IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA, A.D.2013

CORAM: ATUGUBA, J.S.C. (PRESIDING)
DATE-BAH, J.S.C.
ADINYIRA (MRS.), J.S.C.
DOTSE, J.S.C.
GBADEGBE, J.S.C.

CIVIL APPEAL
No.J4/45 2011

30TH JANUARY, 2013

1. MAJOR MAC DORBI	**PLAINTIFFS/**
2. W. O. SAVIOUR	**RESPONDENTS/**
	APPELLANTS

VRS

1. RICHARD ADOM FRIMPONG	**DEFENDANTS/**
2. GEORGE GYESI	**APPELLANTS/**
3. MAR GEORS LTD	**RESPONDENTS**

J U D G M E N T

ATUGUBA, J.S.C.

The substantially common facts of this consolidated appeal are briefly that the Appellants are both retired army officers. Whilst attached to the Castle in the 1980s while still in active military service they procured through the then Chief of Staff the 3 disputed plots of land, noted for them, from the Lands Department. These plots formed part of land vested in the Government of Ghana. They were swampy areas and they were made to understand that unless they developed them significantly, leases would not be granted to them. They did so by expending considerable sums of money

filling up these plots and in the case of Mac Dorbi, constructing the foundation of a building and a sceptic tank.

In the course of events the 1st respondent professing to be a grantee of these same lands, of Nii Kotey III of La, entered upon them and discovered the developments of Mac Dorbi, whose workman Bartholomew, known as Bato for short, informed him that he held Mac Dorbi's plots as joint ownership for them both. The 1st respondent without recourse to Mac Dorbi decided to buy off their interest, rather sadly, at the gargantuan amount of twenty thousand US Dollars ($20, 000).

Since Mac Dorbi and W. O. Saviour, the appellants, would not relinquish their claims to the land this litigation inevitably ensued. The trial judge Ofoe J (as he then was) reviewed the evidence at length and gave judgment in favour of the appellants, but was reversed on appeal to the Court of Appeal.

The Court of Appeal per Kanyoke J.A. held, inter alia, that there were conflicts between the appellants' pleadings and evidence as to the identities of the lands, their manner and source of acquisition.

It is trite learning that the credibility of witnesses is a matter for the trial judge who has the unique advantage of a live trial atmosphere, unpossessed by an appellate court and provided there is evidence to support his findings, the same should not be disturbed by an appellate court. Indeed there is a presumption that trial findings of fact are right. It is further solidly established that where a party's evidence is supported by the admissions or evidence of his opponent then, barring very exceptional circumstances, judgment should be given in favour of such a party. See *Asante v. Bogyabi* (1966) GLR 232, SC, *Banahene v. Adinkra* (1976) 1 GLR 346, CA, *Agyakuma v. Opuni* (1987-88) 1 GLR 47, SC at 50, *Bisi v. Tabiri* (1987) 1 GLR 360, SC, holdings (5) and (6) and *Manu v. Nsiah* (2005-2006) SCGLR 25, holding (2) and at 32-33.

In this case the undisputed physical evidence of the developments on the ground coupled with the act of payment of the $20, 000.00 by the 1st respondent in acknowledgement of Mac Dorbi's title to the 2 plots of land, which he acquired *in consimili casu* with regard to the acquisition of the third plot by W. O. Saviour, make

the inconsistencies and other supposedly unsatisfactory aspects of the evidence in favour of the appellants, pale into insignificance.

Procedural Lapse

From the record of appeal and the Court of Appeal held it to be fundamental, W.O. Saviour did not enter appearance let alone file a defence. He however participated to the hilt in the proceedings and emerged from them as a victorious counter claimant. As to this we wish to point out that the battle for substantial, as opposed to technical and fastidious justice, has been irreversibly won. At the time of the institution of the consolidated suits herein, as noted by Kanyoke J.A. in the Court of Appeal, the new High Court (Civil Procedure) Rules 2004, C.I. 47 had come into force. The comprehensive terms of Order 81 rule 1(1) and 2(2) have indubitably given statutory stamp to the ancient maxim *cuilibet licet renunciare juri pro se introducto*, i.e. a person can waive what the law has ordained for his own advantage. In *Obeng v. Boateng* (1966) GLR 689 Amissah J.A. (as J) did not invalidate the participation in the proceedings of certain third parties who had filed no appearance thereto.

In the striking case of *Nyako v. A.E. Akwa* (1949) 12 WACA 465 at 467 it was held that a litigation which ensued without the issue of a writ of summons was good since the parties appeared before the court and were heard and that the absence of a writ did not vitiate the substantive jurisdiction of the court over the case. Even in criminal trials where the stakes are high it has been held, departing from high classical authority of old, that the absence of a plea or conviction before sentence, does not vitiate the proceedings, see *Kini v. The Republic* (1980) GLR 412 and *Adam v. The Republic* (1992) 2 GLR 150. In his *magnus opus,* Civil Procedure A Practical Approach, Mr. Kwami Tetteh has lamented at length the grant of an unclaimed counterclaim. Time in this case has not allowed us a close scrutiny of his reasoning, though at a glance, we wonder how the decision in *Hanna Assi v. GIHOC Refrigeration & Household Products Ltd* (No.2) (2007-2008) SCGLR 16 can be said to be *per incuriam* of the decisions he relies on.

For all that, since the parties fully litigated over the true ownership of the lands in dispute we hold that Order 81 rule 1 and 2(2) do save the judgment in favour of W. O Saviour.

For all the foregoing reasons we would allow the appeal, set aside the judgment of the Court of Appeal and restore the judgment of the High Court.

(SGD) W. A. ATUGUBA
JUSTICE OF THE SUPREME COURT

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

(SGD) S. O. A. ADINYIRA (MRS)
JUSTICE OF THE SUPREME COURT

(SGD) J. V. M. DOTSE
JUSTICE OF THE SUPREME COURT

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