

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE (LAND DIVISION) ACCRA HELD ON MONDAY THE 6TH OF FEBRUARY 2023 BEFORE HER LADYSHIP JUSTICE JENNIFER ANNE MYERS AHMED (MRS)

SUIT NO. LD/1052/2020

DYNASTY CHINESE RESTAURANT LTD : PLAINTIFF

VRS

1. KWEKU ARKU DATSI CATO : DEFENDANTS
2. ANNAN CATO
3. MRS. NANA DAATSEWA CATO-GILBERTSON
4. KWESI DATSI CATO
5. MISS. ESSIE AKUMENYA CATO
6. LANDS COMMISION.
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The plaintiff by its amended writ of summons and statement of claim filed on the 28th of September 2020 prayed for the following reliefs:

- a. An order setting aside the grant made by the 1st defendant to himself, 2nd, 3rd, 4th and 5th defendants as that grant was made without the requisite capacity;
- b. An order directed at the 6th defendant to remove the plotting of the gift from 1st defendant to himself, 2nd, 3rd, 4th and 5th defendants and to rather plot the existing lease between the 1st defendant and plaintiff as that is still valid;

- c. An order of specific performance compelling the 1st defendant to perform his obligations under the lease agreement;
- d. An order directing the defendants to pay damages to the plaintiff for all the costs it has incurred in seeking to enforce the lease agreement, including cost of counsel's fees;
- e. An order directing 1st, 2nd, 3rd, 4th and 5th defendants to grant consent to the plaintiff to sublease the land in the case of a respectable subtenant; and
- f. Any other orders as the court may deem fit.

The 1st to 5th defendants (hereinafter referred to as the defendants) entered appearance through their counsel on the 27th of October 2020 and filed their statement of defence and counterclaim on the same date also seeking the following reliefs:

- A. A declaration that it is legally within the right of the 1st defendant as holder of the reversionary interest to the sublease of the property known as H/No. F521/1 Cantonments Road(Oxford Street) Osu, Accra to gift portions of same to anyone he so desires to grant such interest to.
- B. A declaration that the option to renew the existing sublease earlier granted by the late father of the 1st to 5th defendants, in the name of the 1st defendant is not automatically upon the same terms as contained therein for the assured term of 30 years which expires on 31st January, 2022.
- C. A declaration that by the plaintiff as a sub lessee, contesting the status and registered title of the 1st to 5th defendants as lessees of the 6th defendant, the existing sublease is by law forfeited to the 1st to 5th defendants as sub lessors therein.
- D. An order directed at the plaintiff to vacate the property known as H/No. F521/1 Cantonments Road(Oxford Street) Osu, Accra forthwith and deliver up vacant possession of same to the 1st to 5th defendants.

- E. An order directed at the plaintiff to settle all outstanding rents, currently set at US\$2733.00 per mensem from August 2019 to date of vacation from the property aforementioned.
- F. General Damages.
- G. Costs.

The issues that were set down for resolution by this court were the following:

1. Whether or not the 2nd, 3rd, 4th and 5th defendants are the beneficial owners of the property the subject matter of this dispute.
2. Whether or not the 1st defendant can assert in law that he played no role in the acquisition of the property the subject matter of this dispute.
3. Whether or not the purported deed of gift of equal portions from the 1st defendant to himself and his siblings was done in accordance with law.
4. Whether or not the 1st defendant had the capacity to transfer the property the subject matter of this dispute, to his siblings and to have same plotted with the 6th defendant.
5. Whether or not the purported transfer by the 1st defendant to himself and his siblings and the subsequent plotting of same with the 6th defendant was in breach of the implied covenants in the lease.
6. Whether or not the 1st defendant's failure to grant consent to the plaintiff to sublease the property in the case of a respectable subtenant was in breach of the sublease.
7. Whether or not the 1st defendant is estopped by acquiescence and by his conduct from alleging that he was not involved in the making of the sublease agreement.
8. Whether or not the 1st, 2nd, 3rd, 4th and 5th defendants are estopped from claiming that there are imperfections in the sublease as they have failed to raise same for twenty-six years.

9. Whether or not the renewal terms in the sublease are subject to negotiation and agreement of terms as alleged in the statement of defence?
10. Whether or not the unilateral variation of the sublease agreement by the defendants was conscionable.
11. Whether or not the surveyor's assessment considered that the multi-storey building was constructed by the plaintiff.
12. Whether or not the 1st defendant's purported grant of the property the subject matter of this dispute, to himself and his siblings and the subsequent plotting of same with the 6th defendant could constitute fraud on the plaintiff.
13. Whether or not the 1st defendant held the property in issue on a resulting trust in favour of the late father of the 1st to 5th defendants;
14. Whether or not as a resulting trustee, if so proven, the 1st defendant had the legal right to grant 80 per centum of his interest in the disputed property to his siblings being the 2nd, 3rd, 4th and 5th defendants;
15. Whether or not the 1st defendant, if proven to be a resulting trustee of the property in issue was legally bound to include the property in issue to the residue of his late father's estate before vesting same in himself and his siblings, being the 2nd, 3rd, 4th and 5th defendants;
16. Whether or not the 1st, 2nd, 3rd, 4th and 5th defendants had the legal basis to negotiate with the 6th defendant for the renewal of the head lease of the property in issue;
17. Whether or not the 1st, 2nd, 3rd, 4th and 5th defendants, through their lawyer gave notice to the plaintiff of the process of renewal of the head lease with the 6th defendant;
18. Whether or not the sublease held by the plaintiff has been compromised in anyway by the renewal of the head lease by the 1st, 2nd, 3rd, 4th and 5th defendants;
19. Whether or not the reliefs sought against the defendants in respect of the renewed head lease constitutes a contest of the title of the 1st, 2nd, 3rd, 4th and 5th defendants;

20. Whether or not, if the reliefs sought against the defendants in respect of the renewed head lease constitutes a contest of the title of the 1st, 2nd, 3rd, 4th and 5th defendants , the 1st, 2nd, 3rd, 4th and 5th defendants are entitled in law to forfeit the sublease;
21. Whether or not the plaintiff and the 1st, 2nd, 3rd, 4th and 5th defendants commenced negotiations on the renewal of rent;
22. Whether or not the renewal of rent negotiations were completed, or truncated by the plaintiff with its complaint to the Rent Officer;
23. Whether or not the 1st, 2nd, 3rd, 4th and 5th defendants refused or postponed the discussion on consent to sublet requested by the plaintiff due to the then pending negotiations on renewal of the head lease.

The Plaintiff's Case

The plaintiff's case as gleaned from its pleadings and the witness statement of their witness Gordon Yeung, a shareholder and director is that the 1st defendant is the plaintiff's grantor and reversionary owner of the property known as hse.no.F521/1 Osu where the plaintiff company carries on its business. On the 1st of February 1992 the plaintiff entered into a 50 year lease agreement with the 1st defendant for the land on which the plaintiff is currently situated which lease was set to expire on the 31st of January 2022. A copy of the lease was tendered into evidence as exhibit B.

At the time the agreement was made the land had a run-down building on it with no infrastructure and thus the plaintiff constructed a '*mixed-use building*' and provided the necessary infrastructure and a picture depicting the '*colonial building*' was tendered into evidence as exhibit C.

Due to constitutional constraints the lease negotiated with the Kwesi Akumenya Cato, the late father of the 1st to 5th defendants gave the plaintiff an initial term of 30 years '*and when the lease was renewed, the plaintiff could take another (20) years on the same terms*

and conditions'. Further the lease agreement provided that the 'reserved rent was to be reviewed at the end of every tenth year of the lease at the rate of 35% of the previous Dollar rent'. The agreement also gave the plaintiff the right to sublet the property with the prior written consent of the 1st defendant and such consent was not to be unreasonably withheld but many requests to the defendant to sublet the property to a reputable bank were unreasonably withheld and copies of emails on the requests made to the defendant and rejected were tendered as exhibit D.

According to the plaintiff's witness, at a point during the existing lease the plaintiff received a letter from the 2nd defendant informing the plaintiff that the property formed part of the estate of the late Kwesi Akumenya Cato and he and the 3rd defendant had been granted letters of administration to administer same. The letter also instructed the plaintiff to pay rent into an account named the Estate of Kwesi Akumenya Cato which instructions the plaintiff had complied with. However, alarmed by the letter, PW1 stated that a search was conducted at the Lands Commission by the plaintiff revealed that the 1st defendant had gifted the land to himself and to the 2nd to 5th defendants which gift had been plotted at the Lands Commission. This transfer of ownership and subsequent registration of same was not brought to the attention of the plaintiff and to the plaintiff's witness, the 1st to 5th defendants had acted in bad faith by this failure to disclose the information most especially when the 2nd defendant had been in communication with him via emails and telephone calls towards the renewal of the plaintiff's lease.

According to the plaintiff's witness, the plaintiff made an offer to the 2nd defendant to instruct its solicitors to assist him in his renewal of the existing lease when the renewal had delayed inordinately but this offer was refused.

To the plaintiff company the posture of the defendants was an indication that if it did not act swiftly to protect its interest the defendants would unilaterally terminate the lease as the defendants' counsel had sent an email to the plaintiff threatening to evict the plaintiff if the plaintiff did not accept their proposed terms of a lease with a

duration of ten years and monthly rent of US \$10,000.00 commencing from the 1st of September 2019 to the 31st of August 2021 which rent would be increased every two years at an increment of 15% for the remaining eight of the ten year lease which was to end on the 31st of August 2029. Tendered into evidence as exhibit E series was a copy of the email from the defendants' counsel dated the 18th of February 2020 as well as a copy of the proposed terms.

To the plaintiff the 1st defendant did not have the capacity to transfer the property to his siblings and thus the purported transfer and the purported plotting and registration of the 2nd to 5th defendants' interest in the property was not only void but was also a breach of the implied covenants in the lease agreement. It had also been done in bad faith and made it impossible for the plaintiff or anyone else claiming through it register its interest in the property with the 6th defendant. To the plaintiff the proper thing for the 1st to 5th defendants to have done if they had wanted to comply with their father's wishes was to have had the executors of their father's will execute a vesting assent in their favour after probate. To the plaintiff, the 1st defendant had acted at all times as if the property was his and not part of his late father's estate. The plaintiff was convinced that the conveyance by the 1st defendant was *'deliberately orchestrated in order that the 1st defendant could avoid its obligations to the plaintiff by supplanting his siblings as landlords so that they could execute a new agreement with the plaintiff with less favourable terms..'*

The plaintiff was also of the view that the 1st to 5th defendants had acted fraudulently and at paragraph 25 of PW1's witness statement the grounds he gave for this view was as follows:

- a. *They are seeking to set the existing lease aside and to get the plaintiff to sign a new lease because the claim the lease was not prepared by a lawyer although this assertion is untrue.*
- b. *They also claim that the existing lease between the 1st defendant and the plaintiff was not signed by the 1st defendant but rather by his father as grounds for setting it aside*

- but they collected rent from the plaintiff for over 26 years and encouraged the plaintiff to construct a mixed-use multi-storey building which included a restaurant for which the plaintiff provided the necessary infrastructure to make into a top-notch restaurant.*
- c. *1st Defendant knowingly purported to make a grant of the Land to himself and his siblings and they plotted the grant even though they knew at the time that the 1st defendant did not have an immediate interest in the Land and, with their interest plotted, the plaintiff would not be able to register its interest in the land because the ownership at the Lands Commission changes.*
- d. *The 1st defendant knowingly made conflicting grants in respect of the same piece of land to more than one person contrary to law.'*

The plaintiff consequently petitioned the Rent Control office and the Rent Control officer made a reference to the Rent Magistrate requesting for an order to be issued to the 1st to 5th defendants to comply with the clauses in the lease agreement which provided the amount of rent payable by the plaintiff and further requiring the lessor not to unreasonably withhold consent. PW1 tendered exhibit F series into evidence in support of this. Exhibit G which was also tendered into evidence by the plaintiff's witness was a copy of the defendants' affidavit in opposition to the rent officer's reference. However the 1st to 5th defendants challenged the validity of the lease when the magistrate sought to enforce the decision of the rent control officer for which reason the plaintiff upon the advice of its counsel discontinued the action at the district court and instituting the instant action.

The 1st to 5th Defendants' Case

The case of the 1st to 5th defendants gleaned from the pleadings and from the witness statement of their lawful attorney Florence Hagan is that the late father of the 1st to 5th defendants who are siblings was known during his lifetime as Kwesi Akumenya Cato. On the 17th of July 1972 Kwesi Akumenya Cato purchased the freehold interest of the

United African Company of Ghana Ltd(hereinafter known as UAC) in a parcel of land with a building on it located at no. F521/1 Cantonments Road(Oxford Street) which was registered at the Lands Commission with Deed registry number 1769/1972. The property was purchased by Kwesi Akumenya Cato in the name of the 1st defendant, at a time when the 1st to 5th defendants were outside the jurisdiction.

Kwesi Akumenya Cato passed away on the 20th of May 2012. According to the lawful attorney, it had been the wish of the late Kwesi Akumenya Cato for his children to have an equal share in the ownership of the property thus the 1st defendant executed a deed of gift of equal portions of the interest in the property to all his siblings who all knew about the property being held in trust for their father by the 1st defendant. A copy of this deed of gift was tendered into evidence as exhibit 3.

The property originally held by the UAC on a freehold was affected by the provisions of the 1969 Constitution(article 163(8)) as well as paragraph 1 of the Lands Commission Decree after the suspension of the 1969 Constitution and was converted into a 50 year leasehold. The property became vested the President of Ghana and the reversion after the expiration of the 50 year leasehold was to vest in the President of the Republic of Ghana. After the deed of gift by the 1st defendant to his siblings, the 1st to 5th defendants decided to start negotiations with the 6th defendant for the renewal of the head lease which was to expire on the 16th of July 2022 and by a letter dated the 12th of September 2016 set the ball rolling.

To the defendants' lawful attorney, the contention of the plaintiff that the 1st defendant could not have transferred to the 2nd to 5th defendants '*what he did not have*' and consequently had prayed for the deed of gift to be expunged from the records of the 6th defendant is misplaced as the plaintiff had pleaded that it had been informed that the 2nd and 3rd defendants had been appointed as administrators of the estate of their father with a further direction that all rents due were to be paid into an estate account. She deposed in paragraph 10 inter alia;

'...This pleading suggests that though the plaintiff acknowledged an agreement between it and the 1st defendant, it had notice from its dealings with the late father of the 1st to 5th defendants that the property was properly part of the estate of the late Kwesi Akumenya Cato and that is why when it received notice of the appointment of the 2nd and 3rd defendants as administrators of that estate it had no recorded reservations about their instructions to pay rents due into the estate account.'

To the lawful attorney the plaintiff was estopped by conduct from contesting the actions of the 1st defendant in creating the deed of gift, having agreed with the instructions of the 2nd and 3rd defendants.

The negotiations with the 6th defendant were successful and by a letter dated the 29th of September 2018 the defendants were made an offer by the 6th defendant subject to several conditions, the major one being the payment of Gh¢882,300.00 besides other related charges. A copy of this offer letter was tendered into evidence as exhibit 5A and the new lease as exhibit 5. Breaking down the payment, the 1st to 5th defendants' lawful attorney deposed that the lease from the 6th defendant cost Gh¢853,800.00 to procure, with a plotting fee of Gh¢21,400.00 and a lease preparation fee of Gh¢500.00 as well as the payment of Gh¢14,000.00 being the payment for ground rent for a period of 2 years. Under the new lease the 1st to 5th defendants are required to pay yearly ground rent of Gh¢7000.00. Exhibit 6 series was tendered to establish the proof of payment by the 1st to 5th defendants to the Lands Commission together with their acceptance letter of the Lands Commission offer letter of the 29th of September 2018. The lease also had a provision for the lessees (the 1st to 5th defendants) to pay a deferred premium of 10% of the cost of the lease on the grant by them of any assignment or long sublease. According to the lawful attorney, with the property having been put to commercial use by the plaintiff, they as owners or sub lessors are required to pay 15% tax on rent collected by them to the Ghana Revenue Authority as well as property rates to the Klottey Korle Municipal Assembly and are also supposed to take out insurance to cover the structure and thus *'with all such significant financial*

responsibilities that they bear, it is inconceivable that the plaintiff will suggest that the renewal of the sublease should be on the repeat of the terms contained in the old one'. To the 1st to 5th defendants, despite the imperfection in the agreement between their late father and the plaintiff which was made in the name of the 1st defendant but signed by their father with his own signature, they had acknowledged the plaintiff's interest in the property. Whilst in the process of negotiations with the 6th defendant for the renewal of the head lease, the plaintiff wrote to the 2nd defendant asking for consent to sublet parts of the property to third parties but their lawful attorney advised them not to in view of the fact that they were waiting for the new grant from the 6th defendant. Exhibit 8 was tendered in support of this. The 1st to 5th defendants thereafter requested their lawful attorney to inform the plaintiff to suspend the payment of rent on their sub-lease until the completion of negotiations with the 6th defendant and the plaintiff was duly informed when a new lease was secured from the 6th defendant. A copy of the letter written to the plaintiff was tendered into evidence as exhibit 9.

The 1st to 5th defendants deemed it necessary to invite the plaintiff for negotiations on the sublease in view of the fact that the existing one was to expire on the 31st of January 2022 and to set rent at a value that to them was a true reflection of the reality of comparable rent in the vicinity. In that regard the 1st to 5th defendants commissioned a surveyor to assess the rental value of the property and a report he produced dated the 28th of November 2019, a copy of which was tendered into evidence as exhibit 11 which put the recoverable rent for the property at US\$ 12,240.00 per month. Consequently the lawful attorney on the instructions of the 1st to 5th defendants wrote the plaintiff with a proposal to set rent at US\$10,000.00 per month with a view to reaching a final figure which would be acceptable to both parties after negotiations. However instead of responding with a counter proposal(as they had expected), the plaintiff's counsel upon enquiries informed the lawful attorney that the plaintiff had petitioned the Rent Control Department for a determination of the acceptable rent. The plaintiff had also refused to settle outstanding rent at the rate existing at the time

the old lease was surrendered after it had been given notice of the new lease and thus since August of 2019 the plaintiff owed rent in the sum of US\$71,058.00, with the rent set at US\$2733.00 per month.

The defendants had become frustrated by the conduct of the plaintiff's representative and based on his challenge of their status as tenants-in-common of the reversion, the plaintiff could *'be deemed to have acted in such manner that it should not expect them to continue to grant it courtesies any further as a sublessee'*.

In **Ackah v Pergah Transport Limited & Others** [2011] 31 GMJ 174, Dotse JSC stated the requirements of the law on a party who makes a claim in a civil suit 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. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence, a reasonable mind could conclude that the existence of a fact is more probable than its non-existence. This is the requirement of the law on evidence under sections 10(1) and (2) and 11(1) and (4).'

This same expectation is required of a defendant who also makes a counterclaim. Thus in **Jass Co. Ltd & Another v Appau and Another** [2009] SCGLR 265 Dotse JSC stated at page 270 as follows;

'We wish to observe that the burden of proof is always put on the plaintiff to satisfy the court on the balance of probabilities in cases like this. Thus, if in a situation, the defendant has not counterclaimed; and the plaintiff has not been able to make out a sufficient case against the

defendant then his claims would be dismissed.....Thus whenever a defendant also files a counterclaim, then the same standard or burden of proof would be used in evaluating or assessing the case of the defendant just as it was used to evaluate and assess the case of the plaintiff against the defendant.'

Both parties herein are seeking reliefs from the court and both each bear the burden of proving their respective claims on the balance of the probabilities.

The court will first proceed to deal with the second issue of whether or not the 1st defendant can assert in law that he played no role in the acquisition of the property the subject matter of this dispute and the thirteenth issue of whether or not the 1st defendant held the property in issue on a resulting trust in favour of the late father of the 1st to 5th defendants together.

It has been the contention of the plaintiff that the 1st defendant is its grantor and the reversionary owner of the property known as house no. F521/1, Osu. In paragraph 6 of its statement of claim it averred that,

'The plaintiff on 1st February 1992 entered into a 50 year lease with the 1st defendant for the Land on which it is currently situated and this lease is set to expire on 31 January 2022 with an option to renew for another 20 years on the same terms and conditions.'

The plaintiff then averred in paragraph 8 that it negotiated the lease with Kwesi Akumenya Cato, the late father of the 1st defendant. These averments were replicated in paragraphs 3, 7 and 9 of the witness statement of the plaintiff's witness Gordon Yeung. The narrative of the defendants however has been as per paragraph 5 of their statement of defence and counterclaim,

'...that the 1st defendant played no role in the acquisition of the property or its later management and therefore was then in law deemed to hold the property on a resulting trust in favour of the late father of the defendants sublessors'.

In paragraph 4 the defendants again averred that,

'The defendants sub-lessors say that the property originally belonged to United African Company Ltd(UAC) as lessees of the Osu Stool and the lease thereof was purchased from the UAC on 17th July 1972 by their late father in the name of the 1st defendant, who then, and presently, lives in the United Kingdom.'

In paragraph 2 of her witness statement the defendants' lawful attorney deposed that the late father of the defendants purchased the property in question when all the defendants were living and working outside of the country. She again deposed at paragraph 3 as follows,

"The purchase was made by the late father of the 1st to 5th defendants in the name of the 1st defendant. The manner of purchase is deemed by the 1st to 5th defendants to have created a resulting trust of the Property in the 1st defendant for his late father."

Under cross-examination PW1 admitted that it was correct that negotiations leading to the sublease was with the late father of the defendants, Kwesi Akumenya Cato and again admitted that he did not at the time of negotiations know the full name of the father of the defendants and did not know at the time that Kweku Arku Datsi Cato i.e the 1st defendant herein was the son and not the father and only found out that the 1st defendant was the son about some ten years before his testimony in June of 2022. The following then transpired;

'Q: So this sublease even though mentions the name of the 1st defendant it was actually signed by his father is that not so?

A: As I said I did not know this until about ten years ago.

Q: You see the reason why the 2nd defendant is an administrator of his father's estate engaged in discussions with you was even though the property is in the name of the 1st defendant it at all time is known to belong to their late father.

A: I do not know anything about what you have just mentioned.'

In the light of this, the plaintiff's counsel has submitted in his address that the resulting trust *'alleged by the defendants to have been created when the 1st defendant(sic) father purchased the property in the name of the 1st defendant can be rebutted by the presumption of advancement'* and that the defendants *'did not present any evidence to rebut the presumption of advancement in favour of the 1st defendant and that even if they had, case law shows that evidence is only admissible to be used against the parent and not in his favour'*. The defendants take the contrary view and their counsel has also submitted in his address that, *'...by the circumstances of the purchase...with his late father having paid the purchase price of the property and having the property transferred into the name of the 1st defendant, such circumstances brought the transaction into the realm of trusts, with the 1st defendant, as named lessee, holding same for the benefit of his late father'*.

B. J. da Rocha and C. H. K. Lodoh, in their book **'Ghana Land Law and Conveyancing' (2nd Edition) at pages 105-106**, trust is a concept in equity whereby one person (called "the trustee") holds the nominal or legal title in property which has been made available to him by another person (called "the settlor") for the benefit of some other person (called "the beneficiary").

In Re Sasu-Twum (Decd); Sasu-Twum v Twum[1976] 1 GLR 23(HC) Abban J(as he then was) stated as follows:

'The law as to presumption of advancement and resulting trust is well established. It is the settled principle of law that where one purchases a property and causes the legal estate in that property to be conveyed in the name of another who provided none of the purchase price, there is a rebuttable presumption that the purchaser of the property intended that that other person should not enjoy the beneficial interest, but should hold the legal estate as a trustee for the purchaser. In the absence of evidence indicating an intention on the purchaser's part of appropriating to himself the beneficial interest, the law will presume that the purchaser intended to keep the beneficial interest for himself and a resulting trust will be declared in his favour. In Dyer v. Dyer (1788) 2 Cox Eq.Cas. 92, Eyre C.B. at p. 93 said: "The clear result of

all the cases . . . is, that the trust of a legal estate....results to the man who [p.33] advances the purchase-money." The same view was expressed in the Australian case of Wirth v. Wirth (1956) 98 C.L.R. 228. At p. 235, Dixon C.J. said:

"It is or may be important to bear in mind that we are not dealing with a purchase in the name of another person. Where a purchase was made in the name of a stranger who provided none of the purchase money the law was clear from a very early time that a resulting trust was presumed and the stranger could take beneficially only if he proved affirmatively that it was so intended."

However, the presumption is the other way round in the case where the person in whose name the legal estate was conveyed is the wife or the child of the purchaser or a person to whom the purchaser stands in loco parentis. A father is under an obligation to support or make provision for his child. So where the father takes a conveyance of property in the name of his child, as in the present case, there will be a presumption of advancement in favour of the child. In other words, there will be a presumption that the father intended to part with both his legal and beneficial interest in the property to the child and that the property was intended to be a gift to the child: see Shephard v. Cartwright [1955] A.C. 431, H.L. and Quist v. George [1974] 1 G.L.R. 1.'

In Halsbury's Laws of England, 3rd Edition volume 21, presumption of advancement is at page 21, section 1, item 447 defined thus;

'Where a father or a person who has put himself in loco parentis, purchases either real or personal estate in the name of a child alone or in the joint names of the child and himself or a stranger, the father or other person is presumed to have intended to make a gift to the child... The presumption of advancement may be rebutted by evidence of a contrary intention collected from the acts or declarations of the parties before or at the time of the transaction, subsequent acts or declarations being only admissible as evidence against the party who did or made them

and not in his favour. The presumption may exist even though the parent has actually received the income during his lifetime and made leases of the property.'

In **Juliana Richards v Nkrumah** [2013-2014] 2 SCGLR 1577, the Supreme Court held as follows:

'Where a father has obtained a conveyance in the name of his child, the presumption was that of advancement of such child. In the instant case, the relationship between the plaintiff and the deceased father created the presumption of advancement in favour of the plaintiff.'

In this present case the defendants who insist that a resulting trust was created when their father acquired the property in dispute in the name of the 1st defendant did not indeed adduce any evidence to rebut the presumption of advancement created in favour of the 1st defendant. The fact that their late father dealt with the property does not negate the fact that it had to be established that there was evidence of a contrary intention than the advancement he made. In *Richards v Nkrumah* (supra), the court also held that;

'...the retention of title deeds (per se) by a father is not conclusive of the property to rebut the presumption of advancement arising from the purchase of the property in the name of a child...'

Per the authorities, the burden is on the party usually the donor, disputing the advancement to rebut same for the presumption is an equitable principle and effectively the beneficial interest in the property as well as the legal title will in this instance rest in the 1st defendant. There being no evidence to the contrary that the 1st defendant played a role in the acquisition of the property the subject matter of the dispute, I find that he did not and I further find as a fact that the 1st defendant did not hold the land in a resulting trust for his late father as same has not been established. In the absence of evidence to the contrary the court concludes that the property was intended as a gift to the 1st defendant by his late father and thus did not form part of

the estate of his late father even though he and his siblings included it in the list of properties acquired by their late father in his lifetime.

I have racked my brains to figure out in what way the plaintiff is affected by whether the property was held in a resulting trust by the 1st defendant or was presumed to have been advanced to him especially considering that the plaintiff is in no way affected by it at all. Rather, I find that what has been emerged out of it is that once a presumption of advancement was created in favour of the 1st defendant, which meant he was both the legal and beneficial owner, there was absolutely no impediment in his path preventing him from gifting out portions of the property to his siblings such that they all held equal shares in the property in dispute. Now the plaintiff's counsel in his address submitted that, *'The 1st to 5th defendants are not the beneficial owners of the property because we have already established that the property was passed on to the 1st defendant by way of presumption of advancement. This means that the 1st defendant was the beneficial owner of the property, and this is evidenced by a deed of assignment dated 17th July 1972 between the United African Company of Ghana Limited and Kwaku Arku Datsi Cato(the 1st defendant). The 1st defendant in turn sublet the property to the Plaintiff by way of a sublease agreement dated the 1st February 1992. Thereby making the plaintiff the beneficial owner of the property until its expiration on 21 August 2019.'* I must state that the 1st defendant was both the legal and beneficial owner of the property and was not the one who entered into the sublease with the plaintiff company but rather his father. The validity of the agreement is irregular considering that the late father of the defendants appended his signature as Kwaku Arku Datsi Cato the sublessor when he was not the actual owner of the property and the 1st defendant was never part of the negotiations leading to the sublease agreement between the plaintiff company and the late father of the defendants. However to the submission of the plaintiff's counsel the defendants' counsel also countered that the interest the 1st defendant conveyed to the his siblings was the reversionary interest in the property and stated that, *' A reversionary interest is alienable. It is a future interest, existing from the time of its creation*

when possession is relinquished upon the grant of a lesser interest in time...It being an existing interest is an affirmation of its possible alienability. This alienability of the future interest held by a grantor allows such grantor to dispose same by assignment-transferring all of the term held absolutely, or by a sublease by alienating a limited term out of the whole.... It is therefore fact in law, that while a term of years has been granted out of a property, be it by lease or sublease, an owner of the property, vested with an interest in the property in future in the character of its return, can deal with the property by granting non-possessory interest in the same property while the term granted runs. This is the effect of the grant of gifts of portions of the interest of the 1st defendant amounts to. The Deed of Gift by which he transferred a portion of his interest in the property to his siblings did not purport to grant them a possessory right, but a share each in his legal interest.'

Does this submission by the defendants' counsel hold sway or does that of the plaintiff's counsel prevail? By the plaintiff's pleadings and per the witness statement of the plaintiff's witness, the plaintiff acknowledged that the 1st defendant is the reversionary owner of the property in dispute therefore why would the plaintiff company deem it fraudulent for the reversionary owner to gift portions of his interest to his siblings? Undoubtedly, a remainder interest in a property is considered a future interest which means that the owner of a property has some future interest of some type that does not include present possessory rights and a reversionary interest is one of such future interest for, at the expiration of the lease agreement, the interest and possession of the original owner will revert to him. The lessee or sub-lessee as in the instant case, is only granted the right of possession for the duration of the lease. Once the sublease had not transferred the total property to the plaintiff company, the 1st defendant as legal owner retained the reversion in it and could effectively gift portions of his reversionary interest to his siblings without recourse to the plaintiff. The interest of the plaintiff was not affected in any measure by the gifting of the property by the 1st defendant to his siblings.

Furthermore, as legal title in the property was vested in the 1st defendant, he granting out portions of his interest to the 2nd to 5th defendants did not make them beneficial owners but legal owners of the property albeit the reversionary interest in the property. The issue though is that the defendants in the erroneous belief that the property was held in a resulting trust by the 1st defendant on behalf of their late father continued to deal with the plaintiff after the demise of their father as administrators of their father's estate but, in actuality, the property did not form part of their late father's estate. Additionally for all intents and purposes, the sublease was irregular, it not having been signed by the purported lessor but by his father. The sublease was to expire on the 31st of August 2022, when the head lease was to expire on the 21st of August 2019. A sublease draws its life from the leasehold so once the head lease was to expire three years before the sublease was to expire then definitely the act of the defendants in surrendering the head lease and applying for a renewal of same could not by any stretch of the imagination be construed as fraudulent. After 21st of August 2019 when the head lease would have expired, the sublease would have automatically expired as well. Despite the assertions that the conduct of the 1st defendant in gifting out portions of his interest to his siblings and registering the deed of gift with the 6th defendant and then subsequently surrendering the head lease and obtaining a renewal of same without disclosing the unregistered interest of the plaintiff to the 6th defendant was fraudulent, the requisite standard of proof beyond reasonable doubt required under the Evidence Act to establish fraud was not adduced by the plaintiff's witness in his testimony.

It is also undisputed that the plaintiff company was given notice by the defendants to temporarily stop with the payment of rent whilst negotiations were ongoing with the 6th defendant for the renewal of the head lease which the plaintiff company complied with. When the lease was surrendered, the sub-lease was automatically revoked and it is even the more when the plaintiff company complied with the request of the defendants and also stopped paying rent as they all contemplated that the sublease

would be affected by the surrender. The plaintiff is thus estopped by its own conduct from asserting the contrary when it was aware that without surrendering the head lease its 30 year sublease would have been curtailed by the expiration of the head lease in 2019. Had the defendants not surrendered the lease and obtained a renewal of same, the 30 years period the sublease was to run would not have been met.

As stated above, the sublease technically was not between the plaintiff and the 1st defendant but between the plaintiff and the father of the 1st defendant who was neither the legal nor beneficial owner of the property so it could not be expected that once the plaintiff company was dealing with the a new person, in this situation the actual owner, that the terms of the sublease would still subsist. Subsequent to the renewal of the head lease, which was not renewed on the same terms as before, the defendants having paid a sum commensurate with the existing values of the property and other factors such as inflation having been taken into account, any new sub-lease to be entered into between the parties would definitely not be based on the terms of a sublease entered into in 1992. A new sublease predicated on the new head lease would have to factor in the fact that Osu '*Oxford Street*' where the property is located has high property values such that the sublessee under a new sublease would need to pay economic rent, which would be based not only on high property values but on inflation from 1992 till 2019 and other ancillaries prevailing in 2019 when the defendants made its proposals regarding the renewal of the sublease to the plaintiff company. The plaintiff's representative admitted that he did not respond to the proposals sent to him by the defendants because all his proposals had been rejected by them.

What were these proposals the defendants rejected? It was his proposal to lease out the property to others. The question is how could he have leased out the property when the head lease had been surrendered by the defendants, a fact which he was aware of per the email exchange between he and the 2nd defendant on the 26th of July 2018 which formed part of exhibit 8 tendered by the defendants? Per exhibit 12, which

was an email exchange between the 2nd defendant and the late president Jerry John Rawlings who had intervened on behalf of the plaintiff company, the plaintiff company was aware that the lease had been surrendered by the defendants as at June 2016 so a new and longer lease could be secured whilst Gordon Yeung and Annan Cato the 2nd defendant sought an investor who could add value to the property. The assertion therefore by the plaintiff that the defendants had refused to grant it consent to lease out the property would not be accurate in light of the fact that the defendants could not have granted that consent when the head lease had been surrendered and was in the process of renewal. How would such a lease by the plaintiff to a third party have been valid when the head lease had been surrendered and the sublease 'suspended' pending the renewal of the head lease? It is also worth noting that per exhibit 9 which was a letter from the defendants' lawful attorney to Gordon Yeung, the plaintiff company was informed of the new lease and asked to negotiate a new sublease since the previous one had expired upon the surrender of the old head lease. The plaintiff was also advised not to pay any rent until a new sublease had been negotiated which he complied with and to date has not paid any rent to the defendants even though it rejected the terms proposed by the defendants and rather run to the Rent Control for redress. The plaintiff thus having rejected the offer to negotiate a new sublease and still occupying the property, not having surrendered same to the defendant and not having paid any rent from 2019 till now does need to pay some rent to the defendants. Thus the court orders the plaintiff to pay to the defendants rent at the cedi equivalent of \$2,733.00 per month from January 2020 till the date the plaintiff vacates the property

From the above, this court finds that in view of the admission of PW1 the plaintiff under cross-examination that he was challenging the registration of the grant by the 1st defendant to his siblings which he claimed as an illegal transfer of ownership of land and which he sought to have set aside and his interest rather plotted when the sublease was not granted him by the legal and beneficial owner of the property, he

had effectively challenged the title of the actual owner. The plaintiff thus automatically forfeits the sublease for as was held in **Quartey v Entertainment & Tourist Development Co.& Others [1992] 2GLR 298;**

'The law was well settled that a tenant who denied the title of his landlord was liable to forfeiture of the lease.'

From the foregoing, the plaintiff on the balance of the probabilities has not been able to prove its claims against the defendants and its claims accordingly fails. Judgment is thus granted in favour of the 1st to 5th defendants for the reliefs claimed in their counterclaim. With regard to relief E, the rent as stated earlier is to be computed from January 2020 when the plaintiff rejected the offer of the defendants.

Cost of Gh¢15,000.00 is granted in favour of the 1st to 5th defendants.

LEGAL REPRESENTATIVES

COUNSEL FOR PLAINTIFF:

**MR. NAJAHAT YAMYOTIA H/B
OF EMMANUEL MATE-KOLE –
PRESENT**

COUNSEL FOR 1-5TH DEFENDANTS:

**MS. DELA ASSIMEH H/B OF MR.
NATHAN YARNEY-PRESENT**

COUNSEL FOR 6TH DEFENDANT:

**MR. NICHOLAS ADAI
TWENEBOAH-ABSENT**

(SGD)

JENNIFER MYERS AHMED (MRS)

JUSTICE OF THE HIGH COURT

6/02/2023