IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ANSAH, JSC (PRESIDING)

DOTSE, JSC

BAFFOE-BONNIE, JSC

BENIN, JSC

PWAMANG, JSC

CIVIL APPEAL
NO. J4/41/2018

28TH NOVEMBER, 2018

FRED ROBERT COLEMAN ……. PLAINTIFF/APPELLANT/RESPONDENT

VRS

1. JOE TRIPOLLEN
2. MR. BOATENG
3. MR. DANSO
4. MR. EBENEZER
5. MR. ODONKOR ……. DEFENDANTS/RESPONDENTS/APPELLANTS

JUDGMENT

DOTSE, JSC:-

This is an appeal from the judgment of the Court of Appeal, Accra dated 7th November 2013. The Plaintiff/Appellant/Respondent hereafter Plaintiff, suing as the head of family of Madam Agoe began an action before the High Court, Accra on 16th December 2010,

against the Defendants/Respondents/Appellants hereafter Defendants in which he claimed the following reliefs:

a) A declaration of title to all that large tract of land or parcel situate and being at Ankwa Dobro near Nsawam in the Eastern Region and known as the property of Madam Agoe bounded on the North by Quarcoopome's land, on the South by Baddoo's land on the East by a road to Nsawam, on the West by the Anfran stream measuring 2300 feet on the North, 3250 feet on the South, 135 feet on the East, and 1150 feet on the West respectively.

b) Recovery of possession from the defendants', Plaintiff's land.

c) General and Special damages.

d) Perpetual injunction restraining the Defendants, their servants, agents, workmen and successors in title from interfering in any way whatsoever with the land in dispute in any manner.

FACTS

The Plaintiff by his statement of claim traces his root of title to one Madam Agoe whom he contends to be his paternal grandmother and who purchased the said land from one Baddoo.

The Plaintiff contends that his grandmother acquired the disputed land as far back as 1908 and the said acquisition is evidenced by an indenture dated 29th December 1908 which was tendered in evidence as Exhibit 'A'. The plaintiff's case is that after the death of his grandmother in 1931, her son, Christian Amonou Coleman, Plaintiff's father and after the demise of the latter, his father's sister took possession of the disputed land. The Plaintiff contends that after the death of his aunt, he, Plaintiff, as the only surviving descendant of his grandmother, took possession of the said land on behalf of Madam Agoe's family. According to the Plaintiff, members of his grandmother's family including

him have lived on the land for so many years spanning over a century and they even have a cemetery on the said piece of land. As a matter of fact, from the pleadings as well as the undisputed facts led in evidence, the Plaintiff and his ancestors before him performed various overt of acts of ownership on the land without let or hindrance save the recent acts of trespass by the Defendants which triggered the instant suit. The plaintiff contends that he has also granted portions of the land to prospective developers.

The defendants on the other hand denied the plaintiff's claims and put him to strict proof of the averments contained in his statement of claim. The defendants averred particularly that, the land being claimed by the Plaintiff is part of Ankwa Dobro Stool Land and the land belongs to the Akuapems. They further averred that, at no time did their family grant portion of its land to Baddoo to alienate to the said Madam Agoe. The defendants further contended that, portions of their family land were granted to people as licensees to cultivate. The defendants concluded that the Plaintiff is not entitled to his claim.

Decision of the High Court

The High Court held that the Plaintiff was not entitled to a declaration of title to the disputed land. The learned High Court judge went ahead and declared the defendants as the rightful owners of the land in dispute as in his view, the defendants had rightly proved that their ancestors settled and farmed the land in dispute. The High Court judge held that the land in dispute was a stool land which could only be alienated to a third party by the stool represented by the elders of the stool.

The High Court further held that the Plaintiff per the evidence on record failed to prove his root of title and also failed to establish concisely the boundaries of the land they are seeking declaration of title for. The High Court held that the Plaintiff suing as head of

family of Madam Agoe of Ankwa Dobro lacked legal capacity to sue as there was no Madam Agoe family of Ankwa Dobro.

Decision of the Court of Appeal

The Plaintiff dissatisfied with the decision of the High Court filed an appeal at the Court of Appeal against the said decision. The Court of appeal unanimously allowed the appeal by the Plaintiff. The Court of Appeal held that the trial High Court Judge erred in law when he granted the defendants reliefs that the defendants had not asked for. The Court of Appeal was of the opinion that per evidence on record the Plaintiff had established the capacity in which they sued and that it would be unjust to non-suit the plaintiff herein just because he described himself as head of madam Agoe's family. The Court further held that the Plaintiff had positively identified the land as Exhibit A tendered in by the Plaintiff and gave the boundaries to the disputed land.

Mariama Owusu JA, speaking on behalf of the Court of Appeal, delivered herself on the issue of ***capacity*** thus:-

> *"The appellant established his capacity to initiate the suit, consequently,* ***it would be unjust to non-suit the appellant just because he described himself as head of Madam Agoe's family. The appellant per paragraphs 5, 7 and 8 has described the capacity in which he instituted this action as well as testified to that effect.*** *See the case of* ***Obeng v Assemblies of God Church, Ghana [2010] SCGLR 300, 305*** *where their Lordships held in holding (5) as follows:* ***And since the courts existed to do substantial justice, it would be manifestly unjust to non-suit Plaintiff church because they added the words "Executive Presbytery" to their name on the writ of summons****. Courts must strive to prevent and avoid ambush litigation by resorting and looking more at the substance than the form. On the facts, once the Plaintiff church had been registered as a corporate entity under the Religious Bodies (Registration) Law, 1989 [PNDCL 221] the plaintiff church could not be denied the capacity which they already had." Emphasis*

Continuing further, Mariama Owusu JA, observed as follows:-

> ***Relating the case cited supra to the case under consideration, from the evidence on record, the appellant has shown that, the disputed property came to his father after the death of the latter's mother.*** *After the death of the Plaintiff's father and aunt, the property has come to him, and he is the eldest member of the father's children. This piece of evidence was corroborated in every material particular by PW1 a member of the appellant's family.* ***The appellant thus established his capacity, and we so hold."*** *Emphasis*

On the issue of non-registration of Exhibit A, which was the Plaintiff's document of title which he relied on to mount the action against the defendants, the Court of Appeal, similarly held as follows:-

> *"In the judgment, the trial Judge held that Exhibit A was not registered to convey title to the appellants grandmother.* ***This conclusion by the trial Judge is wrong. We say so because the document was executed on 29/12/1908. This was long before the Land Registry Act, 1962 (Act 122) came into existence. Therefore the non-registration of the indenture would not affect its admissibility in terms of Section 24 of the Land Registration Act, Act 122."*** *Emphasis*

On ***identity*** of the land, the Court of Appeal delivered itself thus:-

> ***"With all due respect to the trial Judge, the appellant positively identified his land. Exhibit A, which was tendered without objection gave the boundaries of the disputed land as follows:- Quarcoopome's Land, Baddoo's land, Road to Nsawam and Afram Stream. It also gave the dimensions on the East, West, North and South."*** *Emphasis*

It is the above decision of the Court of Appeal that the Defendants feeling aggrieved have appealed against to this Supreme Court on the following grounds of appeal:

a. The learned judges of the Court of Appeal erred in holding that the Plaintiff, who hails from a patrilineal traditional area, had the capacity to institute this instant action.

b. The learned judges of the Court of Appeal erred in law in holding that in the absence of a counterclaim the trial judge could not have granted reliefs to the defendants.

c. Judgment is against the weight of evidence.

d. Additional grounds of appeal would be filed on receipt of the records.

Preliminary Legal Objection

In considering these grounds of appeal, we observe that save for the above grounds of appeal no further grounds have since been filed except the issue of preliminary legal objection.

We have perused the entire record of appeal in this case as well as taken the statements of case filed by the respective learned counsel into consideration.

Non-Service of Writ of Summons on 1st, 4th and 5th Defendants

Learned Counsel for the Defendants, Osafo-Buabeng, submitted that it was only the 2nd and 3rd Defendants who were served with the Writ of Summons in this case. On the contrary, the 1st, 4th and 5th Defendants, upon a search conducted had not been served with the writ of summons. Learned counsel referred to this courts decision in the case of ***Barclays Bank of Ghana Ltd. v Ghana Cable Co. Ltd. [1998-99] SCGLR 1***,

where the court held that a court has no jurisdiction to proceed against a party who has not been served with the writ of summons issued by the Plaintiff. Even though learned counsel for the Defendants conceded that, an entry of appearance and defence were subsequently filed on their behalf by Solicitors, and 1st Defendant in particular testified in the case at the trial High Court, he nonetheless argued that, since the issue of non-service was so fundamental, these events cannot cure the said defects.

Learned counsel for Defendants, again conceded that, even though the above was not raised as a ground of appeal, he referred to Rules 6 (7) and (8) of the Supreme Court Rules, 1996 C. I. 16 and contended that, once this court is required not to confine itself only to the grounds of appeal argued, he invited us to consider the above as a preliminary legal objection and decide upon it.

Incomplete Record

Secondly, learned Counsel for the Defendants, Osafo-Buabeng, again contended that, the record of appeal that was used to determine the appeal at the Court of Appeal was incomplete and as such it was wrong for the court to have based it's decision on an incomplete record.

In response to the arguments of non-service of some of the Defendants, learned Counsel for the Plaintiff, Charles Bentum argued that, although the record of appeal does not disclose service of the writ of summons on the 1st, 4th and 5th Defendants, all the Defendants entered appearance, filed defence and indeed 1st and 2nd defendants testified on behalf of the Defendants. Furthermore, except on a few occasions, all the Defendants and indeed the Plaintiff were personally present in court to prosecute their case.

It is also instructive to observe that, in the instant case, it was the defendants who were given judgment by the learned trial Judge.

The Defendants did not complain about their non-service of the court processes at that time. Instead, they took the advantage bestowed upon them by the said trial High Court judgment. It was only an appeal by the Plaintiff to the Court of Appeal that deservedly reversed that erroneous and reckless judgment that led the Defendants to question the bonafides of their non-service.

Where was learned counsel for the Defendants at all material times? It is said that, he who comes to equity must come with clean hands. By parity of reasoning, he who calls in aid the principles of equity, must also play to the rules of equity. When the defendants did not counterclaim for the reliefs they were granted by the learned trial Judge, they did not complain and avoid the judgment at that time.

We have apprized ourselves with the facts and decisions of this court in the ***Barclays Bank v Ghana Cable case*** supra and are of the view that the facts therein are distinguishable from the facts of the present case.

In the first place, whilst only one of the Defendants in the Barclays Bank case was served, and counsel proceeded to enter appearance on behalf of all of them upon the erroneous impression that they (including corporate entities had been validly served through one Madam Alice, in the instant case, there is ample proof that, even though only 2 of the Defendants had been served, all the other Defendants effectively participated in the case, by either attending court personally or mounting the witness box and testifying on behalf of the other defendants, i.e. the 1st Defendant.

Indeed, having considered all the facts in the Barclays Bank v Ghana Cable case supra and the decision of the court, which states as follows:-

> ***"Since on the facts, the defendants had not been served with the writ of summons issued by the Plaintiff bank, the High Court had no jurisdiction to enter final judgment against them." Emphasis***

Applying this principle to the instant case, it can correctly be stated that, on the facts, all the Defendants must be deemed to have been served with the writ of summons.

This can be deduced from all the surrounding circumstances i.e. entry of appearance, filing of Defence, amendment of the Defence, attendance in court personally on most occasions and testifying in Defence of the case in respect of the 1st Defendant. With all of the above, we are of the considered view that, since our primary role is to ensure that justice is done, we will not accede to the invitation made to us by learned counsel for the Defendants. We reject it as untenable and it is accordingly dismissed.

Finally, learned counsel for the Defendants, Osafo-Buabeng referred the court to Rules 6 (7) and (8) of C. I. 16. We observe that, whilst Rule 6 (7) (a) specifically states that the court may grant an appellant leave to amend the ground of appeal on terms specified by the court, that is not what the Defendants have done in this case. With respect, that rule therefore is inapplicable under the circumstances.

Secondly, sub rule 7 (b) of Rule 6, only reiterates the point that the court shall not confine itself to only the grounds of appeal filed in deciding the merits of an appeal before them. Put in other words, the Rule specifies that, the court is at liberty to explore other grounds of appeal or issues in deciding an appeal before them. **But there is a caveat, in the sense that, in doing so the court is obliged to give reasonable opportunity to the parties or their counsel to be heard on that point or grounds without re-opening the entire appeal**.

Learned counsel could have amended the grounds of appeal if he was minded so to do. Not having done that, is not fatal in our opinion, because, the plaintiff or his counsel have been given proper reasonable opportunity to be heard on the matter, even though that is not the proper scope and intendment of the rule.

We have also considered the arguments on the incomplete record and would have dismissed this point in limine but for the energy expended on it by learned counsel for the plaintiff, Charles Bentum. We have adverted our minds to the following decisions of this court:-

1. *Kwame Nkrumah a.k.a Taste v The Republic, unreported Criminal Appeal No. J3/6/2016 dated 26th July 2017 and*

2. *John Bonuah a.k.a Eric Blay v The Republic, Criminal Appeal No. J3/1/2015 dated 9th July 2015*

In the ***Kwame Nkrumah*** case supra, the court unanimously held as follows:-

> ***"Where it is proven that the missing record is material to the determination of the appeal, it is for the court to determine the viability of a reconstruction of the lost record." Emphasis***

In the ***John Bonuah*** case supra, the Court laid down broad principles to guide courts in the evaluation of cases where it is alleged part of a record is lost as follows per Wood C. J.

> *"An allegation that court proceedings are lost or destroyed require investigations into three important areas,* ***the veracity of the claim, the quantum or magnitude of the lost, missing or destroyed record and it's relevance to the determination of the appeal in question****." Emphasis*

We have evaluated the rival arguments on this issue as well as the record of appeal as it is before us, and we are convinced the Defendants apart from making bare assertions on the matter, have not given any or satisfactory evidence of the missing evidence. It is also important to observe that, the truth or otherwise of the claim, the extent or magnitude of the missing record and the most crucial of all it's importance and or relevance to the determination of the appeal have all not been made out by the Defendants.

Under the above circumstances, we have no difficulty in dismissing the preliminary legal objections as unmeritorious and of no effect.

Substantive Grounds of Appeal

Since we are of the considered view that the Court of Appeal did a really good work in re-evaluating the findings of fact vis-à-vis the evidence led before the trial court, and decided to depart from those findings which they considered to be perverse and with which we agree, we do not intend to detain ourselves any further on these substantive grounds of appeal. This is particularly so as we had stated supra that we had considered the statements of case filed by learned counsel for the parties.

This court, in the case of ***Gregory v Tandoh IV & Hanson [2010] SCGLR 971*** laid down the principles upon which an appellate court, *(such as was done by the Court of Appeal)* can depart from the findings of fact by the trial court as follows:-

> *"First, where from the record of appeal,* ***the findings of fact by the trial court were clearly not supported by evidence on record and the reasons in support of the findings were unsatisfactory; second, where the findings of fact by the trial court could be seen from the record of appeal to be either perverse or inconsistent with the totality of evidence led by the witnesses and the surrounding circumstances of the entire evidence on record, third, where the findings of fact made by the trial court were consistently inconsistent with important documentary evidence on record****." Emphasis*

The Court of Appeal speaking through Mariama Owusu JA, evaluated the evidence of the Plaintiff and his brother P.W.1 on the issue of the identity of the land. The Court of Appeal took pains to examine the entire evidence on record dispassionately and concluded rightly in our opinion as follows:-

> ***"From the evidence of the appellant and his brother PW1, in respect of the boundaries of the disputed land, there are no contradictions. The appellant therefore clearly and positively identified his land."*** *Emphasis*

On the issue that the Plaintiff did not prove his root of title through Madam Agoe, this is how the Court of Appeal made light work of the erroneous and perverse findings of the learned trial Judge.

> "*The trial Judge also came to the conclusion that the appellant was not able to prove his root of title. This assertion cannot be correct. PW3, Nana Kwadwo Duodo II who was the Chief of Ankwa Dobro from 1994-2002 testfied and said the appellants grandmother bought the disputed land from his predecessor Nana Ampadu who was a Chief of Ankwa Dobro.* ***This witness said he did not challenge the appellants occupation of the land in dispute because all the chiefs before him knew the former's grandmother bought the land.*** *He went on to say that he was a secretary at the palace of Ankwa Dobro before he became chief and documents there indicate that the disputed land was sold to Madam Agoe, the appellants grandmother.* ***Exhibit A, the Indenture is dated 29/12/1908, over hundred years now clearly, the Respondents are estopped by laches and acquiescence from challenging the appellants family title****." Emphasis*

In this respect, we wish to draw attention to the fact that we have indeed observed that, there are unimpeachable pieces of evidence on record to establish that, the Plaintiff and his predecessors in title performed various overt acts of ownership on this land without let or hindrance whatsoever from the Defendants, their predecessors in title, assigns etc, as was confirmed, by PW3 for a very long time.

The Supreme Court in ***Nartey v Mechanical Lloyd Assembly Plant [1987-88] 2 GLR,*** took the view that, it is long, peaceful, undisturbed possession over a considerable period of time that raises a presumption in favour of ownership as has happened in the instant case. In any case, the Plaintiff in addition to the long periods of possession have a solid document of title, Exhibit A.

From the record of appeal, the Defendants herein are members of the Ankwa Dobro family or stool from which Madam Agoe purchased the land as far back as 1908. We

are therefore of the considered view that, this is a proper case where, the provisions of sections 25 and 26 of the Evidence Act, 1975 NRCD 323 should apply.

25. Facts recited in written instrument

(1) Except as otherwise provided by law, including a rule of equity, the facts recited in a written document are conclusively presumed to be true as between the parties to the document, or their successors in interest.

(2) Subsection (1) does not apply to the recital of consideration.

26. Estoppel by own statement or conduct

Except as otherwise provided by law, including a rule of equity, ***when a party has, by that party's own statement, act or omission, intentionally and deliberately caused or permitted another person to believe a thing to be true and to act upon that belief, the truth or the thing shall be conclusively presumed against that party or the successors in interest of that party in proceedings between***

(a) that party or the successors in interest of that party, and

(b) the relying person or successors in interest of that person." Emphasis

We have examined this Exhibit A, the document upon which Plaintiff based his root of title and we are convinced that, the said document is legitimate and was respected and honoured by the Defendants predecessors before them. We cannot allow courts of law to carelessly and recklessly jettison ancient documents of title like Exhibit "A" which were recognised by the parties and their successors in title for well over a century without question. As a matter of fact, we can go on and on to show the pieces of evidence which make the findings of the trial court perverse.

For example, we all know that, ordinarily, dead people are not buried clandestinely in the night. Besides, burial of a corpse on a land connotes ownership and is an incident of overt acts of possession and ownership. The Plaintiff succeeded in showing the tombstone of his grandmother who died in 1931 and the Defendants cannot feign ignorance of the above.

See the case of ***Nartey v Mechanical Lloyd Assembly Plant*** supra, particularly at page 356, which confirms the principle that, the Defendants and their predecessors acquiesced in the Ankwa Dobro lands in dispute being in the hands of the Plaintiff and his predecessors for several years which conclusively raised the statutory estoppel by conduct referred to in sections 26 (1) of NRCD 323 supra.

The Court of Appeal, in our opinion was therefore right in concluding thus:-

> "*All these pieces of evidence on record were not properly evaluated and or were wrongly applied against the appellant." See the case of* ***Oppong Kofi and Others v Attibrukusu III [2011] 1 SCGLR 176*** *holding I. After applying the above case to the instant case, the Court of Appeal rightly in our considered view stated as follows:-*
>
> ***"Relating the case cited supra to the case under consideration, we have come to the conclusion that the pieces of evidence on record enumerated above, if applied in favour of the appellant would have changed the decision in his favour."*** *Emphasis*

We endorse the above statements, and add that, the Defendants are not the class of persons to complain about the capacity of the Plaintiff to institute the instant action.

Conclusion

Having established by verifiable references to the record of appeal that the findings of the learned trial High Court Judge were unsatisfactory and perverse, we find no

difficulty in dismissing in its entirety, this appeal lodged against the Court of Appeal judgment of 7th November 2013. The appeal is accordingly dismissed. The Court of Appeal judgment of even date is thus affirmed.

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

ANSAH, JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

J. ANSAH
(JUSTICE OF THE SUPREME COURT)

BAFFOE-BONNIE, JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

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

BENIN, JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

A. A. BENIN
(JUSTICE OF THE SUPREME COURT)

PWAMANG, JSC:-

I agree with the conclusion and reasoning of my brother Dotse, JSC.

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

COUNSEL

O. K. OSAFO-BUABENG FOR THE DEFENDANTS/RESPONDENTS/APPELLANTS.

CHARLES KWESI BENTUM FOR THE PLAINTIFF/APPELLANT/RESPONDENT.