IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT OF GHANA
ACCRA, 2012

CORAM: AKUFFO, (MS) JSC (PRESIDING)
DATE-BAH, JSC
ANSAH, JSC
BONNIE, JSC
BAMFO,(MRS) JSC

CIVIL APPEAL.
No. J4/51/2011

25TH APRIL,2012

MARGARET OSEI ASSIBEY **PLAINTIFF/APPELLANT/APPELLANT**

VRS.

1. JOYCE GBOMITTAH **DEFENDANTS/RESPONDENTS**

2. KWABENA ADOMAKO **/RESPONDENTS**

3. COMMANDER GODWIN EDWARD OSEI

J U D G M E N T

MINORITY OPINION

SOPHIA. A. B. AKUFFO (MS),J.S.C

Background

This is an appeal from the decision of the Court of Appeal, Kumasi, dated 17th December 2010, affirming the judgement of the High Court, Kumasi. It worth noting that although on the cover of the Record of Proceedings as well as in the statements of case respectively filed by both counsel for the parties herein one gathers, from the title of the case, an impression that there are three Respondents, it is evident from the Notice of Appeal in this Court that the sole Respondent herein is Commander G. E. Osei, who had been Co-Defendant at the trial of the matter. In this judgment, therefore, he will be referred to as the Respondent and his co-defendants at the high court will be referred as the 1st and 2nd Defendants. Now, the brief background of the appeal is that, by a writ of Summons issued on 22nd January 2001, the Appellant herein sued the 1st and 2nd Defendants in the High Court, Kumasi, claiming:-

1. Declaration of title to H/No. 461, Kwadaso Estate, Kumasi
2. Recovery of possession
3. Damages for trespass
4. Perpetual injunction restraining the defendants, their servants and or workmen and agents from in any way interfering with Plaintiff's possession of the property.

Subsequently, the Respondent, upon his own application, was joined in the suit as a Co-Defendant.

The case of the Appellant is that she is the widow of one Mr. Samuel Kwame Kyei who, she contends, is the beneficial owner of house number 461, Kwadaso Estate, Kumasi. According to her, she and her children (together with her husband before his death) had been in undisturbed possession of H/No. 461, Kwadaso Estate, Kumasi, the subject matter in dispute herein, for twenty years prior to the commencement of the action. However, sometime after the death of her husband, the Respondent succeeded in throwing her (the Appellant) and her

children out of the house, in the process of which some of her personal effects were even damaged. The Appellant further alleged that her late husband who was a junior member of the Ghana Army and functioning as a security personnel was on friendly terms with the Respondent (at the material time, the Regional Secretary for Ashanti Region) and intimated to him, his desire to purchase a house in Atonso. According to the Appellant, the Respondent, who held the rank of Commander, and was thus a senior member of the army, advised her late husband that Atonso was not a good neighbourhood and that he (the Respondent) would rather help him purchase a house in Kwadaso. The Appellant contended by her statement of claim that, accordingly, her late husband advanced an amount of ¢25,000.00 (old currency) (¢20,000.00 according to her testimony) to the Respondent to enable him purchase the house on behalf of her late husband. The Appellant explained that her husband, as a junior member of the army, could not make the purchase himself, in view of the location of the house being purchased. Hence, the 3rd Respondent, being a senior officer, made the purchase on his behalf. However, the Appellant, whether in her statement of claim or her evidence at the trial (or elsewhere), never explained how the rest of the alleged purchase money for the house was paid.

For their part, the 1st and 2nd Defendants contended that the subject matter in dispute belongs to the Respondent, who purchased the same from the State Housing Corporation (hereinafter referred to as 'SHC'); with mortgage financing he obtained from Ghana Commercial Bank. According to the Respondent, the SHC initially offered him a house at South Suntreso but he declined that offer because the location was not desirable. SHC subsequently offered him the subject matter in dispute herein, situated at Kwadaso Estate. Also according to the Respondent, he was a senior government official in the era of the Supreme Military Council and, during the overthrow of the government by the Armed Forces Revolutionary Council, in 1979, he fled the jurisdiction and went into exile. He averred that, although he entrusted the house into the care of one Mrs. Darko, the Appellant, her late husband and children managed to gain occupancy in the house. The Respondent stated that he allowed the 1st and 2nd Defendants (his sister and nephew respectively) to join the Appellant and her family at the house because he wanted to avoid the situation where the latter would lay adverse claim to the house.

After joining in the suit, the Respondent, by his statement of defence, counterclaimed against the Plaintiff as follows:

1. Declaration of title to H/No. E461 Kwadaso Estate, Kumasi
2. Recovery of possession of the said house
3. Perpetual injunction to restrain Plaintiff and all persons claiming through her from interfering with Co-defendant's right to the said house.

At the conclusion of the trial in the High Court, judgment was entered in favour of the Respondents herein, which judgement was subsequently affirmed on appeal by the Court of Appeal.

The Appellant's grounds of appeal in this Court are that:

1. The Court of Appeal erred in its judgement when their lordships rejected the authentic and reliable documentary evidence voluntarily executed by the Co-defendant dated the 9th day of September, 1986 tendered in the lower court as exhibit 'H' which conclusively and preponderantly established that the disputed landed property herein described as H/No. Plot 461 more particularly situate at Kwadaso Estate, Kumasi is owned by the Plaintiff's late husband without their Lordships prescribing any satisfactory reason(s) for rejecting the said documentary evidence.

2. The judgment of their Lordships at the Court of Appeal was against the weight of evidence on the record

3. Their Lordships at the Court of Appeal erred when they held that to the extent that exhibit 'H' did not make any specific reference to H/No. 461 more particularly situate at Kwadaso Estate, Kumasi, the Appellant could not rely on the said exhibit to claim the disputed house despite preponderant and overwhelming circumstantial evidence on record irrestibly pointing to the singular conclusion that exhibit 'H' is referable to H/No. 461

4. Their Lordships at the court of Appeal erred when they held that there was no material corroborative evidence on record to substantiate the provision of the purchase price of the disputed House by the late Kyei when there

were material pieces of evidence on record corroborating the said acquisition in equity.

5. Their Lordships at the Court of Appeal erred when they failed to appreciate the fact that the entire case centred on a charge against a dead person who could not mount the witness box to answer any of the charges levelled against him.

Discussion

Grounds (i) and (iii) are essentially the same as they raise the issue of whether or not proper weight was assigned to the evidence on record; specifically exhibit 'H'. As such they are also not much different from ground (ii) and they are really the crux of the Appellant appeal. We will therefore consider them together.

Exhibit 'H' is a letter written by the Respondent to one Mr. Kwarteng. And since the Appellant has placed such great store, it is useful to set out verbatim the relevant text of the Exhibit, which is actually a letter and reads as follows:

"My dear junior brother, this note is from your senior brother Cdr. Osei. Mr. Kyei was very lucky to have found me. From him he has been searching for me and he has not been able to trace where I have been residing. All have been proved failure until today he got me near the PTC Head Office where I also saw you some time ago. Mr. Kwarteng, it is all about a house I got for him. You know very well that I am not corrupt and would never get myself into such a situation. It is all true it is for him and he even spent a lot of money on it. I remember giving him a paper to that effect but due to 1979 episode most of my personal effect was stolen. So please handle the problem prudently and on humanitarian bases. I hope you would recall and reflect on to help the poor guy. Thanks and God bless.
Yours

Cdr. Osei

9/9/86

In evaluating Exhibit 'H', the Court of Appeal considered Section 25 of the Evidence Act, NRCD 323 which provides that:

25(1) "Except as otherwise provided by law including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the instrument or their successors in interest."

The learned Justices of the Court of Appeal also took into account the case of PY Atta & Sons Ltd v Kingsman Enterprise [2007-2008] SCGLR 947, wherein our esteemed brother, Brobbey JSC, stated that:

"The general rule is that a document should be given its ordinary meaning if the terms therein are clear and unambiguous... In such a situation, the rules of interpretation mandate that the document should be interpreted in a view that would cause the intention of the parties to prevail"

However, as was rightly noted by the Court of Appeal, the case of P. Y. Atta and Sons Ltd v Kingsman Enterprise concerned a bilateral agreement between the parties in the suit and is, therefore, distinguishable from the instant case. The Court of Appeal further noted, correctly in our view, that not only was Exhibit H not a bilateral document, but also it cannot be categorized as an instrument, as envisaged under the Evidence Act, to bind the Respondent and the late Kyei and their successors. As is patently clear on its face, and as was noted by the Court of Appeal, Exhibit H was written by the Respondent to Mr. Kwarteng. It is a letter and there is nothing suggestive therein that could create a legal relationship between the Respondent and Mr. Kyei because neither of them had any terms, conditions or obligations to observe, fulfil nor perform. Indeed, there is no evidence on the record that Mr. Kwarteng, the addressee of Exhibit H, when he received the letter, acted upon it. But the most significant observation made by the Court of Appeal is that Exhibit 'H' did not give any material particulars of the house mentioned therein. The Court concluded that to know what house the letter was referring to, it was necessary to look at extrinsic evidence such as paragraphs 20 and 21 of the Respondent's amended Statement of Defence. Thus, it was not the view of the Court that the house mentioned in Exhibit 'H' was not the house in dispute, but rather, it was that, in order to arrive at such a conclusion, evidence extrinsic to the letter had to be considered, thereby placing the exhibit outside the purview of Section 25 of NRCD 323. Therefore, the purport of exhibit H was a question of credibility and the trial judge chose to believe its author, the Respondent.

The universal principle in appeals is that they are by way of rehearing. The Court of Appeal therefore referred to the case of Barkers-Woode v Nana Fitz [2007-2008] SCGLR 879 wherein this Court held that:

> **'what weight to give to which part of the judgement is for the trial judge and, even if there is room for an appellate court logically to reach a different conclusion on the evidence, this does not necessarily mean that there is a basis for reversing the trial judge's findings of fact.'**

The Court of Appeal also considered Order 12 rule 3(a) of CI. 47, as well as Sections 10(1), (2) and 11 of NRCD 323. Without doubt, the evidential burden on the Appellant, at the trial, was to adduce admissible, relevant, intelligent and incontrovertible evidence to prove her case, especially since the averments made by her were denied and put in into issue by the Respondent. It was also upon the Respondent was also to meet the same standard of proof required from the Appellant in order to satisfy the court on the balance of probabilities.

Having weighed the evidence before him, the trial judge had dismissed the Appellant's case claims for the following reasons:-

a. That it was the 3rd Respondent who entered into negotiations with the SHC in 1977 as is evident from Exhibit 1
b. That, as was buttressed by Exhibit 2, the Respondent upon inspection of H/No. M30 rejected same and rather accepted the disputed property in replacement.
c. That he was convinced, on the strength of Exhibit 2, that H/No. 461 had been completed by 28th April 1978. Therefore it would have been difficult for the late Kyei to have advanced money to the Respondent in May 1978 towards the acquisition of the said property
d. That the disputed property was completed in 1978 and same was handed over to the Respondent in the same year
e. That the negotiation concerning the disputed property commenced between the SHC and the Respondent before the late Kyei allegedly conceived the idea of acquiring the house in contention.

In arriving at his conclusions, the learned trial judge has observed, inter alia, that:-

"What is fascinating about the Plaintiff's evidence is that the deposit of 20,000 old Cedis advanced by Kyei to the Co-defendant conflicts with her pleadings. Both in paragraph 6, 7 and 10 of the statement of claim and amended reply paragraph 2 thereof Margaret Osei Assibey maintained that Kyei advanced 25,000 old Cedis. But is instructive that Co-defendant's evidence that he made a deposit of 10,000 old Cedis towards the purchase of the house and persuaded his banker's GCB to agree to give him a personal mortgage loan to make good the outstanding balance was consistent with his pleadings. And the law is that where there was a departure from pleadings at a trial by one party whereas the other's evidence accorded with his pleadings, the latter's was a rule preferable.

Accordingly, I am satisfied that on the preponderance of probabilities, it was Commander Osei who negotiated the house for himself and that he did not do so on Kyei's behalf".

For our part, we are also of the view that Exhibit H cannot by any stretch of the law or the imagination serve as any valuable proof, let alone conclusive proof against the Respondent's claim of ownership of the subject matter in dispute herein. Thus, grounds i to iii of the Grounds of Appeal are, in our view, quite unfounded.

Regarding ground 4 of the appeal herein, the 'material pieces of evidence' with which the Appellant sought to base this ground are:

a. PW1's evidence that the Co-defendant introduced the late Kyei to him as the owner (i.e. Kyei) of the disputed property
b. Water bill issued in Kyei's name
c. Electricity bill issued in Kyei's name
d. Property rate receipts issued in Kyei's name
e. Receipts and invoices issued in Kyei's name
f. Petition addressed to the Confiscated Assets Committee by Kyei
g. Letter dated 11/06/1987 by the Regional Confiscated Assets Committee ordering Kyei to vacate the premises
h. Letter dated 30/06/1987 from the National Office of the Confiscated Assets Committee in reference to the order to Kyei to vacate the premises, suspending the ejection.

A study of these pieces of evidence clearly shows that, quite simply, they cannot be taken as substantiating or establishing the Appellant's assertion that her late husband, Kyei, was the one who provided the money for the purchase of the house or that the purchase was made on his behalf. Also as was held in the case of Quagraine v Adams, [1981] GLR 599 such evidence does not necessarily found ownership.

With regard to the 5th ground of appeal, the Plaintiff sought to rely on a quotation from Addo v Anyowuo [2006] 6 MLR... which held that:

> **'The law is that when an attempt is made to charge a dead person in a matter, in which, if he were alive, he might have answered the charge the evidence ought to be thoroughly sifted and the mind of the judge who hears it ought to be, first of all, in a state of suspicion; but if in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine of corroboration becomes absurd.'**

However, in our view, it is patent from even the most charitable reading of the Record of Appeal that the truthfulness of those testifying in support of Kyei's title to the house was anything but perfectly clear and apparent. Rather what is clear is that the trial judge disbelieved them on the balance of the probabilities, and, as such, the above-quoted dictum cannot avail the Plaintiff, and does not persuade me.

Finally, we need to keep in mind that this is an appeal from concurrent judgements of the High Court and the Court of Appeal. In the absence of compelling reasons, beyond any view we might have that, had we been the adjudicators of fact or the first appellate judges, we would have made different findings and/or arrived at a different conclusion, the applicable guiding principle is that we must allow the previous findings and decisions to stand. This has been the longstanding principle that has been upheld and applied by this Court in numerous cases, including Lagudah v. Ghana Commercial Bank [2005-2006] SCGLR 388; Achoro v. Akanfela [1996-1997] SCGLR 209; Obrasiwa II v Otu [1996-97] SCGLR [1996-1997] SCGLR 618; Tuakwa v. Bosom [2001-2002] SCGLR 61 and Gregory v Tandoh IV and Hanson [2010] SCGLR 971. The grounds for overturning concurrent decisions were clearly enunciated in the

majority decision of this court in the case of Koglex Ltd v. Field (no 2) [2000] SCGLR 175, in the following terms:-

i. Where the findings of the trial court are clearly unsupported by evidence on record or the reasons in support of the findings are unsatisfactory.
ii. Where there has been improper application of a principle of evidence or where the trial court has failed to draw an irrestible conclusion from the evidence.
iii. Where the findings are based on wrong propositions of law and, if that proposition is corrected, the finding disappears and
iv. Where the finding is inconsistent with crucial documentary evidence on record.

Therefore, in the circumstances of this case, there is nothing on the record that would justify our overturning the concurrent judgements of the courts below. As has been demonstrated hereinabove, exhibit H cannot be ascribed as being 'crucial documentary evidence' of the kind envisaged in the abovementioned dictum in the Koglex case.

Conclusion

Consequently, it is our view that there is no merit in the appeal before us and same is hereby dismissed. We affirm the decision of the Court of Appeal.

(SGD) S. A.B. AKUFFO (MS)

JUSTICE OF THE SUPREME COURT

(SGD) DR. S. K. DATE-BAH

JUSTICE OF THE SUPREME COURT

MAJORITY OPINION

BAFFOE-BONNIE, J.S.C.

The plaintiff issued a writ against the defendants claiming for and on behalf of her children;

1 Declaration of title to H/No. 461, Kwadaso Estate, Kumasi

2 Recovery of Possession.

3 Damages for trespass.

4 Perpetual injunction restraining the defendants their servants and or workmen and agents from in any way interfering with the plaintiff's possession of the property fully described ….

Her statement of claim could be briefly captured as follows. Her husband the late Kyei a retired sergeant of the Ghana Army, was employed as a security personnel at the Ashanti regional office when the co-defendant, a serving senior military officer was also there. There developed a close relationship between them. When Kyei evinced an intention of acquiring a house, he discussed with his friend the co-defendant. The co-defendant discouraged him from acquiring a house at Atonsu but rather advised that if Kyei could provide an amount of money to the tune of ¢25,000 cedis he could help him acquire an estate house built by the SHC. Though he had been assured that the ¢25000 cedis was enough, after it had been started Kyei realised that it was not enough and that he had to look for extra money for some more building materials. He was eventually introduced to the project foreman of SHC as the owner of the building and the one to purchase the extra building materials. Kyei therefore paid for the necessary materials required for the completion of the project. He also did the terrazzo works and moved in with his family. Even though Kyei kept requesting for the title documents on the property and also the receipt for the monies paid to the Commander, he never had them. Kyei and his family started living in the house before the1979 military uprising and lived in it till he died in 1996. Before he died however the defendants, a sister and a nephew of Commander Osei were permitted by him at the request of Commander Osei to live in the house temporarily when the sister was

divorced from her husband. Kyei died intestate in 1996 and his family continued their long occupation of the house until 16th December 2000 when men from the police striking force, without any court warrant, but acting at the instance of Commander Osei, in a sheer brute show of force, forcibly ejected Kyei's family and effectively installed Commander Osei's people in the house. The plaintiff therefore instituted an action at the High Court claiming the reliefs earlier referred to.

After the defendants had entered appearance and filed a defence, the co defendant applied and was joined to the action. He filed his defence and counterclaimed as follows;

A. Declaration of title to H/no E 461 Kwadaso Estate Kumasi.

B. Recovery Of possession of the said house

C. Perpetual injunction to restrain plaintiff and all persons claiming through her from interfering with co-defendant's right to the said house.

The defendants did not give any evidence. The Co-defendant's case could be summarized as follows:

He bought the property with his own money and not with money from Kyei as was being alleged by the plaintiff. He indeed acquired the property with an initial payment of ten thousand cedis and subsequently a mortgage facility from the bank. On completion of the construction he gave the keys to one Mrs Danso. Kyei went and demanded for the keys from the said Mrs Danso and when she refused to give him the keys Kyei forcibly broke into the house then changed the locks and started living in it with his family. He went into exile following the 1979 uprising and returned to Ghana in 1984. When he came he found that the government of the day had confiscated the property. Kyei convinced him that he knew the man in charge of the confiscated Assets Committee. He therefore gave him a note to be given to the person so that the property will be released. He denied that it was Kyei who permitted the defendants to live in the House. It was he the co-defendant who asked the defendants to live in the house when Kyei started laying adverse claims to the property.

At the close of pleadings the following issues were set down for trial.

1. Whether or not the house in dispute was acquired by co-defendant or for the husband of plaintiff, late Samuel Kwame Kyei.

2. Whether the whole construction of the house in dispute was completed by the state housing company or the plaintiff's late husband had to spend substantial amount to complete same to the knowledge of co-defendant.

3. Whether or not late Kyei forcibly took possession of the house in dispute after same had been entrusted to a certain woman by co-defendant.

4. Whether or not the co defendant is estopped either by conduct, limitation or both from putting up his present claim

5. Whether or not the plaintiffs is entitled to the reliefs or at all.

6. Any other issues raised by the pleadings.

In his judgment the trial judge stated as follows;

"I need to reiterate the point that although as many as about 6 issues were raised nevertheless, the most crucial and fundamental is whether the house in dispute was acquired by Commander Osei by himself and for his own benefit or was acquired for the late Samuel Kyei for his benefit. All other issues shall fall in their proper places when the most crucial issue has been dealt with."

In the end the trial judge concluded as follows;

"Now, having considered this case in its entirety I find that on the balance of probabilities the co-defendant has satisfied me that his story is more probable than the plaintiff's and is therefore entitled to judgment on his counterclaim. The plaintiff's case is dismissed."

In his appeal to the Court of Appeal the appellant herein argued forcefully that the equitable doctrine of resulting trust was clearly made out in favour of the appellant and that the judgment to the respondent was against the weight of evidence. In their judgment their Lordships at the Court of Appeal stated as follows;

"….the fundamental issue to be considered in this appeal is whether or not the appellant was able to adduce such credible, intelligent and quality evidence with such certainty that the trial court ought to have been convinced that the appellant had met the essential criteria for proving her case on the preponderance of probability test."

Their Lordships then concluded thus;

"Clearly looking at all those pieces of evidence both oral and documentary how could the trial court have erred when it held that on the preponderance of probability that there was sufficient evidence to prove that the house belonged to the respondent and not Kyei? In BISI vrs TABIRI alias Asare [1984-86] GLR 282 at page 287 CA. Adade JSC stated that;

'As a judge of fact, it is his peculiar province, listening to the evidence and having the witnesses before him, to weigh the several statements on each issue and to decide which to believe and which to reject. So long as his conclusion can find support from statements on record, it is not open to an appellate tribunal, except for just and compelling reasons to disturb them'

In fact we find no just and compelling reasons to disturb the findings made and the conclusion arrived at by the trial court."

Before us the Appellant has argued the following grounds of appeal;

1. The Court of Appeal erred in its judgment when their Lordships rejected the authentic and reliable documentary evidence voluntarily executed by the co-defendant/respondent/respondent dated the 9th day of September, 1986 tendered in the lower court as exhibit "H" which conclusively and preponderantly established that the disputed landed property herein described as H/No. Plot 461 more particularly situate at Kwadaso Estate, Kumasi is owned by the plaintiff/Appellant/Appellant's late husband without their Lordships prescribing any satisfactory reason(s) for rejecting the said documentary evidence.

2. The judgment of their Lordships at the Court of Appeal was against the weight of evidence on the record.

3. Additional grounds may where necessary be filed upon receipt of the record of proceedings.

I must say that the arguments canvassed before us have been no different from those canvassed before both the Trial High Court and the Court of Appeal. The cumulative conclusion is that the two lower courts failed to properly evaluate the evidence on record as to the ownership of the property, failed to attach the proper weight to a vital documentary evidence, and therefore came to the wrong conclusion. In other words the decision of both courts was against the weight of evidence.

This court has held in several cases that where there are concurrent findings of fact made by two lower courts an appellate court should be slow in overturning such concurrent findings.

In the case of **ACHORO V. AKANFELA. [1996-97]SCGLR 209 Acquah JSC (as he then was) said; "now in an appeal against findings of facts to a second appellate court like this court, where the lower appellate court had concurred in the findings of the trial court, especially in a dispute, the subject-matter of which is peculiarly within the bosom of the lower courts or tribunals, this court will not interfere with concurrent findings of the lower courts unless it is established with absolute clearness that some blunder or error resulting in a miscarriage of justice, is apparent in the way in which the lower tribunals dealt with the facts.**

See also the case of In re **NEEQUAYE(decd) ADEE KOTEY V KOOTSO NEEQUAYE [2010] SCGLR 348.**

However, it must also be stated that this court has also held in several cases that an appeal is by way of re hearing and that an appellate court should put itself in the same position as the trial court. In the case of **PRAKA V KETEWA [1964] GLR 423**, this court said

"An appeal is by way of rehearing and so an appellate court is entitled to make up its own mind on the facts and to draw inferences from them to the extent that the trial court could."

Since the appellant in his first ground of appeal charges that the Court of Appeal drew wrong inferences from documentary evidence thereby coming to the wrong conclusions, the said ground is in fact not any different from the ground 2 which is the omnibus ground of judgment was against the weight of evidence. I therefore intend to treat the two grounds of appeal together as JUDGMENT IS AGAINST THE WEIGHT OF EVIDENCE

I will start by quoting two statements on this subject

In the case of **AKUFFO ADDO** v. **CATHELINE (1992) GLR 377SC** this court said:

"**Where an appeal is against the weight of evidence, the appellate court had jurisdiction to examine the totality of evidence before it and come to its own decision on the admitted and undisputed facts."**

Then in the case of **BONNEY** v. **BONNEY** (1992-93) GBR 779 SC this court held;

"Where an appellant contended that a judgment was against the weight of evidence, he assumed the burden of showing from the evidence that that was infact so. The argument that an appeal is by way of rehearing and therefore the appellate court was entitled to make its own mind on the facts and draw inferences from them might well be so but an appeal court ought not under any circumstances interfere with findings of fact by the trial judge except where they were clearly shown to be wrong, or that the judge did not take all the circumstances and evidence into account, or had misapprehended some evidence or had drawn wrong inferences without any evidence in support or had not taken proper advantage of his having seen or heard in support the witnesses."

As was rightly found by the trial judge, from both the pleadings and the evidence adduced at the trial by both parties, the money was paid to the State Housing Corporation by Commander Osei in whose name the documents on the property were also prepared. The presumption here therefore is that the property was acquired by the co-defendant for himself. This presumption however can be rebutted if the plaintiff can show that the money that was paid to the SHC by the co defendant was indeed provided by the late Kyei and that the property was being purchased for the benefit of Kyei. If this was proved then the equitable doctrine of resulting trust could be invoked.

In the recent case of **RE FIANKO AKOTUAH (DECD); FIANKO & ANOR v DJAN AND ORS** [2007-2008]SCGLR165 holding one it was said;

"It is settled law in equity that the trust of a legal estate whether freehold, copyhold, or leasehold; whether taken in the name of the purchasers and others jointly, or in the name of partners jointly or in the name of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advanced the purchase money or the true owner in equity is not stopped from averring and proving that to be the truth of the transaction; neither can they be stopped from relating the real truth known to them at the time of making of the evidence on record and on the balance of probability"

In the case of In re Koranteng (dec'd), Addo v Koranteng and others [2007-2008] SCGLR 1039 This was said;

"**In essence, a resulting trust was a legal presumption made by the law to the effect that where a person had brought property in the name of another, that other person would be deemed to hold the property in trust for the true purchaser. It was a trust implied by equity in favour of the true purchaser or his estate upon death. The trust was regarded as arising from the unexpressed or implied intention of the true purchaser. Thus for a resulting trust to be established there had to be proof that the purchase money for the disputed property had been advanced by the beneficiary of the resulting trust."**

Now, in their judgment their Lordships at the Court of Appeal said;

"In the instant case, and as already stated in this judgment, apart from the appellant merely mounting the witness box to repeat what is contained in her statement of claim, there was no other evidence to convince the trial court and for that matter this court, that indeed and in fact the late Kyei parted with any consideration to the respondent for the purchase of the house. Again, it is clear from the face of the documents tendered by the respondent that the authenticity of those documents could not be doubted. Therefore the trial court was right in tilting the weight of the evidence in favour of the respondent.

This court is equally satisfied that in view of the ample documentary evidence and on the balance of probabilities, it was the respondent who negotiated and paid for the subject matter in dispute for himself and not for the late Kyei"

The documentary evidence referred to in the above quoted passage was listed as follows;

i. Letter dated 25th April 1978 from SHC and addressed to the Respondent in which the SHC informed the Respondent of its decision to offer him H/No. 461 Kwadaso Estate Kumasi in replacement for M.30 South Suntreso Estate, Kumasi. The SHC requested the Respondent to surrender the lease on M.30 to enable the SHC prepare a new lease form him in respect of H/No. 461. [Exhibit 2]

ii. A letter dated 2nd August 1977 from the SHC confirming the negotiation between the Respondent and the SHC. [Exhibit 1]

iii. Letter dated 30th December 1977 from Ghana Commercial Bank, Mortgage Department, Head Office and addressed to the Respondent advising him that the Bank had approved a personal mortgage loan of ¢45,000.00 old cedis in the Respondent's favour. [Exhibit 3]

iv. A letter dated 4th January 1978 from Ghana Commercial Bank and addressed to the Respondent setting out the terms upon which the personal mortgage of ¢45,000.00 old cedis was granted and requesting the Respondent to call on the Legal Department of the Bank to complete the necessary formalities. [Exhibit 4]

v. An undertaking dated 27th September 1978 from the Legal Offices of SHC acknowledging receipt of a deposit of ¢10,000.000 old cedis from the Respondent and a further sum of ¢43,900.00 old cedis paid by Ghana Commercial Bank in favor of the Respondent being purchase price for a

House Type SH9 on Plot No. 461, Kwadaso Housing Estate, Kumasi [Exhibit 5]

vi. Letter dated 23rd April 2001 from the office of the President, Confiscated Assets Committee and addressed to the Respondent inferring him of the deconfiscation and release of H/No. 461 Kwadaso Estate effective 6th April 2001. [Exhibit 7]

But really, what is the evidential value of these documents in the resolution of the main issue? My answer to this question is that, taken individually or together, they add little or nothing to the co-defendants case. The issue at stake was not who negotiated with or paid the money to, or simply who dealt with, the SHC. The issue is who provided the money that was used to purchase the property and for whose benefit was the property purchased? Incidentally as I will show presently, the documentary evidence that seemed to have influenced the two earlier courts did not address the main issue.

The first two documents identified only show that negotiations to purchase the property were between the co-defendant and the SHC. This is not strange seeing that the plaintiff herself admitted that the arrangement to purchase the property was for the co-defendant to front for her husband using her status as a senior officer since the late Kyei was made to believe that it was only senior officers of the army who could own properties there. The averment in (vi) does not amount to much either. The co-defendant's name was on the property and so if it was being confiscated it would be confiscated as his property and if it was being deconfiscated it would be done in his name and any correspondence to that effect would be sent to him. It still will not negate the fact that he fronted for somebody in the acquisition of the property.

Bullets iii, iv and v are all correspondence in respect of a personal mortgage loan procured by the co-defendant for the purchase of a house. Indeed it is these particular documents that influenced the two lower courts to say that the initial deposit could not have been provided by the late Kyei.

To them if the late Kyei had provided as much as 20,000 cedis for the purchase of the property, there would not have been any need for the co-defendant to have again entered into a mortgage transaction for the same property. An argument like this clearly shows a lack of understanding of the minds of public servants. For obvious reasons senior public servants in the limelight, like co-defendant, are not likely to

make a down payment of a large amount of money towards the purchase of any property if they have the opportunity and choice of paying for the same property either by installments or through a purchase plan like mortgage. Indeed, if Late Kyei had given the whole amount to him, or even if he himself had the full purchase price of the property, the co-defendant would not have paid the full price! This is done to avert suspicion of corruption and avoid public scrutiny. It is this same thought mentality that makes some people purchase properties in other people's names. The documents are therefore not conclusive that no money was given by Kyei to the co-defendant for the purchase of the property in dispute for the benefit of Kyei. At best they are presumptions which can be rebutted.

What was the appellant required to prove and what evidence did she proffer?

As already established since her case hinged on the equitable doctrine of resulting trust what she was required to prove was that the purchase price for the property was provided by her husband and the purchase was to be for his benefit. This really was a tall order. But her story was simple.

Her late husband and the co-defendants were very good friends. Since the late Kyei by his status as a retired sergeant in the Ghana armed forces could not have acquired property in that area reserved for senior officers, the friend Commander Osei undertook to front for him for the purchase of the property. Kyei produced the initial money of 20,000 cedis and same was allocated. Late Kyei was subsequently introduced to the foreman working on the property as owner by the co-defendant. More building materials were purchased by Kyei and the building was completed. He moved in and lived in it with his family until he died in 1996. In 1986 when there were attempts to confiscate the property as belonging to the co-defendant, the co-defendant gave him a note to the assets confiscation committee for the release of the property to Kyei, he being the owner.

As indicated earlier the appellant really had a herculean task proving by direct evidence that the late husband actually provided the money used to purchase the property. This is because the money was paid before 1980 and this action was instituted in 2001; the money was supposed to have been paid by Kyei who had died in 1996, five years before this action was instituted; this was supposed to be an arrangement between friends who trusted that each will act with utmost good faith; no

adverse claims were made by the co-defendant in the lifetime of Kyei for him to be put on notice to prepare against any eventuality. In these circumstances her inability to lead any direct evidence or produce any documentary proof of payment can be understood.

This is what their lordships at the Court of Appeal said;

"The question is, was the Appellant at the trial able to prove that her late husband actually did provide the purchase price?

In the statement of claim, the appellant averred in paragraphs 6 and 7 thereof as follows:

> **"6. Subsequent to this promise Commander Osei requested Kyei to make a down payment of ¢25,000.00 old cedis to enable him secure one of the type SH9 buildings of the SHC for him Kyei.**
>
> **7. The SHC indeed started with building in dispute after the payment of the ¢25,000.00 old cedis to Commander Osei Kyei felt all was well."**

In her evidence-in-chief however, the Appellant testified at page 76 of the record as follows:

> **"Q. Do you know if your husband paid any consideration towards the purchase?**
>
> **A. My Lord later my husband told me he made a deposit of over ¢20,000.00 old cedis to the Co-defendant toward the purchase of the house." [Emphasis]**

This piece of evidence is obviously hearsay but it was allowed because it is a first hand hearsay. But apart from the difference in the consideration the late Kyei was alleged to have paid in the statement of claim and the unspecific consideration the Appellant testified that he paid, there was no other evidence on the record to substantiate that the alleged amount was actually paid to the Respondent."

But the absence of direct evidence is not fatal if credible presumptive or circumstantial evidence could be led in support of her case.

1. There was evidence on record that the late Kyei started living in the house in dispute from the late 1970s to 1996 when he died and after his death his family lived there until this action was instituted.

2. Water bill and electricity bills on the house in dispute bore the name of the late Kyei.

3. Property rates receipts issued in the name of the late kyei

Letters addressed to the confiscated assets committee by Kyei in respect of the house and vice versa.

Admittedly all these pieces of evidence only go to establish a long period of possession by Kyei and not necessarily ownership. But how did Kyei come to live in this house for a period of over eighteen years before he died? According to the appellant Kyei was living in the house because it was his. The co-defendants answer to the long occupation by Kyei was that Kyei forcibly broke the locks to the house and replaced same and moved into the house. Further, he the co-defendant was forced to run away into exile in the wake of the 1979 military uprising. Even though he returned to Ghana from exile in 1984 he still did nothing to move Kyei out of the house.

I have carefully read through the evidence adduced at the trial and It is my view that the co-defendant was very economical with the truth and that at both the trial court and the Court of Appeal the first thing that should have aroused their suspicion was the outright lie told by the co-defendant regarding the relationship between himself and the late Kyei! Seeing that the case of the appellant hinged on the fact that this was an arrangement between friends, hence the lack of proper documentation, the co-defendant went to all lengths to distance himself from Kyei and was prepared to even swear that Kyei was not his friend!

During cross examination this is what took place;

Q Now commander if you accept my suggestion then we will not go into any detail. Late kyei was your very close friend

A. My lord I didn't know him. He was not my friend it is through Akyempimhene that I got to know him

Q Kyei was never your friend you say?

A Yes my lord he was not my friend but I know him through the late Akyempimhene.

There were several suggestions and there were several denials. It was like Peter and Jesus being played back all over again, except that this time the denials were not three but several! But what did the totality of the evidence suggest. In his evidence in chief he was asked to cast his mind back to the year 1986, two years after his return from exile and tell the court what happened. This is what he said;

“A. My lord after my return, I went to my mother in Kumasi and lived with my mother. So Kyei came to me at my mother’s place. I requested for my properties from him. He told me that he had put them to some place but we went round the whole Kumasi and could not find them. .About two days later he came and told me that he knows the officer of the confiscated assets unit. He knows the director very well. My Lord he mentioned the name as Mr Kwarteng. This man I also gave him a note to be given to the confiscated assets unit for the release of the disputed house.

During cross examination this took place

Q Commander you have said in this court that you requested for your properties from the late Kyei. It is in evidence. What properties are they?

A. My Lord when I returned from exile I was informed that Kyei went to the Regional Office and packed all my things. My Lord some of the things were building material. My Lord I also brought some fridges and air conditioners from America. My Lord when I returned from exile I could not find them so I was informed that it was Kyei who had taken possession of these items.

Q. Now commander how did Kyei go to collect your things if he was not your friend?

A. My Lord I cannot tell.

Q. You are talking about moveable properties

A. Yes my lord

Q. And then you were going round the whole town you couldn’t find them?

A. Yes my lord.

Q. And when you could not find these properties you still went forward and wrote this exhibit 6 for him. You trusted him to that extent?

A. That is not correct."

So nauseating was this persistent denial that at a point his obviously frustrated Lawyer remarked,

"……..My lord this is the difficulty. That is why I started by telling him that let us admit certain facts which are there and then we proceed from there. Because to say that Kyei was not your friend is difficult"

Clearly this was not the voice of a truthful person. What was he trying to prove denying Kyei now that he is dead? What was he trying to hide? Surely this was not a credible person and anything he said from now on had to be taken with a pinch of salt.

Evidence on record is that Kyei lived in this house from !979 till he died in 1996, a period of no less than 17 years. All through this period he exercised rights of ownership over this property. What did the co defendant do? His answer was that Kyei forced himself into the house and again he went into exile following the 1979 mutiny. But he admitted that he returned from self imposed exile in 1984 and has actually remained in the country since then. He did nothing while Kyei was alive and indeed until 4 or 5 years after his death. This behavior lends credence to the claim by the appellant that the property belonged to her late husband Kyei.

The most important piece of documentary evidence that was not properly evaluated or improper inferences drawn from, was the letter written by the co-defendant for Kyei variously described as exh 6 or exh H. For a better appreciation let me re-produce the letter unedited'

9/9/86

My dear junior brother,

This note is from your senior brother Cdr Osei. Mr Kyei was very lucky to have found me. From him, he has been fishing for me and he has tried all places he knew and

was told I was residing. All was a failure until today he got me near the PCT head office where I also saw you some time ago. Mr Kwarteng its all about a house I got for him. You know very well that I am not corrupt and will never ever get myself into it. So it is all true that that its for him. I got it for him and he even spent a lot on it. I remember giving him a paper to that effect but due the 1979 situation most of my personal effects got stolen. So please handle the problem prudently and on humanitarian basis.

I hope you would recall and reflect on me to help the poor guy.

Thanks and God bless

Yours

(signed)

Cdr Osei

Before the Court of Appeal, counsel for the respondent argued that this document does not mention the house in dispute and that reference to the word House in the letter does not mean the house in dispute. So there is the need for extrinsic evidence to interpret. This argument seemed to have found favour with their Lordships at the Court of Appeal.

In their judgment their lordships noted thus;

"…..But the most significant observation is that exhibit did not give any material particulars of the house mentioned in that letter. Indeed a careful reading of the said exhibit gives a strong impression that the author was being economical with or choosing his words carefully. Therefore it was not apparent on the face of the document the subject matter that was being discussed. In the absence of any reference to H/NO/461, Kwadaso Estate, Kumasi the trial court was left with no option but to take extrinsic evidence to assist in deciding what weight to attach to it."

. How the Court of Appeal came to the conclusion that this clearly unambiguous document needed to be subjected to interpretation, because there was no indication in the document that the house in dispute was the subject matter of the letter, is not easy

to fathom. When he was being led in evidence by his own counsel this is what took place.

Q…You have said that you went into exile. Tell this court when did you return from exile?.

A. My Lord in 1984

Q. Cast your mind back to the year 1986 ie 2 years after you had returned from exile. Did anything happen between you and the late Kyei in respect of the property in dispute?

A. My Lord after my return, I went to my mother in Kumasi and lived with my mother. So Kyei came to me at my mother's place. I requested for my properties from him. He told me that he had put them to some place but we went round the whole Kumasi and could not find them - about 2 days later he came to and told me that he knows the officer of the Confiscated Assets Unit. He knows the director very well. My Lord he mentioned the name as Mr. Kwarteng. This man I also give him a note to be given to the Confiscated Assets Unit for the release of the disputed house.

Q. Tell this court, what did Kyei ask you to write in the said letter. The content of the said letter?

A. My Lord he asked me to write that if he sent this letter to the Unit it would be released.

Q. What was the purpose of this letter?

A. My Lord the purpose of the letter was to release the house to me.

Q. So you wrote this letter for Kyei. Now have a look at this and see if this is the letter that you wrote for him. This is a photocopy?

A. Yes My Lord.

Q. We want to tender the said letter in evidence?

D. M. Adusei: No objection

By Court: Copy of letter dated 9-9-86 admitted in evidence without objection and marked Exhibit 6.

Then under cross examination this is what happened;

Q. Now commander please look at exhibit 6. Commander exhibit 6 was written by you?

A. Yes my Lord I will not lie

Q. And it was written on the 9th September 1986?

A. Yes my Lord

Q. And to whom was it addressed?

A. My Lord it was addressed to a man whom Kyei had already mention my name to him. So I have written there my junior brother.

Q. So you know him?

A. Yes My Lord.

Q. And this particular person had something to do with de-confistication of Assets.

A. My Lord he was a member of a committee of Confisticated Asset Committee.

Q. And he was somebody who was in the position to help?

A. My lord I believe he could help

Q. Now please look at your exhibit 6 and read out the content to his lordship?

A. (The witness reads the letter)

Q. And this letter was signed by you?

A. Yes my Lord

Q. Now the Kyei referred to in exhibit 6 and which you have just read is the deceased husband of the plaintiff?

A. Yes my lord he is the one

Q. And the property which you were asking Kwarteng to assist the release was the same property which is now the subject matter of the suit?

A. Yes my lord.

So how did their lordships come to the conclusion that it was not clear the subject matter that was being discussed in that letter?

This was a document voluntarily written by an adult retired Senior Officer of the Ghana Armed Forces; a Naval Commander. Not in exile or custody but from the comfort of his home. The Commander then goes to sleep. Thereafter the beneficiary of this letter lives in the said property for ten more years before he dies. Then like the proverbial Rip Van Winkle the Navy Commander wakes up 4 years after his death, and suddenly realizes that the property is actually his and starts scheming to get it back. And his answer to the long period of inaction is that the officers in the mutiny ie AFRC that forced him into exile, were the same people who had come back as PNDC. What he failed to tell the court was why he felt emboldened to return to Ghana in 1984, just two years after the coup that had brought the same people to power. We still have not been told what he did even when Ghana was retuned to constitutional governance in !993. I am sure his answer would be that it was the same AFRC in 79 that came back as PNDC in 82 and metamorphosed into NDC in 1993! Despite the documented turbulence associated with the 1979 military uprising, this is a story that I find too incredible.

It is my considered opinion that the trial court and their Lordships allowed themselves to be unduly influenced by the documentary evidence proferred by the co-defendant while paying scant attention to the single most important document, exh H, on the part of the appellant. If they had adverted their minds properly to the fact of the long occupation of the property by Kyei and his family, the inaction on the part of the co-defendant for the long period lived that Kyei lived in the house till he died while; the fact that exhibit H was evidence against self interest, and finally the fact that the co-defendant sought to repudiate the clear and unambiguous contents of exhibit H, or give it a different meaning only after the death of the beneficiary of that exhibit, they surely would have come to a different conclusion than they came to. As was said in the Achoro . v Akanfela case;by Acquah JSC,

Instances where concurrent findings may be interfered with are

(i) Where the said findings of the trial court are clearly unsupported by evidence on record; or where the reasons in support of the findings are unsatisfactory;

(iv) where the finding is inconsistent with crucial documentary evidence on record. the very fact that the first appellate court had confirmed the judgment of the trial court does not relieve the second appellate court of its duty to satisfy itself that the first appellate court's judgment is, like the trial court's, also justified by the evidence on record; for an appeal, at whatever stage is by way of rehearing. And every appellate court has a duty to make its own independent examination of the record or proceedings."

From the totality of the evidence on record it is my view that decision of their Lordships was against the weight of evidence on record and so the appeal succeeds.

I will therefore allow the appeal and set aside the judgment of the trial High Court, as confirmed by the Court f Appeal . Judgment in favour of the plaintiff/appellant/appellant.

(SGD) P. BAFFOE BONNIE
JUSTICE OF THE SUPREME COURT

(SGD) J. ANSAH
JUSTICE OF THE SUPREME COURT

(SGD) V. AKOTO BAMFO (MRS)
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