IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: YEBOAH CJ (PRESIDING)

OWUSU (MS.) JSC

TORKORNOO (MRS.) JSC

ACKAH-YENSU (MS.) JSC

ASIEDU JSC

CIVIL APPEAL

NO. J4/10/2023

18TH MAY, 2023

ISAAC ANTWI ….. PLAINTIFF/RESPONDENT/RESPONDENT/APPELLANT

VS

OBIRI YEBOAH APPIAHEN

DEFENDANT/APPLICANT/APPELLANT/RESPONDENT

JUDGMENT

ASIEDU JSC:-

My lords, this is an appeal by the Plaintiff/Respondent/Respondent/Appellant (hereafter referred to as the Plaintiff) against the judgment of the Court of Appeal delivered on the 24th June 2021 which reversed a ruling given by the High Court, Tema on the 10th day of December 2018. The Notice of Appeal was filed on the 8th day of July 2021.

FACTS:

In order to put this case in perspective, it is very important to trace the history of this case. The Defendant/Applicant/Appellant/Respondent (hereinafter called the Defendant) alleges that in the year 1996 and 1997, he obtained subleases from AR AND AK PROPERTIES LIMITED in respect of two parcels of land described as plots Number C8/8 and C8/9 situate at a place called Atomic Hills Housing Estate, Accra. The Defendant says that, after acquiring the land, he went into possession by constructing a fence wall around the land and also by placing thereon a caretaker who farmed on the land. In 2014, a Certificate of Purchase was posted on the walls of the land at the instance of the Plaintiff who claims to have purchased the land at an auction held by the Courts. Consequently, the Defendant caused a search to be conducted at the Registry of the High Court by his lawyers. According to the Defendant, the search revealed that, one Iddrisu Ayaa Tetteh commenced an action at the High Court by Suits Number 1/2001 and AL/14/2006 against Winfred Otuafo Aryeh and Another which went in favour of Iddrisu Ayaa Tetteh. In executing the judgments delivered in Suits Number 1/2001 and AL/14/2006, Iddrisu Ayaa Tetteh, caused to be attached plots Number C8/8 and C8/9 situate at a place called Atomic Hills Housing Estate, Accra which were subsequently sold at an auction to the Plaintiff herein.

Following the above, the Defendant sued the Plaintiff in Suit number AP/100/2015 bearing the title Obiri Yeboah Appiahene vs. Isaac Antwi and Another for a declaration

that the purported auction of plots Number C8/8 and C8/9 situate at a place called Atomic Hills Housing Estate, Accra was illegal and hence the certificate of purchase issued by the Registrar of the High Court to the Plaintiff herein was null and void. The Defendant also sought an order to set aside the purported auction sale and a declaration of title to the said properties as well as recovery of possession and damages. The Defendant says that after the trial of the suit in AP/100/2015, judgment went in his favour for the reliefs indorsed on his writ of summons as set out above.

The Defendant says that subsequent to the judgment in AP/100/2015, one Alex Yamoah claiming to be an Assignee of the Plaintiff herein, sued the Defendant at the High Court, Tema, in Suit number E1/7/2017, over plots Number C8/8 and C8/9 situate at Atomic Hills Housing Estate, Accra for a declaration of title. The Defendant says that he succeeded in getting the High Court, Tema to dismiss Suit number E1/7/2017 on grounds of estoppel per res judicata. It is the case of the Plaintiff that he was never served with the processes leading to the judgment in suit Number AP/100/2015 and therefore the said judgment was obtained by fraud. On the 3rd day of July 2018 the Plaintiff instituted the instant action at the High Court, Tema against the Defendant for:

a. *A declaration that the judgment in Suit Number AP/100/2015 obtained on the blind side of the Plaintiff was procured by fraud and same ought to be set aside as void and of no effect.*
b. *An order setting aside all consequential orders flowing from the said judgment in Suit Number AP/100/2015 for same being void and of no effect.*
c. *A declaration of title to all that piece or parcel of undeveloped lands/property situate at New Ashongman, Accra, in the Greater Accra Region of the Republic of Ghana and containing an approximate area of 0.437 acre or 0.177 hectare and bounded on the north-west by assignor's land measuring 213.4 feet more or less on the north-east by assignor's measuring 85.9 feet more or less on the south-east by a proposed road measuring 213.5 feet*

*more or less on the south-west by assignor's land measuring 93.7 feet more or less (b)*** 0.162 acre or 0.063 hectare and bounded on the north-west by a proposed road measuring 70.9 feet more or less on the north-east by assignor's land measuring 100.2 feet more or less on the south-east by assignor's land measuring 69.7 feet more or less on the south-west by assignor's land measuring 100.06 feet more or less which said pieces of land is more particularly delineated on the plan attached hereto and thereon shown edged pink which shows the relevant measurement.*

d. *An order for recovery of possession*
e. *An order for perpetual injunction to restrain the defendant, whether by himself, his agents, servants, assigns, privies and any person claiming through or under them howsoever described from further acts of interference and trespass on the said land.*
f. *General damages for trespass.*
g. *Costs including lawyers' fees."*

In the accompanying statement of claim, the Plaintiff averred at paragraph 10 thereof that the judgment procured by the Defendant in Suit No. AP100/2015 was fraudulent. The Plaintiff went ahead to give particulars of fraud as follows:

"PARTICULARS OF FRAUD

i) The defendant herein knew or ought to have known at all material times that neither he nor his purported grantors had any interest in the land in dispute.

ii) The Defendant herein knew or ought to have known that the Plaintiff herein had better title to the land in dispute having purchased same from an auction authorized by court of competent Jurisdiction.

iii) The Defendant herein took meticulous steps to conceal the pendency of Suit No. AP 100/2015 from the Plaintiff herein.

iv) The Defendant herein and the Plaintiff therein in Suit No. AP 100/2015 knew the plaintiff's herein residential address and yet in the application for substituted Service, the Defendant herein cleverly omitted to add the Plaintiff's residence as one of the modes of service to serve the Writ of Summons, Statement of Claim and any other process.

v) The order for Substituted Service was not posted on the fence wall of the land in dispute for the mandatory twenty-one (21) days, if posted at all as the Plaintiff herein visited the land in dispute regularly and at no point did, he (the Plaintiff herein) observe any such notice on the fence wall.

vi) The plaintiff says that he doubts the very identity of the Defendant herein. The plaintiff says the Defendant herein could not have purchased the disputed land in 1994 as is being alleged because he was a minor in 1994.

vii) The Defendant herein knew or ought to have known at all material times that his purported grantor AR and AK Properties Limited is the alter ego of Winfred Otuafo Aryeh and Tenmote Akakpo, the Judgment Debtors in Suit number AL 14/2006 from which occasioned the aforesaid auction sale.

viii) A search at the Registrar-General's Department revealed the said Aryeh and Akakpo as the Shareholders and Directors respectively of AR and AK Properties Limited.

ix) The subject matter of this suit forms part of the lands auctioned by the Courts in 2014 as part of the interest of the Judgment Debtors in Suit No. AL14/2006. That is to say the interest held by Aryeh and Akakpo.

x) The purported indenture of the Defendant herein was executed in 1996. However, the Defendant quickly went to the Lands Commission and purported to stamp the same in 2014 when the Defendant heard about the said auction. That is to say 18 years after the purported execution of the indenture.

xi) The land in dispute was bare land with no acts of ownership and or possession by the Defendant herein. The Plaintiff says he cleared the land and dumped a trip each of sand and stones on same after the auction.

xii) The Defendant herein has never been in possession of the land in dispute until sometime in 2015 when he (the Defendant herein) hurriedly constructed a fence wall on the front part of the property in dispute in spite of evidence of possession by the Plaintiff, as the three other sides had already been fenced by adjoining land owners.

xiii) The land in dispute was left bare for so long that neighbours had cause to complain about snakes and other reptiles on the land. The land in dispute has never been farmed on as alleged by the Defendant."

After entering Appearance to the writ, the Defendant filed a Notice of Motion for an order of the High Court under Order 11 rule 18(1)(b) & (d) to dismiss the Plaintiff's writ and pleadings for being *"frivolous, vexatious and an abuse of the Court's process and on grounds of estoppel per res judicature sic*". See pages 12 to 16 of the Record of Appeal (ROA). The plaintiff opposed the application by filing an affidavit in opposition which can be found at page 70 of the Record of Appeal (ROA). After hearing arguments in the matter, the learned judge of the High Court, Justice Emmanuel Ankamah, J on the 10th of December 2018 ruled among others, that "*Since fraud vitiates everything that is done, I cannot at this stage strike out the suit. Application is dismissed. Suit to take its normal course"*. Dissatisfied with the ruling of the High Court, the Defendant appealed to the Court of Appeal which reversed the ruling of the High Court, in a judgment delivered on the 24th June 2021. The Plaintiff who is also aggrieved by the judgment of the Court of Appeal has appealed to this court as already stated and prays by way of relief that "the judgment of the Court of Appeal dated 24th June 2021 be set aside and, in the stead, the suit remitted to the High Court, Tema for a full trial." The grounds of appeal are that:

a. *The Court of Appeal erred when the Court failed to address or rule on the preliminary legal objection raised by the Plaintiff/Appellant in his Notice of Intention to rely on a Preliminary legal objection filed on the 6th June 2021.*
b. *The Court of Appeal erred when the Court held that the Plaintiff/Appellant lacks capacity to maintain the instant suit.*
c. *The Court of Appeal erred when the court held that the particulars of fraud listed by the Plaintiff/Appellant in his statement of claim are immaterial and cannot be used to impeach the judgment delivered by the High Court on 27th November 2015*
d. *The Court of Appeal erred when the court held that the Plaintiff/Appellant's action commenced at the High Court, Tema is an abuse of the court process.*
e. *The judgment is against the weight of the evidence on record.*

CONSIDERATION OF THE GROUNDS OF APPEAL:

Fraud: ***

We have decided to determine the third and fourth grounds of appeal first. These grounds are that: *"The Court of Appeal erred when the court held that the particulars of fraud listed by the Plaintiff/Appellant in his statement of claim are immaterial and cannot be used to impeach the judgment delivered by the High Court on 27th November, 2015"* and that *"The Court of Appeal erred when the court held that the Plaintiff/Appellant's action commenced at the High Court, Tema is an abuse of the court process."*

On these grounds of appeal, it has been submitted on behalf of the Plaintiff that *"a successful bidder at an auction sanctioned by a court of competent jurisdiction to a large extent is an innocent purchaser. The buyer only acquires the attached property. That is why the buyer is issued with a Certificate of Purchase and a Deed of Assignment all by the Registrar of the Court."* The Plaintiff also contends that he has a right to sue the Defendant for an order to set

aside the judgment, whether or not it is a judgment in default or after full trial once the judgment was obtained by fraud. Finally, the Plaintiff's Counsel submits that since the Defendant filed a statement of defence to the suit and also alleged fraud against the Plaintiff, the Defendant ought to allow the suit to be tried by the court.

On behalf of the Defendant, counsel argued that the judgment of the Court of Appeal was right. According to counsel for the Defendant at page 23 to 24 of his Statement of Case, the judgment of the High Court in suit Number AP100/2015 was regularly obtained and does not support the Plaintiff's allegation of fraud and so the Plaintiff "*has to adduce sufficient evidence per his affidavit in opposition as required by section 11 of NRCD 323 and that the Plaintiff failed to adduce an iota of evidence to support his allegation*". Counsel therefore submitted that the allegation of fraud as held by the "*Court of Appeal was 'concocted' and calculated to bring the parties back to relitigate over a subject matter which had previously been determined by the courts of competent jurisdiction."*

In their judgment delivered on the 24th day of June 2021, the Court of Appeal, speaking through Dennis Adjei, JA; stated at page 4 which can be found at page 182 of the Record of Appeal (ROA), among others, that:

> *"A person who issues a writ to impeach a judgment on grounds of fraud should give particulars of the alleged fraud and those particulars given should be prima facie relevant or material. Where the particulars of fraud are prima facie immaterial or irrelevant and if proved during the trial cannot impeach the judgment, the action may be terminated under any of the grounds under Order 11 rule 18 of CI.47 and the inherent jurisdiction of the court. A court of law is to prevent an abuse of its process and where particulars of fraud provided by a Plaintiff to set aside a judgment is prima facie immaterial or irrelevant, the court shall dismiss the suit without adduction of evidence."*

The Court of Appeal thereafter, referred to the particulars of fraud pleaded by the Plaintiff herein and then concluded at page 187 of the record of appeal that:

> *"[The] particulars of fraud provided under paragraph 10(i) to (xiii) are not material as they cannot be said to have been used to deceive the court. We find that the particulars of fraud mentioned above are not material and cannot be used to impeach the judgment delivered by the High Court on 27th November 2015. We find that none of the particulars of fraud pleaded by the Plaintiff amounts to fraud in law and when the allegations made by the Plaintiff are proved by evidence, they cannot impeach the judgment on grounds of fraud. The grounds are irrelevant and immaterial and concocted to throw dust into the eyes of the court".*

It has long been recognised and accepted by the courts that the manner by which a party can get a judgment obtained by fraud set aside, is for that party to institute a fresh action against the judgment creditor and plead the alleged fraud with particulars and then prove same by cogent evidence at the trial of the action. Thus, in **Dzotepe vs. Hahormene III [1987-88] 2 GLR 681** this court pointed out at page 684 that:

> *"The settled practice of the court is that the proper method of impeaching a completed judgment on the ground of fraud is by action in which the particulars of fraud must be exactly given, and the allegation established by strict proof."*

See also **Osei-Ansong & Passion International School vs. Ghana Airports Co. Ltd. [2013-2014] 1 SCGLR 25** where the above principle of law was re-emphasized.

The learned editors of Halsbury's Laws of England (5th ed.) Volume 47 state at page 16 paragraph 13 that:

> *"The court has never ventured to lay down, as a general proposition, what constitutes fraud. Actual fraud arises from acts and circumstances of imposition. It usually takes either the form of a statement of what is false or suppression of what is true."*

At page 17 the learned editors write:

> *"A person is guilty of fraud if: (1) he dishonestly makes a false representation, and intends, by making the representation, to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss; (2) he dishonestly fails to disclose to another person information which he is under a legal duty to disclose and intends, by failing to disclose the information, to make a gain for himself or another or to cause loss to another or to expose another to a risk of loss; or (3) he occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person, dishonestly abuses that position, and intends, by means of the abuse of that position, to make a gain for himself or another, or to cause loss to another or expose another to a risk of loss"*

As pointed out earlier one of the main reasons why the Court of Appeal dismissed the Plaintiff's claim was that the particulars of fraud pleaded by the Plaintiff herein and which have been quoted above *"are not material and cannot be used to impeach the judgment delivered by the High Court on 27th November 2015*". Indeed, in the eyes of the Court of Appeal, "*none of the particulars of fraud pleaded by the Plaintiff amounts to fraud in law and when the allegations made by the Plaintiff are proved by evidence, they cannot impeach the judgment on grounds of fraud*". In our opinion, in view of the reasons assigned by the Court of Appeal for dismissing the Plaintiff's action, there is a need for this court to critically examine some of the averments in the Plaintiff's statement of claim in order to establish the validity or otherwise of the assertion made by the court below. At paragraph 6 and 7 of the statement of claim, the Plaintiff pleaded as follows:

> *"6. The Plaintiff avers that the Defendant in the said suit applied for and obtained judgment in Default of Appearance having misled the court that he (the Defendant herein) could not personally serve the Plaintiff herein.*

7. The Plaintiff avers that the Defendant was later granted the declaratory reliefs in the said suit in a judgment delivered by Her Ladyship Justice Novisi Afua Aryene (Mrs.) dated 27th November 2017 without any notice to the Plaintiff herein."

We understand the averments above to mean that the processes leading to the judgment in favour of the Defendant in this matter against the Plaintiff herein were not served on the Plaintiff and that the Plaintiff was never aware of the said processes. The Plaintiff subsequently in paragraphs 8 and 9 of his statement of claim pleaded that the judgment delivered in Suit Number AP/100/2015 was never formally brought to his notice and that he got to know of the existence of the said judgment when his grantee was confronted with same in a different suit at the High Court, Tema. At paragraphs 10 (iii)(iv)(v) the Plaintiff pleaded that:

"(iii). The Defendant herein took meticulous steps to conceal the pendency of Suit No. AP/100/2015 from the Plaintiff herein.

(iv). The Defendant herein and the Plaintiff therein in Suit No. AP/100/2015 knew the Plaintiff herein residential address and yet in the application for substituted serve, the Defendant herein cleverly omitted to add the Plaintiff's residence as one of the modes of service to serve the Writ of Summons, Statement of Claim and any other process.

(vi). The order for substituted service was not posted on the fence wall of the land in dispute for the mandatory 21 days, if posted at all as the Plaintiff herein visited the land in dispute regularly and at no point did, he (the Plaintiff herein) observe any such notice on the fence wall."

By the judgment of the court below, is the Court of Appeal saying that it is immaterial that the Writ of Summons was not served on the Plaintiff in this matter and that even if the Plaintiff is able to prove that he was not served with the Writ of Summons and its accompanying statement of claim, that fact could still not impeach the judgment

delivered in Suit Number AP/100/2015? A Writ of Summons and its accompanying statement of claim are originating processes which are required to be personally served on the Defendant against whom the action has been instituted. Thus, Order 7 rule 12(1) of the High Court (Civil Procedure) Rules, 2004, CI.47 (as amended) specifically provides that:

> *"12. Service of writ*
>
> *(1) Subject to these Rules and any other enactments, a writ shall be served separately on each defendant."*

Indeed, a Plaintiff in an action cannot proceed to take judgment in a Suit against a Defendant against whom a Writ of Summons had been issued unless the Writ had been served on the Defendant and due process observed. For this reason, Order 7 rule 12 (4) of the High Court (Civil Procedure) Rules, 2004 CI.47 (as amended) states in no uncertain terms that:

> *"(4) Where a writ is duly served on a defendant other than by virtue of subrule (2) or (3), then, until the person serving it indorses on it the date on which it is served, the person on whom it is served, and where the person is not the defendant, the capacity in which the person is served, the plaintiff shall not be entitled to enter any judgment against that defendant in default of appearance or in default of defence."*

It is tantamount to a breach of the rules of natural justice for a Plaintiff to proceed to obtain judgment against a Defendant who has not been served with the Writ of Summons and its statement of claim issued against him and, a court of law had no business to enter upon any enquiry by way of determining the suit filed by a Plaintiff where the Writ of Summons has not been served on the Defendant. Thus, in **Alabi vs B5 Plus Company Limited and Others [2018-2019] 1 GLR 197**, this court stated in no uncertain terms that:

"The general position of the rules of procedure under Order 7 rule 2(1) and 5(1) of CI.47 was that a court had no jurisdiction to proceed against a party who had not been served. A writ had to be personally served on all defendants, unless otherwise provided by the rules."

Again, is the Court of Appeal saying that even if the within named Plaintiff is able to prove that the Defendant in this matter deliberately concealed the pendency of Suit No. AP/100/2015 from the Plaintiff and went ahead to obtain judgment in Default of Appearance from the High Court against the Plaintiff, that proven fact will still be incapable of impeaching the judgment taken against the Plaintiff in that suit? As already stated, a Writ of Summons being a process by which a suit is commenced against a Defendant by a Plaintiff, it will be akin to fraud if a Plaintiff who had issued the writ deliberately and consciously conceals the Writ from the Defendant and goes ahead to obtain judgment against the Defendant and therefore if a Defendant against whom such judgment had been taken comes to court and alleges that the said judgment was fraudulently obtained against him, the least that a court, desiring to do justice can do is to allow the Defendant to have his day in court and prove his claims against the Plaintiff in that matter. It amounts to a denial of justice for a Defendant who finds himself in such a situation to be told that his claims are immaterial and cannot establish fraud even if cogent evidence is provided by him in proof of his claims in that regard.

May we further ask whether the court below is saying that even if the Plaintiff herein successfully proves that the Defendant in this matter, who was the Plaintiff in Suit No. AP/100/2015, failed to post the order for substituted service on the fence wall of the land in dispute in accordance with the orders of the High Court in Suit Number AP/100/2015, as alleged by the Plaintiff in paragraph 10(v) of his statement of claim as part of the particulars of fraud, that proven fact will still be sterile in impeaching the judgment obtained by the Defendant in Suit No. AP/100/2015? A party who has been directed by a court of competent jurisdiction to serve a process in a particular manner on another party

to the suit cannot serve the said process in some other way than that which had been ordered by the court and neither can he refuse to obey the order of the court and still expect the court to grant him a hearing to the extent of pronouncing judgment in his favour. Indeed Order 7 rule 6(3) is very emphatic in this regard. It states that:

> *"(3) Substituted service of a document in relation to which an order is made under this rule, is effected by taking such steps* ***as the Court may direct*** *to bring the document to the notice of the person to be served."*

Where an order for substituted service is therefore made by a court, the party ordered to effect the substituted service ought to serve the process in strict compliance with the order made by the court. Therefore, where as in the instant matter, the Plaintiff alleges that a Defendant who had obtained judgment against him deliberately refused to carry out the orders of the court and failed to post the Writ of Summons issued against the within named Plaintiff in accordance with the orders of the High Court, but went ahead to get the court to pronounce judgment in the Defendant's favour, that allegation is worth investigating to unearth the truth or otherwise of the allegation. It will be wrong for a court to say that even if such an allegation is proved, the result will still not be potent to impeach the judgment entered against the Plaintiff.

In the particulars of fraud pleaded in paragraph 10 of his statement of claim, the within named Plaintiff had averred that the Defendant and his Defendant's grantor have no interest in the land in question and that that fact was known to the Defendant in this suit. The Plaintiff says that having purchased the land at a public auction organized under the auspices of the Deputy Sheriff of the High Court, he went into possession by dumping sand and stones on the land at a time that the land was bare and unoccupied by anybody including the Defendant in this matter and, yet, the Defendant says that he took possession of the land the subject matter of the action in AP/100/2015. We think that it is proper for the Plaintiff to be given an unhindered opportunity to ventilate his claims at

the High Court rather than shutting the door of justice against his face. We are firmly of the view that the allegations of fraud made by the Plaintiff herein, particulars of which have been given in the statement of claim, are strong and potent enough such that they cannot be wished away by the Court below or the Defendant herein. The particulars of fraud are weighty enough to require investigations by the High Court of Justice. The allegations of fraud raised by the Plaintiff herein are such as "*the court should be astute to examine whether there was proof of the averment*". See **Dolphyne vs Speedline Stevedoring Co Ltd and Another [1995-96] 1 GLR 532**. In the words of Acquah, JSC (as he then was) in **Frimpong and Another vs. Nyarko [1999-2000] 1 GLR 429**, at page 437:

> *"Fraud, as is well-known, vitiates everything, and when a court of law in the course of its proceedings, has cause to believe that fraud had been committed, the court is duty-bound to quash whatever had been done on the strength of that fraud. As Osei-Hwere JA (as he then was) said in In re West Coast Dyeing Industry Ltd, Adams v Tandoh [1984-86] 2 GLR 561 at 605, CA:*
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> > *"Fraud like cancer, calls for a swift remedy. It must be uprooted. Therefore, [when] fraud is brought to the court's notice and there is credible evidence to support it the court is obliged to deal with it swiftly and decidedly."*
> >
> > *The House of Lords in Jonesco v Beard [1930] AC 298 at 301-302, HL put it this way: "Fraud is an insidious disease, and if clearly proved to have been used so that it might deceive the Court, it spreads to and infests the whole body of the judgment."*

It makes interesting observation that after the ruling by the trial court which dismissed the Defendant's application to dismiss the Plaintiff's action, the Defendant, upon the orders of the trial court, filed a statement of defence on the 24th of December 2018 which can be found at page 76 of the record of appeal. In the said statement of defence, the

Defendant also pleaded fraud against the Plaintiff in this matter and went ahead to give elaborate particulars of the alleged fraud at paragraph 39 of the statement of defence. These processes were all placed before the Court of Appeal but that notwithstanding the court delivered the judgment subject matter of this appeal. We are of the firm opinion that having pleaded fraud against each other, it is only fair and in accord with the dictates of justice that the parties must be allowed the opportunity to investigate these allegations in order that the truth underlying the ownership of plots Number C8/8 and C8/9 situate at a place called Atomic Hills Housing Estate, Accra will be unravel once and for all. We hold therefore that the finding by the Court of Appeal that *"none of the particulars of fraud pleaded by the Plaintiff amounts to fraud in law and when the allegations made by the Plaintiff are proved by evidence, they cannot impeach the judgment on grounds of fraud. The grounds are irrelevant and immaterial and concocted to throw dust into the eyes of the court"* is not only wrong in law, but it is not borne out by the record placed before us. Where a second appellate court, such as this court, concludes, after examining the record of appeal, that a finding and the conclusion reached by the first appellate court could not be supported by the record and the law, the second appellate court was duty bound to reverse not only the finding by the first appellate court but also the wrong conclusion made by the first appellate court. See: **Fosua and Adu - Poku vrs Dufie (deceased) & Adu Poku Mensah [2009] SCGLR 310.** Consequently, we hold that the Plaintiff succeeds on the third ground of appeal.

Abuse of the Process:

In the fourth ground of appeal, the Plaintiff says that *"the Court of Appeal erred when the court held that the Plaintiff/Appellant's action commenced at the High Court, Tema is an abuse of the court process."* It has also been submitted on behalf of the Plaintiff that *"the Plaintiff has given cogent reasons for the basis of this action, and he has also provided detailed particulars of the alleged fraud against the Defendant".* The Plaintiff had also challenged the very identity

of the person who paraded himself as 'Obiri Yeboah Appiahene'. In the words of counsel for the Plaintiff, *"this action cannot in any way be called or labelled in the slightest as an abuse of the court processes. This is the only action commenced by the Plaintiff to vindicate his right upon realising that a judgment had been purportedly obtained against him on his blind side. How can this single step taken by the Appellant to vindicate his rights be an abuse of the court process?"* Finally, it was submitted on behalf of the Plaintiff/Appellant that *"the only option available to the Appellant to vindicate his rights is to issue a new writ to set aside the judgment purportedly obtained by the Respondent on the grounds of fraud."*

For the Defendant, counsel has argued at page 27 of his statement of case that the Plaintiff's action is "*not only frivolous and vexatious but also an abuse of the process of the court in that the judgment of the High Court delivered on the 27th November 2015 proceeded to set aside the purported auction of the Defendant's property*". Counsel says that notwithstanding the judgment of the 27th November 2015, the Plaintiff/Appellant went ahead to assign the property to one Alex Yamoah whose action at the High Court, Tema against the Defendant was also dismissed on grounds of res judicata. Counsel says that in the face of the two judgments against the Plaintiff and his assignee, not only is the Plaintiff estopped but the present action mounted by him is an abuse of the process of the court.

At page 5 of its judgment which can be found at page 183 of the record of appeal, the court below held, among others, that:

> "*a court of law is to prevent an abuse of its process and where particulars of fraud provided by a Plaintiff to set aside a judgment is prima facie immaterial or irrelevant, the court shall dismiss the suit without adduction of evidence."*

The phrase "*abuse of the process*" is a term of art and may be explained to mean the inordinate and mischievous use of the processes of the court not for the purposes of

seeking real justice or any legal or equitable remedy but for some collateral end. The Black's Law Dictionary (8th edition) defines the term at page 11 to mean:

> *"The improper and tortious use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope".*

The learned editors of the Supreme Court Practice, 1995 (also known as the White Book) Volume 1, published by Sweet and Maxwell state at page 344 paragraph 18/19/33 that:

> *"The term connotes that the process of the court must be used bona fide and properly and must not be abused. The court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and interests of justice may be material."*

In **Johnson vs. Gore Wood & Co. [2002] 2 AC 1**, Lord Bingham stated that:

> *"But Henderson v. Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identity any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the*

later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceedings involve what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should have in my opinion be a broad, merit-based judgment which takes account of the public and private interests involved and also takes account of all the fact of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the result may often be the same, it is in my view preferable to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Property applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.

The most important consideration in the instant matter is whether the Plaintiff herein can, by the issuance of the Writ of Summons with its accompanying statement of claim, be said to have indulged in the inordinate, mischievous, improper and tortious use of the processes of the court. The answer to this question can be found in the circumstances of this case which are that: the Plaintiff purchase a parcel of land at an auction organized by the Deputy Sherriff of the High Court and was issued with a Certificate of Purchase. He took possession of the land. Subsequently, the Defendant herein sued the Plaintiff for a declaration that the land purchased by the Plaintiff was his Defendant's bona fide

property. The High Court entered judgment in default of appearance in favour of the Defendant against the Plaintiff. The Plaintiff says that the writ of summons and the statement of claim filed by the Defendant were not served on him and that he was not aware of the proceedings leading to the default judgment. The Plaintiff says the Defendant failed to post an order for the substituted service of the writ on the walls of the property and that the judgment was obtained by fraud. The Plaintiff has, therefore, issued the instant writ for the main purpose of getting the default judgment set aside on grounds of fraud. Wherein lies the inordinate, mischievous, improper and tortious use of the processes of the court by the Plaintiff which the Court of Appeal found? How did the Plaintiff abuse the process of the Court? What else can the Plaintiff do other than seek a declaration that the judgment obtained by the Defendant was procured by fraud? And by what yardstick did the Court of Appeal conclude that the particulars of fraud itemized by the Plaintiff in his statement of claim are "*irrelevant and immaterial and concocted to throw dust into the eyes of the court"*? Equity will not suffer a wrong to be without a remedy. As explained by the learned authors of Snell's Equity (34th edition), Sweet and Maxwell at page 93 paragraph 5-002 that:

> *"The idea expressed in this maxim is that no wrong should be allowed to go without redress if it is capable of being remedied by courts of justice."*

In his contribution to the judgment in **Dolphyne vs Speedline Stevedoring Co Ltd and Another [1997-98] 1 GLR 786**, Amuah JSC stated at page 798 of the report that:

> *"I quite agree with the reasoning but in the case before us, sections 1-15 under Part 1 of NRCD 54 does not provide a period of limitation in the case of fraud; whereas in the case of contract and tort there is a specific period of limitation provided under section 4(1). There is no such provision in the case of fraud and therefore the court has no specified period to follow. I find that proceedings to avoid a transaction can be brought at any time but there is, however, a requirement that the proceedings to avoid a transaction must be*

brought within a reasonable time from the date the plaintiff "has discovered the fraud or mistake as the case may be or could with reasonable diligence have discovered it": see section 22 (1)(c) of NRCD 54 and also Snell's Principles of Equity (29th ed) at 557 in the case where undue influence persists.

In the case before me, the undue influence which persisted against the plaintiff ceased to have effect when he resigned from the Speedline Stevedoring Co Ltd. Therefore, he was left on his own to sue the company but failed to do so. When I consider the report of the Registrar General's Department, the nature of the fraud, undue influence and the difficulties one has to overcome in a case like this before being granted a relief, the maxim: "Equity will not suffer a wrong to be without a remedy" is more appropriate."

We hold that a party who complains that a Defendant had deliberately concealed a writ of summons issued against him and had failed to bring it to his notice and yet had gone ahead to procure judgment against him, that party cannot be said to abuse the process of the court by issuing a fresh writ for a declaration that the judgment was procured by fraud. The Plaintiff therefore succeeds on his fourth ground of appeal.

In the second ground of appeal, the Plaintiff says that: *"the Court of Appeal erred when the court held that the Plaintiff/Respondent/Respondent/Appellant lacks capacity to maintain the instant suit."* Indeed, at page 11 of its judgment which can be found at page 189 of the record of appeal, the Court of Appeal stated that:

"There is evidence on record that the Plaintiff assigned his interest in the plots to the Defendant's grantor (sic) and lacks locus standi to maintain the action. The High Court in the suit which the Plaintiff is seeking to set aside on grounds of fraud found as a fact that the Plaintiff who had interest in the land assigned same to the Defendant's grantor (sic). A person who assigns his interest in land (sic) disposes of his absolute interest and lacks

cause of action. We uphold ground (b) of the appeal and state that the Plaintiff's action is frivolous as he lacks capacity to maintain same."

On this ground of appeal, it has been submitted on behalf of the Plaintiff that the Plaintiff herein is a holder of Land Title Certificate Number GA 54668, and that the Plaintiff is yet to completely divest himself of the land in dispute and therefore he has capacity to maintain the instant action. It has also been argued on behalf of the Plaintiff that since he was a Defendant in Suit Number AP/100/2015 in respect of whose judgment he complains was procured by fraud, Plaintiff has capacity to institute the instant action against the Defendant herein.

In response to the above submissions, it was submitted on behalf of the Defendant that the Plaintiff has admitted in his statement of claim as well as his affidavit in opposition to the application to dismiss the instant action that, he had assigned his interest in the land. Counsel therefore argues that "*having divested his interest in the said land to his assignee, the Plaintiff ceases to be the owner of the said land and consequently, under the principle of privity of estate, the assignee steps into the Appellant's shoes*" and therefore he had no capacity to institute the present action.

It is quite clear that the arguments in support of the Defendant's position defend the stands adopted by the Court of Appeal. However, where a person institutes an action for a declaration that a judgment entered against him was procured by fraud and therefore seeks to set aside the judgment, the only issue which the court is legally called upon to deal with is the question whether or not the judgment complained off was indeed procured by fraud. In that vein, the Court has no jurisdiction to deal with any other issue set out by the Plaintiff. Thus, in **Okwei Mensah (Decd.) (acting by) Adumuah Okwei vs. Laryea (Decd.) (acting by) vs. Ahieteye Laryea & Another [2011] 1 SCGLR 317**, this court delivered itself at page 328 of the report thus:

"In seeking to be relieved from the effects of the previous judgment, the appellant, i.e., the Plaintiff relied on fraud. But in the action, the Plaintiff also sought to rely on certain other facts not amounting to fraud contrary to settled judicial opinion that a party which seeks to set aside a judgment on grounds of fraud must plead fraud and no other facts: See Brutuw vs Aferiba [1984-86] 1 GLR 25, CA; and Cole vs. Langford [1896] 2 QB 36. Delivering his judgment in the Brutuw case (supra), Francois JA (as he then was) (as stated at page 38) made the following pronouncement:

> *An important observation must be made here. In a suit charging fraud, there is clear impropriety for a plaintiff to reopen his entire case. Jonesco v. Beard [1930] A.C. 298 at 300-301, H.L. is authority for the principle that where a judgment is attacked for fraud, fraud only must be in issue. It is not a rehearing of the whole case."*

Again, in **Nana Asumadu II (Substituted by Nana Darku AMPEM) & Another vs. Agya Ameyaw [2019-2020] 1 SCLRG 681**, this court at page 695 stated as follows:

In law, fraud is a deliberate deception to secure unfair or unlawful gain, or to deprive a victim of a legal right. It is both a civil wrong and a crime. Fraud, be it civil or criminal, has one connotation. It connotes the intentional misrepresentation or concealment of an important fact upon which the victim is meant to rely, and in fact, does rely to the harm of the victim. It is therefore criminal in nature even where it is clothed in civil garbs. Having pleaded fraud, the particulars of which the plaintiff provided under paragraph 6 of their statement of claim … which connotes the imputation of crime on the part of the defendant in obtaining the judgment, the law requires the plaintiffs to establish that allegation clearly and convincingly and beyond reasonable doubt …. The facts on record did not permit the trial court to re-open the dispute over title to Diaso lands, as the parties and the reliefs claimed in this suit were the same as those in Suit No. LS. 45/2000. The trial court should have identified the allegation of fraud as the main issue in the matter before it and addressed

that issue only, but it did not do so. It did not even make any findings of fact on the issue of fraud, which makes the trial court's judgment incurably bad".

We are firmly of the view that it is incorrect as stated by the Court of Appeal that because the Plaintiff in the instant matter had, allegedly, assigned his interest in the property, the subject matter of Suit Number AP/100/2015, the within named Plaintiff is bereft of capacity to institute the present action and ask that the judgment in Suit Number AP/100/2015 be set aside on grounds of fraud. We are bold to state that in an action such as this, the Plaintiff derives his capacity from the fact that he was the defendant in the action which led to the judgment which was, allegedly, obtained by fraud and not from the subject matter of the impugned action leading to the impugned judgment. The Plaintiff succeeds on ground two of his grounds of appeal.

Next, the Plaintiff says that "*the judgment is against the weight of the evidence on record*". We recognise the fact that no viva voce evidence was given by the parties in this matter before the trial judge and since this appeal culminates from a decision of the lower courts on an application filed to dismiss the suit in limine, the matter was fought on affidavit evidence. We also recognise the decisions of this court to the effect that where no viva voce evidence was given before the trial court, the instant ground of appeal is not available to an appellant. Thus, in **Fenu & Others vs Dredging International Ltd. [2017-2020] 2 SCGLR 125,** this court held at page 130 of the report that:

"The respondent has raised objection to the ground 1 of the grounds of appeal which seeks to criticise the judgment on the basis that it is against the weight of evidence and the invitation by the appellants for this court to conduct a fresh enquiry or re-hear the entire application for stay of proceedings.

The omnibus ground is usually common in cases in which evidence was led and the trial court was enjoined to evaluate the evidence on record and make its findings of facts in

appropriate cases. In cases where no evidence was led but the order which has been appealed against is interlocutory, such ground of appeal are not canvassed at all…. We think this ground is clearly misconceived and same is hereby struck out as there were no disputed factual matters which called for findings by the lower court which merely determined the application for stay of proceedings on affidavit evidence which was not in controversy."

On the strength of the authorities therefore, we hold that since the decision which resulted in the instant appeal was arrived at, on the hearing of an application with affidavits to dismiss the suit filed by the Plaintiff herein, for which reason, no viva voce evidence was given by the parties, we hold that the ground of appeal that the judgment is against the weight of the evidence on record is not available to the Plaintiff/Appellant. This ground of appeal is therefore dismissed.

The final ground of appeal which we wish to consider is the first ground that *"the Court of Appeal erred when the court failed to address or rule on the preliminary legal objection raised by the plaintiff/respondent/respondent/appellant in his Notice of Intention to rely on a Preliminary Legal Objection filed on the 6th June 2021".*

Under this ground of appeal, counsel for the Plaintiff/Appellant submits that the affidavit which was attached to the motion for an order to dismiss the Plaintiff's suit before the trial High Court, "*is not an affidavit properly so called*". According to counsel, the said affidavit was not deposed to by a named or an identifiable person. Counsel submits therefore that the affidavit offends Order 19 rule 4 and Order 20 rule 2 of CI. 47. Counsel says also that by virtue of the defect in the affidavit, the motion before the High Court did not comply with the mandatory rules of CI.47 and can, therefore, not be saved under Order 81 of the High Court Rules.

In response, it was argued on behalf of the Defendant that, the complaint of the appellant cannot be recognised as a preliminary legal objection since the appeal before the Court of

Appeal has complied with the requirement of the rules with respect to time, form etc. According to the lawyer for the Defendant, he detected the defect in the said affidavit and so sought the leave of the court to amend the said affidavit to insert the name of the deponent "Felix Akuffo". Counsel says it was by sheer inadvertence that the docket copy of the affidavit was not handed over to counsel to amend same. Counsel refers to the proceedings of the 10th December 2018 in support of his arguments. Counsel also argues that the court has power under Order 20 rule 7 to grant leave for the use of a defective affidavit. Counsel says that the need to do substantial justice outweighs procedural or technical lapses and that the preliminary point raised on behalf of the Plaintiff/Appellant should be dismissed since it has no basis in law.

The affidavit in question appears on pages 13 to 16 of the record of appeal. The first paragraph of the affidavit reads as follows:

> *"That I am a Law Clerk in the law firm of Peasah-Boadu & Co., Solicitors for the Defendant/Applicant herein (hereinafter called the Applicant) and the Deponent hereto."*

Clearly, the said affidavit fails to disclose the name of the deponent as well as his residential address. This lapses in the affidavit infringes rule 4(2) of Order 20 of the High Court (Civil Procedure) Rules, 2004, CI.47 which states that:

> *"(2) Every affidavit shall be expressed in the first person and shall state the place of residence of the deponent and the occupation of the deponent or, if the deponent has none, the description of the deponent and whether the deponent is, or is not employed by a party to the cause or matter in which the affidavit is sworn."*

Counsel says that leave was granted as a result of which the defect was corrected by inserting the name of the deponent into the affidavit. However, the record of appeal does not reflect the submission of counsel that the name of the deponent was, with the leave of the court, inserted into the affidavit by way of amendment. Indeed, the affidavit which

can be found on page 13 of the record of proceedings does not show that any such amendment was made as counsel would like this court to believe. Besides, the defect in the said affidavit is not confined to just the absence of the name of the deponent thereto. For, the deponent, also, failed to state his/her residential address in the affidavit contrary to rule 4(2) of Order 20 of CI.47. On an issue like the one currently under discussion, this court stated in **Empire Builders Limited vs Topkings Enterprises Ltd. & Others [2020] DLSC 9923 at page 21** that:

> *"While we agree with the contention of the plaintiff's counsel that the amendment sought which was not more than 144 words could under the provision of Order 28 rule 8 of LN140A be effected by insertion, which the plaintiff contends it so effected, there is no evidence from the record that upon granting leave to amend the trial court ordered the manner in which the amendment could be done as submitted by the plaintiff's counsel, that it is by the insertion of the amending words rather than the filing of an amended writ to reflect the specific relief added within the time permissible by the rules of Court. If, as counsel for the plaintiff asserts, the trial court permitted an insertion, there ought to be an order to that effect on record. There being no evidence of such order, the Court of Appeal cannot be faulted for pronouncing that the amendment purportedly effected was a nullity even though the reason for so pronouncing may not be entirely accurate."*

In a similar vein the record before us does not show that the trial court granted leave to the Defendant herein to amend the defective affidavit. There is nothing to show that the defective affidavit was amended to insert the name as well as the residential address of the deponent. Without a name and residential address, it is difficult to tell who swore to the said affidavit and since the requirement of the name of the deponent as well as the residential address of the deponent is cast in mandatory terms under the rules, it makes the affidavit incurably bad such that Order 81 cannot be applied to save the said affidavit.

As stated by this court in **National Investment Bank Ltd & Others (No.1) vs. Standard Bank Offshore Trust Co. Ltd (No.1) [2017-2020] 2 SCGLR 28** that:

> *"In appropriate cases, the court had a discretion to waive non-compliance with a rule of practice. The court could however not waive non-compliance with all rules of practice because Order 81 rule 1(2)(a) of CI.47 entitled the court to set aside wholly or in part; proceedings, judgment or order in which a failure to comply with a rule occurred. Consequently, even after judgment, the entire proceedings might be set aside for non-compliance with a rule of practice depending on the particular breach complained of. In view of Order 81 rule 1(2)(a) of CI.47, the ex parte Allgate could not be construed as creating an inflexible rule that a court had discretion to waive non-compliance with any rule of practice. Therefore, where the proceeding was a nullity in terms of a particular rule of practice, the court could not waive it."*

At holding five, the court stated that:

> *"Under article 11(1)(c) of the 1992 Constitution, the rules of court formed an integral part of the laws of Ghana and must be treated with equal amount of respect in order to produce sanity in court proceedings. Consequently, where the rule concerned was mandatory by the use of the word 'shall', it should be so regarded in view of section 42 of the Interpretation Act, 2009 (Act 792) as mandatory and the breach fatal to the proceedings. However, where the court finds it necessary to express 'shall' as directional only, it must be forthcoming with reasons before deciding to exercise discretion to waive non-compliance."*

It means therefore that it was as though the motion to dismiss the suit filed by the Plaintiff in this matter before the trial court was filed without an accompanying affidavit contrary to Order 19 rule 4 CI.47.

The above holding in respect of the affidavit in support of the motion to dismiss the Plaintiff's suit notwithstanding, we think that the Notice by the Plaintiff/Respondent of

Intention to Rely Upon Preliminary Objection filed by the Plaintiff herein before the Court of Appeal which is the main stay of the instant ground of appeal is of no moment. The grounds given for the said Preliminary Legal Objection gives the said objection away and deprives it of legal competence. The body of the Notice states as follows:

> *"TAKE NOTICE that the Plaintiff/Respondent named above intends, at the hearing of this appeal, to rely on the following preliminary objection of which notice is given to you:*
>
> *AND TAKE NOTICE that the grounds of the objection are as follows-*
>
> *(1) That the motion filed by the Defendant/Applicant/Appellant on 17th October 2018 (found on page 12 of the record of appeal) to dismiss the instant suit which was dismissed by the court below and is the subject of the instant appeal is incompetent*
> *(2) That the affidavit in support of the motion filed by the appellant on 17th October 2018 (found on pages 13 to 16 of the record of appeal) was not deposed to by a named person or individual.*
> (3) *That the affidavit in support of the said motion, being affidavit evidence ought to have been deposed to by a named person or individual."*

This Notice is said to have been filed under rule 16 of the Court of Appeal Rules, 1997, C1.19. The said rule provides that:

> *"16. Notice of preliminary objection*
>
> *(1) A respondent who intends to rely on a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice before the hearing of the preliminary objection, setting out the grounds of objection, and shall file the notice in the Form 8 set out in Part One of the Schedule.8*

(2) Where the respondent fails to comply with subrule (1), the Court may refuse to entertain the objection or may adjourn the hearing at the cost of the respondent or may make any other appropriate order."

Our understanding of the above rule 16 of CI.19 is that the notice of the preliminary objection must be filed by a respondent to an appeal; the preliminary objection must give three clear days' notice to the appellant prior to the hearing of the appeal; and the preliminary objection must be filed against the "***hearing of the appeal***". Thus, the respondent to the appeal must have a complaint against the hearing of the appeal. There must be an issue which makes the hearing of the appeal improper. It could be, for example, that the notice of appeal was void or any such defect which deprives the Court of Appeal of jurisdiction from hearing the appeal. Hence, in a preliminary objection filed under rule 16 of CI.19, the hearing of the appeal must be the subject of the objection. See **Republic vs. Court of Appeal, Accra; Ex parte East Dadekotopon Development Trust (Lands Commission Interested Party) [2017-2020] 1 SCGLR 1008.**

In the instant matter, the Notice of Preliminary Objection filed by the Plaintiff herein seeks to attack the propriety of the motion and the accompanying affidavit filed before the trial High Court for an order to dismiss the Plaintiff's action filed before the High Court. The hearing of the said motion was not the subject matter before the Court of Appeal. What was on appeal was the decision given by the trial Judge after the said motion had been heard. The said Notice of Preliminary Objection did not raise any issue against the hearing of the appeal before the Court of Appeal. The said motion was therefore incompetent and did not qualify as a Notice of Preliminary Objection under rule 16 of CI.19. The criticism leveled against the Court of Appeal under this ground of appeal is therefore unfounded. The Court of Appeal should therefore have dismissed the said Notice in limine. We proceed therefore to dismiss ground one of the grounds of appeal.

Before we conclude however, we wish to point out that where a writ of summons is issued basically for the relief of setting aside a judgment on the ground that the said judgment was procured by fraud and especially where particulars of the alleged fraud are set out, which on the face of it, shows that the allegations put forth potent issues for determination, a court of law should not be in a hurry to dismiss the writ under Order 11 rule 18 as did the Court of Appeal in the instant matter but should strive hard to grant the Plaintiff a hearing because that is the only opportunity available to the Plaintiff to seek redress for the wrong, allegedly, suffered by him. When fraud is properly alleged it must be investigated by the giving of evidence which shall be subject to cross examination. An allegation of fraud cannot be determined summarily. See **Okofoh Estates Ltd. vs Modern Signs Ltd & Another [1996-1997] SCGLR 224** and **State Insurance Company Ltd. vs Ivory Finance Company Ltd. & 4 Others [2019-2020] 1 SCLRG 388**. It must also be pointed out that, a judgment which is sought to be set aside on grounds of fraud cannot be flagged before a Plaintiff under the pretext that that very judgment which is under attack is as potent as to find and establish estoppel against the Plaintiff who is attacking that very judgment.

CONCLUSION:

We are satisfied from the totality of the record placed before us and the analysis which we have made herein that the within named Plaintiff was unjustly driven away from the seat of justice by the decision of the Court of Appeal given on the 24th day of June 2021. The Plaintiff/Appellant deserves to be heard on his writ of summons issued on the 3rd day of July 2018. It is sad commentary to remark that a writ which was filed in July 2018, five years on, is now being given the nod to be heard by a court of competent jurisdiction. The appeal succeeds. The judgment of the Court of Appeal given on the 24th June 2021 is hereby set aside. The case is remitted to the High Court, Tema, differently constituted, to be heard according to law.

S. K. A. ASIEDU

(JUSTICE OF THE SUPREME COURT)

ANIN YEBOAH

(CHIEF JUSTICE)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

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