

IN THE SUPERIOR COURT OF JUDICATURE, IN THE HIGH COURT OF JUSTICE,
LAND COURT DIVISION, HELD IN ACCRA ON THURSDAY, THE 25TH DAY OF
JULY, 2024, BEFORE HER LADYSHIP JUSTICE NABEELA NAEEMA WAHAB MS.

SUIT NO. LD/0003/2023

1. FRANCO ESTATE & COLD STORE ENTERPRISE - PLAINTIFFS
2. FRANCIS KWESI NYANKSON

VRS

1. GROFIN AFRICA FUND (GH) LTD - DEFENDANTS
2. CHRISTINE BANNERMAN
3. ATO ENCHIL

JUDGMENT

I. PLAINTIFFS' CASE

1. The 1st Plaintiff Enterprise and the 2nd Plaintiff, its Managing Director, instituted the instant action against the Defendants by a Writ and Statement of Claim filed on 4th October 2022.
2. The action was instituted in respect of a property stated to be of an approximate area of 1.633 acres, registered with Land Title Certificate No. GA 29534 and located at Pokuase in the Greater Accra region, hereafter referred to as "*property*" or "*subject property*".
3. It is the case of the Plaintiffs as stated in their Statement of Claim that the 1st Plaintiff Enterprise is registered under the laws of Ghana and engaged in Real Estate Business. The Plaintiffs stated that sometime in the year 2021, the 2nd Plaintiff saw a notice advertising the subject property for sale. They added that on the notice advertising the property for sale, there was a contact telephone number for people interested in purchasing the property to call.

4. The Plaintiffs stated that interested in purchasing the property, the 2nd Plaintiff called the telephone number provided on the notice and spoke with one Richard Akowuah of Hope Capital Limited. The Plaintiffs added that Richard Akowuah informed the 2nd Plaintiff that Hope Capital Limited is a Debt Recovery Company and that it had been authorized by a Power of Attorney provided by the 1st Defendant Limited Liability Company, its principal, to take steps/ initiate actions for and on behalf of the 1st Defendant to recover its loans from persons and / or institutions who have defaulted in repaying same.
5. The Plaintiffs also stated that they learnt from Mr. Akowuah that Banner Medical Center and Funeral Homes had defaulted in repaying a loan given to it by 1st Defendant and that Hope Capital Limited had initiated steps to recover the monies owed by Banner Medical Center and Funeral Homes to its principal, the 1st Defendant.
6. The Plaintiffs added that they conducted due diligence on the property at the High Court and at the Lands Commission to verify and authenticate the documents that were made available to them by Hope Capital Limited and thereafter purchased the subject property. The Plaintiffs also stated that the sale transaction is evidenced by a contract of sale executed by the Plaintiffs and Hope Capital Limited as agent of the 1st Defendant.
7. It is the further case of the Plaintiffs as stated in their Statement of Claim that they paid an amount of Two Million, Three Hundred and Twenty-Five Thousand Ghana Cedis (GHS 2,325,000) as full and final payment for the subject property to Hope Capital Limited and the 1st Defendant. They thereafter took possession of the subject property and started working on the property.
8. The Plaintiffs stated that sometime in September 2022, the 3rd Defendant who claims to have purchased the same property, caused the arrest of workmen of the Plaintiffs who

were on the subject property and the 3rd Defendant has placed “land guards” on the property to keep the Plaintiffs off the subject property.

9. The Plaintiffs added that they learnt from the 3rd Defendant that he had purchased the subject property from the 2nd Defendant, and they also learnt from the 2nd Defendant that she is the lawful representative of the estate of Cyril Laud Bannerman.

10. The Plaintiffs stated that although the 2nd Defendant claims to have sold the subject property to the 3rd Defendant based on some agreement she has with the 1st Defendant, as far as they are concerned, the 1st, 2nd and 3rd Defendants are all trespassers on the subject land. By their action the Plaintiffs therefore seek:

- a. *A declaration of title to the subject land.*
- b. *Perpetual injunction against the Defendants, their agents and assigns from dealing in any manner with the subject land.*
- c. *Damages against the Defendants for trespass.*
- d. *Legal costs.*
- e. *Order directed at the Defendants to remove all materials and construction from the contested land or in the alternative removal of all such material by the Plaintiffs and costs of same levied against the Defendants.*
- f. *Any other relief deemed fit by the Court.*

II. DEFENCE OF THE 2ND AND 3RD DEFENDANTS

11. In their Statement of Defence filed on 11th November 2022, the 2nd Defendant admitted that she is the lawful representative of the estate of the late Dr. Cyril Laud Bannerman.

12. The 3rd Defendant stated that he has no agreement with the 2nd Defendant and the 2nd Defendant has not sold the subject property into him. He denied that the Plaintiffs claim that he informed them that he had purchased the property from the 2nd Defendant.

13. The 2nd and 3rd Defendants denied that they have encroached on the subject property and also denied that the 2nd Plaintiff is the Managing Director of the 1st Defendant Enterprise, that the Plaintiffs have paid money to the 1st Defendant or that the Plaintiffs have purchased the subject property. They stated that the Plaintiffs are not entitled to the reliefs they seek by their action.

III. DEFENCE OF THE 1ST DEFENDANT

14. The 1st Defendant filed its Statement of Defence on the same day as the 2nd and 3rd Defendants, on 11th November 2022. The 1st Defendant admitted the Plaintiffs claim that it is a Limited Liability Company registered under the laws of Ghana and stated that it carries on a business of granting funds and loan facilities to entities within Ghana.

15. The 1st Defendant however denied that the 1st Plaintiff is an enterprise registered under the laws of Ghana and engaged in Real Estate business. The 1st Defendant also denied the Plaintiffs claims that the 2nd Plaintiff saw the subject property advertised for sale or that the Plaintiffs purchased same.

16. Just as the 2nd and 3rd Defendants, the 1st Defendant denied that the 2nd Plaintiff is the Managing Director of the 1st Plaintiff Enterprise and it also denied trespassing on the property.

17. It is the case of the 1st Defendant as stated in its Statement of Defence that the subject property belonged to one Dr. Cyril Laud Bannerman, now deceased, who mortgaged same to secure a loan facility given by the 1st Defendant to an entity known as Banner Medical Centre and Funeral Homes, hereafter also referred to as "**Banner**".

18. The 1st Defendant stated that when Banner defaulted in the repayment of the loan facility, it engaged the services of Hope Capital Limited, a Loan Recovery Company to demand and institute an action against Banner on its behalf as its lawful Attorney for the recovery of the debt.
19. The 1st Defendant added that as its lawful Attorney, Hope Capital Limited instituted Suit No. CM/MISC/0539/2021, entitled *Grofin Africa Fund (Gh) Ltd v. Banner Medical Centre and Funeral Home Ltd* to recover the debt owed to the 1st Defendant by Banner, and on 23rd July 2021, the High Court granted an order or a warrant for the police to assist the 1st Defendant to take possession of the subject property.
20. It is the further case of the 1st Defendant that it was informed by Hope Capital Limited that an order for reserve price was required from the Court before the property could be sold and that Hope Capital maintained and caused the 1st Defendant to accept that the subject property could not be sold without the order for reserve price.
21. In support of its claim that Hope Capital Limited maintained that the subject property would not be ready to be sold until after a reserve price had been obtained from the Court, the 1st Defendant stated that in the year 2022, almost a year after the Order for Police assistance to take possession of the subject property was made, it received an email from the lawyers of Hope Capital Limited by which it was informed that the subject property would be “*ready to be sold*” after Hope Capital Limited had obtained an order for a reserve price.
22. In further support of its claim that Hope Capital Limited maintained that the subject property would not be ready to be sold until after a reserve price had been obtained from the Court, the 1st Defendant added that in its usual monthly progress report to the 1st Defendant contained in an email dated 21st April 2022, Hope Capital Limited informed the

1st Defendant that it had filed an application for a force sale value and that the application would be heard by the Court on 6th May 2022.

23. The 1st Defendant however stated that on 12th May 2022, it revoked the Power of Attorney to Hope Capital Limited and terminated its debt recovery agreement with Hope Capital Limited. The 1st Defendant explained in its Statement of Defence that the revocation of the Power of Attorney and termination of the debt recovery agreement became necessary because Hope Capital Limited admitted that it was not reporting to the 1st Defendant about debts collected and Hope Capital Limited also admitted that it had misapplied various monies collected from some defaulting customers of the 1st Defendant.

24. The 1st Defendant added that after it terminated its Power of Attorney to Hope Capital Limited, it took immediate possession of the subject property without any hindrance, until the 2nd Defendant expressed an interest in repaying the loan to redeem the subject property which was mortgaged property.

25. It is the further case of the 1st Defendant that on 12th September 2022, it reached an agreement with the 2nd Defendant for a 3rd party introduced by the 2nd Defendant to pay the debt owed by the 2nd Defendant to the 1st Defendant and to lawfully redeem the mortgaged/ subject property.

26. The 1st Defendant stated that after this agreement was reached with the 2nd Defendant on 12th September 2022 for the 2nd Defendant to redeem the subject property, an amount of One Hundred Thousand Ghana Cedis (GHS 100,000) was paid into its bank account on 23rd September 2022, however, it instructed its bankers to return the amount to the sender and later learnt from its bankers that it was the Plaintiffs who had paid the amount into its account.

27. It is the case of the 1st Defendant that the amount of One Hundred Thousand Ghana Cedis (GHS 100,000) was paid into its bank accounts by the Plaintiffs ostensibly to create the impression of a sale and purchase relationship between the Plaintiffs and the 1st Defendant.
28. It is the further case of the 1st Defendant that if the Plaintiffs had conducted the necessary due diligence, they would have known that the property was not ready to be sold at the time Hope Capital Limited purported to sell same to them and so Hope Capital Limited had no authority to sell the subject property and had no authority to collect money from the Plaintiffs for that purpose and/ or in the name of the 1st Defendant.
29. The 1st Defendant therefore stated that the Plaintiffs' claims are misplaced and the Plaintiffs are not entitled to any of the reliefs endorsed on the Writ of Summons.

IV. ISSUES SET DOWN FOR DETERMINATION

30. At the hearing of the application for directions on 31st January 2024, the Court set down four of the issues stated in the application for directions filed by Counsel for Plaintiffs on 20th January 2023, two of the additional issues stated in the additional issues filed by Counsel for 1st Defendant's on 25th January 2023 and one of the additional issues filed by Counsel for the 2nd and 3rd Defendants on 27th January 2023, as issues to be determined in the case.
31. The issues set down for determination by the Court are as follows:
- i. Whether or not the Plaintiffs are the lawful owners of the land in dispute.*
 - ii. Whether or not the Defendants have trespassed on the Plaintiffs' land.*

- iii. *Whether or not Hope Capital Limited acted as agent for the 1st Defendant when it sold the disputed property to the Plaintiffs.*
- iv. *Whether or not the Plaintiffs paid the purchase price of the property and took possession.*
- v. *Whether or not the Plaintiffs have paid an amount of Two Million, Three Hundred and Twenty-Five Thousand Ghana Cedis (GHS 2,325,000.00) to the 1st Defendant.*
- vi. *Whether or not the property has been legally redeemed by the 2nd Defendant.*
- vii. *Whether or not the 2nd Defendant owns the property in dispute.*

V. SUMMARY OF WRITTEN ADDRESSES FILED BY COUNSEL FOR THE PARTIES

WRITTEN ADDRESS OF PLAINTIFFS' COUNSEL

32. In his written address filed on 2nd July 2024, Counsel for Plaintiffs stated that the case leans on documentary evidence. He referred to and submitted that on the basis of the Plaintiffs' **Exhibits A- J1** admitted in evidence without objection, the Plaintiffs successfully discharged the burden on them and are entitled to judgment for the reliefs sought.

WRITTEN ADDRESS OF 2ND AND 3RD DEFENDANTS' COUNSEL

33. In his written address filed on 8th July 2024, Counsel for the 2nd and 3rd Defendants stated relying on section 1 of the Mortgages Act, 1972 (NRCD 96) that a mortgage does not operate to change the ownership in the property charged and submitted that the subject property which had been mortgaged remained part of the estate of the deceased Dr. Cyril Laud Bannerman.

34. For the reason summarized in paragraph 33 above, Counsel for 2nd and 3rd Defendant further submitted that whilst the Plaintiffs could have sued for the discretionary relief of specific performance of the purported contract of sale, the Plaintiffs are not entitled to a declaration of title to the subject property and the other consequential reliefs sought when from their pleadings and evidence before the Court, title to the subject property still resides in the estate of the late Dr Cyril Laud Bannerman.
35. Counsel for 2nd and 3rd Defendants added that by the methods of redemption of interest in a mortgaged property stated in section 20(1) of the Mortgages Act, the 1st Defendant as Mortgagor is the person who is competent to redeem the property by performing all the acts secured by the mortgage. Counsel submitted that on the evidence adduced by the 2nd Defendant, the 2nd Defendant had lawfully redeemed the subject property and urged the Court to find and declare that the 2nd Defendant had lawfully redeemed the subject property.
36. For the reasons summarized in paragraphs 33-35 above, Counsel for 2nd and 3rd Defendants therefore submitted that the Court should dismiss the Plaintiffs' case.

WRITTEN ADDRESS OF 1ST DEFENDANT COUNSEL

37. The 1st Defendant Counsel filed his written address on 17th July 2024. At page 16 to 17 of his written address especially, Counsel for 1st Defendant stated that the 1st Defendant executed a Power of Attorney in favour of Hope Capital Limited, as admitted in evidence as **Exhibit B**. He however submitted that a careful reading of **Exhibit B** shows that Hope Capital Limited did not have unfettered authority to act and while Hope Capital Limited was authorized to execute any agreement in relation to recovery of debts under clause 2 of **Exhibit B**, the consent and authorization of its principal, the 1st Defendant was required.
38. Counsel for the 1st Defendant submitted that Hope Capital Limited did not have the authorization of the 1st Defendant to sell the subject property. In support of this submission

Counsel for the 1st Defendant noted and stated that the absence of authorization is evident in the Plaintiffs' own case as stated in their Statement of Claim and admitted during cross-examination that the sale agreement evidencing the purported sale was one executed in the name of the Plaintiffs and Hope Capital Limited, rather than in the name of the 1st Defendant. Counsel for 1st Defendant therefore maintained as claimed by the 1st Defendant in its Statement of Defence that the subject property could not and has not been lawfully sold to the Plaintiffs by Hope Capital Limited.

39. Counsel for the 1st Defendant added as stated in the Statement of Defence filed by the 1st Defendant that the Plaintiffs were also never in possession of the subject land and are therefore not entitled to their claims.

40. In arguments similar to that made by Counsel for the 2nd and 3rd Defendant's in his written address and summarized in paragraph 35 (above), Counsel for the 1st Defendant also relied on section 20 of the Mortgages Act and stated that on the evidence, especially from the Terms of Settlement executed between the 1st Defendant and the 2nd Defendant and admitted in evidence without objection as **Exhibit 8**, the 1st and 2nd Defendants had exercised their rights under section 20 of the Mortgages Act and the 2nd Defendant had redeemed the subject property.

41. Counsel for the 1st Defendant, just like Counsel for 2nd and 3rd Defendants noted that the case of the Plaintiffs as stated in their pleadings was inconsistent with the evidence of the 2nd Plaintiff and PW1, contained in their Witness Statement and in their answers given in Court during cross-examination. Counsel for 1st Defendant submitted that the case of the Plaintiffs and their evidence in support of same amount to calculated attempts to render untruths to the Court despite being sworn under oath. Counsel for 1st Defendant urged the Court to dismiss the case of the Plaintiffs and find that the 2nd Defendant had lawfully redeemed the subject property.

VI. DUTY OF THE COURT

42. In the case of Re Asere Stool; Nikoi Olai Amontia IV (Substituted by Tafo Amon II vrs Akotia Oworsika III (Substituted by) Laryea Ayiku III [2005-2006] SCGLR 637 at page 658, the Supreme Court stated that:

“The judicial function imposes a duty on a court ...to find the facts and then apply the law.”

(Emphasis added)

43. In explaining the duty of the Courts in cases presented before them, in the case of Nana Kwadwo Poku vrs Michael Adusei [Unreported; Suit No. H1/02/2017, 24th July 2018], the Court of Appeal in its judgment delivered by Her Ladyship Welbourne J.A. (as she then was) referred to a previous decision of the Court in the case of Solomon Baah vrs Melcom (Ghana) Ltd and Another [Unreported; Suit No H1/27/2017, 27th February 2016], in which Her Ladyship Torkonoo (Mrs) J.A. (as she then was) delivering the judgment of the Court stated the duty of a Court thus:

“The Courts are courts of law and our duty is to apply the law to disputes brought before it.”

(Emphasis added)

44. In the case presented before this Court, this Court is therefore called upon to find the facts giving rise to the dispute and then apply the law to resolve the dispute brought before the Court.

VII. APPLICABLE LAW

45. The burden and standard of proof imposed by law and which the Parties must meet in proving their claims is provided for by statute and explained in a long line of authorities.

BURDEN OF PROOF/ BURDEN OF PERSUASION

46. In section 10 (1) of the Evidence Act, 1975 (NRCD 323), **the burden of persuasion** is defined as follows:

*For the purposes of this Act, the burden of persuasion means the **obligation of the party** to establish a requisite degree of belief concerning a fact in the mind of the tribunal of fact or the Court.*

(Emphasis added)

47. In section 14 of the Evidence Act which contains provisions on the **allocation of the burden of persuasion**, it is stated that:

*Except as otherwise provided by law, unless and until it is shifted **a party** has the burden of persuasion as to each fact the existence or non-existence of which is*

essential to the claim or defence he is asserting. (Emphasis added).

48. In the case of *Ababio vs. Akwasi IV [1994–95] GBR 774* at page 777, the Supreme Court speaking through Aikins JSC (as he then was) explained the burden of proof/ persuasion on a party thus:

*The general principle of law is that it is the duty of a Plaintiff to prove his case as he must prove what he alleges. **In other words, it is the party who raises in his pleadings an issue essential to the success of his case who assumes the burden of proving it.** The burden only shifts to the defence to lead sufficient evidence to tip the scales in his favour when on a particular issue, the Plaintiff leads some evidence to prove his claim. If the Defendant succeeds in doing this, he wins, if not he loses on that particular issue. (Emphasis added)*

49. This Court therefore notes that although it is stated generally that the “*Plaintiff*” bears the burden to prove his case or what he alleges, it is also understood that each party bears the burden to prove what he alleges or to prove the facts essential to the claim or defence he asserts. Thus, even though the 1st Defendant did not specifically make a counterclaim for a declaration that the 2nd Defendant had redeemed the subject property, the Court finds that the 1st Defendant who stated amongst others that it had entered into an agreement with the 2nd Defendant to redeem the subject property assumed the burden to prove the facts essential to these claims and defence that it asserted, in view especially of the issues raised for determination and stated as issues *vi* and *vii* in paragraph 31 above.

BURDEN OF PRODUCING EVIDENCE/ STANDARD OF PROOF IN CIVIL CASES

50. The burden of producing evidence or the standard of proof required in civil cases is contained in sections 11 and 12 of the Evidence Act. In section 11 (1) of the Evidence Act, the **burden of producing evidence** is defined as:

“...the obligation of a party to introduce sufficient evidence to avoid a ruling on the issue against the party”. (Emphasis added).

51. Section 11(4) of the Evidence Act also provides that:

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

52. Section 12 (1) of the Evidence Act further provides that:

Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities. (Emphasis added).

53. “Preponderance of the probabilities” as defined in section 12(2) of the Evidence Act means:

That degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence.

**THE “TWIN BURDENS OF PROOF AND STANDARD OF PROOF” AND THE
DISTINCTION BETWEEN THEM**

54. In explaining the requirement of sections 10, 11, 12 and 14 of the Evidence Act stated above, in the case of *Isaac Alormenu vrs Ghana Cocoa Board [Unreported, Civil Appeal No. J4/86/2022, 8th February 2023]*, the Supreme Court speaking through Her Ladyship, Prof. Mensa-Bonsu (Mrs.) JSC, referred to sections 10, 12 and 14 of the Evidence Act and explained that from these provisions “*there are two parts to the duty to discharge the burden of proof. ...the twin burdens of proof and standard of proof contained in the provisions are:*

- i. *There is the burden of leading evidence to back an assertion [and]*
- ii. *The burden of persuasion, i.e leading evidence of sufficient standard to persuade a tribunal to rule in one’s favour.” (Emphasis added)*

55. In the case of *Isaac Alormenu vrs Ghana Cocoa Board* (supra) the Supreme Court also referred to its previous decision in the case of *Sumaila Bielbiel (No. 3) v Adamu Dramani & Attorney-General [2012] 1 SCGLR 370 at 371*, in which Dr. Date-Bah JSC (as he then was) explained the importance of the distinction between the burdens of leading evidence and the burden of persuasion thus:

“The distinction between the two burdens of proof, namely the burden of persuasion as defined in section 10(1) and the burden of producing evidence as defined in section 11(1) of the same Act, is

important because the incidence of the burden of producing evidence can lead to a defendant acquiring the right to begin leading evidence 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.” (Emphasis added)

BURDEN AND STANDARD OF PROOF IN LAND CASES

56. In the case of *Gifty Oforiwa & Anor vs. Patrick Nutor [Unreported; Civil Appeal No. H1/225/2018; 16 May 2022; CA]*, the Court of Appeal referred to sections 11(1) & (4), sections 12 and 14 of the Evidence Act as well as the decision of the Supreme Court in *Adwubeng vs Domfeh [1996-97] SCGLR 660* and held per Honyenuga J.A (as he then was, presiding) that:

“The standard of proof in land suits and also in civil cases is proof by preponderance of probabilities.” (Emphasis added)

57. This Court finds that in addition to the standard of proof, the burden of proof required in civil cases contained in the above – stated provisions of the Evidence Act and explained in the decided cases, especially by the Supreme Court in the case of *Isaac Alormenu vrs Ghana Cocoa Board* (supra) is also the same in land cases, for the Court finds that there is no distinction made in the Evidence Act in respect of the burden and standard of proof required in civil cases in which the subject matter of the action is land and that required for other civil cases.

58. In applying the law to resolve the dispute presented, this Court will therefore be mindful of the requirements of the law on the burden and standard of proof imposed on the parties as explained in the decisions cited above.

FINDING THE FACTS/ PROOF IN LAW

59. As explained in the authorities stated in paragraphs 42 and 43 above, the duty of this Court is to apply the law to the facts of this case. In finding the facts of this case, this Court has considered that in the case of *Majolagbe vs. Larbi (1959) GLR 190 at 192*, Ollenu J. (as he then was) reiterated the principle stated in *Khoury v Richter [8 December 1958, unreported]* that:

"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 as 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 on oath or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances from which the court can be satisfied that what he avers is true". (Emphasis added).

60. To find the facts of this case so that the law may be applied to same to resolve the dispute presented, this Court will therefore consider whether or not the Parties have been able to establish their claims by the proper legal means as explained in the case of *Majolagbe vs. Larbi* (supra) and to the standard required by law.

61. In finding the facts of this case, this Court will also rely on the guidance provided by the Supreme Court in the case of *In re Presidential Election Petition (No. 4) Akuffo-Addo & Ors. vs. Mahama & Ors. [2013] SCGLR (Special Edition) 73*, in which the Supreme Court held at page 322 of the report that:

"Our understanding of the rules in the Evidence Decree, 1975 on the burden of proof is that in assessing the balance of probabilities, all the evidence, be it that of the plaintiff, or the defendant, must be considered and the party in whose favour the balance tilts is the person

whose case is the more probable of the rival versions and is deserving of a favourable verdict.”

62. The facts of the instant suit would therefore be which of the versions of the Parties is more probable after consideration / evaluation of all the evidence provided by the Plaintiffs and Defendants and established by the proper legal means.

63. In evaluating the evidence to find the facts, the Court will also rely on the guidance provided in the case of *Frabina Ltd. v. Shell (Gh.) Ltd. [2011] 1 SCGLR 429 at page 445* in which the Supreme Court held speaking through Brobbey JSC (as he then was) that:

In evaluating evidence in judicial proceedings, a court has several sources to draw material evidence from:

1. *The first relates to the **pleadings**. Where the pleadings are not in contention, it is safe for the trial judge to draw from it and make conclusions...*
2. *The second is the **oral evidence** that has been led in court. The credibility of oral evidence is normally tested through cross-examination...*
3. *The third is the **documentary evidence**. This normally takes the form of documents that are tendered during the course of the trial and upon which questions are asked during examination in chief and cross examination. It can also take the form of reports submitted by court appointed expert witnesses such as surveyors, Accountants, Medical Doctors, etc who testify and tender in reports prepared by them to help the judge in determining the case one way or the other.*
4. *The fourth are **judicial decisions and authorities touching and dealing with principles of law in the subject matter** of the case on trial. This is normally done during the closing addresses by Counsel of the parties to the Court. **(Emphasis added)***

64. Relying on the above guidance provided by the Apex Court, this Court will perform its duty of finding the facts of this case. It will then apply the law to resolve the dispute between the parties.

VIII. EVALUATION OF EVIDENCE, ANALYSIS AND OPINION

AGREEMENT OF THE PARTIES AS TO IDENTITY AND NATURE OF THE SUBJECT PROPERTY.

65. In evaluating the evidence, the Court has first considered that as explained in the case of *Frabina Ltd. v. Shell (Gh.) Ltd.* (supra), the pleadings filed are a source from which the Court can draw material evidence and where the pleadings are not in contention, it is safe for the trial judge to draw from it and make conclusions.

66. From the pleadings, the Court finds that the Parties agreed that the subject property is situated at Pokuase and registered with Land Title Certificate number GA 29534. The Parties also agreed that the subject property had been mortgaged to the 1st Defendant to secure a loan. The Court therefore finds that as an undisputed fact that the subject property was mortgaged property, and the relevant law would be applied to this fact resolve the dispute presented.

EVALUATION OF EVIDENCE PROVIDED BY THE PLAINTIFFS IN SUPPORT OF THEIR CASE

67. The Court finds that the Plaintiffs case is essentially contained in paragraphs 7, 16 and 20 of their Statement of Claim. In paragraphs 7 and 20 of their Statement of Claim it is the case of the Plaintiffs that the “purchase price” for the subject property was Two Million, Three Hundred and Twenty-Five Thousand Ghana Cedis (GHS 2,325,000.00) and that they made full and final payment of same to Hope Capital Limited and the 1st Defendant. In

paragraph 16 of the Statement of Claim the Plaintiffs stated that they took possession of the subject property after “final payment” and started working there. All three Defendants however deny these claims.

68. In view of the Plaintiffs’ case as summarized in paragraph 67 above and after considering the explanation by the Supreme Court in the case of Ababio vs. Akwasi IV (supra) and Sumaila Bielbiel (No. 3) v Adamu Dramani & Attorney-General (supra), the Court finds that in the instant case, the general principle is applicable and the Plaintiffs who acquired the right to begin leading evidence in the trial assumed the burden to prove their case or the matters essential to the success of their case. It is for this reason that the Court has also opted to consider and evaluate the evidence provided by the Plaintiffs in support of their case first. The burden will only shift to the Defendants to lead sufficient evidence to tip the scales in their favour when on a particular issue, the Plaintiffs lead some evidence to prove their claim.
69. Having regard to the Plaintiff’s case as summarized in paragraph 67 above and the denial by the Defendants, the Court will consider and determine issues 4 and 5 first for the sake of coherence or consistency in the analysis. Issues 4 and 5 will also be considered together as the Court finds that they are related.
70. Issues 4 and 5 as already stated in paragraph 31 above are:

ISSUE 4:

Whether or not the Plaintiffs paid the purchase price of the property and took possession.

AND

ISSUE 5:

Whether or not the Plaintiffs have paid an amount of Two Million, Three Hundred and Twenty-Five Thousand Ghana Cedis (GHS 2,325,000.00) to the 1st Defendant.

71. As explained in the case of *Ababio vs. Akwasi IV* (supra) and stated in paragraph 68 above, in the face of the denial by the Defendants of the Plaintiffs' claims in respect of the purchase price, who it was paid to and the Plaintiffs' claim to possession of the subject property, the burden of proof was on the Plaintiffs who raised these matters essential to the success of their case to prove same. The Court will consider the evidence relied on by the Plaintiffs in proof of the agreed purchase price, that same was paid to the 1st Defendant and Hope Capital Limited and also that the Plaintiffs took possession of the subject property after final payment. The burden will only shift to the Defendants to lead sufficient evidence to tip the scales in their favour if the Plaintiffs lead some evidence to prove their claim. If the Defendants succeed in doing this, they win, if not they lose on these particular issues.

AGREED PURCHASE PRICE

72. In his Witness Statement admitted in Court as his evidence in Chief, the 2nd Plaintiff stated that the agreed purchase price for the subject property was Two Million, Three Hundred and Twenty-Five Thousand Ghana Cedis (GHS 2,325,000.00).

73. Richard Akowuah who stated in Court that he is the Chief Executive Officer of Hope Capital Limited also testified in support of the Plaintiffs case as PW1. In cross-examination of PW1 by Counsel for 1st Defendant held in Court on 12th December 2023, PW1 confirmed that as stated by the Plaintiffs, Hope Capital Limited as lawful Attorneys of the 1st Defendant agreed with the Plaintiffs that Two Million, Three Hundred and Twenty-Five Thousand Ghana Cedis (GHS 2,325,000.00) should be paid by the Plaintiffs as the agreed purchase price for the subject property. The Defendants did not challenge the amount stated as the purchase price.

74. The Court therefore finds that there is oral and unchallenged evidence in support of the amount stated by the Plaintiffs in their pleadings as the purchase price agreed to be paid for the subject property.

WAS THE AGREED PURCHASE PRICE PAID BY THE PLAINTIFFS IN FULL AND WAS SAME PAID TO HOPE CAPITAL LIMITED AND THE 1ST DEFENDANT?

75. In paragraph 17 of his Witness Statement, the 2nd Plaintiff stated relying on the documents attached and admitted in evidence during the trial and marked as **Exhibit G, G 1-G 19 series** that the Plaintiffs made payments of “*about 80% of the purchase price*” to Hope Capital Limited.

76. In paragraph 18 of his Witness Statement, the 2nd Plaintiff also stated relying on **Exhibit G 20**, that the Plaintiffs paid One Hundred Thousand Ghana Cedis (GHS 100,000), a remainder of the agreed purchase price to the 1st Defendant.

77. The Court therefore finds that whilst the Plaintiffs stated in paragraph 20 of their Statement of Claim that they paid a total of Two Million, Three Hundred and Twenty-Five Thousand Ghana Cedis (GHS 2,325,000.00) to Hope Capital Limited and the 1st Defendant, by his oral evidence/ evidence in chief, the 2nd Plaintiffs case was that about 80% of the agreed purchase price was paid to Hope Capital Limited and it is only the remainder of One Hundred Thousand Ghana Cedis (GHS 100,000) that was paid to the 1st Defendant.

78. The Court also finds that **Exhibits G, G 1 - G 19** are receipts. The dates on the receipts range from September 2021 to February 2022. On the receipts it is stated that the sums stated therein were paid by the 1st or 2nd Plaintiff to Hope Capital Limited for the subject property.

79. **Exhibit G 20** contains transaction details of transfer of One Hundred Thousand Ghana Cedis (GHS 100,000) from the 1st Plaintiff's account to an account stated to be that of the 1st Defendant.

80. The Court notes that the Plaintiffs did not provide any evidence that the amounts stated in **Exhibits G, G 1 - G 19** and stated to have been paid to Hope Capital Limited, were subsequently paid to the 1st Defendant, rather the Plaintiff's own Witness, PW 1, Richard Akowuah, who stated in Court that he is the Chief Executive Officer of Hope Capital Limited, admitted in cross-examination by the 1st Defendant's Counsel held on 12th December 2023 that the monies paid to Hope Capital Limited stated to be about 80% of the purchase price had not been given to the 1st Defendant. PW1 also admitted that it was only One Hundred Thousand Ghana Cedis (GHS 100,000) of the agreed purchase price that was paid to the 1st Defendant.

81. In answer to questions posed to PW 1 by Counsel for 1st Defendant in cross – examination held on 12th December 2023, the following transpired in Court:

Question: Have the Plaintiffs paid the full purchase price of the disputed property?

Answer: Yes, the Plaintiffs paid GHS 2,225,000 to Hope Capital and they paid the remainder of GHS100,00 to the 1st Defendant.

Question: Where is the amount of GHS 2,225,000?

Answer: That money is with Hope Capital and it forms part of an ongoing suit in the High Court between Hope Capital Limited and the 1st Defendant. (Emphasis added)

Question: Your testimony in this Court is that Hope Capital is holding the amount of GHS 2,225,000 in an Escrow Account. Not so?

Answer: Yes

Question: If the Plaintiffs action in this matter is unsuccessful, Hope Capital will have to refund the money to the Plaintiffs. Not so? (Emphasis added)

Answer: Yes, but the terms of the refund will be a matter between Hope Capital and the Plaintiffs. (Emphasis added)

82. The Court therefore finds that as stated by the 2nd Plaintiff, shown on **Exhibits G, G1-G19** and admitted by PW 1, the sum of Two Million, Two Hundred and Twenty-Five Thousand Ghana Cedis (GHS 2,225,000.00) was paid by the Plaintiffs to Hope Capital Limited and are still with Hope Capital Limited. The money was not given to the 1st Defendant.

83. In view of the admission by the Plaintiffs during the trial that 80% of the agreed purchase price was paid to Hope Capital Limited and that only One Hundred Thousand Ghana Cedis (GHS100,000) was paid to the 1st Defendant, this Court finds that if the 1st Defendant is able to lead evidence to the standard required by law in support of its claim that it returned the One Hundred Thousand Ghana Cedis (GHS100,000) paid into its bank account to the Plaintiffs, the Plaintiffs would have failed in establishing their claim that they paid the full purchase price for the subject property and the Plaintiffs would also have failed in establishing that that they paid the purchase price to the 1st Defendant.

84. During the trial, the 1st Defendant established that it did not authorize the payment of the One Hundred Thousand Ghana Cedis (GHS100,000) into its accounts. In cross examination of the 2nd Plaintiff by Counsel for 1st Defendant held on 9th October 2023, especially at page 5 of the record of proceedings of that day the following transpired:

Question: *It is fair to state that at the time you were paying the purported final balance into the 1st Defendant's account, the 1st Defendant Company had not authorized you to pay that money into its account. (Emphasis added)*

Answer: *The 1st Defendant did not give me the go-ahead to make payment into its account but it was necessary to make payment because it was its money and that is why I went ahead to do so. (Emphasis added)*

85. In cross examination of the 2nd Plaintiff by Counsel for 1st Defendant held on 10th October 2023, especially at page 7 of the record of proceedings of that day the following transpired:

Question: *You say in paragraph 18 of your Witness Statement that Richard Akowuah asked you to make the final payment to the 1st Defendant, is that correct?*

Answer: *That is so.*

86. It is therefore the Plaintiffs' own case as stated during cross-examination that it paid the One Hundred Thousand Ghana Cedis (GHS100,000) into the 1st Defendant's account because PW1/Richard Akowuah asked the Plaintiffs' to do so.

87. In support of its claim that it returned the One Hundred Thousand Ghana Cedis (GHS100,000) paid by the Plaintiffs into its account, during the trial, the 1st Defendant's Witness, DW 1 relied on **Exhibit 10**.

88. The Court finds that **Exhibit 10** is a letter dated 11th October 2022 requesting the branch manager of Stanbic Bank to return the amount of One Hundred Thousand Ghana Cedis (GHS100,000) with transaction description "B O Franco Estate and Cold Store E." In emails between DW 1 and Stanbic Bank on the subject "Refund instruction to Stanbic-France Estate

– 11 – Oct – 22” attached to the Witness Statement of DW1, admitted in evidence without objection and marked **Exhibits 11 and 11A**, the Court finds that Stanbic bank confirmed to the 1st Defendant that *“The funds are being returned as sought”*.

89. The Plaintiffs did not deny receiving the One Hundred Thousand Ghana Cedis (GHS100,000) which the 1st Defendant requested its bankers to return as evidenced by **Exhibits 10, 11 and 11A**. In cross-examination of the 2nd Plaintiff by the 1st Defendant’s Counsel held on 9th October 2023, the following transpired as recorded at page 6 of the proceedings for that day:

***Question:** I am further suggesting to you that when the 1st Defendant Company became aware from its bankers the source of the funds, it immediately directed its bankers to return the money to you, the sender.*

***Answer:** That is not entirely true. The 1st Defendant Company knew I sent the money and requested for my bank details so that it could refund the money. I was even surprised that the 1st Defendant Company had my bank details. I did not know why the bank gave my account details to the 1st Defendant Company, due to that I questioned the bank. What I know is that they are deliberately doing this to me.” (Emphasis added)*

90. After consideration of the totality of the evidence adduced in respect of this issue, the Court finds that the remainder of the purchase price, stated to be about 20% or One Hundred Thousand Ghana Cedis (GHS100,000), requested by Richard Akowuah to be sent by the Plaintiffs to the 1st Defendant was returned to the Plaintiffs. The Court therefore finds that the Plaintiffs did not succeed in proving their claim that they made payment of the full purchase price.

91. The Court also finds that the Plaintiffs failed to prove that the purchase price was paid to the 1st Defendant.

POSSESSION OF THE SUBJECT PROPERTY – WHEN/ DATE ON WHICH PLAINTIFFS TOOK POSSESSION.

92. As stated in paragraph 67 above, it is the case of the Plaintiffs as stated in paragraph 16 of their Statement of Claim that they took possession of the subject property after “*final payment*” and “*started working there*”.

93. In its Statement of Defence, the 1st Defendant denied the Plaintiffs claim that they were in possession of the subject property and added that the Plaintiffs were not in possession of the property when it took possession of same, shortly after it revoked the Power of Attorney to Hope Capital Limited, after May 2022.

94. As stated in the earlier analysis, relying on the law on the matter, the burden of proof was on the Plaintiffs to establish their claim of possession which is essential to their case.

95. The Court notes that in their Statement of Claim the Plaintiffs stated that they went into possession after “*final payment*”. During the trial, the Plaintiffs relied on **Exhibit G 20** in support of their claim that the remainder of the purchase price which would have amounted to final payment of the agreed purchase price was transferred to the 1st Defendant on or about 23rd September 2022. The Court therefore finds that in stating in their Statement of Claim that they went into possession of the subject property after “*final payment*”, the Plaintiffs

meant that they went into possession after 23rd September 2022.

96. As pointed out by Counsel for 1st Defendant in cross-examination of the 2nd Plaintiff held on 18th July 2023, in paragraph 17 of an affidavit deposed to by the 2nd Plaintiff and attached to the Plaintiffs’ application for interlocutory injunction filed on 17th October 2022, tendered through the 2nd Plaintiff and admitted into evidence without objection as **Exhibit**

1, the 2nd Plaintiff maintained as stated in the Statement of Claim that the Plaintiffs took possession of the subject property after “*final payment*”.

97. In paragraph 17 of the Witness Statement of the 2nd Plaintiff however, the 2nd Plaintiff stated that the Plaintiffs took possession of the subject property in “*November 2021*” after paying “*80% of the purchase price*”. The Court notes that the 2nd Plaintiff’s statement in paragraph 17 of his Witness Statement suggests that the Plaintiffs went into possession almost a year before the date the Plaintiffs made final payment as evidenced by the Plaintiffs own **Exhibit G20**. This inconsistency between the Plaintiffs’ claim as stated in their pleadings and in **Exhibit 1, Exhibit G 20** and the evidence in chief of the 2nd Plaintiff contained in its Witness Statement is noted by the Court.

98. Relying on the analysis stated in paragraphs 95 to 97 above, the Court concludes that the 2nd Plaintiff’s evidence as to when the Plaintiffs took possession of the subject property is inconsistent and unreliable.

POSSESSION OF THE SUBJECT PROPERTY – ACTS RELIED ON BY THE PLAINTIFFS AS EVIDENCING POSSESSION.

99. The Court notes that whilst in their Statement of Claim the Plaintiffs stated that they took possession of the subject property by starting work on the property, in paragraph 17 of his Witness Statement, the 2nd Plaintiff stated that the Plaintiffs took possession of the property by placing a caretaker on the property and added that it was “*later*” that the Plaintiffs started work on the subject property.

100. The omission of the statement as to the placement of the caretaker on the subject land in the Plaintiffs’ pleadings has been noted by the Court and in this regard the Court finds that

in respect of acts relied on by the Plaintiffs as evidencing their possession of the property, the evidence of the 2nd Plaintiff as contained in his Witness Statement was again not consistent with the Plaintiffs Statement of Claim.

PLACING A CARETAKER ON THE PROPERTY AS EVIDENCE OF POSSESSION.

101. In further support of their claim to possession of the subject land, the Plaintiffs relied on the evidence of Stephen Hugo, PW 2, contained in his Witness Statement, together with the exhibits attached to same and admitted in Court as evidence in chief of PW 2 without objection.

102. It was the case of PW 2 as stated in his Witness Statement that he is mason and a caretaker of the Plaintiffs' land. He stated in paragraph 5 of his Witness Statement that he "*moved onto the land and lived there until September 2022*". He added that he stayed on the property from which he left for work. Thus, in paragraph 6 of his Witness Statement, PW 2 stated that:

"On 29th September 2022, I left the disputed land and went to work...."

103. In further support of his case that he is a caretaker placed by the Plaintiffs on the subject property, PW 2 relied on a copy of a statement he gave to the police which was attached to his Witness Statement, admitted in evidence and marked as **Exhibit AA**.

104. In Court on 4th March 2024 however, PW 2 stated in answer to questions asked by Counsel for 1st Defendant during cross-examination that he did not move onto the subject property as stated in his Witness Statement. He stated that he lived behind the Pokuase Market and that from time to time he visited the subject property. The following transpired in cross-examination of PW 2 by Counsel for 1st Defendant as recorded at page 6 of the record of proceedings of the Court held on 4th March 2024:

Question: In your earlier testimony in Court today, you never told this Court that you lived on the disputed property but you rather stated that you lived behind that market in Pokuase for the past 2 1/2 years. Is that correct?

Answer: Yes that is correct but I can explain. I cannot keep my personal belonging on the disputed land, besides there is a matter in Court in respect of that land.

Question: I am putting it to you that neither you nor any of the workers of the Plaintiffs lived on the disputed land as you testify.

Answer: We have lived on the disputed land before.

105. The Court also finds that even though PW 2 relied on **Exhibit AA**, a copy of his statement to the police, attached to his Witness Statement in support of his case that that he is a caretaker of the subject property, that he moved unto the subject property and also that the Plaintiffs are in possession of the property, it is not stated anywhere in **Exhibit AA** that PW 2 is a caretaker of the subject property or that he lives on the property or ever lived on the property.
106. As suggested by Counsel for 1st Defendant's in his cross-examination of PW 2 and recorded at page 6 of the record of proceedings for 4th March 2024, the Court agrees with Counsel for 1st Defendant that if PW 2 and/ or his colleagues were indeed staying on the subject property or had ever stayed on the subject property and PW 2 was indeed the Plaintiffs' caretaker on the property, it is more probable than not that PW 2 would have stated this to the police in his statement to the Police admitted in evidence as **Exhibit AA**.
107. As stated in the case of *Frabina Ltd v Shell (Gh) Ltd* (supra) the credibility of oral evidence is normally tested through cross-examination. In view of the inconsistencies in the

evidence provided by the 2nd Plaintiff himself and by PW 2 about the presence of a caretaker on the property, the Court does not find the evidence of the Plaintiffs in respect of the alleged presence of a caretaker on the subject property reliable.

WORKS ON THE SUBJECT LAND AS EVIDENCE OF POSSESSION

108. It is the Plaintiffs' claim as stated in paragraph 16 of the Statement of Claim that after completing final payment they took possession of the property and started working there. In paragraphs 21 and 22 of his Witness Statement, the 2nd Plaintiff stated that "*after he paid the remaining balance into the account of Grofin Africa Fund*" he enjoyed peaceful possession of the subject land until sometime in September 2022 when he was informed by his workers that some people suspected to be land guards and policemen had caused the "*arrest of the workers and seized heavy equipment (caterpillars) that they were using*". The 2nd Plaintiff added in paragraph 24 of his Witness Statement that the police took the statements of his workers who were arrested. In support of the claims made by the 2nd Plaintiff in paragraphs 21, 22 and 24 of his Witness Statement as herein summarized, the 2nd Plaintiff relied on copies of the statements made by his workers to the police, attached to his Witness Statement and admitted in evidence without objection as **Exhibit J** and **Exhibit J1**.

109. The Court notes that although the Plaintiffs stated in their Statement of Claim that their workers were arrested, they did not state in their Statement of Claim that equipment being used by their workers were seized.

110. The Court also notes from **Exhibit G 20** that the remaining balance of the purchase price stated to have been paid to the bank account of the 1st Defendant and referred to in paragraphs 21 and 22 of the 2nd Plaintiffs Witness Statement was paid on 23rd September 2022. The Court also notes that **Exhibits J and J1** relied on by the Plaintiffs as statements made to the Airport Police by the Plaintiffs workers are dated 29th September 2022. The

Court therefore considers that even if the Plaintiffs workers had gone unto the subject property immediately after payment to the 1st Defendant on 22nd September 2022, they would have been arrested just about when they went unto the property.

111. The Court finds that **Exhibit J** is the same as the statement attached to the Witness Statement of PW 2 and marked as **Exhibit AA**. From **Exhibit J/Exhibit AA** the Court finds that Stephen Hugo/ PW 2 stated that he is a mason and that his boss Mr. Nyankson asked him and his colleagues to go to *“the site to see whether **some people** were working on the land or not.”* He added that when they arrived on the site they asked about an *“operator”*, but they were subjected to beatings and later sent to the police station.
112. The Court therefore finds from **Exhibit J/ Exhibit AA** that the Plaintiffs worker, a mason, Stephen Hugo and his colleagues were asked to go on the subject property to see whether some people were working there or not. The workers of the Plaintiffs were therefore not on the property and engaged in works when they were arrested as suggested by the Plaintiffs in their Statement of Claim or by the 2nd Plaintiff in his Witness Statement.
113. The Court further notes that it is not stated in **Exhibit J/ Exhibit AA** that the Plaintiffs’ workers were using heavy equipment on the subject land which were seized. The Court therefore finds that the claims introduced by the 2nd Plaintiff in his Witness Statement not found in the Statement of Claim about the presence of a caretaker and heavy equipment being used by his workmen which were seized are all not supported by the Plaintiffs’ own evidence, **Exhibit J/Exhibit AA**. The Court therefore finds that the evidence of the 2nd Plaintiff was unreliable in many respects.
114. In **Exhibit AA**, attached to the Witness Statement of PW 2 the Court finds that PW 2 reported to the police that he was asked by his boss to go to the site with 2 others to find out whether *“**some people were working on the land or not.**”* (**Emphasis added**)

115. The Court however finds that contrary to his statement in **Exhibit AA**, PW 2 stated in paragraph 6 of his Witness Statement that on 29th September 2022, the 2nd Plaintiff called him to go to *“the disputed land to check whether or not the workers were working.”* (**Emphasis added**).
116. The suggestion in paragraph 6 of the Witness Statement of PW 2 that *“workers”* of the Plaintiffs rather than some other *“people”* were working on the subject property is similar to the statement made by the 2nd Plaintiff in his Witness Statement. The Court however finds as analyzed in paragraph 112 above that this claim by the 2nd Plaintiff and by PW 2 is not supported by their own **Exhibit J/Exhibit AA**.
117. In view of the inconsistencies in the claims contained in the Witness Statement of the 2nd Plaintiff as compared to the claims in the Statement of Claim, in view of the inconsistencies in the Witness Statement of PW 2 exposed by cross-examination, considering also that the report made by PW 2 to the police and contained in **Exhibit AA/ Exhibit J** was made shortly after the arrest of PW 2 and shortly after the instructions received from the 2nd Plaintiff, the Court finds that it is most probably the case as stated in **Exhibit AA/ Exhibit J** that rather than *“workers”* of the Plaintiffs, PW 2 and his colleagues had been instructed on 29th September 2022 to go to the subject property to ascertain whether or not *“some people”* were working on the property.
118. The Court also finds that it is more probable than not that these other persons other than the Plaintiffs workers referred to in **Exhibit AA /Exhibit J** had just been engaged to work on the subject land on 29th September 2022 after considering **Exhibit J1**.
119. In a report made to the police dated 29th September 2022, marked as **Exhibit J1**, one Vondie Etor stated that he is an *“operator”*. He added that *“I was working at Pokuase Estate with my brothers on a land that was given to us to grade by Mr. Nyankson...at Pokuase ACP when policemen at airport police station arrested us, saying the land is for a different person who had reported the case at the airport police station.”*

120. The Court therefore finds from **Exhibit J1** that Vondie Etor, an operator had been engaged by the 2nd Plaintiff to “*grade*”. It is noted that the operator did not state that he had been working on the subject property for a number of days. He simply stated that he was working when he was arrested. It is also noted that Vondie Etor did not state that his equipment had been seized.
121. From all the evidence relied on by the Plaintiffs in support of the works on the land, the Court finds that it is more probable than not that “*some people*”, most probably the “*operator*” had just been engaged by the Plaintiffs to clear or “*grade*” the subject land on 29th September 2022 after the transfer of money to the 1st Defendant’ bank accounts on 23rd September 2022. The Plaintiffs informed their workers to go and check up on these works or to see whether “*some people*” other than the Plaintiff’s own workers, “*the operator*” was working on the land.
122. From the Plaintiffs own evidence as contained in **Exhibit AA/ Exhibit J and Exhibit J1**, the Court finds that the operator engaged was arrested whilst he “*was working*” and the workers sent to the subject land on that day, 29th September 2022 to ascertain that the works were ongoing were arrested by the Police upon a report made by the 3rd Defendant as stated by the Plaintiffs’ in the Statement of Claim or perhaps upon a report by the 1st Defendant which claimed on its Statement of Defence that it was in possession of the subject land.
123. The Court therefore finds that there is no evidence before the Court that the Plaintiffs or their workers were on the subject property before 29th September 2022, there is no evidence before the Court that the Plaintiffs or their workers were engaged in works on the subject property before 29th September 2022 or ever, or that heavy equipment which were being used by workers of the Plaintiffs were seized as claimed by the 2nd Plaintiff. The claims by the Plaintiffs that they were in possession of the land because their workers were working

on it, and further claim by the 2nd Plaintiff that “heavy equipment” of the Plaintiffs’ workers were seized is thus unsubstantiated.

124. As analysed and already stated above, the Court finds from the evidence in chief of the 2nd Plaintiff contained in his Witness Statement that the claims of the 2nd Plaintiff as to the placement of a caretaker on the property and as to the date on which the Plaintiffs took possession of the subject property were also not supported by the evidence he relied on.

125. The evidence of PW 2 relied on in support of the Plaintiffs’ claim to possession as analyzed above was also inconsistent in respect of whether or not there was a caretaker on the subject land as well as in other respects.

126. In addition to the findings already made above which leads the Court to the conclusion that the evidence of PW 2 was also not a credible, the Court also considered the inconsistencies in the evidence of PW 2 noted and stated in the written addresses by Counsel for 2nd and 3rd Defendants and by Counsel for the 1st Defendant which include following:

**INCONSISTENCIES IN THE EVIDENCE OF PW 2 ABOUT HOW EXHIBIT AA WAS
OBTAINED**

127. In cross-examination held by Counsel for 1st Defendant on 4th March 2024, it is recorded at page 3 of the record of proceedings for that day that PW 2 provided the following answers about how **Exhibit AA** was obtained:

Question: Where did you get Exhibit AA from?

Answer: I got it from the Airport Police station.

Question: When was it given to you at the Airport Police Station?

Answer: In September 2022.

Question: Who gave it to you?

Answer: It was the CID who gave it to me.

128. Yet on the same day, in further cross examination by Counsel for the 1st Defendant, PW 2 stated as follows:

Question: Is it your testimony that you wrote this statement Exhibit AA at the Airport Police Station and the CID officer gave it back to you?

Answer: I was not given the statement the day I wrote it.

Question: So how did you get it, if it was not given to you the day you wrote it?

Answer: I was granted bail and I left for my home. It may be that my boss or the lawyer collected the statement.

129. The answers provided by PW 2 about how **Exhibit AA** was obtained were clearly contradictory and unreliable.

ADMISSION BY PW 2 TO FALSE STATEMENTS IN HIS WITNESS STATEMENT

130. PW 2 also admitted that statements contained in his Witness Statement are false. In paragraph 7 of his Witness Statement, PW 2 stated that on 29th September 2022 when he got to the subject property, he saw some people with policemen on the land. He added that when he enquired about the workers he was beaten up until the policemen intervened. He also stated that the people he met on the land told the policemen that he, PW 2, was one of the trespassers on the land and he was arrested and taken to the airport police

station where he gave the Statement attached to his Witness Statement and marked as **Exhibit AA**.

131. In cross-examination of PW 2 by Counsel for 2nd and 3rd Defendants held on 4th March 2024, PW 2 admitted as recorded at page 8 of the record of proceedings for that day that this part of his Witness Statement stated in paragraph 7 is false. The following transpired on Court on that day:

Question: In paragraph 7 of your witness statement, you said when you got there I saw some people with policemen on the land and enquired about the workers from the people there. Did you meet the police people when you got there or you got there before the police arrived?

Answer: The police men arrived after we got there. We met the land guards on the land. The police arrived in the evening after the land guards had beaten us.

Question: So you are saying that your statements in paragraph 7 of your Witness Statement are false?

Answer: The statement in paragraph 7 is false.

132. After consideration of the case presented by the Plaintiffs in their pleadings, the Witness Statements of the 2nd Plaintiff and of PW 2, as well as the exhibits relied on, this Court finds that the Plaintiffs' case that they were in possession of the subject land was unsubstantiated and the evidence of the 2nd Plaintiff and of PW 2 in support of the Plaintiffs case that they were in possession of the subject property was not reliable and/or not credible.

133. For the above stated reasons, although Counsel for Plaintiff submitted in his written address that it is a well-established principle that possession is strong evidence of one's ownership of land, the Court finds that the Plaintiffs did not meet the burden of proof on

them to establish that it is more probable than not that they were in possession of the subject land. The Court therefore finds that the Plaintiffs were not in possession of the subject land.

ISSUE 1:

Whether or not the Plaintiffs are the lawful owners of the land in dispute

134. The Plaintiffs claim to ownership of the subject property was largely based on their case that they purchased the subject property by making full payment of the purchase price to Hope Capital Limited and to the 1st Defendant and also that they took possession of the subject property. In their pleadings the Plaintiffs stated that the purchase of the subject property is evidenced by a sale and purchase agreement executed by the Plaintiffs and Hope Capital Limited as agent of the 1st Defendant. The Defendants denied the Plaintiffs claim that they are the lawful owners of the subject property.
135. In proof of their claim that they are owners of the property because they purchased same, during the trial, the 2nd Plaintiff tendered in evidence a document stated to be the sale and purchase agreement executed between Hope Capital Limited as agent of the 1st Defendant and the Plaintiffs, dated 3rd September 2021, admitted in evidence without objection and marked as **Exhibit F**.
136. In support of the Plaintiffs claim that the subject property was sold to them by Hope Capital Limited as evidenced by **Exhibit F**, PW 1 stated in paragraph 12 of his Witness Statement that the subject property was sold to the Plaintiffs on 3rd September 2021.
137. In cross-examination held on 12th December 2023, Counsel for the 1st Defendant observed and pointed out that **Exhibit F** is not stamped.

138. The Court finds that **Exhibit F** stated to be a sale and purchase agreement executed between the Plaintiffs and Hope Capital Limited is an instrument relating to the creation or transfer of an estate or interest in land, and it is an instrument affecting land under the Stamp Duty Act, 2005 (Act 689) as amended. As it was not stamped, it is inadmissible per se even though same was admitted in evidence without objection. In arriving at the conclusion that **Exhibit F** is inadmissible per se, the Court has relied on the case of *Opanin Kwaku Duah and another vrs Peter Kofi Kyere and two others [Unreported, Civil Appeal No. J4/41/2021, Judgment of 18th January 2023, SC]* in which the Supreme Court referring to its previous decision in *Lizori Ltd vs Boye & School of Domestic Science & Catering [2013-2014] SCGLR 889* held in its judgment delivered by His Lordship Amadu Tanko JSC that:

“It is settled law that a court is not permitted to admit and/ or rely on evidence which is legally inadmissible per se, with or without objection. Therefore, since Exhibit 4 constitutes an instrument affecting land, under the Stamp Duty Act, 2005 (Act 689) but had not been duly stamped in accordance with the Act, same was inadmissible and we so hold.” (Emphasis added)

139. In the case of *Opanin Kwaku Duah and another vrs Peter Kofi Kyere and two others* (supra) the Supreme Court also referred to its previous decision on *Juxon Smith vs KLM Dutch Airlines [2005-2006] SCGLR 438* and section 8 of the Evidence Act and expunged the unstamped exhibit. Pursuant to section 8 of the Evidence Act, which provides that Evidence that would be inadmissible if objected to by a party may be excluded by the court on its own motion, and relying on the guidance in the case *Opanin Kwaku Duah and another vrs Peter Kofi Kyere and two others* (supra), this Court expunges **Exhibit F** as well as **Exhibit V** which is also stated to be a contract of sale of immovable property, referred to in paragraph 18 of the Witness Statement of PW1, tendered in evidence and admitted without objection, which is also not stamped.

140. In view of the 1st Defendant's denial that the subject property was sold to the Plaintiffs, in the absence of the contract or agreement stated to be evidencing the alleged sale of the subject property, in the absence of evidence of the payment of the full purchase price, in the absence of evidence of the Plaintiffs possession of the subject land, the Court finds that there is no evidence before the Court that the Plaintiffs are the lawful owners of the subject property.

ISSUE 3:

Whether or not Hope Capital Limited acted as agent for the 1st Defendant when it sold the disputed property to the Plaintiffs.

141. The Court finds that issue 3 may also be restated as:

Whether or not Hope Capital Limited had the right to sell the subject property on behalf of the 1st Defendant, Grofin Africa Fund (Gh) Ltd. to the Plaintiffs.

142. In view of the analysis above and the findings of the Court that the agreed purchase price was not paid in full, that all monies collected by Hope Capital Limited remain with Hope Capital Limited, that no possession was granted to the Plaintiffs and also that there was no sale of the subject property to the Plaintiffs, the Court is of the considered opinion that the question or issue as to whether or not Hope Capital Limited acted as agent of the 1st Defendant when it purported to sell the subject property to the Plaintiffs may be immaterial at this point.

143. Regardless of the finding by this Court that there was no sale, in its duty to find the facts in respect of which the dispute has arisen, the Court has considered the above stated issue noting especially that whilst the Plaintiffs maintained that Hope Capital Limited had the authority of the 1st Defendant to sell the subject property, the 1st Defendant vehemently denied this and much time was expended in addressing the issue during the trial as well as in the written addresses filed by Counsel for the Parties.

144. In support of their case that Hope Capital Limited was authorized to sell the subject property, the 2nd Plaintiff and PW 1 relied on the Power of Attorney dated 2nd August 2016, executed by the 1st Defendant as Principal and authorizing Hope Capital Limited to be its lawful Attorney. A copy of the Power of Attorney was tendered into evidence by the 2nd Plaintiff and marked as **Exhibit B**. PW 1 also tendered in evidence the same Power of Attorney which was marked **Exhibit L**.
145. The Court finds that whilst the Power of Attorney relied on by the Plaintiffs and marked **Exhibit B** and **Exhibit L** did not indicate on the face of the document that stamp duty had been paid, DW 1, the Credit Administration Manager of the 1st Defendant relied on the same Power of Attorney, attached to his Witness Statement and marked as **Exhibit 3** and this copy was stamped.
146. In paragraph 11 of his Witness Statement DW 1 stated that the 1st Defendant by **Exhibit 3** engaged Hope Capital Limited and authorized it as its lawful Attorney to demand and institute the action in Suit No. CM/MISC/0539/2021 to recover the debt owed by Banner to the 1st Defendant.
147. The Court finds that whilst the evidence in chief of DW 1 contained in his Witness Statement is consistent with the 1st Defendant's pleadings, as held in *Majolagbe vs. Larbi* (supra), it is not enough for the Defendant's witness to simply repeat on oath the statements contained in his pleadings.
148. After careful reading of **Exhibit 3**, the Court finds that it does not appear from **Exhibit 3** that the mandate of Hope Capital Limited was restricted to instituting the action in CM/MISC/0539/2021 to recover the debt owed to the 1st Defendant by Banner. Indeed, this Court finds that there is no mention of Banner or Suit No. CM/MISC/0539/2021 in **Exhibit 3**.

149. The Court further finds that in paragraph 5 of the Power of Attorney, **Exhibit 3** it is expressly stated that Hope Capital Limited was authorized “... *to do such lawful acts and things in respect of the recovery of the Debts as the Attorney may deem fit*”.

150. In paragraphs 1 and 3 of **Exhibit 3**, it is also stated that Hope Capital Limited is authorized to:

demand and recover all outstanding debt(s) or sums owed (hereinafter the debt) to the principal by various debtors and

represent the Principal in the law courts and to do such lawful acts and things in respect of the recovery of the Debts as the Attorney may deem fit including the power to engage experts and professionals for the purpose aforesaid as fully and effectually as the Principal may do itself.

151. After carefully analyzing **Exhibit 3**, the Court finds that it is reasonable to infer, and it is indeed probable that at the time **Exhibit 3** was executed in August 2016, the understanding of the Principal and the 1st Defendant was that Hope Capital Limited had the authority of the 1st Defendant to do such lawful acts and things as was required to recover debts owed to the 1st Defendant by various debtors.

152. The Court further finds after reading **Exhibit 3** as a whole that whilst it is expressly stated in paragraph 3 of **Exhibit 3** that such lawful acts and things to recover debts may include engaging experts and professionals, this did not limit the power of the Attorney, Hope Capital Limited, to do such lawful acts and things which it deemed fit to recover the debts owed to the 1st Defendant as stated in paragraph 5 of **Exhibit 3**. Lawful act may thus include instituting actions in Court, executing agreements and even lawful sale of mortgaged property to recover debts owed to the 1st Defendant after obtaining the consent and authorization of the principal as mentioned in paragraph 2 of **Exhibit 3**.

153. In further support of their case that Hope Capital Limited was authorized to sell the subject property, PW1 referred to and relied on a letter dated 7th December 2017 (2017-12-07), received by Hope Capital Limited from the 1st Defendant and admitted in evidence without objection as **Exhibit N**. The Court finds that in paragraph 2 of **Exhibit N**, the 1st Defendant confirmed that Banner, their client has fallen in arrears due to poor re-payments on the duly granted facility agreement. The 1st Defendant in paragraph 2 of this letter, **Exhibit N** expressly authorized Hope Capital Limited to sell the subject property, with Land Certificate number GA 29534, when it stated that:

*“You are therefore requested to assist us in recovery of the account **by way of sale of the assets held by THE GROFIN FUND (Parcel of Land covered by Land Certificate number GA 29534...**” (Emphasis added)*

154. Thus, the Court finds that after the Power of Attorney to Hope Capital dated 2nd August 2016, **Exhibit 3**, the 1st Defendant by **Exhibit N** expressly authorized Hope Capital Limited in December 2017 to sell the subject property covered by Land Certificate number GA 29534.

155. This Court has also considered a Court Order made in Suit No. CM/MISC/0539/2021 and dated 23rd July 2021 which the Plaintiffs attached to the Witness Statement of the 2nd Plaintiff, admitted in evidence during the trial as **Exhibit D** and notes that the same Court Order is attached to the Witness Statement of DW 1 and was marked during the trial as **Exhibit 4**. From **Exhibit D/Exhibit 4**, this Court finds that the action instituted by Hope Capital Limited as lawful Attorney of the 1st Defendant in Suit No. CM/MISC/0539/2021 was to recover and also “realise” the subject property for the 1st Defendant. This Court therefore finds that beyond the express authorization given in 2017 in **Exhibit N**, by **Exhibit D/Exhibit 4** the 1st Defendant admits that it instituted Suit No. CM/MISC/0539/2021 acting by Hope Capital Limited, its lawful Attorney, sometime in the

year 2021, not only for its Attorney to recover possession of the subject property but also to realise same.

156. From the emails dated 8th March 2022 and 4th March 2022, exchanged between the 1st Defendant and PW 1 and copied to others, attached to the Witness Statement of DW 1, admitted in evidence without objection during the trial and marked as **Exhibits 2 and 2A**, this Court finds that the 1st Defendant acknowledged in these emails that Hope Capital Limited was seeking an Order of reserve price from the Court after which the subject property would be sold.
157. It is not expressly stated in the above-mentioned correspondence - **Exhibits 2 and 2A** that the 1st Defendant rather than Hope Capital would sell the subject property after the reserve price is obtained.
158. Until the 1st Defendant revoked its Power of Attorney to Hope Capital Limited on 12th May 2022, as evidenced by the 1st Defendant's **Exhibit 7**, the Court finds from all the evidence adduced in respect of this matter that the 1st Defendant did not expressly state or indicate to Hope Capital Limited that it had no authority to sell the subject property.
159. The Court finds after consideration and evaluation of all the evidence adduced that Hope Capital Limited was authorized by the 1st Defendant or had the approval of the 1st Defendant "*...to do such lawful acts and things in respect of the recovery of the Debts as the Attorney may deem fit*" (paragraph 5 of **Exhibit 3**) and that if Hope Capital Limited deemed it fit, it could do such lawful acts such as sale to recover debts owed to the 1st Defendant, its principal, after the 1st Defendant had authorized same (paragraph 2 of **Exhibit 3**). The Court also finds that the 1st Defendant authorized Hope Capital Limited to sell the subject property in paragraph 2 of **Exhibit N**.
160. In view of the fact that the authority of Hope Capital Limited given in **Exhibit 3** dated 2nd August 2016 was to do such "*lawful acts*" to recover debts owed to the 1st Defendant, to

answer whether or not Hope Capital Limited had authority to sell the subject property at the time it purported to do so, the Court must ascertain whether or not the purported sale of the subject property to the Plaintiffs would have been a lawful act.

PURPORTED SALE A LAWFUL ACT?

161. From the 1st Defendant's **Exhibit 7**, the Court finds that the Power of Attorney to Hope Capital was revoked on 12th May 2022.
162. The Plaintiffs maintain that the subject property was purportedly sold to them before they made the payments evidenced by **Exhibits G, G1-G20** and that at the time of the purported sale, in September 2021, Hope Capital Limited by the Power of Attorney, **Exhibit 3**, had authority to lawfully sell the subject property.
163. The Court finds from **Exhibits G, G1- G19** that the earliest of the payments made by the Plaintiffs was on 7th September 2021- **Exhibit G8**. As it is the case of the 1st Defendant that it revoked the Power of Attorney to Hope Capital Limited on 12th May 2022, this Court finds that the Power of Attorney was revoked after the date of the purported sale in September 2021.
164. The Court however acknowledges that although the Power of Attorney to Hope Capital Limited was revoked after the date of the purported sale to the Plaintiffs, it is the case of the 1st Defendant that as communicated to the 1st Defendant by Hope Capital Limited and as agreed, the property was not ready to be sold without a reserve price, the purported sale of the subject property was not lawful without a reserve price and Hope Capital Limited was not authorized to sell the subject property before a reserve price had been obtained from the Court.
165. As it is the 1st Defendant which maintained that the purported sale of the subject property was not lawful for the reason that Hope Capital Limited had represented to it that the

property could not be sold or was not ready to be sold until a reserve price had been provided by the Court and this had been agreed to, the burden was on the 1st Defendant as explained in the case *Isaac Alormenu vrs Ghana Cocoa Board* (supra), to lead evidence to back these assertions and also lead such evidence as will persuade this Court to Rule in its favour that regardless of **Exhibit 3**, Hope Capital could not lawfully have sold the subject property for the reasons provided by the 1st Defendant and summarized in paragraph 164 above.

WAS THE SUBJECT PROPERTY READY TO BE SOLD?

166. As stated in paragraph 66 above, from the pleadings, the Parties agreed that the subject property was mortgaged property, thus in paragraph 9 of his Witness Statement, the 2nd Plaintiff informed the Court that he obtained a copy of the Mortgage and Loan Agreement between Dr. Cyril Laud Bannerman of Banner Medical Center and the 1st Defendant. The 2nd Plaintiff tendered a copy of this agreement into evidence and same was admitted without objection and marked as **Exhibit C**.

167. The Court finds that **Exhibit C** which is stated to be a Mortgage agreement between the 1st Defendant and Banner is not stamped contrary to section 25 of the Stamp Duty Act, 2005 (Act 689) which requires that:

A writing evidencing a mortgage, bond, debenture, covenant, guarantee or lien shall be treated as an instrument which shall be stamped in accordance with this Act. (Emphasis added)

168. The Court therefore finds that **Exhibit C** is inadmissible even though it was admitted in evidence without objection, same is thus expunged from the record pursuant to section 8 of the Evidence Act.

169. Whilst **Exhibit C** is inadmissible, the Court finds that as already stated, from the pleadings filed, all the Parties agreed that the subject property was mortgaged property. As the undisputed fact of the matter is that the subject property was immovable property, mortgaged to the 1st Defendant to secure a loan, in applying the law to this fact, the Court finds that one of the laws applicable to whether or not the subject property as mortgaged property was ready or could lawfully be sold is the Mortgages Act, 1972 (NRCD 96) as amended.

REMEDY AVAILABLE TO THE 1ST DEFENDANT AS PROVIDED BY THE MORTGAGES ACT.

170. Section 2 of the Mortgages Act as amended provides that:

“A mortgage of immovable property shall only be capable of being effected in accordance with the provisions of this Decree, and every transaction which is in substance a mortgage of immovable property, whether expressed as a mortgage, charge, pledge of title documents...sale with right of repurchase or in any other manner, shall be deemed to be a mortgage of immovable property and shall be governed by this Decree.” (Emphasis added)

171. Upon failure of performance of an act or acts secured by the mortgage the mortgagee, section 15 of the Mortgages Act as amended further provides that the mortgagee may do either or both of the following:

(a) sue the mortgagor or obligor or both on any personal covenant to perform;

(b) realise his security in the mortgaged property in all or any of the ways provided in this Part, and in no other way notwithstanding any provision to the contrary in the mortgage.

172. For purposes of realizing his security in the mortgaged property, the ways provided in Part II of the Mortgages Act as amended include in particular application by the mortgagee to the Court to appoint a receiver, entering possession of the mortgaged property and applying to the Court for a judicial sale as provided for in sections 16,17 and 18 respectively of the Mortgages Act as amended.

173. Where a mortgagee such as the 1st Defendant opts to sell the mortgaged property upon failure of performance of an act or acts secured by the mortgage, as was the decision in this case, section 18 (1) and (3) of the Mortgages Act provide that the mortgagee:

“...may apply to the court for an order for the judicial sale of the mortgaged property, and upon being satisfied as to the existence of grounds for the application the court shall, upon such conditions as it deems just and equitable, grant an order for judicial sale of all or part of the mortgaged property.

(3) A judicial sale ordered under this section shall be by public auction unless the mortgagor and all encumbrancers subsequent to the mortgagee requesting the judicial sale and of whom he has notice at the time of the sale agree to a private sale and the terms of the sale are approved by the court. (Emphasis added)

REMEDY AVAILABLE TO THE 1ST DEFENDANT PROVIDED BY THE BORROWERS AND LENDERS ACT.

174. In answer to questions asked by Counsel for 2nd and 3rd Defendants, PW 1 as Chief executive officer of Hope Capital Limited stated as recorded at page 6 of the record of proceedings held on 15th December 2023 that in respect of the subject property, Hope Capital Limited relied on the provisions of the Borrowers and Lenders Act for the recovery of possession and sale of the subject property. In his written address, Counsel for Plaintiff

referred to section 66 (1),(2),(3) and (4) of The Borrowers and Lenders Act, 2020 (Act 1052) and submitted that by these provisions of Act 1052, the 1st Defendant as a lender could realise the subject property as a collateral given to secure the loan to Banner by auction, public tender, private sale or any other method provided for in the credit agreement.

175. The Court notes that as stated in Act 1052, it is:

“AN ACT to regulate transactions between borrowers and lenders, to establish a Collateral Registry, to provide a legal framework for the registration and enforcement of security interests in collateral, to establish an order of priority of security interests, to provide for credit agreements generally and provide for related matters.” (Emphasis added)

176. By section 1 (i) and (j) of Act 1052, the Act applies to the enforcement of security interests created under the Mortgages Act. In section 1(i) and(j) of Act 1052 it is stated as follows:

“This Act applies to a security interest other than a security interest mentioned in subsection (3), and includes:

- (i) *the effectiveness of a security interest against third parties, priority and enforcement of security interests in fixtures created under the Mortgages Act, 1972 (N.R.C.D. 96) or the Home Mortgage Finance Act, 2008 (Act 770); and*
- (j) *the effectiveness of a security interest against third parties, priority and enforcement of mortgages and other interests in immovable property, including a transfer of rental payments and a right to payment that arises in connection with an interest in immovable property created under the Home Mortgage Finance Act, 2008 (Act 770) or the Mortgages Act, 1972 (N.R.C.D. 96).*

177. In section 85 of Act 1052, the interpretation section of the Act, a *“security interest”* means a proprietary right in a movable or immovable asset that is created by an agreement to secure payment

or the performance of an obligation, regardless of whether the parties have denominated it as a security interest and regardless of the type of asset, the status of the fixed and floating charge, charge on chattels, mortgage over an immovable property, ... or other encumbrance of any nature created by an agreement other than a lien arising by operation of law” (Emphasis added)

178. The subject property as immovable property in respect of which a mortgage had been created to secure the repayment of the loan given to Banner by the 1st Defendant therefore amounts to a security interest within the meaning of Act 1052. The Court further finds that the 1st Defendant was also a lender within the meaning of Act 1052 whilst Banner the beneficiary of the loan facility provided by the 1st Defendant was a borrower.
179. From **Exhibit M** and **Exhibit M3** attached to the Witness Statement of PW1 which are copies of documentation relating to the loan agreement between the 1st Defendant and Banner, the Court finds that, the 1st Defendant was described as a Lender and Banner was described as a Borrower.
180. In **Exhibit M 3**, the Deed of Charge executed between the 1st Defendant and Banner it is also stated that the Loan Agreement entered into between the Parties is dated 5th March 2010. From **Exhibits M1, M2 and M3**, the Court finds that the documentation relating to the loan agreement between the 1st Defendant and Banner were executed in March 2010 and it is also stated in these documents that the loan agreement shall be governed by the laws of Ghana.
181. In view of the dates sated in the documents relating to the loan agreement, in paragraph 180 above, the Court notes that the Borrowers and Lenders Act, 2008 (Act 773) is the law that would have been in force at the time the Loan Agreement and most other documentation related to the loan agreement would have been executed. This Court however finds that whilst the loan agreement between Banner and the 1st Defendant was executed before Act 1052 came into force in December 2020, and whilst Hope Capital Limited may have initiated steps to recover the loan before the year 2020 and before Act

1052 came into force, The Borrowers and Lenders Act, 2008 (Act 773) which was in force at the time of the loan was obtained or steps were taken to recover same has been repealed by section 88 (1) of Act 1052.

182. In the resolution of this dispute, the Court will however consider and apply Act 1052 for the reason that Suit No. CM/MISC/0539/2021 which was instituted for the recovery of the debt was institute sometime in the year 2021; for the reason that Counsel for Plaintiffs relied on Act 1052 in his written address filed in this Court in support of the Plaintiffs' case and also for the reason that in section 88 (2) of Act 1052, it is stated that where an attempt to enforce a security interest has been made by a lender before the entry into force of Act 1052, enforcement may continue under the prior law or may proceed under Act 1052.

183. Further, in section 86 of Act 1052 it is expressly stated that:

Where there is a conflict between this Act and any other enactment regarding the creation, perfection, effectiveness of security interests against a third party, enforcement and priority, the provisions of this Act shall supersede the provisions of that enactment. (Emphasis added)

184. The understanding of this Court is therefore that whereas the Mortgages Act as amended, the Borrowers and Lenders Act, 2008 (Act 773) and other enactments may be applicable to the enforcement of a security interest, in the event of a conflict, the provisions of Act 1052 shall supercede the provisions of the other enactments that may be applicable. It is for all the reasons provided especially in paragraphs 182 – 184 above that this Court has also considered the application of Act 1052 in answering the question whether or not the subject property was ready to be sold and not lawfully sold.

185. In applying Act 1052 to the facts of this case, the Court finds that section 60 (1) and (8) of Act 1052 provide that where an event of default arises under a credit agreement and the lender decides to “realise the security interest”, the lender shall give a notice of the default

to the borrower in writing and request the borrower to pay the amount due within thirty days after the date of receipt of the notice. If the borrower fails to pay the amount outstanding or make satisfactory arrangements to pay the amount outstanding to the lender, the lender will be entitled to the remedies listed in section 61 of the Act, which are:

(a) sue the borrower on any covenant to perform under the credit agreement;

(b) where registered under this Act, realise the security interest in the collateral without initiating proceedings in court; or

(c) appoint a Receiver or Manager under subparagraph (iii) of paragraph (b) of section 74.

(2) Where the collateral is a document of title, the lender may proceed either against the document of title or the property covered by the document of title.

186. This Court therefore finds that upon the failure to repay the loan borrowed from the 1st Defendant and secured by the subject property, the 1st Defendant as a “*lender*” within the meaning provided in Act 1052 had a number of options available to him to recover the loan and as a mortgagee within the meaning in the Mortgages Act as amended, the 1st Defendant also had number of options available to him as already explained above. Compliance with any of the above-stated laws on the matter for the purported sale of the subject property would be lawful if the 1st Defendant authorized same.

187. In support of its case that the purported sale was not lawful because the subject property was not ready to be sold, the 1st Defendant relied essentially on **Exhibits 4, Exhibit 5, Exhibit 2 and Exhibit 2A** in support of this claim.

188. From the 1st Defendant’s **Exhibit 4** which is an order made in Suit No. CM/MISC/0539/2021 and dated 23rd July 2021, the Court finds that the Parties to Suit No. CM/MISC/0539/2021 as stated on the face of the Order were Grofin Africa Fund (Gh) Ltd suing per its lawful Attorney, Hope Capital Limited as Applicant and Banner Medical Centre and Funeral Home and Christine Bannerman as Respondents.

189. The Court therefore finds from **Exhibit 4** that the 1st Defendant as lender acting by Hope Capital Limited, its lawful Attorney, opted to institute an action in Court against the borrower, Banner, to recover the loan secured by the subject property.
190. This Court also finds from the 1st Defendant's **Exhibit 4**, and from the 1st Defendant's **Exhibit 8** - Terms of Settlement filed on 23rd November 2022 in Suit No. CM/MISC/0539/2021, that, it is stated that the action instituted in Court by the 1st Defendant acting by Hope Capital Limited as its lawful Attorney in Suit No. CM/MISC/0539/2021 was an action to recover possession of and "*realise*" the subject property.
191. In view of the fact that the action instituted in Suit No. CM/MISC/0539/2021 was not for "*an order for a judicial sale*" as available under the Mortgages Act, but an action to recover possession of and "*realise*" the subject property, as provided in Act 1052, this Court finds that it is more probable than not that the 1st Defendant acting by Hope Capital Limited exercised its option under Act 1052 as suggested by PW 1 and by Counsel for the Plaintiffs in his written address.
192. By section 64 (3) of Act 1052, a warrant or Order for police assistance such as that contained in **Exhibit 4** may be issued on an application by a lender and under the appropriate circumstances to enable a lender enforce a right of possession in a peaceable manner. For this reason, the Court further finds from **Exhibit 4** that Hope Capital Limited more probably than not pursued the matter pursuant to Act 1052.
193. In section 84 of Act 1052 it is provided that a person who seeks recourse to the Court for any remedy under the Act shall do so in accordance with the High Court (Civil Procedure) Rules, 2004 (CI. 47) or the District Court Rules, 2009 (CI. 59).

194. In Order 30 of C.I. 47, especially per Rules 1, 3 and Rule 4(c) it is provided that where in any cause or matter relating to immovable property it appears necessary or expedient for the purposes of the cause or matter that the immovable property or any part of it should be sold, the Court may order the immovable property, which includes any interest in or right over immovable property, or part of it to be sold.

195. After reading 30 Rule 2(1) of C.I. 47, the Court finds that where an order directing immovable property to be sold is made by the Court, in chambers or in Court, the direction of the Court as to manner of carrying out the sale would be either of the following:

- i. The Court may permit the party or person having the conduct of the sale to sell the immovable property as that person thinks fit;
- ii. the Court may direct that the immovable property be sold in such manner as the Court may direct either by the order; or
- iii. the Court may direct that the sale be carried out in a manner stated under subrule (4) for the best price that can be obtained.

In each case however, all proper parties shall join in the sale and conveyance as the Court shall direct.

196. In Order 30 Rule 2 (4) of C.I. 47 it is provided as follows:

On the hearing of the application, the Court may give such directions as it thinks fit for the purpose of effecting the sale, including, without prejudice to the generality of the foregoing, directions:

(a) appointing the party or person who is to have the conduct of the sale;

(b) fixing the manner of sale, whether by contract conditional on the approval of the Court, private treaty, public auction, tender or some other manner;

(c) fixing a reserve or minimum price. (Emphasis added)

197. This Court finds that **Exhibit 5**, as attached to the Witness Statement of DW 1 is stated to be a progress report received by the 1st Defendant from Hope Capital Limited in April 2022. From **Exhibit 5**, this Court also finds that Hope Capital Limited informed the 1st Defendant that an application for a “reserve price” filed in Court had been fixed or scheduled by the Court for hearing on 6th May 2022.
198. From the 1st Defendant’s **Exhibit 2A**, an email dated 4th March 2022, tendered through PW 1, Richard Akowuah, in Court on 12th December 2023, this Court further finds that the email is addressed to Aikins Partu, the Credit Administration Manager of the 1st Defendant, who testified in support of the 1st Defendant’s case as DW 1, and the email was also copied to Richard Akowuah, Chief Executive Officer of Hope Capital Limited, who testified in support of the Plaintiffs’ case as PW 1. By this email, **Exhibit 2A**, the above named persons were informed that lawyer for the prospective buyers had been informed yesterday, that is 3rd March 2022, to be patient as a “reserved price” had to be obtained for the property “before same can be sold”.
199. It is further stated in the email marked as **Exhibit 2A** that “*So as Mr Akowuah put it, same is not legally ready to be sold and this was communicated to the prospective purchasers lawyer.*” (Emphasis added)
200. The Court therefore finds from the references to the application for a reserve price and to the requirement for a reserve price from the Court stated in **Exhibit 5** and **Exhibit 2A**, as well the provisions of Order 30 Rule (2)(1) and Order 30 Rule 4 (c) of C.I. 47 as reproduced above, that there may well have been an application to be heard by the Court in relation to the sale of the subject property scheduled for “6th May 2022”, at which Hope Capital

Limited would have requested the Court to fix a “*reserve price*” or a minimum price at which the subject property was to be sold. This would have been in accordance with section 84 of Act 1052 as reproduced in paragraph 193 above.

201. The Court notes that even though by Order 30 Rule 2(1) of C.I. 47 stated above, the Court may direct a party or person having the conduct of the sale of an immovable property to sell same in a manner that that person thinks fit, there is no evidence before the Court that such an Order and direction was made in Suit No. CM/MISC/0539/2021.
202. The Court also finds that there is no evidence before the Court as required by Order 30 Rule 2(1) of C.I. 47 that all proper parties joined in the sale and conveyance. Indeed, in this regard, the Court agrees with the observations made by Counsel for 1st Defendant and stated in his written address filed in Court that, Hope Capital did not have authorization of the 1st Defendant to enter into the purported sale agreement with the Plaintiffs before a reserve price had been obtained and it is for this reason that the Plaintiffs’ stated in their Statement of Claim and PW 1 admitted that the document evidencing the purported sale was in the names of the Plaintiffs and Hope Capital Limited rather than the name of the 1st Defendant who is the principal, and a proper party to the purported sale agreement.
203. Further, in tendering **Exhibit 2**, the email dated 8th March 2022 and **Exhibit 2A**, the email dated 4th March 2022 through PW 1 in Court without objection, the Court however finds that the Plaintiffs by their own witness, PW 1, acknowledged the contents and import of the application for and the references to the need for a reserve price before the subject property could be sold.
204. The Court also finds that in representing to the 1st Defendant in the year 2022, that the subject property could not be sold without a reserve price from the Court, Hope Capital Limited represented and admitted that it did not have authority to sell the subject property in the year 2021 when the reserve price required had not been obtained by the Court, which

is a lawful procedure and remedy of the 1st Defendant provided by law, sections 60, 61, 84 of Act 1052 and Order 30 Rule 2(4)(c) of C.I. 47 , in the event of a default by Banner to repay the loan secured by the subject property.

205. PW 1 stated during the trial that from his past experience with the 1st Defendant, some other property had been sold privately. PW 1 also explained other arrangements he had reached with the 1st Defendant in respect of other property secured by mortgage. The Court notes that although Order 30 Rule 2(1) and Order 30 Rule 2(4)(b) of C.I. 47 and Act 1052 contain provisions on the manner of sale which include sale by private treaty, in the circumstances of this case however, the Court finds especially from **Exhibits 2A** and **Exhibit 5** that a firm agreement was reached by Hope Capital Limited represented by PW 1 and the 1st Defendant that the subject property could not and would not be sold without a reserve price from the Court being made in Suit No. CM/MISC/0539/2021, and past arrangements made in respect of other property is irrelevant.

206. After consideration of all the evidence adduced in respect of this issue and analyzed in the paragraphs above, the Court finds that Hope Capital Limited had no authority and could not lawfully sell the subject property in the year 2021 when in accordance with law it agreed with the 1st Defendant that the subject property could not and would not be sold without a reserve price. Without a reserve price, the Court finds that the subject property was not ready to be sold and this was the agreement by the Parties. It was therefore not lawful for Hope Capital to have purported to sell the property to the Plaintiffs in the year 2021 without a reserve price and authorization of the 1st Defendant.

DID THE PLAINTIFFS KNOW OR OUGHT TO HAVE KNOWN THAT THE SUBJECT PROPERTY WAS NOT READY TO BE SOLD AND COULD NOT LAWFULLY BE SOLD.

207. It is the claim of the Plaintiffs that they conducted the necessary due diligence which informed them that Hope Capital Limited could lawfully sell the subject property to them. The 1st Defendant denied this and stated that if the Plaintiffs had conducted the necessary due diligence as they claim, they would have known that the property was not ready to be sold.
208. The Plaintiffs relied on **Exhibit E** in support of their claim that per their due diligence the property was ready to be sold. The Court finds that **Exhibit E** is a valuation report on the subject property dated September 2021 stated to have been prepared by Adsan Consult upon a request by the Managing Director of the 1st Defendant. It informed the 1st Defendant that in the opinion of the valuers the subject property has a market value in the sum of Two Million Seven Hundred Thousand Ghana Cedis (GHS 2,700,000) and a forced sale value of One hundred, Eight Hundred and Ninety Thousand Ghana Cedis (1,890,000.00).
209. The Court therefore finds that **Exhibit E** is simply a valuation report prepared upon request by the 1st Defendant and it is no evidence that the subject property could lawfully be sold by Hope Capital Limited at the time it purported to do so.
210. In further support of the due diligence they conducted, in paragraph 12 of their Statement of Claim, the Plaintiffs stated that they knew that Hope Capital Limited initiated an action in Court to recover the property and had obtained judgment against Banner.
211. During the trial, the Plaintiffs relied on **Exhibit D**, which is the same as **Exhibit 4** relied on by DW1 and analyzed in paragraph 155 above. In **Exhibit D**, the Commercial Division of the High Court noted and stated in its Order made on 23rd July 2021 that in the affidavit in support of its application, the Applicant, Hope Capital Limited had requested assistance of the police “*in taking and realizing*” the mortgaged property. The Order however made by the Court as stated in **Exhibit D** which is in accordance with Act 1052 is only directed at the Police to assist the Applicant in “*taking possession*” of the property situate at Pokuase

described in the schedule to the Parties Mortgage Agreement in respect of indebtedness of GHS 2,499,760 agreed to by the parties.

212. This Court therefore finds that **Exhibit D** is no Order for Hope Capital Limited to realise the loan secured by the mortgaged property by selling same after taking possession.
213. The Court finds that the Plaintiffs **Exhibit D** especially, is therefore proof of the 1st Defendant's claim that the Plaintiffs ought to have known that the subject property could not be sold for **Exhibit D** ought to have put the Plaintiffs on notice to request for the orders or direction of the Court or authority of Hope Capital Limited to sell the subject property by a private treaty as alleged by PW1 or authorization of the 1st Defendant and the Borrower, in compliance with relevant statutory requirements for the sale of this particular property by private treaty as this is the manner in which PW1 alleges the property was sold.
214. In arriving at the conclusion in paragraph 213 above, the Court has also considered that it is the case of the Plaintiffs as stated in the Statement of Claim that the 1st Plaintiff is a company registered to deal in real estate and the Court has also considered that the 2nd Plaintiff stated in Court during the trial that the documents it received from Hope Capital Limited were reviewed by its lawyers before the purported sale or payments of monies by the Plaintiffs to Hope Capital Limited.
215. In arriving at the conclusion in paragraph 213 above, the Court further considered that as already stated above, in tendering **Exhibits 2** and **2A** through PW1, who admitted the contents of same, the Plaintiffs by their own witness admitted the 1st Defendant's case that as stated in **Exhibit 2** and **2A** that the subject property was not ready to be sold without a reserve price or at the time Hope Capital Limited purported to sell same to the Plaintiffs.
216. The Court therefore finds that the subject property was not ready to be sold, the Plaintiffs admitted by their own witness during the trial that the subject property was not ready to

be sold and the Plaintiffs ought to have known that the subject property was not ready to be sold if they had been diligent.

ADMISSION OF FRAUD BY THE PLAINTIFFS' WITNESS

217. In cross-examination of PW1 by Counsel for the 1st Defendant held on 12th December 2023, PW 1 stated as recorded at page 8 of the record of proceedings for that day that Hope Capital Limited had informed the 1st Defendant that the subject property was not ready to be sold until a reserve price had been obtained by the Court to get the 1st Defendant off its back so that it could sell the subject property.
218. This Court finds that the answer by PW1 is an admission of a deliberate deception or an admission of a false representation made knowingly to the 1st Defendant by no less a person than the Chief Executive Officer of Hope Capital Limited and witness of the Plaintiffs under oath.
219. In the Judgment of the Supreme Court delivered by His Lordship Gaewu JSC, in the case of Laryea and another vrs Abubakari Mohammed and another [Unreported, Civil Appeal No. J4/31/2023, 8th November 2023] the Supreme Court referred to the case of S.A Turqui & Bros. V Dahabieh [1987-88] 2 GLR 468 and the case of Nana Asumadu II (deceased)(substituted by Nana Darku Ampem) (deceased) (substituted by Abusuapanyin Amgo Mensah) and Nana Danyi Quarm IV (deceased) (substituted by Samuel Ekobo Acquaye) v Agya Ameyaw (SC) (Civil Appeal No. J4/01/2018; dated 15th May 2019) in which the Supreme Court stated per His Lordship Yaw Appau JSC that:

“In law, fraud is a deliberate deception to secure unfair or unlawful gain, or to deprive a victim of a legal right. It is both a civil and a criminal wrong. Fraud be it civil or criminal, has one connotation. It connotes the intentional misrepresentation or concealment of an important fact upon

which the victim is meant to rely, and in fact, does rely to the harm of the victim. It is therefore criminal in nature even when it is clothed in civil garbs.” (Emphasis added)

220. The Court finds that there is evidence on record which may well indicate that the deliberate deception by Hope Capital Limited was to secure an unlawful gain.

221. In its Statement of Defence, the 1st Defendant stated that it revoked the authority of Hope Capital Limited to act as its Attorney by a letter dated 12th May 2022. A copy of this letter was attached to the Witness Statement of DW and was admitted in evidence without objection and marked as **Exhibit 7**.

222. Critically, the Court notes that the 1st Defendant added in its Statement of Defence that it revoked the authority of Hope Capital Limited because Hope Capital Limited admitted misapplying funds or monies it collected from some defaulting customers of the 1st Defendant. In support of this claim, the 1st Defendant relied on **Exhibit 6**, attached to the Witness Statement of DW1. In **Exhibit 6**, a letter dated 1st March 2021, signed by the Chief Executive Officer of Hope Capital Limited and addressed to the 1st Defendant, the Court finds that Hope Capital Limited admits at page 2 that the company has faced financial challenges in the last year which has led it to make *“some unpopular and some unethical financial decisions just to save the company from collapsing entirely”*. By **Exhibit 6**, the Chief Executive Officer of Hope Capital Limited, and PW1 therefore craved the indulgence of the 1st Defendant to bear with the Company to enable Hope Capital Limited *“take steps to settle all out standings appropriately.”*

223. The Court also finds that **Exhibit 6** which was dated 1st March 2021, was written just over a year before **Exhibit 7**, dated 12th May 2022. **Exhibit 6** was also written shortly after Hope Capital informed or assured the 1st Defendant in its report **Exhibit 5**, that an application for a reserve price filed in Suit No. CM/MISC/0539/2021 would be heard by the Court on 6th May 2022.

224. The Court therefore finds from the dates of **Exhibit 6 and Exhibit 7** and also from the contents of **Exhibit 6** that it is more probable than not that the reason for revocation of the authority of Hope Capital Limited is as the 1st Defendant states.
225. The Court notes that PW1 and Chief Executive Officer of Hope Capital Limited who filed a Witness Statement in this case and had knowledge of the 1st Defendant's case in this regard did not dispute these claims.
226. From the admissions by PW1 that it had made unpopular and some unethical financial decisions as contained in **Exhibit 6**, dated 1st March 2021, and from the admissions by PW1 during the trial that the monies paid by the Plaintiff mainly in the year 2021 to Hope Capital Limited and evidenced by **Exhibit G,G1-G19** had not been reported to or handed over to the 1st Defendant, the Court finds that together the above admissions amount to that Hope Capital Limited purported to sell the subject property to the Plaintiffs well aware that it had represented to the 1st Defendant that same could not be sold so that it could address its financial challenges even though it was an unethical decision to make.
227. In the case of *The Republic vs. Daniel Mckorley, Exparte: Al-Hassan Iddisah [Unreported; Suit No: GJ/0057/2020; 27th Day of February, 2023; CA]*, His Lordship Kweku T. Ackaah-Boafo, J.A. held thus:

*I think the time has come ... to re-state the fact that **when the law speaks of reasonable doubt it is not a fanciful doubt**. To paraphrase the Supreme Court of Canada in *R. v. Villoroman*, [2016] 1 SCR 1000, 2016 SCC 33 (CanLII) at p. 1023, "A reasonable doubt is a doubt based on 'reason and common sense'; it is not 'imaginary or frivolous'; it 'does not involve proof to an absolute certainty'; and it is 'logically connected to the evidence or absence of evidence' (See also *R. v. Lifchus*, [1997] 3 SCR 320, 1997 CanLII 319 (SCC)). In other words, the reasonable doubt threshold does not require a fantastical suspension of disbelief. **It is a doubt that logically***

arises from the evidence, or the lack of evidence based on common sense and reason.
(Emphasis added)

228. Relying on the above cited authority, the Court finds that there is proof beyond reasonable doubt on record that the transaction between Hope Capital Limited and the Plaintiffs was tainted with fraud for the evidence available, mainly admissions by PW1 and summarized in paragraph 226 above is logically connected and points to the fact that the false representation made by PW1 to the 1st Defendant that the subject property was not ready to be sold without an order for a reserve price from the Court was a representation made to secure an unfair or unlawful gain.

229. The Court has further considered that in *Laryea and another vrs Abubakari Mohammed and another* (supra), the Supreme Court also referred to the often-cited case of *Derry v Peek [1889] 14 App. Cas 317*, as the locus classicus on the matter and stated that in the case of *Derry v Peek*, Lord Herschell stated that:

“Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, careless, whether it be true or false.” **(Emphasis added)**

230. This Court therefore finds relying on the authorities stated in paragraph 229 above that the fraud perpetrated by Hope Capital Limited on the 1st Defendant was also proved when the Chief Executive Officer of Hope Capital Limited, who is also the Plaintiffs’ Witness, PW1, admitted in Court and on oath that the statements made to the 1st Defendant, it’s principal, that the subject property was not ready to be sold without a reserve price from the Court was false and the statement was made knowingly.

231. The Court makes this finding of fraud in this case although fraud was not pleaded after consideration of and relying on the decision of the Supreme Court in the case of *The*

Republic vrs High Court, Commercial Court 8, Accra Ex parte: Dr Samuel Annor and 2 interested parties [Unreported, Civil Motion No. J5/56/2022, 14th December 2022, SC] in which the Supreme Court held per Dotse JSC (as he then was) that failure to plead fraud does not preclude a Court from considering it, if there is evidence to that effect on record.

232. In the case of *The Republic vrs High Court, Commercial Court 8, Accra Ex parte: Dr Samuel Annor and 2 interested parties* (supra) the Supreme Court further held that even if fraud is not pleaded, but there is evidence admitted on record without objection, not rendered inadmissible on legal grounds, the Court cannot ignore it unless it will result in a miscarriage of justice.

233. This Court finds that on this occasion PW 1 admitted to fraud in Court, the evidence is admissible and to ignore same will rather result in a miscarriage of justice.

234. The Court also finds that the transaction between Hope Capital Limited and the Plaintiffs was tainted with fraud and same cannot bind the 1st Defendant.

235. The Plaintiffs may well note as the Court has noted that the evidence of PW1, Richard Akowuah, Chief Executive Officer of Hope Capital Limited is evidence given by a person who dealt with the Plaintiffs in respect of the transactions leading to this suit, that PW1 their own witness admitted by **Exhibit 2A** and **Exhibit 5**, the Defendant's case that he had knowledge and had caused the 1st Defendant to believe and agree that the subject property could not be sold without a reserve price from the Courts, that PW1 admitted whilst under oath to fraud perpetrated on the 1st Defendant which makes any purported sale transaction between the Plaintiffs and Hope Capital Limited unenforceable and also that PW 1 admitted during the trial in cross-examination by the 1st Defendant's Counsel that if the Plaintiffs are not successful in the instant action, Hope Capital Limited would refund the monies received from the Plaintiffs in respect of the purported sale of the subject property to the Plaintiffs.

236. The Court has also considered that the evidence of PW1 that Hope Capital Limited will refund sums received from the Plaintiffs to them is evidence of the Chief Executive Officer of Hope Capital Limited who has authority to make such decisions and the Plaintiffs may do well to advise themselves accordingly.

ISSUE 2:

Whether or not the Defendants have trespassed on the Plaintiffs' land

237. The Court is unable to find that the Defendants have trespassed on the subject land when there is no evidence that the Plaintiffs lawfully acquired same or own same.

ISSUE 6:

Whether or not the property has been legally redeemed by the 2nd Defendant,

AND

ISSUE 7:

Whether or not the 2nd Defendant owns the property in dispute.

238. It was the Defendants case that the subject property has lawfully been redeemed by the 2nd Defendant. The 1st Defendant therefore assumed “*the twin burdens of proof and standard of proof*” and it was their duty to lead the evidence essential to this claim to the standard required by law to persuade the Court to determine this issue in their favour as explained by the Supreme Court in *Isaac Alormenu vrs Ghana Cocoa Board* (supra).

239. The Court has considered especially the Witness Statement of the 2nd Defendant admitted in evidence as her evidence in chief together with attached exhibits, admitted without objection, which exhibits include:

- i. **Exhibit 12** - a letter dated 14th September 2022 written by the 1st Defendant to the 2nd Defendant requesting the 2nd Defendant to pay One Million, Nine Hundred Thousand Cedis GHS 1,900,000 in final settlement of the outstanding amount owed to the 1st Defendant and
- ii. **Exhibit 13** - a letter dated and 11th November 2022, written by the 1st Defendant to the 2nd Defendant acknowledging receipt of the above stated amount from the 1st Defendant and informing the 2nd Defendant of the release of the subject property as collateral for the loan.

240. The Court has also considered the 1st Defendant's:

- i. **Exhibit 8** - Terms of Settlement executed between solicitors of the 1st Defendant and the 2nd Respondent herein and solicitors for Banner and filed in Court on 23rd November 2022 in Suit No. CM/MISC/0539/2021, which is the same as the 2nd Defendant's **Exhibit 15**, and
- ii. **Exhibit 9** - Discharge of Mortgage dated 11th November 2022 which is the same as the 2nd Defendant's **Exhibit 14**.

241. The Court has further considered the answers provided by the 2nd Defendant during cross-examination by Counsel for Plaintiffs and her answer in cross-examination by Counsel for 1st Defendant held on 16th May 2024.

242. On the totality of the evidence adduced before the Court as well as the legal arguments contained in the written addresses filed, especially the submissions filed by Counsel for 2nd and 3rd Defendants and summarized in paragraphs 33 and 35 above, this Court finds that the Defendants led credible evidence in support of the claim by the 1st Defendant that the 2nd Defendant has legally redeemed the subject property, that the evidence led was to the standard required by law, that it is more probable than not that the 2nd Defendant has redeemed the subject property and therefore owns same. The Court is therefore persuaded to determine this issue in favour of the Defendants and therefore finds that the subject property has been legally redeemed by the 2nd Defendant and for that matter she owns same.

IX. CONCLUSION

243. The case of the Plaintiffs is wholly dismissed.

244. Costs of Fifteen Thousand Cedis (GHS 15,000) is awarded in favour of the 1st Defendant against the Plaintiffs having regard to Order 74 of C.I. 47

245. Costs of Ten Thousand Cedis (GHS 10,000) is awarded in favour of the 2nd Defendant and 3rd Defendants against the Plaintiffs having regard to Order 74 of C.I. 47.

[SGD]

**NABEELA NAEEMA WAHAB (MS) J.
(JUSTICE OF THE HIGH COURT)**

COUNSEL:

1. **MICHAEL DONKOR FOR THE PLAINTIFFS** – **PRESENT**

2. **SAMUEL QUANSAH ANSAH FOR THE 1ST**

DEFENDANT

– PRESENT

3. ROSEMARY ASANTEWAA OFORI HOLDING
BRIEF OF HUBERT SEVOR FOR THE 2ND AND
3RD DEFENDANTS

– PRESENT

CASES REFERRED TO:

1. *Re Asere Stool; Nikoi Olai Amontia IV (Substituted by Tafo Amon II vrs Akotia Oworsika III (Substituted by) Laryea Ayiku III [2005-2006] SCGLR 637.*
2. *Nana Kwadwo Poku vrs Michael Adusei [Unreported; Suit No. H1/02/2017, 24th July 2018].*
3. *Solomon Baah vrs Melcom (Ghana) Ltd and Another [Unreported; Suit No H1/27/2017, 27th February 2016].*
4. *Ababio vs. Akwasi IV [1994–95] GBR 774.*
5. *Isaac Alormenu vrs Ghana Cocoa Board [Unreported, Civil Appeal No. J4/86/2022, 8th February 2023].*
6. *Sumaila Bielbiel (No. 3) v Adamu Dramani & Attorney-General [2012] 1 SCGLR 370 at 371.*
7. *Gifty Oforiwa & Anor vs. Patrick Nutor [Unreported; Civil Appeal No. H1/225/2018; 16 May 2022; CA].*
8. *Adwubeng vs Domfeh [1996-97] SCGLR 660.*
9. *Majolagbe vs. Larbi (1959) GLR 190*
10. *Khoury v Richter [8 December 1958, unreported].*
11. *In re Presidential Election Petition (No. 4) Akuffo-Addo & Ors. vs. Mahama & Ors. [2013] SCGLR (Special Edition) 73.*
12. *Frabina Ltd. v. Shell (Gh.) Ltd. [2011] 1 SCGLR 429.*
13. *Opanin Kwaku Duah and another vrs Peter Kofi Kyere and two others [Unreported, Civil Appeal No. J4/41/2021, Judgment of 18th January 2023, SC].*
14. *Lizori Ltd vs Boye & School of Domestic Science & Catering [2013-2014] SCGLR 889.*
15. *Juxon Smith vs. KLM Dutch Airlines [2005-2006] SCGLR 438.*

16. Laryea and another vrs. Abubakari Mohammed and another [Unreported, Civil Appeal No. J4/31/2023, 8th November 2023].
17. S.A Turqui & Bros. vs. Dahabieh [1987-88] 2 GLR 468
18. Nana Asumadu II (deceased)(substituted by Nana Darku Ampem) (deceased) (substituted by Abusuapanyin Amgo Mensah) and Nana Danyi Quarm IV (deceased) (substituted by Samuel Ekobo Acquaye) v Agya Ameyaw (SC) (Civil Appeal No. J4/01/2018; dated 15th May 2019).
19. The Republic vs. Daniel Mckorley, Exparte: Al-Hassan Iddisah [Unreported; Suit No: GJ/0057/2020; 27th Day of February, 2023; CA].
20. Derry v Peek [1889] 14 App. Cas 317.
21. The Republic vrs High Court, Commercial Court 8, Accra Ex parte: Dr Samuel Annor and 2 Interested Parties [Unreported, Civil Motion No. J5/56/2022, 14th December 2022, SC].