

**IN THE SUPERIOR COURT OF JUDICATURE**

**IN THE SUPREME COURT**

**ACCRA – AD. 2025**

**CORAM: LOVELACE – JOHNSON (MS.) JSC (PRESIDING)**

**ASIEDU JSC**

**GAEWU JSC**

**KWOFIE JSC**

**DARKO ASARE JSC**

**2<sup>ND</sup> APRIL, 2025**

**CIVIL APPEAL**

**J4/47/2022**

**AGATE ENTERPRISE & TRANSPORT  
PLAINTIFF/RESPONDENT/  
SERVICES LIMITED**

**.....**

**RESPONDENT**

**VRS**

**1. KWAME DJAN**

**..... 1<sup>ST</sup> DEFENDANT**

**2. LEMET CONSTRUCTION LIMITED**

**..... 2<sup>ND</sup> DEFENDANT/  
APPELLANT/ APPELLANT**

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**JUDGMENT**  
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**GAEWU JSC:**

My lords, the core issue in this case on appeal before us for our determination is whether the 2<sup>nd</sup> defendant/appellant/appellant (hereinafter referred to as the '2<sup>nd</sup> defendant') was the bona fide purchaser of the legal estate for value without notice of the plaintiff/respondent/respondent (hereinafter referred to as the "plaintiff") equitable interest in all that land situate and being at Bejuahum near Dome, Accra, in the Greater Accra Region of the Republic of Ghana containing an approximate area of 1.446 acres, which land is particularly described in a deed dated 10<sup>th</sup> August 1988 made between Madam Felicia Dede Addy and the 1<sup>st</sup> defendant and registered in the Land Registry as No. 1904/1988. However, before we proceed to deal with this issue, we would like to state briefly the facts leading to this case.

## **FACTS**

On 17<sup>th</sup> May 2007, the plaintiff, a company registered under the laws of the Republic of Ghana and engaged in the business of busing employees of corporate firms, commenced this action at the High Court, Commercial Division, Accra, against the 1<sup>st</sup> defendant for the following reliefs:

- i. An order of specific performance of the sale agreement executed on 23<sup>rd</sup> March 2007
- ii. Damages for breach of contract in addition to specific performance
- iii. Costs.

The 1<sup>st</sup> defendant caused to be entered on his behalf a Notice of Appearance on 29<sup>th</sup> May 2007 and a Statement of Defence also filed on 13<sup>th</sup> June 2007. The plaintiff then filed its reply on 10<sup>th</sup> July 2007. And in accordance with rule 58(4) of C. I. 47, the case was assigned to a Commercial Court judge to conduct a pretrial settlement conference. At the pretrial conference, it became apparent that the 1<sup>st</sup> defendant was attempting to transfer the subject land to a third party. The plaintiff therefore brought an application for

interlocutory injunction to restrain the 1<sup>st</sup> defendant, any third party and the Lands Commission from proceeding to perfect any deed of transfer of the disputed land. The application was granted, and a copy of the restraining order obtained was posted on the disputed property.

As it turned out, the unknown third party was the 2<sup>nd</sup> defendant who then caused to be filed an application to set aside the order of injunction and for leave to be joined to the action as the 2<sup>nd</sup> defendant.

The High Court dismissed the 2<sup>nd</sup> defendant's application to set aside the interlocutory injunction. However, it granted the joinder and further ordered that the writ of summons be amended to reflect the joinder of the 2<sup>nd</sup> defendant. Upon the joinder of the 2<sup>nd</sup> defendant, the plaintiff amended the writ of summons and sought the following reliefs:

- a) *A declaration that the purported transfer of the property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant is a nullity.*
- b) *An order setting aside the purported transfer of the property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant.*
- c) *An order compelling 1<sup>st</sup> defendant to complete the sale transaction with plaintiff.*
- d) *Costs.*

The 2<sup>nd</sup> defendant on being served with the amended writ and statement of claim, entered appearance through its lawyers and a Statement of Defence was filed on 27<sup>th</sup> May 2008 and counterclaimed against the plaintiff as follows:

1. *A declaration that the 2<sup>nd</sup> defendant is a bona fide purchaser for value without notice of any equitable interest in the property subject matter of this suit described below.*
2. *A declaration of title to all that piece of land and structures thereon situate and being and Bejuahum near Dome, Accra in the Greater Accra Region of the Republic of Ghana containing an approximate area of 1.446 acres which*

*property is particularly described in the deed dated 10<sup>th</sup> August 1988 made between Madam Felicia Dede Addy and the 1<sup>st</sup> defendant herein and registered in the Land Registry as No. 1904/1988.*

The parties again pursuant to Order 58 rule 4 of C. I. 47, proceeded before a Commercial Court judge to conduct a pretrial settlement conference but same failed.

### **PLAINTIFF'S CASE**

According to the plaintiff, as a company engaged in transport business and the busing of corporate workers, it required a larger and a suitable premises to park and service its fleet of vehicles and therefore wanted a land to buy to fit its said business purposes. Its officers located the land the subject matter of dispute at Bejuahum near Dome, Accra belonging to the 1<sup>st</sup> defendant. The plaintiff said it offered to purchase the property and the 1<sup>st</sup> defendant agreed to sell. However, during the negotiation, the 1<sup>st</sup> defendant indicated that the land had been mortgaged to Ghana Commercial Bank and therefore would require part of the purchase price to enable him pay off the sum owed to Ghana Commercial Bank to redeem the land from the mortgage.

According to the plaintiff, it agreed to buy the land at One Billion, Four Hundred and Seventy-Five Million Cedis (C1,475,000,000.00) from the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant agreed. As a result, it entered into an agreement with the 1<sup>st</sup> defendant setting out the payment terms. This agreement was reduced into writing pursuant to which Two Hundred Million Cedis (C200,000,000.00) was paid by the plaintiff to 1<sup>st</sup> defendant to enable him pay off the mortgage at Ghana Commercial Bank.

According to the plaintiff, prior to executing the sale agreement, it conducted a search at the Lands Commission to ascertain the assertion of the 1<sup>st</sup> defendant. The search revealed

the 1<sup>st</sup> defendant's interest and ownership in the land and the fact that the land had been mortgaged to Ghana Commercial Bank. The plaintiff contended that it executed the agreement for the sale of the land on 23<sup>rd</sup> March 2007 and it was a term of the agreement that upon the release of the document of title by Ghana Commercial Bank to 1<sup>st</sup> defendant, same would be given to plaintiff to enable it source funding for the final payment of the transaction which would be within four weeks of the release of the document.

Upon payment of the C200,000,000.00 to the 1<sup>st</sup> defendant, the plaintiff said its managing director, Samuel Adu Gyamfi was introduced to the bank by the 1<sup>st</sup> defendant to enable him follow up on the release of the document at the bank's headquarters. It is the plaintiff's case further that through the efforts of Samuel Adu Gyamfi, the documents were released from the head office of Ghana Commercial Bank to its Ring Road West Branch and the 1<sup>st</sup> defendant was duly informed. However, the 1<sup>st</sup> defendant instead of going to collect the title documents from the Ring Road West branch of the Ghana Commercial Bank and handing same over to the plaintiff for the payment of the balance of the purchase price within the four weeks agreed, the 1<sup>st</sup> defendant rather invited the plaintiff's representative to his office and in the presence of his wife and children, informed the plaintiff that he was no longer interested in completing the sale and therefore the plaintiff should collect its part payment. The plaintiff said he refused and thereafter, it later received a letter from the wife and the children of the 1<sup>st</sup> defendant claiming that the 1<sup>st</sup> defendant had no capacity to sell the parcel of land and hence, he commenced this action against the defendants.

### **CASE OF THE 1<sup>ST</sup> DEFENDANT**

The case of the 1<sup>st</sup> defendant was that he only entered a negotiation for the sale of the land at Bejuahum, the subject matter of this action but he had never agreed that the plaintiff would pay off the outstanding balance of the mortgage facility he had contracted with

the Ghana Commercial Bank to ensure the release of the property which had been mortgaged.

The 1<sup>st</sup> defendant also contended that the memorandum of understanding (MOU) he entered with the plaintiff was not meant to be binding on them. The 1<sup>st</sup> defendant contended further that when he had received the C200,000,000.00 -part payment for the sale of the land in dispute, the plaintiff unduly exerted pressure to compel him to immediately transfer the document into his name contrary to the understanding reached by the parties. And because of the plaintiff's action compelling him to execute a conveyance of the land immediately rather than wait to retrieve the document from his banker's contrary to the agreement, caused him to resile from the agreement. The 1<sup>st</sup> defendant contended further that contrary to the agreed purchase price of C1,475,000,000.00, the plaintiff prepared a conveyance which it forced the 2<sup>nd</sup> defendant to execute with the purchase price stated as C500,000,000.00.

#### **CASE OF THE 2<sup>ND</sup> DEFENDANT**

The case of the 2<sup>nd</sup> defendant was that it was a bona fide purchaser for value without notice of the equitable interest of the plaintiff and that as a prudent purchaser, it conducted the necessary searches before entering the contract of the sale of the land subject matter of dispute. In particular, the 2<sup>nd</sup> defendant pleaded in its paragraphs 4, 5 and 12 of its statement of defence as follows:

- "4. Prior to entering the sale agreement, the 2<sup>nd</sup> defendant investigated the 1<sup>st</sup> defendant title to the land and discovered, as already told by the 1<sup>st</sup> defendant that, the property was mortgaged by him to Ghana Commercial Bank as security for a loan owed by Abiri Djan Sandcrete Ltd

5. Additionally, the 2<sup>nd</sup> defendant inspected the land and discovered that the 1<sup>st</sup> defendant was in possession and operating his business from the premises.
12. The 2<sup>nd</sup> defendant contends that at the time of purchasing the property from the 1<sup>st</sup> defendant, it had no notice of any equitable interest in the property and is therefore a bona fide purchaser for value without notice”.

It was because of the above pleadings by the 2<sup>nd</sup> defendant that it counterclaimed as stated supra.

The parties having failed at the second pretrial settlement conference to settle the dispute, the judge upon consideration, set down the following issues for determination at the trial:

- a) *Whether or not there was a contract for sale of the land situate at Bejuahum, Dome, Accra between the plaintiff and 1<sup>st</sup> defendant.*
- b) *Whether or not there was part performance of the contract between plaintiff and 1<sup>st</sup> defendant.*
- c) *Whether or not 1<sup>st</sup> defendant’s contract with 2<sup>nd</sup> defendant for the sale of the said land was prior in time to plaintiff’s interest.*
- d) *Whether or not the plaintiff is entitled to its reliefs.*

### **EVIDENCE OF THE PLAINTIFF**

At the trial, evidence was given on behalf of the plaintiff by Samuel Adu Gyamfi, its managing director and the following documents were tendered in evidence:

- i) ***Exhibit A** - a photocopy of a Deed of Conveyance dated 10<sup>th</sup> August 1958 between Madam Felicia Dede Abbey and Kwame Djan, the 1<sup>st</sup> defendant.*
- ii) ***Exhibit B** - A search report from the Lands Commission Secretariat dated 23<sup>rd</sup> March 2007 made by the plaintiff with a site plan attached.*

- iii) **Exhibit C** - Memorandum of Understanding dated 23<sup>rd</sup> March 2007 made between Kwame Djan, the 1<sup>st</sup> defendant and Samuel Adu Gyamfi, the managing director of the plaintiff, in respect of the purchase of the property of Kwame Djan situate at Bejuahum near Dome, Accra.
- iv) **Exhibit D** - A photocopy of payment order drawn on SG SSB, Tema Main Branch dated 22<sup>nd</sup> March 2007 with the face value of C200,000,000.00 in favour of the 1<sup>st</sup> defendant by order of plaintiff.
- v) **Exhibit E** - A receipt issued by Kwame Djan dated 22<sup>nd</sup> March 2007 acknowledging receipt of the sum of C200,000,000.00 as part payment from the plaintiff.
- vi) **Exhibit F** - A letter dated April 5<sup>th</sup>, 2007, from Ghana Commercial Bank Ltd addressed to the Director, Abiri Djan Sandcrete Ltd, Accra
- vii) **Exhibit G** - A photocopy of a cheque drawn on Barclays Bank dated 12<sup>th</sup> April 2007 in favour of Ghana Commercial Bank in the sum of C106,052,000.00.
- viii) **Exhibit H** - A letter dated 15<sup>th</sup> May 2007 from Joseph Akyeampong, Esq, 1<sup>st</sup> defendant's lawyer and addressed to Samuel Adu Gyamfi, the managing director of the plaintiff.
- ix) **Exhibit J** - An order of interlocutory injunction dated 17<sup>th</sup> August 2007 tendered in evidence by plaintiff through the 2<sup>nd</sup> defendant.

#### **EVIDENCE OF THE 1<sup>ST</sup> DEFENDANT**

The 1<sup>st</sup> defendant testified himself and tendered in evidence the following document:

- 1) **Exhibit 1** - A purported indenture of conveyance dated 27<sup>th</sup> April 2007 between Kwame Djan and the plaintiff.



## **EVIDENCE OF 2<sup>ND</sup> DEFENDANT**

The 2<sup>nd</sup> defendant testified through Johnson Teye who described himself as the managing director/chief labourer. He tendered in evidence the following documents during the trial:

- a) ***Exhibit 2** - Contract of Sale dated 29<sup>th</sup> March 2007 made between Kwame Djan, the 1<sup>st</sup> defendant, and the 2<sup>nd</sup> defendant.*
- b) ***Exhibit 3** - a photocopy of a cheque drawn on Metropolitan and Allied Bank (GH) Ltd in the sum of C100,000,000.00 from the 2<sup>nd</sup> defendant in favour of Kwame Djan, the 1<sup>st</sup> defendant.*
- c) ***Exhibits 4a, 4b and 4c** - Pictures showing the southern wall of the land.*
- d) ***Exhibit 5** - a gate house constructed by the 2<sup>nd</sup> defendant on the land.*
- e) ***Exhibits 6 and 6a** - A wooden shed and a concrete shed to house a jeanery.*
- f) ***Exhibits 7 and 7a** - a picture of a new office block commenced on the land by the 2<sup>nd</sup> defendant.*
- g) ***Exhibits 8, 8a and 8b** – excavation at the back side of the land, a shed in between the existing structures for storage*
- h) ***Exhibit 9** - a photocopy of Metropolitan and Allied Bank (GH) Ltd cheque dated 3<sup>rd</sup> May 2007 from the 2<sup>nd</sup> defendant to Kwame Djan, the 1<sup>st</sup> defendant in the sum of C1,200,000,000.00 being the final balance*
- i) ***Exhibit 10** - a stamped Deed of Assignment dated 26<sup>th</sup> April 2007 between Kwame Djan, the 1<sup>st</sup> defendant as assignor and the 2<sup>nd</sup> defendant as assignee in respect of the land situate and being at Bejuahum, near Dome, Accra.*

After the trial, the learned trial judge after stating, analysing and reviewing some authorities such as **Prah v. Anane [1964] GLR 458, Lartey v. Bannerman [1972] 2 GLR 43, Koglex v. Field [1998-1999] SCGLR 451, Adu v. Atta [1984-86] 1 GLR 646, Section 3(2) of the Conveyancing Act, 1975, Act 175, Okai v. Ocansey [1992-1993] Part 3 GBR 1047,**

stated in his judgment as follows: *“it is on the strength of these authorities that I come to no other conclusion, that at the time the subject matter was purportedly sold to the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant knew he had no other interest in the property except the balance of his purchase price, hence, my dismissal of 2<sup>nd</sup> defendant’s counterclaim”*.

The learned trial judge therefore held that the plaintiff was entitled to all the reliefs in its amended statement of claim and awarded cost of C5,000.00 in favour of the plaintiff and against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

We have taken our time to peruse the above cases referred to by the learned trial judge and we have noted that, they were cases on the equitable remedy of specific performance of contract without a third party claim of a bona fide purchaser for value without notice of the legal estate of land. The dynamics of the instant case changed when the 2<sup>nd</sup> defendant was joined to the suit and it counterclaimed against the plaintiff that it was a bona fide purchaser for value without notice of any equitable interest in the property.

Being aggrieved by the judgment of the High Court, the 1<sup>st</sup> and 2<sup>nd</sup> defendants filed separate notices of appeal. The 2<sup>nd</sup> defendant notice of appeal was filed on 12<sup>th</sup> March 2011 and that of the 1<sup>st</sup> defendant was filed on 29<sup>th</sup> of March 2011. On 11<sup>th</sup> March 2019, pursuant to a Registrar’s Summons that the appellants have not complied with Rule 20(1) of C. I. 19, the appeals were consequently struck out for non-compliance under Rule 20(2) of C. I. 19. However, on 17<sup>th</sup> of April 2019, upon an application by the 2<sup>nd</sup> defendant to relist its appeal struck out on the 11<sup>th</sup> of March 2019, the honourable Court of Appeal granted the prayer and the notice of appeal filed on the 12<sup>th</sup> of March 2011 by the 2<sup>nd</sup> defendant was relisted on the cause list.

The grounds of appeal set out in the notice of appeal filed by the 2<sup>nd</sup> defendant dated 12<sup>th</sup> March 2011, were as follows:

- a) The learned judge was wrong in law in holding that the 2<sup>nd</sup> defendant is not a bona fide purchaser for value without notice of plaintiff's interest in the land subject matter of the suit.
- b) There was no evidence upon which the learned trial judge could find that the 2<sup>nd</sup> defendant did not acquire the land from the 1<sup>st</sup> defendant bona fide.
- c) The learned trial conclusion that the 2<sup>nd</sup> defendant did not acquire its interest in the land in dispute bona fide merely because it did not inquire from the 1<sup>st</sup> defendant whether there were other competing purchasers of the property at the time is not supportable by the evidence on record before the court.
- d) There was no evidence upon which the learned trial judge could find that the 2<sup>nd</sup> defendant's witness was not truthful that the 1<sup>st</sup> defendant did not at the time of the purchase, disclose the fact that he had not entered a contract with the plaintiff to sell his property to the said plaintiff.
- e) The learned judge erred when he dismissed the 2<sup>nd</sup> defendant's counterclaim since there was evidence in support of the 2<sup>nd</sup> defendant's counterclaim.
- f) The judgment is against the weight of the evidence on record.
- g) Other grounds of appeal to be filed upon receipt of a copy of the record of proceedings.

However, there was no evidence on record of further grounds of appeal filed. The Court of Appeal in its judgment dated 15<sup>th</sup> April 2021 unanimously dismissed the appeal by the 2<sup>nd</sup> defendant, thereby affirming the judgment of the trial High Court dated 12<sup>th</sup> January 2011.

Dissatisfied with the judgment of the Court of Appeal, the 2<sup>nd</sup> defendant per a notice of appeal dated 6<sup>th</sup> July 2021, appealed to this court, and complained about the whole

judgment of the Court of Appeal. However, pursuant to leave of the court granted on the 27<sup>th</sup> of March 2024 upon an application filed on the 26<sup>th</sup> of March 2024 for leave to amend its notice of appeal, the following amended grounds of appeal contained in the amended notice of appeal have been set out as follows:

- i) *The Court of Appeal was wrong in law in holding that the appellant, by merely arguing its grounds of appeal together because the grounds were interrelated, had reformulated its grounds of appeal without leave, contrary to Rule 8(7) of the Court of Appeal Rules, C.I 19 and had thereby abandoned the grounds of appeal argued together.*

#### **PARTICULARS OF ERROR**

- a) *The holding by the Court of Appeal that in arguing the grounds of appeal together under various heading amounted to a reformulation of the grounds of appeal was an error since the appellant's argument under the various headings was not based on a ground of appeal which was not contained in the appellant's notice of appeal.*
- b) *Since there is no provision in the Court of Appeal Rules that prohibits an appellant to argue its grounds of appeal under headings, provided the arguments were covered by a ground of appeal, their Lordships of the Court of Appeal erred when they held that the appellant had reformulated its grounds of appeal and had thereby abandoned them.*
- ii) *The Court of Appeal erred in law when it held that the appellant did not acquire a legal estate in the property in dispute merely because at the time of the execution of the assignment, the property was encumbered by the mortgage executed by the 1<sup>st</sup> defendant in favour of the Ghana Commercial Bank.*

#### **PARTICULARS OF ERROR**

- a) *Since by law, a mortgage over immovable property merely constitutes an encumbrance on property and did not prevent the owner of the property from transferring title to another person, the Court of Appeal erred when it held that transfer of title from the 1<sup>st</sup> defendant to the appellant was null and void because of the existing mortgage at the time.*
- b) *Since at the time the 2<sup>nd</sup> defendant acquired the legal title in the property from the 1<sup>st</sup> defendant, the mortgage in favour of GCB had been fully discharged, their Lordships were wrong in holding that there was a mortgage in existence as at the date of the execution of the deed of assignment in favour of the 2<sup>nd</sup> defendant.*
- iii) *The Court of Appeal erred in affirming the findings of the trial judge that appellant is not a bona fide purchaser for value without notice of the plaintiff's interest in the land subject matter of this suit.*

#### **PARTICULARS OF ERROR**

- a) *There was no evidence on the record that the plaintiff knew or ought to have known, at the time it concluded that purchase of the property from the 1<sup>st</sup> defendant that the plaintiff had an equitable interest in the land subject matter of the suit.*
- b) *An appeal being by way of rehearing, their Lordships of the Court of Appeal overlooked the fact that because the plaintiff had failed to file a reply and defence to the 2<sup>nd</sup> defendant's counterclaim, it was deemed to have admitted averments in the 2<sup>nd</sup> defendant's counterclaim particularly the fact that it was a bona fide purchaser for value without notice and therefore the trial judge not entitled to overlook that point of law in dismissing appellant's counterclaim.*

- iv. The Court of Appeal erred when it affirmed the trial judge's dismissal of the appellant's counterclaim since there was uncontroverted evidence in support of the 2<sup>nd</sup> defendant's counterclaim that it acquired the property in dispute for valuable consideration from the 1<sup>st</sup> defendant and without notice of the plaintiff's equitable interest therein.*
- v. The judgment of the Court of Appeal is against the weight of evidence.*

The trite position of the law on appeals is that they are by way of re-hearing. The oft cited case on this point is the decision of this court in the case of **Tuakwa v. Bosom [2001-2002] SCGLR 61**. In this case, it was unanimously held allowing the appeal that an appeal is by way of re-hearing, particularly where the appellant alleges in his notice of appeal that the judgment of the trial court is against the weight of evidence. In such a case, the court held, although it is not the function of the appellate court to evaluate the veracity or otherwise of any witness, it is incumbent upon an appellate court, in a civil case, to analyse the entire record of appeal, take into account the testimonies and all documentary evidence adduced at the trial before arriving at its decision, so as to satisfy itself that on a preponderance of the probabilities, the conclusions of the trial judge are reasonably or amply supported by the evidence. See also the cases of **Brown v. Quashigah [2003-2004] 2 SCGLR 930**; **Akuffo-Addo v. Catheline [1992-1993] Part 3 GBR 937**; **Bonney v. Bonney [1992-1993] 2 GBR 779**; **Oxyair Ltd & Darko v. Wood & ors. [2005-2006] SCGLR 1057**.

In considering this appeal, however, we have decided to examine in detail the general principle of law which states that, findings of fact made by a trial court, and concurred in by the first appellate court, that is the Court of Appeal, then the second appellate court such as the Supreme Court, must be slow in coming to different conclusions unless it was satisfied that there were strong pieces of evidence on record which made it manifestly clear that the findings of the trial court and the first appellate court were perverse.

However, it must be noted that as has been stated in the general principle, an appellate court, especially a second appellate court such a final appellate court like the Supreme Court, has on stated grounds verifiable from the records of appeal departed from the findings of fact concurred in by the first appellate court.

In the case of **Gregory v. Tandoh IV & Hanson [2010] SCGLR 971**, this court per Dotse, JSC, laid down the principles as follows:

*“However, a second appellate court, like the Supreme Court, could and was entitled to depart from findings of fact made by the trial court and concurred in by the first appellate court under the following circumstances. First, where from the record of appeal, the findings of fact by the trial court were clearly not supported by the evidence on record and the reasons in support of the findings were unsatisfactory; second, where the findings of fact by the trial court could be seen from the record of appeal to be either perverse or inconsistent with the totality of evidence led by the witnesses and the surrounding circumstances of the entire evidence on record; third, where the findings of fact made by the trial court are consistently inconsistent with important documentary evidence on record; and fourth, where the first appellate court had wrongly applied a principle of law. In all such situations, the second appellate court must feel free to interfere with the said findings of fact to ensure that absolute justice was done in the case”.*

See also cases such as **Jass Company Ltd v. Appau [2009] SCGLR 265**, **Awuku Sao v. Ghana Supply Co. Ltd [2009] SCGLR 710**.

With the above principles in mind, we, in the determination of the grounds of appeal argued strongly by both lawyers, consider whether the argument being urged on us by lawyer for the 2<sup>nd</sup> defendant to set aside the findings of facts and the conclusion reached by the court of appeal and in affirming the decision of the trial court as not supported by the evidence on record and the wrong application of the law to the facts are justified. If

in our opinion, we think a case has not been made out against the judgment then we would not disturb it. If, however, we find that the findings and the conclusion are not supported by the evidence on record or that the judgment is based on the wrong proposition of the law, same shall be set aside.

In determining the grounds of appeal, we have decided to deal with the core issue at the trial, that is, whether the 2<sup>nd</sup> defendant is the bona fide purchaser of value without notice of the land in dispute. And for this reason, we shall consider and deal with grounds 3 and 4 together as follows:

- iii) *The Court of Appeal erred in affirming the findings of the trial judge that appellant is not a bona fide purchaser for value without notice of the plaintiff's interest in the land subject matter of this suit.*

#### **PARTICULARS OF ERROR**

- a) *There was no evidence on the record that the plaintiff knew or ought to have known, at the time it concluded that purchase of the property from the 1<sup>st</sup> defendant that the plaintiff had an equitable interest in the land subject matter of the suit.*
- b) *An appeal being by way of rehearing, their Lordships of the Court of Appeal overlooked the fact that because the plaintiff had failed to file a reply and defence to the 2<sup>nd</sup> defendant's counterclaim, it was deemed to have admitted averments in the 2<sup>nd</sup> defendant's counterclaim particularly the fact that it was a bona fide purchaser for value without notice and therefore the trial judge not entitled to overlook that point of law in dismissing appellant's counterclaim.*
- iv. *The Court of Appeal erred when it affirmed that the trial judge's dismissal of the appellant's counterclaim in view of the fact that there was uncontroverted evidence in support of the 2<sup>nd</sup> defendant's counterclaim that it acquired the property in*



*dispute for valuable consideration from the 1<sup>st</sup> defendant and without notice of the plaintiff's equitable interest therein.*

In its statement of defence, the 2<sup>nd</sup> defendant pleaded that it was a bona fide purchaser of value without notice of the plaintiff's prior equitable interest in the land/property and this assertion of the 2<sup>nd</sup> defendant was pleaded in paragraphs 4, 5 and 12 as follows:

- "4. Prior to entering the sale agreement, the 2<sup>nd</sup> defendant investigated the 1<sup>st</sup> defendant title to the land and discovered, as already told by the 1<sup>st</sup> defendant that, the property was mortgaged by him to Ghana Commercial Bank as security for a loan owed by Abiri Djan Sandcrete Ltd
5. Additionally, the 2<sup>nd</sup> defendant inspected the land and discovered that the 1<sup>st</sup> defendant was in possession and operating his business from the premises.
12. The 2<sup>nd</sup> defendant contends that at the time of purchasing the property from the 1<sup>st</sup> defendant, it had no notice of any equitable interest in the property and is therefore a bona fide purchaser for value without notice".

Having pleaded that it is a bona fide purchaser, the 2<sup>nd</sup> defendant had acknowledged the existence of the equitable interest of the plaintiff in the property. Indeed, there are certain facts from the record of appeal that are not in dispute. First, that the plaintiff entered into an agreement with the 1<sup>st</sup> defendant for the sale of the land in dispute on 23<sup>rd</sup> March 2007 - See Exhibit C. Secondly, that the plaintiff paid C200,000,000.00 as part payment of the purchase price of C1,475,000,000.00. - See Exhibit D. Thirdly, the 2<sup>nd</sup> defendant also subsequently entered a contract of sale of the land/property with the 1<sup>st</sup> defendant dated the 29<sup>th</sup> of March 2007. - See Exhibit 2. Fourth, that the 2<sup>nd</sup> defendant pursuant to the contract of sale, Exhibit 2, paid C100,000,000.00 to the 1<sup>st</sup> defendant as part payment for

the land in dispute. - See Exhibit 3. Fifth, that 1<sup>st</sup> defendant had assigned his legal interest in the property by a Deed of Assignment dated 26<sup>th</sup> of April 2007 to the 2<sup>nd</sup> defendant. - See Exhibit 10. Lastly, the 2<sup>nd</sup> defendant had also paid an amount of C1,200,000,000.00 to the 1<sup>st</sup> defendant - See Exhibit 9.

### **WHO IS A BONA FIDE PURCHASER?**

A bona fide purchaser is one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defect or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims. Generally, a bona fide purchaser for value is not affected by the transferor's fraud against a third party and has a superior right to the transferred property as against the transferor's creditor to the extent of the consideration that the purchaser has paid.

Bona fide purchaser is also termed bona fide purchaser for value; good-faith purchaser; purchaser in good faith; innocent purchaser; innocent purchaser for value. - See **Black's Law Dictionary 9<sup>th</sup> Edn, page 1355.**

What constitutes the elements of the plea of a bona fide purchaser for value without notice were set out in **Equity Doctrines and Remedies by Meagher, Gummow and Lehane, 3<sup>rd</sup> Edn** as follows:

*"In order of the holder of the legal estate to fall within the doctrine of 'bona fide purchaser for value without notice, it must appear*

- a) That he has the legal estate in the property in question,*
- b) That he has given valuable consideration for the property, and*
- c) that he had usually at the time of furnishing consideration, ... no notice of the outstanding equity.*

*If these conditions are fulfilled, possession of the legal estate will oust the equity in question”.*

The three elements may be explained as follows: the first ingredient requires that the holder of the legal estate has the legal estate. If he has merely the equitable estate, the doctrine/rule is inapplicable. As regards the second ingredient, the purchaser relying on the plea must have provided valuable consideration for the legal estate. For the rule or doctrine, the word purchaser is a technical expression. It means one who takes an interest in property otherwise than by inheritance. The third and the last ingredient is the absence of notice. The holder of the legal estate must have had no notice of the prior equity at the time he furnished the consideration; if at that time, he had notice, he will take subject to the prior equity. If his absence of notice continues until the time when he acquired the legal estate, his title is perfect even though he might unwittingly have acquired title from a trustee selling in breach of trust.

The notice may be actual notice, constructive notice, or imputed notice. The actual notice is a direct information given to the party. Such a notice must be clear and distinct, not vague report from persons not interested in the property. It is settled that a purchaser is not bound to attend to vague rumours, or statements by mere strangers but that a notice, to be binding, must proceed from some person interested in the property and during the negotiations. These, however, is a tricky rule and must not be taken too widely. It does not mean that information from any other source may be unreasonably disregarded; for this may amount to constructive notice.

Constructive notice means that a purchaser will, generally, be treated as having notice of all that a reasonably prudent purchaser would have discovered.

Imputed notice is usually notice indirectly acquired through an agent, such as a solicitor or counsel and other agents. - See **Modern Principles of Equity** by A. K. Kludze.

A party who relies on the doctrine or rule of bona fide purchaser for value without notice has the burden of proof, that is the burden of producing evidence to establish the claim and it is this burden which may determine the outcome of the case. In the old case of **Pilcher v. Rawlins [1871-1872] 7 LRCh App 259**, James LJ, stated as follows:

*“such a purchaser when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the bona fides or mala fides of his purchase and also the presence or the absence of notice; but when he has gone through the ordeal and has satisfied the terms of the pleas of purchase for valuable consideration without notice, then, according to my judgment, this court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that advantage which he has obtained whatever it may be”.*

It follows that the plea must be established by the party putting forward the plea. - See also the case of **Doudo v. Benewa [2012] 2 SCGLR 1306**.

In **Donkor v. Wih & Anor, [1989-90] 1 GLR 178-189**, the Court in examining the scope of the doctrine of bona fide purchaser for value without notice expounds the burden imposed on the person who puts forward the plea and stated as follows:

*“To qualify as a purchaser of the legal estate, the purchaser must normally show that he has acquired some legal estate in the land and not a mere equitable interest. This requirement, explains Megarry in his Law of Real Property (4<sup>th</sup> Edn), is satisfied if the purchaser of an equitable interest without notice of other equities, subsequently, acquires a legal estate or if he acquires a better right to the legal estate than the prior equitable incumbrance. In the old decision in **Wilkes v. Bodington (1707) 23 E.R 991 Lord Casper, LC**, thus stated the equitable rule: ‘I take it to be the rule in equity that where a man is a purchaser without notice he shall not be annoyed in equity, not only where he has a prior legal estate, but where he has a better title or right to call for the legal estate, than the other’”*

Also in **Snell's Equity, 29<sup>th</sup> Edn, 1990** by **P. V. Baker and P. St. J. Lagan**, relying on *Re: Nisbet and Port's Contract* [1900] 1 CH.386 at 404, 409, 410, stated that "*the onus of proving the purchase of a legal estate without notice rests on the purchaser*".

As noted earlier in this judgment, the 2<sup>nd</sup> defendant had pleaded and contended that it was a bona fide purchaser for value without notice of any prior equitable interest created in the plaintiff in the property by the 1<sup>st</sup> defendant. And to discharge the burden imposed on it, the 2<sup>nd</sup> defendant per its Managing Director in its evidence established that in March 2007, when it had been ejected from its former premises, it approached the 1<sup>st</sup> defendant when it came to its attention that the 1<sup>st</sup> defendant was selling the property or was selling the land the subject matter of dispute. The 2<sup>nd</sup> defendant said, it started negotiations with the 1<sup>st</sup> defendant and obtained a site plan on the land in dispute from the 1<sup>st</sup> defendant, conducted a search at Lands Commission which disclosed that the property was registered in the name of the 1<sup>st</sup> defendant. However, it had been mortgaged to Ghana Commercial Bank. That, it also requested a pastor who lived in the neighbourhood of the land to find out in the area who owned the property. This the Pastor did and informed the 2<sup>nd</sup> defendant through the managing director that its enquiries confirmed that the 1<sup>st</sup> defendant indeed owned the property.

According to the managing director, the 2<sup>nd</sup> defendant did not only investigate its vendor's title by conducting a search at the Lands Commission, but it also went to physically inspect the land to ascertain whether it was encumbered and that on the visit by him, he did not find any encumbrance apart from the fact that the 1<sup>st</sup> defendant was in possession with his block factory on the property moulding blocks. And in cross-examination by counsel for the plaintiff of the 2<sup>nd</sup> defendant's witness, the 2<sup>nd</sup> defendant testified that at all material times, the 2<sup>nd</sup> defendant was not aware or had no clue and that there was no way the 2<sup>nd</sup> defendant could have known that the 1<sup>st</sup> defendant had

entered any transaction to sell the property to the plaintiff or had collected money for the sale.

The 2<sup>nd</sup> defendant per its managing director also testified that it was after the search at the Lands Commission, which search showed that the 1<sup>st</sup> defendant is the owner of the land, and that the property was subject only to a mortgage to Ghana Commercial Bank that the 2<sup>nd</sup> defendant entered the contract of sale with the 1<sup>st</sup> defendant and subsequently paid the initial sum of C100,000,000.00 as agreed in the contract of sale.

After the payment of the C100,000,000.00 the 2<sup>nd</sup> defendant was required to pay an additional amount of C900,000,000.00 to the 1<sup>st</sup> defendant in part payment of the purchase price of the land per the terms of the contract of sale. The 2<sup>nd</sup> defendant said after the payment of C900,000,000.00, the 1<sup>st</sup> defendant granted the 2<sup>nd</sup> defendant possession of the property and it started constructional works on the land. The 2<sup>nd</sup> defendant testified further that in April 2007, it constructed a two-meter-long fence wall on the southern side of the property, gate house, two sheds, one for joinery and another for equipment on the property, commenced construction of new office blocks and excavated the back side of the land and commenced the construction of a workshop. In further evidence under cross-examination by plaintiff's counsel, the managing director of the 2<sup>nd</sup> defendant testified that the 2<sup>nd</sup> defendant's branded vehicles used to visit the property during the construction. That on the 26<sup>th</sup> of April 2007, the 1<sup>st</sup> defendant executed a Deed of Conveyance of his entire interest in the property to the 2<sup>nd</sup> defendant

The 2<sup>nd</sup> defendant testified that it was several months after the purchase of the legal estate in the property and had been in possession and occupation of the property that for the first time, the 2<sup>nd</sup> defendant was made aware of any claim by the plaintiff and for that matter anybody to the property. This was in August 2007 when the order of injunction granted by the trial judge was posted on the property.

From the records of appeal, the above pieces of evidence by the 2<sup>nd</sup> defendant's managing director were not contradicted either by way of cross-examination or rebuttal. In the first

place, the plaintiff did not file a reply and defence to the counterclaim of the 2<sup>nd</sup> defendant. **Order 12, r. 2 of C. I. 47** on Defence to Counterclaim provides that, a plaintiff on whom a defendant serves a counterclaim shall, if the plaintiff intends to defend it, file a defence to the counterclaim; and where a plaintiff serves both a reply and defence to counterclaim on defendant, the plaintiff shall include them in the same document. A defence to counterclaim shall be filed by the plaintiff before the expiration of fourteen days after the service on the plaintiff of the counterclaim to which it relates. There can be no joinder of issue, implied or express, on a statement of claim or counterclaim. See **Order 11, r.14(3) of C. I. 47**. Thus, the plaintiff on whom a counterclaim was served must plead to the counterclaim if only for the purpose of denying specifically those allegations of fact in it which he does not admit. The correct pleading for this purpose is a defence to counterclaim and not a reply. If a plaintiff does not serve a defence to counterclaim, the allegations of fact in the counterclaim are deemed to be admitted. Under Order 11, r. 13(1) of C. I. 47 on Admissions and Denials, subject to subrule (4), any allegation of fact made by a party in the party's pleading shall be deemed admitted by the opposite party unless it is traversed by that party in pleading or joinder of issues under rule 14 operates as a denial of it. The plaintiff may go further and serve a reply if it is needed for compliance with rule 8 of Oder 11 of C. I. 47. Clearly therefore, there cannot be a mere joinder of issue upon a counterclaim. The plaintiff must plead to it with a "defence to counterclaim" as though he were pleading a defence to a statement of claim. the effect is to ensure that the parties are ultimately, but, brought to an issue, and that at the close of pleadings the issue between the parties are clearly and precisely defined. In **Kusi & Kusi v. Bonsu [2010] SCGLR 60**, the court stated on the nature and effect of admission that, *"it is an elementary principle of law that in civil litigation, where no issue was joined as between parties on specific question, issue of fact, no duty was cast on the party asserting it to lead evidence in proof of that fact or issue. Indeed, most of the delays associated with civil trials would be avoided if this simple elementary rule were strictly adhered to"*. The court also relied on the case of **Fori v. Ayerebi**

[1966] 2 GLR 627, where a most direct and helpful authority on the point about undenied averments that, *“when a party had made an averment and that averment was not denied, no issue was joined, and no evidence be led on that averment. Similarly, when a party had given evidence of a material fact and was not cross-examined upon it, he need not call further evidence of that fact.”* Despite this time-honoured principle, the 2<sup>nd</sup> defendant had established at the trial that it acquired the legal estate in the property and was not relying on the equitable interest. Thus, apart from the testimony of the managing director that the 2<sup>nd</sup> defendant acquired the legal estate, it also tendered the Deed of Conveyance by which the 1<sup>st</sup> defendant conveyed the legal title in the property to the 2<sup>nd</sup> defendant and this is contained in Exhibit 10. With regards to the second ingredient of giving valuable consideration, apart from Exhibit 2, which was a cheque of C100,000,000.00 paid by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant as the initial payment, Exhibit 10 has confirmed that a total amount of C2,200,000,000.00 was paid by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant (receipt of which he had acknowledged) as consideration for all his rights, title and interest in the property absolutely and forever free from encumbrances.

On the last ingredient of notice, the evidence of the 2<sup>nd</sup> defendant showed that at the time of giving the consideration, it had no notice of the equitable interest created by the prior MOU the 1<sup>st</sup> defendant entered with the plaintiff on 23<sup>rd</sup> March 2007, Exhibit C, and the initial payment by the plaintiff of the sum of C200,000,000.00 to the 1<sup>st</sup> defendant, the search at the Lands Commission conducted, also did not show that the MOU, Exh. C dated 23<sup>rd</sup> march, 2007, an instrument affecting land entered between the plaintiff and the 1<sup>st</sup> defendant was registered to give notice to the 2<sup>nd</sup> defendant of the plaintiff's interest in the property.

However, the 2<sup>nd</sup> defendant testified that it has inspected the land as part of its investigation of the 1<sup>st</sup> defendant's title and realised that it was only the activities of the 1<sup>st</sup> defendant's block making factory that was on the land.



The law is that the bona fide purchaser must prove by evidence that before and at the time of giving valuable consideration, it has no notice of the prior existence of equity of the plaintiff. The purchaser must show that it acted prudently by not only investigating the title of the vendor but also inspected the property to ascertain if there were adverse claims to the property or that there was any other thing that would put it to further enquiry.

In the case of **Boateng v. Dwinfour [1979] GLR 360 @ 366**, the court stated as regards a prudent purchaser as follows:

*“Apart from investigating the deeds, a prudent purchaser will inspect the land itself. if any of the land is occupied by any person other than the vendor, this occupation is constructive notice of the estate or interest of the occupier, the terms of his lease, tenancy, or other right of occupation, and of any other rights of his except ... a mere equity”.*

With respect to the purchaser inspecting the property, the court, explained further that *“the general principle of equity is that a purchaser is deemed to have notice of all that a reasonably prudent purchaser would have discovered. That is where the purchaser, like the plaintiff in this case, had actual notice that the property was in some way encumbered, she will be held to have constructive notice of all that she would have discovered if she had investigated the encumbrance. Again, if the prudent purchaser deliberately or carelessly abstained from making those enquiries into that title of his vendor that a prudent purchaser would have made, he will be affected with constructive notice of what appears upon the title”.*

In our view, and from the evidence adduced by the parties we find that the 2<sup>nd</sup> defendant had overwhelmingly discharged the burden of persuasion and burden of producing credible evidence placed on it to prove that it was a bona fide purchaser of the legal title in the land from the 1<sup>st</sup> defendant for valuable consideration without notice of any defect and any prior equitable interest of the plaintiff. For this reason, we find the learned trial’s

judge's finding and conclusion that, *"at the time the subject matter was purportedly sold to the 2<sup>nd</sup> defendant, the 1<sup>st</sup> defendant knew he had no other interest in the property except the balance of his purchase price hence my dismissal of 2<sup>nd</sup> defendant's counterclaim"* as wrong application of principle of law to the facts and evidence on the record.

From the record of appeal, the 1<sup>st</sup> defendant created two competing equitable interests in the subject property for both the plaintiff and the 2<sup>nd</sup> defendant, although that of the plaintiff was earlier in time. That of the plaintiff was the MOU, Exh. C dated 23<sup>rd</sup> March 2007. That of the 2<sup>nd</sup> defendant was the contract of sale, Exh. 2 made on 29<sup>th</sup> March 2007. If it were that all the transactions of both the plaintiff and the 2<sup>nd</sup> defendant with the plaintiff had terminated at this level of the contracts, the equitable maxim of *where the equities are equal, the first in time shall prevail: qui prior est tempore potior est jure*. that is, the plaintiff's interest being earlier in time to that of the 2<sup>nd</sup> defendant would have been held to prevail over that of the 2<sup>nd</sup> defendant's latter contract of sale. That is, competing interests rank prima facie according to the order of their creation. However, an interest ranking earlier in point as in the instant case, may be postponed to an interest subsequent to it, by the operation of subsidiary rules relating to the purchaser without notice; fraud, estoppel, and gross negligence; registration; and over-reaching.

However, since the equitable interests of the plaintiff and the 2<sup>nd</sup> defendant were equal, but the 2<sup>nd</sup> defendant proceeded to acquire the legal interest in the land, the law must prevail over all the competing equitable interests created by the 1<sup>st</sup> defendant in the land. In our view, therefore, grounds 3 and 4 of the amended grounds of appeal succeed and we uphold same. This appeal could have succeeded on grounds 3 and 4 alone, but we deem it necessary to consider ground 2 also of the amended grounds of appeal as it raises some fundamental points of law.

The ground 2 is as follows:

*"The Court of Appeal erred in law when it held that the Appellant did not acquire the legal estate in the property in dispute merely because at the time of the execution, the property*

*was encumbered by the mortgage executed by the 1<sup>st</sup> defendant in favour of the Ghana Commercial Bank.*

**PARTICULARS OF ERROR:**

- a) *Since by law a mortgage over immovable property merely constitutes an encumbrance on the property and did not prevent the owner of the property from transferring title to another person, the Court of Appeal erred when it held that transfer of title from the 1<sup>st</sup> defendant to the Appellant was null and void because of the existing mortgage at the time.*
- b) *Since at the time the 2<sup>nd</sup> defendant acquired the legal title in the property from the 1<sup>st</sup> defendant the mortgage in favour of GCB had been fully discharged, their Lordships were wrong in holding that there was a mortgage in existence as at the date of execution of the deed of assignment in favour of the 2<sup>nd</sup> defendant."*

The Court of Appeal in its judgment affirming the judgment of the trial High Court stated as follows:

*"It was after the information not to go on with the sale that plaintiff was given Exhibit H, and 2 days later, it instituted the action. From the chronicle of events summarized from the evidence, there is no evidence that at the time Exhibit 10 was executed, the property had been discharged by the bank; despite the fact that Exhibit G, was issued to clear the indebtedness on 12<sup>th</sup> April 2007. The 2<sup>nd</sup> defendant, who wants to rely on Exhibit 10, as the basis of its claim to legal estate in the disputed property, had to adduce the requisite evidence to show that in fact, at the time of the assignment to it, the disputed property had been discharged from the mortgage. This it failed to do, and this court cannot infer it from the mere fact that a cheque to clear the indebtedness had been issued. This is particularly so, when the indebtedness did not produce any bank statement to show that the 1<sup>st</sup> defendant's indebtedness with the bank had been cleared"*

And at page 20 (see page 81 of the ROA) of the judgment of the Court of Appeal, the Court of Appeal before concluding the judgment also stated as follows: *“it is also pertinent to emphasize that the execution of Exhibit 10 did not give the 2<sup>nd</sup> defendant any legal estate or interest in the property in dispute because, at the time of its execution, the property was still encumbered. The 1<sup>st</sup> defendant, whilst testifying on 13<sup>th</sup> November 2009, at page 163 and 164 of the record of appeal, stated that the documents were still with Ghana Commercial Bank and that they were still in the process of getting them released. This is in conflict with his account given earlier at page 140 of the record of appeal that, the documents were obtained from the bank, one month after he had misunderstanding with the plaintiff, after he was told to execute Exhibit 1, dated 27<sup>th</sup> April 2007. One month from this would be around 27<sup>th</sup> May 2007. Even with this, it is still clear that at the time Exhibit 10 was executed, the property was still encumbered and the 1<sup>st</sup> defendant could not transfer any legal title in it to the 2<sup>nd</sup> defendant.*

*From the above therefore we will dismiss the appeal by the 2<sup>nd</sup> defendant and affirm the judgment of the trial court dated 12<sup>th</sup> January 2011, with all the consequential orders”.*

In arguing this ground, counsel for the 2<sup>nd</sup> defendant stated that the effect of the views of the Court of Appeal was that the appellant did not acquire the legal estate in the property. Therefore, to counsel for the 2<sup>nd</sup> defendant, the Court of Appeal was wrong in the above conclusion, in that it is a basic law in Ghana that a mortgage property only creates an encumbrance and does not prohibit the property owner from transferring the property to another person. Counsel referred to Sections 1(2), 12(1) and 12(5) of the Mortgages 1972 (NRCD 96). These Sections provide as follows:

*“1(2) A mortgage shall be an encumbrance on the property charged, and shall not as provided by this Decree, operate so as to change the ownership, right to possession or other interests whether present or future in the property charged”.*

12(1) *Unless a contrary intention appears, or by necessary implication, a mortgagor may transfer all or any part of his interest in the mortgage property at any time without the concurrence of the mortgagee”.*

12(5) *In this Section, a transfer includes a sale, lease, encumbrance, or other disposition.*

Counsel for the 2<sup>nd</sup> defendant further refers to the book Modern Principles of Equity by A. K. P. Kludze, where the incidences of mortgages under the Mortgages Act were explained as follows:

*‘a mortgagor is entitled, unless a contrary intention appears, to transfer all or any part of his interest in the mortgaged property at any time without the concurrence of the mortgagee. The mortgagor may sell or otherwise assign his equity of redemption or other interest in the mortgage property’.*

Counsel also refers to B. J. Da Rocha and C. H. K Lodoh in their book Ghana Land Law and Conveyancing, 2<sup>nd</sup> Edn, commenting on the power of mortgagor to transfer his interest during the subsistence of a mortgage stated that:

*“a mortgage under NRCD 96, is only a contract charging immovable property as security for the due payment of a debt and any interest accruing thereon or for the performance of some other obligations for which it is given, in accordance with the terms of the contract Section 1(1) of NRCD 96. Consequently, the mortgagor remains the owner of the immovable property subject to the mortgage and may therefore transfer it at any time. Transfer in this context includes a sale, lease, encumbrance, or other disposition; Section 12(5) of NRCD 96”.*

Counsel submits therefore that their lordships at the Court of Appeal were palpably wrong when they held that by law a mortgagor could not transfer his title in the mortgaged property during the subsistence of the mortgage.

On the other hand, counsel for the plaintiff in his submissions whilst agreeing that by law the mortgage of a property does not preclude the mortgagor from conveying the property, however, submits that it is trite learning that upon payment of a loan on mortgaged property, a written discharge must be executed by the mortgagee in favour of the mortgagor or the third party to whom the property is sold. Counsel refers to Section 22 of NRCD 96 to buttress his argument. The Section provides as follows:

- “22(1).        *A mortgage shall be redeemed on acceptance of a tender of performance and compensation under Section 20 or on an order for redemption, but a person who redeems is entitled to require the mortgagee to issue a written discharge.*
- 22(2)        *Where a written discharge is issued to a person other than the mortgagor or the successor to the entire interest in the mortgaged property, it shall operate as a transfer of the mortgagee’s interest in the mortgage.*
- 22(3)        *In a written discharge given under this Section, the same covenants shall be implied as if the person who executes the discharge had been expressed to transfer as mortgagee subject to an interest prior to the mortgage”.*

According to counsel for the plaintiff the wording of Section 22(2) of NRCD 96 makes it clear that a written discharge of a mortgage by the mortgagee operates as a transfer of the mortgagee’s equitable interest in the mortgaged property to a mortgagor or a third party to whom the mortgagor transfers his mortgaged property.

As noted by the parties, Section 1 of the Mortgages Act 1972, NRCD 96 on nature of a mortgage provides that:

- “1). A mortgage for the purposes of this decree is a contract charging a movable property as a security for the due payment of debt and any interest accruing thereon or for the performance of some other obligations for which it is given, in accordance with the terms of the contract.*
- 2). A mortgage shall be an encumbrance on the property charged and shall not, except as provided by this Decree, operate so as to change the ownership, right to possession or other interest (whether present or future) in the property charged.*
- 3). A mortgage may be created in any interest in immovable property which is alienable*

Being only a charge on immovable property, a mortgagor may transfer his interest in the mortgaged property to a third-party subject only to the provisions of the Act or any other law. Indeed, Section 12 of NRCD 96 provides for a transfer by a mortgagor. The Section provides as follows:

- (1) Unless a contrary intention appears expressly or by necessary implication, a mortgagor may transfer all or any part of his interest in the mortgaged property at any time without the concurrence of the mortgagee.*
- (2) The transfer of all or any part of his interest in the mortgaged property shall not relieve the mortgagor of his personal liability on any covenant in the mortgage.*
- (3) In a transfer of a mortgage from a mortgagor for valuable consideration, unless a contrary intention appears expressly or by necessary implication, the transferee shall be deemed to have covenanted to indemnify the mortgagor's personal liability on any covenant in the mortgage.*
- (4) Unless a contrary intention appears expressly or by necessary implication, it shall be implied that the mortgagor covenants to give notice to the mortgagee of any*

*transfer of all or any part of the mortgagor's interest in the mortgaged property by the mortgagor subsequent to the mortgage:*

*Provided that notwithstanding any provision to the contrary, failure to give such notice shall not invalidate the transfer.*

(5) *In this section, a transfer includes a sale, lease, encumbrance or other disposition.*

Section 22 of the Decree, however, is for a written discharge of a mortgage.

We therefore agree with counsel for the 2<sup>nd</sup> defendant that the Court of Appeal was wrong when it held that by law a mortgagor could not transfer his title in a mortgage property during the subsistence of the mortgage.

However, we are aware that there is a restriction on a mortgagor under some circumstances where a mortgagor cannot transfer any interest in the mortgage property without the consent in writing of the mortgagee. Thus, under **Section 32 of National Mortgage, Financing and Guarantee Scheme Decree, 1976 SMCD 23** inserted as **Section 12(A) in NRCD 96** on Mortgagor's right to transfer restricted, provides as follows:

*"A mortgagor under a mortgage to which this Decree applies, shall not transfer any interest in the mortgaged property under Section 12 of the Mortgages Decree, 1972 (NRCD 96) without the consent in writing of the mortgage".*

From the foregoing therefore and having found that the 2<sup>nd</sup> defendant having discharged the burden of persuasion to prove that it has acquired the legal estate in the property, it had given valuable consideration and at the time of giving the valuable consideration, it had no notice of the plaintiff's prior equitable interest and the plaintiff having failed when the burden shift to it to introduce evidence to contradict the evidence led by the 2<sup>nd</sup> defendant, that the 2<sup>nd</sup> defendant did not acquire the legal estate in the property but rather has an equitable interest, that the 2<sup>nd</sup> defendant did not give valuable consideration for



the legal estate it acquired, and that at the time the 2<sup>nd</sup> defendant gave valuable consideration it had notice of the plaintiff's prior equitable interest, we in our view find merit in the appeal and we shall therefore interfere with and depart from the findings of fact made by the trial court and the application of the law and concurred in by the 1<sup>st</sup> appellate court, that is the Court of Appeal

In conclusion the appeal by the 2<sup>nd</sup> defendant succeeds. The judgment of the Court of Appeal dated 15<sup>th</sup> day of April 2021 affirming the judgment of the trial High Court dated 12<sup>th</sup> January 2011 is hereby set aside and the plaintiff's amended reliefs are hereby dismissed. Judgment is entered in favour of the 2<sup>nd</sup> defendant on its counterclaim for:

- A) A declaration that the 2<sup>nd</sup> defendant is a bona fide purchaser for value without notice of any equitable interest in the property subject matter of this suit
- B) A declaration of title to all that piece of land and structures thereon situate and being at Bejuahum near Dome, Accra in the Greater Accra Region of the Republic of Ghana containing an approximate area of 1.446 acres which property is more particularly described in a deed dated 10<sup>th</sup> August 1988 made between Madam Felicia Dede Addy and the 1<sup>st</sup> defendant and registered in the Lands Registry as No. 1904/1988.

**(SGD.)**

**E. Y. GAEWU  
(JUSTICE OF THE SUPREME COURT)**

**(SGD.)**

**A. LOVELACE – JOHNSON (MS.)**

(JUSTICE OF THE SUPREME COURT)

(SGD.)

S. K. A. ASIEDU  
(JUSTICE OF THE SUPREME COURT)

(SGD.)

H. KWOFIE  
(JUSTICE OF THE SUPREME COURT)

### CONCURRING OPINION

DARKO ASARE JSC:

### INTRODUCTION

1. I heartily agree with the opinion of my esteemed and venerable brother, Gaewu J.S.C., that the appeal be allowed. There is nonetheless, one aspect of the decision of the Court of Appeal which I find to be quite troubling and necessitate some brief comments.
2. Before proceeding however, I must observe that (*and if I may respectfully be permitted to say so*), I have found it particularly striking how the Parties have escalated a relatively straightforward and uncomplicated case into a sprawling, contentious and protracted litigation, marked by rancorous and sometimes caustic arguments

3. The facts relevant to this appeal are fully and clearly set out in the judgment of my brother Gaewu JSC, and I do not wish to recapitulate them at any great length, except so much as is necessary to elucidate my own judgment.

### **FACTS**

4. The dispute revolves around a land sale contract between the 1<sup>st</sup> Defendant and the Plaintiff/Respondent (hereafter referred to as Plaintiff), with the 1<sup>st</sup> Defendant receiving partial payment. Simultaneously, without disclosing this contract, the 1<sup>st</sup> Defendant sold the same land to the 2<sup>nd</sup> Defendant/Appellant (hereafter referred to as 2<sup>nd</sup> Defendant) for a substantial sum. The land was initially mortgaged to Ghana Commercial Bank, but after redemption, the 1<sup>st</sup> Defendant transferred legal ownership, to the 2<sup>nd</sup> Defendant which invested heavily in redeveloping the property. When the 1<sup>st</sup> Defendant reneged on the Plaintiff's transaction, the Plaintiff sued for specific performance, damages, and costs. The Plaintiff later amended its claim, seeking to nullify the transfer to the 2<sup>nd</sup> Defendant and compel the 1<sup>st</sup> Defendant to complete the sale. The 2<sup>nd</sup> Defendant counterclaimed, asserting it was an innocent purchaser without notice. The trial court ruled in favor of the Plaintiff, and the decision was upheld by the Court of Appeal, prompting the 2<sup>nd</sup> Defendant's appeal to this Court.

### **CONSIDERATION OF ISSUES**

5. With the facts largely settled, the issues presented for determination in this appeal raise very neatly one pivotal question, and that is whether the 2<sup>nd</sup> Defendant is entitled to successfully pray in its aid the plea of an innocent purchaser for value without notice, a concept sometimes idealized as “equity’s darling”. See the views of Apaloo CJ (as he then was) in the case of *Abotsi (An Infant), In Re; Kwao v. Nortey and Others [1984-86] 1 GLR 144* at page 155.
6. It is to that problem that I now address myself.
7. The Court of Appeal disposed of the question whether or not the 2<sup>nd</sup> Defendant was an innocent purchaser for value without notice on a number of grounds but the one which, in my respectful opinion, warrants significant scrutiny, is the ground which hinges on the allegation that the 2<sup>nd</sup> Defendant failed to obtain explicit verbal assurances from the 1<sup>st</sup> Defendant regarding prior conveyances or assignments to third parties, thereby adversely affecting its *bona fides*, and ultimately defeating its plea of an innocent purchaser for value without notice.

*Failure to make due enquiries from the 1<sup>st</sup> Defendant*

8. At page 78, vol 2 of the record of appeal, the Court of Appeal, in articulating what turned out to be one of the major touchstones for its judgment, delivered itself as follows: -

*“This court also found as a fact that as the representative got the information about the sale from two sources, the property was up for sale to the knowledge of others. In such a situation, we, like the trial judge, wonder why the representative of the 2nd Defendant would not be interested in finding out if there were other competing*

*purchasers. Even though one would not expect him to get the true information from the 1st defendant, we think that it was prudent for him nevertheless, to make the enquiries, and not to agree to commit himself on his first meeting with the 1st defendant. Why the incessant haste? This cannot be explained by the fact that it was being ejected. In any case the grantor can be probed as to whether he/she has had other dealings with the property. The witness could even tell the court that it made enquiries from the 1st Defendant but was not told of the prior dealing with the plaintiff. To say that he was not interested, shows he had something to hide”.*

9. To the Court of Appeal therefore, the 2<sup>nd</sup> Defendant’s representative was aware that the property was publicly known to be for sale, yet neglected to make inquiries about potential competing buyers or other prior dealings, and this raised suspicion which suggested that he had something to hide!
10. Upon careful examination of the reasoning underpinning the Court of Appeal’s decision above-mentioned, it is difficult not to be struck by its far-reaching ramifications that warrant scrutiny.
11. To begin with, while on the authority of such cases as *Boateng v. Dwinfour* [1979] GLR 360 @ 366, a purchaser has a duty to exercise due diligence in searching the vendor's title, I am unaware of any clear and authoritative judicial precedent that mandates a purchaser to obtain explicit oral assurances from the vendor regarding prior conveyances or assignments to third parties, lest they be deemed remiss in their duty of due diligence.
12. The Court of Appeal’s determination becomes even more striking when gauged against the backdrop that there appeared to be no evidence on record which

ought to have reasonably alerted the 2<sup>nd</sup> Defendant to seek oral assurances from the 1<sup>st</sup> Defendant regarding previous dealings in the disputed land. The fact that the property's sale was publicly known can scarcely be deemed a suspicious circumstance warranting inquiry, and it is curious that the Court of Appeal held otherwise.

13. The Court of Appeal did not profess to be breaking any new grounds in their application of the law. Neither did they rely on any definite judicial precedent for their somewhat *ex cathedra* pronouncement of the law. In the premises, it is difficult accepting their conclusion as a definitive proposition of law, providing a clear and definitive answer to the issue whether the 2<sup>nd</sup> Defendant had exercised due diligence as a bona fide purchaser.
14. Based on the matters afore-said, it seems plain that the 2<sup>nd</sup> Defendant is well entitled to complain that the learned Justices of Appeal misdirected their minds in their application of the appropriate legal principles regarding a purchaser's obligation to exercise due diligence, and in the result fell into error.
15. That aside, I also think the reasoning underlying the Court of Appeal's decision yields a more fundamental vulnerability, and it relates to the manner in which they allowed the 1<sup>st</sup> Defendant's statutory duty to assure good title to be unduly eclipsed by 2<sup>nd</sup> Defendant's due diligence obligations.
16. Now, one of the most fundamental principles of the law of real property, is the principle that the vendor is bound to assure a good title and that the purchaser has a right to rely on the vendor's covenant for that purpose. This is commonly referred to as the covenant for right to convey.

17. Halsbury's Laws of England (3rd ed.), Vol. 34, pp. 369—370, para 651-652 states the principle in the following manner: -

*“The covenant for right to convey is a covenant for title……. A covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey...”* (emphasis)

18. The current practice is to rely on the covenants on the part of the person conveying which are implied by statute where that person conveys and is expressed to convey as beneficial owner. Section 22 of the Conveyancing Act, 1973 (N.R.C.D. 175), which was the statutory regime in force at the time the Parties entered into the transactions leading to this suit, deals with implied covenants and provides thus: -

*“Section 22—Implied Covenants by Transferor.*

*(1) In a conveyance for valuable consideration there shall be implied the covenants for right to convey, quiet enjoyment, freedom from encumbrances and further assurance, in the terms set out in Part I of the Second Schedule.*

*(5) The aforesaid covenants shall be deemed to be made by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person or each of the persons to whom the conveyance is made, or, where it is made to joint tenants, to each such person jointly.....*

19. The covenant set out in the 2<sup>nd</sup> Schedule reads as follows: -

“Right to Convey:

*That notwithstanding anything done, omitted or knowingly suffered by the covenantor or any one through whom he derives title otherwise than by purchase for value, the covenantor has, with the concurrence of every other person (if any) conveying by his direction, full power to convey the subject-matter expressed to be conveyed, in the manner in which it is expressed to be conveyed”*

20. From the above statutory provisions, the implied covenant of right to convey, imposes an imperative obligation on the vendor to assure good title, regardless of any agreement or prior inquiries by the purchaser. This statutory duty has been consistently upheld in numerous judicial decisions, including Wilkinson v. Edusei [1963] 1 GLR 393, SC
21. Based on the foregoing, it becomes clear that as between the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, the 1<sup>st</sup> Defendant was bound to convey a good title whilst the 2<sup>nd</sup> Defendant had a right to rely on the former’s covenant for that purpose, whether explicitly sought for or not, save in suspicious circumstances that warrant inquiry.
22. In this light, it seems quite puzzling for the Court of Appeal to have decided that the 2<sup>nd</sup> Defendant's alleged failure to seek explicit assurances regarding prior dealings with third parties, constituted evidence of absence of *bona fides*, defeating its plea of an innocent purchaser for value without notice.
23. The Court of Appeal's rationale improperly seeks to justify the 1<sup>st</sup> Defendant/Vendor's breach of statutory duty at the expense of the 2<sup>nd</sup>



Defendant/Purchaser's alleged failure to seek explicit oral guarantees from the vendor regarding prior transfers to third parties, a proposition that I find strikingly untenable.

24. Simply stated, it appears inherently unfair to relieve the 1<sup>st</sup> Defendant of its statutory obligations and unfairly burden the 2<sup>nd</sup> Defendant, who has thereby been made to suffer the consequences of another's actions, a situation that is fundamentally incompatible with any notions of justice.
25. To the extent therefore that the Court of Appeal's decision in this case, sought to shift the burden of ensuring statutory compliance from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant, I hold the respectful view that it was in error.
26. Indeed, it is doubtful whether any court has jurisdiction to excuse the compliance with statutory obligations imposed on a party and instead shift the burden to the opposing party. See this Court's identity of reasoning in the oft-cited case of *Republic v. High Court (Fast Truck Division), Accra, Ex parte National Lotteries Authority* [2009] SCGLR 390,
27. With great respect to the learned Justices of Appeal, I think they disposed of the very critical issue of the 1<sup>st</sup> Defendant's covenant to assure good title in too cavalier a manner, and it must warrant appellate reversal.
28. For the above and other well-articulated reasons in the lead judgment, I also concur that the appeal be allowed.

(SGD.)

Y. DARKO ASARE  
(JUSTICE OF THE SUPREME COURT)

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