**IN THE SUPERIOR COURT OF JUDICATURE**
**IN THE SUPREME COURT**
**ACCRA AD 2011**

**CORAM: WOOD (MRS) CJ, (PRESIDING)**
**DOTSE, JSC**
**YEBOAH, JSC**
**GBADEGBE, JSC**
**AKOTO-BAMFO, JSC**

***CIVIL APPEAL***

***SUIT NO:J4/41/2010***
**20TH APRIL, 2011**

**OPANIN YAW BOAKYE --- PLAINTIFF/RESPONDENT**
**(SUBSTITUTED) FOR /APPELLANT**
**OPANIN KWADWO ADOM**

**VRS;**

**OPANIN KWAME MARFO ----**
**DEFENDANT/APPELLANT**
**/RESPONDENT**

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**J U D G M E N T**

**GBADEGBE JSC:**

My Lords, the question for our determination in these proceedings is whether the decision of the Court of Appeal that reversed the judgment of the trial High Court in the mater herein was right having regard to the evidence contained in the record of proceedings before us? In my view since the proceedings before the Court of Appeal was in the nature of a rehearing, the court was entitled after hearing the parties and considering the evidence contained in the record of proceedings to give in the words of **rule 32 of the Court of Appeal Rules, CI 19** "**a *judgment and make an order that ought to have been made, and to make a further or any other order as the case may require including an order as to costs***". The jurisdiction so conferred on the court under rule 32, however, must be exercised only in cases where it comes to the view after considering the facts that the decision appealed from is unreasonable or perverse. See: **FOSUA v ADU- POKU MENSAH [2009] SCGLR 310.** In such a situation, the court and indeed any appellate court may interfere with the findings of fact of the trial court which did not properly evaluate the evidence or made wrong inferences from the accepted evidence.

Turning to the appeal herein, the case of the appellant in the High Court was as averred to in the statement of claim filed in the matter herein on 22 October 1998 that sometime after he had acquired Plot No Block 16, Old Amakom Kumasi and built a house thereon he fell into debt and pledged his property to the family of the late Kwabena Gyasi for the sum of five hundred pounds. According to the pleadings filed on his behalf the property was to be redeemed after it had been in possession of the defendant for some time and that although the property has been in possession of the family for over 20 years, they

have in the words employed in paragraph 8 of the statement of claim ***"failed to redeem the pledged property to him."*** The writ of summons herein was therefore taken out by the appellant against the respondent as successor to Kwabena Gyasi for a declaration of title to the disputed property, recovery of possession and perpetual injunction.

Upon service of the writ and the accompanying statement of claim on the respondent, he submitted himself to the jurisdiction of the trial court and filed a statement of defence by which he denied the allegation of a pledge of the disputed property and asserted a purchase by Yaw Barima alias Yaw Gyasi from the appellant for the sum of five hundred pounds. According to the respondent who claimed to be a successor to the late Yaw Barima alias Yaw Gyasi, the sale transaction was covered by a deed of assignment that was registered at the Lands Registry on 7 September 1964. Having denied the pledge on which the appellant based his claim and asserted a purchase by his predecessor of the disputed property, the respondent counterclaimed for a declaration of title and an order of perpetual injunction.

The action proceeded to a full scale trial at the end of which the learned trial judge of the High Court pronounced judgment in favour of the appellant on his claim and dismissed the respondent's counterclaim. In his judgment, the learned trial judge accepted the appellant's version of the matter in preference to that of the respondent. In the judgment, the learned trial judge said among others that since the appellant denied the deed of assignment, it was incumbent upon the respondent to prove the execution of the assignment by the predecessor of the appellant and that its failure amounted to not having led the requisite evidence in respect thereof. Closely linked with this was the opinion which the learned trial judge

expressed of the claim by the respondent that the sale was evidenced by a deed of assignment in so far as the deceased plaintiff was concerned. According to him, the reliance by the respondent on the said deed was an attempt by him to make a claim against the estate of a deceased person and having scrutinized the evidence relating thereto in line with settled judicial pronouncements, he found it not credible and accordingly rejected it as an afterthought. As a result, he accepted the evidence of the appellant and his witness that the transaction between the parties concerning the disputed property was a pledge and not a sale.

Following the decision of the trial court, the respondent appealed to the Court of Appeal which after a consideration of the issues that were raised in the appeal, reversed the decision and entered judgment in his favour on the counterclaim. The instant proceedings before us are subsequent to the lodgment of an appeal from the delivery of the Court of Appeal to this court. As said in the opening paragraph of this delivery, the task before us is to discern from the facts accepted before the trial court whether the findings of the learned trial judge were unreasonable or perverse? An examination of the record of proceedings show that the primary issue of fact to be decided by the trial court was as between the contending parties whose version of the nature of the transaction was more probable? In their decision, the learned justices in a judgment read by **Appau JA** which appears at pages 175 to 199 of the record of proceedings thought that the findings of fact were not right having regard to the evidence. The appellant in these proceedings invites us to set aside the decision of the Court of Appeal and affirm that of the trial court? Is the invitation from the appellant to this court one justified by the record of proceedings? In this regard, we are to discern from the decision of the Court of Appeal if they provided satisfactory reasons for reversing the conclusions of the trial court such as may arise from material inconsistencies in the evidence and making wrong

inferences from established facts that have the effect of the trial court not taking proper advantage of having heard or seen the witnesses. See: **WATT (OR THOMAS) v THOMAS** [*1947*] 1 All ER 582. Applying the principle enunciated in the case of **WATT** v **THOMAS** (supra), **Azu Crabbe JSC** in the case of **NYAME v TARZAN TRANSPORT** [1973] 1 GLR 8 at 11 made the following speech on the function of appellate courts in cases that turn on the findings of fact:

> *"The Court is loth to disturb a finding of fact by a trial judge who has had the advantage of observing the demeanour of the witnesses, " their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial"..... But it is far more ready to reverse his decision in a case which depends on inferences from admitted or undisputed facts."*

A careful reading of the record reveals as was found by the Court of Appeal that while in his pleading in support of his claim the appellant said he pledged the property to a family, in his evidence at the trial what emerged was a transaction between him and an individual. This change in the version of the appellant between the statement of claim and the evidence is fundamental in nature as not to be seen as a variation but a conflict in his case that has the effect of disentitling him to relief on the ground that he had departed substantially from his case and accordingly his case should not have been given a favourable consideration by the learned trial judge. See: **MAHAMA v ISSA** [2001-2002] 1 GLR 694. Then there is the evidence of DW1, a plumber who testified that he was engaged to do plumbing works in the house. According to him he carried out his works between 1969 and 1970 and at the time the house was not occupied by anyone. The evidence tendered by DW1 was in the main unchallenged and its effect is that the appellant could not have pledged a non-income earning property to the respondent's successor; I think it is more supportive of a sale. Also in his judgment, the learned trial judge was at pains to condemn the

reliance by the respondent on the deed of assignment, exhibit 1 on the ground that it was a claim against the estate of a deceased person. While not disputing the correctness of the principle referred to in the cases cited, the leaned trial judge misconstrued their import in relation to the case of the respondent. The document which was relied on by the respondent was made in the life time of the appellant and as such it cannot come within the scope of the principles expounded in the cases referred to in the judgment with which we are concerned in these proceedings. The meaning placed on the said exhibit in terms of its probative value by the learned trial judge was wrong and in my thinking if he had placed the correct interpretation on it he would have come to the conclusion that the respondent had discharged the burden on him to lead evidence on the said fact and that following its introduction, the burden of dislodging its effect shifted to the appellant who unfortunately appeared to base his challenge thereto only on the bare allegation that it was not an act of his predecessor.

It is observed that the respondent was very candid in putting across his case on the very first opportunity he had to state his case in paragraph 7 of the statement of defence filed on 23 November 1995 by indicating quite plainly the transaction on which he relied and the particulars of the deed of assignment and the date of its execution. This served as sufficient notice to the appellant and if indeed he believed in his denial of the execution of the document that was tendered in evidence as exhibit 1 why did he as the learned justices of the Court of Appeal commented in their judgment not adopt a course of conduct of his case at the trial that would require the signatures to be strictly proved? I also refer to the challenge to the signature of the appellant that was raised by the appellant which, unfortunately was not pursued in the course of the trial? Perhaps, the substituted appellant was not in a position to lead any credible evidence in support of the said challenge but having raised the issue

and abandoned it, the inference might be drawn that he came to the realization that the signature on the deed of assignment was actually that of the deceased. This, would tend to render the appellant's case one not worthy of belief as the challenge to the signature was the pivot of his case.

Again, exhibit 1 qualifies under section 130 of the **Evidence Act, NRCD 323** of 1975 as an ancient document and therefore excepted from the requirements of the hearsay rule such that once it is admitted in evidence the burden of dislodging its effect passes on to the person against whom it would operate in the absence of any other evidence-the appellant herein. I refer in this regard in particular to the payment of property rates under the name of the assignee, which fact is inconsistent with a pledge as in pledges the ownership remains throughout in the pledgor, it being only a security for the payment of a debt. I think that the leaned justices of the Court of Appeal were right in their opinion regarding the erroneous application of the rules of evidence by the trial court and its attendant effect in blurring the appreciation of the quality of the evidence that was placed before him.

There is also the evidence which was not properly evaluated by the learned trial judge which concerns the duration of the pledge as alleged by the appellant. In his statement of claim as well as the evidence, the appellant was unable to tell when he made a pledge of the property to the predecessor of the respondent and yet tries to impress the court that since the pledge was more than twenty years in duration, he was entitled to redeem it. In my opinion if indeed there was any pledge as he asserted, he would have remembered the year in which the transaction was entered into as it is crucial not only in the determination of the expiry of the twenty years but also whether he dealt with Yaw Gyasi or some other person for the

purpose of considering the truth or otherwise of his evidence that when he went to redeem the property, the pledge told him that he had purchased the disputed property and that if he so desired he could go to court. The appellant in my view was not being candid to the court and was economical with the truth on what I consider to be crucial to his allegation of a pledge.

On the whole, a consideration of the entire evidence in terms of section 80(2) **of the Evidence Act**, leads one to the conclusion in terms of the substance of the rival versions placed before the trial court, that the narration of the respondent looked more credible and the Court of Appeal was right in preferring his case to that of the appellant. I think that exhibit 1 being a document made by the original parties to the transaction ought to have been given greater weight by the trial court having regard to the circumstances surrounding its making including the giving of statutory consent to the transaction by the Minister of Justice and the oath of proof before the Registrar of the High Court, Kumasi which acts being official in their nature give rise to the presumption of regularity under section 37 of the Evidence Act, NRCD 323 of 1975 in the absence of any credible challenge thereto in preference to the unreliable oral testimony of the appellant.

Turning to the question which was posed at the beginning of this judgment, I proceed to answer it in the affirmative, the effect of which is that the Court of Appeal was right in setting aside the decision of the trial court it being one that was unreasonable and or perverse. The above are in my view sufficient to dispose of the appeal herein but before I end, I wish to refer to a point of procedure that was raised by the Court of Appeal on its own. It relates to the issue of limitation. In my view, it is a plea which except it is raised on the pleadings or arises from the effect of the pleadings one that ought not to be raised by a court on its own motion. In its essence, it is a plea of mixed question of fact and law and to be good must be raised in

compliance with the rules of court. I refer particularly to **Order 11 rule s8 (1) and 11(1) of the High Court, (Civil Procedure Rules) 2004, CI 47** in the following words:

> **(8.1) "A party shall in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any limitation provision, fraud or any fact showing illegality**
>
> **(a) which the party alleges makes any claim or defence of the opposite party not maintainable or**
>
> **(b) which, if not specifically pleaded might take the opposite party by surprise, or**
>
> **(c) which raises issues of fact not arising out of the preceding pleading."**
>
> **(11.1) A party may in pleading raise any point of law."**

**See: BASSIL V KABBARA [1966] G.L.R. 102**

In my view, having regard to the plain words of the relevant rule, the said plea was not properly before the court and as such it was not competent for it to be considered at all. In any event, even if it was one that was apparent from the pleadings of the parties but not raised by either of them in the appeal, in raising it the court is obliged by virtue of **Rule 8 (9)** of the Court of Appeal Rules, CI 19 not to rest its decision thereon without giving the respondent sufficient opportunity of contesting the case on that ground.

The result then is that the appeal herein fails and the decision of the Court of Appeal in the matter herein is affirmed.

**[SGD] N. S. GBADEGBE**

**JUSTICE OF THE SUPREME COURT**

**[SGD] G.T. WOOD (MRS.)**

**CHIEF JUSTICE**

**[SGD] J. V. M DOTSE**

**JUSTICE OF THE SUPREME COURT**

**[SGD] ANIN YEBOAH**

**JUSTICE OF THE SUPREME COURT**

**[SGD] V. AKOTO-BAMFO [MRS.]**

**JUSTICE OF THE SUPREME COURT**

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