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

CORAM: AKUFFO (MS), JSC PRESIDING
YEBOAH, JSC
BAFFOE-BONNIE, JSC
BENIN, JSC
PWAMANG, JSC

CIVIL APPEAL
NO. J4/28/2016

31ST MAY, 2017

1. ABADWUM STOOL

2. EDUBIASE STOOL

3. BENKUM & ADONTEN STOOLS ... 2ND, 3RD & 4TH CLAIMANTS/ APPELLANTS/APPELLANTS

VRS

AKROKERRI STOOL .... 1ST CLAIMANT/RESPONDENT/RESPONDENT

J U D G M E N T

PWAMANG, JSC:-

Some centuries back, the predecessors of the peoples of Akrokerri, Abadwum, Tarkwa and Kwaman in present day Adansi area in the Ashanti Region settled next to one another on lands that were vacant at the time. It is most likely that with time the original settlers came to know their respective boundaries and respected them. However, it appears that with the passage of time, knowledge of their exact boundaries handed down through oral tradition faded and current versions of where their boundaries lie tended to conflict. That is how come from about 1950 these peoples have been disagreeing among themselves over their exact boundaries leading to the filing of a

suit by the Akrokerri Stool against the Abadwum Stool in the Circuit Court, Obuasi in 1982. After the close of pleadings and summons for directions it became clear to the Circuit Court judge that in substance the case was a boundary dispute so he made an order transferring it to the Stool Lands Boundary Settlement Commission, hereafter to be referred to as the Commission, established under the **Stool Lands Boundaries Settlement Decree, 1973 (NRCD 172).**

When proceedings commenced before the Commission, Akrokerri Stool became the 1st claimant and Abadwum Stool became 2nd claimant. Subsequently, the Edubiase Stool, under which Abadwum Stool serves, joined as 3rd claimant whilst Tarkwa and Kwaman Stools were jointly joined to the claim as 4th claimant. In accordance with the procedure of the Commission, the parties filed their respective claims and survey instructions. 3rd claimant however relied on the survey instructions of 2nd claimant since their claims were coterminous. Under directions of the Stool Lands Boundary Settlement Commissioner, to be referred to as the Commissioner, a survey of the lands was conducted by Mr C. C Nuque, licensed surveyor, and he prepared a composite plan showing the respective claims of the parties. The taking of evidence before the Commissioner commenced on 21st July, 1997 at the office of the National House of Chiefs at Kumasi.

While the Commissioner was still hearing the case the Commission was dissolved with the passage of the **Stool Lands Boundaries Settlement (Repeal) Act, 2000 (Act 587)** which came into force on 20th October, 2000. **Act 587** transferred all pending cases and proceedings to the High Court but it nevertheless provided that matters in which the taking of evidence had commenced before the Commissioner shall be continued with by him and completed not later eight months. The Commissioner, Justice John Augustus Osei, continued with the hearing of the instant case and closed the taking of evidence on 18th June, 2001, two days to the end of the eight months grace period. On that day the Commissioner ordered the lawyers of the parties to file their addresses as soon as practicable and adjourned the case sine die.

Thereafter, nothing was done in the claim until 18th June, 2002 when Justice J. A. Osei, then former Commissioner, was given appointment in the Judicial Service as a Court of Appeal judge. On 19th June, 2002 the Chief Justice in exercise of his powers under

article 139(1)(c) of the 1992 Constitution, requested Justice J. A. Osei "as an Additional High Court judge to sit and complete all cases and proceedings pending eight months after the coming into force" of Act 587. On 13th December, 2002 Justice J. A. Osei, sitting in his capacity as a High Court judge, delivered judgment in this case in favour of the 1stclaimant/respondent/respondent, to be referred to in this judgment as the respondent. The 2nd, 3rd, and 4th claimants/appellants/appellants, whom we shall call the appellants, jointly appealed against the judgment but were unsuccessful at the Court of Appeal, hence this appeal.

The appellants filed six grounds of appeal in this court but beside ground one which is a point of law the rest can conveniently be subsumed under the omnibus ground. We shall therefore consider the appeal on two main grounds which are as follows; i) the judgment of the High Court is a nullity since it was delivered after the lapse of the eight months provided for in section 3(2) of Act 587. ii) The judgment of the Court of Appeal is against the weight of the evidence. We shall start with a discussion of the first ground but before proceeding, the distinction ought to be noted that the judgment was delivered by the High Court and not the Commission though the same person functioned in the different capacities.

In order that it is not said that we misunderstood the case of appellants on this ground of appeal we shall quote the main paragraphs of their submissions on the point. They stated as follows;

"(v) With the greatest respect, the Court of Appeal did not sufficiently consider and appreciate our submission on S. 3(2) of ACT 587. We never argued that Act 587 nullified the authorization by His Lordship the Chief Justice to the Commissioner to sit and complete all cases and proceedings pending. ***Our plaint is with the non-compliance with the mandatory provision****…..We submit that the words 'shall be* ***continued before*** *the Commissioner and be* ***concluded*** *by him within a period not exceeding eight months of the coming into force of this Act' need no interpretation than its* ***ordinary meaning****.*

(vi) The Gazette notification of the Act is 20th October, 2000. This is the date the Act is or must be deemed to come into force. We respectfully submit that the non-compliance with the mandatory provision of Section 3(2) of ACT 587 makes the proceedings and the judgment ***delivered on 13th December, 2002*** *(18 clear months after the coming into force of the ACT) NULL and VOID. The instant case is on all fours with the case of TOGBE KONDA v TOGBE DOMPRE [1978] GLR 354, Holding 1. In that case the Court of Appeal held as follows;* ***'that proceedings pending for judgment at that date of commencement of the Decree were caught by section 4 thereof which terminated the jurisdiction on or after that date and any such proceedings would be in violation of the mandatory provision of section 4 of NRCD 172 and are void on that account' (at page 357-8).***

(vii) In the instant case before your Lordships, with the repeal of (NRCD 172) as amended, all ***cases and proceedings*** *pending before the Commissioner immediately before the coming into force of Act 587 were to be transferred to the High Court. We believe the transfer was done. The proceedings continued,* ***but were to be concluded within a period not exceeding eight months from the coming into force of the Act****. The transfer and continuation of proceedings to conclusion, which to our mind and understanding* ***includes delivery of judgment should not go beyond eight (8) months…"***

To begin with, we have taken a look at appellants' grounds of appeal in the Court of Appeal and do not find any ground raising error or misdirection of law and certainly no reference was made to Section 3(2) of Act 587. It is in the written submissions of appellant at the Court of Appeal that there is a mention of Rule 2A of the **High Court (Civil Procedure) (Amendment) Rules, 1977 (LI 1107)** on time limit for delivery of judgments by High Court judges but without any legal arguments. It was in their Reply to respondent's written submissions that appellant for the first time alluded to the point about a mandatory period of eight months in Act 587 for concluding pending proceedings. In those circumstances the lower court was entitled under Rule 8(7) of the **Court of Appeal Rules, 1997 (C.I. 19)** to have ignored the references in appellant's submissions to errors of law but they nevertheless addressed the point on LI 1107

thoroughly and, in our view, competently. There was no distinct ground stated and argued before the Court of Appeal based on Section 3(2) of Act 587 as appellants have done in this court so it is wrong and unfair on the part of the same lawyer to accuse the Court of Appeal of failing to appreciate a case he himself failed to present in accordance with the rules of court. Rule 8(4) of C.I. 19 provides that a ground of appeal alleging error or misdirection of law must state clearly the particulars of the error or misdirection.

From the above discussion it becomes clear that the ground of appeal that the trial court's judgment is a nullity because it was delivered without complying with Section 3(2) of Act 587 is being properly raised for the first time in the Supreme Court as a court of final appeal. The general rule is that a party is not permitted to make a new case on appeal which case he did not place before the court below for its consideration. The exception to this rule is with respect to challenges to jurisdiction and points of law that are fundamental and can be determined on the basis of the record before the court without the need for further evidence. See; **Attorney-General v Faroe Atlantic [2005-2006] SCGLR 271.** The legal point raised by the appellants in this new ground of appeal goes to the very foundation of the judgment and since it can be determined on the basis of the record before us, we shall consider it. Unfortunately, lawyer for the respondent did not respond to the arguments of appellants on this ground except to rely on the judgment of the Court of Appeal which admittedly did not address the issue apparently because it was not properly raised before them.

Now, returning to the substance of the arguments of the appellants, we shall for the ease of reference set out in the judgment the provisions of Act 587 which has only three sections. They are as follows;

"AN ACT to transfer to the High Court the determination of stool lands boundaries disputes; to repeal the Stool Lands Boundaries Settlement Decree, 1973 (N.R.C.D. 172) as amended and to provide for related matters.

1. Jurisdiction of High Court in stool land boundaries disputes

From the date of the coming into force of this Act, the High Court shall have original jurisdiction to hear and determine any dispute arising from, in respect of or related to a stool land boundary.

2. Repeal of N.R.C.D. 172

The Stool Lands Boundaries Settlement Decree, 1973 (N.R.C.D. 172) as amended by the Stool Lands Boundaries Settlement (Amendment) Law, 1986 (P.N.D.C.L. 147) is hereby repealed.

3. Saving and transitional provisions

(1) Subject to subsection (2) the cases and proceedings pending before the Commissioner immediately before the coming into force of this Act are by this Act transferred to the High Court.

(2) A case before the Commissioner in which evidence has been taken shall be continued before the Commissioner and be concluded by the Commissioner within a period not exceeding eight months from the date of the coming into force of this Act.

(3) An appeal pending from a decision of the Commissioner is by this Act transferred to the Court of Appeal.

(4) On the coming into force of this Act,

(a) the Commissioner may, subject to article 144 and section 8 (7) of the Transitional Provisions of the Constitution, be appointed to hold office in the Judiciary;

(b) any other person employed for the Commission immediately before the coming into force of this Act who qualifies and is suitable may on the advice of the Judicial Council and in consultation with the Public Services Commission, be appointed by the Chief Justice to an office in the Judicial Service.

(5) The assets, rights and liabilities of the Commissioner under the repealed enactment and in existence immediately before the coming into force of this Act are hereby transferred to the Judicial Service.

On the face of Act 587, Parliament has not stated the consequences for non-compliance with the time limit in section 3(2). Nonetheless, the appellants contend that the section does not need any interpretation apart from its natural meaning which, according to them, is that non-compliance naturally leads to a nullity since the word "shall" was used. This line of reasoning by appellants that the use of the mandatory word "shall" without more automatically results in nullification of the judgment does not impress us. We shall, with humility, borrow the words of Lord Steyn in the case of **R v Sonje and another [2005] 4 All ER 321,** to explain the need for the interpretation of statutes such as Act 587 by the courts. In that case Lord Steyn said as follows at page 329 of the Report;

"A recurrent theme in the drafting of statutes is that Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply. It has been the source of a great deal of litigation. In the course of the last 130 years a distinction evolved between mandatory and directory requirements. The view was taken that where the requirement is mandatory, a failure to comply with it invalidates the act in question. Where it is merely directory, a failure to comply does not invalidate what follows."

Thus, where, as in this case, parliament sets out in a statute conditions for the exercise of legal authority but does not spell out the legal consequences of non-compliance on the rights of persons affected by the exercise of the authority, it is for the courts to decide in a particular case taking into consideration the concrete facts what the legal consequences of non-compliance shall be. The courts do this by construing the provision in question in the context of the purpose of the enactment as a whole so as to give effect to the intention of the legislature or the rule maker as the case may be.

In Ghana the preferred approach to the construction of statutes is the purposive interpretation approach. In the case of **Abu Ramadan & Nimako v EC & A-G [2013-**

2014] 2 SCGLR 1654, Wood C.J, in support of this approach stated as follows at page 1674;

"To arrive at a proper construction of regulation 1(3)(d) and (e) of the Public Elections (Registration of Voters) Regulations, 2012 (CI 72), firmly established principles of statutory interpretation require that CI 72 be read as a whole, not piecemeal, and purposely construed and the impugned legislation interpreted in the context of the other parts of CI 72."

See also; **section 10(4)(d) of the Interpretation Act, 2009 (Act 792).**

Among common law judges the distinction between mandatory and directory provisions as a framework for legal analysis of the consequences of non-compliance with statutory provisions has been replaced since the dictum of Lord Hailsham of St Marylebone, LC in the case of **London & Clydeside Estates Ltd v Aberdeen DC [1979] 3 All ER 876**. In that case Lord Hailsham of Marylebone LC said as follows at page 883 of the report;

'…though language like "mandatory", "directory", "void", "voidable", "nullity", and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and the developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purpose of convenient exposition.'

In the House of Lords case of **R v Soneji and another (supra),** Lord Steyn, after reviewing the case law of England and Wales, Canada and Australia on the subject, stressed this prevailing posture of the law in the following words at page 333 of the report;

"Having reviewed the issue in some detail I am in respectful agreement with the Australian High Court that a rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness. Instead, as held in A-G's Ref (No 3 of 1999), the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity.

That is how I would approach what is ultimately a question of statutory construction" (emphasis supplied).

See also **TTM (By his litigation friend TM) v London Borough of Hackney and others [2011] EWCA Civ 4 Case No; C1/2010/1658.**

So the issue that confronts us in this case is one of statutory construction to determine whether parliament could be said to have intended that if the Commissioner failed to conclude any part-heard case within the eight months stated in Act 587, admittedly in imperative language, then the whole proceedings are vitiated and legally disappeared such that they were not capable of being continued and concluded by the High Court. But before a court would hold that non-compliance with imperative provision of an enactment shall result in a nullity, the purpose of the legislature in making the provision has to be considered against the consequences of a declaration of nullity. See **Republic v High Court, Koforidua; Ex parte ERDC [2003-2004] SCGLR 21.**

It has to be noted that section 3(1) of Act 587 transferred all "cases and proceedings" pending before the Commission to the High Court to be continued with by the High Court as the appellants themselves have conceded in their statement of case quoted above. Section 3(2) made an exception to the general transfer by way of transitional arrangements in respect of the category of cases where the taking of evidence had commenced such that the Commission would act in place of the High Court for eight months. Therefore, after the eight months any outstanding proceedings stand transferred to the High Court in accordance with section 3(1) of Act 587.The obvious purpose of Section 3(2) was to smoothen the transfer to the High Court of cases in which hearing had commenced. Its purpose could not have been to prohibit the High Court from continuing with such proceedings; yet that is the import of the argument of appellants. To accept the construction placed on Section 3(2) by the appellants would have the result that where the Commission failed to conclude a part-heard case then the proceedings were automatically vitiated such that either a fresh case would have to be filed or a trial de novo resorted to as a matter of course. Such a construction would be inimical to the clear intention of parliament to provide for the High Court to continue with pending cases and proceedings before the Commission.

We refer to the Privy Council case of **Wang v IRC [1995] 1 All ER 367** for its persuasive value. This was a Hong Kong case that went on appeal to the Privy Council. At first instance the High Court held that the deputy commissioner for inland revenue lacked jurisdiction to make two determinations of tax liability since he had not done so within a reasonable time required by the imperative language of the Inland Revenue Ordinance of Hong Kong. The Court of Appeal reversed the decision and an appeal to the Privy Council was dismissed. After reviewing the case law on the subject, Lord Slynn of Hadley who delivered the judgment of the Privy Council stated as follows at page 377 of the Report;

'In the present case the legislature did intend that the commissioner should make his determination within a reasonable time…If the commissioner failed to act within a reasonable time he could be compelled to act by an order of mandamus. It does not follow that his jurisdiction to make a determination disappears the moment a reasonable time has lapsed….Their Lordships do not consider that that is the effect of a failure to comply with the obligation to act within a reasonable time in the present legislation. Such a result would not only deprive the government of revenue, it would also be unfair to other taxpayers who need to shoulder the burden of government expenditure; the alternative result that (that the commissioner continues to have jurisdiction) does not necessarily involve any real prejudice for the taxpayer in question by reason of the delay."

To vitiate proceedings before the Commissioner that were concluded and only pending for judgment would mean that the resources of the state, as well as the parties, expended in hearing the case before the coming into force of Act 587 and up to eight months thereafter would have been wasted. The appellants have not suggested any policy justification apparent from Act 587 for such waste of public resources. Furthermore, the appellants have not pointed to any unfair prejudice they suffered on account of the continuation of the case by the High Court after the eight months period provided in Act 587. The grounds upon which the appellants impeached the judgment of the trial judge before the Court of Appeal only challenged the trial judge's evaluation of the evidence and did not include any compliant against the continuation of the case by

the High Court. The non-compliance with statutory time frames were thrown in later and even then no overreaching unfair prejudice or injustice resulting from the continuation of the case have been alleged or established.

We have read the case of **Togbe Konda and another v Togbe Dompreh V [1978] 354** cited by appellants in support of their submissions but it does not advance their case. The statutory provisions construed in that case are totally different from section 3(2) of Act 587. In that case the court construed section 4(1) and (2) of NRCD172 which provided as follows;

"4. (1) The Commissioner shall have exclusive jurisdiction to determine the boundaries of stool lands and to hear and determine questions or disputes relating thereto.

(2) Where on or after the commencement of this Decree any proceedings are pending or are brought in any Court and in either case it appears to the Court that the situation of any stool land boundary is the real issue in dispute before the Court, the Court shall decline jurisdiction over the determination of that issue; but where it appears to the Court that the situation of the said boundary is only incidental to the determination of the real issue, the Court shall order a stay of those proceedings until the boundary shall have been finally determined as provided in this Decree and may also make such incidental or consequential orders as the Court may deem just."

NRCD 172 did not contain transitional provisions for courts to complete part-heard cases but Act 587 did, so the factual outlines of the two statutes are completely different. In the circumstances, we do not consider the reasoning of the Court of Appeal in that case relevant or persuasive here.

This court had occasion in the case of **Awudome (Tsito) Stool v Peki Stool [2009] SCGLR 681** to consider section 3(2) of Act 587. In that case the appellant complained about the procedure adopted by the High Court when it continued with proceedings that the Commissioner was unable to complete within the eight months stated in the provision. The plaint of the appellants in this case is different.

In sum, we conclude that upon a true and proper construction of section 3(2) of Act 587, the judgment delivered in this case after the lapse of the eight months period stated in the Act is not a nullity. The proceedings before the Commissioner survived the statutory time limit and were properly placed before the High Court judge and the judgment he delivered was a valid judgment. In view of the reasons explained above, we dismiss ground one of the appeal.

On the ground of appeal that the judgment is against the weight of the evidence, we wish from the onset to note that we are here dealing with an appeal against concurrent findings and a long line of authorities, too many to list here, have established that we are required to be slow in overturning concurrent findings. A second appellate court, such as we in this case, would set aside concurrent findings where there is no evidence on the record that support the findings or where the findings are perverse as being inconsistent with documentary or admitted evidence on the record. Furthermore, where concurrent findings are based on a wrong proposition of law, the second appellate court may set them aside.

We have perused the record as we are required to do, an appeal being a rehearing, and have observed that the courts below, and especially the Court of Appeal, based their judgments on pieces of evidence that were adduced at the trial and concluded that the respondent proved a better claim to the disputed area which shows that their boundary is the correct one. However, the appellants challenge those findings and conclusions and in their statement of case in this court they have pointed to evidence led at the trial which, they contend, ought to have persuaded the courts below to find in their favour.

The appellants have referred to letters exchanged between them and the respondent in the 1950s and 1970s in which each claimed against the other ownership of the land in the disputed area and argued that the respondent's failure to sue in court until 1982 makes its action statute barred. In first place, we endorse the dismissal of this argument by the Court of Appeal on the ground that the statute of limitations was not pleaded as part of the case of appellants. Secondly, a simple answer to this argument is that, from the record the exchange of those letters, wherein the parties made claims and counterclaims against one another, ceased in 1974 so it is from that year that time

would begin to run. By the provisions of section 10 of the **Limitation Act 1972 (NRCD 54),** the period after which a party cannot bring an action to recover land is twelve years after the cause of action had accrued. From 1974 to 1982 is eight years so the Limitations Act, even if pleaded, would not have been applicable in this case.

Appellants next referred to a mud house built in the disputed area by the Chief of Abadwum, Nana Amoabeng upon a grant by 4th appellants and contend that the ruins of that house which were shown to the surveyor during the survey ought to have been accepted as part of activities on the land by them. On the other hand, the respondent testified that they stopped the construction of that house and sent men to demolish it and other houses built by persons claiming through appellants, because they tried to build without seeking their consent. So the case of the respondent is that the ruins of the house are as a result of the demolition but appellants say the house was left unroofed and the elements of the weather caused the deterioration. The question begging for an answer is why Nana Amoabeng went to obtain the land from 4th Appellant to build a house but never completed and occupied it for about 40 years. The courts below obviously preferred the version of the respondent and did not consider this an act of effective possession by appellants and it is our view that they were right.

Additionally, the appellants urged the evidence of Pastor Kwamina on us and argued that his evidence ought to have been accepted as evidence of unchallenged possession of the disputed land by appellants since they granted him the land for his church and he had been on it for about 40 years. Under cross examination the pastor admitted that when he started to build his house he was summoned by the respondent and he explained that he was building a church. If respondent did not lay claim to the land what would have been the purpose of summoning Pastor Kwamina? The case of the respondents is that they allowed him to stay on the land because he said he was building a church. This does not pass as an act of unchallenged possession by the appellants.

The appellants also placed considerable reliance on the folkloric account of the discovery of palm wine as recorded by Rev. Carl Christian Reindorf in his book;"**The History of the Gold Coast and Asante"**, re-published in 1966 by the Ghana Universities Press.

The book refers to an incident of long ago when the then Abadwumhene, Akora Frimpong invited the Akrokerrihene at the time called Anti Kyei to drink palm wine with him on a farm of his hunter on his land and Anti Kyei died as a result of drinking too much of the liquor. The place where Anti Kyei died is called Asonoso or Esonoso and is within the disputed area. Appellants contended that Akora Frimpong's hunter's farm is where Anti Kyei died so Asonoso is on Abadwum Stool land. But respondent's evidence was that Anti Kyei being a chief could not have drank the palm wine in the bush, and that he travelled to Abadwum and drank the palm wine there but it was when he was returning and was on Akrokerri land that he suffered the adverse effects of the palm wine and the death occurred on Akrokerri Stool land so Asonoso is on their land.

This is a classical case of different versions of traditional history which tended to conflict. Rev. C.C. Reindorf did not state in his book that he had cross-checked the folklore and ascertained to any extent the particular stool land on which Anti Kyei died. The approach of the law in choosing between such conflicting traditional history is clear. The conflict has to be resolved by reference to recent acts of ownership and possession within living memory. See; **Adjeibi-kojo v Bonsie (1957) 3 WALR 257.** This was the approach adopted by the High Court and the Court of Appeal and we cannot fault them.

For our part, we have examined closely the evidence of activities of possession on the land as shown by the parties to the surveyor, which he has indicated in the composite plan, and we are satisfied on a balance of probabilities that the respondent proved a better claim to the land within the disputed boundaries than the appellants. That in effect means that the boundary as shown by the respondent was proved on a balance of probabilities as against the appellants'.

Consequently, we see no reason to disturb the concurrent findings of the courts below. We find no merits in the appeal and it is accordingly dismissed.

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(JUSTICE OF THE SUPREME COURT)

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