

IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: PWAMANG JSC (PRESIDING)
LOVELACE- JOHNSON (MS.) JSC
AMADU JSC
KULENDI JSC
KOOMSON JSC

CIVIL APPEAL

NO. J4/28/2023

19TH JULY,2023

FRANCIS APPIAH-MENSAH PLAINTIFF/APPELLANT/APPELLANT

VRS

GIFTY ANANE-WIREKO DEFENDANT/RESPONDENT/RESPONDENT

JUDGMENT

KOOMSON JSC:-

The appellant in this appeal, Francis Appiah Mensah (hereafter called the Plaintiff) brought an action at the High Court, Tema, against the Respondent herein, Gifty Anane-Wireko (hereafter called the Defendant) for the following reliefs:

1. An order directed at the Defendant to receive the remainder of the sale price to complete the purchase of the house.
2. An order directed at the Defendant to sign off all interest in the House Numbered B13, Jogis Estate, Community 3, Tema to the Plaintiff.

3. Perpetual Injunction against the Defendant, her assigns and privies and/or any interruptions or dealings in the subject matter.
4. Damages for breach of contract.
5. Cost.

In his statement of claim, the Plaintiff pleaded that sometime in 2011, the Defendant agreed to sell her house No. B13, Jogis Estate, Community 3, Tema to him. According to the Plaintiff, the parties agreed on Twenty- Six Thousand United States Dollars (USD 26,000.00) and same was to be paid on installment basis. It is the case of the Plaintiff that he proceeded to pay an amount of Fourteen Thousand, One Hundred and Fifty United States Dollars (USD14,150.00) to the Defendant which was acknowledged and receipted accordingly. It is further the case of the Plaintiff that, the Defendant stated on the receipt that, much in consonance with the agreement between the parties, that the remainder of the money would be paid when the parties agreed to a suitable timeline. It is the contention of the Plaintiff that the parties could not come to an agreeable timeline and efforts made by him to reach the Defendant so as to pay the remainder of the money to her became difficult. The Plaintiff stated that the number that he could reach the Defendant in the United States of America became inactive. Further, the Plaintiff said the Defendant did not have any postal address for him to reach her. Thus even though the money was in his possession, he was unable to pay same to the Defendant.

It was part of the Plaintiff's case that, the Defendant finally came and he tried to pay the balance outstanding, but the Defendant refused to accept the money claiming that the sale price is too small.

The Defendant controverted every pleading of the Plaintiff to the extent that she even denied the fact that she is resident in the United State of America: see paragraph 2 of the statement of defence in which the Plaintiff denied paragraphs 2 to 12 of the statement of claim. The case of the Defendant is that she is a Ghanaian citizen but resident in the United States of America. She contended that the House numbered B13,

Jogis Estate, Community 3, Tema is her self-acquired property, having bought same from one Mr Charles Oduro. It is further the case of the Defendant that she rented one room in her said house to the Plaintiff at a monthly rent of GHC 150.00 and the Plaintiff deposited USD 4,150.00. According to the Defendant, the Plaintiff approached her and expressed interest to purchase the house and they both agreed at the price which must be paid within 6 months to enable her transfer the property to the Plaintiff before leaving for the United States of America. The Defendant further contended that the Plaintiff could not pay the money before she left Ghana for the United States. Defendant however stated that the Plaintiff later paid USD 10,000.00 through her sister called Selina Wireko. The Defendant contended further that, the Plaintiff failed to effect payment of the outstanding balance. As a result, she called the Plaintiff to terminate the agreement. It is part of the Defendant's case that, the USD 10,000.00 that the Defendant paid through her sister Selina Wireko has been used as rent advance which said rent was to expire in August, 2019.

The trial Court settled 10 issues for trial, namely;

1. Whether or not the Defendant rented House Number B13, Jogis Estate Community 3, Tema to the Plaintiff for a period of 3 years at a monthly rate of One Hundred Ghana Cedis (GHC 100.00) subject to which an amount of Three Thousand Six Hundred Cedis (GHC 3,600.00) was paid to the Defendant.
2. Whether or not the Defendant agreed to sell House Number B13, Jogis Estate Community 3, Tema at an agreed price of Twenty-Six Thousand United States Dollars (USD 26,00.00).
3. Whether or not the plaintiff paid an amount of Fourteen Thousand One Hundred and Fifty United States Dollars (USD 14,150.00) as part payment of the contract price.
4. Whether or not the Parties agreed that the remainder [sic] amount of Eleven Thousand Eight Hundred and Fifty United States Dollars (USD 11,850.00) should be paid at a later date.

5. Whether or not the Plaintiff made efforts to effect payment of the remainder of the agreed amount being Eleven Thousand Eight Hundred and Fifty (USD11,850.00).
6. Whether or not Plaintiff has performed his part of the contract and is willing to pay off the remainder of the agreed amount to the Defendant.
7. Whether or not the Defendant should be made to accept the remainder of the agreed amount and transfer all her title in the property to the plaintiff.
8. Whether or not the Plaintiff is entitled to his claim.
9. Whether or not the Plaintiff breached the agreement.
10. Whether or not the agreement allowed the Plaintiff to pay anytime or pay within six (6) months from date of first payment.

There was a full trial at the close of it the Court found that *“the Defendant offered the property for sale to the Plaintiff which was also accepted by the Plaintiff and both parties agreed on \$26,000.00 as the purchase price.”*

In respect of Exhibit ‘C’ which the Plaintiff relied upon to prove that a contract existed between the parties, the trial Court found that the *“Court hesitates to attach probative value to the Exhibit ‘C’, and hold as a fact that it is not the deed of the Defendant. The Defendant neither caused Exhibit ‘C’ to be prepared nor executed it.”*

In conclusion the trial Court dismissed the Plaintiffs claim and held that *“the alleged contract between the parties is inconclusive and therefore it cannot be declared to be valid.”*

The Plaintiff, dissatisfied and aggrieved by the decision of the trial Court, appealed to the Court of Appeal. The Court of Appeal largely supported the conclusions of the trial High Court and dismissed the appeal. The Court of Appeal held as follows:

“From our re-evaluation of the evidence on record, we find that the evidence adduced by the Respondent’s witnesses, particularly regarding the sale

negotiations was to a large extent devoid of credibility.” (page 15 of the Judgment which appears at page 66 of the ROA).

Then, on the validity or otherwise of Exhibit ‘C’, the Court of Appeal disagreed with the trial High Court on its holding that Exhibit ‘C’ was of a doubtful source and therefore placed no probative value on it. The Court of Appeal however held (at page 31 of the Judgment) that:

Clearly, the Parties were not ad idem regarding the terms of the agreement, and the transaction as a whole. It cannot therefore be said there was a contract between them, and we so hold.”

The Court of Appeal, appeared to be of the opinion that time was of the essence of the agreement between the Parties and the Plaintiff failed to pay the balance on time so as to deserve a favourable exercise of their discretion for specific performance against the Defendant.

Being aggrieved and dissatisfied with the judgment of the Court of Appeal, the Plaintiff has invoked our appellate jurisdiction by a notice of appeal filed on the 9th of March, 2022, on the grounds that:

- “(a) That upon finding no basis to impugn the credibility of Exhibit ‘C’. The Court of Appeal erred when it held that there was no contract between the Parties.*
- (b) That the grant of possession of the House Numbered B13, Jorgis Estate, Community 3, Tema to the Defendant/Respondent/Respondent is not supported by the evidence on record.”*

In his statement of case filed on the 3rd February, 2023, the Plaintiff contends that the Court of Appeal did not impugn the validity or authenticity of Exhibit ‘C’ as the Court of Appeal observed that it is a fact that the Defendant has two names and both names were on record before the Court. Counsel argued that the Court of Appeal found that

the Defendant was sane at the time Exhibit “C” was executed and therefore Exhibit ‘C’ is valid despite any allegation of mental illness subsequent to its execution.

Again, counsel for the Plaintiff contended that the Court of Appeal found on the record that the Attorney of the Defendant confirmed that the Defendant herself issued Exhibit ‘C’ in respect of all the payments made by the Plaintiff. It is further the contention of Plaintiff that time was not of the essence of the contract for if the Parties wanted to make time of the essence of the agreement concerning the payment of the outstanding balance on the sale price of the house, they would have included this term in Exhibit ‘C’ which was the document which contained the essential terms of the contract. Additionally, the Plaintiff contends that the tenancy agreement that subsisted between the Parties was novated by the sale and purchase agreement as contained in Exhibit ‘C’. The Plaintiff therefore submits that the credibility of Defendant’s Attorney was impugned by both the trial High Court and the Court of Appeal in their judgments, the Court of Appeal ought to have held in favour of the Plaintiff that the Exhibit ‘C’ constituted the whole agreement between the Parties and no other terms were agreed on between them.

The Plaintiff also maintains that his decision to pay the balance outstanding into Court was proof of his good faith in discharging his obligations under the Agreement. The case of the Plaintiff is that when he made part payment in respect of the property, he thereby acquired an equitable interest in the property. The Plaintiff finally impeached the grant of the relief of recovery of possession in favour of the defendant who did not specifically claim for a recovery of possession.

The Defendant’s Counsel, for his part, though admitting that Exhibit ‘C’ is a valid contract, he took the view that Exhibit ‘C’ was subject to Section 32 of the Stamp Duty Act, 2005 (Act 689) on the requirement of stamping and that since Exhibit C was not stamped it was ineffective in creating any interest in the house in favour of the Plaintiff and was even inadmissible in evidence.

Further, the Defendant contends that the Exhibit 'C', having been executed outside the jurisdiction ought to have been notarized to make it authentic and in the absence of such notarization, no probative value should have been placed on it by Court of Appeal.

The Defendant repeated the position he has taken throughout the case that time was the essence of the contract and even that was not explicitly stated on Exhibit C, the circumstances surrounding the transaction made time of the essence. He referred to the testimony of the Defendant's Attorney to the effect that the defendant informed the Plaintiff orally, to pay the balance within six months.

The Defendant asserts that on the strength of the case of **GIHOC REFRIGERATION & HOUSEHOLD PRODUCTS v HANNA ASSIS (NO.2) [2007-2008] 1 SCGLR 16**, the Court of Appeal was competent to make an order for recovery of possession even though the Defendant had not specifically counterclaimed for same.

The first question that needs to be resolved in this appeal is whether or not Exhibit 'C', being a document affecting an interest in land ought to have been stamped and since it was not stamped it ought not have been admitted into evidence and relied on.

Counsel for the Plaintiff in his reply to the statement of case filed by the Defendant states as follows:

"We are not oblivious to the general requirement for instruments affecting land to be subjected to the statutory stamping procedure for admissibility purposes. Same is stated in Section 32 of the Stamp Duty Act, 2005 (Act 689)."

Counsel for the Plaintiff however invites the Court to depart from its decision in the case of **LIZORI LIMITED v MRS ELIZABETH BOYE AND ANOTHER [2013-2014] 2 SCGLR 889**, where the Court speaking through Benin JSC on Section 32 of the Stamp Duty Act held that:

“This provision is so clear and unambiguous and requires no interpretation. Either the document has been stamped and appropriate duty paid in accordance with the law in force at the time it was executed or it should not be admitted in evidence. There is no discretion to admit it in the first place and ask the party to pay the duty and penalty after judgment.”

Article 129 (3) of the 1992 Constitution empowers the court to depart from its previous decision when it appears to the Court right to do so. This clause is re-enacted in section 2 (3) of the Courts Act, 1993 (459) verbatim.

It is to be noted that, the Court, in suit No. J4/80/2022 entitled NII AFLAH v BENJAMIN KWAKU BOATENG dated 22nd March 2023, in a unanimous decision, put the issue of the admissibility of unstamped documents to rest. The Court, in its quest to bring clarity and finality to the law by dealing a death blow to the inconstancies in cases like ANTIE & ADJUWUAH v OGBO [2005-2006] SCGLR 494; LIZORI LTD v BOYE & SCHOOL OF DOMESTIC SCIENCE and CATERING [2013-2014] 2 SCGLR 889; WOODHOUSE LTD v AIRTEL GHANA LTD [2017-2018] held, per Kulendi JSC that:

“...we are of the considered opinion that the law on the admissibility or otherwise of an unstamped documents or instruments as enunciated in the cases of *Lizori* and *Woodhouse* are more accurate precedents of the proper construction of Section 32 of the Stamp Duty Act, 2005 (Act 689).”

Exhibit C, having not been stamped ought not to have been admitted into evidence and relied on in accordance with Section 32 (6) of the Stamp Duty Act, 2005 (Act 689).

We have, after an evaluation of all the evidence on record found, however that, there are other pieces of material evidence which proves the fact that there was indeed an agreement between the Parties. There is evidence on record that the Parties agreed that, the Defendant offered the House No. B13, Jogis Estate, Community 3, Tema for

sale to the Plaintiff. There is also evidence on record that the Plaintiff accepted the offer made by the Defendant and agreed to purchase the said property.

It is not a disputed fact on record that both Parties agreed to the sale price to be \$26,000.00. There is evidence also that the Plaintiff by reason of this agreement made part-payment to the Defendant. The fact that the Parties disputed how much the Plaintiff actually paid as part-payment and if the agreement has been terminated or is still in force does not take anything away from their own admissions in their pleadings that an agreement was made between them in relation to the sale of the House Numbered B13, Jogis Estate, Community 3, Tema. They both in their pleadings agree that the Plaintiff paid \$10,000.00 to the Defendant as part-payment for the sale of the house. The principle of law is that in civil litigation, where no issue was joined as between parties on a specific issue or fact, no duty was cast on the party asserting it to lead evidence in proof of that issue or fact: see **KUSI & KUSI vs BONSU [2010] SCGLR 60**.

Was time of the essence in the agreement between the Parties?

It is the case of the Defendant that time was of the essence in the agreement between the Parties. This is contained in the Statement of Defence filed by the Defendant, that is, paragraphs 7 and 8 thereof as follows:

- “7. Defendant says before she travelled to USA the Plaintiff approached her and expressed interest to purchase the house and both parties agreed at the price which must be paid within 6 months to enable her transfer the property in Plaintiff's name before she leaves.*
- 8. Defendant says the Plaintiff could not pay the money before she left the country, however the Plaintiff paid \$10,000.00 through her sister Selina Wireko,”*

The Defendant contends, from her own pleadings referred to above that, it was agreed between the Parties that payment was to be effected by the Plaintiff within 6 months before she left Ghana for the USA. Assuming for a moment that, this averment is true, then, it was apparent to the Defendant, before she left Ghana to the USA that, the Plaintiff had breached the agreement. The Defendant however did not find it necessary to terminate the agreement after the expiration of the alleged 6 months period but left the country and went to the USA. Then again, the Defendant with a full knowledge that the 6 months she allegedly agreed with the Plaintiff had expired, collected the sum of \$10,000.00 from the Plaintiff without raising any objection to the said payment. If indeed time was of the essence as the Defendant want this Court to believe, then, the Defendant by accepting the part-payment of \$10,000.00 must be deemed to have waived any such time. It is further noted that, after the payment of the \$10,000.00 the Plaintiff made another payment of \$150.00 to the Defendant through her daughter.

It is our view that, the conduct of the Defendant in the receipt of the monies paid by the Plaintiff belief her assertion that time was of the essence in the oral agreement between the Parties.

It is noted, any payment made by the Plaintiff, whether \$10,000.00 or \$14,150.00, the said payment was made with the understanding between the Parties that it was part-payment of the sale price in respect of House Number B13, Jogis Estate, Community 3, Tema. It is also observed that, the Plaintiff was in possession of the property having made some renovations to the house the subject matter of dispute.

The evidence on record is therefore clear that the Plaintiff is in possession of the property and has made part payment of the property to the Defendant. This vests an equitable interest in the Plaintiff. The legal position is as has been stated in the case of **RAMSDEN v DYSON [1966] LR 1 HL 129** that:

"If a man under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a Court of equity will compel the landlord to give effect to such promise or expectation."

Specific performance is an equitable relief. And as articulated in the old case of **PICKARD v SEARS (1837) 6 AD & EL. 469** that:

"where one by his words or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things existing at that time."

In **TAHIRU v MIREKU [1989-90] 2 GLR 615**, it was held thus:

"The doctrine of part-performance referred to in section 3 (2) of NRCD 175 was an equitable remedy. Thus where a contract for the sale of land or an interest was not evidenced in writing it might nevertheless be enforced by a decree of specific performance if it had partly been carried into effect. An act of part-performance in equity must be (i) referable to the contract alleged and no other title; (ii) such as to render it a fraud in the defendant to take advantage of it not being in writing; (iii) the contract in its own nature must be enforceable by the court; and (iv) there must be proper parole evidence of the contract. In the instant case, there was overwhelming evidence showing that there was a parole agreement for the house in dispute and no other title. The plaintiff made part-payment of the purchase price, and the defendant made use of the money to the detriment of the plaintiff. Accordingly, refusal to enforce the agreement would amount to fraud in the defendant. The nature

of the agreement was such that it could be enforced by the grant of decree of specific performance... The attitude adopted by equity is that it would be fraudulent for a defendant to take advantage of the absence of a signed memorandum if he stood by and allowed the plaintiff to alter his position for the worse by carrying out acts in the performance of the contract."

The Defendant's Attorney stated that the Plaintiff used \$4,000.00 to renovate the building. There is also evidence that the Plaintiff paid \$150.00 to the daughter of the Defendant at the instance of Defendant. There is also the undisputed fact of the payment of \$10,000.00 to the Defendant by the Plaintiff through the sister of Defendant. The fact of an oral agreement in respect of the disputed house is not in doubt.

It is our considered opinion that, the evidence on record clearly suggest that, the Plaintiff acquired an equitable interest in the disputed property, which said interest was acquired based on the oral agreement between the parties and upon which the Plaintiff made the part-payments.

It is to be noted that, the general principles for the grant of specific performance is largely dependent on the principles of fairness and justice.

Having considered all the circumstances of this case, we are of the considered opinion that it would be just and fair for the Defendant to be called upon to honour her obligations under the oral agreement as her own conduct shows that parties never agreed on anytime frame within which the money was to be paid.

It is our view that, if the Court of Appeal had adverted its mind on this principle, it would not have come to the erroneous conclusion that the monies paid by the Plaintiff as part-payment were to be offset as rent and thereby dismiss the Plaintiff's appeal.

The appeal succeeds and is allowed. The judgment of the Court of Appeal that partially affirmed the Judgment of the High Court dated 20th January, 2022 is hereby set aside, and the reliefs filed on 12th December, 2018 are hereby granted accordingly.

- (i) The Defendant is ordered to accept the payment of the remainder of the sale price of H/No B/13 Jogis Estate Community 3, Tema from the Plaintiff.
- (ii) The Defendant is ordered to convey all her interest in H/No B 13, Jogis Estate Community 3, Tema to Plaintiff.
- (iii) The Defendant and all persons claiming through her are restrained from interfering with the Plaintiff's ownership and possession of H/No B 13, Jogis Estate, Community 3, Tema.

G.K. KOOMSON
(JUSTICE OF THE SUPREME COURT)

G. PWAMANG
(JUSTICE OF THE SUPREME COURT)

A. LOVELACE-JOHNSON (MS.)
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