IN THE SUPERIOR COURT OF JUDICATURE
IN THE SUPREME COURT
ACCRA – A.D. 2018

CORAM: ADINYIRA (MRS), JSC (PRESIDING)
DOTSE, JSC
BAFFOE-BONNIE, JSC
AKOTO-BAMFO (MRS), JSC
APPAU, JSC

CIVIL APPEAL
NO. J4/23/2016

21ST MARCH, 2018

1. THOMAS FOSU-TWUM ……. 1ST PLAINTIFF/RESPONDENT/ RESPONDENT

2. DR. T. A. OSAE ……. 2ND PLAINTIFF

VRS

THEOPHILUS NORTEY …….
DEFENDANT/RESPONDENT/
APPELLANT

J U D G M E N T

ADINYIRA (MRS), JSC:-

This appeal is against a judgment of the Court of Appeal dated 6 February 2013 which reversed the judgment of a High Court delivered on 21 October 2010.The issue for resolution at the High

Court was one of competing titles to a plot of land covering an approximate area of 0.18 acres leased to the parties before us by feuding claimants of a larger tract of land in the case of ***Agyei Osae & Ors v Adjeifio & Ors*** **[2007-2008] SCGLR 499** as to who owns the allodial title to an area of 1170.96 acres of land at Otinshie stretching from off the Accra- Tema motorway to the Akwapim Hills.

A Court of Appeal judgment, delivered on 15 July 2005, in ***Agyei Osae & Ors v Adjeifio & Ors,*** supra, reversed a High Court decision declaring ownership of this large track of land to the Nii Osae Otinshie family, by granting title to the Kle Musum Quarter of Teshie. The Court of Appeal however held that "whatever rights the [Nii Osae Otinshie family] had in Otinshie are usufructury and limited to the areas they have effectively reduced in their possession and the immediate environs. This usufructury is subordinate to the allodial title of the Kle Musum Quarter land."

On appeal by the Nii Osae family, the Supreme Court in ***Agyei Osae & Ors v Adjeifio & Ors*****,** supra, affirmed the Court of Appeal judgment that the Kle Musum Quarter owned the quarter land up to the Akwapim hills but reversed the finding that the Nii Osae Otinshie family owned the usufruct in Otinshie village and its environs by holding that that the said family owned the allodial title as they founded Otinshie village years before the Teshie lands were shared among the various Quarters of Teshie.

With this backdrop let us turn to the appeal before us.

The 1st plaintiff/appellant/respondent [1st Plaintiff] is a trustee of the land for his children and the 2nd Plaintiff (since deceased) was the head and lawful representative of the Osae Family of Teshie which made a grant of the said land to the 1st Plaintiff which was evidenced in writing by an indenture dated 15 March 1997 and was registered. The Defendant /Respondent/Appellant [Defendant] is an estate developer in Accra.

The 1st Plaintiff's case was that he went into possession of the plot of land by constructing a fence wall and a two bedroom outhouse on it and put in a caretaker until the latter vacated the house in 2005 without his knowledge. The 1st Plaintiff said the Defendant forcibly entered the land and hastily developed the land and he therefore instituted this action in the High Court. After joining the 2nd Plaintiff to the action, the Plaintiffs claimed by an amended writ of summons the following reliefs:

(a) A declaration of title to all that parcel of land known as Block 'A', plot No. 47 situate at Otinshie Residential area and covering an approximate area of 0.18 acres.

(b) General damages for trespass

(c) Perpetual injunction restraining the defendant, his allies, privies, assigns and or anyone claiming through him from any further interference with the plaintiffs' title to the said parcel of land.

(d) Order for recovery of possession.

(e) Costs

The Defendant denied the claims of the plaintiffs and said he acquired the land from the Afutu and Osae family and registered his title deeds. He said subsequent to a decision of the Court of

Appeal in a judgment dated 15 July 2005, the Tsie-We family of Kle Musum were declared allodial owners of the land so he obtained a fresh grant from them. According to the Defendant the land in dispute do not fall within Otinshie village which the Supreme Court affirmed the Afutu and Osae family have absolute ownership.

The Defendant claimed he developed the land and was in actual physical possession and that the 1st Plaintiff's action was caught by laches and acquiescence, and that he was a bona fide purchaser of the disputed land without notice of the plaintiff's interest and that the plaintiff is barred under the Land Development (Protection of Purchasers) Act 2. The Defendant counterclaimed for a declaration of title to the same plot of land.

The primary findings made by the learned trial judge on the strength of the record, which were affirmed by the Court of Appeal are summarised as follows:

i) The land in dispute falls within the land known as Otinshie Village lands and that it is owned by the 2nd Plaintiff's family before it was leased to the 1st Plaintiff on 15 March 1997 leading to the preparation of the indenture Exhibit B.
ii) Since the Osae family had already alienated the plot to the Plaintiff in 1997 the subsequent grant by the same family to the Defendant was null and void.
iii) That as the Defendant's grantor, the Tse-We family lost the case at the Supreme Court, Exhibit 4, and the lease which

they prepared for the Defendant passed no title to the Defendant.

iv) That the 1st Plaintiff fenced the land and put up a two bedroom house on it when he got the lease

In as much as the two courts below are agreed on the findings of facts itemized above, it is not pertinent to set out the evidence produced at the trial in much detail but to proceed to consider the grounds of appeal to determine whether there is any justification in the submissions by counsel for the Defendant that, there has been some blunders or errors on the part of the Court of Appeal in dealing with facts of the case which has resulted in a miscarriage of justice to warrant a reversal of the decision of the Court of Appeal.

The grounds of appeal are:

a. The judgment is against the weight of the evidence.

b. The appeal judges erred by setting aside the judgment of the trial judge.

c. The appeal judges erred by holding that possession be granted to plaintiff/appellant/respondent.

d. The appeal judges misapprehended the facts that show the defendant/respondent/appellant was in occupation before he was served with a writ of summons and statement of claim and consequently ruled that defendant/respondent/appellant cannot be protected under the Land Title [sic] (Protection of Purchasers) Act 2 of 1960.

e. The appeal judges misapprehended the facts by not finding as a fact that the defendant/respondent/appellant was a bonafide purchaser for value without notice.

f. Additional grounds of appeal would be filed on receipt of a copy of the record of appeal.

Grounds a, b, and c were considered together by Counsel for the Defendant and we will do likewise.

Submissions by parties

In arguing **grounds a, b, and c** together, Counsel for the Defendant repeated his pleadings that: the disputed land was bare, waterlogged and bushy and that he was a bona fide purchaser of the land without notice, active or constructive, of plaintiff's interest hence plaintiff's action is barred under the Land Development (Protection of Purchasers) Act 2 of 1960, [Act 2].

Counsel submits that when the Defendant got the lease he took possession and built a fence wall and had almost completed the house when agents of Tse- We Family of the Kle Musum Quarter of Teshie confronted him with their Court of Appeal judgment which declared them allodial owners of Kle Musum lands including Otinshie lands. He therefore obtained a fresh lease from them as per his Exhibit 4. He submits this evidence suggests clearly that there was no structure on the land that belonged to the 1st Plaintiff. He submits that the trial judge's finding that the fence wall and structure might have been destroyed after the 2005 Court of Appeal judgment can be supported by the evidence and as a result he has to be protected under Act 2.

Counsel for the Defendant referred us to the cases of ***Tuakwa v Bosom*** [2001-2002] SCGLR 61; ***In Re Okine (Decd); Dodoo and Another v Okine and Ors*** [2003-2004] SCGLR 582***, In Re Krobo Stool (No. 1) v Opoku*** [2000] SCGLR 347 and ***Bonney v Bonney*** (1992-93) 2GBR 779 which set out the principles governing when an appellate court would interfere with the finding of a lower court based on the worn out principle that findings of facts made by a trial judge are presumed to be right primarily because the trial judge had the advantage of listening to the entire evidence and watching the demeanor of the parties and their witnesses.

Counsel for the 1st Plaintiff on the other hand submits that no evidence was led to the effect that his fence wall and outhouse had been destroyed at anytime.

The Court of Appeal in dealing with this particular issue held:

> "Nowhere in the record of proceedings did anybody testify that the wall and two bedrooms structures were pulled down. The defendant's evidence that after the Court of Appeal judgment there was a lot of demolition in the area does not mean that the 1st Plaintiff's wall and two bedroom house was demolished. The 1st Plaintiff insisted throughout the trial that his two bedroom structure still existed and he tendered in evidence photographs exhibits 5 to 5C (sic) which show both buildings and the wall still standing to support his evidence

We have examined the record and we find no evidence to support the inferences the trial judge made that the structures put up by the Plaintiff might have been demolished by the Tsie-We Family after the 2005 Court of Appeal judgment. Accordingly the learned justices of appeal rightly set aside this finding by the High court as the preponderance of the evidence weighed heavily against the inferences made by the trial judge. Accordingly the appeal on grounds a, b and c fails and hereby dismissed.

GROUNDS D and E can conveniently be dealt with together

On the issue whether the Court of Appeal judges misapprehended the facts that show the defendant/respondent/appellant was in occupation before he was served with a writ of summons and statement of claim and consequently ruled that defendant/respondent/appellant cannot be protected under the Land Title [sic] (Protection of Purchasers) Act 2 of 1960.

On the issue whether the Court of Appeal judges misapprehended the facts by not finding as a fact that the defendant/respondent/appellant was a bonafide purchaser for value without notice

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Counsel for the Defendant submission under this head is mainly hinged on the findings by the trial judge that the 1st Plaintiff's

building was demolished by the Tse-Wei Family after the 2005 Court of Appeal judgment which finding the Court of Appeal has found was erroneous and which we have affirmed. So the question is can Act 2 be pressed into service on the Defendant's behalf?

The purpose of Act 2 is to protect purchasers of land and their successors, whose titles are found to be defective after a building has been erected on the land. The provisions of the Act vest discretion in the High Court to determine whether the Act should be applied upon considerations of certain factors. Some of the conditions to be proved by the party seeking protection under Act 2 were that he was a purchaser; he took a conveyance and had in good faith constructed a building on the disputed land and finally the competing hardships to the parties.

In **Dove v Wuta- Offei [1966] GLR 299** at **314**, the Supreme Court in expressing its views on the application of Act 2, opined:

> As the declared policy of the Act is to confer valid title on purchasers who build on land on faith of title subsequently adjudged to be invalid, it seems to me only natural, that the Act should require that the purchaser to avail himself of the statutory protection should have acted honestly and reasonably at the date of the original acquisition of the land and having so acted should have believed of the validity of his title."

The legal issue that is usually determined by the courts is the measure of good faith of the defendant. The term good faith "has been accepted as an honest belief in the validity of the party's title even though it turns out by subsequent adjudication to be an erroneous view;" per Francois JA. (As he then was) in **Ayitey v Mantey [1984-86] 1GLR 552** at **558**

In Dove **v, Wuta- Offei [1966] GLR 299** the Court used the term recklessness as a yardstick for examining good faith.

In **Ntem v Ankwandah [1977] 2 GLR 452 at 462,** Apaloo CJ in analyzing the principles in other decided cases stated as follows:

> "If the defendant is found to be reckless either in erecting or continuing the erection of a building on land whose title was subsequently adjudged against him, he is disentitled to protection under Act 2. Disregarding a warning may render him reckless or not depending on the facts of the case.'

And at page 465 of the report, the learned Chief Justice described the defendant as follows:

> "He showed himself impervious to all warnings and was entirely heedless of danger. If ever a person gambled and lost, it was the defendant. The learned circuit judge pronounced him reckless. A fitter discretion of his conduct cannot be imagined."

In **Ayitey v Mantey** at pages **560** to **561**, the Court Appeal quoted the trial judge's conclusions about the appellant's

conduct: “to have proceeded in the face of all warnings in the hope that the ever loving hand of Act 2 will come to his aid when he acted against all sense of good faith, was denying himself conditions warranting the protection of the Act.”

See also the cases of **Conney v Bentum-Williams [1984-86] 2GLR 301**, **Oforiwah v Laryea [1984-86] 2GLR 410, Amuah – Sakyi v Sasu [1984-86] 2GLR 479, Evangelical Lutheran Church v Aggrey Memorial Preparatory School [1992-93] 1 GBR 149;** where the courts refused to apply Act 2 due to the conduct of the suppliants for relief in ignoring warnings and challenge to their title.

Counsel for the 1st Plaintiff pressed on us that when he visited the land in October his building was still on the land and he warned the defendant’s workers and even took pictures of his structures which were tendered in evidence as Exhibits C, C1-C8 without objection from the Defendant. Counsel for the Plaintiff submitted further that no demolition took place as from the Defendant’s own evidence he was on the land in October before he was confronted by the Tsie - We family that they have been adjudged owners of Otinshie land and he had to attorn tenancy to them before he was allowed to complete his house.

Applying the above principles to the case before us, we are of the view that the Defendant was reckless in going on with the construction of the house after warnings by the 1st Plaintiff as he was put on notice about his defective title and then there was

physical evidence that someone else was in possession and has started developing the land.

We therefore affirm the findings of the Court of Appeal that:

> "Having found that the disputed land was walled at the time the [Defendant] entered, the Defendant should have seen that the land was in possession of the [Plaintiff] and the trial judge erred in applying the Land *Title (sic) (Protection of Purchasers) Act 2 of 1960*. We uphold this ground of appeal and set aside the trial judge's application of Act 2 to protect the [Defendant].

The Court of Appeal went on:

> Having found that the plaintiff had a better title to the land in dispute the learned trial judge should have proceeded to grant the reliefs sought by the plaintiffs and not sell the land to the defendant for GH¢42,000.00. Having failed to grant the relief sought by the plaintiffs, why should the court award costs of GH¢8,000.00 in favour of the plaintiffs. The gymnastics engaged in by the trial judge at the latter part of his judgment is mind boggling.

In our opinion, the trial judge engaged in this gymnastics in his attempt to apply sections 2 and 3 of Act 2 which required him to compensate the plaintiff for the hardship and injustice that the application of Act 2 may occasion.

Even in this case if the trial judge has exercised his discretion properly in weighing the injustice that may be caused to any of the parties before him, the scales of justice ought to have tilted in favour of the plaintiff and not the defendant who recklessly went on hastily with his building when confronted by the plaintiff. The Defendant being an estate developer should have known better. It was obvious that with the haste within which he completed the house and moved in clearly demonstrated his intention to upstage the 1st Plaintiff.

As has been roundly sounded in the numerous cases cited above, far from injustice to the defendant "the best the court can do is to set its face firmly against any use of the Act which makes it a weapon in the hand of the rich for the exploitation of the poor." See **Ntem v Ankwandah,** supra, where the defendant lost his two storey building with eight rooms and boys' quarters and a big terrace, and the learned justices held that: "it is the plaintiff who will suffer incalculable hardship and injustice if the order was made. She will be deprived of her land because she was less well off financially than the defendant. In the circumstances the best the court can do is to set its face firmly against any use of the Act which makes it a weapon in the hand of the rich for the exploitation of the poor". In **Amuah –Sakyi v Sasu** (supra) the Court expressed the view that: "The Act was not designed to aid such gamblers."

From the foregoing we affirm the decision of the Court of Appeal.

The appeal therefore fails and is dismissed. The judgment of the Court of Appeal is hereby affirmed.

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

DOTSE, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

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

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

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

AKOTO-BAMFO (MRS), JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

V. AKOTO-BAMFO (MRS)
(JUSTICE OF THE SUPREME COURT)

APPAU, JSC:-

I agree with the conclusion and reasoning of my sister Adinyira, JSC.

Y. APPAU
(JUSTICE OF THE SUPREME COURT)

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