**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE SUPREME COURT**
**ACCRA- GHANA**
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**CORAM: AKUFFO,(MS) JSC (PRESIDING)**
**BROBBEY, J.S.C**
**DATE-BAH, J.S.C**
**ANSAH, J.S.C**
**ASIAMAH, J.S.C**

**SUIT NO. CA J4/34/2007**
**20TH NOVEMBER, 2008**

**EDMUND ASANTE – APPIAH**

- **VRS –**

**MADAM KATE AMPONSAH ALIAS YAA MANSAH**

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**BROBBEY JSC:**

This is an appeal from the decision of the Court of Appeal which allowed an appeal against the decision of the High Court sitting at Koforidua. The facts which gave rise to the litigation before this court are as follows: The plaintiff who shall hereafter be referred to as the appellant claimed that he alone bought the subject matter of the case which is a house together with an adjoining plot, both of which are situated at Apedwa. He further claimed to have bought it from its original owner, the United African Company and after the purchase he permitted his late brother and the brother's family to live in it. The respondent was the wife of the late brother who also lived in the house.

It was part of the case of the appellant that after the death of her husband the respondent admitted at various meetings that the property belonged to the appellant.

The respondent denied the claims of the appellant. She rather contended that the property was bought jointly by the appellant and her deceased husband who was the half brother of the appellant. After the trial, the High Court gave judgment for the appellant. The respondent then appealed to the Court of Appeal which allowed

the appeal and reversed the judgment of the High Court. Aggrieved by that decision, the appellant appealed to this court.

The appellant filed four grounds of appeal but ended up arguing three of them.

The most fundamental of the grounds was ground (c) which read as follows:

> "The appellate court erred in its construction of section 2 of the Power of Attorney Act, 1998 (Act 548)."

The parties were agreeable that the appellant was at all material times during the litigation resident in England but sued through Nana Kwasi Twum Barima by the use of a power of attorney which was exhibited at page fifteen of the record of proceedings. That power of attorney was fatally flawed for two reasons. Firstly, the rule as contained in Act 548, s. 1(2) is that

> "Where the instrument is signed by the author of the power one witness shall be present and shall attest the instrument."

It is patent on the instrument that no-one signed it as a witness. The Court of Appeal rightly rejected the argument of counsel for the appellant that the Commissioner for Oath doubled as both the witness and the person before whom the power was executed. There is no legal or statutory basis for that argument. It would be observed that the provision is couched in imperative terms. In so far that the power of attorney in question was not signed by any witness, it was not valid.

The instant power of attorney does not show on its face as having been issued from the UK to be used in Ghana courts. The signature on it seems to have been covered by the Evidence Decree, s 160©. Having been locally produced, it did not have to be notarized.

That notwithstanding, since the power of attorney was invalid, the trial court should not have admitted it in evidence. The Evidence Decree, 1975(NRCD 323), s 8 empowers the appellate court to reject evidence which ought to have been rejected at the trial court. This section has been used in a number cases to reject inadmissible evidence admitted at the trial court even if there was no objection to them when they were first tendered. They include *Juxon-Smith v KLM Dutch Airlines* [2005-2006] SCGLR 438, *Edward Nassar & Co Ltd v McVroom* [1996-97] SCGLR 468,

*Ussher v Kpanyinli* [1989-90]2 GLR 13 and *Amoah v Arthur* [1987-88] 2 GLR 87. On the bases of these authorities, the power of attorney is rejected as invalid.

To the extent that the power of attorney was invalid, it could not have provided legitimate basis on which Nana Kwasi Twum Barima could have prosecuted the case on behalf of the appellant. In effect, Nana Kwasi Twum Barima had no capacity with which to prosecute the case.

The relevant rule applicable to the instant case is that where the capacity of a person to sue is challenged, he has to establish it before his case can be considered on its merits.
In the instant case, the respondent challenged the capacity of the appellant right from the inception of the trial. The challenge was explicit in the first paragraph of the statement of defence and in the cross-examination of Nana Twum Barima. The appellant had to establish his capacity before he could expect the court to have considered his case on its merits. He woefully failed to establish the capacity in which he sued by his reliance on the invalid power of attorney.

The evidence given by Nana Kwasi Twum Barima was inadmissible to the extent that he had no capacity to testify as he did.
The appellant himself never testified in the action. In view of the conclusion that the power of attorney was invalid and the one who relied on it had no capacity and therefore his evidence was inadmissible, the appellant was left in a situation as if no-one represented him. The case of the appellant was thus reduced to mere pleadings filed on his behalf. Pleadings obviously do not make evidence on which the appellant could rely to prosecute his case. The failure of the appellant to establish the capacity in which the action was prosecuted was sufficient basis on which to dismiss the appellant's claims. Put differently, even before considering the merits of the case, want of capacity alone was sufficient for the appellant to have lost the case. There was no merit in ground © of the claim and same is dismissed accordingly.

Ground (a) of the grounds of appeal was that the judgment was against the weight of evidence. In arguing that ground of appeal, counsel for the appellant contended

that the respondent admitted at various meetings held after the death of her husband that the property belonged to the appellant jointly with her late husband. To the appellant, that admission was sufficient to prove the case of the appellant. He thereafter contended that the appellant had discharged the onus of proof on him.

That admission was not sufficient to establish the case of the appellant for the disputed property. Both the appellant and the respondent conceded that the property was originally owned by the United African Company or the UAC. That was a reputable company which was owned and run by expatriates. The UAC cannot be presumed to have been a party to transaction that was oral in character.

From the evidence of the PW1, Maame Yaa Ntiriwaah, the property was sold as a result of the indebtedness of a family member who owed the UAC. That presupposes that the sale was by auction. Such sale of the property would surely have been witnessed by documentary evidence. If the property was sold as represented on behalf of the appellant, it would have been evidenced by at least a receipt or certificate of purchase or similar document of sale.

The Auction Sales Act, 1989 (PNDC 230), s 15 which regulates the sale of land, provides that

> "(1) A sale by auction of land shall not take place unless the auctioneer has given at least twenty-one days public notice of the sale at the major town of the district in which the land is situated, and at the place of the intended sale.
>
> (2) The notice shall be in writing and shall state the name and place of the vendor and, where necessary, by the beating of drum or gong-gong or any other method intelligible to the public as the District Chief Executive of the district where the sale is to take place may direct."

Even if the auction papers are not available because of the long lapse of time between the auction of the property and the hearing of the case at the Koforidua High Court, at least the buyer should have in his possession the certificate of purchase or some document evidencing the sale of the property from the UAC to

him. From the colonial days up today, the only means of passing title in an auctioned property is by the certificate of purchase. In the absence of a certificate of purchase, there is nothing to show that the property was auctioned or sold by the UAC to the appellant.

If it were the contention of the appellant that the property was sold without auction, there should be a receipt for the amount paid or some document evidencing the transfer of title after the sale to the buyer. No such evidence was produced throughout the trial.

Since the alleged buyer who was the appellant had nothing to show by way of sale to him of the disputed property, it followed obviously that the appellant failed to prove the sale he relied upon to claim title to the property.

A plea that the appellant's case was based on oral sale could not avail his case on account of the Conveyancing Act, 1975(NRCD 175), s 2 which provides that

> "A contract for the transfer of an interest in land is not enforceable unless
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> (a) It is evidenced in a writing signed by the person against whom the contract is to be proved or by a person who was authorized to sign on behalf of that person, or
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> (b)It is relieved against the need for writing by section 3."

Section three deals with exceptions from writing arising from operation of law, rules of equity, an order of the court, proof by will or on intestacy, by prescription, by certain types of leases or by customary grant. None of those exemptions is applicable to the sale of landed property by a reputable company like the UAC. Whatever interest the appellant claimed to have acquired from the sale of that property was not enforceable if the appellant merely relied on grant which was not evidenced in writing.

There was sufficient evidence on the record which supported the conclusion of the Court of Appeal. Ground (a) therefore failed and is accordingly dismissed.

Ground (b) of the grounds of appeal read as follows:

> "The appellate court erred on the issue of the allocation of the burden of proof in the case."

The complaint of the appellant was that the Court of Appeal erred in its determination of the onus of proof as contained in the Evidence Decree, (NRCD 323), ss. 11(4) and 12. The appellant used the two sections to impugn the decision of the Court of Appeal to have shifted the onus of proof on him in his capacity as the plaintiff.

It is difficult to see why the appellant found any problem with the stand taken by the Court of Appeal on this issue. The appellant who was the plaintiff went to court to claim possession of the disputed property. He also asked for perpetual injunction. He based his case on the averment that he single handedly and exclusively bought the property without any contribution from the husband of the defendant. The law is well established that where a party's claims are for possession and perpetual injunction, he puts his title in issue: He thereafter assumes the onus of proving his title by a preponderance of probabilities, like any party who claims declaration of title to land. There are numerous authorities on these, including *Adwubeng v. Domfeh [*1996-97] SCGLR 660, *Ebusuapanin Yaa Kwesi v. Arhin Davis* (2006) 2 GMLR50 and the old case of *Kponuglo v. Koddadja* (1933) 2 WACA 24. On the basis of that principle, the law required that the appellant should have led evidence to establish his own claim that he single-handedly and exclusively bought the disputed property. In other words, by operation of the law, the onus was on the appellant to have established his title. However, the appellant could not lead any evidence as to how he bought the property, when he bought it, the auction or the sale at which he bought it, the price that he paid for it and the documentary proof establishing his title after the alleged sale.

The appellant took the view that the onus of proof shifted to the respondent merely because she admitted that the property was acquired jointly by her late husband and the appellant. He thereafter spent his time attacking the defence put up by the respondent, pleading in his aid the principle that the plaintiff is entitled to take

advantage of loopholes or weaknesses in the case of his opponent. That principle applies where the plaintiff has already established his title and thereafter proceeds to use weaknesses in the case of his opponent to buttress his case. The principle cannot be invoked and applied in lieu of the necessity to prove one's own case.

In the light of these principles, the Court of Appeal could not be faulted in the decision to place the onus of proof on the appellant.

What the appellant sought to do was to attempt to attack the case of the respondent by punching holes into it. That was clearly a futile exercise because the respondent did not make any counterclaim. Unlike the appellant, the respondent, not having made a counterclaim, assumed no onus of proving title. It was the plaintiff who first had to prove what he had claimed in his writ of summons. The necessity for this proof was more imperative considering the fact that the respondent had been in possession of the property for over thirty years, a fact which was not disputed by the appellant. Since the appellant failed to prove his own case, he could not rely on the weaknesses of the case of the respondent to establish his case.

Ground (b) of the grounds of appeal was devoid of any merit and is dismissed accordingly.

Whichever way one considers the case of the appellant, it just could not be sustained on the balance of probabilities.

The entire appeal was without merit and should therefore be dismissed.

**S. A. BROBBEY**
**(JUSTICE OF THE SUPREME COURT)**

**S. A. B. AKUFFO (MS)**
**(JUSTICE OF THE SUPREME COURT)**

**DR. S. K. DATE-BAH**
**(JUSTICE OF THE SUPREME COURT)**

**J. ANSAH**
**(JUSTICE OF THE SUPREME COURT)**

**S. K. ASIAMAH**
**(JUSTICE OF THE SUPREME COURT)**

COUNSEL
ASANTE-ANSONG FOR THE APPELLANT
K. AMOAKO-ADJEI FOR THE RESPONDENT