a reserved price** to be determined by the Court which gave the judgment.” [Emphasis mine]*

From the above provision of PNDCL 230, it says “*shall be subject to a reserved price*” which makes it mandatory and compulsive for same to be complied with. It is noteworthy to mention that without a Court Order specifically an order for a reserved price stating the reserved price a property attached in execution should be sold at a public auction sale, the auctioneer does not have any authority whatsoever to conduct an auction sale on such a property.

Exhibit ‘E’ being a capital valuation report on the said property was not in itself an authority/order from the Court to conduct an auction sale on the said property without an order of the Court (being order for a reserved price) for such purpose. The fact that there was a valuation report on the property in dispute did not mean that the auctioneer without an order of the Court for a reserved price, could conduct an auction sale on the said property.

From the evidence adduced before this Court in the instant case, the property in dispute was actually sold to the Plaintiff per exhibits ‘B’, ‘C’ and ‘D’, however there is no evidence before this Court that same was done upon the orders of the Court. Moreover, exhibit ‘G’ that supposedly appointed the valuer to value the property of the Defendant in that case, was not even signed by the Deputy

Sheriff at that time. Given that exhibit 'G' was not signed I do not attach any probative value to it. This then implies that there is no credible evidence on record in the instant case that the Deputy Sheriff at the time, appointed a valuer to value the property of the Defendant/judgment debtor in that case. Flowing from that reasoning, the valuation report that was conducted on the property in dispute was done without authority from this Court.

In view of the above, I do hereby find that the property in dispute was sold to the Plaintiff by the said auctioneer, however same was done without authority or order from this Court as I find from the evidence on record that there was no order for a reserved price from this Court upon which the said auction sale was carried out.

Thus, I hereby find from the evidence before this Court that, this Court did not order the auction sale of the property in dispute.

iii. Whether or not the auction sale of the property in dispute was done fraudulently and illegally?

The 1st and 2nd Defendants per paragraph 4 and 3 of their Amended Statement of Defence and Statement of Defence respectively, pleaded fraud and the particulars of fraud are as follows:

- a. Failing to determine a reserve price.*
- b. Failing to serve the judgment debtor the notice of reserve price.*
- c. Failing to post the appropriate notices and for the statutory period in accordance with the law.*
- d. Attaching and selling H/No. 83 Cooperative Homes, when same was not the property of the judgment debtor.*

The Plaintiff denied these allegations in his Reply and Defence to the 2nd Defendant's Counterclaim and further contended that the judicial sale of the property the subject matter of this case was perfectly conducted in accordance with law so far as he is concerned. In light of the denial by the Plaintiff, the Defendants had a burden to prove the particulars of fraud listed above.

Under *section 13 (1) of NRCD 323*, the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond reasonable doubt.

Again in *Fenuku & Another v. John Teye and Another [2001-02] SCGLR 985*, it was held that the law regarding proof of forgery or any allegation of a criminal act in a civil trial was governed by section 13(1) of the Evidence Decree, 1975 (NRCD 323) which provided that the burden of persuasion required proof beyond reasonable doubt.

As indicated supra, there is a finding from the evidence on record that there was no order by this Court for a reserved price in relation to the auction sale which was conducted on the property in dispute. Flowing from that there is also no evidence on record to indicate that the judgment debtor was served with notice of an order for a reserved price. Moreover, the evidence on record in the instant case suggests that there was no compliance of the rules and laws on the periods of notice of sale prior to an auction sale of an immovable property. Last but not the least, from the evidence on record, the property in dispute was rented to the judgment debtor's mother by the 2nd Defendant but same was attached in execution to satisfy the debt of the judgment debtor.

Flowing from the above, it can be safely concluded that the Defendants have been able to prove the particulars of fraud from the evidence on record in the instant action.

In the case of *Derry v. Peek* [1889] 14 AC 337, Lord Herschell outlined in that locus classicus the ingredients for a finding of fraud. He identified fraud to be *an absence of an honest belief in the truth of a false statement*, and held that the burden of proof is discharged when it is shown that *a false representation has been made knowingly, without belief in its truth or, recklessly, careless whether it be true or false*.

I find that this standard of proof was met by the evidence adduced at the trial on the auction sale of the property in dispute since the auctioneer conducted the said sale with the false presentation that the Court had ordered for same relying on a purported letter from the registry of this Court being exhibit 'G'; when there is no evidence on record that the Court actually gave an order for a reserved price by which the sale was to be conducted. The fact that there was a valuation report on the said property did not automatically metamorphose into a Court order for an auction sale. There ought to have been an application on notice for a reserved price for the Court to determine whether or not to grant such application.

Consequently, I find from the evidence on record that the auction sale of the property in dispute was done fraudulently because exhibit 'G' which the auctioneer relied on to conduct the sale was/is unsigned; and illegally in the sense that the sale was not ordered by the Court.

iv. Whether or not the 2nd Defendant is the owner of the property in dispute.

The 2nd Defendant in his pleading stated that the property in dispute is not and has never been the property of the judgment debtor and therefore could not have been sold in satisfaction of any debt owed. He further stated in his evidence in chief before this Court that he is the rightful owner of the property in dispute

and was allocated same by the Tema Community 8 Cooperative Housing Society Limited Registered Number 4121 as the lawful owner on the 20th March 1995 after full payment. The Plaintiff vehemently denied these assertions by the 2nd Defendant; therefore the burden of proof was on the 2nd Defendant to establish his assertion that he is the lawful owner of the disputed property. However the 2nd Defendant did not lead sufficient evidence to substantiate his counterclaim. He referred the Court to attached copies of the framed certificate of ownership however the said exhibits were actually not attached to his Witness Statement. The 2nd Defendant stated in his Witness Statement that he had attached some exhibits but there was not a single exhibit attached to his Witness Statement filed on 2nd April 2019 which he relied on as his evidence in chief.

In the case of *Adjetey Adjei & Ors. v. Nmai Boi & Ors. [2013-2014] 2 SCGLR 1474*, Adinyira JSC held:

“... It is trite law that pleadings would not constitute evidence. To hold otherwise would negate t

The Court of Appeal applying the principle held in the case of *Fordjour v. Kaakyire [2015] 85 GMJ 61* when His Lordship Ayebi J.A. espoused:

“It has to be noted that the Court determines the merits of every case based on legally proven evidence a

The 2nd Defendant ought to have properly adduced evidence of his ownership of the subject matter property before the Court on oath but he did not, because the said document was not attached to his Witness Statement. For that reason, I do not consider the issue herein as having been proved. There is therefore no evidence of ownership of the property in dispute by the 2nd Defendant. The evidence on record indicates that the 2nd Defendant rented the said property to the mother of the judgment debtor who lived in same with her children, including the judgment debtor. Flowing from the above, I find that the 2nd

Defendant could not lead satisfactory evidence to establish his claim that he is the lawful owner of the property in dispute.

v. *Whether or not the Plaintiff is entitled to the reliefs endorsed on the Amended Writ of Summons.*

From the findings above, the said auction sale was conducted without authorization from the Court which made it illegal, therefore exhibit 'D' being the certificate of purchase the Plaintiff obtained from this Court as a result of the said auction sale becomes null and void, and of no legal effect since you cannot put something on nothing and expect it to stand. This is because certificate of purchase obtained from an illegal auction sale passes no title to the purchaser. Flowing from the above reasons and authorities, I find that the Plaintiff is not entitled to the reliefs endorsed on the Amended Writ of Summons.

vi. *Whether or not the 2nd Defendant is entitled to the reliefs in his Counterclaim.*

A counterclaim is a separate and independent action with the burden of proof no different from the Plaintiff's legal burden. In the case of *Op. Kwasi Asamoah v. Kwadwo Appea (2003-04) SCGLR 226 at 246*, it was held that:

"The position with regards to proof of the Defendant's case was that since they made a counterclaim, they assumed the same onus of proof as lay on the Plaintiff."

Reference is also made to the case of *Nii Odoi Kwao Asumang & 2 Ors v. William Sowah Charwey & 14 Ors (2014) 75 GMJ 108 at 135*.

The 2nd Defendant counterclaimed for a declaration that the property in dispute is his property; and an order setting aside the auction sale of the property in dispute.

From the above findings of the Court, there is no concrete evidence before this Court to support an order for a declaration that the property in dispute is the property of the 2nd Defendant, as it is only evidence adduced on oath in Court which can be considered and evaluated. The 2nd Defendant did not tender any exhibits to support his evidence in chief even though he stated in his Witness Statement that he had attached some documents being certificate of ownership among others but these document were not attached to his Witness Statement as exhibits; and counsel for the Defendants did not avert his mind to same when it was filed. However the evidence on record particularly exhibits '3' series and '4' series suggest that the mother of the judgment debtor rented the property in dispute from the 2nd Defendant as the landlord. Being a landlord does not necessarily make a person the owner of the said property he has rented out. Without sufficient evidence properly adduced on oath before this Court that supports the claim that the 2nd Defendant is the owner of the property in dispute, this Court is unable to declare that the 2nd Defendant is the owner of the said property. As far as the evidence on record is concerned, the 2nd Defendant rented the property in dispute to the mother of the judgment debtor. There is not satisfactory evidence before this Court to warrant the declaration of the 2nd Defendant as the owner of the property in dispute but there is sufficient evidence to support the finding that the 2nd Defendant rented the said property to the mother of the judgment debtor in the case of Hagar Fokuoh vrs Abena Mother (Suit No. A2/543/08).

From the findings *supra*, the auction sale of the property in dispute was not done in accordance with the rules and laws governing the period of notices prior to such a sale which made the sale irregular. Moreover same was conducted without an order by this Court authorizing the said sale making the sale illegal. Also there is evidence on record to suggest that the judgment debtor's mother rented the property in dispute from the 2nd Defendant.

Rule 10 subrule (1) of Order 23 of C.I. 59 provides as follows:

"10. (1) At any time within twenty-one days from the date of the sale of any immovable property, an application may be made to the Court to set aside the sale on the ground of material irregularity in the conduct of the sale, but a sale shall not be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that the applicant has sustained substantial injury because of that irregularity."

In the case of **Addai v. Donkor [1972] 1 GLR 209 CA** the Court of Appeal in holding two stated as follows:

"Where a sale is illegal, then the sale is void ab initio and no title passes. Where the sale is irregular, it is voidable at the instance of a debtor if he can prove the alleged irregularity has caused him substantial injury. An act is illegal when it is expressly forbidden by the law of the land. ... Kwabena v. Aninkora [1964] G.L.R. 299, S.C.; Marfo v. Edusei [1964] G.L.R. 365, S.C. and Akyeampong v. Atakora (1952) 14 W.A.C.A. 4, applied. Amoah v. Manu [1962] 1 G.L.R. 218, S.C. doubted."

The Court of Appeal held in the case of *Manu and another vrs. Yeboah [1982-83]* *GLR 34 CA* in holding one as follows:

“an auction sale could be categorised as regular, irregular or illegal. Where the sale was regularly conducted, the purchaser’s title to the property could not be impeached; but where the sale was irregularly conducted, it was voidable and could be set aside if a timeous application to avoid it or set it aside was made and a substantial injury was sustained. In the case of an illegal sale, however, the sale was void ab initio and no title whatsoever passed; time was also no bar in such a case. Marfo v. Adusei [1964] G.L.R. 365, S.C.; Republic v. Circuit Court Registrar; Ex parte Arthur [1980] G.L.R. 309, C.A.; Kwabena v. Aninkora [1964] G.L.R. 299, S.C. and Addai v. Donkor [1972] 1 G.L.R. 209, C.A. applied.”

Applying the above authorities to the instant case, the sale in the instant action was not only irregular because it did not comply with the rules and laws on period of notices prior to the sale, but also illegal because it did not have any legal backing by way of a Court order (order for a reserved price) authorizing the said sale. Since the 2nd Defendant’s counterclaim to set aside the sale is not only based on its irregularity but also on its illegal nature, time was not a bar in such a case as the sale was *void ab initio* and no title whatsoever passed.

Accordingly I find that the 2nd Defendant is partly entitled to the reliefs in his Counterclaim.

On the totality of the evidence before this Court and from the findings above, I conclude that the Plaintiff’s action could not be sustained with the evidence on

record and same is hereby dismissed. The 2nd Defendant on the other hand has been able to sufficiently prove part of his counterclaim on a balance of probabilities and therefore entitled to relief 'b' endorsed under his counterclaim.

From the foregoing reasons, I hereby enter judgment for the 2nd Defendant as against the Plaintiff as follows:

- i. The auction sale of House No. 83 Cooperative Community 8 Tema is hereby set aside; and consequently exhibit 'D' being the certificate of purchase is hereby cancelled.
- ii. Having considered the length and complexity of the proceedings as well as the conduct of the parties and their lawyers during the proceedings, I award costs of GH¢5,000.00 in favour of the Defendants against the Plaintiff.

H/H AKOSUA A. ADJEPONG
(MRS)
(CIRCUIT COURT JUDGE)