IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2017

CORAM: AKUFFO (MS), JSC PRESIDING
ANSAH, JSC
ADINYIRA (MRS), JSC
DOTSE, JSC
YEBOAH, JSC

CIVIL APPEAL
NO. J4/17/2016

14TH JUNE, 2017

MRS VINCENTIA MENSAH
SUING PER HER ATTORNEYS
1. BONIFACE LUMOR
2. JOHN ALLEN
(SUBSTITUTED BY BEATRICE TSOTSO ADJETEY) ..... PLAINTIFF/ RESPONDENT/APPELLANT

VRS

NUMO ADJEI KWANKO II ..... DEFENDANT/APPELLANT/ RESPONDENT

JUDGMENT

YEBOAH, JSC:-

The Plaintiff/Respondent/Appellant herein (who shall be simply be referred to as the Appellant) commenced an action at the High Court, Accra for a declaration of title to a piece or parcel of land at Baatsonaa Station, North of Teshie and other ancillary reliefs against the Defendant/Appellant/Respondent herein (who shall for sake of brevity be referred to as the Respondent) in this appeal.

The facts of this case appeared not to be seriously controverted at the trial court and at the Court of Appeal. The suit was originally instituted by the Appellant per her lawful attorneys Sampson Okai Adjetey and John Allen, against the Respondent herein and one other in the person of Nii Nortey Adjeifio as the second defendant but before the case could proceed to trial, the trial court on 10/03/2005 struck off the said Nii Nortey Adjeifio with the consent of counsel for the parties. The case thus proceeded for trial on the same day between the two parties herein.

The Appellant in her statement of claim had pleaded that the land in dispute was conveyed by a deed dated 24/11/1959 and same registered at the Deeds Registry as No. 1335/1960 from one **Nii Okang Nmashie III, the Mankralo of Teshie** and occupant of the Mankralo stool at the time, with the consent and knowledge of the principal elders and councilors of the said stool in accordance with the customary law, to one Sardis Noah Adjetey and his heirs and personal representatives. According to the Appellant, after the grant the grantees enjoyed peaceful possession of the land free from all encumbrances. It was averred in the Statement of Claim that prior to the Conveyance by the Mankralo, the stool had control over the land in dispute and had the authority to convey the land to the said Sardis Noah Adjetey.

The Respondent was at the time material to the commencement of this action the head of the Kle-Musum Quarter and the Tsei We family of Teshie. He claimed that the land in dispute falls within Kle-Musum Quarter lands as contained in a Statutory Declaration dated 25/07/1965 and registered as L.R 1332/1965 and that by virtue of the fact that the appellant's grantor did not own the land in dispute he had no title to convey and consequently the alleged grant to the predecessor of the appellant was void for want of title.

It was further averred by the Respondent that the land in dispute was also outside the Krobo Quarter land. The Respondent in resisting the claim of the appellant, contended that his family has been in undisturbed possession of their lands including the one in dispute since the original settlement dating back in the 16th Century. **He therefore**

proceeded to lodge a counterclaim for a declaration of title to the land in dispute, damages for trespass and for an order to annul the grant allegedly made to the appellant's predecessor and perpetual injunction restraining the appellant and her privies, etc from entering the land in dispute.

The learned trial judge at the High Court, Accra entered judgment against the Respondent who appealed to the Court of Appeal for reversal of the trial judge's judgment. The Court of Appeal on 12/3/2015 reversed the judgment, and granted the Respondent's Counterclaim after evaluating the evidence and dismissing the claim of the Appellant. The Appellant has lodged this appeal before this Court, seeking the reversal of the judgment of the Court of Appeal. Before this Court, the Appellant has filed several grounds of appeal stated in the notice of appeal thus:

i. The Court of Appeal did not properly evaluate the evidence on record regarding the rights of a party like Plaintiff/Respondent/Appellant who took interest in the land the subject matter of the suit from the Mankralo of Teshie instead of the Kle-Musum Quarter prior to the year 1962.
ii. The Court of Appeal erred when it failed to consider the issue of estoppel which was evident at the trial in relation to Defendant/Appellant/Respondent's Counterclaim.
iii. The Court of Appeal erred when it failed to consider the issue of Bona fide purchaser of land without notice which was evident from the record of proceedings and evidence adduced at the trial in relation to Defendant/Appellant/Respondent's Counterclaim.
iv. The judgment of the Court of Appeal is against the weight of the evidence adduced before the High Court.

On ground one, the complaint of counsel for the appellant, with due respect, did not take into consideration the fact that both parties agree that, the land in dispute falls

within the Kle-Musum Quarter lands. Indeed, the only point of divergence is that the Appellant only admits that it became part of the Kle-Musum Quarter after 1965 and that any land alienated before the declaration as regards the land of Kle-Musum in 1965 was not part of their land. The Court of Appeal as an appellate court with jurisdiction by way of rehearing subjected the mass of documentary evidence to scrutiny and evaluated the oral evidence, judgments of the Superior Courts of Judicature, etc and arrived at its conclusion. The learned Justices of the Court of Appeal placed reliance on Exhibit 6, a land suit instituted as **Adjei Kwanko II v Ibrahim Mensah Kometeh** unreported judgment of Omari-Sasu J (as he then was) in suit no. 1993/8 to determine the right person to alienate Teshie lands which also relied on the case of **Mensah v Ghana Commercial Bank** a judgment of Ollenu J (as he then was) dated 2/02/1962 to hold that long before 1962 Teshie lands could only be alienated by the heads of the quarters. The Court per Maful-Sau JA delivered as follows:

> "…from the above decision (re **Mensah V Ghana Commercial Bank** as per Ollenu J) it is clear that even as at 1957, lands at Teshie were alienated by the head of respective quarter which owned the land and that the stool could not execute any conveyance concerning quarter land without reference to the respective quarter. This is for me an authoritative evidence to the effect that heads of the quarter in Teshie had the vested right to alienate their lands long before 1962 as claimed by the respondent relying on Exhibit B which was executed by the Mankralo in 1959. The fact as stated by Ollenu J. was that even as at 1957 the head of the quarters in Teshie were alienating lands in their area of authority."

The Court of Appeal went further to rely on Exhibit 7 which was tendered as an archival record covering the case of **Numo Adjei Komey v Numo Adjei Onanka**, a judgment of Accra High Court dated 2/02/1962 Land Appeal No. 69/61 to hold that oral evidence

aside, Superior Courts of judicature have found as a fact that before the alleged grant to the Appellant, Teshie lands could only be alienated by the Quarters. As these judicial pronouncements stand it would be unjust if the established custom is reversed by this court in the absence of any compelling reasons canvassed before us. This Court has not been persuaded to change the long-established custom as being repugnant to natural justice and good conscience.

It appears that the Court of Appeal and the High Court differ on this finding as regards the proper person or entity to alienate the Teshie lands. This court as the second appellate court having considered the two judgments is entitled to form its own opinion on the facts, see **Duodu v Benewah [2012] 2 SCGLR 1306**. It is clear from the record that the Court of Appeal went very far to consider both documentary and oral evidence on record before proceeding to depart from the findings made by the trial court. This court finds it reasonable to support the findings made by the Court of Appeal and proceed to hold that the conveyance by the Mankralo of Teshie to the predecessor of the appellant was void as being contrary to the established customary law of Teshie as it then stood at the time of the alienation.

The second ground upon which learned counsel for the Appellant argued this appeal borders on estoppel which according to counsel, the Court of Appeal failed to consider even though it was evident from the record of proceedings and the evidence led at the trial court. The basis for this ground of appeal is that paragraph 6 of the appellant's reply and defence to Counterclaim had stated thus:

> 6. "As to paragraph 8,9 and 10 of the defence, the Plaintiff says that the 1st defendant is ESTOPPED by the judgment of the Supreme Court in Civil Appeal No. 8/92 entitled **Nii Armah Koranteng II and 5 ors vrs Numo Adjei Nkpa Klu** (substituted by Nii Nartey Adjeifio) delivered on the 19th day of April, 1992 from claiming"

From the record of proceedings in this appeal before us, it is clear that the learned trial judge considered the issue of estoppel. Counsel for the appellant complains as per the ground of appeal before us that the Court of Appeal did not consider the issue of estoppel. It was argued at length and as a court we owe a duty to counsel in this final court not to leave this point unanswered.

Learned counsel for the Appellant in his submissions on estoppel by placed reliance on section 26 of the Evidence Act, NRCD 323 of 1975 which states thus:

> Section 26 – Estoppel by own statement or Conduct.
>
> "Except as otherwise provided by law, including a rule of equity, when a party has, by his own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon such belief, the truth of that thing shall be conclusively presumed against that party or his successors in interest in any proceedings between that party or his successors in interest and such relying person or his successors in interest."

Counsel for the Appellant has submitted that in this case the Respondent was aware or fixed with knowledge of plaintiff's claim to the land but did nothing and thereby caused the appellant to believe for all those years that the appellant had good title to the land. References were also made to the Limitations Act, 1972, NRCD 54 to support this point raised against the respondent.

The Court of Appeal was of the view that the grant to the appellant was void and no title passed. Justice Marful Sau, speaking for the Court said:

> "From the evidence on record in as much as the land conveyed to the predecessor of the respondent in Exhibit B was within Kle-Musum land, that conveyance was void and no title passed to the predecessor of the respondent. By the evidence on

> record Exhibit B is therefore void since the interest created therein was not granted by the lawful head of family, that is the Kle-Musum quarter of Teshie"

It would certainly be contrary to law for a court of law which after evaluating the evidence and finding a transaction to be void in law to apply section 26 of NRCD 323 of 1975 to endorse the transaction in the absence of compelling evidence. Section 26 of NRCD 323 has been well discussed by this very court in **T.K. Serbeh & Co. V. Mensah [2005 – 2006] SCGLR 341** and **In re Suhyen Stool; Wiredu V. Agyei [2005-2006] SCGLR 424**.The evidence in support presented by the parties must establish conclusively that the Respondent did not take any action to protect the land and caused the appellant and the predecessors to believe that the Mankralo of Teshie was the proper person to alienate the land. There was no conclusive evidence of any inaction on the part of the respondent to assert title to the land. Counsel's further complaint was that, the Court of Appeal did not consider the issue of estoppel at all.

It must, however, be made clear that a court of law is not bound to consider every conceivable issue arising from the pleadings and the evidence if in its opinion few of the issues could legally dispose of the case in accordance with the law. In this case, as said earlier, the grantor of the appellants predecessor had no title to pass at all in view of the several subsisting judgments of the Superior Courts and Exhibit D. It thus appeared that the issue of estoppel was a feeble attempt by the respondent to make a case even when the maxim 'nemo dat quod non habet' had indeed been successfully established against the grantor. In land suits in which title is in issue, the party claiming title must always plead and prove his root of title to enable his succeed. See **Akoto v Kavege [1984-86] CA 2 GLR 365** and **Mondial Veneer (Gh) Ltd V. Amuah Guedu XV [2011] 1 SCGLR 466.** The Court of Appeal in reversing the trial judge on compelling grounds was of the opinion that the Mankralo of Teshie was not legally clothed with any authority to alienate the land to the appellant and concluded that such grant was void. The issue of estoppel was on record not supportable by the evidence led.

The remaining ground which was also argued with much industry was the failure of the Court of Appeal to consider the issue of bona fide purchaser for value of the land in dispute in favour of the appellant. It appears that this is the first time that this defense on issue is being raised in these proceedings. This point in my view must be answered in detail.

Even though all appeals in this country being first or second appeal is by way of rehearing, new matters not raised at the lower court generally are not allowed to be raised in an appellate court for the first time. This court in **Penkro V. Kumnipa [1987-88] 1 Glr 558**, stated per Sowah JSC (as he then was) at page 561 that:

> *"Courts should not be ready to permit unsuccessful parties to attempt to overturn judgment by raising new considerations."*

In our adversarial system, the court and the parties are bound by the pleadings and the influence of pleadings in civil proceedings is asserted throughout the trial and appellate proceedings. Parties cannot generally introduce new matters on appeal even though a point of law apparent on the record which may not require any fresh evidence may be allowed on appeal save for the above, appellate courts are very circumspect. It is only when from the facts on record, a legal point could be raised for the first time on undisputed facts on appeal. An appellate court will be loath to entertain such course. See **Juxton-Smith v KLM Dutch Airlines [2005-2006] SC 438**, **Kwantreng v. Amassah & ORS [1962] 1GLR 241 SC** and **Stool of Abinabina V. Enyimadu [1953] 12 WACA 171**.

In any case, the plea of bona fide purchaser for valuable consideration if even applicable is a defence which calls for supporting evidence to prove it. In this case the Appellant as plaintiff was pleading it as a shield to assert title which was obviously void by the nature of the grant. The defence even if pleaded should have been proved to the satisfaction of the court on the evidence. This Court in the recent case of **Hydrofoam Estates (GH) Ltd v. Owusu [2013-14] 2 GLR 1117** in discussing this plea held as follows:

> "Where a party had put up the plea of bona fide purchaser for value without notice of any adverse title, the onus would squarely be on that party who had pleaded the same. Since the plea was to be considered as an absolute, unqualified and unanswerable defence if upheld by a court of law, the law would require that evidence in support of the plea must satisfy the court."

After careful perusal of the evidence on record, there is no evidence to support the plea which counsel wanted to introduce into this appeal when it was never raised at the two lower courts. On the whole, we find no merits in this appeal as the Court of Appeal adequately resolved all the issues in accordance with the law. We therefore proceed to dismiss same, and it is accordingly dismissed.

ANIN YEBOAH
(JUSTICE OF THE SUPREME COURT)

S. A. B. AKUFFO (MS)
(JUSTICE OF THE SUPREME COURT)

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

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