IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA – A.D. 2018

CORAM: ADINYIRA, JSC (PRESIDING)

DOTSE, JSC

BAFFOE-BONNIE, JSC

GBADEGBE, JSC

BENIN, JSC

CIVIL APPEAL

NO. J4/44/2017

14TH FEBRUARY, 2018

ADISA BOYA ……. PLAINTIFF/RESPONDENT/APPELLANT

VRS

1. ZENABU MOHAMMED

(SUBSTITUTED BY ADAMA MOHAMMED)

2. MUJEEB …….. DEFENDANTS/APPELLANTS/RESPONDENT

JUDGMENT

The judgment of the Court was read by **Gbadegbe, JSC** as follows:

This is an appeal from the judgment of the Court of Appeal which reversed the decision of the trial Circuit Court in the action herein. By that decision, the Court of Appeal accepted the case of the Defendants/Appellant/Respondents (Defendants) and rejected that of the

Plaintiff/Respondent/Appellant (Plaintiff). As the two lower courts differ in their resolution of the disputed question of fact which turned on the pleadings namely which of the contending parties owns the disputed land, our task in the matter herein is to determine after a careful consideration of the evidence contained in the record of appeal, which of the two decisions truly reflects the effect of the evidence. As there is a conflict of opinion between the trial court and the Court of Appeal, we have to bear in mind that as the trial court was the tribunal of fact, we have to scrutinize the judgment to determine if the conclusion reached on all the evidence was open to the learned trial judge. If on the evidence, the decision reached by the learned trial judge was supported by the evidence, then the Court of Appeal was not entitled to reverse it even if they would have reached a different conclusion on the disputed facts. The Court of Appeal can only interfere when satisfied after a consideration of all the evidence that learned the trial judge did not properly exercise his discretion resulting in the decision being perverse and or unreasonable. It is important that appellate judges demonstrate a slowness in interfering with decisions of trial courts when such decisions are supported by the evidence. The attitude of appellate courts is admirably expressed in the judgment of Kludze JSC (as he then was) in the case of **In Re Okine (Dec'd)** [2003-2004] 1 SCGLR 582 at 607 when he observed as follows:

> *"In the Court of Appeal, and before us, it was argued that we must not disturb the finding of fact made by the trial judge unless they are wholly unsupported by the evidence. I accept that as a sound proposition of law. There is a long line of cases to the effect that even if the appellate court would have come to a different conclusion, it should not disturb the conclusion reached by the trial court. This is because the trial court is presumed to have made the correct findings…… In other words, where the evidence can reasonably support the conclusions of the trial judge, the appellate judges should not order a reversal just because their assessment and comparison, or their view of the probabilities, may be at variance with those of the trial judge. If the evidence can lead to two or more plausible conclusions, the conclusion of the*

trial judge should prevail, even though a different judge might come to a different conclusion."

Thus in this case, although we are faced with two conflicting decisions on contested facts, we should have this caution at the back of our minds in order not to substitute our own decision for that of the trial court. If from the consideration of all the evidence tendered in the matter, we find support in the decision reached by the learned trial judge then the reversal of the decision by the Court of Appeal is a wrong exercise of the jurisdiction conferred on them and in such a case we should interfere to restore the decision of the tribunal of fact. But on the other hand, if the trial court reached a conclusion on the evidence tendered before it that is unsupported by the evidence, then the learned justices of the Court of Appeal were justified in interfering with the decision and in such a case, we should uphold their decision in preference to that of the trial court.

Before proceeding to determine the appeal, we would like to state that certain crucial facts on which the action turned were not disputed including the fact that both parties claim title to the land through the Hia- Topre stool of Ayigya. Also not in dispute is the identity of the disputed property. In the circumstances, we are of the opinion that proof by either party of a prior grant of the land suffices to deprive the owner of title to the land as the basic principle in such cases is that after an owner has granted a clearly determined area of land in favor of a party, he no longer has title to that parcel of land save in circumstances where the grant is affected by vitiating circumstances none of which was raised by either party to these proceedings.

While the plaintiff contended that he obtained his grant in the 1990s and perfected it with a leasehold document from the stool, the defendants who claimed through their deceased father, one Mohammed Suley alleged that their father took his grant on 15 January 1970 and followed it with entry upon the land and the erection of a residential dwelling thereon. According to the plaintiff, the defendants encroached upon his land resulting in him lodging a complaint with the police that led to the conviction of the 1st defendant by a District Court,

Kumasi for the offence of obstruction contrary to section 204 of Act 29/60. On the other hand of the aisle, so to say, the 1st defendant who was aged 30 at the time of his testimony testified that his father's children were all born on the land and that their deceased father was on the land before the plaintiff started molding blocks on a nearby property which they later tried to utilize on the land but met with resistance from the 1st defendant, an act that led to his prosecution and subsequent conviction.

Given the very narrow compass in which the dispute revolved, namely the ownership of the disputed property, it was incumbent upon the learned trial judge to have thoroughly considered the evidence for the purpose of determining which of the contestants had a prior grant but surprisingly, he placed much reliance on a conveyance executed by the owners in favor of the plaintiff and the conviction of the 1st defendant for obstruction of the plaintiff. In our view, the above approach lost sight of evidence which was led by the defendants to establish their prior possession of the land based on an allocation letter and their subsequent entry upon the land and in particular the construction of a place of residence thereon as well as the payment of property rates which were previous to those paid by the plaintiff in respect of the land. In our view, the clear evidence of the defendants' prior grant and the possession which accompanied the grant to their father cannot be superseded by the mere fact that the plaintiff who on the evidence obtained his grant subsequently obtained a conveyance of the disputed property from the owners and succeeded in having the 1st defendant prosecuted for obstruction.

We have carefully attended to the evidence contained in the record of appeal and had regard to the written briefs submitted to us by the parties before us and have reached the conclusion that the plaintiff's grant was subsequent to that of the defendants deceased father and that at the time of the purported grant to the plaintiff, the defendants were actually in physical possession of the land, and such possession ought to have put the plaintiff who went to inspect the land that the grant that he was seeking was encumbered. In the light of this, we are led to the view that the grant to the plaintiff is tainted by the prior grant to the defendants and accordingly on the authority of the decision of this court

in the case of **Amuzu v Oklika** {1998-99] SCGLR 142, the said subsequent grant is not effectual but null and void as at the time that the grant was being made in his favor, the owners had long divested themselves of their interest in the disputed property in favor of the father of the defendants. We pause to observe that writing is not a sine qua non to a customary grant and as the parties to these proceedings are by virtue of the choice of law rules contained in section 54 of the Courts Act, Act 459 subject to customary law, the learned trial judge erred in placing great reliance on the mere fact of the plaintiff had a conveyance of the disputed property; a conveyance only adds to a customary grant but its absence does not detract from a prior grant made under customary law. The grant to the plaintiff was made in circumstances that have the attribute of a fraudulent act done by the grantors and the plaintiff collusively for the purpose of overreaching the defendants grant but that is something that cannot be condoned by a court of law; for which reason we agree unhesitatingly with the Court of Appeal that it cannot have the sanction of law, and is accordingly nullified.

Having carefully read the record of appeal herein over and over again, we have come to the same view as was reached by the learned justices of the Court of Appeal on all the evidence, the effect of which is the decision of the trial judge is unsupported by the evidence. In our view, the learned trial judge's finding to the contrary demonstrates a significant misunderstanding of the effect of the prior possession of the land by the defendants on the subsequent grant to the plaintiff, which raised the suspicion of a colorless grant to the plaintiff and entitled the Court of Appeal to interfere to correct the obvious error. See: **Henderson v Foxworth Investments Ltd** [2014] UKSC 41, [2014] 1 WLR 26. AS we have expressed our agreement with the conclusions reached by them on the evidence, we desire not to detain the precious time of the court by a repetitive examination of the evidence. We think that the views expressed above are decisive of the core issue for our decision that turns of the rival claim before us to the ownership of the disputed property. Similarly, we are of the opinion that the conviction of the 1st defendant for obstruction did not involve a determination of the question of who has a better right to the disputed property and as such cannot operate to preclude the defendants from establishing that as

against the plaintiff (who was the complainant in the criminal case), they have a better title. The point of issue estoppel which the plaintiff impliedly sought to advance is wholly inapplicable to the circumstances of this case.

The plaintiff has also sought to impeach the judgment of the Court of Appeal on the ground of inconsistencies in the evidence led by the defendant. In our opinion, the learned justices of the court below adequately dealt with the said ground of complaint at page 492 of the record of appeal. We wish to say further that a careful anxious examination of the rival cases of the parties reveals that whiles the plaintiff's relied on a grant that was as earlier on expressed in this delivery made in fraudulent circumstances which they tried to conceal in the presentation of their pleading and evidence, the defendants version was marked with truth and that in the circumstances the case of the defendants preponderated over that of the plaintiffs. We do not think that mere insignificant inconsistencies in the presentation of a truthful case would operate to deprive it of the quality of proof that would result in a court preferring a case planked on fraud.

There remains the question raised in the appeal herein by the plaintiff concerning the capacity of the defendants to have mounted a counterclaim in the action. It was contended that in the absence of proof that following the demise of their father to whom the prior grant was made, they had obtained letters of administration from the court and subsequently had the disputed property vested in them they were without capacity. In making this submission, the plaintiff placed great reliance on the concurring judgment of Brobbey JSC (as he then was) in the case of **Okyere (Deceased) v Appenteng & Adoma** [2012] 1 SCGLR 65. In particular, reference is made to the following statement by the learned judge at page 76 in the words that follow:

> *"The import of the judgment in this case is this: when a person dies testate or intestate, his estate devolves on the executor or personal representative respectively until a vesting assent been executed to the beneficiaries or*

devisees and until the grant to them of a vesting assent, the beneficiaries and devisees have no title or locus standi over any portion of the estate."

Basing himself on the above pronouncement, learned counsel for the plaintiff has strenuously contended that the defendants had no capacity to make a counterclaim in respect of their deceased father's property and accordingly notwithstanding the force of the conclusions reached on the evidence, the Court of Appeal erred in decreeing title in their favor. To begin with, we note that in the case in which the above pronouncements were made, the property in dispute was being claimed under a will and therefore in expressing views on matters that related to intestacy the said views were in their nature obiter. Further, in the instant case, the defendants who were peacefully on their property were sued by the plaintiff who sought to have title declared in his favor against them and as by the nature of the controversy, title was necessarily put in issue by either party, it is important that the question as to which party owned the disputed property be put to rest once and for all in order that the matter may not be relitigated in the future. Accordingly, no injustice was occasioned to the parties by the determination of the question of title to the land by the Court of Appeal. Indeed, we are enjoined as judges to avoid multiplicity of actions by the very clear words of Order 1 rule 2 of the High Court (Civil Procedure) Rules, 2004, CI 47 which are as follows:

"These Rules shall be interpreted and applied so as to achieve speedy and effective justice, avoid delays and unnecessary expense, and ensure that as far as possible, all matters in dispute between the parties may be completely, effectively and finally determined and multiplicity of proceedings concerning any of such matters avoided."

The legislative wisdom contained in the above provision which is the overriding principle in civil procedural rules in the High Court cannot be overridden by slavish adherence to mere technicality; our primary concern as judges being to do substantive justice. Then there is the provision of non-compliance provided in Order 81 of CI 47 by which for such defaults to

invalidate proceedings the Party who raises such a point should not have taken a fresh step in the matter after knowledge of such an irregularity - See: Order 81 rule 2 (2). The plaintiff who has urged this point before us took part in the proceedings before the trial court without raising a finger and we are firmly of the opinion that it is too late in the day for him to do that which would have the effect of escaping through the back door after much time and expense has been incurred in the action herein. The matter having been fought to this stage, the parties are entitled to have the issues determined finally between them.

Proceeding further, we are of the view that by virtue of the rules on intestacy contained in section 4(1) (a) of the Intestate Succession Law, PNDC Law 112 , following the death of the father of the defendants and their mother- the original 1st defendant, the property devolved upon the children and as such they had an immediate legal interest in the property that they are competent to defend and or sue in respect of and in any such case either the children acting together or any of them acting on behalf of the others may seek and or have an order of declaration of title made in their favor. In the instant case, it is important to note that the defendants when sued did not specifically seek an order for declaration of title but by virtue of the issues that turned on the pleadings, their title was put in issue as there was a claim for perpetual injunction directed against their continued occupation of the disputed property. We have no doubt that in the circumstances, it was proper for their counterclaim to have been allowed by the Court of Appeal to avoid the same issue being re-litigated in the future.

For these reasons, we dismiss the appeal herein and affirm the decision of the learned justices of the Court of Appeal. The result is that the plaintiff's action is dismissed and judgment entered for the defendants on their counterclaim.

N. S. GBADEGBE
(JUSTICE OF THE SUPREME COURT)

ADINYIRA, JSC:-

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

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

DOTSE, JSC:-

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

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

BAFFOE-BONNIE, JSC:-

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

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

BENIN, JSC:-

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

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

COUNSEL

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