

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT  
OF JUSTICE (LAND DIVISION) ACCRA HELD ON FRIDAY THE 31<sup>ST</sup>  
OF MARCH 2023 BEFORE HER LADYSHIP JUSTICE JENNIFER ANNE  
MYERS AHMED (MRS)

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SUIT NO. LD/0510/2020

DREAM REALTY LIMITED : PLAINTIFF

VRS

1.VETERANS ADMINISTRATION, GH. (VAG) : DEFENDANTS

ANNOR & ASSOCIATES LIMITED

2.DR. SAMUEL YAW ANNOR

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J U D G M E N T

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By its amended writ of summons filed on the 27<sup>th</sup> of April 2021, plaintiff  
claimed the following reliefs

- a. Declaration of title to the 5.89 acres, as described
- b. Declaration that 1<sup>st</sup> Defendant's "re-entry" amounts to trespass.
- c. Damages for trespass.

- d. An order for the removal and/or demolishing of any structure mounted or constructed by the Defendants on the property and carting away the debris, by the Defendants or at the cost of the Defendants.
- e. Perpetual injunction restraining the Defendants and their agents from further interference, and
- f. Plaintiff's cost, expenses and legal fees in this suit on a full recovery basis.

The 1<sup>st</sup> defendant entered appearance on the 11<sup>th</sup> of March 2020 and filed its statement of defence and counterclaim as well. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants in turn entered conditional appearance but their application to have the name of the 3<sup>rd</sup> defendant struck out as a party was dismissed on the 11<sup>th</sup> of June 2020, after which the 2<sup>nd</sup> and 3<sup>rd</sup> defendants then filed their statement of defence on the 24<sup>th</sup> of July 2020.

Subsequently, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants applied for the consolidation of this suit and another one commenced by the 1<sup>st</sup> defendant against them as well as the 4<sup>th</sup> defendant in suit number LD/1173/2020 in respect of 2.533 acres of land. This application was granted after which the 4<sup>th</sup> defendant was joined to this suit and suit number LD/1173/2020 was struck out.

The 1<sup>st</sup> defendant by its further amended statement of defence and counterclaim filed on the 8<sup>th</sup> of June 2021 prayed for the following reliefs against the plaintiff:

1. Declaration of title to the 5.89 acres property described in the purported land certificate of plaintiff i.e GA 43164 as: "ALL THAT PIECE OR PARCEL of land in extent 2.39 hectare (5.89 acres) more or less being parcel No. 36 Block 13 section 005 situate at Airport Commercial Centre in the Greater Accra Region of the Republic of Ghana.
2. A declaration that statement 1<sup>st</sup> defendant has lawfully re-entered its own property and not a trespass.
3. A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant have unlawfully and fraudulently re-assigned 1<sup>st</sup> defendant's interest in the subject land without its (1<sup>st</sup> defendant) consent.
4. Recovery of possession of the land in dispute.
5. An order for the removal and/or demolishing of the structure if any constructed by the plaintiff on the property carting away of the debris or at least at the cost of the plaintiff.
6. An order of perpetual injunction restraining the plaintiff and its agents from interfering with the 1<sup>st</sup> defendant's title, possession and quiet enjoyment of its property.
7. Damages for trespass.
8. Costs including expenses and legal fees on a full recovery basis.
9. And any other orders (s) that the Honourable court may deem fit.

The 1<sup>st</sup> defendant also prayed for reliefs against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as follows;

1. An annulment of the under listed instruments entered into with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants on account of fraud.
  - a. MOU dated 30<sup>th</sup> August, 2002.
  - b. Deed of Assignment dated 24<sup>th</sup> April, 2004.
  - c. Deed of Assignment dated 7<sup>th</sup> July, 2006.
  - d. Supplementary Agreements dated 21<sup>st</sup> April, 2010.
2. A declaration of title to “ALL TITLE THAT piece or parcel of land containing an approximate area of 10.0 acres situate at Airport Commercial Centre in the city of Accra in the Greater Accra Region of the Republic of Ghana and bounded on the North East by Plot No. 8 and a lane on the South East by an unnamed Road on the South west by an Open Space and Plot No. 6 and on the North west by an unnamed Road which piece of land is more particularly delineated on Plan No. LD8551A/13618).
3. Recovery of possession.
4. Damages for breach of contract and non-performance.
5. Cost including litigation expenses and legal fees.
6. Any other relief (s) and order (s) as the Honourable court may deem fit.

The 1<sup>st</sup> defendant’s counterclaim against the 4<sup>th</sup> defendant prayed for the following reliefs:

- a. A declaration of title to 'ALL THAT PIECE OR PARCEL' of land as particularly described in the Schedule hereto in extent 2.533 acres assigned by 2<sup>nd</sup> and 3<sup>rd</sup> defendant to 4<sup>th</sup> defendant.
- b. A declaration that 1<sup>st</sup> defendant has lawfully re-entered its own property.
- c. A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' unlawfully and fraudulently re-assigned 1<sup>st</sup> defendant's interest (equity) in the subject land without 1<sup>st</sup> defendant.
- d. Recovery of possession of the land in the said schedule.
- e. An order for removal and/or demolishing of the structure constructed by the 4<sup>th</sup> defendant on the property and carting away of the debris or at least at the cost of the defendant.
- f. An order of perpetual injunction restraining the 4<sup>th</sup> defendant and its agents from interfering with the 1<sup>st</sup> defendant's title, possession and quiet enjoyment of its property.
- g. Damages for trespass.
- h. Cost including expenses and legal fees on a full recovery basis.
- i. And any other order (s) and relief(s) that the Honourable Court may deem fit.

At the close of pleadings the issues that were set down for determination on the 27<sup>th</sup> of October, 2020 were:

- a. Whether or not 1<sup>st</sup> defendant has any interest persisting in the 5.89 acres of land after executing the deed of assignment dated 7<sup>th</sup> July, 2006 to 2<sup>nd</sup> defendant?

- b. Whether or not 1<sup>st</sup> defendant's claim to the 5.89 acres of land is statute-barred?
- c. Whether or not plaintiff had notice of any encumbrance on the 5.89 acres of land assigned by 2<sup>nd</sup> and 3<sup>rd</sup> defendant to the plaintiff?
- d. Whether or not 2<sup>nd</sup> and 3<sup>rd</sup> on the one hand entered into any agreement (s) prior to the assignment of the 5.89 acres of land by 1<sup>st</sup> defendant on the other hand to 2<sup>nd</sup> defendant.
- e. Whether or not 2<sup>nd</sup> defendant entered into any other deeds or agreements with 1<sup>st</sup> defendant prior to the 7<sup>th</sup> July, 2006 deed of assignment,
- f. Whether or not 2<sup>nd</sup> and 3<sup>rd</sup> defendants obtained the consent of 1<sup>st</sup> defendant prior to the assignment of 7<sup>th</sup> July, 2006 to plaintiff?
- g. Whether or not the 2<sup>nd</sup> and 3<sup>rd</sup> defendant were fraudulent in the assignment of 1<sup>st</sup> defendant's land to plaintiff?
- h. Whether or not plaintiff is entitled to its reliefs?

#### The Plaintiff's Case

As gleaned from its pleadings, the witness statement of the plaintiff's managing director in the person of Karim Jamil Ibrahim (hereinafter referred to as PW1) and the exhibits tendered, the case of the plaintiff company is that by a deed of assignment executed on the 24<sup>th</sup> of January 2008, the plaintiff acquired a parcel of land measuring 5.89 acres from the 2<sup>nd</sup> defendant and a copy of this deed of assignment was tendered into evidence as exhibit A. The 2<sup>nd</sup> defendant was throughout represented by the 3<sup>rd</sup> defendant, its shareholding director and sole controller of the 2<sup>nd</sup>

defendant. After the acquisition the plaintiff applied to register its title with the Lands Commission and the land title certificate issued it was tendered into evidence as exhibit A1.

According to PW1, the plaintiff's investigations prior to its acquisition of the land disclosed that the 5.89 acres formed part of a larger parcel of land measuring 10 acres which the 2<sup>nd</sup> defendant represented by the 3<sup>rd</sup> defendant, acquired from the 1<sup>st</sup> defendant by a deed of assignment dated the 7<sup>th</sup> of July 2006. PW1 tendered into evidence as exhibits B and B1 the deed of assignment executed between the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the land title certificate issued to the 2<sup>nd</sup> defendant by the Lands Commission on the 13<sup>th</sup> April 2007.

Two years after the plaintiff's acquisition, the plaintiff received a letter from the National Security Council dated the 24<sup>th</sup> of June 2010 confirming the plaintiff's duly-acquired title to the land. The 1<sup>st</sup> defendant's conduct compelled the plaintiff to petition the government and received a response from the office of the president that confirmed that the land had been duly acquired by the plaintiff. Copies of these letters received from the National Security Council as well as from the office of the president were also tendered into evidence as exhibits C and C1.

The plaintiff had been in quiet possession of the land and has commissioned plans to develop the land into an ultra-modern multi-purpose commercial facility until in May of 2019 when it received a notice, followed by a letter from the 1<sup>st</sup> defendant, addressed to the 2<sup>nd</sup> and 3<sup>rd</sup> defendant threatening to re-enter the land. The 1<sup>st</sup> defendant in the said letter indicated that it had 'rescinded' certain agreements and understandings reached in an 'MOU' preceding the sale of the larger parcel of land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants

in 2006. A copy of this letter was also tendered into evidence as exhibit D. Alarmed by the contents of the letter the lawyers for the plaintiff wrote back to the first defendant asserting its title to the land. The letter also requested for copies of the documents, agreements and understandings that formed the basis for the threats. Thereafter the plaintiff's lawyers communicated with the executive director of the 1<sup>st</sup> defendant via telephone and received assurances that the plaintiff's requests would be answered but the plaintiff never received any response from the 1<sup>st</sup> defendant. A copy of the letter written by the plaintiff's lawyers to the 1<sup>st</sup> defendant was tendered into evidence as exhibit E.

On the 13<sup>th</sup> of February 2020 the 1<sup>st</sup> defendant trespassed on the land and mounted notices thereon, claiming ownership and warning others to keep off. This prompted the plaintiff to have its lawyers meet with the 1<sup>st</sup> defendant to ascertain the basis of the wrongful entry onto the land but the 1<sup>st</sup> defendant at that meeting insisted that it had re-entered the land due to the failure of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to discharge certain undisclosed obligations owed it. Photographs taken of the notices posted on the land by the 1<sup>st</sup> defendant were tendered into evidence as exhibit F series.

Due to the actions of the 1<sup>st</sup> defendant the plaintiff was compelled to institute this action and the 1<sup>st</sup> defendant after service of the writ on it again trespassed onto the land and mounted additional signs on the land claiming to own the land and warning other persons to keep off. Photographs depicting this further act of trespass were tendered into evidence as exhibit G series.

PW1 stated further that during the period of the 1<sup>st</sup> defendant's threats and trespass, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants refused to respond to their demands



regarding the situation existing between them and the 1<sup>st</sup> defendant and remained out of reach.

Responding to the counterclaim of the 1<sup>st</sup> defendant the PW1 disagreed with the averments of the 1<sup>st</sup> defendant to the effect that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants could not lawfully assign the 5.89 acres to the plaintiff without recourse to the 1<sup>st</sup> defendant or that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants had breached the terms of an MOU and thus the assignment to the plaintiff had no effect. The plaintiff he deposed, had conducted the requisite due diligence before purchasing the 5.89 acres from the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and had been in continuous and open occupation for more than 12 years. The plaintiff was also not a party to any agreement between the defendants(1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>) and therefore not liable to any of them.

#### The First Defendant's Case

The case of the 1<sup>st</sup> defendant, as gleaned from its pleadings, the witness statement of its witness in the person of their acting Executive Director Captain Ben Edmund Duah(Rtd), (hereinafter referred to as DW1) as well as the exhibits tendered is that the 1<sup>st</sup> defendant is an institution established by the Veterans Administration Act of 2012, Act 844 with responsibility for the welfare and administration of all military veterans in the country. The land in dispute measuring 5.89 acres forms part of a larger parcel of land belonging to the 1<sup>st</sup> defendant which was initially granted by the then governor of the Gold Coast to the then Trustees of the Gold Coast Legion British Empire Services League(now VAG) on the 12<sup>th</sup> of May 1950 by an indenture registered at the Deeds Registry as no. 691/1950(3289/50) with land certificate no. GA. 8419 on the 27<sup>th</sup> of April 1995. The purpose of the

grant was for the trustees to provide dwelling houses and necessary ancillary buildings for the disabled servicemen of the Royal West African Frontier Forces. A copy of the deed of lease was tendered into evidence as exhibit 1.

When the lease expired in the year 2000 the Ministry of Defence (MOD) had it renewed for a further period of fifty years on behalf of the 1<sup>st</sup> defendant but due to the fact that the zoning scheme within the lease area had changed to commercial/retail usage rendering the original objective of the lease untenable, the MOD had to figure out an innovative way to attend to the issue of catering to the welfare needs of the ex-servicemen and thus entered into a memorandum of understanding in 2002 with the 2<sup>nd</sup> and 3<sup>rd</sup> defendant to construct a shopping mall on the land. The shopping mall was to be called the '*Accra Shopping Mall*' and was to be a joint venture on the basis of government policy direction at the time referred to as Public-Private Partnership from which funds derived would be channeled to the needs of the ex-servicemen. A copy of the MOU was tendered into evidence as exhibit 2.

The MOD's participation in the proposed project under the MOU was by way of a trust arrangement whereby the MOD would use the purchase price for the land amounting to two million six hundred thousand United States Dollars (US \$ 2,600,000.00) as the equity contribution of the MOD and to set up a trust fund for the upkeep of the ex-servicemen. The MOD under the MOU was, if required, prepared to assign the remainder of the residue of the lease to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for the proposed Accra Shopping Mall, estimated to cost nineteen million United States dollars (US \$ 19,000,000.00) and for securing financing and attracting tenants to the

project. To free the land for the anticipated project to take off the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were required to relocate and resettle the ex-servicemen then living on the land at an estimated cost of US \$200,000.00.

In pursuance of the provisions of the MOU the 1<sup>st</sup> defendant duly executed a deed of assignment dated the 25<sup>th</sup> of August 2004 as supplemental to the MOU, a copy of which was tendered into evidence as exhibit 3. According to DW1, exhibit 3 categorically stated the permitted use of the land as 'the construction of Airport Shopping Mall, penthouses and other commercial structures'.

The 1<sup>st</sup> defendant again at the request of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants executed another assignment on the 7<sup>th</sup> of July, 2006 in favour of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for use in securing funding and attracting tenants to the proposed shopping mall project. A copy of this assignment was also tendered into evidence as exhibit 4.

In spite of the restrictions in the assignments, the *'2<sup>nd</sup> defendant operated by the 3<sup>rd</sup> defendant, in inordinate haste and disregard, partitioned the subject land'* into two and assigned 6.06 acres or 2.45 hectares to the plaintiff and the other in extent of 2.533 acres to the 4<sup>th</sup> defendant. DW1 deposed further that the projects for which the 2<sup>nd</sup> and 3<sup>rd</sup> defendants purported to assign the portions of the land to the plaintiff and the 4<sup>th</sup> defendant are completely different from that stipulated in the MOU and the subsequent agreements with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for while the assignment to the plaintiff is for the object of constructing a tourist centre, the assignment to the 4<sup>th</sup> defendant is for the construction of a multipurpose commercial complex.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants misrepresented the 1<sup>st</sup> defendant to the Lands Commission in order to obtain the Commission's approval, that the 1<sup>st</sup>

defendant had already signed an agreement with the 4<sup>th</sup> defendant to develop the land into a multipurpose commercial complex which was not true. This misrepresentation was according to the witness, contained in a letter from the Lands Commission to the 1<sup>st</sup> defendant seeking its consent for the assignment to the 4<sup>th</sup> defendant Independence Properties. A copy of this letter was tendered into evidence as exhibit 5. DW1 deposed further that '*given this apparent daylight robbery*', the 1<sup>st</sup> defendant re-entered the land by erecting '*stop signs*' thereon, prompting the plaintiff's then lawyers to write to the minister of defence on the 27<sup>th</sup> of October 2009 to ask the 1<sup>st</sup> defendant to remove the signs to enable the plaintiff complete a fence wall around the land which the minister refused to do. The letter written by the plaintiff's lawyer was tendered as exhibit 6.

The 1<sup>st</sup> defendant convened several meetings with the 2<sup>nd</sup> defendant which were attended by the 3<sup>rd</sup> defendant which went well into the year 2012 to discuss the stalled implementation of the MOU and agreements but the 3<sup>rd</sup> defendant never disclosed that he and the 2<sup>nd</sup> defendant had completely divested themselves of the 1<sup>st</sup> defendant's land. A letter that conveyed the concerns of the 1<sup>st</sup> defendant and invited the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to scheduled meetings was tendered into evidence as exhibit 7. An addendum to the MOU and subsequent agreements which was entered into as a supplementary agreement by the 1<sup>st</sup> to 3<sup>rd</sup> defendants was executed on the 21<sup>st</sup> of April 2010. Copies of minutes of two meetings and the supplementary agreement were tendered into evidence as exhibits 8 and 9 respectively. Also tendered as exhibits 10 and 11 respectively were the supplementary agreement and inputs made by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The supplementary agreement provides a timeline for the due implementation

of the tenets of the MOU and the agreements and pursuant to that a sod cutting ceremony was held.

To the 1<sup>st</sup> defendant, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants have by their conduct been dishonest and fraudulent from the beginning. Having pleaded fraud, the 1<sup>st</sup> defendant at paragraph 26 particularized the fraud as follows:

*'a. Re-assigning the land, the subject matter of the MOU, agreements and understandings with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants contrary to the terms of the agreements, understandings and addendums.*

*b. Misrepresenting plaintiff to the Lands Commission that plaintiff had already signed an agreement with a third party, Independence Properties Ltd, to obtain consent for the re-assignment of part of the subject land of 10.0 acres to the said Independence Properties Ltd, when plaintiff never signed any such agreement.*

*c. Continued to attend meetings with 1<sup>st</sup> defendant even though they(2<sup>nd</sup> and 3<sup>rd</sup> defendants) knew that they had already sold out all the land for completely different purposes than otherwise stipulated in the MOU and subsequent agreements.*

*d. Organising a sodcutting ceremony on the land to kick-start works on the construction of the shopping mall even though 2<sup>nd</sup> and 3<sup>rd</sup> defendants knew they had at the time already sold out all the land granted for the purpose.*

*e. Misrepresenting to plaintiff that all the covenants, conditions and stipulations contained in the head lease had been performed or observed up to the date of the assignment to the plaintiff and Independence Properties Ltd when that was never the case.'*

To the 1<sup>st</sup> defendant, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were also in breach of their obligations under the MOU and subsequent agreements with the 1<sup>st</sup>

defendant which had no choice but to abrogate the MOU and all agreements with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants sometime in 2019 and to re-enter the land. The letter of abrogation was tendered into evidence as exhibit 12.

Again the 1<sup>st</sup> defendant contended that the plaintiff was not an innocent purchaser for value without notice as the plaintiff knew from the outset that there were issues with the land in dispute yet the plaintiff failed or neglected to deal with those issues squarely and rather sought the assistance of the National Security Council and further that the plaintiff's claim that it had invested heavily in the land and is not prepared to vacate same is untenable.

#### The Case of The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

The case of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, from the totality of their pleadings and the witness statement of the 3<sup>rd</sup> defendant who testified on their joint behalf and from the exhibits tendered is that the 2<sup>nd</sup> defendant sometime in August 2002 entered into a memorandum of understanding with the Ministry of Defence for the development of the land the subject matter of this dispute into what was to be called the Accra Shopping Mall project at an estimated cost of \$19 million and the resettlement of ex-servicemen on the land to Amasaman. He tendered into evidence as exhibit DSA1 a copy of the memorandum of understanding and stated that the signing of the MOU was necessitated by the fact that the MOD urgently needed to resettle the ex-servicemen who were living on the land and because of the activity of squatters who had invaded the land. The lease of the 1<sup>st</sup> defendant had expired and was yet to be renewed however the 2<sup>nd</sup> defendant agreed to take the risk of building houses to relocate all the ex-servicemen after the

MOU had been signed and constructed dwelling houses and ancillary buildings at Amasaman at a cost of over \$200,000.00.

The 2<sup>nd</sup> defendant in expectation that the 1<sup>st</sup> defendant would be granted a lease by the government procured the services of architects from South Africa for the design of the shopping mall and exhibit DSA2 series was tendered into evidence in support of this assertion. The 2<sup>nd</sup> defendant also secured funding for the project at an estimated cost of about nineteen million United States dollars (US \$19,000,000.00) and engaged a consultant to secure tenants for the building. The consultant, architects and the tenants to occupy the project travelled to Ghana several times from South Africa and by the middle of 2003 everything was in place for the 2<sup>nd</sup> defendant to construct the shopping mall but due to the failure of the 1<sup>st</sup> defendant in securing a lease from the Government through the Lands Commission, all the sources of funding secured for the project and other arrangements made by the 2<sup>nd</sup> defendant with its partners were withdrawn from the project.

The government in 2004 granted a lease of the land to the 1<sup>st</sup> defendant, thereby leading to the execution of a further agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendant dated the 25<sup>th</sup> of August 2004, a copy of which was tendered into evidence as exhibit DSA3. Following the grant of the lease, the 1<sup>st</sup> defendant then executed a deed of assignment in favour of the 2<sup>nd</sup> defendant to secure its interest in the land in dispute on the 7<sup>th</sup> of July 2006. A copy of this deed of assignment was also tendered into evidence as exhibit DSA4.

The 2<sup>nd</sup> defendant thereafter proceeded to register its interest in the land with the Land Title Registry and was issued with land title certificate no. GA 24098 volume 3 folio 142 dated the 13<sup>th</sup> day of April 2007, a copy of which was tendered into evidence as exhibit DSA5. According to the 3<sup>rd</sup>

defendant, even though the size of the land in the assignment by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was stated to be 10 acres, the actual size of the land on the ground as confirmed by the land title certificate was rather 9.454 acres.

The 2<sup>nd</sup> defendant further deposed that per the terms of the agreement executed with the 1<sup>st</sup> defendant, five pent houses were to be constructed for the use of the 1<sup>st</sup> defendant together with the setting up of a trust account which has long been established by the 1<sup>st</sup> defendant at Stanbic Bank.

He also stated that considering that the current Accra shopping mall had commenced and was far advanced, the project as envisaged under the memorandum of understanding could not be undertaken as agreed on by the 2<sup>nd</sup> defendant and thus in order to recoup losses made by the 2<sup>nd</sup> defendant since 2001, it assigned part of the land in dispute to the plaintiff in 2008. A copy of the deed of assignment between the 2<sup>nd</sup> defendant and the plaintiff was tendered into evidence as exhibit DSA 6. The plaintiff after the grant of the land immediately went into possession, constructed a fence wall around the land and registered its interest at the land commission and had been issued with a land title certificate. By the terms of the head lease the 2<sup>nd</sup> defendant only required the consent of the lands commission to assign the land in dispute and to the 3<sup>rd</sup> defendant, it was *'erroneous for the 1<sup>st</sup> defendant to suggest that its consent was required in any disposition by the 2<sup>nd</sup> defendant'*.

Following a series of engagements between the 1<sup>st</sup> and 2<sup>nd</sup> defendants in March 2010 it was agreed that the project to be undertaken by the 2<sup>nd</sup> defendant which would now consist of a hotel(1<sup>st</sup> phase) shopping mall and office block which was to be executed on the remaining portion of the land



in dispute and the minutes of a meeting dated the 1<sup>st</sup> of March 2010 was tendered into evidence as exhibit DSA 7. The hotel complex which was to contain the 5 penthouses for the use of the 1<sup>st</sup> defendant had started though it was yet to be completed. The 3<sup>rd</sup> defendant denied the claims of the 1<sup>st</sup> defendant that the 2<sup>nd</sup> defendant had been dishonest with the 1<sup>st</sup> defendant and that at all material times the 1<sup>st</sup> defendant was aware of the assignment to the plaintiff and that it was disingenuous on the part of the 1<sup>st</sup> defendant to say that it was unaware of it. The 3<sup>rd</sup> defendant also stated that the 1<sup>st</sup> defendant at the time of the sod cutting ceremony was aware that the parties to whom the 2<sup>nd</sup> defendant had granted parcels of the land to were in visible possession for all to see. He also stated that the sod cutting ceremony undertaken in 2010 on the remaining land was in furtherance of the consensus reached in March 2010 that the project was to be undertaken on the remaining portion of the land and that the plaintiff at the time of the sod cutting ceremony had already walled its land, which was known to the 1<sup>st</sup> defendant and for this reason the 1<sup>st</sup> defendant raised no issue with the plaintiff's occupation of the land. Neither he nor the 2<sup>nd</sup> defendant had received any letter from the 1<sup>st</sup> defendant dated the 1<sup>st</sup> of February 2019. He also stated that he had been wrongly joined to the suit as he had at all material times acted in his capacity as a director of the 2<sup>nd</sup> defendant and had no personal interest in the land and had been improperly joined to the suit.

#### The Case of the 4<sup>th</sup> Defendant

As gleaned from the pleadings of the 4<sup>th</sup> defendant as well as the witness statement and exhibits attached filed by its witness Ian David Morrison, its

managing director who testified on its behalf and hereinafter designated as DW2, the 4<sup>th</sup> defendant is a body corporate engaged in the development of real estate and sale of properties.

DW2 gave a narration of the various assignments by the Lands Commission to the 1<sup>st</sup> defendant, then from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and tendered copies of the deeds of assignment of these transactions which had already been tendered by the other parties into evidence as exhibits IP1 and IP2. By a lease agreement dated the 20<sup>th</sup> of August 2010, Annor and Associates conveyed the parcel of land containing an approximate area of 2.53 acres to the 4<sup>th</sup> defendant for valuable consideration. A copy of the deed of assignment was tendered into evidence as exhibit IP4. The 4<sup>th</sup> defendant then registered its interest and was issued with a land title certificate numbered GA. 60885 volume 3 folio 488p dated the 18<sup>th</sup> of December 2019, a copy of which was tendered into evidence as exhibit IP4.

The 4<sup>th</sup> defendant had taken possession of the land after the deed of assignment dated the 20<sup>th</sup> of August 2010 and had commenced with the construction of a hotel complex on same and had been in possession without any disturbance from any quarter. Prior to the construction of the hotel a sod cutting ceremony had been held sometime in July of 2010 which had been attended by the then executive director and chairman of the 1<sup>st</sup> defendant. To DW2 the 1<sup>st</sup> defendant was precluded from denying the 4<sup>th</sup> defendant's interest in the 2.5 acre land it validly obtained from the 2<sup>nd</sup> defendant and that the 1<sup>st</sup> defendant having validly transferred its interest in the property to the 2<sup>nd</sup> defendant has no interest in the land. Furthermore, the 4<sup>th</sup> defendant contended, it was not privy to any alleged or undisclosed private understanding between the 1<sup>st</sup> defendant on the one part and the 2<sup>nd</sup>

and 3<sup>rd</sup> defendants on the other part and therefore not bound in any way by any such understanding. Any allegation of fraud made by the 1<sup>st</sup> defendant against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants was an afterthought and a ruse calculated to mislead the court into granting it a claim it is not entitled to.

Obviously the assignment did not specifically contain a clause requiring the prior consent of the 1<sup>st</sup> defendant to assign the land to a third party.

In unravelling the knot of evidence presented by the parties in order to arrive at a determination, this court shall first determine two issues together and these are whether or not 2<sup>nd</sup> and 3<sup>rd</sup> on one hand entered into any agreement (s) prior to the assignment of the 5.89 acres of land by 1<sup>st</sup> defendant on the other hand to 2<sup>nd</sup> defendant and whether or not 2<sup>nd</sup> defendant entered into any other deeds or agreements with 1<sup>st</sup> defendant prior to the 7<sup>th</sup> July, 2006 deed of assignment. But having carefully looked at these issues and in all honesty the first part makes no sense to me, the issue that rather appears necessary is the following, whether or not there was a valid contract between the 1<sup>st</sup> and 2<sup>nd</sup> defendant and if so whether the 2<sup>nd</sup> defendant has fulfilled the terms of that contract.

In **May & Butcher v R**[1934]2 KB 17 Viscount Dunedin stated:

*‘To be a good contract there must be a concluded bargain and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties.’*

Similarly, in **NTHC Ltd. v Yaa Antwi**[2009] SCGLR 117 @ 125 it was held as follows:

*“Basically an offer is an indication in words or by conduct by an offeror that he or she is prepared to be bound by a contract in the terms expressed in the offer, if the*

*offeree communicates to the offeror his or her acceptance of those terms. Accordingly, the offer has to be definite and final and must not leave significant terms open for further negotiation. By the words 'significant terms', we here mean terms that are essential to the bargain contemplated. It is important to emphasize the proposition that the mere acceptance of an offer is sufficient to turn the offer into a contract, if there is consideration for it, together with an intention to create legal relations."*

Essentially a valid contract must have an agreement, a promise, a legal duty, consideration and a remedy which are encapsulated in exhibit 3.

From the evidence on record, the Ministry of Defence and Annor & Associates of Pretoria, Republic of South Africa represented jointly by Dr. Annor and one Mr. Tom Tagoe entered into a memorandum of understanding(exhibit 2) on the 30<sup>th</sup> of August 2002, in which Annor & Associates were described as promoters. Subsequently the agreement between VAG and Annor & Associates was executed on the 25<sup>th</sup> of August 2004, pursuant to the memorandum of understanding. This MOU stated that the Ministry of Defence was willing to assign the remainder of its 50 year lease of the land in dispute to Annor & Associates for the proposed shopping mall project estimated to cost nineteen million US dollars. To facilitate the building of the project the ex-servicemen who then resided on the land were to be relocated to a new location at a cost of \$200,000.00 which was to be borne by Annor & Associates. The Ministry on the other hand had *'decided to participate in the proposed project by way of a trust arrangement and intends to utilize the purchase price of US \$2,600,000.00(two million six hundred thousand US dollars) for the land as its equity distribution'*.

In recitals F and G of this lease agreement, mention was made of the MOU signed on the 30<sup>th</sup> of August 2002. In the definitions and interpretation part of the lease agreement, the purchase price was listed as '*\$1,250,000.00(one million two hundred and fifty United States Dollars) to be spent on the construction of 5 penthouses for VAG plus \$269,011.70 to be paid yearly for five years into the trust fund*' and also included the payment of US\$ 4,950.00 the then equivalent of Old Cedis ₨ 44, 394,000.00 by the 2<sup>nd</sup> defendant for the payment of rent arrears to the Lands Commission covering the period from 1<sup>st</sup> January 1989 to 31<sup>st</sup> December 2004. Trust Fund was defined as '*...the remainder of the purchase price(amounting to US\$1,345,058.40...that is to be paid into an account at the Stanbic Bank for and on behalf of the ex-servicemen*'. The permitted use of the land was defined as '*...the construction of Airport shopping Mall, Penthouses and other Commercial structures.*'

In fulfilment of its obligations, the 1<sup>st</sup> defendant released the land to the 2<sup>nd</sup> defendant company which was the consideration agreed on in the lease agreement of the 25<sup>th</sup> of August 2004 as well as that executed on the 7<sup>th</sup> of July 2006. Undoubtedly, this lease agreement executed on the 7<sup>th</sup> of July 2006 which I shall refer to as exhibit 4, was in pursuance of the MOU as well as the agreement executed on the 25<sup>th</sup> of August 2004 and was the consideration given by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant contingent on the 2<sup>nd</sup> defendant also fulfilling its obligations under the MOU and the lease agreement of the 25<sup>th</sup> of August 2004 which I shall refer to as exhibit 3. During cross-examination of the 3<sup>rd</sup> defendant by the 1<sup>st</sup> defendant's counsel he was asked if the land was made available to Annor & Associates for the purpose of constructing the shopping mall and he admitted that it was

subject to the fulfilment of certain conditions which he described as the resettling of the ex-servicemen on the land and the renewal of the head lease by the Lands Commission. He was also asked to read paragraph 7 of the agreement of 25<sup>th</sup> of August 2004 and was then asked the following question;

*'This land that was granted to you pursuant to this agreement was for securing funding and attracting tenants to the joint project between the 1<sup>st</sup> defendant on one part and 2<sup>nd</sup> and 3<sup>rd</sup> defendants on the other as per paragraph 6 of the MOU is that not so?'*

His answer was;

*'Yes my lord, I have seen the MOU, paragraph 6 refers to the intention behind the project but the intention was only to come into fruition after paragraph 3 had been complied with.'*

The paragraph 3 which he referred to was of course the giving up of vacant possession of the land by VAG to Annor & Associates. The 1<sup>st</sup> defendant had performed its part of the contract. **In The Republic v The High Court, Cape Coast; Ex Parte: Ghana Cocoa Board(Apotoi III Interested Party)[2009] SCGLR 603 , Atuguba JSC at page 619 stated as follows:**

*'It is trite law that for a contract to be enforceable it must be certain at least as to its essential terms. In modern times however, the courts have taken a stand that, especially as here, there has been part performance, the agreement should survive as a contract, see Koglex Ltd. V Field[1999-2000] 2 GLR 437 S.C. But certainty of the contract is a logical and necessary requirement which has never been questioned;see Walford v Miles[1992] 1 All. ER 453 HL.'*

After carefully analyzing the MOU as well as the agreement of the 25<sup>th</sup> of August 2004 together with the assignment of the 7<sup>th</sup> of July 2006, it can be perceived that the nature of these agreements established a fiduciary relationship between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant in relation to the land in dispute. A fiduciary relationship essentially is one in which one party (the fiduciary) is placed in a trust and confidence in relation to another party and acts on his behalf or in their interest. The fiduciary has the duty to act in the best interest of the other party. A constructive trust was thus created when the 1<sup>st</sup> defendant, in anticipation that the land would be developed for the benefit of veterans, assigned its legal interest to the 2<sup>nd</sup> defendant. In **Ghana Land Law and Conveyancing** (2<sup>nd</sup> Edn), Da Rocha and Lodoh explain constructive trust at page pages 117-118 as follows:

*“A constructive trust is a trust which arises independently of the intention of the parties but it is imposed by equity because the circumstances demand that the person holding the title to the property should be considered as a trustee. This trust usually arises by operation of equity where a fiduciary relation exists. A trustee or a person in a fiduciary relationship is not permitted to profit from his position....”*

In **Gateway Worship Centre v David Soon Boon Seo**, J4/12/2008 delivered on 21<sup>st</sup> January 2009, Akuffo JSC(as she then was) stated thus:

*‘ the essential ingredients of a constructive trust may be stated as follows:*

- a. *There must be no express intentions of the parties to create a trust (this is because the intentions of the parties are totally irrelevant; there being no requirement for an express trustee as in express trusts, neither is there a requirement for the parties to be ad idem as in the law of contract).*
- b. *There must be in existence a fiduciary relationship.*
- c. *The fiduciary relationship must specifically be in the context of trust such as to make the fiduciary a trustee in equity.'*

By parity of reasoning therefore, whilst the 2<sup>nd</sup> defendant became the legal owner of the land in dispute, the 1<sup>st</sup> defendant at all times remained the beneficial owner of it, since the legal ownership was premised on the 2<sup>nd</sup> defendant developing the land for the benefit not only of itself but for the benefit of VAG, the beneficial owner.

The issue thus is, once the 1<sup>st</sup> defendant as the beneficial owner, had upheld its end of the stick, had the 2<sup>nd</sup> defendant also upheld its end of the stick?

Breach of a contract is a legal cause of action in which basically a party to an agreement fails to honor the terms of the agreement or contract by non-performance and fails to fulfill its obligations as described in the contract. From all the evidence produced before the court and from the horse's own mouth, the 2<sup>nd</sup> defendant appears to have done absolutely nothing when it came to fulfilling its part of the bargain with the 1<sup>st</sup> defendant apart from moving the ex-servicemen to Amasaman. But even with that, the 3<sup>rd</sup> defendant was unable to provide any proof that the 2<sup>nd</sup> defendant had



constructed any buildings for the ex-servicemen or to provide the amenities the 2<sup>nd</sup> defendant was required to do per the terms of the agreement with VAG. He could not disprove the assertion by the 1<sup>st</sup> defendant's counsel that the land at Amasaman was land which had already been owned by the MOD where it had operated a camp and already had some buildings thereon and that the 2<sup>nd</sup> defendant had not constructed any buildings at all for the ex-servicemen.

The 3<sup>rd</sup> defendant under cross-examination admitted that he had sold all the land assigned by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant but when asked if he was no longer in a position to construct a shopping mall and the penthouses stipulated in the MOU and the other agreements, he said that that is not so but gave no explanation for how that was not so. The following question was then asked of him;

*'You have also not paid the amount of US\$1,345,058.40 stipulated under paragraph 4 of your DSA3 into the trust account at Stanbic Bank . Is that not the case?'*

His response was, *'That is not the case'*, but yet again he was unable to explain what the actual situation was. Indeed if he or the 2<sup>nd</sup> defendant had made any payment at all since 2006 into the trust fund account undoubtedly he ought to have been able to prove so before this court with documentation showing deposits paid into the account.

The 3<sup>rd</sup> defendant said it was incorrect that the 2<sup>nd</sup> defendant had breached their covenant with the 1<sup>st</sup> defendant to construct a shopping mall, penthouses and maintain a trust account for the benefit of the ex-servicemen. The following question and answer session took place during cross-examination by the 1<sup>st</sup> defendant's counsel;

*'Q: At paragraph 18 of your own witness statement you indicated that you sold the land to recoup your losses. Is that not so?*

*A: we sold part of the land not the whole land to recoup our loss.*

*Q: Which part did you sell and which part did you not sell?*

*A: Per the agreement we had between the 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendant with the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant was expected to have given vacant possession of the land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants by August 2004 latest. When that agreement was breached the directors of the 2<sup>nd</sup> defendant most of us were then resident in South Africa'.*

Basically the 3<sup>rd</sup> defendant did not answer the question. Indeed exhibit 3 provided at paragraph 3.4 under 'Terms' that in the event where the 1<sup>st</sup> defendant was unable to give vacant possession of the land the 2<sup>nd</sup> defendant was entitled to damages, compensation and full reimbursement of the financial costs incurred by it prior to the signing of the agreement. From this, had the 1<sup>st</sup> defendant been unable to give vacant possession of the land to the 2<sup>nd</sup> defendant why had the 2<sup>nd</sup> defendant not requested for the payment of damages for any costs incurred by it and yet even gone ahead to execute the deed of assignment with the 1<sup>st</sup> defendant? Perhaps this is because exhibit 3 gave no specific time limit within which the 1<sup>st</sup> defendant was to give vacant possession of the land to the 2<sup>nd</sup> defendant. The head lease from the lands commission was renewed on the 20<sup>th</sup> of August 2004 and the first agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants took place five days later so when exactly did the 1<sup>st</sup> defendant breach the terms of the agreement? Secondly the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' exhibit DSA2 series which are ostensibly the architectural rendition of the shopping mall complex do not provide any date indicating when it was drawn up or even

how much was expended by the 2<sup>nd</sup> defendant in preparing itself for the development of the land. Considering the claims that the 2<sup>nd</sup> defendant mobilized \$18 million as well as investors willing to invest in the shopping mall there was not a shred of evidence provided in support of these assertions to establish what losses the 2<sup>nd</sup> defendant suffered which it had to recoup or mitigate by selling off most of the land assigned to it by the 1<sup>st</sup> defendant. Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, example by producing documents, description of things, reference to other facts, instances or circumstances and his averment is denied, he does not prove it by merely going into the witness box and repeating that averment on oath. He does so by producing other evidence of facts from which the court can be satisfied that what he avers is true'. – reference here to **Danso-Dapaah v Falcon Crest Investment Ltd & 4 Others**[2015] 89 GMJ 148 @ 172 per Dzamefe JA. Similarly in **T.K.Sebeh &Co. Ltd v Mensah**[2005-2006] SCGLR 341 Dotse JSC at 360 stated as follows'

*'...for however credible a witness may be, his bare assertion on oath or the repetition of his averments in the witness box cannot constitute proof'.*

The 3<sup>rd</sup> defendant was unable to prove what loss the 2<sup>nd</sup> defendant suffered for which reason he decided to sell off the land not only to the plaintiff but to a another company set up by himself and his wife in which they were both directors and shareholders, again without paying a farthing to the 1<sup>st</sup> defendant.

In **Sarpong( deceased) (Substituted by ) Koduah v Jantuah**[2017-20] 1 SCGLR 736@747, the Supreme Court per Benin JSC stated the principle of

law that the burden of persuasion rests with the person who substantially asserts the affirmative of the issue on the pleadings. Generally a plaintiff has the burden of proving his claims, which duty is not imposed on a defendant who makes no claims- **Samuel Oblie & Others v Tetteh Lancaster**[2018] DLSC 5622 per Appau JSC. However where as in this case both the plaintiff and the defendant make claims of title to the land, then they both bear the same onus of proof. In the present case, both the plaintiff and the first defendant have led sufficient evidence in proof of their claims. Simply put, the 1<sup>st</sup> defendant has led evidence before this court to establish that it had an agreement with the 2<sup>nd</sup> defendant, the 2<sup>nd</sup> defendant reneged on the agreement and then disposed of the land to the plaintiff and the 4<sup>th</sup> defendant, without the consent and concurrence of the 1<sup>st</sup> defendant. The germane fundamental issue in this case is not whether the 1<sup>st</sup> defendant completely assigned its interest in the land in dispute to the 2<sup>nd</sup> defendant and thus cannot make any claim of title to the land but whether the 2<sup>nd</sup> defendant breached the agreement with the 1<sup>st</sup> defendant. Admittedly the 2<sup>nd</sup> and the 3<sup>rd</sup> defendants do not bear the same burden of proof the 1<sup>st</sup> defendant bears but once the 1<sup>st</sup> defendant has been able to satisfy the burden of proof, what evidence have the 2<sup>nd</sup> and 3<sup>rd</sup> defendant been able to provide before this court to rebut the claims and evidence on record of the 1<sup>st</sup> defendant; to prove that indeed the 2<sup>nd</sup> defendant also performed his part of the contract and therefor the 1<sup>st</sup> defendant and consequently the plaintiff are not entitled to their respective claims? In **Sumaila Bielbiel v Adamu Dramani & Attorney-General**(No. 3) [2012] 1 SCGLR 370 at 371 to 372, Date-Bah JSC opined thus:

*“There are two kinds of burden of proof recognized by the common law and which are preserved in Ghana law by the Evidence Act, 1975 [NRCD 323] In the common law, some cases and text writers have made the distinction between legal burden of proof and evidential burden of proof. The distinction is narrowed in the Evidence Act, 1975 by the distinction between the burden of persuasion and the burden of producing evidence...*

*The distinction... is important because the incidence of the burden of producing evidence can lead to the defendant acquiring the right to begin in a trial, even though the burden of persuasion remains on the plaintiff. Ordinarily the burden of persuasion lies on the same party as bears the burden of producing evidence. However, depending upon the pleadings or what facts are admitted, the evidential burden can move on to a defendant. The cumulation on the defendant of the evidential burden on the issues to be tried in a case can result in the right to open the case shifting to the defendant. For instance, where the burden of producing evidence on every issue in a case lies on the defendant, he or she will have the right to open the case, even if the burden of persuasion remains on the plaintiff.”*

Applying the above to the instant case, I find that the answer to this question is none, none at all. Rather the evidence of the 3<sup>rd</sup> defendant proves that the 2<sup>nd</sup> defendant breached the terms of the agreement it had with the 1<sup>st</sup> defendant and has to date, with the exception of the resettlement of the ex-servicemen, failed to uphold its end of the agreement with the 1<sup>st</sup> defendant.

The next issue to be determined is whether or not 2<sup>nd</sup> and 3<sup>rd</sup> defendants obtained the consent of 1<sup>st</sup> defendant prior to the assignment of 7<sup>th</sup> July, 2006 to plaintiff?

It does not appear that this is a contentious issue in the sense that the 3<sup>rd</sup> defendant in his witness statement admitted that the prior consent of the 1<sup>st</sup> defendant was not sought before assigning part of the land to the plaintiff. He specifically deposed thus at paragraph 19;

*'I further say that by the terms of the Head Lease, the 2<sup>nd</sup> defendant only required the consent of the Lands Commission to assign the land in dispute and that it is erroneous for the 1<sup>st</sup> defendant to suggest that its consent was required in any disposition by the 2<sup>nd</sup> defendant.'*

He had earlier deposed in paragraph 15 that;

*'By the terms of the Assignment, the 2<sup>nd</sup> defendant was required to observe the terms of the head lease between the 1<sup>st</sup> defendant and the Government of Ghana represented by the Lands Commission.'*

The lease agreement of the 25<sup>th</sup> of August 2004 between the 1<sup>st</sup> and 2<sup>nd</sup> defendants, contained the following covenants to be borne by the assignee i.e the 2<sup>nd</sup> defendant.

*'The assignee which is the developer covenants with the assignor(VAG) as follows:*

*5.1. To pay the purchase price hereby reserved in clause 4 above when it becomes due and observe and perform all covenants, conditions and stipulations contained in the lease therein and on the part of the Assignee to perform.*

*5.2. Agrees to observe the terms and perform all covenants conditions and stipulations contained in the Head Lease.*

5.3. *Notwithstanding anything contained herein to the contrary this agreement shall not come into force unless the prior consent of the Head Lessor shall have first been obtained.'*

However, even though exhibits 3 and 4 did not have any provision requiring the 2<sup>nd</sup> defendant to obtain the consent of the 1<sup>st</sup> defendant before it could assign the land to any other person or entity, it is clear that the terms of the agreements with the 1<sup>st</sup> defendant did not give the 2<sup>nd</sup> defendant this option and so assigning the land to the plaintiff as well as to the 4<sup>th</sup> defendant was in clear breach of the agreement the 2<sup>nd</sup> defendant had with the 1<sup>st</sup> defendant, especially so when the 1<sup>st</sup> defendant at all times remained the beneficial owner of the property in dispute.

In view of the fact that the 1<sup>st</sup> defendant pleaded and particularized fraud, can it be said that the 3<sup>rd</sup> defendant's conduct was fraudulent?

It must be noted that the burden of proving fraud in a civil case is held to the same standard as is applicable to a criminal case which is that of proof beyond a reasonable doubt. In **Aikins v Dakwa** [2013] 58 GMJ at 209 and 211 Ayebi JA held that;

*"Fraud it is known is a serious crime to be charged against another. That is why the law requires in section 13(1) of NRCD 323 that if fraud is alleged even in a civil suit, it must be proved beyond reasonable doubt as pertains in normal criminal cases...What amounts to fraud has long been settled in Derry v Peeks (1889) 14 Appeal Case 337. At page 374 Lord Hershell said:*

*"Fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly, careless whether it be true or false...."*

*These are the elements of fraud which plaintiff must prove."*

What are the acts of the 3<sup>rd</sup> defendant in the name of the 2<sup>nd</sup> defendant which can be said to be fraudulent?

In the first place the failure of the 2<sup>nd</sup> defendant to perform its part of the contract after so many years cannot be discounted especially when the 3<sup>rd</sup> defendant has been unable to give any reasonable explanation for this failure. Furthermore, the very act of selling the land on the blind side of the 1<sup>st</sup> defendant when the 2<sup>nd</sup> defendant through its officers in particular the 3<sup>rd</sup> defendant was aware that the assignment of the land to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant was conditional and predicated on the 2<sup>nd</sup> defendant adhering to the MOU as well as the subsequent agreements to build a shopping mall and hotel complex on the land was fraudulent.

In spite of its failure to uphold its part of the agreement and despite the fact that it had sold the portions of the land to the plaintiff, the 3<sup>rd</sup> defendant had further meetings with representatives of the 1<sup>st</sup> defendant in March 2010 at which he gave details without informing them that part of the land had been sold to the plaintiff. Per the 1<sup>st</sup> defendant's exhibit 8 which is the minutes of a meeting held on the 1<sup>st</sup> of March 2010 which meeting the 3<sup>rd</sup> defendant admits attending and participating in, it was agreed that the work would commence on the land in July 2010 to be completed in 2014. It was further agreed that the trust fund was to start from the year the project was to take off and not at the date of completion of the project. Another meeting was held on the 25<sup>th</sup> of January 2012 and the 3<sup>rd</sup> defendant who represented the 2<sup>nd</sup> defendant was asked why the project had not taken off. The explanation given by the 3<sup>rd</sup> defendant at the said meeting, the minutes of which were tendered into evidence as exhibit 9 by the 1<sup>st</sup> defendant are replicated below:



1. *'Dr. Annor thanked the National Chairman for the opportunity to meet him. He said after the project agreement had been finalized between MOD/VAG and Annor & Associates, he had met the National Chairman of the Lands Commission who in fact recommended a lawyer to assist him with the documentation processes at the Lands Commission.*
2. *Dr. Annor said that he had met all requirements and paid all fees as requested by the Lands Commission and yet close to two years now he had not had his documents signed to enable the project take off. He said he suspected a political interference somewhere along the line.*
3. *Dr. Annor intimated that if the documents are signed within the next few weeks, he could anticipate the project taking off by April, 2012.'*

It was decided that the 3<sup>rd</sup> defendant pursue the matter at the Lands Commission and get back to the chairman if there were any further bottlenecks while the Chairman said he would also call at the Lands Commission to see if he could facilitate the process.

It was subsequent to the meetings held in March 2010 (but prior to the meeting held on the 25<sup>th</sup> of January 2012) that exhibit 10 was executed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants on the 21<sup>st</sup> of April 2010 as an addendum and amendment to parts of the preceding agreement of the 25<sup>th</sup> of August 2004 and was to give effect to the agreement to set up the Trust fund immediately after the commencement of the project. It was agreed that an amount of US \$135,000.00 was to be paid yearly into the trust fund during the period of

construction which was not to exceed 5 years in duration. Other details pertaining to the payment of money into the trust fund as well as the trustees of the trust fund were all part of this agreement. It was further agreed that the commencement of the project and a sod cutting ceremony marking the commencement of the project '*...shall not take place later than the last day of July 2010 but vacant possession of the property should be given by the assignor to the assignee not later than the 15<sup>th</sup> of April 2010*'. Per the 1<sup>st</sup> defendant's exhibit 11, a letter written by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant, the vacant possession involved the removal of all stop work signboard which according to DW1 had been placed on the land by the 1<sup>st</sup> defendant to deter encroachers. The ex-servicemen had by that time been long removed from the land a fact admitted by the 3<sup>rd</sup> defendant under cross-examination. The sod cutting ceremony was indeed held as agreed on by the parties. It is instructive to note that during this period, the 2<sup>nd</sup> defendant company had on the 24<sup>th</sup> of January 2008 assigned the 5.89 acres to the plaintiff company, a fact it failed to disclose to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant being unaware of this fact also put up a fierce resistance to the plaintiff's attempts to develop the land, culminating in letters and petitions being made to the national security coordinator at the time and subsequently to the presidency. And during this period the 2<sup>nd</sup> defendant had already been issued with a land title certificate by the Lands Commission on the 13<sup>th</sup> of April 2007. Therefore the 3<sup>rd</sup> defendant's claims at the meeting held on the 25<sup>th</sup> of January 2012 that he had a challenge processing documents at the Lands Commission which he even attributed to political interference was a blatant falsehood. It was simply untrue and a

statement made by him to deceive the officials of not only the 1<sup>st</sup> defendant but of the MOD as well.

As stated earlier, the 3<sup>rd</sup> defendant in his evidence asserted that the 1<sup>st</sup> defendant at the time of the sod cutting ceremony was aware that the parties to whom the 2<sup>nd</sup> defendant had granted parcels of the land to were in visible possession for all to see. He also stated that the sod cutting ceremony undertaken in 2010 on the remaining land was in furtherance of the consensus reached in March 2010 that the project was to be undertaken on the remaining portion of the land. But this was not true. He had not divulged to the 1<sup>st</sup> defendant that he had sold off a portion of the land to the plaintiff company and the plaintiff company was also unaware that the 1<sup>st</sup> defendant was in the dark about the sale of the land to it by the 2<sup>nd</sup> defendant.

After the sod cutting ceremony held on the 28<sup>th</sup> of July 2010, the 2<sup>nd</sup> defendant purportedly assigned 2.533 acres to the 4<sup>th</sup> defendant, a company of which the 3<sup>rd</sup> defendant and his wife are both shareholders and directors. He admitted this fact under cross-examination, that not only are he and his wife directors of the 2<sup>nd</sup> defendant company but they are also directors and shareholders of the 4<sup>th</sup> defendant company. He was asked the following question under cross-examination by the 1<sup>st</sup> defendant's counsel;

*'So you were the owner of the 2<sup>nd</sup> defendant and beneficial owner of the land in dispute which you purported to transfer part thereof to the 4<sup>th</sup> defendant is that not the case?'*

His answer was, *'That is the case'*. His answer when it was put to him that his dealings or conduct with the various parties portrayed a great lack of

candor on his part he stated that that was far from the truth and that the truth was that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants were all aware that they were changing the agreement from the development of a shopping mall to the development of a shopping complex and that the provision of 5 penthouses for VAG was going to be at the top of the hotel complex which was to be constructed by the 4<sup>th</sup> defendant. However at no point in time was the 1<sup>st</sup> defendant made aware of the dealings going on vis-à-vis the 4<sup>th</sup> defendant. Thus incorporating a company with his wife and one other to form the 4<sup>th</sup> defendant and then assigning the land to the 4<sup>th</sup> defendant all on the blind side of the 1<sup>st</sup> defendant and when questioned under cross-examination claiming that he was a shareholder and director of the 4<sup>th</sup> defendant to protect the interest of the 1<sup>st</sup> defendant, but could not explain in what way he was protecting the interest of the 1<sup>st</sup> defendant show that the 3<sup>rd</sup> defendant was not honest in his dealings with the plaintiff and most especially with the 1<sup>st</sup> defendant. I find that the allegations of fraud have been established beyond reasonable doubt against the 3<sup>rd</sup> defendant.

Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant has argued strenuously that the 3<sup>rd</sup> defendant cannot be held liable for the acts of the company and ought not to have been made a party to this case the and cites the oft quoted case of **Morkor and Kuma** to support his submissions. However in **Morkor v Kuma(No 1)** [1999-2000] 1 GLR 721 at 733, Akuffo JSC( as she then was) held as follows:

*‘The corporate barrier between a company or persons who constitute or run it may be breached only under certain circumstances. These circumstances may be generally characterized as those situations where, in the light of the evidence, the dictates of justice, public policy or Act 179 itself so require. It is impossible to*

*formulate an exhaustive list of the circumstances that would justify the lifting of the corporate veil. However, the authorities are indicate that such circumstances include where it is shown that the company was established to further fraudulent activities or to avoid contractual liability’.*

It is clear from the evidence on record that the 3<sup>rd</sup> defendant who was at all material times a shareholder and director of the company as well as the face of it to the 1<sup>st</sup> defendant, made material representations to it as well as to the plaintiff which were false. He cannot now justify his conduct by claiming it was on behalf of the 2<sup>nd</sup> defendant. This court is thus lifting the veil of incorporation and holding the 3<sup>rd</sup> defendant liable for the fraud he committed against the 1<sup>st</sup> defendant. It can be inferred that he had no intention of fulfilling his contractual obligations with the 1<sup>st</sup> defendant from the get go, it cannot be stated that it was the 2<sup>nd</sup> defendant which put up the charade to the 1<sup>st</sup> defendant. In **Frimpong v Nyarko, Acquah JSC**(as he then was) put it succinctly as follows:

*‘Fraud as is well known, vitiates everything and when a court of law, in the course of its proceedings has cause to believe that fraud has been committed, it is duty bound to quash whatever has been done on the strength of that fraud’.*

Was plaintiff a bona fide purchaser?

Absolutely. Armed with a land title certificate given to it by the 3<sup>rd</sup> defendant on behalf of the 2<sup>nd</sup> defendant, what else did the plaintiff need to establish that the assignment to it was real? Plaintiff could not have envisaged that there was an encumbrance on the land in the nature of the beneficial interest held by the 1<sup>st</sup> defendant in it, which the 2<sup>nd</sup> defendant through its representatives failed to disclose, most especially the 3<sup>rd</sup>

defendant to the plaintiff. At the time the land was sold to the plaintiff the ex-servicemen residing thereon had been moved to Amasaman and so it would not have been easy for the plaintiff to have discerned any signs of possession by the 1<sup>st</sup> defendant in the land. It was rather after the acquisition and when it sought to develop the land that the 1<sup>st</sup> defendant was roused to the presence of what it also presumed to be trespassers on the land. The court finds the plaintiff to have been a bona fide purchaser of the land without notice of the beneficial or equitable interest of the 1<sup>st</sup> defendant herein. Reference here to **Yeboah v Amofa And Another**[1997-98] 1GLR 674 and **Appollo Cinema Estates (Gh) Ltd v Chief Registrar of Lands & Others** [2003-2005] 1 GLR 167

However the 4<sup>th</sup> defendant cannot by any stretch of the imagination be described as a bona fide purchaser and this is due to the main fact that it was incorporated by the 3<sup>rd</sup> defendant and his wife and others fully aware that 2<sup>nd</sup> defendant had no such right to assign its interest. In fact the 3<sup>rd</sup> defendant admitted under cross-examination- and in response to a question put to him by the 1<sup>st</sup> defendant's counsel about an averment at paragraph 7 of the 4<sup>th</sup> defendant's statement of defence to the effect that it was an innocent purchaser for value without knowledge of the 1<sup>st</sup> defendant's interest in the land – that the averment was not correct as the 4<sup>th</sup> defendant had been aware of the 1<sup>st</sup> defendant's interest in the land.

Conclusion

From the totality of the evidence on record, the court finds that the 2<sup>nd</sup> defendant reneged on the agreement it had with the 1<sup>st</sup> defendant and has failed to perform its side of the contract/agreement.

The 1<sup>st</sup> defendant has on the balance of probabilities been able to prove that the 2<sup>nd</sup> defendant failed to discharge its obligation under the MOU dated 30<sup>th</sup> August, 2002, the agreement dated 25<sup>th</sup> August 2004 and the supplementary agreement dated the 21<sup>st</sup> of April 2010.

The actions of the 3<sup>rd</sup> defendant cannot be discounted. As the face of the 2<sup>nd</sup> defendant, he has by his conduct deceived the 1<sup>st</sup> defendant into parting with the land in dispute, continued with the deceit by failing to inform the 1<sup>st</sup> defendant that it had with parted the land to the plaintiff and further to the 4<sup>th</sup> defendant, an entity he happens to be a shareholder and director of. Being an artificial entity, the business of the company is always carried out by individuals and in the instant case, it has been expedient to lift the veil of incorporation and find the 3<sup>rd</sup> defendant liable for the fraudulent actions perpetrated in the name of the 2<sup>nd</sup> defendant.

In the vein therefore, I hereby set aside the MOU dated 30<sup>th</sup> August, 2002, the Deed of Assignment dated 25<sup>th</sup> August 2004, the Deed of Assignment dated 7<sup>th</sup> of July, 2006 and the supplementary agreement dated the 21<sup>st</sup> of April, 2010 between the 1<sup>st</sup> defendant and the 2<sup>nd</sup> defendant.

The court hereby sets aside the assignment of the land measuring 2.533 acres to the 4<sup>th</sup> defendant and orders the 1<sup>st</sup> defendant to recover possession of same and the rest of the land not occupied by the plaintiff.

With regard to the plaintiff, the court finds it to be bona fide purchaser for value without notice, and thus it shall continue to be in possession of the land measuring 5.89 acres. It is recommended however that the plaintiff execute a new assignment with the 1<sup>st</sup> defendant who is the equitable and beneficial owner.

The court orders the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to pay damages to the 1<sup>st</sup> defendant for breach of contract in the sum of the cedi equivalent of \$2,600,000.00 and interest is at the bank rate prevailing today with effect from July, 2010 when the sod cutting ceremony took place.

The 1<sup>st</sup> defendant's counterclaim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant succeeds.

The plaintiff's claim succeeds in part.

Cost of Ghc50,000.00 in the 1<sup>st</sup> defendant's favor.

**SGD**

**MRS. JENNIFER ANNE MYERS AHMED**

**JUSTICE OF THE HIGH COURT**

**31/03/2023**



