IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – GHANA

CORAM: MRS WOOD, CJ (PRESIDING)

ADZOE, J.S.C

BROBBEY, J.S.C

ANSAH, J.S.C

ASIAMAH, J.S.C

CIVIL APPEAL

NO. J4/33/2007

27TH OCTOBER, 2008

FKA COMPANY LTD … PLAINTIFF/RESP/RESPONDENT

- VRS –

EFFAH SARKODIE … DEFENDANT/APPLT/APPELLANT

_____

J U D G M E N T

WOOD C.J

BRIEF FACTS

The Plaintiff/Respondent/Respondent (hereinafter known as the Plaintiff) issued out an Amended Writ of Summons and Statement of Claim on the 27th May 2003 for the following reliefs:

1. Declaration of title to all that land situate, lying and being at New Weija-Accra and containing an approximate area of 95.194 acres more or less and bounded on the Northwest by a proposed road measuring 2891.70 feet more or less, on the Northeast by a proposed road measuring 2656.39 feet more or less, on the Southeast by Weija lands measuring 1889.36 feet more or less and on the Southwest by Weija lands measuring 2068.55 more or less.

2. Recovery of possession

3. Damages for Trespass

4. Perpetual Injunction

5. Further or other orders

Plaintiff's case is that its Managing Director had acquired a large swathe of land from the Weija stool by way of customary grant in or about 1980. He immediately went into possession by clearing the land and erecting boundary pillars.

In 1998, when Plaintiff was incorporated, its Managing Director requested the stool, acting by its Chief Nii Anto Nyame II that the documents in respect of the land be made out in the name of the Plaintiff Company.

It is also the case of Plaintiff Company that a cadastral plan prepared by the Government to delineate the precise boundaries of the stool and family lands of Weija clearly defined Plaintiff's land in the plan, except it was marked as "FAK" instead of "FKA"

It was Plaintiff's further contention that its grantor, the Weija Stool had had its title confirmed in various judgments e.g. Manche Anege Akwei v Manche Kojo Ababio IV (Accra Water Works Acquisition) dated 24th July 1948 and another judgment of the Full Court dated 1924. Further, that various portions of the land acquired for public use by the then Gold Coast Government paid compensation to the Weija Stool and no one else.

Plaintiff says the Defendant has illegally entered onto portions of its land and causing damage and loss to Plaintiff consequently necessitating the Writ and Statement of Claim.

The Defendant conversely denies the Plaintiff's claim and asserts that he acquired the property from his grantors the Ngleshie Amanfro stool who took him to the Chief of Weija Nii Anto Nyame II and his elders since they are "allied families" and the Weija Chief agreed to make a grant to him of the land. Defendant further says that he made an initial payment to the Ngleshie Amanfro Family and subsequently made further payments to the Weija Chief and his Elders for the land. The Defendant further contends that even though Weija Stool was adjudged owner of the lands, the Government has nonetheless not released the land to the Stool and therefore Plaintiff cannot claim the land as the land is still plotted in the name of the Government.

The trial judge after hearing entered judgment for the Plaintiffs on all the reliefs endorsed on his writ.

Aggrieved by the decision of the trial court the Defendant filed an appeal in the Court of Appeal.

1 GROUNDS OF APPEAL

1. The judgment is against the weight of the evidence

2. Having regard to the state of pleadings and the evidence adduced during the trial, the court erred in entering judgment for the Plaintiff.

3. Further grounds will be filed on receipt of record of proceedings

The Court of Appeal dismissed Defendant Appellant's appeal and affirmed the decision of the Court below.

Further aggrieved, the Defendant filed a further appeal to the Supreme Court.

2 GROUNDS OF APPEAL

The Judgment is against the weight of the evidence.

As held by their Lordships in Tuakwa v Bosom [2001-2002] SCGLR 61,

"an appeal is by way of re-hearing, particularly where the Appellant alleges in his notice of appeal that the decision of the trial court is against the weight of the evidence… In such a case, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial

before arriving at its decision, so as to satisfy itself that on a balance of probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence".

3 It is also provided in the Evidence Decree, 1975 (NRCD 323) Sections 11 and 12 as follows:

11(4) 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

12(1) Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of the probabilities.

12(2)"Preponderance of the probabilities" 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.

4 EVIDENCE

On the evidence, the Plaintiff acquired the tract of land customarily in 1980 from the Weija Stool. Defendant tries to counter this in his statement of case in the Court of Appeal as to the age and financial background but led no evidence in the trial Court to show that the circumstances of the Plaintiff witness was such that it was impossible for him to acquire such a large piece of land.

Defendant on the other hand admits in his evidence that he initially acquired the land from the Amanfro Stool who later led him to Weija to have the conveyance affirmed or regularised.

5 The main issue for the Court to determine will simply be that on a preponderance of the probabilities, whose story is more probable than not.

It is not surprising that the trial Court found for the Plaintiff.

Firstly, Plaintiff testifies that its Managing Director was granted the land customarily in 1980 by Weija Stool. This was not challenged in any particular by the Defendant, who also admitted that the land belonged to Weija by his being led there by the Elders of the Amanfro Stool to have his conveyance regularised. If Plaintiff's Managing Director was granted a customary conveyance, then even the Weija Stool had no more claim to the land and therefore had nothing to give to the Defendant Appellant.

Case of DOVIE & DOVIE v ADABANU [2005-2006] SCGLR 905 by their Lordships as follows:

"An effective Customary conveyance divested the grantor of any further right, title or interest in the land to convey or grant to a subsequent grantee"

6 Further, pertaining to the issue of the identity of the land, the Court appointed Surveyor in his report tendered to the Court on the 7th of April 2005 testified that about 85% of the land being claimed by Defendant fell within land being claimed by Defendant, that the Cadastral Plan submitted by the Plaintiff conforms to what he surveyed whilst that of the Defendant had huge displacements. This is a crucial piece of evidence coming from an independent witness.

7 Plaintiff also obtained judgement against the elders of the Amanfro Stool as evidenced by Exhibits C,D & E. All these exhibits were tendered without objection and in Exhibit C, the Judge states that he ordered hearing notice to be served on the Defendants to contest the proof of title and assessment of damages and this was duly done but Defendants failed to appear to challenge the title. These judgements still stand as they have not been set aside and these judgments therefore proves a good title to the land.

8 Also Plaintiff tendered through Defendant witness Exh O which is a letter of consent to sublet and assign dated 31st July 2000. And recited in this letter is the schedule of the land of Plaintiff measuring 95.149 acres. If Plaintiff had not been granted this land, it is difficult to surmise how the Chief and elders would have given approval to sublet and assign the land.

9 It is also noteworthy that the dispute over the land began only after the death of the Chief of Weija and the conveyance to the Defendant was made by the acting Mankralo of the Weija Stool. The Wulomo of the Stool as Defendant Witness gave evidence that the only reason for the Plaintiff being on the land was because he had been made a caretaker of the lands by the stool. With all due respect, this beggars belief, and as was put to him in

cross-examination by Plaintiff Counsel, this was highly improbable as Plaintiff MD was a stranger to the stool and could not have been made a caretaker for such a large tract of land. The only reasonable inference to be drawn here is that some Elders of the Weija Stool colluded with the Defendant after the death of the Chief to deprive Plaintiff of the land.

10 The Defendant in the Court of Appeal argued that the Plaintiff witness's testimony was full of inconsistencies and therefore must be discredited. An example of the inconsistencies he gave was the fact that Plaintiff testified that he had acquired 64 plots from the Chief himself which later turned out to be 60 plots. As stated by the Court of Appeal, that inconsistency cannot be fatal to Plaintiff's claim as it does not detract from the fact that Plaintiff bought the land in dispute from the Chief and elders of Weija.

In the case of EFFISAH v ANSAH [2005-2006] SCGLR 943, the Court speaking through Wood JSC (as she then was) held as follows:

"In the real world, evidence led at any trial which turned principally on issues of fact, and involving a fair number of witnesses, would not be entirely free from inconsistencies, conflicts or contradictions or the like. In evaluating evidence led at a trial, the presence of such matters per se, should not justify a wholesale rejection of the evidence to which they might relate. Thus in any given case, minor, immaterial, insignificant or non-critical inconsistencies must not be dwelt upon to deny justice to a party who had substantially discharged his or her burden of persuasion. Where inconsistencies or conflicts in the evidence were clearly reconcilable and there was a critical mass of evidence or corroborative evidence on crucial or vital matters, the court would be right to gloss over those inconsistencies."

Finally, in the Supreme Court, Defendant's appeal is based on the solitary ground that the Appeal is against the weight of the evidence.

The Defendant especially argues that as it was never established that the Plaintiff i.e. F.K.A Company had a prior grant in 1980, the trial judge and the Appeal Court were in error in holding that the land belonged to the Plaintiff. He further cited the case of Salomon v Salomon [1897] AC 22 to buttress his point by saying that the Company had a separate legal entity from that of its Managing Director, and since Plaintiff Company was not incorporated until 1998, it was wrong to hold otherwise.

The evidence on record shows that the Defendant acquired two separate tracts of land from the Amanfro Stool in 1993 and 1996. From the report of the Surveyor, these two tracts fell squarely in the cadastral plan of Plaintiff. In 2000, he acquired another tract from the Weija Stool. For this land, it was only 8% of it which fell within Plaintiff's land. Inferentially, it could be said that since the land did not belong to the Amanfro Stool, they could not know what had been alienated and what had not been but the Weija Stool were

aware of what had been granted that was why what they granted to the Defendant had an error of only 8%.

It was found by the trial judge that indeed all the lands belonged to the Weija stool so the principle of nemo dat non quo habet comes into play here. The Amanfro stool could not have alienated lands it never had in the first place.

On the evidence, as Plaintiff witness had acquired the land customarily in 1980, there was even no need for him to go back to the Stool to have the Conveyance drawn up in Plaintiff's name.

Dovie & Dovie v Adabanu relying on Hammond v Odoi [1982-83] 2 GLR 1215 @ 1304 held thus:

"No document is necessary to effectuate the customary purchase, given that customary law knows no writing. And the conveyance made in accordance with customary law is effective as from the moment it is made. A deed subsequently executed by the grantor to the grantee may add to but it cannot take from the effect of the grant already made at customary law"

Effisah v Ansah [2005-2006] SCGLR 943

"It was well settled that an appellate court might interfere with the findings of a trial tribunal where specific findings of fact might properly be said to be wrong because the tribunal had taken into account matters which were irrelevant in law; or had excluded matters which were crucially necessary for consideration; or had come to a conclusion which no court, instructing itself in the law, would have reached; and where the findings were not inferences drawn from specific facts, such findings might be properly set aside. As a corollary, a second appellate court had power to restore primary findings of fact and right conclusions which might have been unjustifiably set aside by a first appellate court."

On an evaluation of the evidence as a whole, the judgment of both the trial court and the Court of Appeal cannot be disturbed as the evidence supports the findings made. In the circumstances the appeal fails and the same is accordingly dismissed.

G. T. WOOD (MRS)

(CHIEF JUSTICE)

ANSAH JSC.

This is an appeal against the judgment of the Court of Appeal dated 6th March 2007 which affirmed the judgment of the High Court, Accra, dismissing an action by the plaintiff therein, the appellant before us. The action was by its nature, one for a declaration of title to land coupled with the ancillary

The facts which gave rise to the action in the High Court, as well as the evidence and the issues at stake have been stated in the judgment read by the learned Chief Justice which I agree with. I only wish to add a few words of my own by way of contribution to the judgment aforesaid. I may not repeat them here except as and when it becomes necessary for me to do so.

The duty of an appellate court in an appeal on this ground was stated by this court in its unanimous judgment delivered by our esteemed sister, Akuffo JSC, in Tuakwa v Bosom [2001-2002] SCGLR 61 where she said at page 65 of the report:

"..an appeal is by way of a re-hearing particularly where the appellant….. alleges in his notice of appeal that, the decision of the trial court is against the weight of the evidence. In such a case, although it is not the function of the appellate court to evaluate the evidence for the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyze the entire record of appeal, take into account the testimonies of all documentary evidence adduced at the trial before it arrived at its decision, so as to satisfy itself that on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence."

The issue was could the criticism against the judgment of the Court of Appeal be justified? The answer lay in the strength of the submissions in support of or against the appeal.

The appellant submitted the recital in the plaintiff's document of title in Exhibit B was false for in 1980, the Company had not been incorporated and was not in existence by then. Therefore the Court of Appeal committed an error when it affirmed the finding of fact by the trial court that the grant was made to the plaintiff respondent company in 1980.

The evidence led by both sides must be examined to see whether or not it supported the decision by the Court of Appeal.

In its amended statement of claim the plaintiff pleaded that:

"3 Plaintiff company says that long before Plaintiff Company was incorporated, its Managing Director, namely, Frederick Kofi Asare acquired a large tract of land by way of customary grant from the Weija Stool represented by its chief Nii Anto Nyame II."

The defendant denied this averment and pleaded that when the plaintiffs Managing Director went to the land he had been there already.

What did the Exhibit B say in connection with all this?

The recital had it that:

"And whereas in 1980 the Weija Stool made a customary grant of the land hereinafter described to he lessee but no deed was executed in favour of the lessee: AND WHEREAS the lessee has now made a request to the Weija Stool for a deed of conveyance to evidence the said customary grant…"

The lessee in Exhibit B was F.K.A. Company Ltd., the plaintiff respondent herein.

In his evidence in chief, the plaintiff gave evidence through its Managing Director and said it was in 1980 when he paid ¢60m to the chief of Weija and his elders for 95,194 plots of land. When in 1998 he formed a company he told the chief to prepare documents in the name of the company; that was how Exhibit B came to be prepared in the name of the company as the lessee.

Reading the evidence on record as a whole, the chronology of events was that in 1980, the Managing Director of the company took a customary grant of the plots of land from the Chief of Weija and paid for it. No documents were prepared for him. In 1998 he incorporated his company and requested the Chief to prepare a deed of conveyance for him but in the name of the company. Exhibit B was accordingly prepared. In other words what was begun in 1980 towards the acquisition of the land was consummated when Exhibit B was prepared. There was no variation of the contents of Exhibit B by the evidence led by the respondent for the evidence sought only to expatiate on the circumstances surrounding the acquisition of the land the first step for the plaintiff to take to discharge the onus on him to be entitled to the declaration he sought from the court. The criticism by the appellant to the effect that the plaintiff varied the contents of Exhibit B was not justified and is rejected.

The plaintiff also tendered Exhibit O through the DW1, Nii Kofi Okine II, the Seitse or Stool father of Weija, a signatory to the document, relevant portion of which document was that:

"The Weija Stool hereby grant (sic) consent to FKA Company Limited to assign portions of the land granted to the said company by a Lease which land is more or less more particularly described in the schedule below."

The lease was tendered in evidence as exhibit B

Laying the foundation for the tendering of the exhibit O, the DW1 said that the grant of the land was made to the company, (which was to say), the

plaintiff. That would corroborate the evidence of the Managing Director and the case of the plaintiff company and the rule of law was:

"Where the evidence of one party on an issue was corroborated by a witness of his opponent whilst that of his opponent on the same issue stood uncorroborated even by his own witness, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good reason (which must appear on the face of the judgment) the court found the corroborated version incredible or impossible: see the dictum of Ollennu J (as he then was) in Tsrifo v Dua VIII [1959]GLR 63 at 64-65 as applied in cases like Osei Yaw v Domfeh [1965] GLR 418, at 423, SC; Asante v Bogyabi [1966]GLR 232 at 240-241, SC and In Re Ohene (Decd); Adiyia v Kyere [1975]2 GLR 89 at 98, CA." see Banahene v Adinkra [1976]1 GLR 346 at 350 per Anin JA (as he then was).

The case of the plaintiff was accordingly corroborated by the DW1 and the facts that emerged from the oral and documentary evidence were that the Managing Director of the plaintiff Company, in the person of Frederick Kofi Asare, took a customary grant of the land in dispute from the Weija Stool in 1980 and when he formed the company in 1998, he asked the Stool to prepare documents of title in respect of the land in he name of the company and what was done was the evidence in Exhibit B.

The Court of Appeal could not have erred when it affirmed the judgment of the trial court based on these findings of fact by the trial judge for they were supported by the evidence on record that the Weija Stool granted the land in dispute to the plaintiff company, in 1980.

Therefore, when the same stool purported to grant title to the same land to the defendant appellant in 1999, as per the indenture in Exhibit 1, it had divested itself of title to the land and had nothing to pass to the defendant appellant according to the "Nemo dat quod non habet" principle. Consequently, the defendant took nothing from the Stool.

In his judgment the late Kofi Akwaah J said considering a plan of the disputed land:

"Now this court ordered that a composite plan be prepared for the consideration by the Court. This was duly done and accepted by the Court. From the report submitted by the Survey Department, it is clear that all the three (3) different parcels of land shown on the ground by the defendant to be his actually fall squarely within the land shown by the plaintiff."

The learned judge, now of blessed memory, took pains to study the site plan and drew inferences from it. He went on to make decisive holdings, namely, that the Weija Stool exercised suzerainty over the Amanfro Stool and secondly, a grant by the Weija Stool is superior to any grant by the Amanfro Stool.

Furthermore, he held that:

"I hold further that plaintiff has a valid grant from Weija Stool and that the Weija Stool by its registration, has divested itself of this land in favor of the Plaintiff and thus cannot validly make any grant of any portion of this land to anyone else, defendant included. Defendant therefore cannot lay any claim to any part of this land."

The appellant has not challenged the validity of this material statement of the law in this appeal and I affirm it.

The trial judge had both oral and documentary evidence before him to guide him to determine the pivotal issue as to which of the parties was better entitled to the area in dispute and also whether or not the plaintiff was entitled to the remedies he sought from the court.

He carefully considered the evidence before him and made his findings of facts and concluded that the plaintiff succeeded on his claims and entered judgment for him accordingly. The Court of Appeal concurred in the judgment of the trial court.

As a matter of law, where the Court of Appeal confirmed the judgment of the trial court the principle of law which has guided this court in considering appeals against concurrent judgments of lower courts has been stated several times over so that it is well ossified into the judgments in cases like Ntiri & Another v Essien & Another [2001-2002] SCGLR 451 where Bamford-Addo JSC said at page 459 that:

"In this case, there has been concurrent finding of fact by two lower courts and in such circumstances an appellate court would not interfere with concurrent findings of fact unless it can be shown that there has been a patent error on the facts which had resulted in a miscarriage of justice. As to when an appellate court would overturn the concurrent findings of fact made by the lower courts: see the following case which sets out the conditions under which the Supreme Court will interfere with concurrent findings of fact made by lower courts. The case of Obrasiwa v Out [1996-97] SCGLR 618, where the Supreme Court held (as stated in the head note), in dismissing the appeal from the decision of the National House of Chiefs, that:

"where the lower court appellate court had concurred in the findings of the trial court, especially in a dispute, (the subject matter of which was peculiarly within the bosom of the lower courts or tribunals,) a second appellate court would not interfere with the concurrent findings of the lower courts unless it was established with absolute clearness that some blunder or error which had resulted in a miscarriage of justice was apparent on the face of the way the lower tribunals had dealt with the facts.. The errors would include: an error on the face of a crucial documentary evidence; and a misapplication of a principle of evidence and; finally, a finding based on n erroneous proposition of law such that if that proposition was corrected the finding would disappear. However, it was not enough that the blunder or error per se was established; it must further be established that the said error had led to a miscarriage of justice. Achoro v Akanfela [1996-97] SCGLR 209 …"

Koglex Ltd (No.2) v Field [2000] SCGLR 175 was a further explanation of the principle governing appeals against concurrent findings of fact by lower courts.

A reading of the record shows the findings of fact made by the trial court were amply supported by the evidence on record and therefore an appellate court must be loath to interfere with a judgment based on those facts. A second appellate court must be satisfied there was or were errors in the judgments of the lower courts before it might allow an appeal premised on the ground that they were against the weight of evidence. The appellant did not succeed in discharging this burden on him.

The judgments of the lower court are affirmed. The appeal is dismissed.

J. ANSAH

(JUSTICE OF THE SUPREME COURT)

I agree

T. K. ADZOE

(JUSTICE OF THE SUPREME COURT)

I agree

S. A. BROBBEY

(JUSTICE OF THE SUPREME COURT)

I agree

S. K. ASIAMAH

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