IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA -AD 2015

CORAM: WOOD (MRS) CJ (PRESIDING)
ANSAH JSC
DOTSE JSC
YEBOAH JSC
BENIN JSC

CIVIL APPEAL

NO.J4/3/2015

22ND OCTOBER 2015

ROSINA ARYEE	**-**	**PLAINTIFF/APPELLANT/ APPELLANT**
VRS		
1 SHELL GHANA LTD	**-**	**DEFENDANT/RESPONDENT RESPONDENT**
2 FRAGA OIL	**-**	**CO-DEFENDANT/RESPONDENT RESPONDENT**

JUDGMENT OF THE COURT

BENIN, JSC:-

This appeal raises two important principles of law, namely *nemo dat quod non habet* and priority of registrable instrument by a bona fide purchaser, which were relied upon by the plaintiff and the defendants, respectively. The trial High Court as well as the Court of Appeal agreed that the prior registration by the co-defendant who they considered a bona fide purchaser should prevail both on the facts and the law.

The facts of this case are very simple. The State Housing Company, hereafter called the Company, leased the land in dispute numbered 4A Lami Dwaahe Street situate at Adentan Housing Estate to the plaintiff/appellant/appellant, hereafter called the plaintiff. The plaintiff leased the land to the Defendant/respondent/respondent, hereafter called the defendant, for a term of fifteen years. Under the terms of the lease agreement the defendant paid the plaintiff rent advance for ten years, with rent for the remaining five years to be paid later at an appointed date. When the plaintiff went to demand payment for the rest of the term, the defendant refused saying the plaintiff was not the owner of the property and that the land was owned by the Co-defendant/respondent/respondent, hereafter called the co-defendant. The plaintiff commenced an action against the defendant claiming, inter alia, ejectment for denial of title. In their defence the defendant maintained their position that the land was owned by the co-defendant. The defendant counterclaimed for a refund of their money inter alia. Subsequently Fraga Oil was joined to the suit as the co-defendant. The co-defendant pleaded that they were bona fide purchasers for value and had also duly registered their title in accordance with law. In response to the co-defendant's claim, the plaintiff denied their claim to be bona fide purchasers and pleaded that they were in possession at the time in that they carried out business on the land. Apparently in May 2003 the State Housing Company had granted the same land to the co-defendant. The Company file on this property that was tendered in evidence as exhibit 1 confirms this, see pages 200, 213, 214 and 221 of the record of proceedings as well as the pleadings of the parties and the evidence on record; thus there is no dispute about the identity of the land.

The case was contested on these facts. At the end the trial High Court found the claims by the co-defendant were established and so it entered judgment for them.

The plaintiff appealed to the Court of Appeal but failed there too. This is a further appeal to this court wherein the plaintiff has raised these grounds of appeal by the amended grounds of appeal:

i. The Court erred in upholding that even though the 2nd respondent did not counterclaim for a declaration of title the trial court nevertheless was right in granting same based on the authorities of EFFISAH v. ANSAH (2005-2006) SCGLR 943 and HANNA ASSI v. GIHOC REFRIGERATION & HOUSEHOLD PRODUCTS (No. 2) (2007-2008) SCGLR 16.
ii. The Court of Appeal erred when it ruled that no authority was shown in the proposition that possession in law is not only physical occupation but also the right to it.
iii. The Court of Appeal erred when it ruled that the 'nemo dat quod non habet' rule could not avail the appellant.
iv. The court erred when it upheld the trial court's decision that the 2nd respondent's registration had priority over the appellant's.

Both courts below have concurred in their findings of fact and law. This court would ordinarily respect such concurrent findings unless, inter alia, the courts below failed to take account of some important pieces of evidence on record or failed to evaluate such evidence correctly. There is no dispute that on the evidence the Company gave the same piece of land to the plaintiff in 1997 and then to the co-defendant in 2003. There is no dispute that the co-defendant registered the land in May 2003 whilst the plaintiff also succeeded in registering the same piece of land subsequently. This double registration depicts the confusion that has engulfed land administration in this country.

The co-defendant is saying that at the time they acquired the land they conducted appropriate searches. The result was that there was no encumbrance so they acquired the title which they duly registered. Therefore they claimed they were bona fide purchasers for value without notice; moreover they perfected their title by prior registration. The courts below rejected the plaintiff's claim to have been in possession when the land was given to the co-defendant.

For the purposes of this appeal, we would first have to focus on the issue of possession by the plaintiff whether in fact and in law the plaintiff was in possession and if so whether it negatives the plea of bona fides; that is reflected in ground 2 of the grounds of appeal. We take this approach because in law if the principle of bona fide purchaser succeeds, coupled with the prior registration, the co-defendant would succeed against every person as they would have acquired an indefeasible title. On the other hand, if the co-defendant was fixed with notice of any encumbrance, in this case by plaintiff's possession, it would negative the bona fides plea notwithstanding their prior registration of title.

Possession in law is one of the most difficult and complex areas of the law, hence the impossibility in placing it in a pigeon hole. It is normally determinable from the facts of a given case. We are concerned with possession of land in a city like Accra. We cannot lose sight of the numerous problems associated with land ownership in Accra. People who have gone through the process of acquiring land genuinely stand the risk of losing it if they fail to develop it immediately because of multiple sales or leases by the same vendor or lessor as the case may be. Hence developments have been rushed through without building permits all because people want to protect their land. So in order not to violate the laws of the land people have resorted to erecting temporary structures on the land to serve as visible sign to everybody who goes there to know that at least somebody is on the land. Needless to say squatters also take advantage to settle on unoccupied lands with kiosks and all sorts of temporary structures.

The above scenario is played out in this case as the situation of the land bears out as per exhibit 1at page 203 of the record. The situation of the land is vividly captured in the site inspection report conducted by the Company. It reads: *'Area was not developed by SHC. The places is(sic)being used by squatters who have placed kiosks along the expanse with the shaded portion being used by tipper operators. The shaded portion pink has no permanent structure but temporary ones'*

The plaintiff said she was using the place for moulding and selling blocks, and from the totality of the evidence on record she did so from a temporary structure she erected on the land. This structure was leased out to the defendant by the plaintiff in 1998 together with the two plots of land. The agreement between

plaintiff and defendant dated 6th August 1998 was put in evidence as exhibit B; the relevant part reads thus: *'That you will release to Shell Ghana Limited, the two properties situated at Adenta-as per the attached copies of the site plans.* ***The erected structure on the property*** *situated in the SSNIT flats area* ***shall constitute part of this deal.' Emphasis supplied***

From the site inspection report dated 4th April 2002, the co-defendant became aware of the presence of temporary structures on the land. They must have known that such structures must have been placed there by somebody. Or are they saying that it is only a permanent structure that deserves attention? It would be plainly unjust for the court to accept that a person is in possession only when he has a permanent structure erected on the land. When the site inspection disclosed the presence of a temporary structure on the land, it behoved the co-defendant to have made further inquiries to know who had erected the structure on the land. Possession in this case was complete when the plaintiff took the plots and erected the temporary structure on it and carried on her block-making business thereon. And later she leased the land to the defendant together with the erected structure. The defendant acknowledged there was an erected structure on it.

Also before the co-defendant acquired the land they got to know there was a temporary structure on it. They ought to have made inquiries but they just took it for granted the land was vacant because it was being occupied by squatters in kiosks, by tipper truck drivers and by temporary structure. There is nothing on the record to show that the co-defendant even bothered to find out from the occupants, the squatters and especially from the tipper truck drivers how they came to occupy the land or on whose authority. This reference is being made not because those people were placed there by the plaintiff, but because an intending purchaser must enquire from the occupants of the land he intends to purchase their authority for staying on the land. The person you consider a squatter sleeping in a kiosk might have been placed there by the landlord as caretaker or overseer. It is equally his duty as a prudent purchaser to find out who must have erected the structure there. For registration under the law does not dispense with the requirements of the equitable doctrines of fraud and notice; see the following Supreme Court decisions: **Amuzu v. Oklikah (1998-99) SCGLR 141; Western Hardwood Enterprise Ltd. and Another v. West African Enterprises Ltd. (1998-99) SCGLR 105.** Notice does not mean only notice of registration of the title but also notice of possession

by the first purchaser, grantee or lessee or their agent as the case may be. That is why an intending purchaser must make reasonable enquiries in respect of the property he seeks to acquire. This involves legal searches at the land registry, but more critically it involves a physical inspection of the land to ensure it is free from any encumbrances.

The co-defendant was aware the land was being occupied, albeit by persons they described as encroachers in their letter dated 5th August 2003 addressed to the Company. The letter headed EJECTION OF ENCROACHERS informed the Company about their readiness to commence operations on the land; they therefore requested the Company to eject the encroachers who had erected unauthorized structures on the land. The import of this piece of evidence found at page 220 of the record is that before the co-defendant acquired the land they knew of the existence of structures on the land and these structures remained on the land all through even after they had registered the land. As pointed out earlier they made no attempt to investigate the presence of these structures on the land, they assumed they were owned by encroachers. What was the basis for that assumption? The co-defendant did not tell the court. Was it the site inspection report? In the site inspection report, the Company mentioned three categories of persons or things on the land; namely, squatters living in kiosks, tipper truck drivers operating on part of the land and structures on another part of the land the ownership of which was not disclosed. Who erected the structure/s on the land? The co-defendant did not bother to find out; they only assumed it was put up by encroachers. but the evidence from the plaintiff supported by the lease agreement with the defendant as reflected in exhibit B confirm that the plaintiff did erect the structure from which she operated her block making business. And even if the structure was not erected by the plaintiff it still does not detract from her case for according to the unchallenged evidence of the plaintiff this structure was on the land as at 1998 when she handed it over to the defendant. As at 2003-2005 when the co-defendant purported to acquire the land the defendant had not destroyed or removed the structure from the land.

On these facts the co-defendant could not be said to have been a bona fide purchaser, they ought to have enquired about the presence of the erected structure/s on the land, since these are not natural fixtures to the land. They did nothing of the sort and only assumed they were owned by encroachers.

It appears the courts below both did not consider these vital pieces of evidence at all, indeed they did not mention them; they proceeded with their decisions as though these facts did not exist on the record. Having leased the land together with the erected structure on it to the defendant, in law the plaintiff could be said to have been in effective possession, notwithstanding the fact that the defendant did not move into immediate occupation of the land after they had been given possession thereof by the plaintiff following the execution of the lease agreement. We make reference to what the two courts below said on the issue of possession by the plaintiff. This is what the trial court said: *"The issue of possession raised by the plaintiff having been denied by the defendants, the law enjoined the plaintiff to call independent and corroborative evidence in proof thereof.……In the face of the plaintiff's possession of the land, she failed to lead any* evidence *in proof of that assertion. The record of proceedings does not reveal any such evidence and I am unable to accept this assertion by the plaintiff that she took possession of the land from 1997 to 1998 and moulded cement blocks thereon. The plaintiff's case is worsened by the defendant's evidence that when it agreed to lease and leased the land from the plaintiff, it was left unused until about the years 2005/2006. From all this I find as a fact that contrary to the plaintiff's assertion, the land was lying unoccupied when the co-defendant acquired it and it could not have been aware of any prior possession thereon by the plaintiff."*

For their part this is what the Court of Appeal said about the issue of possession: *"But the pertinent question to ask is: was the plaintiff in effective possession of the land when she let the land to the 1st defendant in to establish prior possession or interest in the land? What does the evidence say?"* Having posed these questions the court proceeded to answer in these words: *"A cursory look at the evidence of the plaintiff including her only witness indicates that they came to repeat their pleadings on oath without more. The plaintiff sought to establish that she had been moulding and selling cement blocks on the land prior to the lease to the 1st defendant company in a bit to establish possession and some form of notice of her interest in the land. However, the defendant controverted the plaintiff on the issue of possession of the land in dispute in cross-examination. It is significant to note that, if a party relies on his claim for ownership in possession, then there must be evidence of clear and positive acts of unchallenged and sustained possession or substantial user of the land. See* ***Akoto vrs. Kavege (1984-86) 1 GLR 365"***.The

citation of the last case by the court below is clearly wrong. That case was earlier digested in (1984-86) G.L.R.D. 115 CA and subsequently reported in (1984-86) 2 GLR 365. After citing this case, the court below continued thus: *"In such situation, the plaintiff who was relying on possession to claim the subject property and the same was vehemently challenged by the defendants could have called other persons i.e. boundary owners, etc who could have seen her work on the land as witnesses. The law frowns upon bare assertion without more as same is settled in cases like* ***Majolagbe vs. Larbi & Ors. (1959) GLR GLR 190 at 192 and Zabrama vs. Segbedzi (1991) 2 GLR 221CA"***

The trial court Judge rejected the plaintiff's claim for what he termed lack of independent and corroborative evidence. In the same vein the Court of Appeal rejected it because among other things she failed to call her boundary owners; which is understood to mean supporting evidence. It must be pointed out that in every civil trial all what the law requires is proof by a preponderance of probabilities. See section 12 of the Evidence Decree, 1975 NRCD 323. The amount of evidence required to sustain the standard of proof will depend on the nature of the issue to be resolved. The law does not require that the court cannot rely on the evidence of a single witness in proof of the point in issue. The credibility of the witness and his knowledge of the subject-matter are determinant factors; see this court's decision in the case of **William Ashitey Armah vs. Hydrafoam Estates (Gh.) Ltd, Civil Appeal J4/33/2013, dated 28th May 2013, unreported**. Indeed even the failure by a party himself to give evidence cannot be used against him by the court in assessing his case. See this court's decisions in these cases: **In re Ashalley BotweLands; Adjetey Agbosu and Others vs. Kotey and Others (2003-2004)** SCGLR 420, per Wood, JSC (as she then was) at page 448 and **William Ashitey Armah vs. Hydrafoam,** referred to above. In the last case cited the plaintiff did not testify in the action at all and only relied on the testimony of the court appointed witness, yet he succeeded and this court considered the process valid so long as the evidence relied upon was credible and sufficient to discharge the evidential burden that he assumed. The decision in the oft-cited **Majolagbe vs. Larbi** case, supra, should not be understood to have laid down any hard and inflexible rule that a party must at all costs produce a witness; and especially in a land case to call boundary owners. That decision was only reflecting on the required standard of proof in a given case. It does not mean where

the plaintiff does not call any witness to support the fact he has pleaded which the other party has challenged he must fail. No, he will only fail if his testimony is not credible enough as for instance if it is seriously flawed either during the presentation in evidence-in-chief or in cross- examination as to render same unreliable. Or if the evidence proffered does not satisfy every element of the law applicable to the facts.

Thus the courts below were bound by the law to examine every piece of evidence on record in order to reach a decision whether the plaintiff had discharged the burden of producing evidence and persuasion on a preponderance of probabilities. She did not require to call any boundary owner/s or witness/es to confirm that she had a structure on the land or that she conducted business on the land prior to the date she handed over the land with the erected structure thereon to the defendant. If you go through her entire evidence and cross examination you will not fail to notice that these facts stood unchallenged. How could they have been challenged anyway in the light of exhibit B whereby the defendant had admitted that they took a lease of the land from the plaintiff with the erected structure thereon? The plaintiff has firmly established her point that she was on the land and transferred it together with the erected structure to the defendant. Be that as it may it does not lie in the mouth of the defendant to deny that the plaintiff put up the structure because at the time the defendant came into contact with the plaintiff in 1998 the structure had been erected already on the land. Therefore it was not possible to challenge the plaintiff's evidence on this fact.

Thereafter the co-defendant assumed the burden of persuading the court that as at the date they acquired the land it was not in any way encumbered by the presence of the plaintiff on the land. But the site inspection report and their letter of 6th August 2003 both of which have earlier on been referred to have confirmed that there were visible presence of human beings and structures on the land which no prudent purchaser could and should brush aside without investigations into their presence there. The defendant to whom the plaintiff handed the erected structure never said they destroyed or removed it from the site prior to the acquisition by the co-defendant.

As earlier pointed out the courts below did not pay regard to all these pieces of vital evidence. Indeed they did not pay heed at all to exhibit B and the site

inspection report contained in exhibit 1 which was very critical to a determination of whether the co-defendant was fixed with notice of any encumbrance on the land. The result is that the co-defendant was a reckless purchaser and not an innocent one and did not acquire title validly. Thus ground 2 succeeds. This is enough to dispose of this appeal so we do not intend to consider the other grounds of appeal.

There is no dispute the defendant refused to pay any more rent to the plaintiff and denied that she was their landlady. This was in clear breach of the terms of exhibit B. We therefore set aside the judgments of both the High Court and the Court of Appeal. In their stead judgment is entered for the plaintiff for an order of ejectment and recovery of possession against the defendant for denying her title to the leased property and also the co-defendant to whom the court below ordered the defendant to attorn tenancy and who the defendant claims is their new landlord.

As stated already, the defendant was in breach of the lease agreement. The plaintiff was therefore entitled to recover rent for the last five years of the lease period that is for the period 6th August 2008 to 5th August 2013 which defendant refused to pay her. The plaintiff is therefore adjudged to recover the sum of five thousand five hundred Ghana cedis **(**GH¢5,500.00) representing fifty percent of rent paid for the first ten years. Interest is awarded on this sum from 6th August 2008 to date of payment at the prevailing bank rate. Since the lease expired on 5th August 2013 by effluxion of time, the defendant has continued to remain in possession without paying any rent to the plaintiff. Consequently, the plaintiff is adjudged to recover rent from the defendant at the rate to be assessed by the Land Valuation Division of the Lands Commission from the 6thof August 2013 to date, which sum should also attract interest at the prevailing bank rate from 6th August 2013 until final payment.

In addition judgment is entered for the plaintiff to recover general damages from the defendant for breach of contract which is assessed in the sum of fifty thousand Ghana cedis (GH¢50,000.00). For reasons contained herein the defendant's counterclaim fails entirely and same is dismissed.

In conclusion the appeal succeeds for reasons explained above and is accordingly allowed.

(SGD) A. A. BENIN

JUSTICE OF THE SUPREME COURT

(SGD) G. T. WOOD (MRS.)

CHIEF JUSTICE

(SGD) J. ANSAH

JUSTICE OF THE SUPREME COURT

(SGD) V. J. M DOTSE

JUSTICE OF THE SUPREME COURT

(SGD) ANIN YEBOAH

JUSTICE OF THE SUPREME COURT

COUNSEL

THOMAS HUGHES ESQ. FOR THE PLAINTIFF/APPELLANT/APPELLANT.

MARTIN AGYIN-SAMPONG ESQ. (WITH HIM SENA ABLA KPODO) FOR THE DEFENDANT/ RESPONDENT/ RESPONDENT.

CHARLES HAYIBOR ESQ. FOR THE CO-DEFENDANT/RESPONDENT/ RESPONDENT.